

Why Does Representation Matter?

The Impact of Legal Representation in Immigration Court

Karen Berberich and Nina Siule

Fact sheet
November 2018

Who gets an attorney in immigration court?

The U.S. Constitution's Sixth Amendment established the right to counsel as an essential American value, deemed by the Supreme Court as "necessary to insure fundamental human rights of life and liberty."¹ However, the right to appointed counsel has only been applied in *criminal* proceedings. Deportation cases are *civil* proceedings. Despite the high stakes involved in removal proceedings—including permanent separation from loved ones and, sometimes, life-threatening risks in their countries of origin—immigrants are entitled to representation paid for by the government only in extremely limited circumstances.² This means that while everyone is permitted to have a lawyer, only those able to secure an attorney are represented in court. Over the past several years, almost half of all immigration court cases have gone unrepresented.³

Who doesn't have an attorney? The lack of appointed counsel means that tens of thousands of people each year go unrepresented, including asylum seekers, longtime legal residents, immigrant parents or spouses of U.S. citizens, and even children. They are left to defend themselves in an adversarial and notoriously complex system against the United States government, which is always represented by counsel. Consistent with recent efforts by immigration advocates and federal, state, and local governments to expand access to counsel for immigrants, the federal Executive Office for Immigration Review (EOIR, the immigration court agency) reports a steady increase in the percentage of noncitizens who were able to secure counsel in their deportation proceedings over the last several years. While 50 percent of detained and non-detained immigrants combined were represented in fiscal year 2012, that rate rose to 61 percent in fiscal year 2016.⁴ Notwithstanding this improvement, the total number of unrepresented immigrants facing deportation in recent years is at historic highs. In fiscal year 2016, 73,524 cases that completed in immigration court lacked representation.⁵

The likelihood of securing representation is substantially lower for several subgroups of immigrants.

- > In recent years, representation rates for people in detention have hovered around 30 percent, leaving the remaining 70 percent without the benefit of counsel.⁶
- > In 2016, 70 percent of family units (adults and accompanying children with adjoined cases) were unrepresented at the time their cases closed.⁷
- > As of August 2018, slightly more than half of all pending children's cases were unrepresented.⁸

Representation increases due process in immigration court

Many people in deportation proceedings have valid legal claims to remain in the United States, but cannot possibly argue their cases effectively for themselves absent legal expertise. Representation allows people to make the appropriate decision about whether or not to fight their cases and to exercise and access the rights afforded to them under existing U.S. law.

Lawyers help immigrants access the defenses available to them under existing law

- > It is nearly impossible to win deportation cases without the assistance of counsel. Only 5 percent of cases that won between 2007 and 2012 did so without an attorney; 95 percent of successful cases were represented.⁹
- > This is not the result of lawyers choosing to represent stronger cases; the impact of representation is substantial even in cases that may initially appear weak. In other words, merits-blind universal representation also improves chances of a successful outcome. The New York Immigrant Family Unity Project (NYIFUP), the first publicly-funded universal representation program in the nation, demonstrated a significant, causal effect

of representation on case outcomes, independent of other factors. Under NYIFUP's universal representation model, detained immigrants in New York City saw the odds of winning their cases increase from 4 percent when unrepresented to a projected 48 percent with an attorney—a 1,100 percent increase.¹⁰

- > Representation makes a fourteen-fold difference in terms of case success for family cases defined as “women with children.”¹¹

Lawyers are especially critical in detained cases

- > The physical constraints associated with detention mean unrepresented people face serious obstacles to obtaining even the most basic evidence and paperwork they need to substantiate their legal claims.¹²
- > Attorneys can make the greatest impacts in detained cases. When they are represented, detained immigrants are 10.5 times more likely to succeed in their legal cases than their unrepresented counterparts.¹³

Lawyers help vulnerable people achieve protections available under U.S. law

- > Asylum seekers are at least three times more likely to win relief when represented.¹⁴
- > Children with legal representation have obtained legal outcomes that allowed them to remain in the United States 70 percent of the time, compared to just 9 percent for children without representation.¹⁵

Representation increases the likelihood of release from detention

For many people, release from detention while their case is ongoing can be as critical as the case outcome. Release from detention allows people to return to their families, work in their communities while their case is pending, and prepare their affairs should the court ultimately order them to leave the country. In recent years, U.S. Immigration Customs and Enforcement (ICE) has declined to set bond amounts in most detained immigrants' cases, requiring them to seek custody hearings in front of an immigration judge.¹⁶ As with the legal case outcome itself, representation is critical to effectively demonstrate to a judge that the detained immigrant is an appropriate candidate for release. When represented, the odds of a person being granted bond, and therefore being eligible to be released from custody, are about three times as high, even while controlling for other factors.¹⁷

Representation increases court appearances

One of the primary justifications for immigration detention is that noncitizens need to be detained throughout the duration of immigration court proceedings to ensure that they appear in court for upcoming hearings.¹⁸ Immigrants who fail to appear in court may be ordered deported “*in absentia*”—a deportation order not based on the merits of the case, but for the sole reason that the respondent was not present for the hearing. Research shows that representation has a positive effect on a person's likelihood of appearing for subsequent court appearances. When people have lawyers, they show up in court.

