



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #8

REQUESTED ACTION: Approval of a resolution offered by the Committee on Immigration Representation urging the State Legislature to enact a right to counsel in immigration proceedings.

In 2012, the Committee on Immigration Representation issued a report, approved by the House in June 2012, proposing minimum standards for the provision of legal representation in immigration proceedings and recommending programs to improve immigration justice. Since the issuance of that report, the committee has worked to increase access to quality legal representation. Presently, with federal immigration policy promoting more widespread enforcement and restricted access to legal benefits, the committee has revisited access to counsel for immigrants.

The attached report provides an assessment of access to counsel in New York immigration proceedings, noting challenges posed by political and geographic variations, including geographic distances, language barriers, political fears, budgeting, and long wait lists. The report notes that having counsel significantly improves an applicant's prospects for success in proceedings, and urges legislation to provide a right to counsel.

The committee notes that New York City created a right to counsel in housing court for indigent and low-income residents, and suggests that the circumstances that led to the creation of a right to counsel in those matters are similar to immigration proceedings. The committee notes that since a right to counsel in housing court was developed in 2017, there has been a 24% decrease in evictions.

This report was posted for comment in April 2019. Attached is a memorandum from the Committee on Mandated Representation indicating its support for the report. Also attached is a memorandum from the Committee on Legal Aid supporting the report, but indicating that it should recommend that any funds allocated by the Legislature should be subject to the issuance of a Request for Proposals and competitive bidding process.

The report will be presented at the June 15 meeting by committee co-chairs Camille Mackler and Prof. Sarah F. Rogerson.

New York State Bar Association
Committee on Immigration Representation
Proposed Resolution

WHEREAS, the New York State Bar Association (NYSBA) has long supported and encouraged equal access to justice and to our courts of law for all, including immigrants residing in New York State; and

WHEREAS, in the past, NYSBA has actively promoted and participated in efforts to provide immigrants in New York with access to justice by promoting access to legal representation through the establishment of a committee specifically for that purpose, as well as through partnerships with Governor Cuomo's Liberty Defense Project; and

WHEREAS, a national study of immigration court data published by the American Immigration Council shows the great disparities in outcomes between cases that have legal representation and those that don't, including a 78% success rate for never-detained represented immigrants compared to 15% for their never-detained non-represented counterparts; and

WHEREAS, a similar study done through the evaluation of the first years of the New York Immigrant Family Unity Project (NYIFUP), the pioneering public defender system that provides universal representation to detained immigrants appearing before the Varick Street immigration court in New York City, shows that detained immigrants have a 48% chance of success with a NYIFUP attorney, compared to 4% before NYIFUP was created; and

WHEREAS, the American Bar Association has called for both a federally funded system of appointed counsel for indigent respondents in removal proceedings as well as for states and localities to provide such counsel until the federal government does so; and

WHEREAS, recent policies and immigration enforcement trends have greatly increased removal risks to immigrant New Yorkers and our immigration courts backlogs have reached historical highs; and

WHEREAS, NYSBA believes that true access to justice includes ensuring due process is served and principles of fundamental of fairness are observed in any judicial setting;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby urges the New York State Governor and the New York State Legislature to enact a right to counsel in immigration proceedings as a statutory requirement under New York State law.

The Need for Access to Counsel in Immigration Proceedings in New York

Prepared by the New York State Bar Association's
Special Committee on Immigration Representation¹

EXECUTIVE SUMMARY

In 2012 the New York State Bar Association's Special Committee on Immigration Representation issued a report detailing its findings regarding access to counsel for immigrants in New York. The report detailed the monumental task the new Committee faced as they sought to increase rates of representation for some of New York's most vulnerable communities. In 2019, as immigration policies have continued to focus on enforcement-heavy mechanisms and as worrying limitations on due process have emerged, the Committee has chosen to re-visits the report and its initial assessments to ensure its work is responsive to today's needs.

Based on an initial review of publicly available data as well as field research conducted by some Committee members it has become apparent that, despite the progress made by the Committee, new policies have continued to impede immigrants' access to counsel and, by extension, to justice. In addition, New York State's diverse geography, its uneven distribution of service providers, and concentrated funding streams pose significant challenges for immigration attorneys throughout the state, as well as the communities that seek to access their services.

Notwithstanding these obstacles, recent studies have highlighted the impact of access to counsel, particularly in immigration court proceedings. In fact, a national study showed that having a lawyer dramatically increases not just an individual's chance of success in immigration applications, but also the likelihood of them appearing in immigration court or applying for some kind of protection from deportation. A New York-specific study of the impact of representation in detained court also showed significantly improved chances of applying for relief, winning protections from deportation, and earlier releases from custody. Taken together, these findings show that one way in which New York can meaningfully support its immigrant communities is by creating a statutory right to counsel in immigration proceedings.

