

EOIR/AILA Liaison Meeting Minutes
April 11, 2013

EOIR Welcome:

Director Juan Osuna commented that despite the freeze and sequester, EOIR was able to fill various positions within OGC (Office of the General Counsel) and OCIJ (Office of the Chief Immigration Judge). Director introduces the new General Counsel, Jeff Rosenblum, and the new Deputy General Counsel, Jean King. In addition, he announced that EOIR has filled IJ positions in OCIJ. Director Osuna said he is pleased that the AILA members are attending this meeting and that EOIR values its open dialogue with AILA.

Introductions

All attendees introduce themselves.

Questions and Answers

OCAHO

AILA: Thank you for taking the time to meet with us last fall. We appreciate the dialogue and exchange of information. In addition, we appreciate the recent updates to the topical index and have noticed that decisions are being published more promptly. We thank you for your response to these and other issues.

1. Unpublished Decision Distribution

Although unpublished decisions are said to have no precedential value, certain unpublished decisions and pleadings have been cited in DOJ briefs and correspondence, as well as in ICE negotiations. This lack of publication creates an unfair advantage to Department of Justice and Department of Homeland Security attorneys who have internal access to these decisions and pleadings. Improved access for all will create better jurisprudence for all parties involved.

In addition, we note that other EOIR components make their nonprecedent “index decisions” available to the public pursuant to the Department’s obligations under FOIA.¹ While we appreciate the challenges brought on by limited resources and staffing and how it may impede the systematic publication of decisions and rulings, in light of AILA’s and OCAHO’s concern for transparency and equal access to justice, how can AILA support this effort?

OCAHO Response: In response to AILA’s feedback at the Fall 2012 Liaison Meeting, the Office of the Chief Administrative Hearing Officer (OCAHO) has revised its publication policy to include a presumption of publication for all substantive decisions, whether precedential or not or interlocutory. Decisions are generally published within

¹ See 28 C.F.R. §§16(a) and (c).

one week of issuance. Any decisions that are not published, as well as pleadings, may be requested through the Freedom of Information Act (FOIA) process.

OCAHO now publishes all substantive decisions. The only decisions we do not publish are purely per curiam, e.g., dismissals based on settlement agreements, or pro forma default judgments. We are unaware of specific instances in which unpublished decisions or pleadings have been cited by the Department of Justice (DOJ) or Immigration and Customs Enforcement (ICE), and are unaware of any such citations in OCAHO decisions. Only published decisions may be relied upon as precedent in OCAHO cases.

- a. In reference to decisions that are published by OCAHO, there are often references to exhibits such as the ICE complaint, Memo to Case File, Affidavits of ICE auditor, etc. Are these exhibits accessible to the public? If so, via what mechanism?

OCAHO Response: These exhibits may be requested under FOIA and released pursuant to the appropriate FOIA procedures. Certain material in these exhibits and other records, including Social Security or alien numbers and confidential personnel and medical information, may have to be redacted before being released. EOIR recently responded to a FOIA request for all records (including motions, briefs, complaints, charge forms, and other exhibits attached to filings) related to OCAHO's antidiscrimination cases.

AILA Question: Tell us about publication of all decisions?

OCAHO Response: Our new policy is to publish all substantive decisions. Pleadings, exhibits, etc., may be requested under FOIA.

- b. Department of Labor (DOL) employs a comprehensive case publication system whereby all cases are published daily, cases are searchable, and interested parties are notified of new cases through a listserv. We recognize that DOL is a much larger organization but can any of their functions be replicated by OCAHO, e.g. a "searchable feature" or a listserv for dissemination?

OCAHO Response: OCAHO's cases are fully searchable using the search function on the DOJ website. The DOJ search function also offers the option of an advanced search in which you can narrow your search to the EOIR domain, and can further narrow your search by file type (all of OCAHO's cases are in.pdf format). The Advanced Search feature also allows you to input specific search terms or phrases, such as case and party names, and identify terms or phrases for which you do not want to see results. The results list contains a link to each case the search returns, and you can then use the "find" function within each .pdf document to see where in the case those specific keywords are mentioned. In addition, published OCAHO cases are fully searchable on Westlaw and LexisNexis. OCAHO will also request that notification of new published decisions be sent out through EOIR's main listserv. Finally, notification of new OCAHO published decisions can be sent out through EOIR's official Twitter account.

