OOD
PM 20-05

Effective: November 21, 2019

To: All of EOIR
From: James R. McHenry III, Director
Date: November 21, 2019

LEGAL ADVOCACY BY NON-REPRESENTATIVES IN IMMIGRATION COURT

PURPOSE:	Reaffirms principles related to legal advocacy by non-representatives in immigration court proceedings
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. § 1003.0(b)

EOIR does not allow individuals to appear in immigration court before an immigration judge and engage in legal advocacy on behalf of a respondent without being recognized as the respondent's legal representative. The only individuals authorized to directly participate in immigration court proceedings through the provision of legal representation to respondents[1] are those who (1) are authorized to provide representation under 8 C.F.R. § 1292.1 (attorneys and qualifying law students, law graduates, reputable individuals, accredited representatives, and accredited officials), (2) have completed registration with EOIR through eRegistry, to include receipt of an EOIR ID, and (3) have filed a Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court. 8 C.F.R. §§ 1003.17, 1240.3, 1292.1(e).

These requirements protect respondents, attorneys, and immigration judges and help to ensure the integrity of immigration court proceedings. When an appearance is made by a person acting in a representative capacity, his or her personal appearance and signature on Form EOIR-28 constitutes a representation that, under the provisions of 8 C.F.R. part 1003, he or she is authorized and qualified to represent individuals and will comply with the EOIR Rules of Professional Conduct in 8 C.F.R. § 1003.102. The filing of the EOIR-28 requires the EOIR ID, which works to ensure

[1] This PM addresses only the actual appearance of a non-representative at an immigration court hearing before an immigration judge. It does not address a non-representative's preparation or filing of materials outside of a court hearing. It does not address a non-representative who testifies as a witness in a particular case. It does not address a non-representative who simply wishes to attend an immigration court proceeding as a member of the public, and nothing in the instant PM should be construed as affecting applicable regulations regarding public access to immigration court hearings, *e.g.* 8 C.F.R. § 1003.27. Finally, it does not address participation in the Legal Orientation Program or programs under the Department of Homeland Security's National Detention Standards, both of which occur outside of court proceedings.

all legal representatives speaking in immigration court are known and accountable to the agency. A person who engages in legal advocacy in open court on behalf of a respondent without having officially entered an appearance as a respondent's legal representative makes no such representations regarding his or her qualifications or willingness to abide by the EOIR Rules of Professional Conduct. Such advocacy also risks confusing a respondent who may believe that the individual making arguments on the respondent's behalf is, in fact, representing him or her in a legal capacity. Moreover, such legal advocacy by a non-representative risks making concessions or waiving or forfeiting rights held by a respondent in contravention of a respondent's actual wishes and leaving the respondent with little recourse against an individual who is not actually the respondent's representative. By ensuring the clear delineation of a legal representative relationship, these requirements further protect attorneys from inadvertently creating an unintended attorney-client relationship by implication and, thus, unintentionally assuming the multiple duties owed by an attorney to a client. They also ensure that such an unintended attorney-client relationship[2] does not also unintentionally bind a respondent to legal concessions or arguments made in the course of the proceeding. Finally, these requirements protect immigration judges by ensuring that the arguments made on behalf of a respondent and considered by an immigration judge are genuinely congruent with the respondent's wishes and are made by an individual who is both qualified to make such arguments and willing to abide by EOIR's Rules of Professional Conduct.

For all of these reasons, EOIR continues to maintain its longstanding policy of not allowing individuals to appear in immigration court before an immigration judge and engage in legal advocacy on behalf of a respondent at a hearing without being officially recognized as the respondent's legal representative through the filing of an EOIR-28.

Individuals appearing in immigration court under the heading of an *amicus curiae*[3] are not an exception to this policy. EOIR has never had a policy allowing an *amicus curiae* to engage in legal advocacy on behalf of a respondent in open court.[4] To the contrary, such a role would be fundamentally at odds with the nature of an *amicus curiae* as an aid to the *court*, rather than as an aid to one party or the other. Moreover, allowing an *amicus curiae* to engage in advocacy on behalf of a respondent in open court would raise all of the concerns noted above regarding advocacy by an individual who is not actually a respondent's legal representative. [5]

Neither statute nor applicable regulations explicitly provide for an *amicus curiae* to appear in-person and speak in an immigration court proceeding in any capacity. In contrast, the regulations

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[2] The filing of an EOIR-28 indicates to the immigration court that the respondent has consented to representation by the filing legal representative.

[3] "*Amicus curiae* is a Latin phrase for 'friend of the court' as distinguished from an advocate before the court." *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974).

[4] The PM does not address situations in which *amicus curiae* may have filed briefs in individual cases at the immigration court level without attempting to appear in person and advocate in open court.

