



OOD  
PM 21-08

Effective: December 10, 2020

To: All of EOIR  
From: James R. McHenry III, Director  
Date: December 10, 2020

## PRO BONO LEGAL SERVICES

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PURPOSE:	Consolidate and update Executive Office for Immigration Review policies related to pro bono legal services
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. § 1003.0(b)
CANCELLATION:	Operating Policies and Procedures Memoranda 97-1 and 08-01

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### I. Background

This Policy Memorandum (PM) replaces Operating Policies and Procedures Memoranda (OPPM) 97-1, *Maintaining the List of Free Legal Service Providers*, and 08-01, *Guidelines for Facilitating Pro Bono Legal Services*. Each of these OPPM was issued over a decade ago, and much of the information in them has become outdated. Any applicable references to either of those OPPM in any other OPPM or document shall be considered a reference to this PM. Nothing in this PM alters the availability of legal access programs in EOIR’s Office of Policy (OP) nor the availability of materials for unrepresented aliens provided by EOIR at individual immigration courts or online through the Immigration Court Online Resource, <https://icor.eoir.justice.gov/en/>.<sup>1</sup>

“Pro bono legal services are those uncompensated legal services performed for indigent individuals or the public good without any expectation of either direct or indirect remuneration, including referral fees (other than filing fees or photocopying and mailing expenses), although a representative may be regularly compensated by the firm, organization, or pro bono referral service with which he or she is associated.” 8 C.F.R. § 1003.61(a)(2).

EOIR continues to facilitate pro bono representation in multiple ways, and this PM consolidates and updates guidance on those practices.<sup>1</sup>

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<sup>1</sup> Although this PM applies principally to pro bono legal services in the context of immigration courts and the Board of Immigration Appeals (Board), the Office of the Chief Administrative Hearing Officer, in coordination with OP, is also encouraged to facilitate pro bono representation for cases within its jurisdiction.

## II. The Pro Bono List

The EOIR Director<sup>2</sup> maintains the List of Pro Bono Legal Service Providers (Pro Bono List), which is a list of organizations, pro bono referral services, and attorneys qualified under 8 C.F.R. part 1003, subpart E to provide pro bono legal services in immigration proceedings. 8 C.F.R. § 1003.61(b). The procedures for updating the Pro Bono List are established by regulation, 8 C.F.R. §§ 1003.61-1003.66, and overseen by the Office of Policy (OP). They are also summarized on EOIR's website, <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>. The Pro Bono List is updated quarterly and provided to individuals in removal and other proceedings before an immigration court. 8 C.F.R. § 1003.61(b).

The Pro Bono List is not to be used by organizations or attorneys for the purpose of solicitation for paid legal services.

Each version of the Pro Bono List will contain a date (month and year). Even if there are no changes, the Pro Bono List should be reproduced quarterly with a new date. This requirement will avoid confusion and ensure that outdated lists are not disseminated. This PM does not prevent interim updates, but ensures updates, or reproduction without update, occur at least four times per year.

Following each update, a copy the revised or reproduced Pro Bono List must be sent to the Office of the Chief Immigration Judge (OCIJ) for dissemination. The Court Administrator, or his or her designee, is responsible for ensuring that only the most recent version of the Pro Bono List is publicly posted at each immigration court and that copies of that Pro Bono List are available at the reception window, in each courtroom, and at all detail hearing locations, including Institutional Hearing Program (IHP) locations.

The Pro Bono List is available in multiple presentations on EOIR's website, <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>. OP will ensure that the Pro Bono List online is also updated quarterly. OCIJ will ensure that the online link to the Pro Bono List is made available to the Department of Homeland Security and to the respective Departments of Corrections in states where EOIR conducts IHP hearings.

Immigration Judges are required to ensure that each alien in removal proceedings<sup>3</sup> has been advised "of the availability of pro bono legal services for the immigration court location at which the hearing will take place, and ascertain that the respondent has received [the Pro Bono List]." 8 C.F.R. 1240.10(a)(2). Further, if an alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be removed and the alien has not previously filed an application for asylum or withholding of removal that has been referred to an Immigration Judge by an asylum officer, an Immigration Judge shall, *inter alia*, provide the Pro Bono List to the alien. 8 C.F.R. § 1240.11(c)(1)(iii). Similarly, at the time of filing an asylum application, when an Immigration Judge advises the alien of the privilege of being represented by counsel and the

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<sup>2</sup> The EOIR Director has delegated this responsibility to the Assistant Director for Policy pursuant to 8 C.F.R. § 1003.61(a)(1).

<sup>3</sup> These procedures also apply in proceedings conducted under 8 C.F.R. § 1208.2(c)(1) and (c)(2). *See* 8 C.F.R. § 1208.2(c)(3)(i).

consequences of knowingly filing a frivolous application for asylum, the Immigration Judge shall also provide the Pro Bono List. INA § 208(d)(4)(B). To facilitate compliance with these requirements, immigration courts have begun including a copy of the Pro Bono List with each initial master calendar hearing notice served by mail, regardless of representation. *See* PM 21-05, *Enhanced Case Flow Processing in Removal Proceedings* (Nov. 30, 2020) at 3, n.4. Immigration Judges should also confirm in the record the provision of the Pro Bono List in all cases.

