

**ADOPTED****RESOLUTION**

1 RESOLVED, That the American Bar Association supports the appointment of counsel at  
2 federal government expense to represent all indigent persons in removal proceedings  
3 before the Executive Office for Immigration Review (in Immigration Courts and before  
4 the Board of Immigration Appeals), and if necessary to advise such individuals of their  
5 rights to appeal to the federal Circuit Courts of Appeals.

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7 FURTHER RESOLVED, That unless and until the federal government provides counsel  
8 for all indigent persons in removal proceedings before the Executive Office for  
9 Immigration Review, the American Bar Association encourages state, local, territorial,  
10 and tribal governments to provide in removal proceedings legal counsel to all indigent  
11 persons in their jurisdictions who lack the financial means to hire private counsel and  
12 who lack pro bono counsel.

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14 FURTHER RESOLVED, That the American Bar Association encourages federal, state,  
15 local, territorial, and tribal governments to prioritize government-funded counsel for  
16 detained individuals in removal proceedings.

## REPORT

The American Bar Association (“ABA”), through its Commission on Immigration (“Commission”), and other related entities, is strongly committed to ensuring fair treatment and full due process rights for immigrants and asylum-seekers under the nation’s immigration laws and in accordance with the Constitution. ABA policy has consistently recognized the importance of access to counsel in removal proceedings,<sup>1</sup> where a lawyer’s assistance is essential for a noncitizen to fully understand and effectively navigate the complexities of the U.S. immigration system. Immigration law has been recognized as second only to tax law in terms of complexity.<sup>2</sup> Removal proceedings can be especially difficult and intimidating where language and cultural barriers are present or where the individual is detained or is a member of a vulnerable population.<sup>3</sup> Currently, by statute, a respondent in removal proceedings has the right to be represented by counsel of his or her choosing, but not at government expense.<sup>4</sup>

This resolution proposes to expand the ABA’s current policy to include providing government appointed counsel at the federal government’s expense to indigent noncitizens in removal proceedings before the Department of Justice’s Executive Office for Immigration Review (“EOIR”), specifically those proceedings in Immigration Courts and subsequent appeals to the Board of Immigration Appeals. If necessary, the resolution also calls for appointed counsel to advise clients of their further appellate rights before the U.S. Circuit Courts of Appeals. The ABA has taken an incremental approach in supporting an expanded right to appointed counsel at government expense for indigent individuals in civil proceedings, and this resolution is the next logical step.<sup>5</sup>

The ABA already supports the right to appointed counsel at government expense in all immigration processes for unaccompanied children, people with disabilities and people with mental health conditions, as well as for indigent individuals in removal proceedings with potential legal relief who are unable to secure free or pro bono representation.<sup>6</sup> This resolution

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<sup>1</sup> Removal proceedings are federal administrative proceedings that determine whether an individual will be expelled or admitted to the United States. *See* Immigration and Nationality Act (“INA”) § 240, 8 U.S.C. § 1229a. These proceedings are held under the jurisdiction of the Executive Office for Immigration Review (EOIR), part of the Department of Justice. EOIR is comprised primarily of the Board of Immigration Appeals, the Office of the Chief Immigration Judge, the Office of the Chief Administrative Hearing Officer, and the Office of Legal Access Programs. 8 CFR § 1003.0(a).

<sup>2</sup> *Castro-O’Ryan v. INS*, 821 F.2d 1415, 1419 (9<sup>th</sup> Cir. 1987) (quoting E. Hull, *Without Justice for All* 107 (1985)) (superseded by *Castro-O’Ryan v. INS*, 847 F.2d 1307 (9<sup>th</sup> Cir. 1988)).

<sup>3</sup> Vulnerable populations can include unaccompanied minors, adults with children, people with disabilities and people with mental health conditions, crime victims and asylum-seekers, among others.

<sup>4</sup> INA § 292, 8 U.S.C. § 1362.

<sup>5</sup> In practice, this incremental approach means that only a limited number of individuals would be affected, because it is estimated that only around 35% of all removal orders are issued through EOIR. The majority of removal orders today are issued through an administrative, non-judicial process (executed by the Department of Homeland Security). *See* Marc R. Rosenblum and Kristen McCabe, *Deportation and Discretion, Reviewing the Record and Options for Change*, THE MIGRATION POLICY INSTITUTE (2014), <http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change>.

<sup>6</sup> *See* ABA Recommendation 107A, adopted February 2006, available at [http://www.americanbar.org/content/dam/aba/directories/policy/2006\\_my\\_107a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107a.authcheckdam.pdf).

expands support for appointed counsel to all indigent individuals in removal proceedings. Expanding the right to counsel to such individuals will not only help ensure due process and fairness, but also has the potential to make the process more efficient. This resolution is especially timely due to an expected increase in detention and removal proceedings due to the current Administration's expanded enforcement priorities, as well as a growing awareness of the need for publicly funded counsel by various state and local jurisdictions across the nation.

### **Current ABA Policies**

ABA policy has consistently recognized the importance of legal representation in immigration cases where a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system. As President Klein stated at the ABA's 2017 Midyear Meeting, "we insist on the right to due process and legal representation – including hearings before impartial immigration judges. Under the rule of law, we owe due process to all, including those who face deportation."<sup>7</sup>

In the civil context generally, consistent with its commitment to legal representation, the ABA has continuously supported "Civil Gideon" since the 2006 Civil Gideon resolution that supported the provision of legal counsel at public expense in adversarial proceedings "where basic human needs are at stake."<sup>8</sup> The 2006 Civil Gideon resolution specifically lists basic human needs "such as those involving shelter, sustenance, safety, health or child custody" as examples, but it does not mention immigration.<sup>9</sup>

Unaccompanied children:

- In 2001, the ABA supported government-appointed counsel at government expense for unaccompanied minors in all stages of immigration processes and proceedings.<sup>10</sup>
- In 2004, the ABA adopted its own Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States.<sup>11</sup> These standards include the right to an attorney and a call for timely legal rights presentations for all unaccompanied children, including the opportunity to consult with an attorney, the right to have an attorney represent them in all formal proceedings or other matters affecting a child's immigration status, and (if necessary) the right to government-appointed counsel at the government's expense.<sup>12</sup>

<sup>7</sup> Remarks of Linda A. Klein, President of the ABA, Address to the ABA House of Delegates (February 6, 2017), available at <http://www.americanbar.org/content/dam/aba/images/abanews/LindaKleinABAHouseOfDelegates2-6-17.pdf>.

