

ACIJ Checklist for Handling Complaints Against IJs

A. Initial Processing

1. ☐ Complete intake form
2. ☐ Assess OPR/OIG – (circle one) yes / no / maybe
 - ☐ if OPR, consult ACIJ C/P and/or ELR
 - ☐ if OIG, consult ACIJ C/P and/or ELR and/or Ethics Officer
 - ☐ N/A

B. Review and Investigation

3. Decisions

- ☐ IJ ☐ BIA ☐ __ Circuit ☐ N/A

4. Recordings

- ☐ DAR ☐ tapes ☐ N/A

5. ROP

- ☐ requested ☐ reviewed ☐ N/A

6. Interviews

- ☐ IJ ☐ witnesses ☐ N/A

7. Additional info

- ☐ requested ☐ received ☐ N/A

C. Disposition

8. Dismissed

- ☐ frivolous ☐ merits-related ☐ allegations disproven
☐ allegations cannot be substantiated ☐ failure to state a claim
☐ N/A

9. Concluded

- ☐ corrective action already taken
☐ intervening event (circle one):
 terminated / terminated during trial period / resigned / retired
☐ merged into another complaint
☐ resolved per another complaint

10. Corrective (Non-Disciplinary) Action

- ☐ counseling (circle one) – oral / written ☐ training
☐ performance-based action (PIP) ☐ other ☐ N/A

11. Disciplinary Action Proposed

- ☐ reprimand ☐ suspension ☐ removal ☐ N/A

D. Notification

- ☐ notify complainant ☐ notify IJ ☐ N/A

E. Closed

- ☐ complaint closed

Actions for processing complaints against IJs
(actions in **blue** are possible resolutions)

Initial Processing
• source initiated communication • EOIR received communication from source • EOIR sent communication to source • EOIR requested additional information from source • additional information requested from source was received at EOIR • complaint referred to ACIJ • complaint re-opened • alleged conduct occurred • OCIJ consulting with ELR

OPR/OIG Processing	
OPR Processing	OIG Processing
• complaint referred to OPR • OPR declined to investigate or closed without further action • OPR finding ◦ professional misconduct (intentional, reckless disregard) ◦ no professional misconduct (poor judgment, mistake, IJ acted appropriately) • OPR recommendation ◦ recommended discipline ◦ other – [details] • OPR action referred to ACIJ	• complaint referred to OIG • OIG referred complaint back to EOIR for management action • OIG issued report • other OIG action – [details] • OIG action referred to ACIJ

Complaint Dismissed or Concluded		
Complaint Dismissed	Complaint Concluded	Other
• frivolous • merits-related • allegations disproven • allegations cannot be substantiated • failure to state a claim	• corrective action already taken • intervening event made action unnecessary (IJ termination, IJ termination during trial period, IJ resignation, IJ retirement, other)	• merged into another complaint • resolved per another complaint

Management Action	
Corrective Action	Disciplinary Action
• oral counseling • written counseling • training • performance-based action (PIP) • other – [details] • corrective action occurred date(s)	• discipline proposal (suspension, removal, other) • discipline decision (reprimand, suspension, removal, other) • discipline imposed date(s)

Subsequent Action
• challenge filed (grievance, arbitration, EEOC, MSPB, other) • subsequent decision (reversed, upheld, mitigated) • subsequent decision imposed date(s)

Miscellaneous Action
• none of the above – [details]

Event Print Text
(events in brackets print no text on reports)

Initial Actions

Communication received
[EOIR communication sent]
Database entry created
EOIR requested additional information from source
Additional information requested from source received at EOIR
Complaint referred to ACIJ
Initial complaint processing completed
Complaint re-opened
Alleged conduct occurred
Source date
Consulting with ELR

OIG/OPR

Complaint referred to OIG
OIG referred complaint back to EOIR for management action
OIG issued report
OIG action
OIG's action was referred to the ACIJ
Complaint referred to OPR
OPR closed its investigation without taking further action
OPR finding of professional misconduct - intentional
OPR finding of professional misconduct - reckless disregard
OPR finding of no professional misconduct - poor judgment
OPR finding of no professional misconduct - mistake
OPR finding of no professional misconduct - IJ acted appropriately
OPR recommended discipline
OPR recommendation
OPR's action was referred to the ACIJ