The Right to Counsel is not a new concept in New York. In fact, last year New York City became the first jurisdiction to pass a right to counsel in housing court. Preliminary results show that the impact has been overwhelmingly positive. At the

¹ This report was prepared by the following members of the Special Committee: Camille Mackler (co-chair), Sarah Rogerson (co-chair), Stephen Yale-Loehr, Hasan Shafiqullah, Jojo Annobil, Karen Murtagh, and staff liaison Thomas Richards. Special thanks to Elyssa Klein for her contributions.

same time, the idea of providing universal representation to immigrants has also become a growing concept among advocates and attorneys. In order to put its own work in context, the Committee offers in this report a framework by which universal access to representation can be broadly construed, with recommendations on how a publicly funded right to counsel would be incorporated.

INTRODUCTION

In May of 2011 the New York State Bar Association formed a special committee to prepare a “report and recommendations to improve the quality and availability of legal representation and to ensure that immigrants, especially those of low income, have access to competent immigration assistance throughout New York State.”² The Special Committee’s report, released in 2012, relied heavily on a then-recent study by the Katzmann Study Group on Immigration Representation, which “found that having legal representation is one of the two most important variables in obtaining a successful outcome in an immigration proceeding.”³ Unfortunately, the Special Committee’s report further concluded that there lacked sufficient specialized, knowledgeable attorneys throughout New York State to address immigration legal needs in the state.⁴ This finding mirrored the Katzmann Study Group’s conclusion that there is a crisis of representation, both in quality and quantity, for New York’s immigrant communities.⁵

In the intervening years, the Special Committee has worked to increase access to quality immigration legal education and *pro bono* legal engagement on behalf of indigent and low-income immigrant New Yorkers.⁶ This task, which the Special Committee initially described as “Sisyphean,”⁷ has only become harder as fluctuating federal immigration policy has trended towards more widespread enforcement while simultaneously restricting access to legal benefits.⁸ In 2019, as the Special Committee examines its work and impact amid a White House administration that has made immigration enforcement a centerpiece of its policy platforms, we believe the time is right to revisit the state of access to counsel for New York’s immigrants and the impact it has on our profession.

² N.Y. State Bar Ass’n, Report of the Special Committee on Immigration Representation 3 (2012), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26696>.

³ *Id.* at 2 (citing The New York Immigration Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings New York Immigrant Representation Study Report: Part 1*, 33 *Cardozo L. Rev.* 357, 363 (2011)).

⁴ *Id.*

⁵ *See id.* at 2; The New York Immigration Representation Study, *supra* note 3, at 358.

⁶ *See* N.Y. State Bar Ass’n, *supra* note 2, at 46-49.

⁷ *Id.* at 49.

⁸ Muzzaffar Christi et al., *Even as Congress Remains on Sidelines, the Trump Administration Slows Legal Immigration*, Migration Pol’y Inst. (Mar. 22, 2018), <https://www.migrationpolicy.org/article/even-congress-remains-sidelines-trump-administration-slows-legal-immigration>.

ASSESSMENT OF CURRENT ACCESS TO COUNSEL

Immigrant New Yorkers remain extremely vulnerable to increasingly anti-immigrant policies coming out of Washington, even as enforcement increases to unprecedented levels. In the seven years since the Special Committee first released its assessment of its Sisyphean task of increasing rates of representation in immigration proceedings, the backlog in New York's immigration courts has more than doubled, from just over 47,000 in 2012 to over 110,000 in the first quarter of 2019.⁹ At the same time, Immigration and Customs Enforcement arrests and deportations in New York have far surpassed the national averages, with a 35% jump in arrests from 2017 to 2018, compared to 11% nationally, and a 29% increase in deportations, more than double the 13% national increase.¹⁰ Many of these arrests have come while New Yorkers sought access to justice in other areas. The Immigrant Defense Project (IDP) reports that ICE conducted at least 178 arrests in New York's courthouses in 2018, compared to 159 in 2017 and 11 in 2016.¹¹

New York's political and geographic variations create significant challenges in providing immigrants access to justice and access to counsel, and low-cost legal services are particularly difficult to expand. New York is home to more than 4 million immigrants,¹² of which nearly an estimated 1 million lack lawful status¹³ and are vulnerable to immigration enforcement. While little empirical data exists to give an objective assessment of the immigration legal services field in New York, a 2018 report by the New York Immigration Coalition (NYIC) and the Immigrant Advocates Response Collaborative (I-ARC) found that geographic distances, political fears, financial considerations, long wait lists, and language barriers were the top reasons why immigrants could not access legal representation in New York State.¹⁴ In the same report, non-profit organizations reported that lack of flexible funding, lack of funding for supervisory positions, lack of physical space, and constant changes in immigration law and policy requiring rapid response efforts constituted major

⁹ *Immigration Court Backlog Tool*, TRAC Immigr., https://trac.syr.edu/phptools/immigration/court_backlog/ (follow "New York" hyperlink under "State") (last updated Feb. 2019).

¹⁰ Beth Fertig, *ICE Arrests and Deportations on the Rise in New York*, Gothamist (Dec. 14, 2018), http://gothamist.com/2018/12/14/ice_deportations_surge_new_york.php.

¹¹ Immigration Defense Project, *The Courthouse Trap: How ICE Operations Impacted New York's Courts in 2018*, at 6, <https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf>

¹² *Immigrants and the Economy in New York*, New Am. Econ., <https://www.newamericaneconomy.org/locations/new-york/> (last visited Mar. 23, 2019).