<sup>8</sup> ABA Recommendation 112A ("2006 Civil Gideon resolution"), adopted August 7, 2006, available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_resolution\\_06\\_a112a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_resolution_06_a112a.authcheckdam.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> ABA Recommendation 106A, adopted February 2001, available at [http://www.americanbar.org/content/dam/aba/directories/policy/2001\\_my\\_106a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2001_my_106a.authcheckdam.pdf).

<sup>11</sup> ABA Standards for the Custody, Placement and Care; Legal Representation, adopted August 2004, available at [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant\\_Standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf).

<sup>12</sup> *Id.*

- In 2015, the ABA adopted a resolution supporting the provision of legal representation at government expense to unaccompanied minors who have come to the U.S. with no resources for counsel, but with claims for immigration relief, at all stages of the immigration process, including during initial asylum interviews.<sup>13</sup>

People with disabilities and people with mental health conditions:

- In 2006, the ABA adopted a policy supporting the establishment of a system to provide legal representation, including appointed counsel and guardians ad litem, to people with disabilities and people with mental health conditions in all immigration processes and procedures, whether or not potential relief may be available to them.<sup>14</sup>

Indigent persons with potential relief:

- In 2006, the ABA adopted a policy supporting the due process right to counsel for all persons in removal proceedings, and the availability of legal representation to all non-citizens in immigration-related matters.<sup>15</sup> This policy also supported the establishment of a system to screen and refer indigent persons with potential relief from removal to pro bono attorneys, Legal Services Corporation sub-grantees, charitable legal immigration programs and government-funded counsel.<sup>16</sup>
- In 2011, the ABA also adopted a resolution to improve access to counsel for individuals in immigration removal proceedings, focused on pro bono services.<sup>17</sup> That resolution included developing regulations to strengthen eligibility requirements for pro bono providers, encouraging an increase in pro bono efforts, requiring BIA recognized agencies to provide more pro bono services, increasing training and expertise and minimizing the unauthorized practice of law.<sup>18</sup>

## **Due Process**

The courts have long recognized that people in deportation proceedings are entitled to due process protections.<sup>19</sup> The U.S. Supreme Court has stated that “once an alien enters the country, the legal circumstance changes, for the Fifth Amendment’s Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>20</sup>

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<sup>13</sup> ABA Resolution 113, adopted February 2015, *available at* [http://www.americanbar.org/content/dam/aba/images/abanews/2015mm\\_hodres/113.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/113.pdf).

<sup>14</sup> ABA Resolution 107A, *supra* note 6.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> ABA Resolution 118, adopted August 8-9, 2011, *available at* [http://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_118.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_118.authcheckdam.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> *See Bridges v. Wixon*, 326 U.S. 135, 161-62 (1945).

<sup>20</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (U.S. 2001). *See, e.g., Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (holding that an alien was deprived of due process by the Immigration Judge's failure to probe into the facts of his case); *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926-927 (9th Cir. 2007); *Salgado-Diaz v. Gonzales*, 395

As noted in prior ABA reports, one of the most important elements of due process is the right to be represented by counsel. This right can be based on multiple sources, including the Fifth Amendment to the U.S. Constitution, and has also long been recognized in the field of immigration law.<sup>21</sup> The Immigration and Nationality Act provides that individuals in removal proceedings “shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing.”<sup>22</sup> This provision does not *prohibit* programs from providing government-funded counsel; although it purportedly restricts such individuals’ ability to claim an entitlement to counsel and affirms that the government is not *required* to provide counsel.<sup>23</sup> In fact, certain state and local governments have already voluntarily established programs to provide government funded counsel in their jurisdictions for some noncitizens in removal proceedings.<sup>24</sup>

Federal regulations recognize an individual’s right to counsel in diverse matters and circumstances.<sup>25</sup> In addition, courts have recognized that due process might necessitate the appointment of counsel in particular cases<sup>26</sup> and have noted the importance of counsel in removal proceedings.<sup>27</sup> As the studies cited below show, representation is one of the single most important factors affecting the outcome of a proceeding.

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F.3d 1158, 1162 (9th Cir. 2005) (finding that “[i]mmigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment’s requirement of due process”).

<sup>21</sup> See, e.g., *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1033 (9th Cir. 2016) (“[W]e agree with the court’s analysis in *Anguilar* that, ‘[b]y any realistic measure, the alien’s right to counsel is part and parcel of the removal proceeding itself . . . [A]n alien’s right to counsel possesses a direct link to, and is inextricably intertwined with, the administrative process that Congress so painstakingly fashioned.”) (citing *ICE*, 510 F.3d 1, 13 (1st Cir. 2007)); *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (“The right to counsel in immigration proceedings is rooted in the Due Process Clause and codified at 8 U.S.C. § 1362 and 8 U.S.C. § 1229a(b)(4)(A).”); *Dakane v. U.S. Atty. Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2005) (“It is well established in this Circuit that an alien in civil deportation proceedings, while not entitled to a Sixth Amendment right to counsel, has the constitutional right under the Fifth Amendment Due Process Clause right to a fundamentally fair hearing to effective assistance of counsel where counsel has been obtained”) (quoting *Gbaya v. U.S. Atty. Gen.*, 342 F.3d 1219, 1221 (11th Cir. 2003)); *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005) (recognizing that aliens have a statutory and constitutional right to counsel); *Ram v. Mukasey*, 254 F. App’x 47, 48 (2d Cir. 2007) (recognizing that the Second Circuit has held that claims of ineffective assistance of counsel are “rooted in the Fifth Amendment’s Due Process Clause, and in the statutory right to counsel (at the alien’s expense) in expulsion proceedings.”); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975) (“Since *Glasser*, the courts have repeatedly recognized that denial of the Sixth Amendment right to counsel is so inherently prejudicial that there is no room for the harmless error doctrine.”).

<sup>22</sup> INA § 240(b)(4)(a), 8 U.S.C. § 1229a(b)(4)(A); see also INA § 292, 8 U.S.C. § 1362.

<sup>23</sup> See Kate M. Manuel, *Aliens’ Right to Counsel in Removal Proceedings: In Brief*, CONG. RESEARCH SERV. R43613 1, 7-8 (March 17, 2016), available at <https://fas.org/sgp/crs/homesecc/R43613.pdf>.

<sup>24</sup> See *id.* at 8.

<sup>25</sup> See 8 C.F.R. §§ 1003.15(b)(5); 1240.10(a)(1); 1240.48(a); 1292.5(b).

