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Submitted via www.regulations.gov

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
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Re: Professional Conduct for Practitioners--Rules and Procedures, and Representation and Appearances; RIN 1125–AA83 / EOIR Docket No. 18-0301 / A.G. Order No. 4841–2020

Dear Assistant Director Reid:

The undersigned non-profit organizations sub-contract to provide legal services through the Legal Orientation Program (LOP), funded by the Executive Office for Immigration Review (EOIR). We record this comment against the backdrop of the United States immigration court system in crisis, crippled by backlogs and operating in a state of chaos.[1] There is no right to appointed counsel in immigration court. Despite the best efforts of our organizations and many others, the vast majority of individuals facing an immigration judge do so without an attorney by their side.[2] For this reason, we are proud to participate in the Legal Orientation Program, which we see as a critical bulwark against deteriorating due process norms for those navigating the immigration court system.

LOP is an umbrella term that encompasses the LOP for detained individuals in the custody of Immigration and Customs Enforcement, the Immigration Court Helpdesk for non-detained individuals, and the LOP for Custodians program for caregivers of unaccompanied immigrant children. Our LOP teams provide individualized information and education about the immigration court and deportation systems and potential forms of relief to thousands of unrepresented individuals facing removal proceedings. Put simply, our teams help people figure out how to navigate the overwhelmingly complex web of immigration laws, policies, forms, and procedures that in many cases they must untangle while behind bars. The detained individuals who participate in our workshops are scared, alone, and often bewildered. It is our hope that the

[1] Kate Brumback, Deepti Hajela, and Amy Taxin, Associated Press, "AP visits immigration courts across US, finds nonstop chaos," Jan. 19, 2020, https://apnews.com/article/7851364613cf0afbf67cf7930949f7d3; Tal Kopan, *San Francisco Chronicle*, "Immigration courts in 'chaos,' with coronavirus effects to last years," May 18, 2020, https://www.sfchronicle.com/politics/article/Immigration-courts-in-chaos-with-15276743.php; Marissa Esthimer, Migration Policy Institute, "Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?," Oct. 3, 2019, https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point.
[2] Ingrid Eagly and Steven Shafer, American Immigration Council, Access to Counsel in Immigration Court, Sept. 28, 2016, https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

information and support we provide empowers them to present their own defenses to deportation effectively. We know all too well that for these individuals, their success is quite literally a matter of life and death.[3]

The LOP services our teams provide involve four component parts: 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. Our legal teams are already constrained in the services they can provide by the long-standing prohibition on the use of LOP funds for the provision of legal advice. Because of this restriction, our teams do not advise individuals on their specific legal case, but instead provide general information about immigration law and policy, the detention and court systems, and explanations as to how those systems differ for different individuals. Individual orientations and pro se workshops, in particular, offer an opportunity for our teams to provide information tailored to certain audiences. We might, for example, provide a workshop focused on asylum laws and procedures for a group of individuals who recently arrived from the border; whereas we might provide a workshop focused on the law and procedures governing bond hearings for a group of individuals with upcoming custody redetermination hearings.

LOP has long enjoyed broad bipartisan support for its vital role in preserving basic due process rights for unrepresented immigrants facing removal proceedings while contributing to the efficient functioning of the courts.[4] Yet, in the above-referenced Rule, EOIR has proposed changes to the federal rules that would directly and indirectly undermine the integrity and functioning of LOP. Should the agency publish the Rule in its current form, it would run afoul of appropriations law, which requires the continuation of the services and activities provided by all LOP programs in their current form.[5] For this reason, our organizations have come together to urge EOIR to make critical changes to the Proposed Rule prior to its final publication to ensure that the Rule does not interfere with the integrity or continuity of LOP programming.[6]

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[3] *See* Kevin Sieff, Washington Post, "When death awaits deported asylum seekers," Dec. 26, 2018, https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/.

[4] Evidence has shown the detained LOP program to be remarkably successful by fiscal, efficiency and due-process related measures. A 2012 study conducted by the Department of Justice found that detained immigrants who received LOP completed their court proceedings more quickly and therefore remained detained for an average of six fewer days, yielding the government a net savings of more than $17.8 million annually. U.S. Department of Justice, *Cost Savings Analysis - the EOIR Legal Orientation Program*, Apr. 4, 2012, https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf. A previous study conducted in 2008 by the Vera Institute of Justice found similar gains, including an average reduction in case processing time of 13 days for LOP participants as well as significantly higher rates of court compliance rates for those released from detention who received LOP services. Vera Institute of Justice, Legal Orientation Program: Evaluation and Performance and Outcome, May 2008, https://www.justice.gov/sites/default/files/eoir/legacy/2008/05/15/LOPEvaluation-final.pdf.

[5] Consolidated Appropriations Act, 2020, Public Law 116-93, 133 Stat. 2317 at 2396 (Dec. 20, 2019). In the Appropriations Act, the "Legal Orientation Program" refers to the LOP for detained individuals, the Legal Orientation Program for Custodians, and the Immigration Court Helpdesk program.