[5] An individual who represents a respondent under 8 C.F.R. § 1292.1, including one who represents a respondent as a "reputable individual" under 8 C.F.R. § 1292.1(a)(3), is a respondent's legal representative and, thus, is not considered an *amicus curiae*.

do explicitly allow for the appearance of *amicus curiae* at the Board of Immigration Appeals (the Board) on a case-by-case basis. 8 C.F.R. § 1292.1(d); *cf. Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J.1985), *aff'd,* 782 F.2d 1033 (3d Cir.), *cert. denied,* 476 U.S. 1141 (1986) ("At the trial level, where issues of fact as well as law predominate, the aid of *amicus curiae* may be less appropriate than at the appellate level where such participation has become standard procedure."); *Sierra Club v. FEMA*, 2007 WL 3472851, *1 (S.D. Tex. 2007) ("An *amicus* may be useful at the appellate level but not in the district court."). Similarly, regulations governing EOIR's Office of the Chief Administrative Hearing Officer (OCAHO) allow an *amicus curiae* to submit a brief but otherwise forbid *amicus curiae* participation in the proceedings. 28 C.F.R. § 68.17 ("The amicus curiae shall not participate in any way in the conduct of the hearing, including the presentation of evidence and the examination of witnesses."). [6]

EOIR has never had a policy formally allowing the appearance of *amicus curiae* in any cases at the immigration court level, except recently in cases involving unaccompanied alien children (UAC).[7] In 2014, former Chief Immigration Judge Brian M. O'Leary issued a memorandum regarding the presence of *amicus curiae* in immigration proceedings involving UAC. *See* Memorandum from Brian M. O'Leary, Chief Immigration Judge, *The Friend of the Court Model for Unaccompanied Minors in Immigration Proceedings* (Sept. 10, 2014) (O'Leary Memorandum). Although the instant PM formally supersedes the O'Leary Memorandum,[8] it does

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[6] Nothing in the instant PM should be construed as affecting the procedures of the Board or OCAHO for appearances by *amicus curiae*.

[7] Whether there is, in fact, legal authorization for an *amicus curiae* to appear in immigration court in any formal capacity is beyond the scope of this PM. The presence of an express regulation authorizing *amicus curiae* appearances in proceedings before the Board—but *not* before immigration courts—in Part 1292 of Title 8 governing representation and appearances before both immigration courts and the Board strongly suggests that there is not a regulatory authorization for such participation, as does the lack of any reference to *amicus curiae* in the 160 pages and 17 Appendices of the Immigration Court Practice Manual. Although the O'Leary Memorandum intimated, without analysis and without definitively reaching a conclusion, that 8 C.F.R. § 1240.1(a)(1)(iv) may provide authorization for *amicus curiae* appearances in immigration court, it did not explain why that language should be read differently than nearly identical language in 8 C.F.R. § 1003.1(d)(1)(ii) and similar language in 28 C.F.R. 68.28(a)(6)-(8). Nevertheless, assuming, *arguendo*, there is legal authorization for an *amicus curiae* at the immigration court level, EOIR policy remains, consistent with the O'Leary Memorandum, that the role of an *amicus curiae* is limited to that of an aid to the court in UAC cases and not as an advocate on behalf of an individual UAC. Further, any appearance by an *amicus curiae* would be only at the discretion of the immigration judge, who should allow both parties an opportunity to give their positions regarding the request to appear by a putative *amicus curiae* before deciding whether to grant the request. Finally, as discussed herein, immigration judges should be mindful of alleged *amicus curiae* who are actually acting on behalf of one party rather than as an aid to the court.

[8] The O'Leary Memorandum assumed that its guidance on *amicus curiae* applied to cases in which UAC do not have legal representation; however, most UAC do obtain legal representation. Moreover, most of the O'Leary Memorandum addresses actions—*e.g.* assisting a respondent in filling out forms, providing transportation options for a respondent, explaining logistical procedures to a respondent, sitting with a respondent, serving as a community liaison for a respondent—that are not unique to an *amicus curiae* and may generally be performed by anyone of the respondent's choosing. Similarly, as also referenced in the O'Leary Memorandum, providing specific factual information regarding a respondent to the court—*e.g.* whether a minor has been reunified with his or her parents and, is, thus, no longer a UAC or whether the respondent speaks a particular language—is also not a unique function of an *amicus curiae* and generally may also be provided by anyone of the respondent's choosing. Finally, EOIR already has clear polices regarding the appropriate handling of UAC cases. *See* EOIR Operating Policies and Procedures Memorandum 17-03, *Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien*

not change the central tenet expressed by that Memorandum: "the Friend of the Court is, fundamentally, an aid to the court and not an advocate." *Id.* at 2.