2. Name of Respondent's Counsel

Would OCAHO consider providing the name of the attorney representing the respondent on its published decisions to allow the limited number of attorneys involved in these cases the opportunity to network and collaborate with one another?

OCAHO Response: OCAHO's current practice is to include the names of the attorneys appearing in a case in the final decision when the case proceeds to a hearing. OCAHO will consider including the names of the attorneys in a case on other final decisions in the future as well.

3. E-mail Listserve

E-mail distribution lists are available for many agencies, and even sub-agencies within. Given that EOIR publicizes an e-mail distribution list, would OCAHO consider the same?

OCAHO Response: The Office of Legislative and Public Affairs maintains EOIR's e-mail distribution listserv. OCAHO can request that notification of new published decisions be sent out through this main listserv. To be added to the listserv, please email PAO.EOIR@usdoj.gov with your name and email address and with the subject "Stakeholder distribution list." Additionally, notification of new OCAHO published decisions can be sent out through EOIR's official Twitter account. All new published decisions are currently posted on the Volume 10 Decisions page on OCAHO's website. <http://www.justice.gov/eoir/OcahoMain/publisheddecisions/Looseleaf/Volume10/vol10listforInternet.htm>

4. Amicus Briefs

At the last meeting, we discussed the filing of amicus briefs and the willingness of the Chief Administrative Hearing Officer to receive input from amicus. While there are most certainly occasions when AILA members or other lawyers might desire or need amicus support, the general lack of knowledge of these cases and the lack of a published amicus procedure prevents the regular filing of such briefs. Accordingly, would OCAHO consider the following:

- a. Publish on the OCAHO website a request for amicus briefs;
- b. Forward all decisions (including those decisions that the CAHO reviews and reverses) to AILA for distribution within the AILA network;
- c. Forward interlocutory rulings to AILA for distribution within the AILA network;
- d. Set up a listserv for the publication/distribution of all decisions.

OCAHO Response: The procedures for filing an amicus brief in an OCAHO case are set forth in OCAHO's rules of practice and procedure at 28 C.F.R. § 68.17. OCAHO publishes most substantive decisions (including interlocutory orders and CAHO decisions) on OCAHO's website generally within one week of issuance, and, as previously mentioned, will consider providing notification of these decisions through EOIR's listserv and Twitter feed. At present, new decisions appear on OCAHO's Volume 10 Decisions webpage as soon as they are published, with newer cases at the bottom of the page.

5. Topical Index

We appreciate that the topical index of decisions has been updated. Would you consider providing a disclaimer on the website noting that the index is not exhaustive? Can the volumes which are currently available on the OCAHO website be indexed and converted to a searchable format?

OCAHO Response: OCAHO just recently updated its topical index, including updating the topics for all published decisions, and standardizing case names to make searching within the topical index easier and more reliable. OCAHO will continue to update the topical index to reflect new cases and topics at least once per month. We will also consider providing a notice on our website as to when the topical index was last updated.

OCAHO has also made several other improvements to the information contained on its website. The 274B Complaint/Questionnaire has been revised and updated, as has the informational page on How to File a 274B Complaint. The Frequently Asked Questions document on OCAHO's home page was also updated. OCAHO is also working on adding additional information to the case volume listings on the website, and is open to any other suggestions AILA may have about ways to improve or augment the information OCAHO maintains on its website. In addition, OCAHO has been making other improvements to the topical index, including standardizing case names and making topics more consistent and sub-topics narrower.

6. Flow Charts Outlining OCAHO Procedures

Members of the AILA OCAHO Liaison Committee have drafted flow charts to help clarify the procedural steps involved in OCAHO proceedings. We would appreciate it if you would review it and provide us with feedback to ensure its accuracy. We would eventually like to release it to our members to further educate them on OCAHO proceedings.