Dismiss/Conclude

Complaint merged into another complaint
Complaint resolved per another complaint
Complaint dismissed as frivolous
Complaint dismissed as merits-related
Complaint dismissed because it was disproven
Complaint dismissed because it cannot be substantiated
Complaint dismissed due to the complainant's failure to state a claim
Complaint concluded - corrective action already taken
Complaint concluded - IJ termination made action unnecessary
Complaint concluded - IJ termination during trial period made action unnecessary
Complaint concluded - IJ resignation made action unnecessary
Complaint concluded - IJ retirement made action unnecessary
Complaint concluded - intervening event made action unnecessary
Complaint closed

Corrective

Oral counseling
Written counseling
Training
Performance-based action (PIP)
ACIJ decision
ACIJ decision imposed
ACIJ corrective action occurred

Discipline

Proposed suspension
Proposed removal from federal service
Proposed action
Decision - suspension
Decision - removal from federal service
Disciplinary decision
IJ suspended
IJ to be removed from federal service
Disciplinary action
Written reprimand

Subsequent

Subsequent action filed
Decision subsequently reversed
Decision subsequently upheld
Decision subsequently mitigated
Decision subsequently mitigated
Decision subsequently mitigated
Decision subsequently imposed
Decision subsequently imposed
Decision subsequently imposed

Miscellaneous

[Miscellaneous action]

new “hedged” language following ELR’s 3/15/10 comments:

Dismissal and Conclusion

(b) (5)

Keller, Mary Beth (EOIR)

From: Swanwick, Daniel (EOIR)
Sent: Wednesday, March 24, 2010 7:52 AM
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: thoughts on "disproven"

(b) (5)

Daniel L. Swanwick
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3/24/2010

Keller, Mary Beth (EOIR)

From: Swanwick, Daniel (EOIR)
Sent: Tuesday, March 23, 2010 6:25 PM
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: latest narrative
Attachments: OCIJ proposed 3.23.10.doc; complaint processing actions at-a-glance.doc

Attached. I made the three ELR changes and the two Romig changes we talked about. (b) (5)

(b) (5)

I made some minor changes to the chart to comport with the narrative changes. However, I think Doreen's larger structural suggestions require more thought.

I also updated the at-a-glance sheet for the ACIJ's, which I've attached. It now includes "allegations disproven" as a ground for dismissal.

-Dan

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3/24/2010

Merits-Relatedness

2008 Rules for Judicial-Conduct and Judicial-Disability Proceedings

- Rule 3, Commentary
 - In order to preserve judicial independence, the complaint procedure must not be used to collaterally attack the substance of a judge's ruling.
 - "Any allegation that calls into question the correctness of an official action of a judge – without more – is merits-related. . . . Conversely, an allegation – however unsupported – that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it 'relates' to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness – 'the merits' – of the ruling itself."
 - "The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist. . . . However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by a chief judge until the appellate proceedings are concluded in order to avoid, *inter alia*, inconsistent decisions."
 - "Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. . . . If . . . the challenged language does not seem relevant on its face, then an additional inquiry . . . is necessary."
 - "[A] complaint of delay in a single case is excluded as merits-related. . . . But . . . an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related."

1986 Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

- Rule 1(b)
 - "Conduct prejudicial to the effective and expeditious administration of the business of the courts" is not a precise term. . . . It does not include making wrong decisions – even very wrong decisions – in cases. The law provides that a complaint may be dismissed if it is 'directly related to the merits of a decision or a procedural ruling.'"

outline for ACIJ meeting, 3/23/10

documents

- latest narrative and chart
- draft intake form & "orange file"
- test cases with "model answers"
- sample reports
 - detail
 - summary

concrete overview of ACIJ SOP

- walk through test cases
 - run-of-the-mill
 - outlier(s)
- when in doubt, it's a complaint
- quick run-through of narrative/chart:
 - preliminary investigation, dismissals and conclusions, full investigation, OPR/OIG, ELR, corrective actions, reprimands, proposed discipline, discipline decisions, grievances and other challenges