¹³ *Profile of Unauthorized Population: New York*, Migration Pol'y Inst., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/NY> (last visited Mar. 23, 2019).

¹⁴ N.Y. Immigration Coalition & Immigration Advocates Response Collaborative, *No Safe Harbor: Challenges in Obtaining Immigration Legal Services in New York State 6* (2018 Update), www.nyic.org/nosafeharbor.

obstacles to expanding access to legal help for indigent and low-income immigrant New Yorkers.¹⁵

Lack of supervisory positions is a particular problem, as it hinders organizations' and firms' abilities to hire more junior attorneys, to take on more complex legal cases, and also prevents the expansion of pro bono engagement because there are insufficient numbers of experienced supervising or mentoring attorneys.¹⁶ In 2018, 75% of non-profits reported requiring their supervisors to carry full or nearly full caseloads on top of their supervisory responsibilities.¹⁷ Only 58% of non-profits handled appeals of immigration court cases.¹⁸

New York's rural areas suffer particularly from lack of access to competent immigration representation. In 2018, Committee Co-Chair Camille Mackler toured New York's various regions to determine what challenges they face in accessing immigration representation.

Long Island

The main challenges specific to Long Island are (1) difficulties in traveling to meetings with legal service providers, (2) difficulties in finding linguistically competent staff willing to work on Long Island, (3) lack of funding for certain desperately needed services, and (4) lack of meaningful collaborations between the private and non-profit bars.

Travel: Services on Long Island are unevenly distributed and more prevalent closer to New York City, leaving areas such as Eastern Suffolk County with very few immigration legal providers. While community members use the Long Island Rail Road to travel to court dates and immigration appointments in New York City, in the absence of driver's licenses for undocumented immigrants in New York they must rely on buses, taxis, and unlicensed car services dubbed "rideros" to access legal appointments and other critical services. This can be costly, leading to a reluctance in seeking out help, and has also created an opportunity for unscrupulous individuals who take advantage by charging higher rates than are warranted. Immigration attorneys have organized screening and other legal events in the more under-resourced areas, but the distances present problems for follow-up after initial intakes.

Linguistically Competent Staff: Like other parts of the state, immigration providers on Long Island have noted the need for case workers, social workers, and mental health providers to support legal services. This is particularly crucial as there have historically been system-wide discrimination issue on Long Island that have prevented communities of color from enrolling in school or accessing necessary

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 9, 41.

¹⁷ *Id.* at 44.

¹⁸ *Id.* at 6.

social and law enforcement services. A secondary challenge is recruiting linguistically competent staff, both for legal and non-legal positions, who are willing to live and work on Long Island. Many of the local law and social service students do not speak Spanish, which represents the biggest language need, and attracting candidates from outside Long Island is difficult. Several Long Island groups noted that their funding is tied to yearly renewals, such as funds provided by New York State, and that this also hampers their recruitment because candidates are unwilling to settle on Long Island with no guarantee of a long-term position.

Lack of Funding for Needed Services: Much of the funding for providers on Long Island is siloed to address specific needs, such as unaccompanied children, which prevents providers from helping individuals with other cases. Notably, lack of funding for both citizenship and family-based green card petitions that may flow from a community member naturalizing were both raised as specific gaps in provision for the region. Many providers with less-restrictive funding focus on deportation defense and other urgent-type cases, leaving those who could legalize their status and avoid the risk of enforcement without access to resources through which to do so. Those providers who offer those services typically charge fees. In addition, clients, whether receiving free or low-cost services, still struggle to pay onerous immigration filing fees.

Lack of Meaningful Collaboration with Private Immigration Bar: With the exception of a handful of private attorneys who work closely with local non-profits, there is no meaningful collaboration between the non-profit and private immigration bars on Long Island. This is due in part to a lack of resources. Many private non-immigration attorneys express interest in doing pro bono immigration work, but non-profits lack the capacity to mentor them.

New York City

While relatively well resourced compared to the rest of the State, New York City poses its own unique sets of challenges. The main challenges specific to New York City are (1) uneven distribution of legal services, (2) restrictive funding contracts, and (3) geographic limits.

Uneven Distribution of Legal Services: The vast majority of legal service providers are concentrated in Manhattan, with some in Brooklyn and Queens and very few in the Bronx and Staten Island. As a result, many immigrants must travel long distances to secure legal services, which often requires a day off from work, to meet with a lawyer. Many funding sources have also historically favored larger providers, who tend to be located in Manhattan, at the expense of small, community-focused providers in the other-boroughs.

Restrictive Funding Contracts: The main sources of funding for New York City-based immigration providers are funds provided by New York City itself. While these investments represent some of the largest municipal investments in immigration legal services nationwide, the contract requirements either silo the type of cases

that can qualify for funds or limit the number of cases that can be opened each year. The silo-ing of funding effectively forces lawyers to choose which cases to take on based on funding streams rather than the merits of a particular case. The limits on how many times a case can be re-enrolled into a grant program from year to year limits the number of cases organizations will take on because of the risk that the longer a case takes, the less they will get paid.

