



## Ethical Considerations for Appearing as Friend of Court Updates for Attorneys Working with Unaccompanied Children After DM 22-06

Since the *Flores* Settlement Agreement in 1997, there has been a series of laws and policies designed to ensure that children who enter the United States unaccompanied are protected and have access to legal services. As a result of the Homeland Security Act (HSA) of 2002 and reinforced by the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Health and Human Services (HHS) has funded legal services for unaccompanied children in their custody. From the beginning of this initiative, the concept of friend of court has been a standard activity for legal services providers working with unaccompanied children.<sup>1</sup>

Friend of court, or *amicus curiae*, has been used in various ways in various types of court proceedings going back centuries. We are often familiar with *amicus* briefs being submitted to the U.S. Supreme Court or for impactful litigation in other courts. The people that write the briefs, the *amici*, are not a party to the litigation, but their briefs argue for a specific position on the case at issue.<sup>2</sup> However, friend of court in the immigration context is slightly different. In immigration court, *amici curiae* are viewed as a neutral party whose purpose is to assist the court, not advocate for either side.<sup>3</sup>

In the unaccompanied minor context, friend of court has been used as a way to provide the legal services required by the HSA and TVPRA without entering representation for every child in ORR custody. It has formed part of the requirements for legal service providers under the Vera contract since at least 2008.<sup>4</sup> However, there were no formal guidelines from the Executive Office for Immigration Review (EOIR) as to how friend of court should work until 2014.

### O'Leary Memo (2014)

Due to the 77% increase in apprehensions of unaccompanied children from FY 2013 to FY 2014,<sup>5</sup> EOIR began to notice a correlating increase in the number of cases on their dockets.<sup>6</sup> EOIR released the [Friend of the Court Guidance](#) memorandum in September 2014, otherwise known as the O'Leary Memo, specifically for use in cases involving unaccompanied minors.<sup>7</sup> The memo indicated that

[t]he Friend of the Court may, with the permission of the court, act as the court's advisor, call attention to law or facts that may have escaped consideration, and provide requested information to the court...However, given the Friend of the Court's advisory role, he or she

---

<sup>1</sup> Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System* (Mar. 2012), <https://www.vera.org/downloads/publications/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf> [hereinafter *Vera Report*].

<sup>2</sup> United States Courts, *Glossary of Legal Terms*, <https://www.uscourts.gov/glossary>.

<sup>3</sup> Memorandum from David L. Neal, Director, Executive Office for Immigration Review, DM 22-06, *Friend of the Court* (May 5, 2022), <https://www.justice.gov/eoir/page/file/1503696/download>.

<sup>4</sup> *Vera Report*.

<sup>5</sup> U.S. Customs & Border Protection, *Southwest Border Unaccompanied Alien Children FY 2014*, [https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014?language\\_content\\_entity=en](https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014?language_content_entity=en) (last visited June 28, 2022).

<sup>6</sup> Executive Office for Immigration Review Memorandum, [Friend of the Court Guidance](#), Brian M. O'Leary, September 10, 2014.

<sup>77</sup> *Id.*

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.<sup>8</sup>

EOIR then gave examples as to the kind of involvement friend of court could have in an unaccompanied child's immigration case.<sup>9</sup> Friend of court could inform the immigration judge as to the status of the child's reunification with a parent or sponsor, whether the child had obtained representation, and if the child had any special needs. EOIR also suggested that friend of court should help the child navigate courtroom procedures by explaining what was happening and helping the child with various tasks for the court to maintain docket mechanics. Assisting the child in reviewing and filling out forms, such as change of address and change of venue, was also contemplated. Friend of court was encouraged to explain to the child the requirement to return to court and provide logistical support facilitating the child's attendance at hearings. Finally, EOIR recommended that friend of court serve as a liaison for the child in the wider community.

Nevertheless, EOIR emphasized that friend of court does not represent the child. All parties have an obligation and "should take care to clarify the role of the Friend of the Court" to the child.<sup>10</sup> The O'Leary Memo was not mandatory, rather, EOIR stated that "it is for the court, in its discretion, to determine the scope of the Friend of the Court."<sup>11</sup> As a result, implementation of this memo varied in practice across immigration courts and judges.

