ILLINOIS STATE BAR ASSOCIATION

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The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's comments

BY LEWIS F. MATUSZEWICH

Welcome to Patrick Kinnally, who is leading the International and Immigration Law Section Council in the 2016-2017 ISBA year. His first Message appears in this issue of *The Globe*.

For many years Pat has been one of the more prolific authors of informative articles in *The Globe* (and other ISBA Section Council publications). Last year, Pat prepared three articles, including, "Conditional Residency and Immigration Family Law Cases: Who Has the Burden of Proof?"; "Child Abuse: Is It a Removable Offense?"; and "A Red Flag: Orders of Protection and Deportability for Resident Aliens."

In this issue he has provided us with his article, "Removal Proceedings: A Right of Cross Examination."

Howard Stovall, who practices in Chicago, provided his article, "Short Form" Agreements under Arab Commercial Agency Law: Some Legal and Practical Issues." Howard has been providing the readers of *The Globe* articles since at least 2001 and has provided us a total of twelve articles. Most recently in the February, 2016 issue of *The Globe*, his article, "Use of Foreign Governing Law and Arbitration

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Message from the Chair

BY PATRICK M. KINNALLY

The first thing I would like to say is that my role for the International and Immigration Section Council is not to be "the chair." Where that titular noun originated, escapes me as I am sure it does you. Hopefully, I can be a guide and a resource.

My membership in the ISBA started when I was in law school as a night student at John Marshall in 1978. During the day and on weekends, my job was working for INS at its Chicago office and at O'hare Airport and sometimes checking ships on Lake Michigan on the weekends. I attended the Border Patrol Academy at Los Fresnos, Texas for immigrant inspector training and worked on the border at Sault Sainte Marie, Michigan. My career has included being an adjunct professor at Northern Illinois University Law School for 15 years, teaching trial skills, immigration law, and Civil Practice courses. My firm is a small, mainly plaintiff's personal injury and worker's compensation litigation. Also, we represent Kane County and the Kane County Forest Preserve.

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***(Notice to librarians:** The following issues were published in Volume 53 of this newsletter during the fiscal year ending June 30, 2016: September, No. 1; October, No. 2; November, No. 3; December, No. 4; February, No. 5; April, No. 6; June,, No. 7).*

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Editor's comments

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Clauses In Arab Commercial Agency and Distributorship Agreements" appeared.

Thank you to all of our contributors.

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Message from the Chair

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My tenure on this Council spans two decades. Ask Lew Matuszewich. I did not ask for this job, but welcome it. Your help is needed.

We have a great roster. But we need players who not only want to be in the mix but whom are willing to partake. Please join us. Here are my goals.

Juliet Boyd is our CLE coordinator. She is a very capable person, with South African flair. She has put together good programs on educating lawyers about why immigration law matters to the general practitioner. This year hopefully she will put together a program on family law which will touch VAWA, U-Visas, and Special Immigrant Juveniles. I intend to help. Will you?

My good colleague Cindy Buys and yours truly will attempt to persuade our General Assembly to revisit 725 ILCS 5/113-8 and put some teeth into a law we thought made state trial court admonitions mandatory [See: "Aliens, Guilty Please and the Risk of Deportation: Time for Legislative Action, Illinois Bar Journal (2001) Vol.89 99 194-198. Unfortunately, the Illinois Supreme Court gutted this statute in *People v. Delvillar* 235 Ill. 2d 507 (2009) as well as *People v. Carrera* (2010) 239 Ill 2d 241. Cindy's expert is making legislation happen will help our clients and our society. Please enlist.

Unfortunately, we are entering a political season where some politicians seek to divide our polity into "we and they," based on immigration. If this is government then it is a front we need to resist. Yet, we cannot ignore it. Deportations under the current administration have increased. We need people, true statesmen and stateswomen who strive to bring people together, not divide us. I wish Daniel Patrick Moynihan were still with us.

To do this we need to inform those whom do not know why a plurastic society matters. We need to write articles, formulate education programs, speak at our law schools, colleges and high schools about why, our melting pot, this country, is as great as it is. We all know that, let's bring it back to where it should be.

