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You've Got a Friend in Me: Updates to Friend of the Court Practice in Immigration Court[1]

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The Evolution of EOIR Policy Memoranda on Friend of the Court

More than a decade ago, the Executive Office for Immigration Review (EOIR), facing an increase of unaccompanied children in removal proceedings, issued the first guidance on Friend of the Court (FOTC).[2] Since then, various administrations have issued additional policy memoranda, either expanding upon or restricting the policies and principles first established in the 2014 O'Leary Memo. Most recently, the current administration rescinded the 2022 Friend of the Court memo and reinstated the prior 2020 guidance. While the FOTC guidance currently in effect marks a departure from the enthusiastic endorsement of FOTC outlined in the 2022 memo, Friend of the Court remains a permissible practice in immigration courts nationally. This practice guide outlines the recent changes to FOTC guidance, provides examples of how different immigration courts and advocates have approached FOTC since the new administration took office in January 2025, and offers concrete tips for practitioners seeking to appear as FOTC in their respective jurisdictions.

The 2014 O'Leary Memo, citing the "growing need for support systems the courts can use to effectively and efficiently manage the cases of unaccompanied minors,[3] established the first official guidance from EOIR on the use of Friend of the Court. From the outset, several principles were established: the purpose of FOTC was to "aid the court" as opposed to act as an advocate, and the right to be heard and participate in proceedings as FOTC was "entirely within the court's discretion."[4] While the FOTC was permitted, with the court's permission, to call attention to law or facts that may have been overlooked and provide requested information to the court, they could not file pleadings or motions or reserve appeal.[5] FOTC could, however, gather and convey basic information regarding the status of a respondent's case, assist the respondent in reviewing and filling out forms, facilitate a respondent's attendance at hearings, and serve as a liaison to connect them with community resources, among other functions.[6] While the 2014 O'Leary memo did not explicitly exclude adult respondents, it focused on the use of FOTC in proceedings involving respondents who were unaccompanied children.

The 2014 memo remained in effect until November 2019, when EOIR released Policy Memorandum 20-05, "Legal Advocacy by Non-Representatives in Immigration Court."[7] While PM 20-05 reflected a more restrictive policy related to Friend of the Court, it contained many of the same principles as the 2014 O'Leary Memo. It reaffirmed that FOTC, or amicus curiae, should act neutrally for the purpose of assisting the court. Like the 2014 O'Leary Memo, it stated that advocacy on behalf of a respondent is not an appropriate function of Friend of the Court; to engage in legal advocacy, individuals must first be recognized as a respondent's legal representative through the filing of an E-28. And also like the 2014 O'Leary Memo, it made clear that it is not

[2] Executive Office for Immigration Review, Brian M. O'Leary, Director's Memorandum, *The Friend of the Court Model for Unaccompanied Minors in Immigration Proceedings*, (Sept. 10, 2014).
[3] *Id.* at 1.
[4] *Id.*
[5] *Id.*at 2.
[6] *Id. a*t 3-5.
[7] Executive Office for Immigration Review, Policy Memorandum 20-05, *Legal Advocacy by Non-Representatives in Immigration Court* (Nov. 21, 2019).

appropriate for Friends of the Court to file motions, pleadings, waivers, or "other forms of legal advocacy" on behalf of a party.

In contrast to the 2014 O'Leary Memo, however, which encouraged Immigration Judges to allow FOTC appearances, PM 20-05 simply directed Immigration Judges to allow a FOTC appearance at their discretion.[8] The policy memo noted that while regulations permit amicus curiae at the BIA, no such regulation exists at the trial level, concluding that whether legal authorization for FOTC to appear in immigration court at all is "beyond the scope of this PM."[9] The memo included a lengthy discussion of the risks of individuals engaging in legal advocacy on behalf of respondents without formally entering an appearance as their legal representative. Fundamentally, the memo concluded, an amicus curiae is defined by their "impartiality and dispassionate willingness to assist a court."[10]

Just over two years later, in May 2022, EOIR again changed course when it issued Director's Memorandum 22-06, "Friend of the Court," which reaffirmed—and expanded upon—the 2014 O'Leary Memo.[11] DM 22-06 lauded the benefits of Friend of the Court, including "greater efficiency and fairness," and stated that the agency "welcomes and encourages" FOTC "in all types of immigration court proceedings involving unrepresented respondents," not just unaccompanied children—although it noted that the FOTC model is "all the more beneficial" where the respondent is a member of a particularly vulnerable group, like unaccompanied children and adults with competency issues.[12] It directed court staff to "encourage and advance court practices that facilitate the assistance" of FOTC.[13]

DM 22-06 made clear that the role of FOTC is not just to dispassionately assist the court, but instead to "increase the pro se respondents' understanding of the proceedings, as well as their rights and obligations, to the greatest extent possible."[14] It provided numerous examples of ways in which a FOTC could assist the court—many of which had been mentioned in the original 2014 O'Leary Memo, like providing basic form assistance and serving as a liaison to connect the respondent with community resources—as well as by facilitating communication between the IJ and the respondent and communicating information about the respondent's case or competency.[15]