### OPPM 20-05 (2019)

The O'Leary Memo remained in place until November 21, 2019, when EOIR issued OPPM 20-05, [Legal Advocacy by Non-Representatives in Immigration Court](#).<sup>12</sup> In that memo, EOIR reiterated that *amici curiae* are not an exception to the rule that only individuals who have been recognized by the court as a legal representative through the filing of the form EOIR-28 can engage in legal advocacy on behalf of a respondent.<sup>13</sup> OPPM 20-05 explicitly superseded the O'Leary Memo authorizing friend of court for unaccompanied children.

However, although the tone of OPPM 20-05 was somewhat more restrictive, it did not actually represent a significant departure, textually, from the prior guidance:

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.

The memo also noted that certain actions previously outlined in the O'Leary Memo were still authorized as long as they were at the request of the respondent. Those actions included "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

---

<sup>8</sup> *Id.* [internal citations and quotation marks removed].

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> Executive Office for Immigration Review, Memorandum 20-05, [Legal Advocacy by Non-Representatives in Immigration Court](#), November 21, 2019.

<sup>13</sup> *Id.*

a respondent.”<sup>14</sup> Additionally, the memo found that certain actions in court were also authorized by anyone of the respondent’s choosing, such as “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.”<sup>15</sup>

## DM 22-06 (2022)

On May 5, 2022, David L. Neal, Director of EOIR, released [DM 22-06, Friend of the Court](#), which is intended to supersede and replace both OPPM 20-05 and the O’Leary Memo. DM 22-06 lays out similar guidelines as the prior O’Leary Memo.<sup>16</sup> When it comes to continuing friend of court practice for unaccompanied children, there only appears to be a few significant changes.

First, DM 22-06 appears more encouraging of friend of court practices than the O’Leary Memo. Although it indicates that “the immigration court has discretion to determine the scope of assistance provided by a Friend of the Court,” DM 22-06 also states that “Assistant Chief Immigration Judges (ACIJ) and Court Administrators should encourage and advance court practices that facilitate the assistance of Friends of the Court.”<sup>17</sup> According to DM 22-06 ACIJs “should” work with EOIR’s Legal Access Programs to “better coordinate the agency’s support of the Friend of the Court model.”<sup>18</sup> The Chief Immigration Judge (CIJ) is going to appoint a Regional Deputy Chief Immigration Judge to coordinate friend of court practices among the immigration courts and the CIJ will “compile the best practices, lessons learned, and insights on facilitating this participation” in friend of court.<sup>19</sup>

Second, as with the O’Leary Memo, DM 22-06 allows friend of court to assist a child with basic forms.<sup>20</sup> The O’Leary Memo gave the change of address and change of venue forms as specific examples, but DM 22-06 only specifically mentions change of address and “[o]ther [f]orms [a]s appropriate, based on form instructions and applicable law and regulation, and consistent with such rules related to preparer attestations.”<sup>21</sup>

Third, DM 22-06 says that friend of court “can appropriately assist the court” by communicating “information regarding competency,” mental health concerns, or other sensitive issues the respondent is facing.<sup>22</sup> This is an expansion from previous guidance, and as a departure from previous practice, an EOIR-28 will not be required. However, if addressing competency issues as friend of court, it is important to be familiar with competency issues in the unaccompanied child context and ethical issues that may arise.<sup>23</sup> For example, assessing competency issues may require building trust with the child, and consultation with a mental health expert, both requiring time and

---

<sup>14</sup> *Id.* at FN 8

<sup>15</sup> *Id.*

<sup>16</sup> DM 22-06, *supra*.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> For assistance with competency and ethics issues, please see the following CILA trainings: [Identifying and Raising Capacity and Mental Competency Issues in Children’s Immigration Cases](#), [Best Practices for Representing Children in Competency Hearings](#), [Pro Se Children in Detention: How to Balance Being Friend of the Court While Preserving the Record](#).

resources that may be more fitting for a legal representative of the child. Also, a child deemed incompetent may have difficulty understanding the difference between a friend of court and a legal representative.