More specifically, this PM reaffirms the O'Leary Memorandum's guidance that "given the Friend of the Court's advisory role, he or she can file no pleadings or motions of any kind, can reserve no exception to any ruling of the court, and of course cannot prosecute an appeal," and "[t]he Friend of the Court is without authority to accept or concede service, admit factual allegations, enter pleadings, request a removal order, seek relief (including voluntary departure), or exercise or waive rights on behalf of the respondent." *Id.* (internal quotations and citations omitted); *see also United States v. Board of County Commissioners of the County of Otero*, 184 F. Supp. 3d 1097, 1117 (D.N.M. 2015), *aff'd*, 843 F.3d 1208 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 84, 199 L. Ed. 2d 184 (2017) ("'[A]n *amicus curiae* is not a party and has no control over the litigation and no right to institute any proceedings in it[;] nor can it file any pleadings or motions in the case.'. . . Moreover, '[t]he named parties should always remain in control, with the *amicus* merely responding to the issues presented by the parties.'. . . 'An *amicus* cannot initiate, create, extend, or enlarge issues.'. . .Consistent with this limited role, an amicus may not introduce an issue into a case or seek relief that is not raised or requested by the parties." (cleaned up)).

In short, the hallmarks of an *amicus curiae* are its impartiality and dispassionate willingness to assist a court. *United States v. State of Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) ("The position of classical amicus in litigation was not to provide a highly partisan account of the facts, but rather to aid the court in resolving doubtful issues of law."); *see also Pagano*, 606 F. Supp. at 1568 ("'Where a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as *amicus curiae.*'" (quoting *Casey v. Male*, 164 A.2d 374 (Essex Cty. Ct. 1960)); *United States v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) ("Rather than seeking to come as a 'friend of the court' and provide the court with an objective, dispassionate, neutral discussion of the issues, it is apparent that the [putative *amicus curiae*] has come as an advocate for one side, having only the facts of one side at the time. In doing so, it does the court, itself and fundamental notions of fairness a disservice.").

Despite extensive case law and the clear guidance in the O'Leary Memorandum, confusion may nevertheless arise regarding situations in which an individual seeks to appear as an *amicus curiae* in immigration court, but also wishes to advocate on behalf of one party.[9] Following the O'Leary Memorandum, the instant PM reiterates that it is not appropriate for an immigration judge to recognize as an *amicus curiae* an individual or organization that is, in fact, advocating on behalf of one party or to countenance motions, pleadings, waivers, or other forms of legal advocacy rendered in open court by such an individual on behalf of a party. *See* O'Leary Memorandum at 2 (". . . given the Friend of the Court's advisory role, he or she can file no pleadings or motions of any kind, can reserve no exception to any ruling of the court, and of course cannot prosecute an appeal. . . The Friend of the Court is without authority to accept or concede service, admit factual

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Children (Dec. 20, 2017). Accordingly, in superseding the O'Leary Memorandum, the instant PM need not address any of these issues.

[9] To the extent that individual immigration courts previously may have engaged in practices inconsistent with the O'Leary Memorandum, this PM reiterates that an *amicus curiae* is an aid to the court and not an advocate on behalf of one party.

allegations, enter pleadings, request a removal order, seek relief (including voluntary departure), or exercise or waive rights on behalf of the respondent.").[10] In no case, including that of a UAC, is it appropriate for an immigration judge to accept motions or pleadings from a putative *amicus curiae* in open court, nor is it appropriate for an immigration judge to allow a putative *amicus curiae* to admit allegations, concede removability, seek relief, or exercise or waive rights on behalf of a respondent. *Id.*

This PM supersedes any prior guidance issued by EOIR regarding the role of *amicus curiae* or a friend of the court in immigration court proceedings.

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. Further, nothing in this PM should be construed as mandating a particular outcome in any specific case.

Please contact your supervisor if you have any questions.

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[10] Immigration judges should also be mindful of individuals seeking to appear as *amicus curiae* who do not seek to aid the court but are, in fact, attempting to aid one of the parties. Such individuals should not be recognized as *amicus curiae*. *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) ("When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear *amicus curiae* should be denied."); *see also Pagano*, 606 F. Supp. at 1568 ("'Where a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as *amicus curiae.*'" (quoting *Casey*, 164 A.2d 374)). Similarly, individuals who appear in court in order to solicit potential clients rather than to assist the court should not be recognized as *amicus curiae*. *Cf.* 8 C.F.R. § 1003.102(d) (prescribing disciplinary sanctions for practitioners who solicit professional employment through in-person contact with prospective clients with whom the practitioner has no prior relationship when a significant, though not exclusive, motive is for pecuniary gain and prohibiting the distribution of advertising material or solicitation documents "in or around the premises of any building in which an Immigration Court is located").