Most recently, in February 2025, EOIR issued Policy Memorandum 25-18, which rescinded DM 22-06 and reinstated PM 20-05.[16] EOIR provided a single paragraph of reasoning for this shift, stating that no legal basis had been provided for DM 22-06's recission of PM 20-05 and that DM 22-06 "overrode an Immigration Judge's decisional independence by effectively requiring Immigration Judges to recognize an *amicus curiae* in all cases."[17] It is "well-established law and practice by courts at all levels that the recognition of an *amicus*

[8] *Id.* at FN 7.
[9] *Id.*
[10] *Id.* at 4.
[11] Executive Office for Immigration Review, David L. Neal, Director's Memorandum 22-06, *Friend of the Court* (May 5, 2022).
[12] *Id.* at 6.
[13] *Id.* at 2.
[14] *Id.*
[15] *See generally id.*
[16] Executive Office for Immigration Review, Sirce E. Owen, Policy Memorandum 25-18, *Cancellation of Director's Memorandum 22-06 and Reinstatement of Policy Memorandum 20-05* (Feb. 4, 2025).
[17] *Id.* at 1.

curiae lies within the sound discretion of the presiding adjudicator."[18] Accordingly, as of the time of writing of this practice advisory, PM 20-05—and its relatively strict approach that prohibits non-representatives from engaging in any advocacy unless they have officially entered an appearance—is back in effect.

Notably, PM 20-05 does not prohibit Friend of the Court appearances. It does, like the preceding memos, prevent FOTCs from advocating on behalf of a party unless they are formally recognized as a respondent's "legal representative" (i.e. are authorized to provide representation, have completed registration with EOIR through eRegistry, and have submitted an EOIR-28). Unlike DM 22-06, which strongly encouraged Immigration Judges to facilitate Friends of the Court and promote practices that support their involvement (with court administrators tasked with "encourag[ing] and advanc[ing] court practices that facilitate the assistance of FOTCs"), PM 20-05 grants Immigration Judges more discretion about whether to allow appearances by FOTC. Immigration Judges are now encouraged to make independent decisions regarding the recognition of an amicus curiae based on discussions from all parties involved.

Judicial Discretion and Diverging Approaches to FOTC

With the recission of DM 22-06 and the return to PM 20-05, opportunities to appear as Friend of the Court have been, in some instances, constrained—but avenues to appear as Friend of the Court and assist respondents still exist, particularly when carefully tailored to avoid appearing to constitute legal advocacy. Advocates nationally have experienced a wide variety of responses to attempts to appear as FOTC, depending on the immigration court and even the particular Immigration Judge.

Some practitioners have been prohibited entirely from appearing as Friend of the Court. One Immigration Judge, citing to PM 25-18, did not allow a practitioner to speak on behalf of unaccompanied children in removal proceedings without first filing an E-28, even though the practitioner was not seeking to represent the respondents. Other Immigration Judges have not allowed anyone without an E-28 on file to say anything during a hearing, whether on or off the record. Some Immigration Judges have been openly hostile to observers.

Other Immigration Judges continue to regularly allow Friend of the Court—including attorneys, case workers, and others with insight—to appear and share information about respondents' cases. Some have allowed an individual to appear as FOTC after that person explicitly acknowledged that while they understand the FOTC guidance has changed, they are present to aid the court by offering procedural background on a respondent's case. And many Immigration Judges have expressed gratitude to individuals appearing as FOTC for their assistance.

[18] *Id.*

Strategies for Seeking Permission to Appear as FOTC

Practitioners who have appeared as FOTC have shared a number of tips and strategies for navigating inconsistent court practices. Some have had success informing the court clerk in advance that they plan to appear as FOTC. If they receive pushback, some have still been able to appear as FOTC via WebEx. When appearing virtually as FOTC on behalf of a specific respondent, it may be helpful to change your name in WebEx to include your first and last name, followed by the last three digits of the respondent's A number.

During the hearing itself, it can be helpful to watch for cues about when to speak. Some IJs allow individuals appearing as FOTC to speak at the end of the hearing, often off the record. Consider opening with language like "I'd like to raise an issue for the court's awareness," or "We'd like to share the following information to aid the court." If you're not familiar with the IJ and how they might respond to an attempt to appear as FOTC, it may be best to begin off the record. Explain that you believe it would be appropriate for the court to hear from you on the record as FOTC, as permitted under PM 20-05 when the individual offers an objective, dispassionate, and neutral discussion of the issues.

Some practitioners have found it effective to proactively clarify that they will not be making legal arguments or motions but are instead present to provide neutral reminders to the respondent and assist the court in understanding the respondent's circumstances. In some cases, individuals have provided Know Your Rights information to the respondent off the record. Notably, some IJs are more resistant to allowing attorneys they already know to appear as FOTC, since they believe that legal representatives should have to submit an E-28 to be allowed to appear. To avoid this, several organizations have successfully sent paralegals or law graduates as FOTC instead of barred attorneys.

In courts where IJs are exercising their discretion to prohibit FOTC appearances altogether, some practitioners have been able to gain access as an observer. Once present in the courtroom (whether in-person or virtually), they have then gently offered to provide information to the court, either during or after the hearing. A legal service provider shared that when their team contacted their local Assistant Chief Immigration Judge (ACIJ), the provider offered to be present in the courtroom without explicitly referring to their role as "friend of the court." This approach enabled the ACIJ to sidestep the need to create a formal policy or interpretation regarding FOTC appearances. The judge then connected the provider with the court administrator and granted permission to facilitate communication within the local court.

