

The Legal Profession and the Unmet Needs of the Immigrant Poor  
The Orison S. Marden Lecture of the Association of the  
Bar of the City of New York, February 28, 2007

Judge Robert A. Katzmann<sup>1</sup>  
US Court of Appeals for the Second Circuit

It is a great privilege to deliver the Orison S. Marden Lecture of the New York City Bar - a series honoring the memory of a person deeply committed to providing legal services to the poor, an individual who was steadfast in that support as a partner in White & Case, and remarkably as president of three distinguished bars (the New York City Bar, the New York State Bar, and the American Bar Association). I thank Peter Eikenberry for inviting me, Barry Kamins for his gracious welcome, Barbara Berger Opatowsky and her able staff for all of their efforts, and Jed Rakoff, a most distinguished judge and treasured colleague, for his all too generous introduction. And all of you for coming.

My subject tonight is a pressing one, the unmet legal needs of immigrants, a vulnerable population of human beings who come to this country in the hopes of a better life, who enter often without knowing the English language and culture, in economic deprivation, often in fear. I think we can all imagine our own ancestors or ancestors of friends and relate to the anxieties of today's newcomers. We are a nation of immigrants, whose contributions have been vital to who we are and hope to be. All too often immigrants are deprived of adequate legal representation, essential if they and their families are to live openly and with security. This failure should be a concern for all of us committed to the fair and efficient administration of justice. My views are shaped by experience as a judge on the U.S. Court of Appeals for the Second Circuit where our caseload dockets have virtually doubled in the last couple of years as a consequence of an avalanche of immigration cases (ranging from 32 - 48 cases per week). I speak tonight, I should emphasize, in an individual capacity, not as an official representative of my Court.

I begin this evening with some words about the lawyer's ethical responsibility to provide effective representation, then offer a profile of the immigrant's plight, move next to a description of ongoing efforts to secure adequate representation, and then conclude with

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some ideas for further action. I salute those who have worked to provide effective representation of immigrants and hope to encourage those who have yet to be involved in these efforts.

### The Lawyer's Responsibility

Some years ago, in a volume, The Law Firm and the Public Good, I observed that at least since Greek times, lawyers have been viewed by the public as economically greedy, indeed unscrupulous opponents of the common good. Aristophanes described the typical "lawyer" of his day as "a law book of legs, who can snoop like a beagle, a double-faced, lethal-tongued legal eagle" and further asserted: "If you pay them [lawyers] well, they can teach you how to win your case - whether you're in the right or not." This perception, however simplistic, underscores the importance of assuring that the administration of justice is as fair as we can make it.

In our legal system, driven by complex rules and procedures, a lack of access to competent legal services damages fundamental concepts of fairness and equality before the law. The lawyer's function is grounded in role morality, the notion that special obligations attach to certain roles - in the lawyer's case, to serve justice. As a consequence of specialized knowledge and skill, lawyers claim autonomy to perform their jobs. In large measure, the state grants such autonomy, an effective monopoly, in exchange for lawyers, as officers of the court, discharging their duty to further equality before the law. After all, the very reason that the state conferred such a monopoly was so that justice be served - a notion that surely means that lawyers have an obligation to provide effective representation and some responsibility towards those unable to pay or those pursuing an unpopular cause. A lawyer's duty to serve those unable to pay is not an act of charity or benevolence alone, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system.

Immigrants can secure legal representation in immigration proceedings, but "at no expense to the Government." 8 U.S.C. sec. 1362. The importance of quality representation, paid or pro bono representation is especially acute for immigrants, not only because the stakes are often so high - whether individuals will be able to stay in this country or reunite their families or be employed - but also because there is a wide disparity in the success rate of those who have lawyers and those who proceed pro se. For example, several studies have shown that asylum seekers are much more likely to be granted asylum when they are represented in immigration proceedings.<sup>2</sup> These findings

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<sup>2</sup>Kerwin, p. 6: In political asylum cases, 39% of non-detained, represented asylum seekers received political asylum, compared with 14% of non-detained, unrepresented asylum seekers. Eighteen percent of represented, detained asylum seekers were granted asylum, compared to three percent of asylum seekers who lacked counsel;

are particularly noteworthy because they do not even take into account the varying quality of representation that asylum seekers receive. Justice should not depend upon the income level of immigrants. While differences in success rates do not by themselves tell us about causation, these data uncomfortably suggest that outcomes can be affected by whether the immigrant can afford a lawyer or has the ability to access free legal services. (I will leave for a little later comment my concerns about the wide range in quality of representation that actually is secured). For immigrants with limited means, who seek asylum, the difficulty of securing legal representation is compounded by regulations generally forbidding them from working during the initial pendency of their claims, thus depriving them of the capacity to earn money to hire a lawyer. (Schoenholtz and Jacobs:747; Code of Federal Regulations 2004: 8 CFR §208.7a).

### The Immigrant's Plight in Profile

While my remarks will focus on individual immigrants in administrative immigration proceedings and their judicial review, the problem of the unmet legal needs of aliens goes well beyond the application to secure lawful status or in resisting removal. All present a challenge to the legal profession and the administration of justice, including: unlawful discrimination in housing and employment based on alienage or national origin, disputes over access to public education and other public benefits.

I come to this subject, as I noted earlier, as an appellate judge for some seven and a half years. From the outset, I have found immigration cases to be of special interest, as the son and grandson of immigrants. Our Court's involvement in immigration has deeply intensified in the last few years. By way of background, the Board of Immigration Appeals (BIA) from which appeals to the Second Circuit come, had accumulated by March 2002 a backlog of more than 56,000 cases nationally. To reduce the backlog, the BIA dramatically began to expand its resort to summary procedures such as single Board members rather than three member panels to adjudicate cases, and to permit single Board members to summarily decide appeals through summary dismissals and affirmances without opinion. Consequently, the number of petitions for review in federal court increased exponentially. My colleague Judge Jon O. Newman put it this way: "It's as if a dam had built up a massive amount of water over the years, and then suddenly the sluice gates were opened up and the water poured out." By 2005, appellate courts were receiving about five times as many petitions for review as they were before 2002. As

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USCIRF,

[http://www.uscirf.gov/countries/global/asylum\\_refugees/2005/february/execsum.pdf](http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/execsum.pdf) at 4: asylum seekers without a lawyer had much lower chance of being granted asylum (2 percent) than those with an attorney (25 percent); Schoenholtz and Jacobs; asylum seekers are four to six times more likely to be granted asylum in immigration proceedings when represented.

then Second Circuit Chief Judge John M. Walker, Jr., remarked in April 2006: “What we thought was a one-time bubble has turned into a steady flow of cases, in excess of 2,500 a year, and about a 50% increase in our total annual filings.” Most of these cases are asylum matters. The Second Circuit receives about 21% of the more than 12,000 petitions for review filed each year nationwide, behind only the Ninth Circuit.