<sup>26</sup> See *Franco-Gonzalez v. Holder*, 2014 WL 5475097, at \*11 (C.D. Cal. Oct. 29, 2014) (holding that mentally incompetent aliens were entitled to appointment of “Qualified Representative”); *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) (finding that right to counsel was violated where there was “unexplained haste in beginning deportation proceedings” combined with other factors such as the alien’s incarceration).

<sup>27</sup> “The alien's stake in the proceeding is enormous (sometimes life or death in the asylum context); the legal rules surrounding deportation and asylum proceedings are very complex; specialized counsel are necessary but in short supply; and evidence suggests that some conduct on the part of the Government in deportation and asylum proceedings has been abusive.” *Ardestani v. I.N.S.*, 502 U.S. 129, 140 (1991) (Blackmun, J., dissenting).

As noted in prior ABA reports, a hallmark of the U.S. legal system is the right to counsel, particularly in complex proceedings that have significant consequences. In acknowledging the severe consequences of deportation, Justice Brandeis stated almost 100 years ago that removal can result “in loss of both property and life, or of all that makes life worth living.”<sup>28</sup> Removal proceedings are adversarial and may carry severe consequences. The stakes for many individuals and their families are exceedingly high: the potential loss of homes and livelihoods, permanent separation from U.S. citizen and legal permanent resident (“LPR”) family members, banishment of a family’s sole breadwinner, or even persecution, torture or death. In this context, representation is arguably at least as critical as in the criminal context.<sup>29</sup>

### **New National Enforcement Priorities**

Through two Executive Orders and implementation memos,<sup>30</sup> the current Administration has set out to vastly increase immigration enforcement and has identified several new national enforcement priorities and mechanisms that will affect a substantial number of noncitizens already living in the United States. These changes include:

1. plans to hire (i) 10,000 additional Immigration and Customs Enforcement (“ICE”) officers and agents to focus on internal enforcement<sup>31</sup> and (ii) 5,000 additional U.S. Customs and Border Protection agents for increased border enforcement<sup>32</sup>;
2. plans to compel state and local authorities to perform immigration enforcement functions<sup>33</sup>;
3. expanding detention capacity and mandating the detention of individuals throughout their immigration court proceedings<sup>34</sup>;

<sup>28</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284 (U.S. 1922).

<sup>29</sup> *See Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

<sup>30</sup> *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>; Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>; *see also* Implementing the President’s Border Security and Immigration Enforcement Improvement Policies, Department of Homeland Security (“DHS”) (Feb. 20, 2017), *available at* [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf); Enforcement of the Immigration Laws to Serve the National Interest, DHS (Feb. 20, 2017), *available at* [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

<sup>31</sup> Exec. Order No. 13,768, *supra* note 30 at § 7.

<sup>32</sup> Implementing the President’s Border Security and Immigration Enforcement Improvement Policies, *supra* note 30 at 3.

<sup>33</sup> *See* Exec. Order No. 13,768, *supra* note 30 at § 8.

<sup>34</sup> Implementing the President’s Border Security and Immigration Enforcement Improvement Policies, *supra* note 30 at 2.

4. prioritizing for removal all individuals who entered the United States without authorization or who are deportable or inadmissible due to criminal offenses or security grounds<sup>35</sup>; and
5. setting new enforcement priorities that include removing noncitizens (i) convicted of any criminal offense (regardless of how minor), (ii) simply charged with any criminal offense, where such charge has not been resolved; (iii) who have committed acts which constitute a chargeable criminal offense; (iv) who have engaged in fraud or willful misrepresentation before a governmental agency; (v) who have abused the receipt of public benefits; (vi) who are subject to a final order of removal; and (vi) who, in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.<sup>36</sup>

As a result of these priority changes, a drastic increase in apprehension, detention and removal is expected. DHS Secretary Kelly has already referred to the development of additional detention space in his February 20, 2017, implementing memo on border security.<sup>37</sup> Therefore, counsel for this increasingly targeted population is more essential now than ever before.

### **Access to Representation in Practice**

Regardless of the type of study or methodology used, research has consistently shown the multiple benefits of counsel in removal proceedings, especially for detained noncitizens. Researchers have employed a variety of approaches in evaluating the proportion of immigration cases that have benefited from representation. The statistics differ depending on the approach taken and the numbers vary based on geographic location, detention status and nationality of the respondent.

The most comprehensive report to date is a study by Ingrid V. Eagly and Steven Shafer published in 2015.<sup>38</sup> This study drew on over 1.2 million deportation cases decided between 2007 and 2012.<sup>39</sup> According to the study, the national average of immigrants that secured legal representation in all removal cases was 37%.<sup>40</sup> Some national studies have put the overall national average of immigration cases involving representation upwards of 50%.<sup>41</sup> However, EOIR, which has put in place some measures to provide noncitizens with assistance in obtaining

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<sup>35</sup> Exec. Order No. 13,768, *supra* note 30 at § 5.

<sup>36</sup> *Id.*

<sup>37</sup> Implementing the President's Border Security and Immigration Enforcement Improvement Policies, *supra* note 30 at 3.

<sup>38</sup> Ingrid V. Eagly and Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1 (2015) (hereinafter, "Eagly and Shafer").

<sup>39</sup> *Id.* at 11.

<sup>40</sup> *Id.* at 2.

<sup>41</sup> See Lenni B. Benson and Russell R. Wheeler, Enhancing Quality and Timeliness in Immigration Removal Adjudication, Report for the Administrative Conference of the United States at 22 (June 7, 2012) (the report found that detained respondents were represented 51% of the time, and non-detained respondents were represented 87% of the time).

representation, found that in 2015, almost 60% of noncitizens overall (and only about 14% of those who were detained)<sup>42</sup> had representation.<sup>43</sup>

In contrast, a Transactional Records Access Clearinghouse (“TRAC”) report observed the number of “rocket dockets” (cases that are given priority in the system) involving “adults with children” in which the family was represented as of September 2016.<sup>44</sup> The TRAC report found that only 30% of the cases involved representation.<sup>45</sup> A number of more local studies have been conducted as well. One study surveying cases in Northern California found that roughly two thirds of detained immigrants in removal proceedings before the San Francisco Immigration Court had no legal representation at any point in their removal proceedings.<sup>46</sup> A critical New York-based study focused on the impact of detention on representation. It found that 40% of detained persons in New York City were represented.<sup>47</sup> That number decreased dramatically to 19% when the detainees’ proceedings were transferred outside of New York City.<sup>48</sup>

The principal imbalances that emerge from the aforementioned studies are as follows: (i) imbalances based on whether the person was detained or not; (ii) imbalances based on the location of the proceedings; and (iii) imbalances based on the respondent’s nationality.