Public Access to Immigration Hearings

If an Immigration Judge is reluctant to allow an advocate to access the courtroom, even just to observe, it can be helpful to cite to the authority for public access to immigration hearings. The Constitution, common law, regulations, and EOIR's own policy guidance all support the public's right to access immigration proceedings.

The First Amendment and common law both recognize the right of the public to attend judicial proceedings. That right may only be limited if a court makes "specific factual findings" demonstrating that closure is essential to protect an overriding interest, and that the restriction is no broader than necessary to serve that purpose.[19]

Federal regulations additionally support the proposition that immigration proceedings, other than exclusion hearings, should open to the public.[20] The only exceptions are where physical facilities require a reasonable limitation of attendees at any one time; to protect witnesses, parties, or the public interest; in cases involving abused spouses or children (unless the abused spouse consents to the hearing being open to the public); and where information subject to a protective order has been filed under seal.[21] If none of these exceptions apply, any person should be able to attend and observe immigration court. Generalized references to "security" are insufficient to displace the public's right of access without concrete factual findings.[22] Furthermore, individuals who are excluded from a hearing must be given a reasonable opportunity to raise their objections.[23]

EOIR's own policy guidance further supports the principles that immigration hearings should remain open to the public: PM 20-05 explicitly notes that 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."[24]

Appearing as FOTC in Children's Cases

FOTC appearances on detained juvenile dockets have remained largely consistent with prior practice, but the reinstated memo makes it clear that the role is discretionary and narrowly defined. Legal service providers report that IJs in Newark, New Jersey; San Diego, California; and Tucson, Arizona have prohibited FOTC appearances in children's cases.

The scope and permissibility of the FOTC in detained juvenile cases might be set by the individual Immigration Judge, but typically the FOTC role is intended to communicate to the court the status of a child's reunification or transfer (and therefore assist the court with understanding the ideal location and timeline for removal proceedings) and possibly the child's status of securing representation in the most appropriate venue. In practice, this means that IJs often expect the FOTC to provide basic updates on the child's

[19] *Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for Dist. of Ariz.*, 156 F.3d 940, 949 (9th Cir. 1998) (citing *Oregonian Pub. Co. v. U.S. Dist. Ct. for Dist. of Oregon*, 920 F.2d 1466 (9th Circ. 1990)).
[20] *See* 8 C.F.R. § 1003.27.
[21] *Id.*
[22] *See, e.g., Phoenix Newspapers, Inc.*, 156 F.3d at 950; *Oregonian Pub. Co*., 920 F.2d at 1467.
[23] *United States v. Brooklier*, 685 F.2d 1162, 1167-68 (9th Cir. 1982).
[24] PM 20-05 at FN1.

reunification status (e.g., whether release to a family member is anticipated) and facilitate court efficiency by advocating for procedural motions (e.g., Change of Venue and Change of Address).

Legal service providers in the Acacia Unaccompanied Children's Program (UCP) network must offer courtroom assistance to any unrepresented child in ORR custody who appears before the immigration court. Notably, during the recent termination of the UCP, where legal service providers endured a gap in funding for representation services, many IJs expressed frustration at the lack of FOTC assistance, given that they rely heavily on FOTC to maintain docket efficiency.

With the child's consent, and as allowed by EOIR, a FOTC may help the child understand court procedure, provide non-confidential logistical updates, clarify hearing dates, and emphasize procedural rights after the hearing. A Friend of the Court may not act as legal counsel for the child, accept or concede service of the NTA, admit factual allegations or charges, file substantive motions, briefs, or requests for relief, waive or request appeal on the child's behalf, or request a removal order.

Best Practices for FOTC Appearances in Detained Juvenile Cases

FOTC should clarify their role and gain the consent of the youth they are working with. This involves explaining to the child and any potential sponsor that as FOTC, they are not the child's attorney and do not represent them. Additionally, FOTC should state their limited role on the record at the start of their appearance.

Further, FOTC should only share the information that is necessary and helpful for docket management purposes and avoid sharing any more information than is necessary. The government may attempt to place the onus of their obligations upon FOTC; therefore, FOTC should always avoid overstepping their role or assuming duties that belong to DHS or the court. FOTC should keep an especially close eye on burden shifting.[25] For example, if a child leaves the facility and a legal service provider has additional information about their whereabouts, FOTC cannot and should not disclose further information to the court, even when pushed; it is the responsibility of DHS to locate the child and amend the NTA.

With the role of FOTC intact for detained children's cases, practitioners must navigate carefully, providing procedural support while avoiding the assumption of duties that belong to DHS or the IJ to protect the child's due process rights.

[25] DHS, through its trial attorneys, has the initial burden to prove alienage and removability by clear and convincing evidence. Only after DHS meets that burden does the respondent have to show eligibility for any form of relief or protection. In cases involving unaccompanied children detained by the government, the burden of ensuring their appearance in immigration court falls on the Office of Refugee Resettlement (ORR). ORR is responsible for the care and placement of unaccompanied children, which includes coordinating with the DHS and EOIR ensure court appearances.