- > The Appearance Assistance Program, a community supervision program that connected released clients to attorneys and other support services in New York City, yielded an impressive 91 percent appearance rate.¹⁹
- > One analysis showed that only 7 percent of non-detained, represented individuals were ordered removed in *absentia*, compared to 68 percent of unrepresented people.²⁰
- > Similar trends are observed for children. Only 5 percent of non-detained, represented children have been ordered removed in *absentia* for failure to appear in court, compared to 80 percent of unrepresented children.²¹
- > Outside of full representation, even mere interactions with an attorney—who can inform people about the importance of attending court and the consequences associated with failing to appear—have been shown to improve court appearance rates. Participants who attended a “Know Your Rights” orientation through Vera's Legal Orientation Program received 7 percent fewer in *absentia* orders than those who did not attend an orientation.²²

Conclusion

Representation before any court of law is a matter of fundamental fairness. The U.S. judicial system has recognized that the Sixth Amendment requires the government to provide counsel for indigent immigrants in criminal proceedings. Given the high and often severe stakes associated with immigration proceedings and the complexity of the law, these same principles ought to govern our nation's immigration courts.²³ The significant, proven impacts of representation on immigration cases demonstrate the necessity of attorneys in navigating that complicated web.

Endnotes

- 1 Johnson v. Zerbst, 304 U.S. 458 (1938).
- 2 Under a court order in the Ninth Circuit, certain detained immigrants who have been deemed mentally incompetent to represent themselves must be provided with counsel. See Franco-Gonzalez v. Holder, 10 CV 02211 DMG (C.D. CA August 2, 2010).
- 3 Between October 2000 and August 2018, 54 percent of all cases filed had never been represented (2,156,633 of 4,013,177 cases). See Transactional Records Access Clearinghouse (TRAC), “Details on Deportation Proceedings in Immigration Court,” accessed November 4, 2018, <http://trac.syr.edu/phptools/immigration/nta/>.
- 4 Executive Office for Immigration Review (EOIR), *FY 2016 Statistics Yearbook* (Falls Church, VA: EOIR, 2017), F1 and figure10, <https://perma.cc/H2S8-Q4DT>.
- 5 EOIR, *FY 2016 Statistics Yearbook*, 2017, F1.
- 6 TRAC, “Who Is Represented in Immigration Court?” October 16, 2017, <https://perma.cc/HPX7-GPF6>.
- 7 TRAC, “With the Immigration Court’s Rocket Docket Many Unrepresented Families Quickly Ordered Deported,” October 18, 2016, <https://perma.cc/FR3R-JSF5>.
- 8 TRAC, “Juveniles—Immigration Court Deportation Proceedings,” accessed November 4, 2018, <http://trac.syr.edu/phptools/immigration/juvenile/>. Court data from fiscal year 2005 through August 2018 show 257,390 cases out of 496,129 were unrepresented.
- 9 Ingrid V. Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court,” *University of Pennsylvania Law Review*, 164, no. 1 (2015), 1-91, 22, <https://perma.cc/82F5-WE2D>. Data from TRAC shows a similar trend, that counsel was involved in 91 percent of cases that resulted in grants of relief between 2001 and 2018. See TRAC, “Details on Deportation Proceedings in Immigration Court,” accessed November 4, 2018, <http://trac.syr.edu/phptools/immigration/nta/>.
- 10 Jennifer Stave, Peter Markowitz, Karen Berberich, Tammy Cho, Danny Dubbaneh, Laura Simich, Nina Siulc, and Noelle Smart, *Assessing the Impact of Legal Representation on Family and Community Unity* (New York: Vera Institute of Justice, 2017), 28, <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation>.
- 11 TRAC, “Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court “Women with Children” Cases,” July 15, 2015, <https://perma.cc/7NBM-BNXW>.
- 12 Stave et al., *Assessing the Impact of Legal Representation*, 2017.
- 13 Eagly and Shafer, “A National Study of Access to Counsel in Immigration Court,” 2015, 49.
- 14 Andrew I. Schoenholtz and Hamutal Bernstein “Improving Immigration Adjudications through Competent Counsel,” *Georgetown Journal of Legal Ethics* 21, no. 1 (2008), 55-60, 55, <https://perma.cc/A834-LCZH>.
- 15 TRAC, “Juveniles—Immigration Court Deportation Proceedings,” accessed November 5, 2018, <http://trac.syr.edu/phptools/immigration/juvenile/>. Data covers all completed cases from fiscal year 2005 to September 2018.
- 16 TRAC, “What Happens When Individuals are Released on Bond in Immigration Court Proceedings?” September 14, 2016, <https://perma.cc/D4PY-CRXB>.
- 17 Emily Ryo, “Detained: A Study of Immigration Bond Hearings,” *Law & Society Review* 50, no. 1 (2016), 117-153. The study found represented people to be 3.5 times more likely to be granted bond.
- 18 Matter of D-J- 23 I&N Dec. 572 (A.G. 2003).
- 19 Vera Institute of Justice, *Evaluation of the Appearance Assistance Program, Volume 1* (New York: Vera Institute of Justice, 2000), <https://perma.cc/LQ7F-NRHU>.
- 20 Eagly and Shafer, “A National Study of Access to Counsel in Immigration Court,” 2015, 74
- 21 TRAC, “Juveniles—Immigration Court Deportation Proceedings,” accessed May 21, 2018, <http://trac.syr.edu/phptools/immigration/juvenile/>. Data covers all completed cases from 2005 through 2018.
- 22 Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II* (New York: Vera Institute of Justice, 2008), <https://www.vera.org/publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii>.
- 23 Immigration law is often described as a “labyrinth,” termed “second only to the Internal Revenue Code in complexity.” *Castro-O’Ryan v. INS* (1987)

For more information

For more information about this report, contact Nina Siulc, research director, Center on Immigration and Justice, at nsiulc@vera.org. The Vera Institute of Justice is a justice reform change agent. Vera produces ideas, analysis, and research that inspire

change in the systems people rely upon for safety and justice, and works in close partnership with government and civic leaders to implement it. Vera is currently pursuing core priorities of ending the misuse of jails, transforming conditions of confinement, and

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