### **III. Encouraging Pro Bono Representation**

EOIR continues to maintain a policy of encouraging pro bono representation by all of its adjudicatory components. Nevertheless, adjudicators must also be mindful that encouraging pro bono representation does not excuse compliance with applicable law or an adjudicator’s ethics and professional responsibility obligations. EOIR similarly expects representatives, whether they are serving in a paid or pro bono capacity, to remain mindful of their legal ethics and professional responsibility obligations.

#### **A. Immigration Courts and the Board of Immigration Appeals**

At the immigration court level, Immigration Judges should ask representatives appearing pro bono to identify themselves as such. Pro bono representatives should be asked to annotate the Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28) to reflect pro bono representation. Absent that annotation, Immigration Judges should ask representatives to identify themselves orally on the record as appearing pro bono (e.g., “Jane Doe, appearing pro bono on behalf of John Smith”).

When a pro bono representative enters an appearance, immigration court personnel are responsible for ensuring that the “pro bono” field is appropriately marked in CASE (or any successor case management system) to track and verify genuine pro bono representation.

Immigration Judges are encouraged to call cases with pro bono representatives first at master calendar hearings, if requested. Immigration Judges are further encouraged to be flexible when a pro bono representative seeks to appear telephonically or through video teleconferencing.

Immigration Judges are also reminded that delays in proceedings, especially in asylum cases, may discourage pro bono representation.<sup>4</sup> Accordingly—as in all cases, but particularly in cases involving pro bono representation—Immigration Judges should continue to adhere to applicable law to ensure that cases are completed in a timely manner. *E.g.* INA § 208(d)(5)(A)(iii); *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

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<sup>4</sup> For example, one survey of pro bono coordinators showed that “nearly 75 percent of pro bono professionals indicated that delays at the immigration court are a significant or very significant negative factor in their ability to accept a case.” Human Rights First, *In the Balance, Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems* at 17, <https://www.humanrightsfirst.org/sites/default/files/HRF-In-The-Balance.pdf>. One pro bono leader described asylum delays as “a major threat to the pro bono model of representation.” *Id.*

The BIA Pro Bono Project promotes pro bono representation at the Board level. Through that Project, within two weeks of filing an appeal, EOIR identifies and reviews cases for potential pro bono representation and distributes case summaries to pro bono representatives nationwide.

EOIR also encourages pro bono representation through training resources such as the Model Hearing Program. Organizations interested in EOIR participation in pro bono training programs are encouraged to submit a request for an EOIR presenter through the agency's [Request a Speaker Form](#).<sup>5</sup> Consistent with this PM and applicable law, OCIJ and the Board, in coordination with OP, will determine the most appropriate means of encouraging pro bono representation within their respective components, including the designation of pro bono liaisons as warranted.

## **B. Legal, Ethical, and Professional Responsibility Concerns**

EOIR's policy of encouraging pro bono representation does not supersede applicable law or ethics and professional responsibility obligations. For example, although Immigration Judges may provide procedural and scheduling courtesies to pro bono representatives over other representatives when appropriate, Immigration Judges nevertheless remain obligated to be impartial in their consideration of the merits of cases before them. 5 C.F.R. § 2635.101(b)(8). It is inappropriate for an adjudicator to base his or her decision in a case on the identity of a party's representative, rather than on the applicable law and the evidence of record. Thus, the pro bono status of a legal representative in a particular case must have no bearing on the adjudicator's decision.

The encouragement of pro bono representation also does not override legal requirements regarding the disclosure of information. Information that is privileged or information subject to the Privacy Act, 5 U.S.C. § 552a, confidentiality regulations, 8 C.F.R. § 1208.6, or any other disclosure restrictions, *e.g.* 8 U.S.C. § 1367, may not be shared without complying with applicable disclosure requirements. Consistent with OPPM 09-01, *Classified Information in Immigration Court Proceedings* (Feb. 5, 2009), classified information may never be shared without strict adherence to applicable law (including relevant Executive Orders), Department of Justice and EOIR policies, and coordination with the Office of Administration's Office of Security.

Further, consistent with former OPPM 08-01, if an EOIR adjudicator, employee, or contractor is concerned that an organization or representative is misrepresenting the basis for a request for information related to pro bono representation, the concerned individual should contact his or her supervisor.

When encouraging pro bono representation, Immigration Judges should be mindful not to pressure representatives to appear pro bono. Immigration Judges should neither reward representatives who do handle such cases—except through procedural and scheduling courtesies consistent with this PM—nor penalize representatives who do not wish to handle pro bono cases. Pro bono representation should be truly voluntary, and attorneys and other representatives should

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<sup>5</sup> Consistent with former OPPM 08-01, all requests remain subject to review and authorization, including review by the Office of General Counsel (OGC) Ethics Office.

not feel compelled to enter appearances in specific cases.

As appropriate, when encouraging pro bono representation, adjudicators should consult with their leadership, OP, and OGC's Ethics Office regarding issues that may arise.

#### **IV. Conclusion**

This PM is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing herein should be construed as mandating a particular outcome in any specific case. Nothing in this PM limits an adjudicator's independent judgment and discretion in adjudicating cases or an adjudicator's authority under applicable law.

Please contact your supervisor if you have any questions.