Submission of Third-Party Notifications

There is an additional mechanism, beyond appearance as Friend of the Court, to support respondents in removal proceedings who may have mental health issues affecting their ability to represent themselves: the submission of a Third-Party Notification (TPN). A TPN is essentially a letter or written notification that a person or organization *who is not the respondent's legal representative* can submit to alert the court to a potential issue affecting the respondent's ability to meaningfully participate in their proceedings. A TPN usually includes facts and observations about a respondent's mental health, specific mental health diagnoses if there are any, impressions related to a respondent's competency, and other information to aid the court in assessing a respondent's competency.

People in removal proceedings in immigration court are presumed to be competent unless there are "indicia of incompetency," which include a "wide variety of observations and evidence."[26] TPNs are an example of evidence that can be submitted to show indicia of incompetency; indicia can also include observations of certain behaviors by the respondent, as well as record evidence of mental illness or incompetency like medical records.

When there are indicia of incompetency, an Immigration Judge must make further inquiry to determine whether a respondent is competent to participate in proceedings under the test set forth in *Matter of M-A-M-*.[27] Following such inquiry, the Immigration Judge must determine whether the respondent is competent to proceed with the hearing without safeguards.[28] The IJ must articulate that determination and share her reasoning. [29] If the Immigration Judge determines that the respondent lacks sufficient capacity to proceed with the hearing, they must prescribe safeguards, which are procedural protections to help ensure that an individual with disabilities receives a fair hearing.[30]

The legal authority for submission of Third-Party Notifications derives from several sources. *Matter of M-A-M-* states that "indicia of incompetency" can include "record evidence" that may come from affidavits or testimony from third parties like friends or family members and reports or letters from teachers, counselors, or social workers.[31] Immigration Judges can "permit a family member or close friend to assist the respondent in providing information."[32] An Immigration Judge is required to consider indicia of incompetency and make further inquiry: where there are indicia of incompetency, an Immigration Judge "*must* take measures to determine whether a respondent is competent to participate in proceedings" and

[26] *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011).
[27] "The test for determining whether an alien is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *Matter of M-A-M* at 484.
[28] *Id.* at 481.
[29] *Id.*
[30] *Id.* at 481; INA § 240(b)(3). For more information about the National Qualified Representative Program and safeguards, see *NQRP Practice Advisory: Procedural Safeguards and Section 504 of the Rehabilitation Act* (Oct. 2023), available at https://acaciajustice.org/wp-content/uploads/2023/12/2023-10-30-NQRP-Practice-Advisory-Procedural-Safeguards-and-Section-504-FINAL-updated-10-2023.pdf.
[31] *Matter of M-A-M-* at 480.
[32] *Id.* at 481.

"*must* weigh the results from the measures taken and determine, under the test for competency . . . whether the respondent is sufficiently competent to proceed with the hearing without safeguards."[33]

Additional justification for submission of a Third-Party Notification exists for unrepresented people in removal proceedings who are detained in DHS custody in Arizona, California, and Washington. The seminal case *Franco Gonzalez v. Holder* states that "third parties (including family members, social service providers, and others) may submit to the Immigration Judge, and the Immigration Judge *shall* consider, additional mental health information or other information relevant to a detainee's mental competency or incompetency to represent him- or herself in immigration proceedings."[34] Individuals attempting to submit TPNs or appear as FOTC on behalf of respondents in *Franco* states should cite to this language in support of their request.

Individuals should consider submitting a copy of the TPN that they file with the immigration court to ICE's Office of the Principal Legal Advisor (OPLA) as well. The permanent injunction in *Franco Gonzalez v. Holder* requires ICE to identify Franco class members in Franco states.[35] Sending ICE a copy of the TPN can serve as a paper trail that they were notified about a respondent's potential mental competency concerns. The TPN can be mailed to the main OPLA office where attorneys generally serve documents for clients.

Finally, submission of a TPN is not inconsistent with the parameters set forth in PM 20-05. While the prior DM 22-06 explicitly stated that providing information to the court regarding a respondent's competency was a function of FOTC, PM 20-05 does not contain such language. Instead, PM 20-05 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."[36] Individuals attempting to submit Third-Party Notifications can argue that they are sharing information about a respondent's competency to aid the *court*, not to aid one of the parties. A TPN is not a pleading or motion, which are not permitted by PM 20-05 to be submitted by non-legal representatives, but instead a *notification.*

Some advocates have received pushback to submission of TPNs for non-detained respondents. Crucially, *Matter of M-A-M-* applies equally to all respondents in removal proceedings, both adults and children, whether detained or non-detained—meaning that Third-Party Notifications can be submitted on behalf of *any* respondent in proceedings, not just those who are detained.[37] The reasoning in *Franco*, in contrast, applies to any respondents detained in DHS custody in Arizona, California, or Washington; although not binding to Immigration Judges in other jurisdictions, it may be persuasive. In the current climate, where the number of people detained is skyrocketing, legal access to people in detention has been obstructed, and programs serving people who are detained terminated, it is particularly important to direct the immigration court's attention to unrepresented, detained respondents in proceedings who may have mental health conditions that prevent them from effectively representing themselves and could benefit from safeguards.