### *Imbalances Based on Detention*

It is hardly surprising that detention negatively impacts a person’s access to counsel. Detention necessarily restricts an individual’s access to information and resources that are critical to obtaining counsel. The figures that emerge from the abovementioned studies indeed reflect a very slim likelihood of representation for detainees, relative to non-detained persons. For this reason, until the federal government funds counsel for all indigent individuals in removal proceedings, this policy encourages all jurisdictions that provide immigration-related representation to prioritize counsel for detained, indigent respondents in removal proceedings.

The EOIR breaks down the detention status of respondents into three categories: (i) respondents held in detention throughout the pendency of their case, who are referred to as “detained”; (ii) respondents who are detained, but eventually released on bond before a decision is reached on its merits, who are referred to as “released”; and (iii) respondents who are never detained.<sup>49</sup> Eagly

<sup>42</sup> Eagly and Shafer, *supra* note 38 at 2.

<sup>43</sup> Executive Office for Immigration Review, Office of Planning, Analysis, and Technology, FY 2015 Statistical Year Book at F1 (April 2016), available at <https://www.justice.gov/eoir/page/file/fysb15/download>

<sup>44</sup> TRAC Immigration Report, With the Immigration Court’s Rocket Docket Many Unrepresented Families Quickly Ordered Deported (Oct. 18, 2016), available at <http://trac.syr.edu/immigration/reports/441/>.

<sup>45</sup> *Id.*

<sup>46</sup> N. Cal. Collaborative for Immigrant Justice, Access to Justice for Immigrant Families and Communities: Study of Legal Representation of Detained Immigrants in Northern California, at 9 (Oct. 2014), available at <http://perma.cc/L8GJ-8ZAT>.

<sup>47</sup> Steering Comm. of the N.Y. Immigrant Representation Study Report, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings, New York Immigrant Representation Study Report: Part I, 33 Cardozo L. Rev. 357, 364 (Dec. 2011) (hereinafter, the “New York Study”).

<sup>48</sup> *Id.* at 363

<sup>49</sup> Eagly and Shafer, *supra* note 38 at 31.

and Shafer found that only 14% of detained respondents received representation.<sup>50</sup> This astonishingly low figure compares with 66% of released and never detained persons.<sup>51</sup> Moreover, Eagly and Shafer found that even in cases where detainees were given time to find representation, they were substantially less likely to do so than those who were released or never detained. Only 36% of detainees who were granted continuances to seek counsel successfully obtained representation, as compared to 71% of “never detained” respondents and 65% of released respondents.<sup>52</sup> The New York Study similarly found a severe disparity between the ability of detained respondents and non-detained respondents to obtain representation.<sup>53</sup>

### *Geographical Location of Court*

Eagly and Shafer observed that the rate of representation for those detained fluctuated by as much as 22 percentage points between the twenty court jurisdictions that decided the highest volume of detainee cases.<sup>54</sup> In addition, Eagly and Shafer observed that in the twenty jurisdictions with the highest volume of non-detainee cases (both released and never detained), representation rates varied by as much as 40 percentage points.<sup>55</sup>

But the most striking geographic finding in Eagly and Shafer’s study relates to the availability of attorneys in different locations with high volumes of immigration proceedings. Eagly and Shafer looked at the ratio of immigration attorneys per 1,000 cases in cities with at least 20,000 proceedings during the six-year period of their study.<sup>56</sup> The study compared the four cities with the highest rate of representation to the four cities with the lowest.<sup>57</sup> Even amongst the cities with relatively high representation numbers the ratio fluctuated significantly, with 8.8 immigration attorneys per 1,000 cases in Miami to 27.5 attorneys per 1000 cases in New York.<sup>58</sup> The extent of the disparity with the bottom end of the spectrum is even more jarring – in Tacoma there were only 1.3 attorneys per 1,000 cases, while in Lumpkin, Georgia, the city did not have a single immigration attorney despite the 42,006 cases decided there.<sup>59</sup>

These geographical results are significant in that they highlight the importance of uniform federal funding throughout the United States. As described more below, several cities and states have begun to implement government funded representation programs. However, as these results show, lack of counsel is particularly dire in some locations which have large detention centers with no government funded programs and limited availability of pro bono counsel. For this reason, until the primary goal of federally appointed counsel is realized, the ABA would encourage additional state, territorial and local jurisdictions to offer government-funded counsel

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<sup>50</sup> *Id.* at 32.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 34.

<sup>53</sup> New York Study, *supra* note 47 at 367-369.

<sup>54</sup> Eagly and Shafer, *supra* note 38 at 38.

<sup>55</sup> *Id.* at 40.

<sup>56</sup> *Id.* at 42.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 43.

<sup>59</sup> *Id.*

programs, particularly in areas where detention centers and immigration courts operate. In addition, the ABA would encourage those jurisdictions that offer appointed counsel to cover all detained individuals held in their jurisdiction, not only those who can show they are residents of the local jurisdiction.

### *Nationality*

Eagly and Shafer also show a substantial disparity in representation rates between different nationalities.<sup>60</sup> Once again, a variety of factors make this an unsurprising result in and of itself. However, the extent of the disparity is astonishing. The representation rate among Mexican respondents was found to be only 21%, while the rate for Chinese was 92% – a spread of 71% in the likelihood of representation.<sup>61</sup>

### **Impact of Lack of Representation on Immigration Proceedings on Respondents**

The impact of non-representation in immigration proceedings may be considered in two respects. First, statistics show that lack of representation significantly impacts the court's decisions. Respondents are far less likely to succeed on the merits without representation than they are with representation. Second, lack of representation dramatically impacts motions and other documents filed in the proceedings, making it very difficult to determine whether the respondent has a bona fide claim for relief.

If success is measured by a respondent's ability to remain in the United States, the data reflects a staggering disparity in success between represented respondents and those who appear *pro se*. Eagly and Shafer show how the numbers fluctuate based on custody status. Detained respondents were ten-and-a-half times more likely to succeed when represented, released respondents were five-and-a-half times more likely and never-detained respondents were three and half times more likely.<sup>62</sup> Regardless, the statistics reflect the overwhelming benefits of representation for persons facing removal proceedings. A TRAC study focusing on proceedings involving women and children found that in cases closed without representation, only 2.3% of respondents were allowed to remain in the country, while 97.7% were ordered deported.<sup>63</sup> In contrast 32.9% of represented respondents were allowed to stay in the country, and 67.1% were deported.<sup>64</sup>

The New York Study found that only 3% of detained respondents who were unrepresented received favorable outcomes.<sup>65</sup> The rate of success for unrepresented non-detained persons was

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<sup>60</sup> *Id.* at 44-46.

