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RE: Comment Opposing Proposed Rules on Professional Conduct for Practitioners-Rules and Procedures, and Representation and Appearances (September 30, 2020), [RIN 1125-AA83; EOIR Docket No. 18-0301]

Dear Ms. Reid:

Immigrant Legal Resource Center (ILRC) submits this Comment in response to EOIR Docket No. 18-0301 (hereinafter, "Proposed Rule" or "Rule"). We urge the Department of Justice to withdraw the Proposed Rule in its entirety..

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity. The ILRC has produced legal trainings, practice advisories, and other materials pertaining to the immigration law and processes.

The ILRC also leads the New Americans Campaign, a national non-partisan effort that brings together private philanthropic funders, leading national immigration and service organizations, and over two hundred local services providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship. Through our extensive networks with service providers, immigration practitioners, and naturalization applicants, we have developed a profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits.

ILRC provides technical support to non-profit programs who are providers of the legal orientation programs impacted here, and our technical assistance and policy work also encompasses access to legal representation, which would be severely limited by this rule.

I. INTRODUCTION

On September 30, 2020, the Executive Office for Immigration Review (EOIR) published its Proposed Rule to amend the regulations to permit practitioners to assist *pro se* individuals (litigants who represent themselves before a tribunal without counsel) with drafting, writing, or filing applications, petitions, briefs, and other documents in proceedings before EOIR only if such assistance is clearly disclosed and the practitioner files an amended version of EOIR's notice of entry or appearance form. Comments are due by October 30, 2020.

ILRC strongly objects to these proposed changes and further objects to the mere 30-day time period to respond to these changes. This Comment will outline the two primary concerns that ILRC has regarding the Proposed Rule's impact on government-funded orientation services for *pro se* individuals facing removal proceedings.

First, by broadening the scope of legal "practice," the Proposed Rule would require non-representative providers to reduce the scope of the orientation services they currently offer to *pro se* respondents across the country so as to not provide "representation." This would further eviscerate procedural protections for *pro se* individuals in removal proceedings, making it more difficult for due process to be upheld when indigent respondents are facing government counsel before an adjudicator. Further, the corresponding limited definition of "preparation" will lead to increased inefficiencies in the immigration court process as *pro se* respondents are generally less equipped to navigate the complex rules and procedures of the immigration court system without access to the educational resources and individualized information that programs are currently allowed to provide within the scope of orientation services.

Second, by mandating filing and attestation requirements (and sanctions for failure to comply) for non-representative practitioners willing to assist *pro se* individuals solely with preparation, the Proposed Rule would stifle programs such as the Legal Orientation Program (LOP)[1] and Immigration Court Helpdesk (ICH)[2], which are administered by EOIR and funded by Congress. These programs and their participating non-profit provider networks assist individuals (both detained and not detained) across the country who are facing removal proceedings in the immigration court system. The programs are tasked with offering orientation services that inform and empower respondents who are representing themselves in removal proceedings. If the Proposed Rule takes effect, the services these programs offer would likely be reduced to a mere recitation of information, rather than the dynamic educational experience that participants currently depend on. This would only make it more difficult for *pro se* respondents to understand the legal complexities of the immigration court system and to fully and competently prepare for their removal proceeding.

Further, LOP and ICH practitioners perform the dual roles of educating *pro se* respondents about their rights and obligations, while also connecting respondents to *pro bono* representation, if possible, and supporting them with continued *pro se* assistance when such placements are not possible. By constricting the services LOP and ICH practitioners can provide, the Proposed Rule would limit this bridge to *pro bono* representation, thus further reducing the likelihood that underserved *pro se* individuals will be able to receive *pro bono* assistance.