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[33] *Id.* (emphasis added).
[34] *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG DTBX, 2014 WL 5475097, at *9 (C.D. Cal. Oct. 29, 2014) (emphasis added).
[35] *Id.*
[36] PM 20-05 at FN1.
[37] Under the National Qualified Representative Program (NQRP), unrepresented respondents in removal proceedings who are detained in DHS custody and who have been found by an Immigration Judge to be incompetent to represent themselves will be appointed a Qualified Representative to represent them at government expense.

Making the Case for Third-Party Notifications

Immigration court clerks have at times declined to accept Third-Party Notifications, and such refusals have become more frequent under the current administration. It can be challenging to determine how best to submit information regarding a respondent's competency into the record. The following recommendations can help support arguments that the court should accept TPNs and increase the likelihood that such submissions will be accepted. Advocates who expect resistance from the court to the submission of a TPN may wish to include the template TPN cover letter, provided as Appendix B to this practice advisory, when filing their TPN.

Some advocates have been informed by immigration courts that because federally funded programs like the Legal Orientation Program (LOP) and the National Qualified Representative Program (NQRP)[38] were terminated or paused, courts are no longer accepting Third Party Notifications. However, the authority for TPNs comes not from these programs, but from case law, including *Matter of M-A-M-*. Even though some courts were accustomed to submission of TPNs by providers working under the Legal Orientation Program, the fact that LOP is not currently in effect does not impact the court's obligation to accept TPNs submitted by third parties.

Some immigration courts that no longer allow individuals to appear as Friend of the Court have similarly not permitted people to submit Third Party Notifications. However, submission of a TPN is an entirely different process from Friend of the Court; appearance as FOTC should not be necessary to submit a TPN. Even so, some immigration court administrators have mistakenly conflated FOTC and TPNs. Individuals attempting to submit TPNs in person without appearing as FOTC should argue at the filing window that their TPN submission has nothing to do with FOTC, that immigration courts are required to accept TPNs, and cite to the language in *Matter of M-A-M-*, supra. Some providers have reported more success filing TPNs in person than via mail; others have been able to arrange with their local immigration courts to submit TPNs via email.

Some advocates have found that even when written TPNs are rejected by the immigration court, they have been permitted to appear as FOTC at a subsequent hearing to verbally share information about a respondent's competency with the court.[39] Some IJs allow a person appearing as FOTC to read a TPN they had prepared into the record. This has been especially effective in virtual hearings, where no mechanism exists to actually hand a physical copy of a TPN to the court staff, as well as during in-person hearings where no clerk is present in the courtroom to accept a hard copy of a TPN.

Practitioners may also want to counsel third parties, like family members, community advocates, or volunteer court observers, about how they can appear as FOTC on behalf of respondents with potential

[38] As of the time this practice advisory was published, the National Qualified Representative Program had been reinstated and was in operation.

[39] Neither *Matter of M-A-M-* nor *Franco Gonzalez v. Holder* limit information from third parties relevant to competence to written submissions.

competency issues. Given the recognition in *Matter of M-A-M-* that third parties can alert the court to competency concerns, these individuals can play a crucial role in helping IJs identify when safeguards are needed. In one case, for example, a family member who was simply observing their loved one's hearing was invited by the Immigration Judge to speak about the respondent's condition—something the IJ might not have done if an attorney or representative had attempted to appear as FOTC instead.

In the current environment, where more people are being placed into removal proceedings and legal organizations have limited capacity to appear as FOTC, preparing and supporting family and community members to serve in this role can be an important strategy. Practitioners can help ensure that those individuals understand what FOTC is and how their participation can positively impact someone's proceedings. It can be especially helpful to speak with third parties in advance of a hearing about how to share information related to a respondent's mental health or cognitive functioning—particularly since people may be hesitant to speak about those issues in front of a judge, especially without understanding how that information could help their loved one by resulting in safeguards or appointment of a Qualified Representative. Framing FOTC participation as a way to help the court better understand the respondent's circumstances, while also benefiting the respondent, can help community members more effectively step into that role.

Third-Party Notifications and Friend of the Court Appearances Should Not Require an E-61

Practitioners must file a Form E-61 (with the immigration court) or Form E-60 (with the Board of Immigration Appeals) whenever they provide document assistance to a pro se respondent. "Document assistance" is the drafting, completing, or filling in blank spaces of any motion, brief, form or other document or set of documents intended to be filed with the immigration court or the BIA.[40] Recently, some immigration courts have begun requiring that an E-61 accompany a Third-Party Notification (TPN) before the court will accept it. This approach is problematic, because only attorneys and accredited representatives are permitted to file an E-61, which means that non-attorneys—such as paralegals, family members, social workers, or other concerned individuals—are effectively barred from submitting TPNs.

An E-61 should *not* be required to be submitted with a TPN.[41] By definition, a TPN is submitted by someone who is *not* a representative of the respondent. A TPN is not an appearance and typically includes impartial facts and observations, not legal advocacy. In contrast, an E-61 is a notice of limited appearance,

[40] Executive Office for Immigration Review, Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances (RIN 1125–AA83) Frequently Asked Questions (June 2023), available at https://www.justice.gov/eoir/page/file/1551476/dl?inline.