That's my goal. It cannot be done alone. Get involved. We need you.

With a wish that is best.

Patrick M. Kinnally

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Removal proceedings: A right of cross-examination

BY PATRICK M. KINNALLY

As we know, immigration tribunals are courts created by Congress, so, through the Executive Branch, it can control the process of civil immigration removal hearings. The Executive Office for Immigration Review (EOIR) is the federal agency which presides over immigration courts. All of its employees are appointed to their positions—whether judges or otherwise—by other federal employees. One might find it surprising with this federal regime, that in immigration proceedings, the Federal rules of Evidence (FRE) do not apply. If this seems odd to you, it should. Federal immigration law, federal regulations created by EOIR, judges and employees appointed by the federal government, but no Federal Rules of Evidence? See, *Doumbia v. Gonzales*, 472 F.3d 957 (7th Cir. 2007). As our 7th Circuit Court of Appeals noted:

> * * * the promise of a reasonable opportunity offered by 8 U.S.C. 1229(b)(4) should not be confused to mean that the Federal Rules of Evidence apply in immigration proceedings – they do not. *Niam v. Ashcroft*, 354 F.3d 652 (7th Cir. 2004). Rather, "the sole test for admission of evidence is whether evidence is probative and its admission is fundamentally fair * * * where "fundamentally fair" should simply be read to mean "in accordance with the reasonable opportunity guaranteed by 8 U.S.C. 1229 (b)(4)" * * *

At first glance, this holding seems circular since the reason given for not employing the FRE is the fact the statutory provisions supplants them. The statute does not say that the FRE does not apply in removal proceedings, nor for that matter, does it say it does apply; or is a substitute for the FRE. The conclusion the FRE does not apply in removal proceedings is based on the fact Congress never said it did, or did not. Statutory law merely provides a framework of procedural guarantees for immigrants in the midst of adversarial, civil immigration hearings. Regardless, the focus is that the evidence offered must be probative, reliable and therein, fundamentally fair. See, *Pouhova v. Holder*, 726 F.3d 1007, pp. 1011-1012, (7th Cir. 2013). (But, *cf.*) *Antia-Perea v. Holder*, 768 F.3d 647, 657-658) (7th Cir. 2014). The 7th Circuit has been steadfast in that holding. See, *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004); *Lam v. Holder*, 698 f.3d 529 (7th Cir. 2012) ("*Lam*"). The hearsay rule as to documents used as evidence in removal hearings, as we shall see, creates special considerations.

In distinguishing *Pouhova*, however, the Seventh Circuit has stated that a Record of Deportable Alien (Form I-213), is inherently trustworthy and admissible even without the testimony of the officer who prepared it. It is quintessentially a hearsay document. The I-213 is prepared by a government agent and is used universally in removal hearings. This is because the maker of the record (a government agent), "cannot be presumed to be an unfriendly witness other than an accurate recorder." *Antia-Perea* at 657. That proposition is quite debatable since the recorder agent's job is to enforce immigration law. But the Seventh Circuit and other courts have held that unless there is some indication, some attack on when the document was made, how it was completed and whether it contained statements of third parties, it may be admitted as the only proof of removability. Since Antia-Perea was present when the I-213 was recorded and never challenged its contents or creation, its efficacy as being reliable was not in controversy.

The *Antia-Perea* Court relied on two factors. First, the I-213 in *Antia-Perea* was created contemporaneously in Antia-Perea's presence. It was his statement, not another's. In *Pouhova*, the written document was created six years later. Additionally, in *Pouhova*, the I-213 documented an interview with a person other than the respondent without giving the respondent the right to cross examine the utterer of the statement. *Antia-Perea* at 658, citing *Malave.*

Here is the Framework

Immigrants in removal proceedings are entitled to due process of law as guaranteed by the Fifth Amendment. This is a constitutional requirement. See, *Pouhova v. Holder*, 726 F.3d 1007, pp. 1011-1012 (7th Cir. 2013). But what constitutes due process in the immigration area is, largely, left to Congress. It has provided a statute which states:

> * * *
>
> (4) Aliens rights in proceedings. -- In proceedings under this section, under regulations of the Attorney General –
>
> (A) the alien shall have the privilege of being represented at no expense to the government, by counsel of the Alien's choosing who is authorized to practice in such proceedings,
>
> (B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence of the alien's own behalf, *and to cross-examine witnesses presented by the government* * * * (8 U.S.C. 1229a(b)(4). (Emphasis added.)