Geographic Limits: Because most organizations rely primarily on city funding, they are also limited to representing individuals who live or work within the five boroughs of New York City and cannot help grow the field of immigration law by exporting the resources and knowledge developed within the City.

Capital Region

The main challenges specific to the Capital Region are (1) difficulties in traveling to legal service providers and lack of providers for the region overall, especially for regions north of Albany, (2) lack of access to interpreters, (3) the Immigration Court's location in Buffalo, NY and detained court in Batavia, NY, and (4) the increase in detention at the Albany County jail.

Travel and Geographic Disparity: Relatively few legal service providers serve the Capital Region. It can be difficult to access services for immigrants, most of whom cannot obtain a driver's license. The lack of public transit infrastructure outside the city of Albany itself means that many must risk driving without a license, further increasing their risk of arrest by local law enforcement departments that cooperate with ICE. Moreover, while the lack of legal services organizations providing immigration legal services necessarily means that community members will need to travel to wherever they can obtain services, it also makes growing the field more difficult as local law schools often cannot find local placements for graduates interested in taking on the work.

Lack of Access to Interpreters: The Capital Region is extremely diverse, with immigrant communities from South and Central America, Asia, Africa, and Eastern Europe. As a result, it is near-impossible for providers to competently represent individuals without access to robust interpretation services. However, existing services are often high-priced and geared towards medical or other professions that cannot adapt easily to the immigration legal field, while student-led interpretation services can only help a few cases at a time, subject to student availability.

The Immigration Courts' Geographic Inaccessibility: Cases in the Capital Region depend on the immigration offices in Buffalo, NY. While USCIS and ICE have sub-offices in Albany, the non-detained immigration court is in Buffalo, NY and the detained court in Batavia, NY. This means that community members in deportation proceedings must not only drive approximately 4 hours to Buffalo for all appearances, they must also find a lawyer willing to do so. Individuals arrested locally may be held for a few days in the Albany County Jail but are typically transferred to Batavia, far from their families and legal counsel.

Increase in Detention at the Albany County Jail: Over the last year, the need for detained representation at the Albany County Jail increased exponentially. Amid the border crisis over the summer of 2018, ICE transferred large numbers of recently-arrived asylum seekers to the Albany County Jail to make more bed space at the U.S.-Mexico border. Because of the procedural posture of their cases, which effectively treated these individuals as if they were still at the Southern Border seeking admission to the U.S., none of the nearly 400 individuals transferred between July and December, 2018 qualified for funded services in the region. As a result, local non-profits to launch an unprecedented legal rapid response effort that was staffed by volunteers from all over New York State and beyond. This effort, the Detention Outreach Project (“DOP”), assisted all needing counsel at the Albany County Jail in preparing for their Credible Fear Interviews (“CFIs”) as well as connecting them to other help. Attorneys leading the DOP were able to address medical needs, reunite separated family members, and, once an individual had passed their CFI, ensure they were connected to state-funded lawyers to represent them in immigration court. Once they passed their CFIs, detained migrants at the Albany County Jail were taken on for representation by the state-funded New York Immigrant Family Unity Project (NYIFUP), which provides free lawyers to detained immigrants who cannot otherwise afford an attorney. The impact of this crisis has radically changed how immigration legal services are viewed in the Capital Region and will likely continue to alter its landscape; all while encountering and exposing new challenges, into 2019.

Western & Central New York

The main challenges specific to Western and Central New York are (1) a significant lack of immigration lawyers, (2) the isolation of community members, (3) a general fear of consulting immigration attorneys, and (4) the burden on community-based organizations.

Significant Lack of Attorneys: There are only 12 legal services organizations serving Western and Central New York, which span about 200 miles (from Buffalo to Utica) by 100 miles (from the Canadian border to Pennsylvania). Most of these organizations have only one or two attorneys working on immigration issues on staff, and many rely on refugee resettlement funding to support their overall work, even as that funding has undergone significant cuts because of the federal reduction in refugee admission numbers in recent years. As a result, non-profit attorneys are frequently at capacity and are forced to turn away clients or place them on months-long waiting lists. In 2017, New York State government created the Liberty Defense Project (LDP) and gave out \$10 million in grants for immigration legal services throughout New York. Before the LDP was created, there were no attorneys handling deportation cases in Central New York, and that attorney’s docket has rapidly filled up. To make matters worse, an Equal Justice Works AmeriCorps Legal Fellowship program created to enhance legal representation in underserved areas was not renewed after its first year, meaning that approximately 100 immigrants became at risk of losing their attorney mid-way through their cases. Private

immigration attorneys in this region are equally scarce, and in both the non-profit and private sector many attorneys do not speak Spanish. Community members and advocates alike describe hours of calling from organization to organization trying to place a single case, or getting screened at community clinics but being unable to obtain legal help for follow-up.