To handle these matters, the Second Circuit in October 2005 instituted a non-argument calendar (“NAC”) for asylum cases, running parallel to the regular argument calendar (“RAC”). Under that procedure the Court, with three-judge panels, adjudicated 32 - 48 NAC cases per week in the first year, and 27-36 NAC cases per week more recently, in addition to one or two cases per sitting day on the regular argument calendar. Especially with respect to decisions that are affirmed by the BIA without opinion, the Court of Appeals is effectively the first line of review, however limited, in a system where the immigration judges and the Board of Immigration Appeals, which hears appeals from the immigration court, are under extraordinary pressure to resolve cases. At the time of Judge Walker’s testimony in April 2006, each immigration judge, he noted, had to dispose of 1,400 cases a year, or more than five each business day to stay current with his docket. Similarly, even with streamlining so that dispositions can be made by a single judge, each BIA member, Judge Walker reported, had to dispose of about 80 cases per week. The burdens on immigration officials are extraordinary and the challenges for any judge, however conscientious, to dispose of all these cases with due care are overwhelming. Judge Walker observed in testimony before the Senate Judiciary Committee: “I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances.” I know that immigration judges and the BIA are optimistic that various recent reforms, noted later, once fully implemented, will alleviate some of these problems. For their sake and for the sake of the immigrant population who seek the benefit of a fully deliberative adjudicatory system, we can only hope so.

As an appellate judge, immigration cases tend to come before me in a legally circumscribed context. A judge’s role is to review the administrative record and decision; the Court is largely constrained to defer to the agency’s ruling, absent legal error or lack of substantial evidence supporting the decision. What record is made by the immigrant, therefore, and what legal points are preserved for review in the record are critical to the outcome, especially where the alien has the burden of coming forward with evidence and the burden of proof of entitlement to status or relief. Even if a judge would have ruled differently in the first instance, he or she has no authority to do so. Thus, quality legal representation in gathering and presenting evidence in a hearing context and the skill in advocacy as to any legal issues and their preservation for appeal can make all the difference between the right to remain here and being deported. It also means that getting effective counseling BEFORE, not after, petitioning for relief or getting immersed in proceedings provides the best chance for fleshing out the merits of the case, avoiding false or prejudicial filings, and securing lawful status or appropriate relief.

A snapshot offers some perspective about the challenge the legal profession faces in immigrant representation. The United States Immigration and Customs Enforcement Service removed 186,000 persons in fiscal year 2006. One out of three asylum seekers do not have counsel in asylum interviews conducted by asylum officers. (Schoenholtz and Jacobs, 2002:742). [U.S. Immigration and Customs Enforcement detained more than 250,000 persons, including 4,700 unaccompanied children. About 10% of detainees secured legal counsel.] In 2005, immigration courts handled almost 369,000 cases, about 33,000 in immigration courts within the Second Circuit. Approximately 35% were represented. Twelve per cent of Immigration Judge decisions were appealed to the BIA, with approximately 69% securing counseled representation. In the Second Circuit, approximately 42% of the BIA decisions were appealed. Of those cases on appeal in the Second Circuit, 76% had represented counsel and the rest were handled pro se. Data indicate that 9% of counseled cases were reversed, vacated, and/or remanded in whole or part, while only 2% of pro se cases were reversed, vacated, and/or remanded in whole or part.

Numbers alone cannot capture the human drama on display in the immigration process. All immigrants, whether or not refugees or asylum seekers, are largely strangers to our language, our culture, our laws, certainly the complicated maze of immigration laws. Especially for those fleeing from persecution, however, their first encounters with immigration authorities may be difficult. Experience has led them to be distrustful and fearful of government. Having lived life in the shadows in their native lands, they enter this country afraid and often are easy prey for unscrupulous parties. Not knowing where to turn, anecdotal evidence suggests that they often depend on notarios and travel agents - persons who generally share the language and culture -- for advice as to how to secure legal entry. And anecdotal evidence suggests that not all notarios and travel agents are competent or honest; travel agents often refer the immigrants to persons with whom they have relationships, but who are not licensed to practice law. These unauthorized practitioners, sometimes known, misleadingly as “notarios”, charge immigrants for their services in filing documents and preparing applicants for relief and benefits, but often lead the immigrants astray with incorrect information and terrible advice with lasting, damaging consequences that can fatally prejudice what otherwise would be a proper claim to entry. The immigrants are also referred to licensed lawyers, too many of whom render inadequate and incompetent service. These attorneys do not even meet with their clients to flush out all the relevant facts and supporting evidence or prepare them for their hearings; these are “stall” lawyers who hover around the immigrant community, taking dollars from vulnerable people with meager resources. They undermine trust in the American legal system, with damaging consequences for the immigrants’ lives.

What is filed and what is said have enduring effects. Immigration judges will often make findings of adverse credibility based on the disparity between the two. Often times, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different. For the immigrant who is ultimately

deported, the consequences of faulty representation are devastating. Unlike a person in the U.S. who can sue a lawyer for malpractice, or file a bar complaint, a deported immigrant for financial, geographic or other reasons, is unlikely to pursue such recourse.

Legal representation could be useful, in sum, at a variety of stages. Consider the asylum seeker. At the point of entry, an asylum seeker might face expedited removal, without a hearing, unless she expresses a fear of returning to her home country or asks for political asylum. But she may be unfamiliar with this requirement and its importance.