In our view, the Proposed Rule directly and negatively impacts the already restricted scope of permissible services that programs like the LOP and ICH can provide to *pro se* respondents. Under the Proposed Rule, these organizations would be further limited, as they could assist only with "preparation," which is defined as "acts that consist of purely non-legal assistance." All other acts would fall within the ambit of representation and would require the program volunteer to file a notice of entry or appearance on behalf of the participant, or risk disciplinary sanctions. This would not only narrow the scope of these programs to a point of obsolescence, but it would

[1] The LOP was established by Congress in 2003 to educate detained individuals facing removal proceedings about the immigration court, its processes, and basic information on forms of available relief.
[2] The ICH was established by Congress in 2016 to educate non-detained respondents facing removal proceedings, with similar objectives as the LOP.

jeopardize the programs' federal funding, disincentivize attorneys and non-attorneys from volunteering their time with these programs, and leave *pro se* individuals without meaningful access to the orientation services necessary to ensure their full due process rights.

If the Proposed Rule is approved, ILRC expects significant harm to the capabilities of the LOP and ICH. That harm will be borne by the individuals whom this Proposed Rule allegedly seeks to protect.

Proposed Rule Background

After reviewing the public comments received in response to the Department of Justice (DOJ)'s Advanced Notice of Proposed Rulemaking, issued on March 27, 2019 (the "ANPRM"), the DOJ issued the Proposed Rule that would amend Sections 1001.1, 1003.17, and 1003.102 of title 8 of the Code of Federal Regulations (the "Regulations").

The Proposed Rule provides that practitioners may assist *pro se* individuals with drafting, writing, or filing applications, petitions, briefs, and other documents in proceedings before EOIR only if the practitioner files the appropriate form. Although the Proposed Rule would not expand in-court limited representation beyond the existing provisions for custody and bond proceedings, the Proposed Rule would allow practitioners to engage in limited representation so long as the nature of the assistance is disclosed on an amended Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals or a Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court, Forms EOIR–27 and EOIR–28, collectively, the "NOEA forms." The Proposed Rule would not allow such continued practice or preparation without additional disclosure following the same procedure. Under the Rule, practitioners who assist a *pro se* individual without representing that individual before EOIR would still be required to file the amended NOEA form disclosing the nature of that assistance, either practice or preparation, and related information.

The Proposed Rule attempts to justify the proposed amendments with a stated concern that undisclosed legal assistance, or "ghostwriting," both facilitates fraud and gives *pro se* litigants who receive such assistance an unfair advantage. These concerns do not justify the costs. First, although there are "bad actors" who take advantage of individuals facing removal proceedings, the Proposed Rule is not limited to addressing such actors. Bad actors will not be deterred by the nuanced differences between "practice" and "preparation," or the heightened form requirements. Instead, it will be the federally-funded legal providers, organizations that are already held accountable under the law if they provide representation, that will be deterred from offering free, critical education and orientation services to unrepresented individuals facing removal proceedings. Second, providing *pro se* respondents with orientation and education assistance without disclosure does not give these respondents special treatment or an unfair advantage. If a respondent walks away from a LOP or ICH session with a basic understanding of the immigration court system and his or her claims, then this will only benefit the immigration court system. If the DOJ were truly concerned about selective assistance providing a non-universal benefit to *pro se* respondents, then a more appropriate rule would seek to expand federal funding of programs providing such assistance so that all *pro se* respondents could have a basic understanding of the immigration court system and their particular claims before representing themselves before EOIR.

A. Summary

In order to effectuate the Proposed Rule, the DOJ proposes a number of amendments. ILRC comments on two of those proposed amendments:

1. *First*, the Proposed Rule would amend the definitions of "practice" and "preparation" found throughout the relevant Regulations to distinguish between "practice" (as broadened to include any action "involv[ing] the provision of legal advice or exercise of legal judgment") and "preparation" (as limited to "acts that consist of purely non-legal assistance").

2. *Second*, the Proposed Rule would amend the NOEA forms to permit a practitioner to engage in "preparation." Specifically, the forms would have three sections: (1) a section "limited to situations in which a practitioner has provided assistance in the form of non-representative practice, but does not wish to take on actual representation in the EOIR proceeding"; (2) a section "limited to the rare situation in which a practitioner has engaged in preparation"; and (3) a section "relating to representation similar to the current practice with the existing [NOEA forms]."

