



Beyond Borders

The Case for Pro Bono Representation
in Immigration Proceedings

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WITH CONTRIBUTIONS FROM PHIL BARBER

The Access to Justice Series explores the access to justice gap in Colorado, discusses strides that have been made in closing this gap, and encourages innovation in this arena.

Working at the Rocky Mountain Immigrant Advocacy Network (RMIAN) for the last 14 years has given me the privilege of bearing witness to the very best of the human spirit. RMIAN is a nonprofit organization that provides free immigration legal services to individuals in civil immigration detention in Colorado, as well as to children throughout the state. I have witnessed families be uprooted from their homes, separated from their family members, and persecuted, yet possess the strength and resilience to endure detention,

navigate an unbelievably complicated and often nonsensical legal system, and fight for their very survival so that their children could have opportunities to thrive and grow.

But my job has also forced me to confront the fundamental unfairness and cruelty of our government's immigration system. While working at the detention center in Aurora, one of my first cases involved a mother of two young children who was in immigration detention after being referred to Immigration and Customs Enforcement (ICE) as a result of a traffic infraction. She was a survivor of domestic

violence, had assisted law enforcement in the prosecution of that case, and was eligible for a special humanitarian protection under federal immigration law called a U visa (which she would later go on to obtain). Yet she had been taken from her 9-month-old baby and 4-year-old child, stripped of her belongings, put in a jumpsuit, and jailed in the civil immigration detention center, with no resources to hire a private immigration attorney to fight for her rights.

The stark reality is that there is no right to court-appointed counsel in immigration removal (deportation) proceedings.¹ As a practical matter, this means that 6-year-old children are expected to represent themselves in their immigration proceedings, before an immigration judge, with opposing counsel from ICE on the other side. It means that individuals in civil immigration detention are expected to navigate a complex legal and procedural system, where their lives may be on the line, while detained in a prison with no access to documents to support their cases, no Internet, little or no access to family members, and, most likely, without counsel. If this sounds like imprisonment, you are correct. The detention process bears little resemblance to civil procedures. Studies show that nationally over 84% of immigrants in civil immigration detention are unrepresented by an attorney, creating vast and unjust disparities in court outcomes based on clients' income levels.²

Why is Representation in Immigration Proceedings so Important?

Immigration attorneys and advocates know that access to counsel may be the single most important determinant in an individual's ability to win his or her immigration case, and this perception is backed by empirical studies. A national study of access to counsel in immigration court found that "detained immigrants with counsel obtained a successful outcome in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts."³ Considering the complexity of immigration proceedings, the often life-and-death stakes of these hearings, and the challenges for clients in detention, these disparities are hardly surprising. For clients in

detention, these challenges include restricted movement in a locked facility, use of restraints, use of uniforms with color systems based on perceived risk, segregation and isolation, lack of contact with family and loved ones, difficult and expensive access to phones, no access to Internet, sudden transfers to isolated facilities, and emotional trauma. A study of 70 detained asylum seekers in the United States found that 86% suffered from depression, 77% from anxiety, and 50% from post-traumatic stress disorder; all symptoms were significantly correlated with length of detention.⁴

Children in immigration proceedings face equally complex challenges and are greatly disadvantaged by lack of legal representation. *The New York Times* reports that, based on data compiled by the Transactional Records Access Clearinghouse at Syracuse University, between October 2004 and June 2016 more than half the children who did not have lawyers were deported. Conversely, “only one in 10 children who had legal representation were sent back.”⁵ Many of these children are eligible for relief from deportation under existing federal immigration law, including protections such as asylum, Special Immigrant Juvenile Status,⁶ T visas for victims of human trafficking, and U visas for victims of certain other crimes. Yet without an attorney to protect their rights and best interests, many children are deported without the opportunity to assert these protections.

The State of Immigration Proceedings in Colorado

Although becoming more public, the world of immigration proceedings in Colorado remains a largely hidden one. Many in the legal community and beyond are surprised to learn that children appear without an attorney every month before the Denver Immigration Court, in cases involving what may be the most important legal decisions of their lives. One of RMIAN’s Children’s Program attorneys recently witnessed two brothers in removal proceedings before the Denver Immigration Court. The brothers sat together at respondents’ table holding hands, unrepresented, with opposing counsel from ICE across from them. The holding of hands by two children, that simple act of love and

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support, provided a heartbreaking contrast to the realities of this vast legal system: that children have to face an adversarial court system, in cases where their lives may be on the line, without an attorney by their sides. A recent study shows that only 44% of unaccompanied children before the Denver Immigration Court are represented.⁷