If the asylum seeker expresses a credible fear and is given an interview, some form of counseling, even if not full representation in every instance, could be very helpful. For those asylum seekers who apply for asylum after entering the United States through an affirmative application process, legal representation at the asylum interview in preparing the application itself often is critical - incomplete information then provided could later figure prominently in an IJ's credibility findings.

Proceedings before the immigration judge are fact-intensive. An immigrant often has limited fluency with the English language, and the immigration judge must work with a translator in the effort to understand the immigrant's case; frequently, because of the language difficulty, the judge must ask the immigrant the same question repeatedly in order to be secure about his or her complete answer. An immigrant who appears pro se or does not have the benefit of adequate counsel will be at a disadvantage in such proceedings.

And there are the sizeable number of immigrants, who are legal permanent residents, with criminal convictions (large and small), who are placed in removal proceedings following the completion of their criminal sentences (sometimes long after a conviction). It is a gross understatement that their futures are very much affected by whether they can secure quality legal assistance. Asylum seekers and others who are detained in jails may confront special challenges; as Human Rights First documented in its report "In Liberty's Shadow," in some areas in which a facility is located there a few locally-based lawyers to provide legal representation, such that attorneys from other jurisdictions have to travel lengthy distances.

I might also say, from sitting on an appellate court, that the quality of representation varies widely. There are, of course, many lawyers in the immigration bar who serve their clients well, who submit briefs which reflect considerable thinking; they deserve our praise and appreciation. But too many of the briefs which I see are barely competent, often boilerplate submissions. John Palmer, a superb staff attorney with the Second Circuit, undertook a study with coauthors Stephen Yale-Loehr and Elizabeth Cronin, and determined that ten law offices (most with just one attorney) had 34.87% of the petitions for review pending in the Second Circuit on April 21, 2005, and that the total for top 20 offices was 46.54%. What is particularly striking is that several of these solo practitioners each had more than 100 cases pending for review. From my vantage point, one cannot help but feel that at some point the quality of representation suffers under the

volume of cases.

### Ongoing Efforts to Meet Legal Needs

The immigrant's plight would be even more dire were it not for efforts of various organizations and law firms, which have provided pro bono assistance, and of which many of you here have played so important a part. Various approaches abound. What follows is hardly an exhaustive survey, but a description of what is happening mostly in the area of the Second Circuit, and even then offering examples of activity; with apologies, I cannot for reasons of time and space note all of the valuable programs underway. My focus here is on immigrants as they face the hurdles upon entry to secure legal status. Quite obviously, the legal profession has much that it can do to support immigrants once they are settled in their communities, as the work of such organizations as Sanctuary for Families and New York Lawyers for the Public Interest attest.

A. Nonprofit organizations. As to efforts to provide assistance to secure legal assistance, a wide variety of organizations have been involved, including Human Rights First, the Legal Aid Society, the International Senior Lawyers Project, and Catholic Legal Immigration Network (CLINIC). Some non-profits provide direct in-house representation (though a decline in funding has led to a decline in such activity); some organizations offer legal aid by recruiting, training and supporting pro bono lawyers; and a few organizations do both.

By a way of example, Human Rights First, as Eleanor Acer has written, has used two models of pro bono representation-- national representation and individual pro bono refugee representation.

The national representation model involves the coordinated response to a national representation challenge, such as when 2000 Haitian asylum seekers were detained in facilities across the country. In that circumstance, Arthur Helton, then of Human Rights First's predecessor, The Lawyer's Committee for Human Rights, and colleagues created and fully implemented a plan to recruit and train 2000 volunteer lawyers in 20 states, with the support of the American Immigration Lawyers Association (AILA) and the American Bar Association (ABA). In the direct representation approach, organizations such as the Legal Aid Society and Human Rights First also provide counseled representation to asylum seekers at various stages - some are awaiting non-adversarial interviews, others are before an Immigration Court Judge, still others are on appeal. An innovative example of the delivery of legal aid is the Immigration Representation Project (IRP), which seeks to help meet the needs of detainees and nondetained immigrants. In cases in which there is a plausible claim, immigration judges and service organizations refer non-detained unrepresented immigrants to screening sessions at which attorneys provided by four participating non-profit agencies, interview referred clients. Income-eligible clients with viable claims are referred to one of the participating agencies or to pro bono attorneys for representation. In New York City,

Human Rights First, Catholic Charities and the Legal Aid Society are especially active participating agencies, with funding provided by the New York Community Trust.

An important component of both the national and direct representation approaches has been the recruitment, training and supervision of pro bono attorneys in solo offices or general practice firms, and by such organizations as Sanctuary for Families, The City Bar Justice Center, and Human Rights First. For instance, Human Rights First offers training seminars featuring immigration judges, asylum officers and its own staff; case support including case law and memos covering asylum law, regulations and procedures; consultations with staff lawyers about strategies and procedures; review of all submissions by staff lawyers; referrals to country experts and medical experts; and access to Probono.net and its on-line library of sample asylum submissions, and relevant case law. Other nonprofits, such as the ACLU Immigrants' Rights Project, focus more on declaratory judgment, injunctive proceedings and class action impact litigation as well as public education. The National Center for Refugee and Immigrant Children provides *pro bono* legal and social services to unaccompanied children released from detention in the United States, not through direct representation, but by matching children with pro bono providers.

In the context of criminal representation, the New York State Defenders Association sponsors the Immigrant Defense Project which seeks to “serve as a legal resource and training center for criminal defense attorneys, criminal justice and immigrant advocates, and immigrants fighting against deportation and detention”; (2) promote community-based advocacy; and (3) “promote immigrant-protective impact litigation by recruiting and mentoring pro bono attorneys to provide legal assistance to immigrants challenging their detention or removal order in federal court.”