These amendments would prove disastrous for programs such as LOP and ICH, which, in the absence of universal representation in immigration proceedings, provide a critical stopgap by offering educational and orientation services to *pro se* respondents facing removal, whose life and liberty hang in the balance.

II. DOJ DID NOT PROVIDE SUFFICIENT TIME TO COMMENT ON THE PROPOSED RULE

Although this Comment is timely filed, we begin by requesting the full 60-day period that should be afforded for public comment to provide a meaningful opportunity to analyze and respond to the Proposed Rule, which threatens to further erode the fairness in our immigration courts. Moreover, the Proposed Rule was published on September 30, 2020, at a time when the COVID-19 pandemic continues to accelerate throughout the country and to exacerbate the difficulties of working full-time remotely, making the 30- day comment period even more untenable. The restrictive 30-day period and unprecedented pandemic have impeded our ability to thoroughly analyze the Proposed Rule and research all potentially relevant sources.

III. AMENDMENT TO DEFINITIONS OF "PRACTICE" AND "PREPARATION"

The Department of Justice proposes to amend the definitions of "practice" and "preparation" to broaden "practice" to any action that "involve[s] the provision of legal advice or exercise of legal judgment" and to limit "preparation" to "acts that consist of purely non-legal assistance."

A. Practice

As amended, a practitioner would be engaging in "practice" any time "he or she provides legal advice or uses legal judgment and either appears in person before EOIR, or drafts or files documents with EOIR." "Practice," as broadened under the Proposed Rule, would include "actions typically regarded as the practice of law related to any matter or potential matter, before or with EOIR, and including both in-court and out-of-court representation." Such actions could "include legal research, the exercise of legal judgment regarding specific facts of a case, the provision of legal advice as to the appropriate action to take, drafting a document to effectuate the advice, or appearing on behalf of an individual or petitioner, in person or through a filing." This proposed definition is so broad as to render almost any form of education or orientation an act that triggers the obligation to file a NOEA form and renders the act "representation," which is outside the scope of permissible LOP and ICH services. Thus, the broadened definition of "practice" would only serve to silence and constrain LOP and ICH providers.

Comparatively, the current definition of "practice in the Regulations is limited to instances when a practitioner appears in a case on behalf of another person. The LOP and ICH are designed to comply with this definition. Both the LOP and ICH involve four components of service: (1) group orientations and information sessions; (2) individual orientations and information sessions; (3) *pro se* and self-help workshops; and (4) referrals and outreach to *pro bono* attorneys. Although LOP and ICH providers have never been allowed to offer legal advice because that would constitute representation, the proposed restriction on the exercise of legal judgment and legal research would have profound consequences for the efficacy of these programs. The amended definition would primarily impact the scope of services offered during the individual orientations, self-help workshops, and *pro bono* referrals and potentially limit providers to only offering group orientations, which, while useful, are not sufficient alone to ensure full due process protections for the *pro se* respondents.

The Proposed Rule states that the exercise of "legal judgment" could constitute practice under the amended definition. Legal judgment is an internalized action that attorneys and DOJ-accredited representatives will necessarily use when engaging with any legal situation. Allowing a practitioner to ask follow-up questions during an individual orientation or information session to understand the applicable facts and circumstances of the participant's situation is necessary to provide appropriate and relevant legal information. But these actions could be construed as "practice" under the Proposed Rule to the extent legal judgment is required. Not only does this diminish the intent of the programs, it prevents providers from determining the relevant information (from the multitude of complex immigration laws) to communicate to the participants.

For example, an LOP or ICH participant might describe that they entered the United States a few months ago and are seeking asylum. As part of an individual orientation or information session, it would be customary for the practitioner to ask follow-up questions to determine the exact date of entry, whether a Credible or Reasonable Fear Interview had been conducted, and, if an interview had been conducted, what the resulting decision was. Answers to these questions allow the provider to inform the participant of the next steps in the asylum-seeking process and their rights and obligations before the immigration court based on recent changes in asylum law.
Without further context, a provider would leave the participant in the dark regarding pertinent information to his or her case and unable to make educated decisions. This would result in limiting the programs' positive impact on court efficiencies.