<sup>61</sup> *Id.* at 45.

<sup>62</sup> *Id.* at 49.

<sup>63</sup> TRAC Immigration Report, Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court "Women with Children" Cases (July 15, 2015) available at <http://trac.syr.edu/immigration/reports/396/>. See also TRAC Immigration Report, Representation is Key in Immigration Proceedings Involving Women with Children (Feb. 18, 2015) available at <http://trac.syr.edu/immigration/reports/377/>; TRAC Immigration Report, Representation for Unaccompanied Children in Immigration Court (Nov. 25, 2014) available at <http://trac.syr.edu/immigration/reports/371/>.

<sup>64</sup> *Id.*

<sup>65</sup> New York Study, *supra* note 47 at 383.

better –13%.<sup>66</sup> But it is the disparity with cases in which the respondent was represented that is critical for the purposes of this report. In cases involving detained individuals, representation yielded successful results 18% of the time.<sup>67</sup> In other words, detained individuals were six times more likely to succeed when represented than when unrepresented. In cases involving non-detained individuals, represented respondents were successful 74% of the time.<sup>68</sup> In other words, non-detained respondents were 5.6 times more likely to succeed when represented than when acting *pro se*. In addition, immigration judges surveyed in 2011 indicated that they can adjudicate cases more efficiently when individuals in removal proceedings are represented by competent counsel.<sup>69</sup>

### **Inefficiencies in the Lack of Representation on Immigration Proceedings**

Access to counsel has been shown to have a significant impact on the efficiency of the immigration court system. The following section will highlight the ways in which costs of a public sponsored representation program could be offset by resulting efficiencies.

It is worth noting three major ways in which government sponsored representation could create more efficiency in the U.S. immigration system. First, the duration of immigration proceedings could be reduced if an integrated public defender system or alternative system of legal representation were introduced. Immigration respondents, who have a right to seek counsel, cause substantial delays in the system due to time spent seeking pro bono or legal services representation.<sup>70</sup> Second, the presence of counsel diminishes the number of respondents in immigration detention through successful bond hearings and requests for custody redeterminations.<sup>71</sup> Third, respondents with counsel are much more likely to appear for their scheduled hearing dates in immigration court than those without counsel.<sup>72</sup> Furthermore, individuals who are able to obtain limited pro bono or legal services representation are likely to have stronger claims for relief than those who are unable to obtain counsel.<sup>73</sup> Accordingly, by providing competent counsel to all indigent respondents at the outset of the hearing, individuals with no viable legal defense will be sooner counseled of this reality and likely spend less time in detention.

### **Government Sponsored Representation as a Solution to Under-Representation**

Eagly and Shafer examined the sources of representation that were provided to persons facing removal proceedings. They found that 90% of representation in all removal proceedings nationwide was provided by small firms and solo practitioners.<sup>74</sup> Only 10% of representation was provided by nonprofit organizations, law school clinics and medium to large size firms,

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Eagly and Shafer, *supra* note 38 at 59.

<sup>70</sup> Eagly and Shafer, *supra* note 38 at 60-61.

<sup>71</sup> *Id.* at 70-71.

<sup>72</sup> *Id.* at 73.

<sup>73</sup> *Id.* at 48.

<sup>74</sup> Eagly and Shafer, *supra* note 38 at 26.

providing predominantly *pro bono* representation.<sup>75</sup> This data underscores the fact that the nonprofit sector and traditional *pro bono* efforts alone, cannot meet the need of those currently lacking counsel without a significant infusion of additional resources.

### **What Government Sponsored Representation Would Entail**

#### *Models for Sponsored Representation*

In the criminal context, compensation rates for representation are set “in one of three ways: (i) uniform rates set by statute, regulation or rule, (ii) rates set at the discretion of the presiding judge on a case-by-case basis, or (iii) through a contract between the state or a state agency and private attorney.”<sup>76</sup> However, the public defender model has been subject to its own share of criticism,<sup>77</sup> and in particular its feasibility in the immigration context has been questioned.<sup>78</sup> Recent efforts by state and local governments to tackle the representation problem with respect to removal proceedings present some alternative models for sponsored representation. The New York Immigrant Family Unity Project (“NYIFUP”) is a public defender model funded by the New York City Council that has contracted with three different agencies to “represent all detained immigrants who meet income criteria and request counsel, regardless of eligibility for relief from removal.”<sup>79</sup>

Recently, in April 2017, the success of the NYIFUP model led the State of New York to pass a budget that set aside \$4 million to expand NYIFUP statewide, with the aim to provide legal representation to all financially-eligible New Yorkers facing deportation proceedings in the state

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<sup>75</sup> *Id.*

<sup>76</sup> National Association of Criminal Defense Lawyers, *Gideon* at 50: A Three-Part Examination of Indigent Defense in America: Part I – Rationing Justice: The Underfunding of Assigned Counsel Systems, at 9 (March 2013).

<sup>77</sup> “Witnesses reported the prevalence of indigent defense systems plagued by a variety of ailments, including a severe lack of funding; excessive and rising public defender caseloads coupled with inadequate support personnel; insufficient attorney compensation, leading to increased pressure to plead cases; arbitrary and capricious payments to assigned counsel; failures to inform of the right to counsel; acceptance of improper waivers of counsel in misdemeanor cases; and the increased use of contracts for defense services based primarily on cost, not quality, considerations. Regrettably, twenty years later, we found that not that much has changed. In some respects, as detailed in this report, the picture has become more bleak.” American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*, at ii (Dec. 2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf).

<sup>78</sup> “The program should not replicate a public defender model, which repeatedly has been critiqued for overwhelming caseloads, which in turn result in minimal attention per case.” National Immigration Law Center, *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond*, at 26-27 (March 2016), available at <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf>.