OCAHO Response: OCAHO has reviewed these flow charts, and has recommended several changes and corrections. These suggested changes are indicated in red on the copies of the flow charts that were sent to us. (The marked-up copies were then distributed). In addition, in response to your inquiries in the Fall 2012 Liaison meeting and agenda, we included a flow chart for Immigration and Nationality Act section 274B cases in the Fall 2012 Liaison Meeting Minutes posted on EOIR's website.

7. APA Proposed Rulemaking & Revisions to the Federal Rules of Civil Procedure (FRCP)

DOL recently published a notice of proposed rulemaking to modernize its rules of procedure and bring the DOL rules in harmony with revisions to the Federal Rules of Civil Procedure (FRCP) adopted since the last revision. As you are aware that the OCAHO Rules of Practice and Procedure were last updated in 1999. Does EOIR contemplate revisions to Part 68 in the near term? If so, AILA would welcome the opportunity to consult with EOIR regarding proposed revisions. Among other revisions, we respectfully request that the following be considered for adoption, consistent with changes adopted by the DOL Office of Administrative Law Judges:

- a. Mandatory preliminary disclosures, comparable to the requirements of Rule 26(c)(1) of the FRCP;
- b. Mandatory disclosure of expert report(s), comparable to the requirements of Rule 26(f) of the FRCP;
- c. The right to discovery of communications between a party and its experts relating to facts or data that the party's representative provided and that the expert considered in forming the opinions to be expressed as well as the assumptions that the party's representative provided and that the expert relied on in forming the opinions to be expressed; and
- d. A settlement judge procedure. We have taken the liberty of drafting a proposed settlement judge rule, derived from the DOL model. (See attachment A.)

OCAHO Response: OCAHO contemplates making revisions to Part 68 in the future in response to legislative changes that occur. At that time, OCAHO will consider the specific proposals above, as well as any others it may receive via public comment during the rulemaking process. We welcome AILA's continued input on this matter. On the specific point of the use of settlement judges, OCAHO is receptive to the idea, and thanks AILA for providing the attached draft rule. We would note, however, that OCAHO does not have any funds in its budget to pay for use of an outside settlement judge, and does not have additional Administrative Law Judges within the office who could serve as settlement judges in cases they are not adjudicating. OCAHO will continue to explore the concept of using settlement judges within these existing budgetary and resource constraints, and subject to any future changes in staffing or budget.

AILA Statistical Addendum

Caseload Procedure, Trends and Statistics: Over the past five years, have there been any significant changes in the number and composition of the cases on the OCAHO docket? Has there been an appreciable increase in the number of document abuse cases being prosecuted by OSC compared with the prior five year period. Likewise, has the

number of paperwork-only cases filed by ICE increased significantly in the most recent five year period compared with the prior five year period?

OCAHO Response: Over the past five years, there have been significant changes in the number and composition of OCAHO cases. Cases filed under 8 U.S.C. Section 1324a have increased from five in FY08 to 70 in FY12, a 1300% increase.

Individual complainants (as well as organizational complainants, such as labor unions and professional associations) continue to file the vast majority of Section 1324b cases. There has been no appreciable increase in the number of document abuse cases being prosecuted by OSC compared with the prior five-year period. The number of employment eligibility verification (paperwork)-only cases filed by ICE has increased over the most recent five-year period, when there were 177 paperwork-only cases filed; in the previous five-year period, there were no paperwork-only cases filed.

OCAHO Update: In addition, of the 43 cases filed since 10/1/12, 34 are Section 1324a cases, and nine are Section 1324b cases. Two of the Section 1324b cases were pro se, and seven were filed by private attorneys. There have been no document abuse cases filed by OSC. Twenty-nine of the Section 1324a cases alleged employment eligibility verification violations (paperwork-only).

Attachment A
Proposed Revision to the OCAHO Rules of Practice and Procedure

§ 18. Settlement judge procedure.

(a) How initiated. The Office of the Chief Administrative Hearing Officer (CAHO) provides settlement judges to aid the parties in resolving the matter that is the subject of the controversy. Upon a joint request by the parties or upon referral by the judge when no party objects, the CAHO may appoint a settlement judge.