B. Bar Associations. The City Bar, apart from its own nationally respected Pro Bono program in which law firms agree to provide such legal assistance, has had an active immigration and nationality committee, under the leadership most recently of Linda Kenepaske and Claudia Slovinsky, and with the able work of Jennifer Kim and Suzanne Tomatore. I note the Committee's instructive symposium on deportation without representation organized by the Committee; the Immigrant Women and Children Project, which seeks to recruit and train volunteer lawyers to help victims of domestic violence free themselves from their abusers and attain legal status; and the Refugee Assistance Project, which recruits and trains volunteer lawyers to represent asylum seekers (finding pro bono representation, supervising that representation, assisting immigrants with filings, mock interviews, and the like). My understanding is that the City Bar also accepts two cases per month as referrals from the Immigration Representation Project. And, coincidentally, today is the first day the Fragomen Fellow will work at the City Bar Justice Center on immigration issues. Through this program the law firm of Fragomen, Del Rey, Bernsen & Loewy is lending a Fragomen attorney to the City Bar Justice Center for six months to a year (and paying salary). NYC Bar executive director Barbara Opotowsky and Maria Imperial of the City Bar Justice Center inform me that this is the first time that



they know of that an immigration law firm is earmarking support specifically for providing immigration legal services to those who cannot afford such services. The Fellow program provides an innovative way for a law firm to demonstrate their pro bono commitment.

There are other City Bar initiatives, such as the naturalization clinic which provides free legal assistance in completing naturalization forms; monitoring of immigration courts; exploring ways legislatively to allow young people to secure legal status; and examining how immigrant criminal defendants who are considering taking pleas can be made aware of the consequences of accepting such pleas on their immigration status. I want also to acknowledge that Claudia Slovinsky was very helpful to my Court when she helped us secure counsel in cases where the attorney at record failed to provide adequate counsel

The American Bar Association (ABA) has been very active, through its Commission on Immigration, in focusing on issues of expanding representation. The Commission: “1) advocates for statutory and regulatory modifications in law and governmental practice consistent with ABA policy; 2) provides continuing education and timely information about trends, court decisions and pertinent developments for members of the legal community, judges, affected individuals and the public; and (3) develops and assists the operation of pro bono programs that encourage volunteer lawyers to provide high quality, effective legal representation for individuals in immigration proceedings, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations.” Over the years, the ABA has assumed a leadership role in helping to fund and create pro bono representation projects.

The American Immigration Lawyers Association (AILA) is the national association of 10,200 immigration lawyers established “to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.” Among its stated goals are to: increase member participation in advocacy before Congress, the Judiciary, federal agencies, and the media, for the immigration-related interests of clients and society; promote and support delivery of competent, ethical, and lawful immigration services by lawyers, authorized accredited representatives, and pro bono programs; and to encourage and facilitate member participation in, and support for, pro bono services and programs. Among the ways it seeks to stimulate pro bono efforts, AILA has recently created the position of pro bono coordinator to work with its membership, a development that holds the promise of a broadening of services to the immigrant poor. It also bestows awards and provides recognition through coverage in its magazine, Immigration Law Today. A recent issue focused on the pro bono work of Cyrus Mehta, currently secretary of the NYC Bar. The American Immigration Law Foundation, affiliated with AILA, created the Legal Action Center to promote fundamental fairness for immigrants, their families, and their employers. Staffed by experienced immigration practitioners and litigators, it conducts impact litigation files merits and amicus briefs in the federal courts and before administrative agencies, and provides technical assistance and support to lawyers litigating immigration issues.

C. Law Firms. Over the last several years, partly in response to the ABA's Pro Bono Challenge and other projects of its Center for Pro Bono ([www.abanet.org/legalserivices/probono](http://www.abanet.org/legalserivices/probono)) and Sections of Litigation and Senior Lawyers, large law firms have devoted more resources to pro bono cases, including immigration (largely asylum) cases. For instance, White & Case (with the work of lawyers such as James Stillwaggon), quite fittingly given the roots of the Orison Marden Lecture, has handled many asylum cases for Human Rights First and has figured importantly in matters having to do with unaccompanied minors. To offer another example, lawyers at Latham & Watkins, through coordinated efforts in ten of its US offices, have represented more than 40 individual children in various immigration proceedings. The American Lawyer reports that more than 200 Am Law firms volunteered to represent asylum applicants. At Fried Frank, yet another prominent example, Robert Juceam has spearheaded efforts to secure legal representation for immigrants for more than twenty years, including Haitian immigrants fleeing the Cedras regime.

D. Government. Since 2003, the U.S. Department of Justice Executive Office for Immigration Review (EOIR) has carried out the Legal Orientation Program (LOP) to improve judicial efficiency and assist all parties in detained removal proceedings - detained aliens, the immigration court, Immigration and Customs Enforcement (ICE) and the detention facility. Through the LOP, representatives from nonprofit organizations explain immigration court procedures along with other basic legal information to large groups of detained individuals. The orientations generally have three parts: "1) the interactive group orientation, which is open to general questions; 2) the individual orientation, where non-represented individuals can briefly discuss their cases with experienced counselors; and 3) the referral/self-help component, where those with potential relief, or those who wish to voluntarily depart the country or request removal are referred to pro bono counsel, or given self-help legal materials and basic training through group workshops, where appropriate." In 2005, over 20,000 detainees were served by the LOP, or roughly 20 percent of all ICE detainees who appeared before EOIR immigration courts.

In January of 2001, EOIR's Pro Bono Program, with the BIA Clerk's Office, implemented the Board of Immigration Appeals (BIA) Pro Bono Project (the "Project") to increase pro bono representation for individuals detained by the U.S. Immigration and Customs Enforcement (ICE) with immigration cases under appeal. The Project was developed between EOIR and several non-governmental organizations, including the Catholic Legal Immigration Network, Inc., the Capital Area Immigrants' Rights Coalition, the National Immigration Project of the National Lawyers Guild, and the American Immigration Law Foundation. Since its start, the Project has secured pro bono counsel for close to 400 detainees around the country - individuals who would not have otherwise been represented by counsel. As I noted earlier, many immigrants in removal proceedings are without resources such that they have no choice but to appear before the immigration courts and the BIA without legal representation. Agencies that provide legal services to immigrants normally face great obstacles in identifying, locating, and communicating with detained and unrepresented individuals in time to write and file an

appeal brief. Under the Project, EOIR assists in identifying certain cases based upon criteria determined by the partnering volunteer groups. Once cases are identified and reviewed, their summaries are then distributed via e-mail to pro bono representatives across the United States. Volunteers who accept a case under the Project receive a copy of the file, as well as additional time to file the appeal brief.