Isolation of Community Members: Many immigrants in Western and Central New York are geographically isolated, as they often live and work on remote farmland and cannot easily take a day off to drive, without a driver's license, into an urban area to meet with a lawyer. Non-profit attorneys and community advocates often have to drive hours to meet with a single client, or to bring a client to a law office or government appointment. In many of these areas, cell service and other technology are non-existent, making it hard to communicate with those in need of legal help.

Fear of Consulting an Attorney: The scarcity of immigration lawyers has also led to unscrupulous individuals taking advantage of immigrant communities' vulnerabilities to enforcement and anti-immigrant policies. This, in turn, leads to a general distrust of lawyers on the part of community members. It is a prevailing belief among community members that lawyers, while necessary to winning legal status in the United States, will likely charge money for no work in return. In some instances, individuals had been charged tens of thousands of dollars, working through debilitating illnesses to be able to afford legal representation, with no good results. Isolation and a lack of connection to appropriate resources means that community members frequently do not report these providers to law enforcement, allowing them to continue preying on others with impunity.

Burden on Community-Based Organizations: In the absence of sufficient legal services, community-based organizations (CBOs) have stepped up to act as a conduit between community members and lawyers. Staffs of CBOs often have enough training and experience to recognize facts that may have immigration consequences, and spend enormous time transporting community members, helping them gather documents, and calling around to organizations hoping to persuade them to take on a specific case. Most CBOs, however, are not funded to do this work and take it on in addition to their regular obligations. Those who do receive funding receive it mainly from government grants but often have difficulties in responding to the weighty reporting and administrative requirements.

North Country

Though there is a significant immigrant population working in agriculture, construction, hospitality, and other labor-intensive industries throughout the North Country, there are no legal service providers in the region and community members are often isolated and have difficulty protecting their legal rights. When community members need an immigration lawyer, they must travel to Albany or Syracuse and face the same challenges in those regions as those enumerated above.

Future Assessments

To increase our awareness and understanding of immigration legal needs of immigrants living in rural New York, the Special Committee co-chairs, along with colleagues in the pro bono and other committees, hope to embark on a week-long trip visiting agricultural and dairy farms along the New York-Canadian border. The visits will include story collection, know your rights presentations, and one-on-one legal screenings that will hopefully lead to a more precise assessment of the legal needs of some of our state's most vulnerable communities.

NEED TO ACCESS LEGAL REPRESENTATION IN IMMIGRATION PROCEEDINGS

Despite the proven impact of legal representation on case outcomes and the quasi-criminal nature of immigration proceedings, courts have overwhelmingly found that federal law does not provide a guaranteed right to counsel in immigration proceedings.¹⁹ This is all the more dramatic because, as one judge put it, immigration court proceedings are akin to “death penalty cases heard in traffic court settings.”²⁰ In this context, where the government is always represented by a trained attorney but the immigrant is far less likely to have legal counsel, increasing access to representation is imperative to ensure due process and access to justice.

Nationally, a study by the American Immigration Council, which studied data on case outcomes obtained from the Executive Office for Immigration Review, showed that having an attorney made it more likely for someone to:

- Be released from custody: 44% of represented immigrants were given a custody hearing, compared to 18% of unrepresented immigrants, and 44% of represented immigrants were actually released from custody, compared to 11% of unrepresented immigrants.²¹
- Appear in immigration court: “Ninety percent of unrepresented immigrants with removal²² orders were removed in absentia versus only 29 percent of

¹⁹ Mills et al., *supra* note 27, at 366-67.

²⁰ Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html>.

²¹ Ingrid Eagly & Steven Shafer, Am. Immigration Council, *Access to Counsel in Immigration Court* 17 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

²² In 1996 the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) merged the concepts of exclusion, whereby an individual is not permitted to lawfully enter the United States, and deportation, where an individual is physically removed from the United States after having been previously admitted. The terms were merged into the concept of “removal”, which is the legally accurate word for both exclusion and deportation. For sake of accuracy, this report will use the word “removal” to discuss issues typically addressed as “deportation” in layman’s terms.

their represented counterparts with removal orders.”²³

- Defend themselves against removal charges: 21% of represented detained immigrants fought off removal either by filing successful applications for relief or successfully challenging the proceedings in the first instance, compared to 2% of unrepresented detained immigrants, and 60% of never-detained represented immigrants did the same versus 17% of never-detained unrepresented immigrants.²⁴
- Win their cases: Of those that filed applications for relief from removal, 32% of detained immigrants won their case, compared to 3% of unrepresented detained immigrants, and 78% of never-detained represented immigrants won their case versus 15% of never-detained represented immigrants.²⁵

In New York, the first round of assessment of the New York Immigrant Family Unity Project (NYIFUP), the pioneering public defender model for detained immigrants begun in New York City in 2013, shows that access to lawyers has resulted in a 48% success rate for detained New Yorkers, compared to 4% pre-NYIFUP.²⁶ This represents a 1,100% increase in a detained individual’s chances of winning their cases before an immigration judge.²⁷

Access to counsel is inexorably linked to access to justice in the immigration context because of the high stakes involved. A bad decision in immigration court can lead to a death sentence in the home country²⁸ or permanent exile from family and community in the United States.²⁹ Nonetheless, immigration judges are under mounting pressures that compromise their independence, including performance reviews directly tied to case-completion quotas and re-interpretations of immigration law by the Department of Justice that remove the little discretion they once enjoyed, which has led to an exodus from their ranks.³⁰ At the same time, immigrants facing deportation can be indefinitely detained in prison-type settings under civil, administrative authority only, with no constitutional protections

²³ Eagly & Shafer, *supra* note 20, at 18.