(b) Appointment. The CAHO has discretion to appoint a settlement judge, who must be an active or retired judge. The settlement judge will not be appointed to hear and decide the case or approve the settlement without the parties' consent and the approval of the CAHO.

(c) Duration of settlement proceeding. Unless the CAHO directs otherwise, settlement negotiations under this section must be completed within 60 days from the date of the settlement judge's appointment. The settlement judge may request that the CAHO extend the appointment. The negotiations will be terminated if a party withdraws from participation, or if the settlement judge determines that further negotiations would be unproductive or inappropriate.

(d) Powers of the settlement judge. The settlement judge may convene settlement conferences; require the parties or their representatives to attend with full authority to settle any disputes; and impose other reasonable requirements to expedite an amicable resolution of the case.

(e) Stay of proceedings before presiding judge. The appointment of a settlement judge does not stay any aspect of the proceeding before the presiding judge. Any motion to stay must be directed to the presiding judge.

(f) Settlement conferences. Settlement conferences may be conducted by telephone, videoconference or in person at the discretion of the settlement judge after considering the nature of the case, location of the participants, availability of technology, and efficiency of administration.

(g) Confidentiality. All discussions with the settlement judge are confidential; none may be recorded or transcribed. The settlement judge must not disclose any confidential communications made during settlement proceedings, except as required by statute, executive order, or court order. The settlement judge may not be subpoenaed or called as a witness in any hearing of the case or any subsequent administrative proceedings to testify to statements made or conduct during the settlement discussions.

(h) Report. The parties must promptly inform the presiding judge of the outcome of the settlement negotiations. If a settlement is reached, the parties must submit the required documents to the presiding judge within 14 days of the conclusion of settlement discussions unless the presiding judge orders otherwise.

(i) Non-reviewable decisions. Whether a settlement judge should be appointed, the selections of a particular settlement judge, and the termination of proceedings under this section, are matters not subject to administrative or judicial review.

I. Immigration Court Practice Manual (ICPM) and Court Practices

In past meetings, AILA has discussed the inconsistent application of the Immigration Court Practice Manual (ICPM) and the difficulties caused by unpublished local rules of procedure. *See* AILA-EOIR minutes from November 2012,² March 2012, November 2011, and November 2010 liaison meetings (AILA Doc. Nos. 12092654, 11121349, and 10122237). At the November 2012 meeting, EOIR stated that problems could be brought to the attention of the appropriate Assistant Chief Immigration Judge or the Practice Manual Committee.

- A. Thank you for inviting the submission of suggestions and proposed revisions to the ICPM to the Practice Manual Committee. Would you please provide a point-of-contact and e-mail address where comments, suggestions, and proposed revisions may be submitted?

EOIR Response: Contact information for submitting comments, suggestions and proposed revisions regarding the Practice Manual is available in Chapter 13.4 (Public input) of the Practice Manual. Correspondence regarding the Practice Manual should be addressed to:

United States Department of Justice
Executive Office for Immigration Review
Office of the Chief Immigration Judge
5107 Leesburg Pike, Suite 2500
Falls Church, VA 20530³
Attn: Practice Manual Committee

- B. Attached to the agenda are standing orders from the immigration court in Charlotte, North Carolina. These standing orders are not available on the EOIR website, including the Charlotte Immigration Court's information page, and are in conflict with the ICPM. The standing order that pre-determines eligibility for non-LPR cancellation of removal based on evidence presented in a master calendar hearing is particularly troubling. Requiring such a presentation of a case prior to the submission of the applicable forms, evidence, witnesses, and without the preparation required for an individual hearing, interferes with the respondent's right to a fair hearing and limits counsel's ability to zealously advocate for the client. Moreover, because frivolous conduct is always prohibited, we believe the references to 8 C.F.R. § 1003.102(j) in the standing orders are unnecessary. Have these standing orders been reviewed and approved by EOIR headquarters? Does EOIR agree that these standing orders are problematic?

² As of the date of this writing, the November 2012 meeting minutes had not yet been finalized and posted to the AILA website.

³ Note that EOIR will begin using this new zip code beginning October 1, 2013.