When it comes to the ethics of friend of court, all attorneys should also be aware of the May 2013 Ethics Opinion No. 628 (hereinafter “Opinion”) issued by the Professional Ethics Committee for the State Bar of Texas (hereinafter “Committee”), which is mentioned in all EOIR guidance on friend of court, including DM 22-06. The Opinion discusses whether a Texas attorney may appear as friend of court for a minor in immigration proceedings without acting as a lawyer for the minor.<sup>24</sup>

The Committee determined that “[i]f a lawyer provides advice to a minor appearing before an immigration court and provides legal and factual argument to the court on behalf of the minor, the lawyer must ensure that the minor clearly understands the nature of their relationship and the role of the lawyer.”<sup>25</sup> The Committee also concluded that an attorney-client relationship is created by implication “if the lawyer knows a person reasonably expects him to provide legal services but does nothing to correct that misapprehension.”<sup>26</sup> Therefore, attorneys appearing as friend of the court must consider and be mindful of whether the minor, who may not understand English, “might reasonably assume that the lawyer was providing legal services” given the nature of the immigration court proceedings.<sup>27</sup> The EOIR guidance cites to this opinion because it is important for all attorneys, not just those licensed in Texas, to keep this issue in mind.

### Below are best practices and tips for attorneys who appear as friend of the court in their practice:

- **DO clarify your role as friend of court to the child, the child’s sponsor (if applicable), and for the record.** If you do not intend to create an attorney-client relationship, you *must* clearly define the role you intend to perform to the minor, and not participate in the proceedings “in any manner that would reasonably lead the minor to believe” you are representing them.<sup>28</sup>
- **DO help the child navigate courtroom procedures.** This may include ensuring that the child received a Know Your Rights presentation while in a shelter, identifying the child as the respondent for the court, guiding the child around the courtroom, assisting the child in identifying documents that the immigration judge requests, reinforcing information provided to the child by the Immigration Judge, alerting the court if you learn that the child does not understand what is being said, or answering the child’s non-legal questions. For example, it is permissible to answer questions the child may have about the change of address form or about proper courtroom attire. It is also appropriate to provide information about community resources, including pro bono legal and social services.
- **DO gather and convey basic information about the child’s reunification status if the child is detained.**

<sup>24</sup> State Bar of Texas Professional Ethics Committee, [Opinion No. 628](#), May 2013.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.*

<sup>28</sup> Opinion at 2-3; DM 22-06 at 6.



- DO gather and convey the child’s or legal service provider’s efforts to secure legal representation without compromising any issues regarding removability. If the judge is unaware as to how obtaining representation works while in ORR shelter, it is appropriate to explain the process.
- **DO get the child’s consent** if you are going to communicate to the court any special needs, competency issues, or particularly sensitive issues that may need to be addressed in a sidebar or special hearing. This means that you will need to have a conversation with the child about any issues prior to court.
- DO communicate to the court any technical issues that may arise during a VTC hearing including when the audio or video equipment is not working, or audio or video feeds are coming in from another hearing.
- **DO NOT act as the child’s attorney.** The friend of court does not have the authority to accept or concede service, admit factual allegations, enter pleadings, file motions, request a removal order or declare relief, or seek or waive appeal.<sup>29</sup>
- DO assist the child in filling out Change of Address forms, and other administrative forms as appropriate.
- **DO explain the requirement to return to court to the child and provide logistical support for future hearings.** If you do explain the requirement to return, also explain the potential consequences of failing to appear at future hearings.
- DO request additional guidance from the immigration judges and court staff as necessary.

For further examples, please see our friend of court talking points available as part of our “Toolkit for Advocating for UC in VTC and ‘Rocket Docket’ Proceedings,” accessible to the Vera network.

This practice advisory does not constitute legal advice and is for the purpose of highlighting key ethical considerations when appearing as friend of court. For case specific technical advice, please reach out to us via our website, [www.cilacademy.org/technicaladvice](http://www.cilacademy.org/technicaladvice); the [State Bar of Texas Ethics Hotline for Lawyers](#), 1-800-532-3947; or the state bar where you are licensed.

---

<sup>29</sup> DM 22-06.