And, if removal proceedings comport with these statutory rights, no due process violation will occur, save a constitutional challenge to the statute. See, *Malave v. Holder*, 610 F.3d 483, (7th Cir. 2010) ("*Malave*"); *Barradas v. Holder*, 582 F.3d 754 (7th Cir. 2009) ("*Barradas*").

Here is the Hearsay Rule

So, let's go back and refresh ourselves about what we learned in law school.

The problem hearsay statements create during administrative hearings are frequent. *Malave*. Documents that are hearsay are admitted routinely, which lessens the burden of proof for government trial attorneys who are prosecuting removal cases. *Barradas*. There are only four risks which pertain to evaluating the trustworthiness of in-court witness testimony. Administrative and trial court judges should observe them. See, *Graham, Handbook of Illinois Evidence* (2016), §801.1, pp. 857-862. These are:

- Perception in the sense of capacity and actuality of observations through any of the senses
- Recordation and recollection (memory)
- Narration (ambiguity)
- Sincerity (fabrication)

These inquiries exist for evaluating in-court witness testimony. In that setting, the adjudicator has the opportunity to determine the witness' credibility as to each risk factor since the witness is present for direct and cross examination. Yet, this evaluative protocol is remarkably different when the witness or declarant is unavailable to testify. This is because the person or document is not under oath, is not subject to observation during direct examination and finally, is not subject to any cross examination. Under such circumstances, the trustworthiness of the process is undermined, which is why hearsay evidence should be excluded. We need to remember that.

Here is the Result

A recent opinion from our Seventh Circuit Court of Appeals is a fair example of why cross examination in immigration cases is a safeguard immigration courts need to not only implement, but require. *Karroumeh v. Lynch*, 820 F.3d 890 (7th Cir. 2016) ("*Karroumeh*")

Karroumeh was admitted to the United States as a visitor on May 2, 1996. Once he arrived, he obtained a proxy divorce from his wife, in Jordan, five months later. In February 1997, he married Terri Wright ("Wright"), a Untied States citizen. Wright filed a visa petition for Karroumeh, and he was granted conditional lawful resident status in June 1998. Both Wright and Karroumeh filed a joint petition to remove the conditional resident status which the United States Citizenship and Immigration Services (USCIS) approved in January 2001.

In May 2001, Karroumeh applied for naturalization as a United States citizen. During his interview on that application in February 2002, Wright did not accompany Karroumeh. Karroumeh told the USCIS adjudicator he was getting divorced from Wright. Karroumeh withdrew the application. He was divorced in March 2012.

Later, Karroumeh filed two subsequent nationalization applications, the latest being in 2006. USCIS initiated an investigation as to whether Karroumeh and Wright's marriage was fraudulent.

During the USCIS inquiry, a USCIS official, Leslie Alfred ("Alfred"), procured a statement from Wright in 2008. This statement, obtained six years after the couple's divorce, raised questions which were ambiguous and contradictory about the couple's living arrangements after their marriage. For example, Alfred asked Wright if she ever thought that Karroumeh married her to get his green card. She replied, "I felt he did not want to live with me."

As a result of the USCIS investigation, it denied his application for naturalization. Even though Karroumeh calendared his application with the federal district court in 2012 for review, USCIS placed him in removal proceedings, alleging he obtained his permanent resident status solely by marrying a United States citizen for an immigration benefit. Karroumeh denied the alleged charge in his removal hearing before an administrative, immigration judge (IJ).