- C. AILA reiterates its request that all local filing requirements that are in addition to or conflict with the ICPM be made widely and easily available to the public through the EOIR website and/or as an addendum to the ICPM. AILA also reiterates its request that EOIR evaluate all current local standing orders and other local requirements for consistency with the ICPM, reasonableness and fairness.

EOIR Response: Immigration Judges have the authority to modify the provisions in the Practice Manual on a case-by-case basis. The Practice Manual does not encompass all situations. As always, AILA is welcome to share its concerns regarding local practices in the courts with the appropriate Assistant Chief Immigration Judge.

EOIR is reviewing the Standing Orders from the immigration court in Charlotte, North Carolina that were provided by AILA.

II. Court Recordings

AILA applauds EOIR on the use of its Digital Audio Recording (DAR) system for immigration hearings. The system appears to be working very well and audio recordings of hearings where this technology is employed are easy to listen to and easy to obtain. However for cases that took place prior to the implementation of the digital system, the audio recordings remain on the old tapes and are often difficult to hear. In many courts, tapes are provided to attorneys, but require a very specific audio machine to listen to them, and not all courts have the equipment.

- A. Is it possible for EOIR to transfer audio from older tapes into a format that is more usable for ICE, attorneys, and respondents? If so, is this something that EOIR is considering or pursuing for all non-digital recordings?
- B. If not, can EOIR equip all courts with the necessary technology to allow attorneys to listen to tapes of proceedings not recorded digitally?
- C. What happens to the old tapes? How long are they retained? If the tapes are not retained indefinitely, how will attorneys be able to listen to audio from older cases?
- D. What are EOIR's plans for the future in terms of recording hearings and retaining recordings?

EOIR Response: EOIR does not have any further plans to make changes in terms of recording hearings. There is no plan to convert all of the tapes from older proceedings into digital audio recordings. EOIR will continue to retain the tapes from the older proceedings as part of the record of proceedings. The record of proceedings, which includes the tapes, is retained for 50 years, which is the established retention period for these records. All courts are equipped with the appropriate recorders that allow people to listen to the tapes when necessary. If AILA members encounter a court without this

capability, please let EOIR know. Going forward, the new technology will continue to be used so that litigants have easy access to records of proceedings. The retention schedule for DAR hearings is 20 years.

III. Electronic Registration

At the November 2012 AILA/EOIR liaison meeting, EOIR discussed the development of an electronic registration tool that will individually identify each registered attorney or fully accredited representative and associate the information provided during registration with that attorney or accredited representative. The tool will ultimately enable an electronic filing system that will reduce the time and expense presently incurred with paper filings.

- A. Please provide an update on the implementation of the electronic registration tool.
- B. When do you expect it to be fully implemented and what can practitioners expect it to look like when the system is finalized?
- C. Will EOIR be beta-testing the new system and if so, how can AILA participate in beta-testing?
- D. Does EOIR have a timeline for the electronic filing system?

EOIR Response: Over the years, EOIR has discussed our desire to implement electronic filing for the immigration courts and the Board of Immigration Appeals (BIA). We agree that all parties will experience efficiencies with electronic filing. Currently, EOIR does not have the funding to undertake the implementation of a comprehensive, nationwide electronic filing system and, therefore, we do not have a specific timeline on when electronic filing can be implemented at EOIR. However, EOIR is using an incremental approach to develop some of the infrastructure necessary for electronic filing. These technical improvements to our current IT systems will bring EOIR closer to realizing our goal of electronic filing in the immigration courts and the BIA.

On Monday, April 1, 2013, EOIR issued guidelines and FAQs on the new electronic registration process, which can be found at Federal Register Volume 78, Number 62. Once the registration process is instituted, attorneys and accredited representatives who appear before EOIR must go through the two-step registration process. The process requires that attorneys and accredited representatives: 1) register online, and 2) appear at any immigration court or the Board of Immigration Appeals to show proper identification and get an EOIR ID number. Upon completion of the process, the individual can practice before EOIR. EOIR requests that all AILA members report any problems with the registration process so those issues can be resolved.

EOIR will not be beta testing the system. However, the system will be tested internally via “User Acceptance Testing” prior to distribution to practitioners. OCAHO will not have any attorney registration, but will be implementing an e-filing pilot for OCAHO eventually. OCAHO is currently in the development stage of an e-filing system pilot project.