[6] This comment focuses its scope on proposed changes made by the Rule that we believe would impact LOP; failure to refer to other pieces of the Rule does not signal our approval or opposition to those provisions.

I. The Rule must be amended to ensure continuity of LOP programs by striking language suggesting EOIR funds cannot be used for legal access programming

In Section IV of the discussion of the changes proposed by the Rule, the Department states among other things that promulgation of the Rule would not permit "EOIR funds to be used for such assistance."[7] This statement does not appear to be reflected in the Rule's proposed changes to regulatory text, raising questions about its impact and meaning. However, if taken at face value, this statement would essentially defund the LOP programs, which frequently involve assistance with preparation for individuals in removal proceedings. Prohibition on the use of EOIR funds by the Department for practice and preparation, however, is not only beyond the scope of the Proposed Rule but also outside EOIR's legal authority, especially in light of explicit Congressional appropriations provisions funding the LOP program.

A. EOIR funding, and by extension the Legal Orientation Program, is outside the scope of this Rule

First, EOIR funding is not the focus of the Proposed Rule. The Rule is about creating clear guidelines about when, how, and who can provide limited representation to immigrants in the course of their removal proceedings. The subject of the Rule is clear: "This proposed rule would amend Department of Justice ("Department" or "DOJ") regulations to allow practitioners to assist individuals with drafting, writing, or filing, of applications, petitions, briefs, and other documents in proceedings before the Executive Office of Immigration Review ("EOIR")..."[8] It is a Rule proposed for the purpose of defining how and to what extent practitioners can "engage in limited representation, or representation of a client during only a portion of the case beyond what the regulations currently permit."[9] To introduce a prohibitive EOIR funding statement to certain activities described in this Rule is beyond the scope of the Rule, and the Department explains as much.

In section III, when describing the comments received as part of the Advanced Notice of Proposed Rulemaking (ANPRM), the Department describes that many comments it received supported the allowance of limited representation as a means to increase access to counsel and specifically one comment proposed that government funded counsel should be provided.[10] Addressing this specific comment, the Department unambiguously stated, "such suggestions are beyond the scope of this regulation."[11] It is illogical that despite acknowledging that government

[7] 85 Fed. Reg. at 61,645.
[8] *Id.* at 61,640.
[9] *See Id*. at 61,641 (describing the question posed by the Department in the Advanced Notice of Proposed Rulemaking as to subject matter of the current NPRM).
[10] *Id.* at 61,641 n. 3 ("Some comments opined that government funded counsel should be provided).
[11] *Id.*

funding is not part of the scope of the Rule the Department would, nevertheless, prohibit in the next section the use of EOIR funds to activities described in this Rule.

Furthermore, it would be an overreach for these funding prohibitions statements to apply to the LOP program, as the focus of the Rule is not the LOP program but rather limited representation before the EOIR. While some of the activity described in this Rule may touch upon some of the components of LOP programming it does not mean that this Rule should apply to the program as a whole.

This is especially so given that the LOP program and by extension its components predates this Rule. The LOP program began as a legal services model created by the Florence Immigrant and Refugee Rights Project ("FIRRP" or the "Florence Project") in 1989. It was the effectiveness of the project[12] that led the Senate, in 1992, to pass a bipartisan resolution instructing the Department to fund an EOIR-funded legal orientation pilot to be carried out by nonprofits.[13] This EOIR-pilot program was then expanded to three additional program sites in 1998,[14] and formally launched as an EOIR funded program in 2003 as part of a $1 million congressional appropriations package.[15] The LOP program, and its components, therefore predate not only this Proposed Rule on limited representation, but also the first limited bond representation rule promulgated by the Department in 2015.[16] Importantly, the 2015 limited bond representation rule never mentioned or discussed the LOP program and its components.[17] So to apply this Proposed Rule to the LOP program would not only be beyond the scope of this Rule but also not in keeping with the Department's first limited representation rule.

Even if the Department seeks to apply the prohibition funding statement to the LOP program, the Department violates its rulemaking authority by failing to explain or justify this sweeping prohibition in the Proposed Rule. As part of reasoned decision-making, an agency must explain not only its new decision-making but also when it departs from a previous position, and "may not, for example, depart from a prior policy *sub silentio.*"[18] Yet that is exactly what the