²⁴ *Id.* at 19.

²⁵ *Id.* at 20.

²⁶ Jennifer Stave et al., Vera Inst. of Justice, Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity 5-6 (2017), <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation>.

²⁷ *Id.* at 6.

²⁸ John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, “*Death is Different*” and a Refugee’s Right to Counsel, 42 Cornell Int’l L.J. 361, 362 (2009).

²⁹ Marks, *supra* note 19.

³⁰ See Hamed Aleaziz, *Being An Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BuzzFeed News (Feb. 13, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump>.

available in the criminal context.³¹ In New York, this often means being detained in county jails in New Jersey or in a federally-run facility outside of Buffalo.³² However, increasingly, ICE has begun opening detention centers in remote locations across the country.³³ Since ICE has full authority to transfer any detainees outside New York, the stakes are correspondingly higher to ensure that New Yorkers do not end up in ICE detention in the first place. This makes access to counsel that much more of an imperative.

As policies have evolved and immigration reform remains elusive, the need has only continued to grow since the Special Committee first issued its report and recommendations in 2012. As New York State continues to respond to Washington's recent immigration policies by countering with pro-immigrant solutions,³⁴ a state-wide statutory right to immigration counsel is the necessary next step.

CIVIL RIGHT TO COUNSEL IN NEW YORK

Though there is no nationally recognized right to counsel in civil cases, many states and jurisdictions have carved out instances in which the interests at stake necessitate a right to counsel for principles of fundamental fairness to be met. For example, New York courts have found that in both family court and appeals of family court decisions there is a right to counsel for minors, for respondents in child protection cases, for legal custodians in child custody and guardianship cases, for certain petitioners seeking visitation with children, in domestic violence cases generally, and for individuals accused of being in contempt of family court.³⁵ Additionally, courts may assign counsel in proceedings to commit mentally ill individuals, drug addicts, children to state agencies where the parents are not competent, in habeas cases, and in civil actions generally.³⁶

³¹ See Immigrant Advocates Response Collective, *Behind Bars in the Empire State: An Assessment of the Immigration Detention of New Yorkers 6-7* (2019), <https://d1jiktx90t87hr.cloudfront.net/323/wp-content/uploads/sites/2/2019/03/State-of-Immigration-Detention-of-NYers-v5.pdf>.

³² *Id.* at 8.

³³ See Noah Lanard, *ICE Is Sending Hundreds of Asylum-Seekers to a Private Prison in Mississippi*, Mother Jones (Feb. 15, 2019), <https://www.motherjones.com/politics/2019/02/ice-is-sending-hundreds-of-asylum-seekers-to-a-private-prison-in-mississippi/>.

³⁴ Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces New Measures to Assist Immigrants and Protect Them from ICE (Mar. 14, 2019), <https://www.governor.ny.gov/news/governor-cuomo-announces-new-measures-assist-immigrants-and-protect-them-ice>.

³⁵ Donald Kerwin, Migration Pol'y Inst., *Revisiting the Need for Appointed Counsel 11-12* (Apr. 2005), <https://www.migrationpolicy.org/research/revisiting-need-appointed-counsel>.

³⁶ *Id.* at 12.

In 2017, New York City became the first jurisdiction to create a right to counsel in housing court for indigent and low-income New Yorkers.³⁷ The law requires New York City to provide an attorney to all city residents who make less than 200% of the federal poverty guidelines.³⁸

The circumstances that led to the creation of the right to counsel in housing court are strikingly similar to proceedings in immigration courts:

- Like in immigration court, there is an imbalance between the party that holds power, in housing the landlord and in immigration the Government, versus the respondent, in housing the tenant and in immigration the immigrant themselves.³⁹ Before the right to counsel legislation, 90% of landlords in New York City's housing courts were represented, compared to most tenants who did not have access to attorneys.⁴⁰
- Like in immigration court, the stakes for Respondents in housing court are extraordinarily high. Most tenants facing eviction are low-income and losing their home leads directly to homelessness for themselves and their families.⁴¹
- Providing attorneys in housing court has restored fairness to court proceedings by providing a check on landlords' abilities to profit from the imbalance of power and ensuring due process and equal protections of the law apply to all in the court system.⁴²
- Providing a right to counsel actually saves money, by protecting individuals from homelessness and the associated costs for social services the city must shoulder once someone loses their home and enters the homeless system.⁴³ Similarly in immigration court, if a household loses a primary breadwinner or primary caregiver to prolonged detention and/or deportation, the city or State will incur higher costs in providing social assistance to the family members left behind, at the same time as they lose the revenue of a taxpayer and possibly business and/or home owner.