AILA Question/Comment: The Liaison Committee asked if EOIR would schedule separate registration dates for attorneys who practice in states that have an immigration circuit ride court, so that AILA members in those states would not have to travel hundreds or thousands of miles to a permanent court to register in person.

EOIR Response: EOIR will review this suggestion.

IV. Personnel Shortage

At the November 2012 AILA/EOIR liaison meeting, EOIR said that the hiring freeze announced on January 21, 2011 was still in effect and explained the consequences of the freeze on EOIR headquarters and immigration courts around the country. AILA has heard these concerns and problems echoed by local immigration courts when discussing court backlogs with AILA chapters at local liaison meetings. We also understand that current federal budget cuts and the resulting loss of personnel have added to the breadth of the problem.

- A. In light of these difficult times, but also considering the need for the court system to function efficiently and to provide for expeditious hearings when possible, how does EOIR plan to manage the ongoing shortage of personnel at the courts and current case backlogs?
- B. How has sequestration affected EOIR’s budget? Are future budget cuts expected and if so, how do you anticipate they will affect EOIR?
- C. Will EOIR consider changes in motion practice, including automatic grants of joint motions when filed by respondents and the government pursuant to mutual agreements?
- D. Are there other ways that AILA and OCC can help EOIR manage the backlog of cases and lack of court resources?

EOIR Response: EOIR is now subject to a “hard” hiring freeze with no exceptions, other than extremely important positions. Any hiring would be subject to the direct approval of the Attorney General. Positions lost due to retirement or attrition will not be filled until further notice. All non-adjudicative travel is frozen, including attendance at conferences and other non-court-related travel. EOIR is very worried about the effects of sequestration. It is unclear whether furloughs will be necessary, but if so, it will affect hearing times.

EOIR wishes to be clear that there are no court closings planned as a result of the current budgetary issues. EOIR continues to suggest that litigants work diligently with ICE to resolve as many issues as possible prior to individual hearings and to encourage stipulations. There is a pre-trial pilot project in Bloomington. EOIR constantly seeks additional efficiencies in conducting immigration court proceedings and welcomes AILA's suggestions.

V. Prosecutorial Discretion and Review of Pending Removal Matters

- A. What guidance, if any, has EOIR issued regarding how judges or courts should proceed with cases where 1) a respondent has requested prosecutorial discretion from DHS but has not received an answer; 2) DHS has granted prosecutorial discretion; or, 3) a joint motion for termination or closure has been filed by the respondent and OCC?

EOIR Response: There is no EOIR-issued guidance regarding how judges should proceed with these types of cases.

- B. EOIR temporarily closed non-detained courts in a number of cities throughout the spring and summer of 2012 to allow DHS to review cases on the court dockets for possible grants of prosecutorial discretion. EOIR also reported that special master calendars for pro se aliens would be conducted.

- (i) What were the results of these temporary closings and special master calendars?

EOIR Response: No courts closed as a result of DHS's prosecutorial discretion initiative. In certain courts, EOIR temporarily and partially diverted immigration judge resources to other dockets by in-person and VTC details, to allow DHS attorneys an opportunity to review files for prosecutorial discretion. As a result of the special master calendars, many respondents received and accepted DHS offers of joint motions for administrative closure or, in some cases, termination.

- (i) Based on EOIR's experience last year, would EOIR consider taking similar actions for case review or other purposes, or to provide special assistance to pro se aliens in the future?

EOIR Response: EOIR constantly strives to enhance efficiency of the adjudicative process, taking into consideration resources available.

AILA Comment: Explain the options to challenge an Immigration Judge's handling of a matter.

EOIR Response: If litigants do not agree with an IJ decision on a motion filed by the parties, the litigants can appeal to the Board, including an interlocutory appeal. When a party has an immediate concern regarding an immigration judge's conduct that is not

appropriate for a motion or appeal, the concern may be raised with the ACIJ responsible for the court or the ACIJ for Conduct and Professionalism. In the alternative, parties may raise concerns regarding an Immigration Judge's conduct directly with OCIJ by following the procedures outlined on the EOIR website at www.justice.gov/eoir or by sending an e-mail to OCIJ at: EOIR.IJConduct@usdoj.gov. Where appropriate, concerns may also be raised with the Department of Justice, Office of Professional Responsibility (OPR).