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[12] *See* GAO, GAO-FFD-92-85, Report to the Chairman, Subcommittee on International Law, Immigration, and Refugees, Committee on Judiciary, House of Representatives, Immigration Control: Immigration Policies Affect INS Detention, 50-51 (Jun. 1992), https://www.gao.gov/assets/160/151988.pdf (in 1992, then Legacy Immigration & Naturalization Services observed the "successful results" of the Florence orientation program).
[13] S. Res. 284 (103d Congress, 2d. Session, Oct. 8, 1994), https://www.justice.gov/sites/default/files/eoir/legacy/2013/04/18/rtspresrpt.pdf.
[14] See U.S. Dep't of Justice, EOIR, Evaluation of the Rights Presentation 3-4 (1998), https://www.justice.gov/sites/default/files/eoir/legacy/2013/04/18/rtspresrpt.pdf (implementing 90-day orientation pilot programs in facilities at three locations: Port Isabel, Texas; Florence, Arizona; and San Pedro, California).
[15] U.S. Dep't of Justice, EOIR, News Release, New Legal Orientation Program Underway To Aid Detained Aliens Mar. 11, 2003, http://www.usdoj.gov/eoir//press/03/LegalOrientationProgramRelease0311.pdf.
[16] Separate Representation for Custody and Bond Proceedings, 80 FR 59,500 (Oct. 1, 2015).
[17] *Id.*
[18] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.")

Department effectively is doing in proposing this Rule that does not name the LOP program yet simultaneously seeks to seize its funding and prohibit a number of its components.

B. The Department exceeds and acts contrary to appropriations law by seeking to limit what activities should be funded by EOIR, which would result in the nullification of all three of the LOP programs

Second, this statement within the introduction to the Rule also exceeds the scope of the Department's executive function. Whether and how funds are appropriated is determined by Congress, not by an agency within the executive branch of government.[19] By instructing how funds should and should not be used to further activities the Department has defined in this Rule, the Department violates one of the basic precepts of the separation of powers between the co-equal branches of government: that it is Congress who sets out the laws and appropriates funds to carry out these laws, and it is the Executive who carries this out.

As stated earlier, funds for the LOP program have been appropriated since 1992. Congress, since that time and throughout each funding period, has chosen to fund the program in its entirety, keenly aware of the components of the program. Most recently, in February 2019, Congress through the Fiscal Year 2019 Consolidated Appropriations Act required in statutory text the continuation of the services and activities provided by LOP.[20] The Fiscal Year 2020 Appropriations Act continued this language, providing an expanded $18 million for the services and activities provided through the LOP.[21] The Joint Explanatory Report accompanying the bill clarified that, "EOIR shall continue all LOP services and activities without interruption, including during any review of the program."[22]

If the Department moves forward with finalizing the definitions and statement of the Proposed Rule, however, the existence and continuance of the LOP program will be in jeopardy in direct contradiction to these Congressional appropriations statements. This is because the Department seeks to bar EOIR funding in a broad manner. In stating that EOIR funds should not be permitted to go to "such assistance" the Department does not define what actual assistance it means to preclude.[23] The Rule addresses limited representation, and further defines activities that should

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[19] *See, e.g., Office of Pers. Management v. Richmond*, 496 U.S. 414, 424; *United States v. Maccollom*, 426 U.S. 317, 321 (1976) (plurality opinion) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.").

[20] *See* Consolidated Appropriations Act, 2019, Public Law 116-6, 133 Stat. 13 at 102 (Feb. 15, 2019).

[21] *See* Consolidated Appropriations Act, 2020, Public Law 116-93, 133 Stat. 2317 at 2396 (Dec. 20, 2019).; Joint Explanatory Report to the FY2020 Commerce, Justice, Science, and Related Agencies Appropriations Act, H.R. 1158, https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/HR%201158%20-%20Division%20B%20-%20CJS%20SOM%20FY20.pdf, at p. 32.

[22] *Id.*

[23] By discussing the over breadth of this prohibitive funding provision we in no way suggest that the Department has the authority to even define funding in this manner. Far from it, the whole point of this section is that the Department does not have the authority to even demarcate funding much less do so in such a broad way.

be considered "practice "and activities that should be considered "preparation".[24] But nowhere does the Department explain what it means by "such assistance" nor whether this assistance incorporates just practice, or just preparation, or both. Nor does the Department provide any clarification regarding what is meant by "such assistance" later where, in a following section of the Rule, it states again that, "[t]he proposed rule neither creates any right or entitlement for an alien to obtain such assistance nor provides for Department funds to be put toward that purpose."[25] In sum, the Department only discusses EOIR funding in the narrative section of the Rule in three limited instances, and in each instance it does so without crucial explanation. An agency must provide a reasoned explanation for its actions.[26] The fact that the application of this unlawful statement about the Rule is not clear shows the Department has failed to follow even this basic requirement of reasoned rulemaking.

Of greatest concern is that as it is written, it appears the Proposed Rule intends to bar the use of EOIR funds to go to assistance considered "preparation." Specifically, the Proposed Rule redefines "preparation" as the completion of forms or applications *without* the provision of legal advice or exercise of legal judgment.[27] Yet, as discussed in greater detail below, that is exactly the type of work that EOIR funding currently supports through the LOP program and is what makes it successful.

