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October 26, 2017

VIA ELECTRONIC & HAND DELIVERY

The Honorable John Culberson, Chair  
House Appropriations Subcommittee on  
Commerce, Justice, Science and Related Agencies

The Honorable José Serrano, Ranking Member  
House Appropriations Subcommittee on  
Commerce, Justice, Science and Related Agencies

The Honorable Richard Shelby, Chair  
Senate Appropriations Subcommittee on  
Commerce, Justice, Science and Related Agencies

The Honorable Jeanne Shaheen, Ranking Member  
Senate Appropriations Subcommittee on  
Commerce, Justice, Science and Related Agencies

The Honorable Chuck Grassley, Chair  
Senate Judiciary Committee

The Honorable Dianne Feinstein, Ranking Member  
Senate Judiciary Committee

The Honorable Robert Goodlatte, Chair  
House Judiciary Committee

The Honorable John Conyers, Jr., Ranking Member  
House Judiciary Committee

Dear Chairs and Ranking Members:

We write on behalf of the Association of Pro Bono Counsel (APBCo), a membership organization of law firm pro bono practice leaders, to express concern over Department of Justice plans to deal with immigration court backlogs through “numeric performance standards” imposed on immigration judges. *See* “Immigration Judges Say Proposed Quotas From Justice Dept. Threaten Independence,” The Washington Post, Oct. 12, 2017, available at <http://wapo.st/2hS5yM0>. Our concern focuses on the negative impact of rushed hearings on due process in immigration proceedings, including impeding the ability of private lawyers to provide pro bono assistance to persons facing removal from the United States.

APBCo is a membership organization of 211 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis at 109 of the country's largest law firms. APBCo members' firms provided almost 4 million hours of pro bono legal services last year. A substantial portion of that time is devoted to representing immigrants around the country, including those seeking asylum and defending removal in immigration court. APBCo members therefore have a strong interest in ensuring that the immigration system is funded sufficiently to ensure due process and access to counsel. And as the Department of Justice has long recognized, "[p]ro bono representation in immigration court ... promotes the effective and efficient administration of justice." OPPM 08-01: Guidelines for Facilitating Pro Bono Legal Services (March 10, 2008) at 2, available at <http://bit.ly/2yDDBiX> (hereafter "Pro Bono OPPM").

We agree that immigration dockets are backlogged and serious intervention is needed to repair the system. According to the Transactional Records Access Clearinghouse (TRAC), an independent data gathering, data research and data distribution organization at Syracuse University, U.S. Immigration Courts had more than 630,000 cases on their dockets as of August of this year. On average, immigration cases are taking 681 days to resolve, with cases for non-detained individuals taking much longer. The multi-year wait for a merits hearing undermines the system and everyone in it, including those seeking protection from persecution, trafficking and torture. An inefficient system also reduces our firms' ability to find and keep pro bono volunteers, who are understandably apprehensive about committing to a case that will not go to hearing for years.

But quotas are not the solution. Imposing quotas that force immigration judges to adjudicate backlogged cases with ever-greater speed will only make things worse. The current backlog was not caused by immigration judges spending too much time on each case, but rather by a lack of capacity in the immigration courts, which have been short-staffed for years. There is neither a sufficient number of immigration judges nor enough law clerks to support them. Imposing numerical quotas and case-completion deadlines on an already overloaded court system, with no additional resources, is merely an exercise in whip-cracking that values speed, or rather the prospect of speed, over fairness and due process.

The DOJ's proposal concerns APBCo not just because of our commitment to fair and legitimate court processes, but because it will inevitably reduce our ability to provide pro bono representation to immigrants in need of counsel. First, we are concerned that any quota-based system will discourage pressured immigration judges from granting continuances to allow respondents to find pro bono counsel. The process that connects pro bono counsel with needy immigrants who have bona fide claims can be time-consuming – legal services providers need to identify who qualifies for free legal services, evaluate their cases, and then solicit pro bono help from private lawyers. As the Department of Justice has understood, when scheduling cases and considering continuances, "[j]udges should be mindful of the inherent difficulties in the recruiting of pro bono representatives and the burdens pro bono representatives assume for the public good." See Pro Bono OPPM at 4. We ask that you remind the Department that continuances in many cases safeguard the process and facilitate the efficient operation of the immigration courts.

Second, a numeric performance system could also encourage immigration judges to shorten hearings, which already provide limited time for respondents to present their claims for relief. These claims are often complex, involving evidence from multiple sources (including testimony and documentary evidence from overseas). The Department of Justice must be clear that immigration judges retain discretion to allow hearings to proceed as long as needed for a respondent to present a full claim for relief. As leaders of law firm pro bono practices, we are concerned that any effort to limit pro bono lawyers' ability to present their clients' claims in full will discourage future participation in these cases. Furthermore, having one's day in court is a pillar of our justice system, one that should not be eroded by a calculation that puts quantity ahead of quality adjudication.

The backlog in the immigration courts is real, and common-sense solutions are required. For instance, immigration judges could make better use of pre-hearing conferences to limit the scope of, or even resolve, their cases. Another way to safely shrink the docket would be for the Department of Homeland Security to better exercise its prosecutorial discretion by passing on clearly meritorious claims and focusing instead on cases that present real issues of national security, community safety and imminent harm to the respondents.

We look forward to working with you to ensure that efforts to deal with the backlog in the immigration courts are undertaken in a way that preserves the fairness and legitimacy of the courts and encourages further pro bono representation.

Sincerely,



Kevin J. Curnin  
President, APBCo

Jennifer Colyer & Steven Schulman  
Co-Chairs, APBCo Immigration Task Force