[41] Recent changes to the Immigration Court Policy Manual (ICPM) may add to the confusion around whether E-61s are required for TPN submission. ICPM chapter 2.1(c) states " Practitioners who have not filed a Form EOIR-28 to become the practitioner of record . . . and **who provide assistance to pro se respondents with the drafting** . . . of a specific motion, brief, form, or **other document or set of documents intended to be filed with the immigration court**, must disclose such assistance by completing a Notice of Entry of Limited Appearance for Document Assistance Before the Immigration Court (Form EOIR-61)." This section could be read to require an E-61 whenever a practitioner prepares any document for filing with the immigration court, including a TPN. Practitioners may wish to raise the counterarguments outlined in this advisory to challenge that interpretation.

filed by a practitioner at the respondent's request to submit documents like applications, briefs, or motions, which often do constitute legal advocacy. Importantly, *Matter of M-A-M-* explicitly contemplates that courts may receive TPNs from third parties who are not attorneys or accredited representatives. Requiring an E-61 to be submitted with a TPN would exclude non-practitioner third parties from raising competency concerns—undermining the safeguards envisioned in *M-A-M-*.

The same principle applies to the role of FOTC: because the FOTC's function is to assist the court, not to advocate for or represent the respondent, an E-61 should not be required to appear as FOTC.[42]

Nonetheless, some advocates have concluded that, where courts have required submission of an E-61 to submit a TPN or appear as FOTC, it is ultimately in the respondent's best interest to comply. In these instances, advocates may choose to file an E-61 to avoid delays, preserve relationships with local court staff, and ensure key information makes it into the record. Still, practitioners should be mindful of the broader policy implication: requiring an E-61 creates a barrier for non-lawyers who may have critical information about a respondent's competency but are unable to share it through the filing of a TPN, since they cannot also file an E-61. Organizations facing an E-61 requirement from their local immigration court can consider requesting a meeting with their ACIJ to explain the legal basis for TPNs and discuss the policy implications of requiring an E-61 for their acceptance.

Conclusion

Despite the reinstatement of more restrictive guidance in PM 20-05, the Friend of the Court model remains a valuable and permissible tool for supporting pro se individuals and families in immigration court. PM 20-05 states that Immigration Judges have discretion to allow FOTC appearances in their courtroom. Many practitioners continue to find ways to assist in an FOTC capacity—whether by coordinating with court staff in advance, appearing virtually, or offering procedural guidance during hearings—while remaining within the boundaries of non-advocacy. When approached thoughtfully, FOTC accompaniment can still play a meaningful role in helping pro se individuals understand their rights and obligations and in facilitating communication with the court.

In addition to FOTC appearances, advocates are strongly encouraged to submit Third-Party Notifications (TPNs) when they observe signs that a respondent may be experiencing mental health challenges that affect their ability to represent themselves. A TPN allows a non-representative to alert the court to concerns about a respondent's competency, including relevant diagnoses, observations, or other contextual information. Importantly, *Matter of M-A-M-* applies to all respondents in removal proceedings—whether detained or non-detained—affirming that TPNs may be submitted in any case where competency is at issue. In today's environment, where access to legal support for detained individuals is increasingly

[42] *See generally* PM 20-05.

limited, TPNs are a critical mechanism for ensuring that the court is aware of potential competency concerns and can administer appropriate safeguards.

FOTC and TPNs remain two of the most effective tools to protect due process and support individuals and families navigating a complex and often intimidating court system. By helping someone understand what's happening in their hearing or flagging concerns about mental competency, these mechanisms allow immigration advocates to assist, even without serving as legal representatives.

APPENDIX A

Introducing yourself as Friend of the Court
Before a New Immigration Judge or Docket

Fact pattern: You are an attorney or BIA accredited representative providing orientations and legal consultations to pro se individuals as part of the Legal Access Services for Reunified Families (LASRF) Program team at your local Court. You meet the Derluguian family in the lobby at 8am and they show you their notice of hearing for a master calendar that morning at 8:30am. Mr. Derluguian tells you that they have moved out of state, so it took the family 6 hours of driving through the night to make it to the hearing this morning. Mr. Derluguian mentions that he has not seen a copy of his NTA and has never been in an immigration court before. He asks if you could please accompany him into the courtroom and help him speak with the Judge.

- What type of support could a FOTC provide in this situation?
- If you have not previously appeared in a FOTC capacity in front of this Immigration Judge, how would you explain your role?

Script 1:

Before the hearing:

Friend of the Court to the Court Clerk

"Good morning, I am requesting to appear as a Friend of the Court on behalf of _____ (Organization Name) for _____ appearing on your Honor's 9am docket]."

During the hearing:

Immigration Judge: Please introduce yourself on the record.

Friend of the Court: "Your honor, I am [Your Full Name], a [Full Title] with the _____ (Organization and legal program, if relevant. I am appearing as a Friend of the Court; I am not a licensed attorney and therefore not entering my appearance. I am NOT representing the respondent today. We have been assisting Mr./Ms. [Respondent], pro se, since _____[they were detained or since they arrived at court this morning]. [Explain reason for appearing as Friend of the Court: *I would like to provide information about this family's current address to assist the court in determining whether a Change of Venue may be appropriate in this case.*]"

Immigration Judge: If you're representing this individual and advocating on their behalf, you should file an E-28 with this court. I don't understand why you have not submitted an E-28.