AILA Comment: What is the difference between OPR and the Office of the Inspector General.

EOIR Response: OIG investigates "allegations of criminal wrongdoing and administrative misconduct on the part of Department employees." 28 C.F.R. § 0.29a(b)(2). OPR investigates "allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice." 28 C.F.R. § 0.39a(a)(1). The jurisdictions of the two offices are not mutually exclusive, and the offices can refer matters to each other.

C. The AILA EOIR Liaison Committee has reviewed the immigration court statistics published by Transactional Records Access Clearinghouse (TRAC) <http://trac.syr.edu/>. TRAC is a data gathering, research, and distribution organization at Syracuse University. TRAC obtains data through FOIA requests, and then presents that data to the public.

- (i) Are the TRAC numbers for prosecutorial discretion closures accurate (http://trac.syr.edu/immigration/prosdiscretion/activecourts_latest.html), or does EOIR have different statistics on cases that have been administratively closed and terminated?
- (ii) TRAC reports that despite OCC's prosecutorial discretion efforts, OCIJ backlogs continue to increase nationwide. http://trac.syr.edu/immigration/reports/latest_immcourt/#backlog. AILA members also report increasing backlogs.
- (iii) What reports, if any, is EOIR receiving from the field regarding the impact of administrative closures and prosecutorial discretion processes on the immigration courts?
- (iv) Assuming that the TRAC numbers are accurate, would EOIR care to comment on the import of the numbers?
- (v) Please provide statistics for cases that have been administratively closed or terminated before the Board of Immigration Appeals.
- (vi) Please provide statistics regarding the number of new NTA filings from USCIS, CBP, and ERO, if available.

EOIR Response: Prosecutorial Discretion is a DHS-driven initiative, and EOIR defers to ICE on any questions regarding the statistics. EOIR does not have any information regarding which division at DHS has filed an NTA with EOIR.

VI. Regulations/ Rulemaking

At the November 2012 AILA/EOIR liaison meeting, EOIR commented that it was working on a number of regulations that were in various stages of drafting and review.

- A. Can EOIR provide any updates, including the timeframe for agency action, on the status of the regulations pertaining to the departure bar, ineffective assistance of counsel, recognition and accreditation, regulatory review, list of free legal service providers, and other regulatory additions or changes?

EOIR Response: Regulations are at various stages of development. EOIR is currently reviewing regulations regarding the departure bar, ineffective assistance of counsel, recognition and accreditation, regulatory review, EOIR list of pro bono providers, and electronic registration. Regulations relating to the departure bar are in the early stages of review. EOIR is working with DHS on the ineffective assistance of counsel regulations, which are relatively far along in the process. The recognition and accreditation regulations are not quite as far along, but it is a high priority.

Departure Bar

This is in the early stages. In June 2012, EOIR provided a response to the petition for rulemaking filed by the American Immigration Council requesting amendment of the regulatory provision known as the “departure bar.”⁴ In particular, EOIR partially granted the petition, committing to initiating a rulemaking proceeding to amend the departure bar regulatory provisions, without committing to any particular outcome for this rulemaking.

List of Free Legal Service Providers:

EOIR continues to work with Departmental components and DHS on a regulation making improvements to the List of Free Legal Service Providers. The list will now be called the list of the Pro Bono Legal Services Providers.

Other Regulatory Priorities

EOIR continues to work with Departmental components and DHS on other regulatory priorities, including William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, 122 Stat. 5074 (TVPRA).

⁴ The “departure bar” is the regulatory provision at 8 C.F.R. sections 1003.2(d) and 1003.23(b)(1) that prohibits aliens from filing a motion to reopen or reconsider with the Board of Immigration Appeals (Board) or immigration courts after their departure from the United States. This regulatory provision also renders a motion to reopen or reconsider withdrawn if the alien departs the United States while the motion is pending.