<sup>79</sup> *Id.* at 15.

immigration courts.<sup>80</sup> In March 2015, Friends Representation Initiative of New Jersey was launched based on the NYIFUP model in Elizabeth, NJ.<sup>81</sup>

In California, the Alameda County Public Defender's Office established a full time position in 2014 for an attorney who screens former or current Alameda Public Defender clients for immigration relief.<sup>82</sup> Unlike NYIFUP, the Alameda attorney "prioritizes cases according to how much of a difference it will make if the immigrant has legal representation."<sup>83</sup> In early 2016, Los Angeles and San Francisco established programs to provide legal representation to immigrants in detention, with each city allocating \$5 million to the cause.<sup>84</sup> In addition, in early 2017, the Seattle City Council and the King County Counsel each approved a legal defense fund to provide for government-sponsored representation in immigration courts, with the Seattle City Council pledging \$1 million, and the King County Counsel pledging \$750,000.<sup>85</sup> In January 2017, the Washington, DC, Mayor's Office announced the Immigrant Justice Legal Services grant program, earmarking \$500,000 for organizations and law firms providing immigration-related representation to DC residents and their families.<sup>86</sup> There are also efforts to establish similar programs in other immigrant-rich cities.

The various approaches taken by local and state governments above to provide appointed counsel to indigent individuals in removal proceedings offer several models for implementing government sponsored representation. Similar to the Alameda and San Francisco County Public Defender Offices, a position may be created under the Public Defender Office, with the budget coming from the total Public Defender Office<sup>87</sup> or from additional funding provided by the county, like in the case of Alameda<sup>88</sup>, or the state. Alternatively, under the NYIFUP scheme, the government can contract with different agencies specializing in immigration law.<sup>89</sup>

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<sup>80</sup> Press Release, Vera Institute, New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation (April 7, 2017), available at <https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation>.

<sup>81</sup> National Immigration Law Center, *supra* note 78 at 18.

<sup>82</sup> *Id.* at 22.

<sup>83</sup> *Id.*

<sup>84</sup> Emily Tucker, Protecting Immigrant Communities: Municipal Policy to Confront Mass Deportation and Criminalization, Center for Popular Democracy, at 30 (March 2017), available at [https://populardemocracy.org/sites/default/files/Sanctuary-Cities-Toolkit\\_web.pdf](https://populardemocracy.org/sites/default/files/Sanctuary-Cities-Toolkit_web.pdf).

<sup>85</sup> Q13 Fox, Seattle City Council approves \$1M legal defense fund for immigrants, refugees; King County OKs \$750K, <http://q13fox.com/2017/04/17/seattle-city-council-approves-1-million-legal-defense-fund-for-immigrants-refugees/> (last visited April 19, 2017).

<sup>86</sup> Washington DC's Mayor's Office on Latino Affairs, Mayor Bowser Announces Immigrant Justice Legal Services Grant Program, <https://ola.dc.gov/release/mayor-bowser-announces-immigrant-justice-legal-services-grant-program> (last visited Jan. 9, 2017).

<sup>87</sup> "No additional city funding is being used to pay for [the San Francisco Public Defender's Office] program. The public defender's office created the role from one of its budgeted attorney positions after assessing the need through its intake forms." Tamara Aparton, Public Defender to Provide Immigration Help, San Francisco Public Defender, <http://sfpublicdefender.org/news/2014/08/public-defender-to-provide-immigration-help/> (last visited May 19, 2017).

<sup>88</sup> National Immigration Law Center, *supra* note 78 at 22.

<sup>89</sup> National Immigration Law Center, *supra* note 78 at 15.

Whatever approach is taken, the ultimate program would need to have government support, full-time, paid legal staff and support from immigration judges, court staff and ICE trial attorneys for success.<sup>90</sup> Furthermore, while this policy resolution calls for federally appointed counsel, until that primary goal is realized, the ABA supports and encourages additional efforts by state, local and territorial governments to allocate funding for appointed counsel. While this policy does not call for government appointed counsel at the federal appellate level, it does require government-appointed counsel to appropriately counsel clients of their appellate rights, by providing information on filing deadlines and other relevant procedures.<sup>91</sup>

### *Cost of Sponsorship*

In a 2014 report on estimated costs of a national immigration public defender system, economist John Montgomery estimated the cost of such a program to be around \$208 million annually.<sup>92</sup> The report did note, however, that certain required information and data were incomplete.<sup>93</sup> If criminal defense funding is taken as any indication, the costs can vary significantly between states and the federal program. The Federal Criminal Justice Act currently compensates attorneys representing indigent defendants in federal court at a rate of \$125 per hour and limits attorney compensation to \$9,700 in the case of non-capital felonies and \$2,800 in the case of misdemeanors.<sup>94</sup> In contrast, there are 30 states that have an established statewide rate of compensation.<sup>95</sup> The average compensation in those states is below \$65 an hour and can be as low as \$40 an hour (Wisconsin).<sup>96</sup> At least 20 states utilize flat fee contracts to provide indigent defense services or pay a flat rate to assigned counsel based on the seriousness of the charge.<sup>97</sup> On the other hand, private attorneys compensated by the government often have a higher rate. In a 2009 study, hourly rates paid to private attorneys by public defender programs ranged from \$60 to \$125.<sup>98</sup> Funding in immigration cases may also entail additional costs. For example, language-related services are often required. Some removal-defense programs report language-related costs of \$12,000 to \$24,736 in 2008 and \$12,000 to \$33,830 in 2009.<sup>99</sup>

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<sup>90</sup> National Immigration Law Center, *supra* note 78 at 27.

<sup>91</sup> Note that only the 9<sup>th</sup> Circuit Court of Appeals has a program to provide pro bono appellate counsel to represent indigent petitioners before the federal Circuit Courts of Appeals, *See* <http://www.ca9.uscourts.gov/probono/>.

<sup>92</sup> John D. Montgomery, Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings NERA Econ. Consulting, at 3 (May 28, 2014), *available at* [http://www.nera.com/content/dam/nera/publications/archive2/NERA\\_Immigration\\_Report\\_5.28.2014.pdf](http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf).

<sup>93</sup> *Id.* at 2.

<sup>94</sup> National Association of Criminal Defense Lawyers, *supra* note 78 at 12.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 14.

<sup>98</sup> Arnold & Porter LLP, Reforming the Immigration System, Proposal to Promote Independent, Fairness, Efficiency and Professionalism in the Adjudications of Removal Cases, American Bar Association Commission on Immigration, at 5-15 (Feb. 2010), *available at* [http://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_complete\\_full\\_report.athcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.athcheckdam.pdf).

<sup>99</sup> New York Study, *supra* note 47 at 399.