high-level description of database and data entry SOP

- new system, built from scratch, nearing completion
- going forward, capturing a lot more data on each complaint
 - will go back as far as is feasible to clean up and migrate the old data
- data entry will be done at HQ
 - fax intake form
 - cc Deborah Moutinho on every conduct-related message you send to MaryBeth
- HQ will generate regular reports and email them to each ACIJ (see sample detail report)
 - will also generate them on demand

remaining tasks

- develop formal ACIJ training
- publicizing
 - present to IJs
 - publish procedures in practice manual and on EOIR website
 - post procedures in courts
 - train immigration court staff
 - circuit court dialogue
 - AILA / DHS / OIL / other conferences
- continue to develop database and SOPs
- finalize physical compliant file and ACIJ intake form
- when to notify IJs?
 - requesting feedback from NAIJ on this

Scenario 1: Attorney calls the ACIJ and complains of abusive behavior by an immigration judge in court, and gives specific details of potentially inappropriate shouting, hostility, badgering, and improper application of law. BUT: says he does not wish to file a formal complaint.

Scenario 2: Attorney files a written document with specific allegations as in the above, but then wishes to “withdraw” the complaint.

Scenario 3: Attorney either files a written complaint or calls the ACIJ and orally asserts that an IJ keeps resetting a case and refuses to rule on a motion over a lengthy period of months.

Scenario 4: (b) (6) in which the (b) (6) Circuit found the IJ failed to meaningfully advise the respondent “of his right to seek voluntary departure,” and thus the respondent’s waiver of appeal of that matter “was neither “considered” or “intelligent,” therefore his due process rights were violated. No harshly critical language in court decision.

Scenario 5: Written email complaint that IJ gave written and oral advisals in Spanish to an Indian respondent.

Scenario 6: BIA IJCs regarding IJ denials of DHS motions/motions for reconsideration to appear via VTC in Saipan.

Scenario 7: Written allegation that IJ has demonstrated bias, and therefore violated the Ethics and Professionalism Guide’s provisions on “Appearance of Impropriety” and “Impartiality.”

Scenario 8 : Written allegation that IJ has demonstrated bias by virtue of referring to respondents from a given country with broad generalizations about natives of that country (not racial slurs), and therefore violated the Ethics and Professionalism Guide’s provisions on “Appearance of Impropriety” and “Impartiality.”

1. The head of Catholic Charities phoned the ACIJ C/P directly to report that a pro bono attorney appearing in immigration court under the auspices of Catholic Charities felt that an IJ was impugning her reputation by implying that she was either naive or engaged in fraud. Initially the attorney wished to remain anonymous, but after being told that the investigation could not proceed without reviewing the tapes, which would necessarily require the A#, she agreed to allow the Catholic Charities head to release the information. Upon review, the IJ's actions, although potentially procedurally or legally questionable, were found not to constitute misconduct. Catholic Charities was advised that they could file a formal complaint if they wanted to.
 - a. interplay between anonymity and need to investigate
 - b. difference between a call "on background" and a formal complaint – getting too formal may discourage individuals to file complaints
2. Two "vexatious litigants" who appear to be mentally ill inundate OCIJ with complaints full of delusional and paranoid claims. (b) (6)
3. Courthouse News Service (via EOIR's news clips) reports that the 7th Circuit found it "hard to believe" that the Board found Ethiopia's denationalization of ethnic Eritreans did not amount to persecution. The article quotes the 7th as calling the IJ's reasoning "problematic."
4. Email from R's atty to SACIJ complaining about a long series of sua sponte reschedulings in a very old case.
 - a. only tangentially related to an IJ – one denied motion to reschedule along the way, but no IJ named and no explicit claim of misconduct
5. "FYI" email from BIA atty to ACIJ C/P noting that the 1st Cir. found an IJ's remarks "ill-chosen and insensitive." Upon review, the ACIJ C/P directed that it not be entered as a complaint in the database because she found that it was a performance issue, not a conduct issue.
 - a. is this a permissible way to get info? highlights a tradeoff between transparency and staying out in front of problems
 - b. what was the standard for deciding this shouldn't go in the DB?
6. Law.com (via EOIR's news clips) reports that the 2d Circuit found that the BIA misapplied precedent in upholding the IJ's denial of asylum.
7. Courthouse News Service (via EOIR's news clips) reports that the 4th Circuit found that an IJ and the BIA erred by minimizing the R's mistreatment.
8. Courthouse News Service (via EOIR's news clips) reports that the 4th Circuit found an IJ's denial of asylum was not supported by substantial evidence or specific, cogent reasons.
9. Letter purportedly from 70 immigration detainees to "whom it may concern," cc'ing BIA, 5th Cir., Dallas IC, Dallas ICE, congressional immigration committees, FBI, President-Elect Obama, DHS Secretary-designate, Dallas