As providers we can attest that LOP programs are essentially triage programs—attorneys, accredited representatives, and legal assistants trained to provide information and support for individuals facing life and death proceedings in a fast paced setting with far more individuals in need than the programs are funded to handle.[28] Indeed, as part of LOP work, nonprofit providers are often fielding questions from *pro se* immigrants about what an application is asking, and explaining legal concepts in lay terms. We also help some immigrants prepare forms for relief, who because of time constraints imposed by rushed court hearings, illiteracy, or language access issues, may not have the means or wherewithal to complete this task alone. The LOP program is centered around the delivery of general and individual orientations, designed to empower individuals who often do not speak English as a first language to represent themselves before an immigration judge. Providing this kind of preparation assistance is a vital tool in the LOP providers' toolbox.

By broadly precluding the use of EOIR funding to these activities, however, the Department is doing exactly the opposite of what Congress expressly instructed the agency to fund. The Supreme Court has held that when appropriating funds Congress can, in keeping with its

[24] 85 Fed. Reg. 61,645.
[25] *Id.* at 61,647.
[26] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).
[27] 85 Fed. Reg. 61,645 (emphasis added).
[28] For an example of the life and death stakes faced by those seeking relief in immigration court, *see* Kevin Sieff, Washington Post, "When death awaits deported asylum seekers," (Dec. 26, 2018), https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/.

authority, put restrictions upon their use as a way to prevent the purpose of their use from being nullified.[29] Congress has done exactly that by appropriating funds to the LOP program to further its current components. Precluding the use of EOIR funding for this purpose by implicitly limiting some of its components and then restricting funding to these components would violate appropriations law and be nothing short of a death knell to the LOP legal access program, at least insofar as those programs are actually intended to *help* individuals understand their legal rights.

LOP has robust substantive components that utilize both legal judgement and preparation to help empower *pro se* immigrants to make decisions in their cases so as to move them towards an efficient resolution. This is the type of program Congress has been funding since 1992. In its current form, however, this Rule at a minimum would gut LOP and prevent funding for some of these core program components. That is a nullification of the program and is at odds with Congress's explicit appropriation for the LOP program.

II. The proposed definitions of "practice" and "preparation" are overly restrictive—the "exercise of legal judgment" on its own does not constitute practice, and defining it as such will render LOP providers unable to provide meaningful services

The Rule proposes a new definition of "practice" and "preparation," and includes any act that "involve[s] the exercise of legal judgement" in conjunction with assistance with case preparation as practice rather than preparation. Specifically, the Rule defines as "practice" actions including: "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 a respondent or petitioner, in person or through a filing."[30] Similarly, the proposed definition of "preparation" is limited to clerical acts in the completion of forms, applications, or documents, "where such acts do not include the provision of legal advice or exercise of legal judgment…"

The use of the phrase "legal judgment" is inappropriately used in both contexts. This proposed definition of "practice" is so broad as to sweep within its ambit many actions that do not, under any common sense meaning of the term, constitute the practice of law. Legal service providers

[29] See *Cincinnati Soap Co. v. U.S.*, 301 U.S. 308, 321 (1937) ("It is perfectly plain that since Congress may levy the tax with the collateral purpose of protecting the industries of this country, it may in appropriating the proceeds put such restriction upon their use as will prevent the purpose from being nullified. This, we think, is the aim and the effect of the proviso.").

[30] 85 Fed.Reg. at 61646. The Rule's proposed amendments to 8 C.F.R. § 1001.1 are worded slightly differently than this provision in the Proposed Rule's narrative text; these proposed amendments would define "practice" to include any "exercise of legal judgment on any matter or potential matter before or with EOIR" when combined with an appearance before the court or "[a]ssisting in any matter before or potentially before EOIR through the drafting, writing, filing or completion of any pleading, brief, motion, form, application, or other document that is submitted to EOIR, on behalf of another person or client."

utilize their legal judgement constantly in the context of actions that are in no way the provision of legal representation or the practice of law. This is particularly the case for LOP providers.

Here are a few simple examples of actions involving legal judgment that should not, in any common-sense understanding of the term, be considered the practice of law:

- LOP provider Jane sits down to conduct an individual orientation with Laura, who has identified herself as a long-time green card holder. Jane exercises her legal judgement to explain to Laura the eligibility criteria for cancellation of removal for lawful permanent residents, but does not discuss the eligibility criteria for cancellation of removal for non-permanent residents.
- LOP provider Christopher is providing a general orientation presentation to a group of thirty men. He has reached the part of his presentation where he discusses the different types of immigration court hearings. A man in the back of the room raises his hand and says, "I've heard that people with certain criminal convictions don't get to go to court. Is that true?" Christopher uses his legal judgment to explain that certain criminal convictions serve as bars to various types of relief from removal, and that in the case of an aggravated felony conviction, individuals who are not lawful permanent residents may face what is called administrative removal which is a summary removal without a day in court.
- LOP provider Monica is conducting a know your rights workshop to a group of women who are getting ready to submit their I-589 asylum applications at their next master calendar hearings. One of the women asks, "What does it mean when the form asks if I am a member of a particular social group?" Monica uses her legal judgement to explain what a particular social group is, as defined by the circuit court of appeals with jurisdiction over the immigration court where the women will present their claims.
- LOP provider Jonathan is staffing the Immigration Court Helpdesk and providing an individual orientation to Luis. Luis explains that he traveled hundreds of miles for his hearing because he was previously detained in the jurisdiction of the immigration court where Jonathan and Luis are sitting, but he now lives many miles away with his cousin. Jonathan uses his legal judgment to explain to Luis the procedure and process for filing a motion to change venue.

