

**AMERICAN BAR ASSOCIATION
COMMISSION ON IMMIGRATION
REPORT TO THE HOUSE OF DELEGATES**

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges the U.S. Circuit Courts of Appeals
- 2 to establish or expand pro bono programs to provide *pro bono* representation to *pro se*
- 3 appellants in immigration cases.

REPORT

The Board of Immigration Appeals (“BIA” or “Board”) reviews decisions made by immigration judges (and, in some cases, by the Department of Homeland Security).¹ The Board is part of the Executive Office for Immigration Review (“EOIR”), which is a part of the Department of Justice (“DOJ”). The Attorney General appoints Members of the Board.² Where judicial review of final decisions is available,³ it must be sought in the United States Court of Appeals for the judicial circuit in which the immigration judge completed the proceedings.⁴

Several of the Circuit Courts of Appeals—most notably the Ninth and Second Circuits—have developed formal programs to provide pro bono counsel to *pro se* parties with meritorious or complex appeals, including immigration appeals.⁵ These programs have proven extremely popular and successful, with many more volunteer attorneys than cases each year. The Ninth Circuit also provides additional resources, including an immigration law outline developed by the Immigration Legal Resource Center.⁶ Such programs serve to increase pro bono representation and allow the Circuit Court to make more effective, well-reasoned, and fair decisions. Such efforts are laudable, and other Circuit Courts should be encouraged to examine and adopt similar programs to increase representation for *pro se* litigants in immigration-related appeals.

Because removal proceedings are civil, not criminal, in nature, noncitizens are not entitled to representation at government expense in immigration proceedings.⁷ By statute, noncitizens are entitled to representation in immigration proceedings, but at no

¹ See 8 C.F.R. § 1003.1(b).

² *Id.* § 1003.1(a).

³ Current law restricts the scope and availability of judicial review of immigration decisions. See generally 8 U.S.C. § 1252. The ABA has supported the restoration of certain types of judicial review that were previously available. See ABA House of Delegates Resolution 10M114D (adopted February 8-9, 2010), available at https://www.americanbar.org/content/dam/aba/directories/policy/2010_my_114d.authcheckdam.pdf (urging Congress to enact legislation restoring federal judicial review of immigration decisions).

⁴ 8 U.S.C. § 1252(a), (b)(2).

⁵ U.S. Court of Appeals for the Ninth Circuit, Pro Bono Program, <http://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf> (last accessed May 28, 2019); *Pro Bono Counsel Plan*, U.S. Court of Appeals for the Second Circuit, http://www.ca2.uscourts.gov/clerk/attorneys/pro_bono_counsel_plan.html (last accessed May 28, 2019).

⁶ See U. S. Court of Appeals for the Ninth Circuit, *Pro Bono Program* at 2, <http://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf>.

⁷ See, e.g., *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”); *Romero v. U.S.I.N.S.*, 399 F.3d 109, 112 (2d Cir. 2005) (“As deportation proceedings are civil in nature, aliens in such proceedings are not protected by the Sixth Amendment right to counsel.”).

121E

cost to the Government.⁸ As a result, a substantial number of noncitizens do not secure representation for their immigration proceedings.⁹ This number is particularly high for certain groups of noncitizens, including detained immigrants and family units.¹⁰

At the same time, studies show that representation plays a critical role in ensuring due process, fairness, and efficiency in immigration proceedings.¹¹ Providing pro bono counsel to *pro se* noncitizens in the Circuit Courts helps to achieve these goals by assisting noncitizens to identify legal errors and/or ineffective assistance of counsel below, developing potentially meritorious legal arguments, and achieving successful outcomes that can benefit other noncitizens.¹² Pro bono programs also assist the courts by identifying bona fide legal issues, and avoiding frivolous arguments.

Providing greater access to pro bono representation in appeals before the Circuit Courts is especially important because it is the only level of the immigration adjudication system that is independent of the Department of Justice. Because immigration judges and BIA members are employees of DOJ, widespread concerns have persisted regarding

⁸ 8 U.S.C. § 1229a(b)(4)(A) (“[T]he 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.”).

⁹ Karen Berberich & Nina Siulc, Vera Institute of Justice, *Fact Sheet: Why Does Representation Matter? The Impact of Legal Representation in Immigration Court* 1 & n.3 (Nov. 2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/why-does-representation-matter/legacy_downloads/why-does-representation-matter.pdf (noting that, between October 2000 and August 2018, 54 percent of all immigration cases filed had never been represented); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 7 (Dec. 2015) (based on national study of removal cases decided between 2007 and 2012, finding that only 37% of noncitizens secured representation).

¹⁰ Berberich & Siulc, *supra* note 8, at 1 (noting that representation rates for noncitizens in detention have been around 30 percent in recent years, and that in 2016, 70 percent of family units were unrepresented when their cases closed); Eagly & Shafer, *supra* note 8, at 32 (during the period studied, only 14% of detained noncitizens were represented, whereas 66% of non-detained noncitizens were represented).

¹¹ Berberich & Siulc, *supra* note 8, at 1-2 (noting that represented noncitizens are much more likely to succeed in their cases, obtain release from detention, and show up for their hearings); Vera Institute of Justice, *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity* 5-6, 27-29, 34-35 (Nov. 2017), www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation (studying program providing a free attorney to nearly all detained financially eligible noncitizens in New York City and finding that it led to more successful case outcomes, helped immigration proceedings run more smoothly, and helped to ensure due process by evaluating and pursuing all potentially meritorious forms of relief); Eagly & Shafer, *supra* note 8, at 2 (finding that immigrants with attorneys were more likely to seek and obtain relief from removal, and that the involvement of counsel was associated with gains in efficiency because represented noncitizens brought fewer non-meritorious claims, were more likely to be released from custody, and were more likely to appear at future hearings).