Morning News, Houston Chronicle, Washington Post and CBS News, claimed that all Dallas IJs are engaged in racketeering by virtue of their setting high bonds and then profiting from the aliens' continued detention via kickbacks from the owners of the detention centers. The letter was unsigned, had no return address, and included the detainees' names and arrest numbers rather than their A#s (with two exceptions), all in the same handwriting. The writer did not identify himself. SACIJ closed after reviewing the letter, concluding that (1) there is legal recourse for anyone who feels their bond has been set too high, (2) the SACIJ was without authority to investigate criminal allegations, and (3) IJs are required by statute and regulations to rule on bonds. ACIJ C/P and ELR determined that the allegations were too generalized to send to OIG. SACIJ indicated that he would not respond to the putative complainants because it's not practical to respond to 70 people, some of whom have been deported. In addition, lacking A#s for all but two, it was not reasonable to go to DHS to ask for their whereabouts. Finally, the SACIJ noted, "I think it is not advisable for EOIR to respond to a letter that alleges, without even the slightest indication that the allegation has a factual basis, criminal activity by numerous agencies and individuals, none of who are identified by name and all of whom EOIR has no authority over."

- a. large number of complainants
 - b. large group of IJs
 - c. many non-IJ targets of complaint
 - d. difficult if not impossible to ascertain whether any or all named aliens actually joined complaint
 - e. criminal allegations of widespread racketeering; OCIJ obviously can't investigate this, and decided that referral to OIG was unwarranted; what are the contours of our duty to forward to law enforcement?
 - f. SACIJ states that it is impractical to respond to all named complainants; how far does OCIJ's duty to contact all complainants extend, especially in a case like this where there is no identifiable "lead" complainant?
 - g. SACIJ states that it is difficult if not impossible to track aliens down in order to respond; however, he found that one whose A# was provided still had a case pending before a Dallas IJ and was presumably still in custody; does OCIJ have a duty to follow up with this individual?
 - h. likely able to be closed as frivolous, merits-related, and unable to be substantiated; however, the complainant probably did successfully state a claim
10. R's pro se appeal to the 2d Circuit states summarily that the IJ acted more as a prosecutor than a judge. Unclear how it got to OCIJ.
11. Gay City News (via EOIR news clips) reports that the 2d Circuit, in an unpublished decision, criticizes an IJ's opinion at length for ignoring evidence in the record. ACIJ C/P concludes not a conduct issue and refers to SACIJ for possible performance issue.
12. EOIR webmaster forwarded to OCIJ an email from an individual who read an article in the Dallas Morning News (which appeared in the EOIR news clips)

critical of an IJ's courtroom conduct. The CIJ, in consultation with the Director, determined not to enter it as a formal complaint. The SACIJ and ACIJ C/P determined it would be handled as a training issue.