Each of the actions described above involve the LOP providers' use of legal judgement. While some of these actions might very well constitute "preparation," in no rational world could any of these actions be described as the practice of law. Yet, when combined with pro se assistance to the involved individuals as they move forward with filing their applications and supporting materials with the court, that is exactly how they would be considered were this Rule to be finalized in its current form. And, as such, all of these actions and others like them would be prohibited for LOP providers.

Similarly, the reference to "legal research" as an action that may constitute practice is unreasonable and far outside the commonly understood practice of law. Especially in an area of law and practice as rapidly changing as immigration, practitioners must engage in legal research in order to ensure that they are providing accurate legal information even in a straight-forward know-your-rights context. For example, an LOP provider might have to do legal research to answer a question raised by an LOP participant about the state of the law while assisting with the preparation of a form; especially without applying the law to the facts of any particular case, this act should not constitute practice. Moreover, an LOP provider may need to do some legal research before determining that a case would make a good referral for a *pro bono* placement—the fourth critical component of the LOP. Yet, under this Rule, pro se individuals who could benefit from *pro bono* representation may not receive that assistance because the research necessary to assess the case for placement could render the work un-funded. LOP providers should not have to fear that in exercising diligence to ensure they are providing accurate information they are inadvertently veering into the practice of law, but that is exactly the situation the Department will create by narrowing the definition of preparation and broadening the definition of legal practice.

The Rule's proposed overly broad—and nonsensical—definition of "practice" will undermine the continuity of the LOP program and leave countless immigrants without a basic orientation as to their rights. LOP providers will be limited in their provision of services to the recitation of facts or procedure, untethered to the needs or identities of the actual people receiving the group or individual orientation. Practitioners will essentially be relegated to serving as a transcriber or translator, unable to even help participants understand what application questions are asking. In short, the LOP program would be left an empty shell, a robotic recitation of scripts and rules that provide meaningful help to few.

Especially in the fast paced world of immigration court where so few individuals are able to access representation, it is critical that LOP and other legal service providers be permitted to utilize their judgment to provide critical information and orientation without such actions being considered to cross the threshold into legal practice. In short, this Rule would waterdown the usefulness of the LOP and thereby undermine the ability of LOP providers to meet the programs' stated objectives, raising questions about the motives and purpose of this Rule. Such a severe undermining of the integrity and mission of the LOP program also places the Proposed Rule in direct violation of the FY2020 Appropriations Act, which requires the program's continuity.[31]

Adopting this broad definition of "practice" would also place EOIR outside the norms of American legal practice. In 2003, the American Bar Association's Task Force on the Model Definition of the Practice of Law issued a recommendation that each state and territory adopt its own definition of the "practice of law," centered on the basic premise that practice involves "the

[31] *See* n. 21 *supra.*

application of legal principles and judgment to the circumstances or objectives of another person or entity."[32] EOIR's proposed definition of "practice" deviates from this central premise by including any action involving the exercise of legal judgement in the course of pro se assistance within the definition, without any requirement that such judgement be applied to the individual case.

The following excerpt from the ABA Task Force's Report is also of note: "The chief reason for defining the practice of law and regulating those who perform services within the scope of the definition is to protect the public from harm that may result from the activities of dishonest, unethical and incompetent providers.... The scope of permissible conduct of persons who may engage in activities that are included within the definition of the practice of law will vary among jurisdictions, dependent upon the harm and benefit to the public and the requisite qualifications, competence, accountability and other requirements thought necessary to engage in those activities. Thus, in order to determine who may provide services that are included within the definition of the practice of law, jurisdictions must have sufficient information available to predict which nonlawyers, and under what circumstances, may provide a great benefit and which may create harm."[33]

While acknowledging the gravity of the harm caused by notarios and other actors engaging in the unauthorized practice of law, this Rule is not sufficiently tailored to preventing situations involving "bad actors." We urge EOIR to acknowledge that LOP and other legal service providers are working tirelessly each day to provide as much quality information to as many unrepresented individuals as we can reach. EOIR's indiscriminate attempts to place undue burdens and unreasonable restrictions on our ability to provide these services is one more illustration of the politicization of the immigration court system. Through the regulatory process, EOIR is endeavoring to undermine rather than defend basic due process protections provided to *pro se* respondents in its courts.