Through new pro bono outreach programs, the Legal Orientation Program is working with national nonprofit agencies and the Division for Unaccompanied Children's Services at the Office of Refugee Resettlement to improve legal services for detained children, who are unaccompanied by a family member or legal guardian.

The Model Hearing Program is an educational program developed by the Pro Bono Project to enhance the quality of advocacy before the court, as well as increase levels of pro bono representation. Model Hearings consist of small-scale mock trial training sessions held in the immigration court and presented by volunteer immigration judges. The training sessions, carried out in cooperation with partnering bar associations and/or pro bono agencies, provide practical immigration court training to small groups of attorneys/law students with an emphasis on practice, procedure and advocacy skills. Participants receive training materials and CLE credit, and commit to a minimal level of pro bono representation throughout the year.

Also involved in immigration issues is the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices in the Civil Rights Division. This office seeks to protect US citizens and work authorized immigrants against employment discrimination based on citizenship, immigration status or national origin. Individuals may file charges with the office and, if successful, secure injunctive relief, be awarded back pay and reinstatement, among other remedies. The office conducts outreach workshops for immigrants and employers, awards grants for orientation programs as to the IRCA laws' requirements, operates a worldwide web information and materials page and has signed memoranda of understanding with various state and local human rights agencies to promote awareness of the office and the rights it seeks to protect ([www.usdoj.gov/crt/osc/htm/facts.htm](http://www.usdoj.gov/crt/osc/htm/facts.htm)).

E. Law School Clinics. Virtually all of the law schools in the Second Circuit have clinics which afford law students the chance to represent immigrants and asylum seekers. Many have formal mentoring programs with the immigration bar. Although such clinics are limited in the number of cases they can assume, they provide an invaluable service not just in terms of needed representation, but also by demonstrating to students how important and dynamic the field of immigration law can be, and thus helping to add new generations of well-trained immigration attorneys. More broadly, the ABA Center for Pro Bono has teamed with the American Association of Law Schools to publish the Directory of Law School Public Interest and Pro Bono Programs ([www.abanet.org/legalservices/probono/lawschools](http://www.abanet.org/legalservices/probono/lawschools)) to facilitate the exchange of program models and educational materials among those providing direct representation to immigrants.

F. Advocacy/Think Tank/Policy. In addition to providing direct legal representation, some organizations, such as the New York Immigration Coalition concentrate on policy analysis and advocacy, civic participation, voter education and training and leadership development. Nationally, the Migration Policy Institute is an independent, non-partisan think-tank in Washington, D.C. which analyzes migration and refugee policies. The Institute for the Study of International Migration at Georgetown University undertakes studies of immigration, and its director of law and policy studies, Andrew Schoenholtz has explored the state of asylum representation. The Vera Institute of Justice conducts studies and projects, including monitoring, analyzing, and providing technical assistance to EOIR's Legal Orientation Program.

G. Governmental Lawyer Pro Bono. Many departments and agencies of the federal and state governments have sought to encourage governmental lawyers (some 80,000+ in federal and state governments) to undertake pro bono activities, and over the last 15 years there have been important strides in eliminating the obstacles to their lawyers meeting their pro bono moral obligations. Certainly, the conflict of interest problem is a real one for those lawyers who are involved, for example, in law enforcement as it relates to immigration. Thinking about how to draw upon government and military lawyers in counseling aliens as to the consequences of their status on such matters as employment eligibility, housing, flood relief, and matrimonial status has been a focus of the Government and Public Sector Lawyers Division of the ABA and its Center for Pro Bono (See [www.abanet.org/govpub/probono.html](http://www.abanet.org/govpub/probono.html)).

H. Inside Corporate Counsel. The American Corporate Counsel Association, in conjunction with the Pro Bono Institute, has developed a nationwide program and website to promote pro bono activities generally by in-house lawyers. One notable success in the immigration area has been a project, launched in 2001, in which Seattle-based Microsoft funds and partners inside counsel with local advocacy groups and private law firms in providing "know your rights" presentations to immigrant detainees and, in selected cases, fostering direct representation of immigrants.

I. Media. The media have played a constructive role in encouraging pro bono work. For instance, the American Lawyer not long ago published an issue that was dedicated in large measure to describing the work of a variety of law firms undertaking asylum cases. And, as I noted earlier, Immigration Law Today, the magazine of AILA, has a column devoted to pro bono efforts, spotlighting the work of individuals and organizations. The New York Law Journal publishes a monthly column, "Pro Bono Digest" by William J. Dean, Executive Director of Volunteers of Legal Service, which celebrates the work of pro bono providers and the need for expanded activity. Daily reporting in the New York Law Journal by such reporters as Mark Hamblett of particular cases is first rate and gives the legal community a sense of developing immigration law.

More generally, reporting on the immigrant's legal plight, as exemplified by the sophisticated stories of Nina Bernstein in the New York Times, puts a spotlight increasing wider public understanding of the issues.

## Steps Towards Meeting the Largely Unmet Need: What the Legal Profession Can

### Do

All of these and other significant efforts notwithstanding, the sheer number of immigrants in need of competent legal representation is so large as to suggest that the legal profession must do more both to improve the quality of paid counseled representation and to expand pro bono assistance. **Keep in mind that 65% of aliens whose cases were completed in immigration courts during FY 2005 were unrepresented.** [US DOJ, EOIR, FY 2005 Statistical Year Book (February 2006) p. A. 1, p. 23] Although this statistic suggests the magnitude of the challenge, the excellent work already underway should inspire to think that the legal profession has the capacity to expand and deepen its commitment to the immigrant population.