The IJ required that the Department of Homeland Security (DHS) attorney file its evidence. DHS indicated it would call Wright, Wright's children, a landlord where Karroumeh resided and Alfred. DHS counsel requested a subpoena issue for Wright and her children, which was granted for a hearing scheduled on September 5, 2013. The subpoenas were never served. The hearing date was rescheduled to January 2014. A new subpoena was never requested. Wright never showed up for the hearing.

At the hearing, the only witness was Alfred. The IJ permitted Alfred to testify about Wright's sworn statement which said the couple never lived together. Karroumeh's attorney objected to the admission of Wright's statement since she was unavailable for cross examination. The IJ concluded that because DHS had attempted to obtain Wright's presence in Court, he was going to admit Wright's statement. Thereafter, the IJ concluded Wright's statement was "extremely damaging" to Karroumeh and that Karroumeh fabricated evidence to show the couple's marriage was true, when it was not entered into in good faith. The IJ ordered Karroumeh's permanent resident status is terminated. The Board of Immigration appeals (BIA) affirmed that decision. It held DHS made reasonable efforts to have Wright present at the hearing, and Karroumeh's attorney had a reasonable opportunity to cross examine Alfred. Karroumeh was ordered removed from the United States.

The Seventh Circuit saw it differently, and granted Karroumeh's petition for review. It concluded the government's rulings finding Karroumeh's statutory procedural rights to cross examine the main witness against him was not only violated, but that such error was prejudicial.

Citing *Malave,* the Court found that the right to cross examine adverse witnesses extends not only to live witnesses, but to those third-party witnesses whose statements are presented in written declarations like the statement of Terri Wright.

DHS argued it used "reasonable efforts" to ensure Wright's attendance at the hearing. The court did not decide whether that conduct was adequate to comport with the fairness of admitting a document whose declarant is unavailable for cross examination. It did so because DHS never subpoenaed Wright for the January merits hearing. Nor did It seek the United States Attorney or District Court's authority in enforcing such a subpoena. 8C.F.R. 1003.35(b)(6).

Notwithstanding the procedural violation of Karroumeh's right to cross examination of Wright, he still had to show that abrogation resulted in prejudice. Here,

since the IJ concluded Wright's statement was 'extremely damaging" to Karroumeh, prejudice, without cross examination of Wright, was apparent.

The Court concluded, as has been its history, that the admission of evidence must be probative, fundamentally fair, and trustworthy. *Lam*, at 555. Because the Wright statement could not be cross examined, and was prejudicial to Karroumeh, the Circuit Court of Appeals reversed the BIA and the IJ and remanded the case for a hearing with all the procedural guarantees due to Karroumeh, including the cross examination of Terri Wright.

Karroumeh v. Lynch involves a decade of litigation about a simple principle we cherish: the right to the protection a statute entails; a right to confront at least a third-party accuser; a right to the process that is due to every person whose right to live in this country may be in peril. It is a welcome precedent. ■

Patrick Kinnally concentrates in general and commercial litigation, immigration and citizenship and administrative, environmental and local government law. Pat, currently Chair of the International and Immigration Law Section Council, can be reached at Kinnally Flaherty Krentz Loran Hodge & Masur PC by phone at (630) 907-0909 or by email to pkinnally@kfkllaw.com.

"Short form" agreements under Arab Commercial Agency Law: Some legal and practical issues

BY HOWARD L. STOVALL

In general, Arab businessmen tend to prefer shorter agreements than their Western counterparts. This preference also seems to apply to local commercial agency agreements. The specific preference in the Arab Middle East for shorter commercial agency agreements might be attributed, at least in part, to local registration requirements under Arab commercial agency laws.

When Western businessmen propose their longer form commercial agency agreements to Arab parties, the latter often counter with their own standard short form agreements. Sometimes, the Arab commercial agent will sign the Western principal's long form agreement on the condition that the parties also execute a short form commercial agency agreement.

This article briefly discusses some of the implications of using such short form commercial agency agreements.