Just 15 minutes east of the Denver Immigration Court is the only other immigration court in Colorado, the Aurora Immigration Court, a court housed within an immigration detention center. On any given day, between 700 and 1,000 adults are detained in civil immigration detention in Aurora, in a private facility run by a private prison contractor, the GEO Group, Inc. Individuals being detained on civil immigration charges in Colorado include asylum-seekers, refugees, survivors of human trafficking and other crimes, and longtime lawful permanent

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OIL AND GAS LAWYER PHIL BARBER SHARES HIS EXPERIENCES WITH RMIAN

I became a lawyer to help people. I grew up in Pueblo, which had a history of immigrants coming to work in the steel mills starting in the early 1900s. More recently, I have been moved by news coverage of the plight of immigrants who die trying to escape from persecution and know there are not legal services available for them. Until about 2015, most of my cases were “deportation” (now removal) matters for detained and non-detained individuals from Mexico or Central America. Many had worked in the United States for years and had families, worked, paid taxes, and were integral community members. In 2012, I learned about RMIAN and began working with them. In the past two years, RMIAN has referred five asylum cases to me.

Two asylum-seekers were from Eritrea and were imprisoned underground for years based on religious beliefs or alleged disloyalty to the regime. Miraculously, both escaped and eventually made it to the United States, where they were granted asylum. Another client was a transgender woman from Mexico who was held and brutalized as a sex slave in Tijuana. She fled when her captors were too drunk to watch her. She asked for asylum at the border and was segregated from the other detainees for nearly a year until she received asylum. Other clients included an abused mother from Haiti and a Coptic Christian family of four from Egypt. In my cases through RMIAN, my work helped save lives. I have had very few outcomes in 35 years that come close to the profound effect that these cases have had on me. This work has enriched my practice and my life.

I cannot say enough positive things about the work RMIAN does for its clients and the support it provides for volunteer lawyers like me. My solo practice is in oil and gas law, and I know very little about immigration law. RMIAN sponsors seminars to train volunteers on the nuts and bolts of the immigration system. When I take a case, RMIAN supplies a detailed case memo, which provides cites to articles and cases that may support the client’s claim. RMIAN’s staff lawyers have always been available to provide sample pleadings and briefs, answer questions, and provide encouragement.

Immigration law is a world unto itself. The first challenge is to gain a bare understanding of the Immigration and Naturalization Act and immigration court procedures. Other challenges I have encountered along the way include:

1 Overcoming language barriers. My clients have come from Eritrea, Haiti, Mexico, and Guatemala. Finding someone who can provide translation services requires patience and working with their schedule. RMIAN has helped me locate interpreters, all of whom were willing to donate their time.

2 Finding the time. Asylum cases take time, easily 40–60 hours or more (experienced immigration law practitioners are likely more efficient). But I put aside other work and make the time because these are life and death cases.

3 Marshalling evidence. The majority of the evidence comes from the clients, who typically have little documentation to support claims of persecution and torture, and often fled their home countries with nothing more than the clothes on their backs. An abused mother I represented from Haiti lost all of her possessions while crossing a river, so we had to find a way to prove her identity as well as the elements that would allow a judge to grant her asylum. She could not communicate with her family, who had gone into hiding from her stalker. “Country conditions” experts are sometimes available to educate the court and testify about the history of a country and the persecution that people face. They help corroborate the client’s story, provide published background information to support the client’s asylum claims, and often work for a modest stipend or for free. These experts were especially helpful for my Eritrean clients, because so little is known about the conditions in that country.

These are emotional cases that keep me awake at night. Despite these challenges, I am passionate about encouraging other attorneys, particularly those outside the immigration bar, to take these cases. Everyone has his or her own reasons for doing this work. Mine are that I look around the world and remember that my clients likely fit the profile of the people I see on television who are fleeing from Northern Africa to Italy in rubber rafts. Asylum seekers also remind me that “there but for the grace of god go I” and let me use my legal skills to help them. All of these people are now lawfully in this country, are safe for the first time in years, and are putting their lives together here. This work and these outcomes are the reasons I went to law school.

residents. A national study of access to counsel in immigration court shows that between 2007 and 2012 only 9% of individuals detained in Aurora and before the Aurora Immigration Court had attorneys.⁸

Challenges Compound with Increased Enforcement

The inherent lack of counsel for individuals in immigration proceedings, and the resulting unequal access to justice, have been compounded in this era of increased immigration enforcement and detention. New directives announced in February 2017 by the Secretary of Homeland Security call for (1) the increased use of expedited removal to the interior of the U.S., subjecting individuals to summary deportations from immigration officers, as opposed to immigration court hearings; (2) an expansion of the use of immigration detention; (3) the reduction of the use of parole or release, even for asylum-seekers and other vulnerable individuals; (4) the vast expansion of immigration enforcement priorities to essentially everyone who is undocumented in the United States; and (5) the increased use of the 287(g) program to deputize local law enforcement to enforce federal immigration law.⁹ These increased enforcement actions and this stripping away of due process protections has created an even greater need for access to counsel for individuals.