FOTC: Your honor, I would like to clarify that I am not representing this individual but am simply facilitating communication and understanding between this individual and the court in a Friend of the Court capacity.

- If assistance with documents is required, our team would file a limited appearance for purposes of document preparation using the E-60/61. [*Flesh out explanation of E-60/61 if needed*]

- The recently reinstated PM 20-05 still grants Immigration Judges the discretion to allow appearances by amicus curiae, as stated in footnote 7 of the memo.

Immigration Judge: I am concerned about the section of the memo that states that individuals cannot engage in legal advocacy without being recognized as a respondent's legal representative. How is what you're doing different from advocacy?

Friend of the Court: Thank you for the opportunity to explain, Your Honor. I completely agree that FOTC should not engage in legal advocacy. The memo emphasizes that FOTC should act as a neutral party to assist the court. Our role is to facilitate communication, provide logistical support, and assist with basic forms, all in a neutral and objective manner."

- My goal in this particular case is to _____ [complete goals such as providing facts for severing the case, assisting with obtaining documents, identifying potential forms of relief, and requesting a continuance.]

Immigration Judge: Thank you for this clarification. Please go ahead and share the relevant facts you have about this family's current address.

Advocating for Friend of the Court Services despite Pushback from Immigration Judges based on Policy Memo 20-05

Fact Pattern: You have met with a 14-year-old unaccompanied child, Ivan, scheduled for an initial master hearing. You reviewed the Notice to Appear, and other documents provided by DHS/CBP to the HHS/ORR shelter where he was transferred to shortly after his entry to the U.S. The Notice to Appear is defective because it lacks the time and place at which the proceedings will be held. Further, the Certificate of Service is defective because it states the document was served on Ivan's sponsor, but the document was provided to the HHS/ORR shelter staff, and it lacks a signature of the person upon whom the document was served.

- You discussed these issues with Ivan and prepared him to communicate these issues to the IJ. As the case is called, you introduce yourself to the Immigration Judge as Friend of the Court (FOTC) and the DHS Assistant Chief Counsel ("DHS ACC") immediately objects to your request to speak on behalf of the 14-year-old child and provide information to the court.
- The DHS ACC cites the recently reinstated PM 20-05 which rescinded DM 22-06. You had previously appeared as FOTC as allowed by DM 22-06.

Script #2:

Legal Staff Member (FOTC): Good morning, your Honor, my name is Jennifer Jenkins, and I am here to assist as a Friend of the Court. I am not the attorney of record in this case.

Judge: Good morning. I have reviewed the latest EOIR policy memorandum, and I will not permit Friend of the Court services in my courtroom based on the new guidelines.

Legal Staff Member (FOTC): I understand your concerns regarding the latest EOIR policy memorandum, your honor. However, I would like to clarify that PM 20-05 still grants Immigration Judges the discretion to allow appearances by amicus curiae, as stated in footnote 7 of the memo.

Judge: The memo clearly states that individuals cannot engage in legal advocacy without being recognized as a respondent's legal representative. I cannot allow any form of advocacy from FOTC.

Legal Staff Member (FOTC): Your Honor, I completely agree that FOTC should not engage in legal advocacy. The memo emphasizes that amicus curiae should act as a neutral party to assist the court. Our role is to facilitate communication, provide logistical support, and assist with basic forms, all in a neutral and objective manner. I am not here to advocate on behalf of either party today. My goal is to ensure that this Court is privy to all the convoluted facts of this case.

Judge: But the memo also mentions that it is not appropriate to recognize an amicus curiae who is advocating on behalf of one party.

Legal Staff Member (FOTC): Absolutely, Your Honor. We are committed to maintaining our neutrality. Our purpose is to assist the court and the respondents without engaging in advocacy. The memo does not prevent FOTC appearances or the submission of Third-Party Notifications (TPNs). It only restricts us from advocating on behalf of a party unless formally recognized as a legal representative.
Judge: I am still concerned about the potential for FOTC to solicit clients or engage in unauthorized advocacy.

Legal Staff Member (FOTC): Your Honor, we understand those concerns. Our team has a track record of assisting as FOTC without engaging in solicitation or unauthorized advocacy. We are here to support courtroom operations, improve communication, and enhance judicial efficiency. The reinstated memo still allows for your discretion to permit FOTC in your courtroom, and we believe our services can be beneficial.

Judge: I see. I originally interpreted the rescission of DM 22-06 as precluding FOTC services going forward. Could you tell me more about your interpretation of the recission of the previous FOTC memo and the reinstatement of PM 20-05?

Legal Staff Member (FOTC): Of course, your honor. While DM 22-06 strongly encouraged the facilitation of FOTC in courtrooms, the new PM 25-18, which reinstates PM 20-05, grants you more discretion. It encourages judges to make independent decisions regarding the recognition of amicus curiae based on discussions from all parties involved. We are here to assist in a neutral capacity, as outlined in the O'Leary Memo and PM 20-05.

Judge: How will these memos affect the orientation services offered by your team?

Legal Staff Member (FOTC): Even under DM 22-06, our staff serving in an FOTC capacity were not allowed to engage in legal advocacy through filings and motions. Our role has always been to provide neutral support, such as helping with forms, explaining procedures, and facilitating communication. We believe these services are still within your discretion to allow.