As noted above, on April 1, 2013, EOIR published a final regulation establishing an eRegistry. EOIR will also publish a notice in the Federal Register prior to implementing eRegistry.

In addition, on March 29, 2013, EOIR published a final rule addressing the procedure by which EOIR forwards asylum applications for consideration by the Department of State. EOIR will also be publishing a final rule making technical amendments to EOIR's regulations governing the discipline of immigration practitioners. The rule is currently under review by the Office of Legal Counsel.

Information regarding EOIR's pending rulemakings can be found on the Unified Agenda, which is available online at <http://www.reginfo.gov>. EOIR welcomes and encourages AILA to continue to provide comments on EOIR's pending rulemakings.

- B. EOIR indicated that it will publish an [Advanced Notice of Proposed Rulemaking](#) (ANPRM) for evaluating mental competency issues. *See* <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1125-AA73>. Can EOIR provide an update on the current status of the ANPRM?
- C. On March 22, 2013, EOIR will conduct a [stakeholder meeting](#) regarding the Attorney Discipline Program. AILA Doc. No. 13022146. Would EOIR please comment on issues raised and the steps being considered or taken for their resolution? How, if at all, has the Attorney Discipline Program affected EOIR's view of regulations for ineffective assistance of counsel?

EOIR Response: The meeting, which was attended remotely by approximately 100 individuals, was an informational meeting in which the Disciplinary Counsel, Jenni Barnes, gave a presentation about the Attorney Discipline Program. The participants asked about her process, statistical information, and anecdotal information, such as whether certain grounds had been the basis for discipline.

As to the regulations regarding ineffective assistance of counsel (IAC), EOIR views the requirements for reopening proceedings to be a different set of criteria from an attorney's violations of the attorney discipline regulations. The IAC regulations focus on an alien's proceedings, and the impact of the attorney's conduct on a particular case. As Ms. Barnes noted in her webinar, a finding of ineffective assistance of counsel may be evidence of a violation of the attorney discipline regulations, and she receives referrals from the BIA and OCIJ when findings are made. The two do not otherwise relate, however. EOIR thought that the Attorney Discipline Stakeholder meeting was successful and informative.

VII. Court Evaluations

At the November 2012 AILA/EOIR liaison meeting, EOIR indicated that it was conducting evaluations of the San Diego, East Mesa, Miami, Omaha, Seattle, San Antonio, Tucson, Buffalo, and Batavia Immigration Courts in 2012.

- A. Can EOIR provide an update on these evaluations?

EOIR Response: All of the above courts were evaluated as scheduled, and are currently in various stages of the evaluation process.

- B. What elements of the courts is EOIR evaluating?
C. Are there any patterns showing up in the evaluations?
D. What courts will be evaluated in 2013?

A number of issues are evaluated, including the court's docket, language access capabilities, technology, security, and the relationship with counsel. Because of resource limitations, no additional court evaluations are currently scheduled.

EOIR appreciates AILA's candid feedback in the on-line surveys. It is very helpful. If you have any questions or concerns about the survey, you may contact Joe Egozcue, Chief of Organizational Results, at (703) 305-0099.

AILA Question: Is this a trend? Will there be more VTC? In Falls Church?

EOIR Response: Likely, there will be more VTC in Falls Church, possibly in Arlington because of limited office space. OCIJ is considering doing more pretrial conferences via video.

VIII. Memorandum of Agreement (MOA) between EOIR and DHS issued on October 29, 2012

At the November 2012 AILA/EOIR meeting, EOIR referenced a Memorandum of Agreement (MOA) between EOIR and DHS executed on October 29, 2012 governing the electronic exchange of data and MOAs in certain cities between the local court and the respective ICE Chief Counsel's office. Can EOIR provide AILA with copies of these MOAs.

EOIR Response: The MOA has been posted on EOIR's website. The Memorandum of Agreement between DHS and DOJ EOIR has been provided to AILA. The document can be located on AILA InfoNet at Doc. No. 13050148.

AILA Question/Comment: AILA asked about the general processing times for appeals at the Board of Immigration Appeals.

EOIR Response: Detained appeals are taking approximately three months. Non-detained appeals are taking 17 months.