³⁷ Kriston Capps, *New York City Guarantees a Lawyer to Every Resident Facing Eviction*, CityLab (Aug. 14, 2017), <https://www.citylab.com/equity/2017/08/nyc-ensures-eviction-lawyer-for-every-tenant/536508/>.

³⁸ *Id.*

³⁹ See Right to Counsel NYC Coalition, *Housing Justice: New Yorkers Should Have a Right to Counsel in Eviction Proceedings 1* (2016), <https://www.righttocounselnyc.org/resources> (follow hyperlink "FACT SHEET: See the facts about why we need Right to Counsel").

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *id.* at 1-2.

⁴³ *Id.* at 2.

Though still early in the five-year implementation process, the impact of providing a right to counsel is already obvious. In 2018, 33,000 households received legal assistance through city-funded services.⁴⁴ This led to a 24% decrease in evictions since 2014, an increase in representation rates from 10% pre-right to counsel to 27% in the first year, an increase from 200 to 500 non-profit lawyers working with low-income tenants, and a 10% decrease in housing court proceedings overall.⁴⁵ Advocate are already working on expanding the right to counsel to individuals making less than 400% of the federal poverty line, to appellate and additional kinds of housing-related proceedings, and to fund community based groups for outreach and know your rights presentation.⁴⁶

UNIVERSAL REPRESENTATION IN IMMIGRATION PROCEEDINGS

As policies have evolved and immigration reform remains elusive, immigrant's needs for legal representation has only continued to grow since the Special Committee first issued its report and recommendations in 2012. At the same time, the idea of universal representation of immigrants has begun to take hold in New York State, which leads the country in funding for immigration legal services and piloted the first immigrant public defender model for detained immigrants through the NYIFUP program.

While there is no widely accepted agreement on the definition of universal representation for immigrants, this report has focused by and large on the need to provide representation to individuals in immigration court proceedings and facing possible removal from the United States. For this section, the Special Committee examines what a broader framework of universal representation could look like for anyone interacting with our immigration system and offers the following guidance for consideration in any discussion on this topic:

A Universal Representation System Should Account for Ability to Pay

When discussing an aspirational system, a universal representation framework should examine the entirety of the immigration system, not just immigration court proceedings. In other words, this framework applies not just to those needing representation to defend themselves from deportation charges, but also examines the need for access to legal assistance when affirmatively applying for immigration benefits. These services are equivalent to early intervention services, allowing individuals to access immigration benefits they may legally be entitled to and that

⁴⁴ Office of Civil Justice, N.Y.C. Human Res. Admin., *Universal Access to Legal Services: A Report on Year One of Implementation in New York City 1* (2018), <https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ-UA-2018-Report.pdf>.

⁴⁵ Right to Counsel NYC Coalition, *RTC 2.0: Achieving the Full Vision of Right to Counsel for Tenants*, https://d3n8a8pro7vhmx.cloudfront.net/righttocounselnyc/pages/23/attachments/original/1536702507/RTC_2.0_One_Pager-2.pdf?1536702507 (last visited Mar. 26, 2019).

⁴⁶ *Id.*

would protect them from being placed into deportation proceedings in the first place.

Under such a framework, it is important to note that not all individuals in the above categories will require free or low cost legal services. Rather, to maximize the legal services field it would be best to develop a sliding scale structure that ensures that those unable to pay receive free services, those with limited means have access to low-bono services, and individuals with sufficient income to afford an attorney be directed to private bar.

A Universal Representation System is Distinct from Appointed Counsel

Realistically assessing available resources, or potential resources, the concept of universal representation can be further refined by distinguishing itself from a system of appointed counsel. The latter may be appropriate for certain categories of cases but not all. Rather, in certain instances there is a compelling need to ensure an individual access to a lawyer no matter the circumstances of their case, whereas in others a more flexible approach giving legal service providers some latitude in which cases they take on is appropriate.

Akin to the position taken by the National Immigration Law Center (NILC), the Vera Institute of Justice, and the Center for Popular Democracy (CPD) in their recently-released “Advancing Universal Representation Toolkit,” and given the high liberty and human rights interests at stake, individuals facing deportation should have access to a lawyer if they cannot afford one and have no private counsel, irrespective of the actual merits of their case.⁴⁷ In areas where resources are limited, priority should be given to detained immigrants.⁴⁸ This position has been adopted by the American Bar Association (ABA), which passed a resolution in 2017 calling for federally-funded appointed counsel for all indigent respondents in removal proceedings and further calling on states and localities to provide such counsel until the Federal Government does so.⁴⁹ The Ninth Circuit has also recognized that individuals who lack mental competency must be provided with counsel in removal proceedings.⁵⁰ Finally, there is a growing acknowledgment that

⁴⁷ Karen Berberich et al., Ctr. for Popular Democracy, Nat’l Immigration Law Ctr., Vera Inst. of Justice, *Advancing Universal Representation: A Toolkit Module 1: The Case for Universal Representation 3* (2018), <https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1>.