Further, the Proposed Rule states that "legal research" could constitute practice under the amended definition, but the Rule fails to define "legal research." This ambiguity could hinder practitioners' research generally, including the research necessary to stay informed of recent changes in asylum law and to refer a *pro se* respondent to appropriate *pro bono* counsel. A volunteer program provider may refrain from referring respondents to pro bono representation given the uncertainty of whether that action could be construed as "legal research" and the threat of disciplinary sanctions if it is so construed. . Such broad, undefined language discourages *pro bono* representation at a time when there is a crisis of underrepresentation in the immigration court system.

B. Preparation

Under the Proposed Rule, to provide assistance with "preparation" not constituting "practice," a practitioner would be limited to "acts that consist of purely non- legal assistance." That is, although the practitioner could help a program participant complete forms or applications, the practitioner could not provide any "legal assistance." The Proposed Rule provides examples of unrepresented individuals receiving "preparation" assistance and limits such assistance to "help completing applications or forms with such basic, factual information as their name, address, place of birth, etc." The Rule notes that practitioners providing "preparation" assistance must "take care to avoid providing legal advice or exercising legal judgment regarding a specific case, as such actions would constitute practice and would trigger the additional requirements to which practice is subject as compared to preparation." Some examples of "preparation" constituting "practice" include a practitioner "who advises a client on what details to include in an asylum application in order to establish past persecution or learns information about an alien's case and suggests taking a particular action." Under the Proposed Rule, the practitioner would essentially be relegated to serving as a transcriber or translator, unable to even help participants understand what application questions are asking. The Proposed Rule also notes that individuals who are not licensed to practice law or not fully accredited as a representative "should not be providing legal judgment or advice, as such actions could constitute the unauthorized practice of law." Although LOP and ICH providers have never been permitted to provide representation, this new insertion is unnecessary and unduly restrictive given the important role LOP and ICH providers play in supporting *pro se* respondents who are proceeding on their own with limited resources.

Comparatively, under the current regulations, "preparation, constituting practice" does not occur unless the practitioner: (1) studies the facts of the case, (2) gives legal advice, *and* (3) performs other activities, such as the

preparation of forms or a brief for the Immigration Court.[3] The LOP and ICH are structured to comply with these guidelines and practitioners are allowed to assist participants with preparation, so long as the practitioner does not "appear in any case" or "study[] the facts of a [specific] case" and give "advice and auxiliary activities."

Consistent with these guidelines, the individual orientation and information sessions offered by the LOP and ICH do not constitute representation because practitioners do not give legal *advice* concerning individuals' specific cases; instead, the practitioners are limited to providing *information* to participants as part of individualized assessments. In other words, although the practitioner is prohibited from giving directive advice ("I suggest you apply for this relief"), the practitioner is allowed to give individualized information.

During individual orientation and information sessions, practitioners expressly tell participants they are not providing legal advice or representation (and obtain participant waivers and verbal consent acknowledging that) and then limit their services to comply with the Regulations. In compliance with the Regulations, during these sessions practitioners elicit information from the unrepresented individuals, assist those individuals in understanding their legal situations (*e.g.*, the availability of potential relief from removal, release eligibility, the differences between meritorious and frivolous cases), and respond to any specific questions or concerns the individual has relating to the law, applicable procedures, or requirements for pursuing different forms of relief. So long as the practitioner is careful not to give legal advice concerning a participant's specific case, this assistance is permissible under the current regulations.

Such individualized educational services are critical to providing *pro se* respondents an opportunity to competently litigate their cases without representation. The proposed definition of "preparation" threatens to further erode the protections that *pro se* respondents are afforded by programs like the LOP and ICH, which work to ensure that indigent individuals facing removal, many of whom have limited English proficiency and educational attainment levels, are able to file complete and legible motions, applications, and evidence with the court in support of their claims for relief.