13. 2d Circuit orders assignment to a new IJ upon remand, finding his adverse credibility determination unsupported by the record because he engaged in speculation. AUSA's take was that IJ was frustrated but not overly mean, and wasn't sure why the 2d recommended assignment to another IJ. This was entered as a complaint in the DB and the above consultation was noted in the "complaint nature."
14. Attorney spoke with ACIJ C/P at length by phone regarding four of her cases before four IJs. The attorney followed up via detailed email. ACIJ C/P forwarded email to SACIJ, who investigated and responded at length to the attorney, concluding in each case that the IJ had not engaged in misconduct that that removal of the IJ from the pending case was unwarranted. Attorney followed up via phone call to ACIJ C/P. Both SACIJ and ACIJ C/P indicated that the attorney should file motions to recuse, then pursue legal remedies on appeal.
15. Fifteen immigration judges wrote sua sponte letters to Lionbridge in support of a dismissed interpreter. All used their official titles, and four wrote on Department letterhead. It is unclear how the letters came to the attention of the Agency.
16. Attorney wrote letter to CA and cc'd "EOIR, Falls Church, VA" complaining that a court security guard spoke with and prejudiced an IJ against the attorney's client after an altercation between the attorney and the guard. After investigation at the court, the Deputy CA informed the attorney that it had been the TA, not the guard, who related the incident to the IJ, and the attorney seemed to acknowledge that the promised removal of the guard would resolve the situation.
17. Letter from accredited representative to EOIR Director alleging multiple IJs' improper denials of COV motions. Indicated that at least two Atlanta IJs and one named IJ in another city are deliberately violating due process by denying COVs where clearly warranted. SACIJ closed the matter as merits-related and communicated this disposition with the complainant.
18. Letter from attorney to OPR complaining about immigration court staff attitude and conduct. OPR responded, indicating no jurisdiction over non-attorneys, and forwarded the complaint to EOIR OGC.
19. Letter from attorney to DHS/OIG, cc'd SACIJ, regarding mistreatment and threats by CCA guards. Discussed with CIJ, but no mention of IJs, so no complaint opened.
20. Pro se respondent wrote letter to CIJ claiming that his in absentia order was a mistake because an IJ granted a COV, but to the wrong address. Reopening was subsequently granted. No complaint opened.

21. During a scheduled discussion with the SACIJ, ICE attorneys indicated a concern with two IJs, one who they felt was consistently biased against them, and another who was violating the regulations by failing to deliver oral decisions before both parties. The SACIJ subsequently documented these concerns and asked for guidance in an email to the ACIJ C/P and ELR.

22. (b) (6)

23. A respondent's attorney sent a letter to the CIJ following the BIA's reopening and remand to the same IJ based on newly discovered evidence. The letter includes as an attachment a copy of a motion to recuse filed (simultaneously?) with the IJ, but not yet ruled upon, and asks the CIJ for "[a]ny assistance you could provide in the matter." The attorney alleges bias, due process violations and legal error on the part of the IJ.

Keller, Mary Beth (EOIR)

From: Sheppard, Karen (EOIR)

Sent: Thursday, February 25, 2010 12:27 PM

To: Swanwick, Daniel (EOIR); Nong, Phu (EOIR); Pasierb, Mark (EOIR); Moutinho, Deborah (EOIR); Keller, Mary Beth (EOIR)

Subject: RE: terminology

Thank you Dan.

From: Swanwick, Daniel (EOIR)

Sent: Thursday, February 25, 2010 12:22 PM

To: Sheppard, Karen (EOIR); Nong, Phu (EOIR); Pasierb, Mark (EOIR); Moutinho, Deborah (EOIR); Keller, Mary Beth (EOIR)

Subject: terminology

All,

On the question of what to call the two types of preliminary resolutions:

DISMISSED if frivolous, merits-related, cannot be substantiated, or fails to state a claim

CONCLUDED if corrective action already taken or intervening events make action unnecessary

This tracks the complaint resolution terminology used by the federal courts, and it just seems right to me.

-Dan

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2/25/2010

proposed complaint nature list, with brief characterizations
2/25/2010

in-court conduct – allegations that an IJ behaves inappropriately while on the bench; a catch-all for allegations not specifically characterized below; typically relates to lost temper, inappropriateness or other forms of unprofessionalism

out-of-court conduct – allegations that an IJ acted inappropriately while not on the bench; may concern poor treatment of EOIR staff, time & attendance issues, or violations of ethical provisions applicable to IJs (gifts, misuse of position, etc.)

due process – allegations that an IJ failed to provide a full and fair hearing; typically rooted in a procedural failing such as: cut off testimony, communication or interpreter issues, notice issues, off-the-record, prosecutorial questioning, transcript issues, evidentiary issues (incl. failure to mark, failure to consider, and extra-record), COV abuse, substitution of counsel abuse, continuance abuse, pre-judgment w/o bias

bias – allegations that an IJ was predisposed to rule for or against a given party or class of party

legal – allegations of legal error in a decision by an IJ

criminal – allegations of criminal violations by an IJ

incapacity – allegations that an IJ is unable to perform judicial duties due to an impairment which is temporary or permanent, mental or physical

on/off duty?