Registration Requirements

Most Arab countries have enacted special legislation governing commercial agencies, and describing certain qualification requirements, including a requirement to register the commercial agency within a special registry at the Ministry of Commerce in the relevant country.

As part of the registration process, the commercial agent usually must submit a copy of the parties' commercial agency agreement. The commercial agency agreement must be drafted in Arabic or accompanied by an Arabic translation. Preparing this Arabic translation could be relatively costly if the parties' commercial agency agreement is lengthy, and a local commercial agent would usually prefer to avoid incurring this translation cost.

In some Arab countries, the local registrar will undertake a substantive review of the parties' agreement submitted for registration, and might reject certain terms deemed to conflict with local law. As a result, many local commercial agents will prefer to keep their agreements simple, short and basic, to avoid the scrutiny (and possible rejection) by registration officials. More recently, however, most registration officials have significantly reduced their scrutiny of commercial agency agreements submitted for registration.

Strictly speaking, a commercial agent conducting business under an unregistered commercial agency agreement is in breach of the relevant local commercial agency law. Arab commercial agency law usually states that a person performing commercial agency in violation of the law's requirements (including the requirement to register the agreement) will be subject to a fine and, in some circumstances, the closing of its business. In practice, however, many agreements are not registered; local government authorities in most Arab countries are not actively tracking down or punishing unregistered commercial agents.

2. Alternate Approaches to Registration

In light of the above, a local commercial agent is faced with certain alternatives, *e.g.*, operating under a unregistered long form commercial agency agreement, incurring the expense of translating that long form to register it under the commercial agency law, and/or convince its foreign principal to sign a short form agreement that can be registered without incurring those translation costs.

A Western principal should usually insist that its Arab commercial agent sign an agreement that fully and thoroughly

addresses the rights and obligations of the parties. Such an agreement is customarily reflected in the Western principal's standard long form agreement—with any amendments negotiated by the parties to reflect their particular relationship and jurisdiction.

If a Western principal should nonetheless contemplate the use of a short form commercial agency agreement for registration, at least such a short form should contain the most crucial and important provisions of the parties' agreement, including territory, products, exclusivity, commission rate, no authority to bind the principal, effective term, just cause for termination, compliance with law, governing law and dispute resolution. Such a short form agreement should also be consistent with any unregistered long form commercial agency agreement executed by the parties.

In some instances, local customers in the Arab Middle East (particularly local government ministries and public sector departments) will only transact business with authorized commercial agents. However, some of these customers are willing to accept a short "To Whom It May Concern" letter on the Western principal's letterhead, confirming that the local commercial agent is duly authorized to assist the Western principal in its product promotion and sales. Of course, such a short form letter should accurately reflect the substance of the parties' underlying detailed commercial agency agreement, and also contain an explicit cross-reference along the following lines:

> Commercial Agent is authorized to act in accordance with the terms and conditions of our International Commercial Agency Agreement dated [specific date], which reflects the detailed contractual relationship between Commercial Agent and Principal, including Commercial Agent's rights and responsibilities in this regard.

Such a provision should serve as a safeguard to significantly reduce the risk that the short form letter, by itself, would be deemed the entire "agreement" between the parties.

3. "Dealer Protections"

Many Arab commercial agency laws are known for the "dealer protections" offered to local commercial agents, most notably the right to claim compensation in the event the foreign principal decides to terminate (or not renew) the commercial agency without fault by the commercial agent.

For a local commercial agent in some Arab jurisdictions (such as the UAE and Qatar), there is a potentially significant disadvantage of operating through an unregistered commercial agency—an unregistered commercial agent would not enjoy the statutory dealer protections available under the local commercial agency law. Otherwise, the unregistered commercial agency should be treated as an enforceable agreement under general principles of contract law.

This has led to any interesting dichotomy in those jurisdictions: the notion that two types of commercial agencies exist under local law, registered agencies and unregistered agencies. Anecdotal evidence suggests that it is becoming increasingly common for foreign principals to structure their commercial sales activities in these countries through unregistered commercial agencies—thereby placing the relationships outside the dealer protections of the local commercial agency law.