I recognize that there are proposals calling for legislation to provide government funded legal representation. Even before the immigration caseload explosion hit, some legislators were sufficiently concerned about unrepresented immigrants to advance legislative solutions. In 1999, Senator Daniel Patrick Moynihan proposed a mandated counsel pilot project in three Immigration and Naturalization Service districts, arguing that asylum seekers should have the right to representation in removal provisions and that such provisions would be cost effective by obviating the need for frequent continuances for asylum seekers who search for pro bono legal support. [Amendments to the Immigration and Naturalization Act, section 173, (1999) available at <http://thomas.loc.gov/cgi-bin/query/R?r106:FLD001:S00603-S00604>]. Senator Diane Feinstein proposed legislation mandating legal representation for unaccompanied children in immigration proceedings, reasoning that youngsters should not be expected to navigate the immigration process. [Unaccompanied Alien Child Protection Act of 2000, section 3117, available at <http://thomas.loc.gov/cgi-bin/query/R?r106:FLD001:S00603-S00604>]. As a sitting judge, it is not appropriate for me to assess such legislative proposals requiring counsel, other than to note their existence and to leave to you their consideration. My focus, rather, is on steps the legal profession itself can undertake towards meeting the need, here and now. And in making these recommendations, I stand on the shoulders of many of you here, whose daily commitment to the work is essential to continuing success, and whose suggestions have refined my own thinking.

First, competent legal assistance should be available at the earliest stages of an immigrant's entry into this country. As I noted earlier, those who have adequate legal assistance fare much better than those who do not. When immigrants fall prey to travel agents, notarios and those lawyers who do not serve them well, their fates are all but sealed.

Second, a mix of approaches to provide adequate legal assistance should be employed. In the absence of government funded direct legal support there is much that

can be done pro bono by law firms and nonprofit organizations. As Donald Kerwin suggested, it would be desirable if there could be routine legal screening of unrepresented immigrants in removal proceedings by a qualified and impartial attorney or a BIA-accredited representative. Worth considering is whether such screening should be provided even earlier as when individuals apply affirmatively for asylum. As Mr. Kerwin also noted, it would be useful if there were a system of referral for representation of noncitizens with plausible claims of relief, as determined by that screening. And any system should provide for training and support for the lawyers and BIA-accredited representatives. I have already described a variety of efforts that support direct legal representation such as the Immigration Representation Project and the EOIR funded legal orientation/rights counseling programs whereby incoming noncitizens in a detention facility are educated about the law and the removal process. These and other programs should be encouraged.

Third, a central component of any plan for improved representation is the infusion of more competent paid counsel from the immigration bar as well as pro bono counsel from the immigration bar as well as firms.

A. Immigration Bar. As to paid counsel, we might start with finding ways to engage more fully the many competent immigration lawyers, who focus mostly on business immigration practice, to take on cases in the area of asylum, removal and family based immigration. If they would accept even a few more such cases, they could assume leadership roles in encouraging others and helping to meet the need.

As to those paid lawyers who have failed in their responsibilities to provide competent service, John Palmer proposes the idea that an enterprising lawyer or firm consider tracking down deported aliens or aliens who have lost their cases and not yet been deported, and pursue malpractice suits.

B. Large Law Firms. Large law firms, too, have much to contribute. When senior partners send the signal to the firm of their support for pro bono, the work happens. Yet, the Pro Bono Institute at Georgetown University, under the leadership of pro bono pioneer, Esther Lardent, have produced data indicating that less than fifty percent of lawyers undertake pro bono work in a given year. And Ms. Lardent recently warned of a flattening out of such activities by AmLaw's 200 largest firms, though New York City seems still to be in the top of firms doing pro bono work.

Skeptics may scoff at the vision of lawyers doing more to serve the public good. And those who focus on the economics of law firm practice will no doubt point to countervailing forces against providing services at little or no fees: the pressure to log more billable hours to support the extraordinary growth in firm size, and to keep pace with rising costs, and the burgeoning of paid legal work as more firms recently seem to be engaged near capacity.

But a Governance Institute study of a group of lawyers, which I directed a dozen

year ago produced, after four years of intensive work, evidence dispelling myths about the economics of firm practice and offered reason to hope that large law firms with 100 or more lawyers, are in a position to allocate more resources to pro bono activities. Not only do lawyers have a moral obligation to represent the financially needy, which in itself justifies expanded pro bono work; the self-interest of the law firm supports greater attention to pro bono activity.

Given the pressures of everyday practice, appeals to moral principle may not be enough to move firms to more vigorous action. Our study shows that it is possible to do well financially and fulfill responsibilities to the wider community. Pro bono activity is positively related to firm performance: the larger the firm and the greater its gross revenues, the more willing it is to encourage or permit pro bono activity. The conventional wisdom that pro bono involves a financial sacrifice to the firm fails to measure the reality and benefits of such activity. Even in the limited circumstances when a law firm operates at near capacity, committed lawyers can almost always expand their day for pro bono work. A firm that encourages such work will have a competitive advantage in the recruitment and retention of lawyers who are interested in serving the wider community and obtaining, earlier than otherwise, the opportunity for case leadership and client interaction. Thus, professional responsibility and self-interest are not opposing goals, but rather complementary ones.

Pro bono work can improve lawyering in various respects. By dealing with a broader cross-section of the community, the lawyer becomes more attentive to the attitudes and values of the entire community. Such work can sharpen the lawyer's ability to manage a team effort, select a jury, interrogate a witness, negotiate a transaction, or interview a prospective client. Young lawyers will mature more rapidly through community service than they will in the structured setting of most law firms. With respect of immigration, pro bono work broadens and deepens a young lawyer, offering an opportunity to represent clients directly, appear in court, and write briefs

Pro bono work can also raise lawyer morale. Life in a large law firm has its own stresses: the acute concern with billable hours; administrative burdens; threats to collegiality, and the decline of client loyalty. Community service can provide a safety valve against these pressures, and the constructive engagement that lawyers often miss. By infusing professional life with more immediacy and larger public purposes, and with a sense of renewal, community service increases personal satisfaction that can energize the other more mundane aspects of everyday practice. Why should a lawyer working long hours do pro bono work for immigrants? Ask any attorney who has experienced the rewards of assisting an immigrant, of making a difference not just in the life of that immigrant but also in the lives of the immigrant's family.