In sum, the proposal to distinguish practice and preparation under the Proposed Rule unduly limits the scope of the LOP and ICH. These programs are vital to participants who rely on in-person self-help assistance because, as explained above, many LOP and ICH participants lack the degree of literacy required to use written self-help materials and depend on the programs to navigate the immigration court system and removal proceedings on their own.

Moreover, the claimed benefits of these amended definitions do not outweigh the costs. The programs have proven to increase efficiencies in the immigration court and detention processes.[4] The Proposed Rule does not proffer any plausible justification for the definition amendments that would outweigh the costs from seriously limiting the services of programs like the LOP and ICH. The Rule is not tailored to stopping "bad actors" from taking advantage of

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[3] 8 C.F.R. §§ 1.1(k) and 1001.1(k) ("The term *preparation*, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure.").

[4] *See* "Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II", Vera Inst. of Justice (May 2008), https://www.vera.org/downloads/Publications/legal- orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase- ii/legacy_downloads/LOP_evalution_updated_5-20-08.pdf (finding that LOP participants moved through courts faster, received fewer *in absentia* removal orders, and were effectively prepared to proceed *pro se*, and that the program improved detention facility conditions and increased immigration court efficiency).

individuals facing removal proceedings. Instead, the Rule would indiscriminately limit the ability of LOP and ICH providers to offer necessary education and information to respondents who are facing the incredibly complex immigration court system without representation.

IV. NOTICE OF ENTRY OR APPEARANCE (FORMS EOIR-27 AND EOIR-28)

The Proposed Rule also lays out amendments to the current notice of entry or appearance forms (Forms EOIR-27 and EOIR-28). Specifically, the amended forms would have three functions: (1) a section "limited to situations in which a practitioner has provided assistance in the form of non-representative practice, but does not wish to take on actual representation in the EOIR proceeding"; (2) a section "limited to the rare situation in which a practitioner has engaged in preparation"; and (3) a section "relating to representation similar to the current practice with the existing EOIR Forms 27 and 28."

Under the Proposed Rule, a practitioner assisting with "preparation" would be required to submit an amended Notice of Entry or Appearance to EOIR, which would accompany the form, application, or filing that was the subject of the assistance. The practitioner would have to list his or her name, contact information, State bar number or EOIR identification number, general nature of work done, and fees charged, and they would have to complete an attestation and certification on the amended form(s) attesting that he or she has explained, and the individual understands, the limited nature of the assistance being provided as "preparation." Filling out the preparer sections of USCIS or EOIR forms (*e.g.*, I-589, I-485, EOIR-40, EOIR-42A, EOIR-42B, I-881) would not be a substitute for the filing of an amended notice of entry or appearance form.

ILRC is concerned about these heightened form requirements because, by requiring a LOP or ICH provider to enter a notice of limited appearance for every person consulted as part of the program's individual orientations, information sessions, and workshops, such services may ultimately be deemed "representation" and, accordingly, government funds to support the programs would be withheld.

The Proposed Rule has the potential of requiring a majority of, if not all, LOP and ICH providers that provide application assistance, including the translation of forms and applications, to file an amended Notice of Entry or Appearance by completing the form's "non-representative practice" section or "preparation" section. This will likely impact most, if not all, LOP and ICH providers because, as the Proposed Rule points out, under the Rule's broadened definition of "practice," practitioners will engage *rarely* in acts of "preparation," which is limited to "completing forms or applications without the provision of legal advice or the exercise of legal judgment—for example, by serving purely as a transcriber or translator." The Proposed Rule finds that the mere transcription and translation process would be rare because the Rule assumes there is an "inherent likelihood that a practitioner will exercise legal judgment or provide legal advice while performing otherwise ministerial tasks such as serving as a scribe in filling out a form."

However, as discussed above, assisting *pro se* individuals with filling out forms is a critical part of the LOP and ICH as these programs were originally designed to offer orientation to immigration proceedings without providing legal advice—again, because many of the program participants lack the degree of literacy required to accurately understand and then fill out these forms on their own, and inaccurately filled out forms only serve to hinder court efficiency and increase the current backlog in the immigration court system. Helping *pro se* participants with "preparation" is not rare; preparation— and solely the legal judgment required to provide competent preparation assistance—is a touchstone of the LOP and ICH.