¹² Vera Institute of Justice *Evaluation*, *supra* note 10, at 36-37, 40 (clients of program providing a free attorney to eligible noncitizens experienced a higher rate of appeals, and won appeal outcomes that were more favorable; counsel identified, litigated, and established precedential decisions in important areas of law).

the independence of the immigration judiciary and its fairness toward noncitizens.¹³ Therefore, encouraging the adoption of pro bono programs by the Circuit Courts will also have the beneficial effect of bestowing more legitimacy to the immigration system as a whole.

The ABA has long supported the appointment of counsel at federal government expense to represent all indigent persons in removal proceedings before EOIR, including in immigration court and before the BIA, and, if necessary, to advise such individuals of their rights to appeal to the federal Circuit Courts of Appeals.¹⁴ However, until the goal of government-funded representation is accomplished, we support increasing pro bono efforts to provide legal counsel in removal proceedings, including appeals of those proceedings, to indigent persons who lack counsel or the financial means to hire private counsel.

Respectfully submitted,

Wendy S. Wayne
Chair, Commission on Immigration
August 2019

¹³ See ABA Commission on Immigration, *2019 Update Report, Reforming the Immigration System, Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, UD 6-4, 6-8-6-12 (March 2019) (“2019 Update Report”). For this reason, and others, the ABA has recommended the creation of an independent, Article I court to adjudicate immigration cases. See ABA House of Delegates Resolution 10M114F (adopted February 8-9, 2010), *available at* https://www.americanbar.org/content/dam/aba/directories/policy/2010_my_114f.authcheckdam.pdf; 2019 Update Report at UD 6-12-6-16.

¹⁴ See ABA House of Delegates Resolution 06M107A (adopted February 13, 2006), *available at* https://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107a.authcheckdam.pdf.

121E

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Wendy S. Wayne

1. Summary of Resolution(s). This Resolution encourages Circuit Courts of Appeals to examine and adopt programs to increase *pro bono* representation for *pro se* litigants in immigration-related appeals.
2. Approval by Submitting Entity. The resolution content was discussed and approved by Commission Members between April 22nd and April 26th. Previously, Members were also active in preparing a Report from which the recommendations for the resolution originate, *2019 Update: Reforming the Immigration System*. The Update Report was released in March 2019 after 3 years of research and development.
3. Has this or a similar resolution been submitted to the House or Board previously? No
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

Policy Resolution 06M107A supports the due process right to counsel for all persons in removal proceedings, and the availability of legal representation to all noncitizens in immigration-related matters. It also supports establishing a system to screen and refer indigent persons with potential relief to pro bono attorneys. The proposed policy would expand access to pro bono legal representation until the goal of Policy Resolution 06M107A could be accomplished.

Policy Resolution 11A118 supports measures to improve access to counsel in removal proceedings and to encourage participation in pro bono services by qualified agencies and individuals. The proposed policy would complement and support Policy Resolution 11A118.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a
6. Status of Legislation. (If applicable) n/a
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice,

121E

and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudication system.

8. Cost to the Association. (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.
9. Disclosure of Interest. (If applicable) No known conflict of interest exists.
10. Referrals.

Center on Children and the Law
Commission on Hispanic Rights and Responsibilities
Section of Civil Rights and Social Justice
Section of Criminal Law
Section of International Law
Standing Committee on Pro Bono and Public Service
Working Group on Unaccompanied Minor Immigrants

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Meredith A. Linsky
Director, Commission on Immigration
1050 Connecticut Ave NW, Suite 400
Washington, DC 20036
Tel: 202-662-1006
E-mail: meredith.linsky@americanbar.org

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Mary Ryan
Liaison to the Commission on Immigration
Working Group on Unaccompanied Minor Immigrants
Nutter McClennen & Fish LLP
155 Seaport Blvd.
Boston, MA 02210
Tel: 617-439-2212
E-mail: mryan@nutter.com

121E

EXECUTIVE SUMMARY

1. Summary of the Resolution

Several of the United States Circuit Courts of Appeals—most notably the Ninth and Second Circuits—have developed formal programs to provide pro bono counsel to *pro se* parties with meritorious or complex appeals, including immigration appeals. These programs serve to increase pro bono representation and allow the Circuit Courts to make more effective, well-reasoned, and fair decisions. This Resolution encourages other Circuit Courts to examine and adopt similar programs to increase representation for *pro se* litigants in immigration-related appeals.

2. Summary of the Issue that the Resolution Addresses

Representation plays a critical role in ensuring due process, fairness, and efficiency in immigration proceedings; however, there is no right to counsel at government expense in immigration proceedings, and most non-citizens are unable to secure representation. This resolution encourages other Circuit Courts to examine and adopt pro bono programs to increase representation for *pro se* litigants in immigration-related appeals.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The ABA supports the appointment of counsel at federal-government expense to represent all indigent persons in removal proceedings, and, if necessary, to advise such individuals of their right to appeal to the federal Circuit Courts of Appeals. Until this goal is achieved, the proposal would help to increase representation for *pro se* litigants in immigration appeals.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

There are no minority views of which we are aware.