Professional responsibility and self-interest reinforce the same conclusion: the law firm and the public good are inextricably linked, and each can draw strength from the other in ways that nourish both. At stake is nothing more or less than the access to justice

for those who come into contact with the American legal system. Given the wide disparity in legal services between the haves and the have-nots, the active engagement of law firms is critical if the gap is to be narrowed. And, by the active engagement of law firms, I mean involvement at all levels of senior lawyers supervising associates in collaborative effort.

C. Senior Lawyers and Retirees. As the ranks of senior lawyers grow, many have to leave partnerships or want to leave the full time active practice of paid representation, yet stay involved in legal issues on a reduced schedule. For these lawyers, immigration and nationality law could provide important and satisfying work. Most state and local bars have begun senior lawyer projects to recruit and train lawyers to undertake pro bono in fields they did not practice. Immigration needs lawyers for counseling, administrative filings and appeals, preparing regulatory proposal comments, drafting materials and presenting them in public education settings, promoting funding of direct representation projects -- in short functions that could benefit from the broad, seasoned skills of the mature lawyer. This "Second Season of Service Initiative" has broad ABA support from its elected leadership, its Senior Lawyers Division and groups it has promoted such as ISLIP. What next? Those who promote pro bono efforts in bars and non-profits might consider deepening efforts to recruit senior lawyers in organization, law reform and direct representation roles. Moreover, innovative ways to effect delivery of legal services to the poor and those of limited means need to be tested, promoted and funded. Senior lawyers are well equipped to bring their career experience to bear on such initiatives and to find a way to eliminate the duplication in effort and cost for basic services to those who do direct delivery. A concrete challenge is how to coordinate, organize and consolidate the materials on the 500 websites that offer legal services resources readily available to the pro bono community.

D. Bar Associations. The continued work of such organizations as the New York City Bar, American Bar Association and the American Immigration Lawyers Association is critical. The Federal Bar Council, through its public services committee, might also play a useful role in immigration cases. Bar associations set the tone of legal practice. They can spur an intensified effort in the immigration area through their support for pro bono assistance programs, by publicly recognizing the activities of firms and individuals in private practice, and through the creation of task forces concerned more broadly about immigration policy. Worthy of endorsement is the American Bar Association Commission on Immigration's call for a partnership of the ABA and AILA, along with local bars and AILA chapters, with the EOIR to establish legal information centers in all facilities where immigration matters are processed or adjudicated. Such centers could make it possible for immigration applicants to secure preliminary advice from counsel, and where feasible, limited legal assistance for extended representation. (American Bar Association Commission on Immigration Report to the House of Delegates, February 2006, pp 4-5). These bar organizations might also collaborate and examine how best to address the problem of substandard legal representation. Perhaps the New York City Bar could undertake a pilot project which seeks to explore workable collaborative activity.



E. CLE Programs. Continuing legal education programs on immigration can not only educate lawyers on the subject, but also tap into a pool of attorneys who might be willing to provide pro bono assistance with additional training and support.

F. Law Schools. The ongoing efforts of law school clinics are valuable as well, not simply because they provide services to the indigent immigrant, but also because they sensitize law students to problems about which they should be concerned once they enter the profession upon graduation. Apart from clinical programs, law students would also benefit from expanded lecture and seminar opportunities focusing on immigration.

G. Nonprofits and Foundations. It is an understatement to say that without the engagement of nonprofit organizations, the plight of the immigrant in need of legal assistance would be much worse. The immigration work of these organizations is essential, in providing direct representation and in offering needed support to pro bono attorneys; and I very much commend the work that they do in the area of immigration representation. They depend upon the support of foundations and other individual sources of charitable giving. More than ever, foundation assistance for immigration work is necessary if the various nonprofits involved are to battle high costs that threaten to result in cutbacks in services. More funding for immigration programs could provide expanded opportunities for legal representation and different approaches to the delivery of services. With more funding, additional skilled immigration lawyers could be employed, not only to provide direct legal assistance to immigrants, but also to train lawyers in firms who are interested in pro bono practice. Lawyers not trained in immigration law are at a disadvantage in providing meaningful representation when they do not have access to attorneys who have a detailed understanding of this body of law. With more funding, there could be developed storefront, drop-in legal centers in the immigrant communities themselves. One could imagine a storefront legal assistance office which consisted of a mix of full-time lawyers and attorneys willing to give part-time pro bono assistance. Immigrants could learn of such facilities, not just through word of mouth, but also through advertisements in newspapers in the immigrants' native languages and advertisements posted in community and business establishments. Physically integrated in those communities, such centers could provide alternatives to immigrants who find themselves without direction, and too often prey to unscrupulous individuals. Foundations could also work with nonprofit organizations and bar associations to develop widely accessible, easy to use legal resources that provide immigrants with information on the immigration application process. Those materials, available on the web, could be translated into several languages. Foundations might also support the development of phone information lines, whereby immigrants could call and speak to trained immigration lawyers, and where possible, immigration lawyers who are fluent in the immigrant's language.

H. Corporate-Non-Profit-Law Firm Partnerships. As I noted earlier, a promising development was the founding of a unique pro bono partnership to assist immigrants,

funded by the Microsoft Corporation, bringing together local Seattle law firms, in-house corporate counsel of Microsoft Corporation, and a newly founded public service non-profit, the Volunteer Advocates for Immigrant Justice (VAIJ). The program was the outgrowth of initiatives through Association of Corporate Counsel, the American Bar Association and the Pro Bono Institute. Robert Juceam informs me that of 500 immigrants, the number routinely detained in the State of Washington, less than 20 per cent had any legal representation. VAIJ has recruited more than 100 volunteers with whom it had placed 70 cases as of mid-2006 and it has provided screening for over 450 detained individuals, including 21 unaccompanied detained. This partnership model is worthy of study and replication in other parts of the country, including New York.