In other Arab countries, the failure to register the commercial agency will not affect the parties' right to raise "dealer protection" claims under the commercial agency law. For example, the Kuwaiti Court of Cassation has ruled that registration is not a condition to a commercial agent's entitlements under Kuwaiti law—including a commercial agent's claim for compensation upon the foreign principal's unjustified termination or non-renewal of the arrangement.

4. Some Short Form Practices to Avoid

A Western principal should be particularly concerned if provisions in a registered short form commercial agency agreement are contrary to, or substantially inconsistent with, the provisions of the parties' related but unregistered long form agreement. For example, a company might not be able to rely on a 'non-exclusivity' clause in an unregistered commercial agency agreement if the registered agreement provides for exclusivity.

(Under civil code principles in many Arab countries, when contracting parties hide an actual (*e.g.*, non-exclusive commercial agency) contract behind an apparent (*e.g.*, exclusive commercial agency) contract, the actual contract will bind the contracting parties. However, third parties acting in good faith may rely on the apparent contract.)

Egypt is a jurisdiction giving rise to a number of short form commercial agency requests. For example, many Egyptian commercial agents present short one-page documents to their Western principals, requesting a signature and full legalization from the latter. Although these one-page letters barely address any of the commercial aspects of the relationship, they usually include a specific undertaking by the principal "to inform the proper Egyptian embassy or consulate located in the principal's country of residence of any amendments to the agreement." Such specific language, which is a unique requirement under the Egyptian Commercial Agency Law, indicates that the Egyptian commercial agent is seeking to register that short form agreement in the local commercial agency register.

In recent years, Egyptian registration officials have accepted registration applications from commercial agents but not from distributors. This has given rise to some short form agreements in which an Egyptian distributor attempts to re-characterize the parties' arrangement as a commercial agency. (The primary advantage of registration in the Egyptian Commercial Agency Register is that the registered agent may be entitled to certain "dealer protections" in the event of termination or non-renewal.)

We have also seen Egyptian commercial agents propose short form agreements intended for registration that state the commercial agent's commission as a low percentage (say, 1%) of Product sales price, while the unregistered long form commercial agency agreement actually states that the commission would be a

significantly higher percentage. Such a misstatement of commission in the registered agreement would pose risks not only *vis a vis* government officials within the Egyptian commercial agency register, but conceivably with other government departments as well—such as an Egyptian government customer of the Western principal, or Egyptian income tax authorities. ■

Howard L. Stovall is a Chicago-based attorney, devoting his practice exclusively to Middle Eastern commercial law matters. He is a frequent contributor of material to The Globe. He may be reached at Howard@Stovall-Law.com

Why visit CDC.gov?

BY LEWIS F. MATUSZEWICH

With all the attention being given to the Zika epidemic, people might consider viewing the Centers for Disease Control & Prevention Web site if they are going to Brazil, or other areas in the news where people are at risk for Zika-carrying mosquitos. However, the Centers for Disease Control should be on your list of sites to visit, regardless of your destination.

For example, if you are visiting the Czech Republic they strongly urge that you have an up-to-date Hepatitis A vaccine, due to "contaminated food or water in the Czech Republic, regardless of where you are eating or staying."

The site also raises a concern that Rabies is common in bats throughout the Czech Republic, although "it is not a major risk to all travelers."

In comparison, a traveler to India receives the same warning on Hepatitis A and in addition, the CDC recommends the Typhoid vaccine for most travelers. They recommend that all travelers should discuss with their doctors the advisability of vaccinations or carrying medicine for Hepatitis B, Malaria, Japanese Encephalitis and Rabies.

Even travelers to Canada are alerted to speak to the doctor concerning travel to Canada and whether or not there is a risk for Hepatitis A, Hepatitis B and Rabies. The main concern for travelers relative to Rabies is those going to Canada for outdoor activities where they might be at risk for animal bites.

The Centers for Disease Control and Prevention website is very easy to use (www.cdc.gov). ■

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