NYIFUP, which represented 1,554 clients from November 2013 through November 2015, was started with \$500,000 in 2013, “with the aim of representing 190 of the 900 indigent detained immigrants whose cases were before the Varick Street court.”<sup>100</sup> In 2014, due to the success of the program, the New York City Council allocated an additional \$4.9 million dollars for the 2015 financial year.<sup>101</sup> However, the funding still covered less than half of the New Yorkers that the Bronx Defenders estimates were unable to afford counsel in removal cases at the time.<sup>102</sup> Based on the NYIFUP figures and the Bronx Defenders’ estimates of the need, it would take an annual \$10 million to represent each indigent defendant in removal proceedings in New York. NYIFUP itself, however, estimates this cost to be less, at “\$7.4 million – or 78-cents per personal income taxpayer per year.”<sup>103</sup>

In his report discussed above, John Montgomery posited that any federal government-sponsored representation costs would be offset by at least \$173 to \$174 million per year in savings to the federal government, not including the additional savings from reductions in the costs of the Legal Orientation Program,<sup>104</sup> transportation and foster care.<sup>105</sup> After such savings, he estimated that a national program would cost no more than \$4 million per year.<sup>106</sup> The figures he used are based on the estimated benefits arising from government sponsored representation, including increased efficiency in the courtroom, reduction in continuances, and reduced number of days in detention.<sup>107</sup> Separately, NYIFUP estimated that it would produce \$4 million in savings for New York state employers and \$1.9 million in annual savings to New York State in public health insurance and foster care services, along with additional tax revenue garnered from those released from detention and able to return to work during the pendency of their removal proceedings and/or upon the successful termination of such proceedings.<sup>108</sup>

In addition, savings in detention costs can be anticipated with the provision of appointed counsel to all individuals in removal proceedings. The Eagly and Shafter study estimated that the cost of a single day of detention is approximately \$158.<sup>109</sup> The same study found that detained

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<sup>100</sup> National Association of Criminal Defense Lawyers, *supra* note 78 at 14.

<sup>101</sup> *Id.* at 14.

<sup>102</sup> “Approximately 1,650 immigrant New Yorkers each year are unable to afford counsel in removal cases.” NYIFUP, The Bronx Defenders, <http://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/> (last visited March 20, 2017).

<sup>103</sup> Center for Popular Democracy at al., The New York Immigration Family Unit Project: Good for Families, Good for Employers, and Good for All New Yorkers, at 7 (2013), *available at* [https://populardemocracy.org/sites/default/files/immigrant\\_family\\_unity.pdf](https://populardemocracy.org/sites/default/files/immigrant_family_unity.pdf).

<sup>104</sup> Since 2003, EOIR has funded the Office of Legal Access Programs (formerly known as the Legal Orientation and Pro Bono Program) to administer the Legal Orientation Program to educate detained immigrants in a limited number of facilities about their rights and responsibilities in immigration court. EOIR’s Office of Legal Access Programs, EOIR, <https://www.justice.gov/eoir/pr/eoir-expands-legal-orientation-programs> (last visited May 17, 2017).

<sup>105</sup> Montgomery, *supra* note 92 at 18.

<sup>106</sup> *Id.* at 35.

<sup>107</sup> *Id.* at 14.

<sup>108</sup> Center for Popular Democracy, *supra* note 103 at 15.

<sup>109</sup> Eagly & Shafer, *supra* note 38 at 60.

immigrants spent an average of 33 days seeking counsel.<sup>110</sup> If counsel were provided on day one, detention cost savings would be over \$5,200 per person just from eliminating the delays caused by seeking counsel.<sup>111</sup> Moreover, counsel could further reduce the number of days spent in detention by reducing the number of frivolous actions filed where there is no legal relief possible,<sup>112</sup> by successfully advocating for release of their clients,<sup>113</sup> and by reducing the number of court hearings.<sup>114</sup> In fact, such increases in efficiency would outweigh any increase in adjudication time,<sup>115</sup> and “overall the average time for represented cases would undoubtedly decrease.”<sup>116</sup>

### **Conclusion**

In recognition of the serious, life-altering impact of deportation and the extraordinary complexities of immigration law, this resolution reaffirms the ABA’s commitment to due process and fundamental fairness by calling for the appointment of counsel at government expense for indigent respondents in removal proceedings, thereby improving efficiency and enhancing justice.

Respectfully submitted,

Mary Meg McCarthy, Chair  
Commission on Immigration

August 2017

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<sup>110</sup> *Id.*

<sup>111</sup> This figure represents the cost of a single day of detention (\$158) multiplied by the average days spent seeking counsel (33 days). *See id.*

<sup>112</sup> Eagly & Shafer, *supra* note 38 at 66.

<sup>113</sup> *Id.* at 70.

<sup>114</sup> *Id.* at 62.

<sup>115</sup> *See* Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Courts: Results of a Randomized Experiment, 35 *Law & Soc’y Rev.* 419, 429 (2001).

<sup>116</sup> Eagly & Shafer, *supra* note 38 at 64.

**GENERAL INFORMATION FORM**

Submitting Entity: Commission on Immigration

Submitted By: Mary Meg McCarthy, Chair

1. Summary of Resolution(s).

This Resolution seeks to establish a right to appointed counsel to represent indigent individuals in adversarial removal proceedings before the Executive Office for Immigration Review (“EOIR”), and, if necessary, to advise such individuals of their subsequent appellate rights before the U.S. Circuit Courts of Appeals. EOIR is comprised of the Immigration Courts and the Board of Immigration Appeals, an administrative appeals unit located in Falls Church, Virginia. Through this Resolution, until the primary goal of appointed counsel at federal expense can be accomplished, the ABA also encourages state, local and territorial governments to provide funding for indigent immigrants in removal proceedings in their jurisdictions. Finally, the Commission encourages all jurisdictions that are providing funding for indigent individuals in removal proceedings to prioritize those who are detained in immigration custody.

2. Approval by Submitting Entity.

The Commission on Immigration approved this Resolution at our last business meeting on February 3, 2017, in Miami, Florida. Previous versions had been disseminated and voted upon by e-mail. At the February 3, 2017, meeting, the Resolution was approved unanimously, by all eligible Commission members present in person and by telephone.

3. Has this or a similar resolution been submitted to the House or Board previously?

No. The ABA has established policy recommending appointed counsel at government expense in immigration processes for unaccompanied children, people with disabilities and people with mental health conditions, as well as for indigent individuals in removal proceedings with potential legal relief who are not able to secure free or pro bono representation. There is no prior policy that recommends government funded counsel for all indigent individuals in removal proceedings, regardless of their particular vulnerabilities or eligibility for relief. There is a civil Gideon policy that recommends government-appointed counsel for low-income persons in adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody. This policy does not specifically include (or exclude) immigration proceedings.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

In the civil context generally, consistent with its commitment to legal representation, the ABA has continuously supported “Civil Gideon” since the 2006 Civil Gideon resolution (112A) that supported the provision of legal counsel at public expense in adversarial proceedings “where

basic human needs are at stake.” The 2006 Civil Gideon resolution specifically lists basic human needs “such as those involving shelter, sustenance, safety, health or child custody” as examples, but it does not mention immigration. In 2010, the resolutions supporting the ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings (105) and the Civil Gideon Model Access Act for States (104) reiterated the 2006 Civil Gideon resolution.