III. The development and provision of templates and boilerplate language for LOP participants must be permitted and should not be considered "practice"

LOP is staffed by dedicated non-profit workers with the mission of empowering individuals to understand and successfully navigate one of the nation's most complex areas of law and practice. Our staff members are salaried non-profit employees who have nothing to gain from having a greater number of LOP participants or from a higher number of referrals to pro bono representation. We are proud of our LOP staff—dedicated individuals who show up every day

[32] The Recommendation and Full Report of the Task Force are available here: https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/.
[33] Report, Report of the Task Force on the Model Definition of the Practice of Law, 2013, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/taskforce_rpt_803.pdf, at p. 5.

ready to make a difference. For those serving remote detention facilities, they often regularly awake hours before dawn to make the long car ride to deliver LOP services, and come home late in the evening. And in the midst of the pandemic, these very same providers are fielding calls from immigrants attempting to understand the changing scheduling and immigration court deadlines in light of COVID-19 and assisting people to get basic forms and evidence filed given unpredictable mailing services and new electronic service procedures, all while allaying panic and concerns of risk of harm from wide scale outbreaks of the virus inside detention centers.

And yet, the Proposed Rule directly and indirectly lumps our LOP teams in with a vaguely defined set of "bad actors" who would manipulate the immigration court system and take advantage of unwitting *pro se* respondents for their own financial or personal gain. In Section IV.B.2.A of the Proposed Rule, EOIR devotes several paragraphs to discussion of the harms and dangers of the practice it refers to as ghost-writing. EOIR argues that undisclosed legal assistance in the form of ghostwriting facilitates fraud and gives *pro se* litigants an unfair advantage. We see it quite differently. In the context of the chaotic immigration court system, where detained and *pro se* individuals are simply doing their best to figure out how to complete basic tasks like obtaining evidence from family and friends, printing and filing country conditions packets, and making sure these are timely filed in compliance with the immigration court's often changing rules, EOIR's characterization of those providing support for *pro se* litigants would be laughable if it were not so pernicious.

LOP occupies a unique space in the ecosystem of immigration law and practice. As LOP providers we are attempting to fill a gaping chasm by providing as much information and assistance as our small teams can manage to the many individuals in need—in the context of detained LOP, the more than four out of every five detained individuals who cannot access representation.[34] One of the most direct ways we can assist individuals in this triage environment is to provide assistance with the *pro se* drafting of motions and filings that must be submitted to the court. Many LOP providers provide LOP participants with templates or boilerplate language that individuals can tailor to their own case and utilize in court. The Proposed Rule, however, would lump these activities together into the category of "ghostwriting" and render LOP providers subject to discipline or sanction for providing such assistance.

There is no reasoned justification for this restriction. LOP providers are surely not providing *pro se* individuals with any sort of "unfair" advantage in immigration court—on the contrary, we are merely striving to assist them in just beginning to balance out the deck that is stacked against them as they face the immigration judge alone opposite a federally funded prosecutor.

[34] Eagly and Shafer, *supra*.

Consider the case of Rodrigo[35]: during his individual orientation Rodrigo disclosed he had a final deportation order for failing to appear at his immigration court hearing. Rodrigo told LOP staff that he had not received notice of this hearing and he thought it had to do with him being homeless during this time in his life. Accordingly, LOP staff explained the law on motions to reopen and provided him a template motion to reopen which had boilerplate language of what the law required. The motion had two main blank sections with instructions to the immigrant to discuss a) the reasons why they had not appeared at their hearing and b) what form of relief the person was eligible for. A couple of days later, Rodrigo called staff to let them know he was being staged for removal immediately. Rodrigo had attempted to complete this motion and an asylum application but called LOP staff for help because no one in his housing unit could read or write English. With little time to engage in referring his case for pro bono representation, LOP staff translated and explained the contents of the motion to Rodrigo over the phone and transcribed his answers to the motion and his I-589 application. Rodrigo then instructed his wife to deliver a letter to LOP staff to attach to his motion to reopen which they helped file with the court. Rodrigo's case was reopened and he managed to apply for asylum and withholding of removal and eventually won relief. Under the current provisions of the Proposed Rule, however, Rodrigo would be disadvantaged in two ways: first LOP staff would be prohibited from using their legal judgement to discuss the law on motions to reopen, but also second, LOP staff would be prohibited from giving Rodrigo a template motion to reopen. Additionally, LOP staff would have been required to complete a notice to appear to accompany a motion they did not in fact write for Rodrigo. Surely, these restrictions undermine rather than enhance fairness and efficiency in the courts.