I. Immigration Authorities. My focus in this lecture is not the workings of the governmental institutions involved in the resolution of immigration cases. I, do note, however, as many of you know, that the Attorney General ordered a “comprehensive review” on January 9, 2006 of the immigration courts and the Board of Immigration Appeals in response to concerns that the system was not functioning fairly and effectively, and that following this examination, the Department of Justice announced on August 9 of that year a number of measures to enhance the performance of the Immigration Courts and the Board of Immigration Appeals. Those steps include: periodic performance evaluations of each immigration judge and member of the BIA and a new code of conduct for these officials; immigration law examinations for IJA and BIA members; Executive Office of Immigration Review consideration, and where appropriate, drafting of proposed new rules and revisions to existing rules to increase the authority of IJs and the BIA to sanction litigants and counsel for defined categories of gross misconduct; Department of Justice (DOJ) requests for budget increases starting in FY 2009 to hire more IJs, and more staff attorneys to support the Board; four members added to the BIA; making adjustments to the BIA streamlining practices, including the increased use of one-member written opinions to address poor or intemperate immigration judge decisions and the issuance of more precedential opinions, especially in a small class of complex cases; and a DOJ commitment to improve the screening, hiring and certification of interpreters.

For now, I offer a few thoughts on what immigration officials can do to encourage more effective lawyering. As counseled representation, the Executive Office for Immigration Review should continue to use its authority to discipline lawyers for unprofessional conduct and to publicize those actions. As to pro bono activities, the Executive Office of Immigration Review should be supported such that it can expand its pro bono office, legal orientation presentations and pro bono representation project at the BIA. There is much merit to the recommendation of the US Commission on International Religious Freedom that legal orientation programs be expanded nationwide (volume 1, page 83). As part of its August 2006 package of measures to improve the immigration system, the Department announced that the Director of EOIR will consider forming a committee to manage the expansion of its sponsored pro bono program, with such committee being comprised of immigration judges, BIA representatives, other EOIR

personnel, representatives of the Department of Homeland Security, the private immigration bar, and any other participants the Director deems necessary. In addition to this welcome step, I think there is much to be said for the proposals of Human Rights First that immigration judges and the BIA should be encouraged to grant adjournments necessary to allow indigent immigrants to try to secure pro bono assistance; that, following the model of the Arlington, Virginia immigration courts, the Department of Justice and EOIR routinize throughout the country regular local meetings between local pro bono providers and local liaison immigration judges; and that immigration authorities provide all pro se litigants with accessible information about the whole application process, including the right to appeal BIA decisions to federal appeals courts.

J. Government Lawyers. Worthy of further consideration is how government lawyers might, in ways that do not present conflicts, provide pro bono legal assistance to immigrants. For instance, there is value in assessing the role that such lawyers could play in providing public education, offering citizenship qualification training and counseling, that is, in participating in fora other than immigration courts and appeals where the conflicts issue may render service problematic. Despite great strides in removing the underbrush of objections to government lawyer pro bono, government lawyers in the United States are a largely untapped resource. This is especially so for many state employed government lawyers for whom there may be fewer circumstances where conflicts would be an impediment to such activities.

K. Policy Work. Lawyers should also be involved in policy, in thinking about systemic approaches that might effectively address the larger immigration issues. Their experience directly representing immigrants could assist policymakers who seek to tackle broad questions of immigration reform. As to problems of representation in individual cases, lawyers who have been involved in immigration, could advise the legislative branch as to questions bearing upon right to counsel in immigration cases. Lawyers also can play a role in educating the public and the media as to the immigration problem and responsible reforms. For instance, lawyers could work with government, foundations, and the bar in developing programs for reporters who might cover and explain immigration issues to the wider public.

L. Media. As to steps, the media too can continue to play a useful part by educating the public as to the immigration issue, and by highlighting the work of those firms that have provided pro bono support, recognizing such contributions through annual awards.

M. Judiciary. Last, but not least, I believe there is a role for the judiciary, state and federal, in welcoming and promoting pro bono services for immigrants and in encouraging quality paid representation. Efforts such as those under the auspices of the Third Circuit, sponsoring recruitment sessions for lawyers interested in doing immigration work, should be replicated. As a Court, we in the Second Circuit can host periodic meetings, bringing together immigration authorities, bar associations, immigration lawyers, non-profits, and

law firms to promote the recruitment, training and recognition of lawyers in immigration cases. Judges need to speak at bar association gatherings such as this one about the importance of securing able legal representation for immigrants, whether that representation be paid or pro bono. Perhaps the Court should consider an advisory committee of members of the bar focused on immigrant representation. The recent creation by the Second Circuit of a committee of distinguished attorneys to handle grievances against lawyers for misconduct that are referred to it by the court, chaired by former judge Michael B. Mukasey, will no doubt increase oversight of defective immigrant counseling. We should explore ways to recognize immigrant pro bono work in awards ceremonies at the Courthouse and/or at circuit judicial conferences. As Robert Juceam has suggested, courts could sponsor programs and exhibitions that explore the immigrant experience and the law. More systematically, Chief Judge Dennis Jacobs of the United States Court of Appeals for the Second Circuit, has held meetings of our judges and BIA officials in an effort to foster communication and understanding of the immigration caseload challenges before us, and that dialogue should continue.

### Conclusion

As I conclude, I am reminded of the words of John Adams, who in 1761 wrote of the lawyer's responsibility. He asked:

to what greater object, to what greater character, can we aspire as lawyers  
 than  
 to assist the helpless and friendless in a worthy cause [?] I say there is none.  
 To  
 devote your skill and energy to the plight of another, without the promise of a  
 material reward for oneself, is what sets us apart as professionals.”

Tonight I have presented some of the problems and steps towards improvements to you, this audience of lawyers, because whether in fact justice can be secured depends so much on your vigorous involvement. I hope that we might come together periodically to assess the progress we have made and the challenges we still face in meeting the unmet needs of our immigrant poor. And I hope that you might enlist your colleagues to join with us in that effort. The City Bar, which has been a leader in promoting effective representation of immigrants, is the ideal organization to spearhead continuing activity.

I thank the City Bar and all of you for your great courtesy.