By essentially equating preparation with representation, except in "rare" cases, the Proposed Rule sets the LOP and ICH up for punitive action. As discussed above, the LOP and ICH, as a condition of receiving federal funding, are prohibited from providing "representation" to program participants at the government's expense. By broadening the scope of what constitutes "representation" and the activities that necessitate the filing of notice of entry and

appearance forms, the Proposed Rule directly limits the scope of the LOP and ICH and the range of services that can be offered under their guise. There is no reason for such a limitation.

As currently structured under EOIR's interpretation of "representation," LOP and ICH providers regularly assist program participants with preparation for their proceedings and use legal judgment to provide relevant information to the participants.

When a practitioner volunteers with the LOP or ICH—such as by leading a *pro se* workshop or individual information session—the practitioner does not have to enter appearances for each participant that the practitioner assists. Such a requirement would be unduly burdensome for the volunteer practitioners and would leave the practitioner vulnerable to the risk of disciplinary sanctions for failure to enter appearances for each assisted participant.

ILRC is concerned about the implications of the Proposed Rule on the program's ability to recruit volunteer attorneys and non-attorneys to help with *pro se* form assistance. Although the Proposed Rule notes that an attorney who does not have an EOIR identification number would not have to register with EOIR in order to submit the form and engage in preparation, footnotes 9 and 12 of the Proposed Rule provide conflicting information on what is necessary as far as an attorney providing "preparation" assistance without an EOIR identification number. LOP and ICH providers can and do recruit volunteer attorneys and non-attorneys to assist with *pro se* and self- help workshop sessions where *pro se* form assistance occurs. As the volunteer attorneys may not currently practice before EOIR, it is foreseeable they would not have an EOIR identification number. If a non-attorney volunteer (*e.g.*, a law school graduate) assists with form preparation under the supervision of an LOP or ICH attorney, it would then fall on the LOP or ICH attorney to submit an NOEA. Because of the large capacity the LOP and ICH networks have in serving *pro se* respondents, it is not reasonable to expect or require the LOP and ICH attorneys to have hundreds of limited scope NOEAs on file with EOIR for *pro se* preparation assistance. As such, this amendment has the potential of affecting *pro se* assistance, as a volunteer attorney may want to err on the side of caution and avoid possible disciplinary sanction by not having an EOIR identification number.

The immigration system is already facing a crisis of underrepresentation and *pro se* assistance is critical to upholding the due process measures for all respondents. ILRC opposes measures that would lead to further erosion of due process without providing material and tailored justifications for those measures. It is nearly impossible to imagine how LOP and ICH providers can avoid using any legal judgment during the course of providing legal services, particularly during workshops and individual information sessions, during which specific forms of relief are covered and application forms completed.

I. CONCLUSION

The Proposed Rule would unduly burden the non-profit immigration legal services programs and their clients that are served by ILRC. The rule would prevent these programs from performing the critical work of improving efficiency and promoting justice in the immigration court system through educational orientation services provided to individuals facing removal. These programs—as currently structured—have proven to benefit immigration courts by improving efficiency and ensuring the due process rights of unrepresented respondents in proceedings. The Proposed Rule would hinder the efficacy of these programs while not providing any tangible benefit. In order for legal information to be effectively provided, it must be provided by someone who truly understands it—which necessarily requires legal judgment. If LOP and ICH providers are prohibited from using legal judgment without risking representation—and thereby risking federal defunding—then the services offered by the LOP and ICH will fundamentally change to the detriment of the *pro se* participants served.

ILRC strongly urges EOIR not to adopt the Proposed Rule in consideration of the efficiencies of the courts and the effects on those who rely on the LOP and ICH.

Sincerely,

Margaret Gleason
Senior Staff Attorney for
Immigrant Legal Resource Center