The American Bar Association has dismissed this concern regarding the provision of an "unfair advantage" even outside of the immigration context, noting in its 2007 formal opinion entitled "Undisclosed Legal Assistance to Pro se Litigants," that ".... permitting a litigant to file papers that have been prepared with the assistance of counsel without disclosing the nature and extent of such assistance will not secure unwarranted 'special treatment' for that litigant or otherwise unfairly prejudice other parties to the proceeding. Indeed, many authorities studying ghostwriting in this context have concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage…."[36]

Despite EOIR's protestations to the contrary, there is no clear authority finding that ghostwriting or the development of templates or boilerplate language to support *pro se* litigants implicates any ethical concerns in the LOP context. The ABA's Formal Opinion on the matter, issued in 2007, found no prohibition in the Model Rules of Professional Conduct on the provision of undisclosed

[35] This name is anonymized for privacy and confidentiality reasons.
[36] American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 07-446, "Undisclosed Legal Assistance to Pro Se Litigants," May 5, 2007.

legal assistance to *pro se* litigants.[37] In the specific context of immigration court, and especially in a detained setting, the provision of such assistance clearly serves the interests of justice. LOP and other legal service providers should be allowed to provide such comprehensive services in the interests of justice and court efficiency. The Department's efforts to preclude us from doing so raises questions as to the true motivations behind this proposed Rule.

Furthermore, the transparency concerns raised by EOIR regarding candor to the tribunal and potential pecuniary interests could be easily solved by LOP and other legal service providers including a short attestation as to the assistance provided when providing boilerplate language or templates.

IV. LOP providers should not be required to provide a Notice of Appearance for assistance in preparation

The Proposed Rule requires that practitioners complete a full Notice of Appearance (EOIR-28, EOIR-27, or EOIR-26) each time they engage in an act of practice *or* preparation.[38] When the act of practice or preparation is not in the course of representation, the practitioner must include an attestation that they have communicated the parameters and limitations of the services and relationship to the client, and a certification that the client understood the communication. The agency estimates that the time to review and complete each Notice of Appearance form for non-representative practice or representation is eight minutes.

Eight minutes might not seem like a long time in the abstract, but for LOP providers every minute counts. In the context of detained LOP, for example, time is precious, ticking away between short windows of time when individuals in ICE custody are permitted to meet with our teams between required counts and mealtimes. It would not be unusual for an entire individual orientation to be completed in eight minutes, during which time an individual will receive the information they need to effectively provide their application or defense to the immigration court. It is literally, therefore, not an exaggeration that for each Notice of Appearance an LOP provider must complete because of this Rule, means one less detained person will receive an individual orientation.

Furthermore, the certification required by the NPRM must come from the individual submitting the application, adding new challenges for detained LOP providers who may be assisting individuals telephonically with follow up preparation services in the context of remote detention centers. Particularly in the context of the pandemic, when many LOP providers are providing entirely remote detained LOP and ICH and LOPC services, this requirement may render service provision entirely impossible.

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[37] *Id.*
[38] 85 Fed. Reg. at 61647.

A specific concern arising out of the proposed Notice of Appearance requirement is the ability of legal service providers to provide third party notifications to assist the court in identifying individuals with serious mental health concerns who are in need of assessment to determine if they are competent to stand trial or are in need of assistance through the National Qualified Representative Program.[39] In many cases an LOP provider is the first person to identify *indicia* of serial mental illness during individual orientations, and plays a critical role by ensuring that this information is flagged for the immigration court. LOP and other legal service providers must be permitted to make these notifications and must be permitted to do so without having to utilize a Notice of Appearance form when the very fact of the *indicia* of mental incompetence would render it difficult or impossible to do so. Additionally a prohibition from doing so by the Proposed Rule would appear to violate the agency's own case law and policy, which allows anyone with relevant information about a respondents' mental state, to communicate this information to the court.[40]

In sum, requiring the submission of new forms constitutes an unnecessary bureaucratic requirement that will dramatically hamper our ability to protect due process *and* it will undermine the ways in which LOP contributes to the efficient functioning of the court.

The agency's expressed concerns about ease of identification of preparers can be addressed by far less cumbersome manners. Most forms with which preparation assistance is often required already include a preparers' section. In other cases, a simple attached attestation would do the trick, as is already EOIR's practice with regard to interpreter attestations that are completed using a simple Certificate of Interpretation included as an appendix in the EOIR immigration court manual.[41] Requiring the submission of an entirely separate form is wasteful and harmful.

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[39] The National Qualified Representative Program, also operated through EOIR, ensures enhanced procedural protections and in certain jurisdictions the appointment of a Qualified Representative for individuals found by an Immigration Judge or the Board of Immigration Appeals to be mentally incompetent to represent themselves. More details about the program are available at https://www.justice.gov/eoir/national-qualified-representative-program-nqrp.

