

PREFACE

I am delighted to introduce this new publication by the American Immigration Lawyers Association; a book like this is long overdue. I spent 35 years as an immigration judge in the San Francisco immigration court. During that time, I saw a wide spectrum of skill (and ethics) levels in the practitioners who appeared before me. I saw well-meaning, but inexperienced attorneys who accepted cases *low bono* but who were way out of their depth, lacking sufficient preparation and structure in their presentations to the court. I saw unscrupulous lawyers who cranked out dozens of rote submissions that clearly followed a repetitive format, untailored to the individual case at hand, leaving their clients vulnerable to claims by government attorneys that their stories were fabricated. Even the highly skilled attorneys from large firms who appeared *pro bono* were often flummoxed by the relaxed rules governing immigration court proceedings. Most commonly, I saw inexperienced attorneys trying to do their best with little guidance on how to best present their client's case to the court. I have read and provided comments on every chapter of this book, and I believe it will be an invaluable tool for all levels of immigration court practitioners.

On the bench, I commonly saw practitioners who had no idea how to organize the most critical part of their case—the direct examination of their clients. It was often a challenge for practitioners to leave behind legalese and form simple, direct, and clear questions that are absolutely essential to making a clear record when proceeding with an interpreter. The direct examination chapter provides step-by-step instruction on how to best organize a successful direct examination and how to formulate effective questions. Equally important, the chapters on case analysis and witness preparation will help the practitioner to evaluate their client's case, come up with a persuasive theory of the case, and explain this theory to their witnesses so they can best answer any question put to them, even those posed by opposing counsel.

Other trial skills, such as effective objections, cross-examination, and redirect examination, which are common in state and Article III federal courts, often go underutilized or completely unused by immigration court practitioners. As an immigration judge, I would sometimes object to questions myself because counsel did not do so. The chapter on objections clearly explains both how to object to questions by opposing counsel, and, equally importantly, how to rephrase questions or argue that one's own questions are not objectionable.

Although the Department of Homeland Security (DHS) Office of the Principal Legal Advisor (OPLA) does not often call witnesses in immigration court, when it does, immigration practitioners rarely cross-examine their witnesses. The chapter on cross-examination provides insight on how cross-examination can be used both to bolster the respondent's case and to undermine the opposition's witness.

I also saw many practitioners waive redirect examination or conduct very unhelpful redirects in which they actually reinforced the points made by DHS OPLA on cross-examination. The redirect examination chapter lays out how to analyze the

negative inferences raised during cross-examination and quickly formulate surgical questions to defuse the points DHS OPLA has scored.

As immigration court proceedings have become more adversarial over my time on the bench, and as substantive immigration law has become more complex, the effective use of expert witnesses has become ever more critical to success in immigration court. I often saw practitioners struggle with basic concepts of accrediting their proposed expert and conducting effective voir dire. Worse, even after an expert was accredited, practitioners did not always question them on every subject on which they could provide an opinion and often ceded control of the testimony to the expert who would opine in lengthy monologues. The chapter on expert witnesses provides step-by-step information on how to effectively qualify a proposed witness as an expert, and, just as importantly, on how to then use the expert effectively by eliciting testimony that is persuasive to the immigration judge.

Immigration judges are always under pressure to complete cases quickly, and some judges may be reluctant to grant practitioners the opportunity to make a closing argument. This reluctance stems in part from the fact that many practitioners merely summarize the facts the judge has already heard or read a pre-written closing, rather than interweaving facts and law in a persuasive argument to the immigration judge. The closing argument chapter explains the importance of using themes or powerful quotes to make the argument memorable and how to structure the argument to address key issues that have arisen during the trial.

I wish that practitioners had had access to this book when I was on the bench. The cases heard in immigration courts have dramatic life-altering consequences for the respondents in removal proceedings, oftentimes being tantamount to a death sentence or forced exile. Yet despite the gravity of these outcomes, many of the basic trappings we take for granted in our American court systems are absent in immigration court. While litigants are entitled to due process, immigration judges are given broad leeway in how to conduct hearings, and practitioners must be both knowledgeable and flexible to successfully practice in immigration court. This book will go a long way to helping practitioners, both new and experienced, provide the high-quality representation their clients desperately need. It is a treasure trove of valuable information, guidance, and practical tips that will benefit practitioners who are new to the field as well as seasoned litigators. It is thorough and very readable. It should help settle the queasy stomachs of practitioners entering the immigration court by realigning the distortions and differences from other court systems and placing them in an understandable perspective. I am hopeful it will encourage more brave attorneys to foray into our nation's immigration courts so they can help it be a shining example of the fairness of our American system of justice that citizens and noncitizens alike deserve.

Hon. Dana Leigh Marks (ret.)

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Immigration Judge Dana Leigh Marks served on the trial court bench at the San Francisco Immigration Court from January of 1987 through December of 2021. Prior to taking the bench, Judge Marks spent ten years in private practice of immigration law and served as lead counsel who successfully argued the landmark case of *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1986), which established that asylum applicants need only satisfy a more generous “reasonable possibility” standard in order to qualify for relief. She also was a California Certified Specialist in Immigration and Nationality Law from 1989 to 1993.

Judge Marks is a President Emerita and Executive Board member of the National Association of Immigration Judges (NAIJ), a union affiliate of the International Federation of Professional and Technical Engineers (IFPTE) that has represented the more than 600-member national immigration judge corps since 1979. Previously she served as NAIJ President for 14 years. Judge Marks has published numerous articles and testified to Congress regarding the urgent need to restructure our nation’s immigration courts to safeguard due process and judicial independence and regarding ways to improve the efficiency and fairness of the system. Judge Marks speaks frequently to the media, in English and Spanish, regarding immigration court issues such as due process, implicit bias, secondary traumatic stress, and burnout suffered by immigration judges working in the current overburdened system.