In the immigration context specifically, the ABA has adopted several “right to counsel” policies that recognize the crucial importance of legal representation in immigration proceedings. Populations of specific concern include persons in removal proceedings, political asylum applicants, unaccompanied minors, non-citizens whose removal cannot be effectuated, detainees, and those held in incommunicado detention. The ABA already supports the right to appointed counsel at government expense in all immigration processes for unaccompanied children and people with disabilities and people with mental health conditions, as described below.

#### Unaccompanied children:

- In 2001, the ABA supported government-appointed counsel at government expense for unaccompanied minors in all stages of immigration processes and proceedings. (2001M106A)
- In 2004, the ABA adopted its own [\*Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States\*](#). These standards include the right to an attorney and call for timely legal rights presentations for all unaccompanied children, including the opportunity to consult with an attorney, the right to have an attorney represent them in all formal proceedings or other matters affecting a child’s immigration status, and (if necessary) the right to government-appointed counsel at the government’s expense. (2004A117)
- In 2015, the ABA adopted a resolution supporting the provision of legal representation at government expense to unaccompanied minors who have come to the U.S. with no resources for counsel, but with claims for immigration relief, at all stages of the immigration process, including during initial asylum interviews. (2015M113)

#### People with disabilities and people with mental health conditions:

- In 2006, the ABA adopted a policy supporting the establishment of a system to provide legal representation, including appointed counsel and guardians ad litem, to people with disabilities and people with mental health conditions in all immigration processes and procedures, whether or not potential relief may be available to them. (2006M107A)

#### Indigent persons with potential relief:

- In 2006, the ABA adopted a policy supporting the due process right to counsel for all persons in removal proceedings, and the availability of legal representation to all non-citizens in immigration-related matters. This policy also supported the establishment of a system to screen and to refer indigent persons with potential relief from removal (as identified in the expanded “legal orientation program”) to pro bono attorneys, Legal Services Corporation sub-grantees, charitable legal immigration programs and government-funded counsel. (2006M107A)

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- In 2011, the ABA also adopted a resolution to improve access to counsel for individuals in immigration removal proceedings, focused on pro bono services. That resolution included developing regulations to strengthen eligibility requirements for pro bono providers, encouraging an increase in pro bono efforts, requiring BIA recognized agencies to provide more pro bono services, increasing training and expertise and minimizing the unauthorized practice of law. (2011A118)

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.

If and when Congress considers legislation that would affect appointment of counsel for indigent respondents in removal proceedings, the ABA will be able to share its position based on this and other relevant ABA policies. Recognizing that this type of legislation is unlikely to be introduced at the current time, this policy will provide support and encouragement for efforts of state, local and territorial governments to provide funding for their individual programs.

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.

Commission on Domestic and Sexual Violence  
Commission on Hispanic Legal Rights and Responsibilities  
Section of Civil Rights and Social Justice  
Massachusetts Bar Association  
Criminal Justice Section  
New York County Lawyers Association  
Section of Litigation  
The Standing Committee on Legal Aid and Indigent Defendants  
New York City Bar Association

Working Group on Unaccompanied Minor Immigrants  
Commission on Racial and Ethnic Diversity in the Profession  
Center for Racial and Ethnic Diversity  
Coalition on Racial and Ethnic Justice  
Council for Racial and Ethnic Diversity in the Educational Pipeline  
Commission on Sexual Orientation and Gender Identity  
Commission on Disability Rights  
Commission on Women in the Profession

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

Meredith A. Linsky, Director, ABA Commission on Immigration, 1050 Connecticut Ave., NW, Suite 400, Washington, DC 20036, tel. (202) 662-1006,  
[Meredith.Linsky@americanbar.org](mailto:Meredith.Linsky@americanbar.org).

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Mary Meg McCarthy, Chair, ABA Commission on Immigration, 3180 N. Lake Shore Drive, Apt. 9F, Chicago, IL 60657, tel. (312) 660-1351 (office), (312) 287-6400 (cell),  
[MMccarthy@heartlandalliance.org](mailto:MMccarthy@heartlandalliance.org).

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution proposes a right to government appointed counsel at federal expense to indigent noncitizens in removal proceedings before the Department of Justice's Executive Office for Immigration Review (EOIR), specifically before the Immigration Courts and the Board of Immigration Appeals (BIA). This resolution also seeks to ensure that noncitizens are aware of their rights to appeal their cases to the U.S. Circuit Courts of Appeal (if relevant). The ABA has taken an incremental approach in supporting an expanded right to appointed counsel at government expense for indigent individuals in civil proceedings, and this resolution is the next logical step.

### 2. Summary of the Issue that the Resolution Addresses

The right to counsel provided for by the Immigration and Nationality Act (INA) does not currently include a recognized right to appointed counsel at government expense for indigent respondents. The majority of individuals are ordered removed through summary, DHS-only proceedings, only a minority of individuals (approximately 35%), are placed in "regular" removal proceedings in immigration court pursuant to INA § 240. These are adversarial proceedings where the respondent is opposed by an experienced government attorney. Moreover, the immigration laws are extremely complex and subject to constantly changing agency interpretations and varied case law within the Board of Immigration Appeals and among the U.S. Circuit Courts of Appeals. Meanwhile, the immigration courts are extremely backlogged, demonstrated by the fact that at the end of January 2017, over 540,000 cases were pending. In a recent national study, only 37% of all immigrants in removal proceedings benefitted from legal representation. Many unrepresented individuals request multiple continuances in immigration court to seek counsel, yet ultimately represent themselves and are unable to successfully defend against removal or apply for relief to which they are legally entitled. As a consequence, the immigration system is bogged down and plagued with inefficiencies. Practically speaking, this lack of counsel results in great hardship to individuals with bone fide claims for relief. As a result, families are separated, U.S. citizen children lose loving parents, and in the most egregious situations, asylum seekers face violence and even death when unable to properly present a claim for protection.

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

The adoption of this policy would improve fairness within the immigration system, as well as enhance the efficiency with which the immigration judges and BIA members operate by making it easier to quickly identify respondents who qualify for legal relief and provide advice and counsel to those who do not qualify.

### 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.