⁴⁸ *Id.*

⁴⁹ ABA Resolution 115 (2017), <https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/115.pdf>

⁵⁰ *Franco v. Holder*, Am. Civil Liberties Union S. Cal., <https://www.aclusocal.org/en/cases/franco-v-holder>.

asylum seekers⁵¹ and children should have appointed counsel in immigration court proceedings.⁵²

For individuals where the rights and liberties at stake are not as high, a system geared towards universal representation should take steps towards sustainably growing the immigration legal bar, community access to legal help, and community empowerment to protect their legal rights.

A Universal Representation System Requires Sustainable Growth of the Immigration Legal Services Field

Some considerations when promoting a system that achieves universal representation could include:

- Public procurement processes that allow a maximum number of non-profits to apply for government funding to run immigration legal services programs. Current requirements are often too onerous for small and mid-size organizations to qualify.
- Focus on legal education with mechanisms to encourage recent graduates to enter the immigration legal field, including low-bono incubator models, apprenticeship models, loan repayment assistance, and incentives to provide legal assistance in underrepresented areas.
- A voucher system, similar to one employed in several Canadian provinces, whereby non-profit organizations provide a voucher to pay for services provided by a previously vetted private bar attorney. This system is similar to the current 18b panels in family and criminal courts around the state.
- Further incentives to provide pro-bono services to immigrants beyond the 50-hours requirement for New York law students and recently admitted attorneys.
- Better mechanisms to connect attorneys across the state to foster co-counsel relationships and promote information and resource sharing.

CONCLUSION AND RECOMMENDATIONS

In 2019, with immigration courts facing a doubled case load even as arrests and deportations increase, the Special Committee believes the time has come for a renewed, in-depth assessment of the immigration legal services field, to culminate in an updated report to the House of Delegates examining current challenge and making specific recommendations to defining and achieving universal

⁵¹ Mills et al., *supra* note 27, at 376-78.

⁵² Matthew S. Mulqueen, *Access to Counsel in Immigration Proceedings*, Am. B. Ass'n: GPSolo eReport (Feb. 21, 2019), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2019/february-2019/access-counsel-immigration-proceedings/.

representation, as well as a call on New York State to create the first statutory right to counsel in immigration proceedings.



COMMITTEE ON MANDATED REPRESENTATION

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TO: NYSBA Executive Committee

FROM: Robert S. Dean, Chair, Committee on Mandated Representation

DATE: May 22, 2019

RE: Letter in Support of the Committee on Immigration Representation’s Proposed Resolution to Urge the State Governor and Legislature to Enact a Right to Counsel in Immigration Proceedings as a Statutory Requirement Under State Law

The Committee on Mandated Representation supports the Committee on Immigration Representation’s proposed resolution that the New York State Bar Association (NYSBA) urge the Governor and State Legislature to enact legislation that would provide a right to counsel in immigration proceedings.

The Committee on Immigration Representation, in support of the resolution, issued a report that assessed the current state of access to counsel for immigrant New Yorkers in removal (deportation) proceedings in the context of increasingly anti-immigrant policies at the federal level and stepped up immigration enforcement arrests and deportations in New York that “have surpassed the national averages.” The report described the specific main challenges to competent immigration representation currently facing each of the geographic regions of Long Island, New York City, the Capital Region, Western and Central New York, and the North Country. Noting that courts have “overwhelmingly found that federal law does not provide a guaranteed right to counsel in immigration proceedings,” the report detailed the proven significant impact of legal representation on deportation case outcomes, and argued that a State-wide statutory right to immigration counsel would be a “necessary next step” for New York State to take in its ongoing immigrant-protective responses to federal anti-immigrant policies in recent years.

The Committee on Mandated Representation has for years studied issues, and made recommendations to the Executive Committee, relevant to methods of providing mandated representation, and proposed, commented on, or supported legislation that would further the goal of ensuring quality mandated representation to indigent New Yorkers. We therefore support the resolution that NYSBA urge the enactment of a State right to counsel in deportation proceedings, as we are of the view that such a law is necessary – absent a federally recognized right to counsel – to address what has been described as a “crisis in representation” for immigrant New Yorkers, and to ensure access to justice, due process, and fundamental fairness in any proceeding that threatens immigrant New Yorkers with permanent exile from their community and families here in the United States.



COMMITTEE ON LEGAL AID

May 30, 2019

TO: Committee on Immigration Representation

Dear Friends,

The New York State Bar Association's Committee on Legal Aid (COLA) supports the adoption by the New York State House of Delegates of the proposed resolution of the Committee on Immigration Representation urging the New York State Governor and the New York State Legislature to enact the right to counsel in immigration proceedings as a statutory requirement under New York State law, with the following comment/addition.

The COLA believes that, if the proposed resolution is adopted, it should include a recommendation that any funds allocated by the Legislature to implement the right to counsel in immigration proceedings as a matter of New York State law must be allocated only following the issuance of a Request for Proposals by the state agency administering the program, with all qualified applicants being accorded a fair opportunity to be awarded funding to provide these services, with allocation decisions made after a competitive bidding process, and with grantees selected based upon the objective application of selection criteria for receipt of funding.

Sincerely yours,

Hon. Sergio Jimenez
Chair, Committee on Legal Aid