Judge: I will consider your points. Thank you for the clarification.

Legal Staff Member (FOTC): Thank you, Your Honor. We appreciate your consideration and are here to support the court in any way we can.

APPENDIX B

Template Cover Letter for Third-Party Notification

[DRAFTING INSTRUCTIONS – REMOVE BEFORE FINAL: This cover letter explains the authority for third-party notifications (TPNs) to assist immigration court clerks in reviewing and accepting a TPN. Place this cover letter on top of your TPN, and see the sample third-party notifications for reference. Please edit red text before submitting.]

To Whom It May Concern:

I, NAME, respectfully submit the enclosed third-party notification (TPN) to inform this Court that RESPONDENT, based on information and/or observation, may be showing indicia of mental incompetency. Pursuant legal authority and policy guidance, this Court must accept the enclosed TPN.

A TPN is a letter or written notification that a person or an organization *who is not the respondent's legal representative* can submit to alert the court to a potential issue affecting the respondent's ability to meaningfully participate in their proceedings. A TPN includes facts and/or observations about a respondent's mental health.

The legal authority for submission of third-party notifications derives from several sources. As established in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), where there are indicia of mental competency, "Immigration Judges will need to consider whether there is good cause to believe that the alien lacks sufficient competency to proceed without safeguards. Indicia of incompetency include a wide variety of observations and evidence."[43] Such observations can come from the Immigration Judge, the parties, or third parties. Indicia of incompetency can derive from evidence including "direct assessments of the respondent's mental health, such as medical reports or assessments from past medical treatment or from criminal proceedings, as well as testimony from medical health professionals. *It may also include evidence from other relevant sources*, such as school records regarding education classes or individualized education plans; reports or letters from teachers, counselors, or social workers; evidence of participation in programs for persons with mental illness; evidence of applications for disability benefits; and affidavits or testimony from friends or family members."[44]

[THIS PARAGRAPH RELEVANT TO INDIVIDUALS DETAINED IN DHS CUSTODY IN ARIZONA, CALIFORNIA, OR WASHINGTON]: For individuals in removal proceedings detained in Department of Homeland Security (DHS) custody in Arizona, California, or Washington, the seminal case *Franco Gonzalez* v. *Holder* provides additional justification for submission of a third-party notification. "At or before [judicial competency inquiries] . . . third parties (including family members, social service providers, and others) may submit to the Immigration Judge, *and the Immigration Judge shall consider*, additional mental health information or other information relevant to a detainee's mental competency or incompetency to represent him- or herself in immigration proceedings."[45]

Submission of a TPN is not inconsistent with the parameters set forth in the current Director's Memo (DM) 20-05. While the prior DM 22-06 explicitly stated that providing information to the court regarding a respondent's competency was a function of FOTC, DM 20-05 does not contain such language. Instead, DM 20-05 addresses "only the actual appearance of

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[43] 25 I&N Dec. 474 (BIA 2011) at *479.
[44] *Id*.
[45] *Franco-Gonzalez v. Holder*, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) at *9 (emphasis added).

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." The enclosed TPN regarding the Respondent's mental health is intended to aid the court, not any party. Additionally, this TPN does not attempt to advocate on behalf of either party in these proceedings.

Additionally, Form EOIR-61 (E-61) is not required to be submitted with the enclosed third-party notification. Practitioners file Form E-61 to "enter limited appearance when they provide *document assistance* to pro se individuals in proceedings before an immigration court or the BIA, and the practitioner has not already entered their appearance or is not seeking to enter their appearance to become the practitioner of record.[46] "Document assistance" is the drafting, completing, or filling in blank spaces of any motions, brief, form or other document or set of documents intended to be filed with the immigration court or the BIA.[47]

The enclosed TPN is not a motion, brief, or legal argument submitted to the Court. Rather, it is intended solely to assist the Court and preserve judicial efficiency. Furthermore, *Matter of M-A-M-* explicitly contemplates the submission of third-party notifications by individuals who are not practitioners, including family members, friends, and social service providers; to require submission of an E-61 as a precondition to TPN acceptance would prevent such individuals from being able to submit TPNs, in direct contravention of *Matter of M-A-M-*.

This TPN does not arise from services provided under the Legal Orientation Program (LOP) or the National Qualified Representative Program (NQRP). LOP is a court-based legal education program that, since 2002, has provided detained individuals with information about detention, available relief, and court procedures. As part of that work, LOP providers often submitted third-party notifications when they observed indicia of incompetency. Some courts became accustomed to receiving TPNs from LOP providers, but the existence—or lack—of LOP or NQRP has no bearing on whether a court may or must accept a TPN. The authority to accept a TPN stems from the court's independent obligations under *Matter of M-A-M-* and other authority, which require consideration of indicia of incompetency brought to the court's attention by any third party. Accordingly, the fact that LOP is not currently in effect has no impact on the court's obligation to accept TPNs.

Respectfully submitted,

SIGNATURE
NAME
[IF APPLICABLE] ORGANIZATION

DATE

Encl: Third-Party Notification

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[46] *See* 8 C.F.R. §§ 1003.17(b), 1003.38(g)(2).
[47] *Id*.