Oral Remarks Presented by
Immigration Judge Dana Leigh Marks
at the Ninth Circuit Court of Appeals
Immigration Brainstorming Session
May 5, 2006

I am speaking here today in my capacity as Vice President of the National Association of Immigration Judges, not as a representative of the U.S. Department of Justice. Any ideas I express are my personal opinion, not an official opinion of the Department. They also are not an official position of the Association, as our membership is diverse and no consensus has been reached yet on the issues that we will be discussing today. The NAIJ is extremely interested, however, in being involved in the process of improving transparency in the court system and in assuring judges retain decisional independence, so we are active in efforts to assure that our members have the legal, administrative and cultural tools they need to render top quality decisions. So, I am proudly here on their behalf, even if my contribution and ideas are personal.

As I prepared my ten minutes of remarks for this morning, I realized the irony that what I am being asked to do here today is a microcosm of what I do daily and why we are here! Just as I do in Court every day, my task today is to take a factually rich, legally complex problem, and logically and eloquently resolve it – while operating at top speed in a severely circumscribed time frame! My assignment on this panel was to explain the genesis of the recent crush of cases reaching the circuit courts and hopefully by doing that, to help provide a basis for creative ideas to address or ameliorate that situation. Honestly, the more I struggled with the topic, the less I felt this was a task that could be accomplished!

Instead, what I decided would be most helpful, is to provide some context for many of you who have only an outsider's view of my world, so you can see for yourself why our cases come to the circuit courts in the posture that they do. Perhaps this will provide a spark of inspiration to help us find a solution to this crisis together.

The realities of an Immigration Judge's professional life are not very glamorous, but they provide a lot of insight into why immigration cases arrive at the Circuit in the form they do. Part of the current state of affairs is due to the complicated nature of the immigration law

itself and its often convoluted evolution; another factor is the large body of circuit court precedent which exists in this very factually rich body of law; yet another part which contributes to our present situation is the scarcity of financial resources, both administratively at EOIR and with regard to representation of applicants; and finally, there is a part played by habit -- the long established patterns of practice by attorneys, Immigration Judges and the BIA, which perhaps need to be revisited.

But even in this challenging area, you must remember the proper context for today's session, which is that what we discuss today is a small portion of the work done by the Immigration Courts. The overwhelming majority of Immigration Judge decisions never reach the circuit courts. Many are not appealed at all or do not go beyond administrative review by the BIA. What you will never see, unless you are a "hard core" immigration practitioner, are the large number of cases which end with resolutions that are the equivalent of stipulations or mutual agreement, those where both parties are satisfied that justice has been served by a grant of some form of relief, or where each side, even the party adversely affected, accepts the outcome as within the proper exercise of discretion by the Immigration Judge.

Immigration Court proceedings are a strange hybrid

of administrative, civil, and criminal law. Although we are technically an administrative tribunal, we are not governed by the APA; thus there is no formal discovery and the vast majority of our decisions are delivered orally. When I say orally, I mean these decisions are rendered extemporaneously, immediately following the completion of several hours of testimony, without access to any written transcript of testimony. And, here in San Francisco, we render an average of ten such oral decisions each week.

As administrative adjudicators, Immigration Judges are experts, who are often assumed by the parties to be virtually prescient and thoroughly informed of obscure permutations of the law or specific country conditions in a particular region or area. While it is true that we are experts, there are times when a good old fashioned trial brief would go a long way to aid the Court in its analysis -- yet they are few and far between. (That's the function of habit, I believe.) While our proceedings are civil in nature, the consequences of Immigration Judge decisions are as far-reaching as criminal court verdicts, since deportation is the equivalent of banishment and a mistaken order denying asylum-related relief can be tantamount to a death sentence. Yet formal rules of evidence do not apply, and Perry Mason type surprises are not uncommon! Many of you will be surprised to find

that we Immigration Judges do our job without the ability to impose sanctions or employ contempt authority.

Add to the mix, the following:

-- We often deal with complex witness testimony, which is delivered through a foreign language interpreter, who may or may not have the same level of education or sophistication as the respondent.

-- We are often presented with witnesses whose demeanor which may not be in accord with our traditional American notions of propriety because of their cultural heritage.

-- We do not have court reporters or stenographers, but rather create a record of our proceedings through tape recorders which each Judge herself operates, and which are transcribed by individuals in some remote location, who I suspect are mono-lingual, and have likely never have taken a world geography course in school.

-- We Immigration Judges are allotted a "generous" four hours of administrative time off the bench each week, which we must use to review all case submissions and filings for trial, to read and understand new statutes, regulations and governing precedent, to rule on motions

and to reflect and research novel legal issues.

In San Francisco for example, we Judges accomplish all this with 1/6 of a law clerk per judge – in other words, three law clerks for 18 Immigration Judges.

On top of this, Immigration Judges are most frequently required to assess witness credibility based on the account of only one person (not the traditional two witnesses which greatly aid in weighing what seems more credible) regarding events which happened years ago, in a foreign venue, with unfamiliar customs, and to interpret or assess the veracity of foreign documents which are generally completely novel to us.

To that recipe, we add the great wealth of Ninth Circuit precedent which instructs us on how to evaluate testimonial and documentary evidence, and how to assess the weight of exotic foreign documents, or harder still, the weight to afford both the presence and absence of such documentation.

Lastly, this unusual legal mix is baked in an environment where the majority of Immigration Judges learned their craft at a time when we were trained to simply create a complete record which supports one's

decisional rationale, but to leave the "fine points" of legal citations and complicated legal arguments to the BIA to flesh out or add upon their review if they believe it to be warranted once a case is appealed.

This procedural reality may help you folks to better understand the posture of the cases that you may see in the course of your representation before the Circuit Court.

Without being able to give you a definitive assessment of what has caused this current crush of cases, I think it is fair to expect that it will be years before it abates. Eventually, I believe it will abate, due to a combination of factors.

I think the BIA will intensify efforts to more thoroughly explain its rationale in all cases and remand more cases to IJs for clarification if they predict that the circuit court would be displeased with either the state of the record or the contents of an Immigration Judge's decision. Some of you may have already heard about the recent assignment of three Immigration Judges to serve as temporary BIA members starting immediately, as a first step towards additional resources.

Personally, I am also hopeful that more resources will be allocated to the Immigration Courts, so our decisions

can reflect the actual quality of our work: such as clear, un-garbled transcripts and decisions which are properly transcribed, reflecting correct spelling and punctuation . Maybe the brave new world of technology will finally arrive at EOIR and we Immigration Judges will be provided the state-of-the-art technology and the administrative support necessary to render a greater number of detailed written decisions in complex cases and those involving matters of witness credibility.

But for now, this is how this "crisis" looks from my vantage point. I hope by being here today, we Immigration Judges can contribute to finding a creative solution to the problem this crisis is causing at the Circuit Court level.

Thank You.

DLM
5/5/06