Pro Bono Efforts Are Essential

In response to the evident need for representation and the crisis facing communities across the United States, many local governments, including New York City and Los Angeles, are examining ways to provide representation for individuals facing deportation.¹⁰ Denver Mayor Michael Hancock ordered the formation of a working group to explore and implement an Immigrant Legal Defense Fund.¹¹ However, even with these initiatives, pro bono participation and work by volunteer lawyers will continue to be essential to protect individuals in removal (deportation) proceedings.

Marshalling resources, and at the very least providing pro bono attorneys for low-income children and individuals in immigration deten-

tion, is fundamental to ensuring fairness and due process in the immigration court system. These protections are vital to creating a more level playing field in light of the overwhelming challenges outlined above.

Yet while pro bono work is essential, it will never be the whole picture for access to counsel. The volunteer work of the legal community must be matched by the will to change the system, in the way that *Gideon* changed the playing field for indigent criminal defendants.¹² Until government-funded counsel exists for those facing deportation and unable to hire private attorneys, pro bono work is necessary to upholding the basic tenets of fairness central to the U.S. legal system. The threat that immigrants and immigrant communities face—and really, all of us who care about treating people fairly—is historically unprecedented. If there was ever a moment for the legal community to step up for pro bono immigration representation, it is now.

How You Can Help

In addition to the direct legal services and social services provided by its staff members, RMIAN

relies on a vast network of pro bono attorneys to work for access to justice for children and detained adults in immigration proceedings. RMIAN screens cases, conducts preliminary research, and provides a referral memo, training, mentoring, and professional liability insurance to all its volunteer lawyers. If you are interested in getting involved, please contact RMIAN Executive Director Mekela Goehring at mgoehring@rmian.org or RMIAN Pro Bono Coordinator Jessica Burnett at jburnett@rmian.org. Additional information is available at www.rmian.org. 

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NOTES

1. See Immigration and Nationality Act § 240(b)(4)(A) (“the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings”). One exception to this general principle is the appointment of counsel for individuals in immigration detention found to be incompetent to represent themselves, available in the Ninth Circuit through *Franco-Gonzales v. Holder*, 767 F.Supp.2d 1034 (C.D.Cal. 2010), and in limited immigration courts nationwide through the National Qualified Representative Program, www.vera.org/projects/national-qualified-representative-program.
2. Eagly and Shafer, “A National Study of Access to Counsel in Immigration Court,” 164 *U. Pa. L.Rev.* 1 (Dec. 2015).
3. *Id.*
4. Keller et al., “Mental Health of Detained Asylum Seekers,” 362 *The Lancet* (Nov. 2003).
5. Santos, “It’s Children Against Federal Lawyers in Immigration Court,” *The New York Times* (Aug. 20, 2016), www.nytimes.com/2016/08/21/us/in-immigration-court-children-must-serve-as-their-own-lawyers.html.
6. For more information about special immigrant juvenile status, see Vigil and

- Johnson, “State Court Orders Supporting Special Immigrant Juvenile Status,” 45 *Colorado Lawyer* 45 (June 2016).
7. TRAC Immigration, Representation for Unaccompanied Children in Immigration Court, <http://trac.syr.edu/immigration/reports/371>.
8. Eagly and Shafer, *supra* note 2 at 38.
9. See Executive Orders issued on January 25, 2017, “Border Security and Immigration Enforcement Improvements” and “Enhancing Public Safety in the Interior of the United States.” See also implementing memo from February 20, 2017 from Department of Homeland Security Secretary John Kelly, “Enforcement of the Immigration Laws to Serve the National Interest.”
10. See California Coalition for Universal Representation, “California’s Due Process Crisis: Access to Legal Counsel for Detained Immigrants” (June 2016), www.niic.org/wp-content/uploads/2016/06/access-to-counsel-Calif-coalition-report-2016-06.pdf.
11. “Mayor Hancock Signs Public Safety Enforcement Priorities Act” (Aug. 31, 2017), www.denvergov.org/content/denvergov/en/mayors-office/newsroom/2017/mayor-hancock-signs-public-safety-enforcement-priorities-act-is.html.
12. *Gideon v. Wainwright*, 372 U.S. 335 (1963).