[40] EOIR's own guidance regarding the detection of indicia of mental incompetence states: "Indicia of the respondent's cognitive, emotional, or behavioral functioning may come from any reliable source including, but not limited to: family members, friends, legal service providers, health care providers, social service providers, caseworkers, clergy, detention personnel, or other collateral informants or third parties knowledgeable about the respondent." EOIR, "'Phase 1 Guidance' Regarding Protections for Detained, Unrepresented Aliens Who May Be Mentally Incompetent," Dec. 31, 2013," available at https://www.aila.org/infonet/eoir-phase-i-guidance-protections-for-detained; *see also Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).

[41] The Certificate of Interpretation is a template found at Appendix L of the Immigration Court Practice Manual, available at https://www.justice.gov/eoir/page/file/1258536/download.

V. We oppose the Proposed Rule's restrictions on access to the Record of Proceedings; such access is critical for core component services provided through LOP

The Proposed Rule contains language purporting to limit access to Records of Proceedings (ROPs).[42] LOP providers at times rely on access to ROPs to refer *pro se* immigrants to *pro bono* representation and provide them with the information they need to apply the lessons of LOP to the facts of their own proceedings. *Pro se* immigrants, particularly detained immigrants, often do not have parts of their ROP on hand, including their Notice to Appear (NTA) or the record of oral statements made by the parties and the immigration judge in their cases. For instance, a *pro se* detained immigrant will often not have a copy of their NTA on their person if they were placed in removal proceedings prior to their instant detention. Similarly, virtually no *pro se* immigrant is able to recount all the statements and findings made by the immigration judge and the prosecuting DHS attorney at prior hearings because of gaps in interpretation, unfamiliarity with legal terms of art, and similar barriers.

LOP providers often fill this information gap by requesting access to the ROP with a signed waiver from the *pro se* individual. FOIA is not a suitable alternative because FOIA results are typically returned months after a person's detained proceedings would have concluded. Detained immigrants likewise face multiple practical barriers to obtaining records in their ROPs that they do not already have on hand, especially documents from other court proceedings. For example, court phone answering services may not be set up to accept incoming calls from detention centers, particularly collect calls. If the person is able to get through to the court filing window, interpreters are generally not available and the court may require submission of requests in person or in writing. Language barriers and limited literacy levels prevent or delay many *pro se* immigrants from mailing written requests to the court. Any mailed requests they are able to submit will often go without response because of the volume of mail received by overworked courts.

Further, ROP review, particularly to request access to court audio recordings, is typically not something judges arrange in open court. Even if a *pro se* detained respondent were to receive an audio CD record of their proceedings, they have no means to listen to it at the detention center. where reliable access to computers much less audio equipment is unpredictable. In contrast, with a signed waiver from the *pro se* respondent, LOP providers well-versed in court procedure are readily able to access relevant parts of ROPs from the court and provide these to the *pro se* immigrant.

ROP access is critical to core services provided by LOP: *pro bono* placement of meritorious cases and individual orientations. *Pro bono* attorneys are often unable or unwilling to take on representation for a case referred by LOP without an understanding of critical facts contained in

[42] 85 Fed. Reg. at 61,649.

the record of proceedings, such as whether DHS is charging removability under aggravated felony provisions or what basis the immigration judge articulated for their decision in a case on appeal before the BIA.[43] ROP access is also important for effective *pro se* orientation: as a *pro se* individual works to apply the lessons they learned in LOP to the facts of their case, they will often ask LOP providers to explain or translate for them findings or allegations contained in their ROP. LOP providers cannot effectively provide either service without access to ROPs.

LOP access to ROPs bears no relation to a Rule addressing limited representation. LOP providers are not engaging in "practice" or "preparation," as defined by this Rule when they obtain ROP information to refer a case for *pro bono* placement or translate or otherwise share the contents with a *pro se* immigrant. Yet, language in the proposed Rule purports to limit access to ROPs to FOIA for anyone other than the respondent or counsel of record. FOIA is not an adequate alternative, particularly on the fast-paced detained docket, as explained above.

The Department's justification for this provision is rooted in the concern that anyone providing non-representational assistance to a *pro se* person can "quickly and easily obtain information or documents about a case directly from the alien."[44] This statement is predicated on an erroneous assumption that all the contents of the ROP are "readily available for review by the alien."[45] As detailed above, this is far from the case, particularly for detained immigrants, immigrants who require English interpretation, immigrants with limited literacy, and immigrants unfamiliar with court procedures—in sum, the majority of *pro se* immigrants. The language in the Proposed Rule that would restrict access to ROPs must be stricken to ensure *pro se* immigrants can continue to benefit from non-representational LOP services like *pro bono* case placement.

VI. The Proposed Rule puts good faith LOP and legal service providers at risk of unfair discipline

We are further concerned that the Proposed Rule puts LOP and other legal service providers at risk of unfair discipline. The Proposed Rule would subject any practitioner to discipline for engaging in an act of preparation and then simply failing—on only one occasion—to submit a signed and completed Notice of Appearance form. This comprises a significant change from the current rule, which requires the establishment of a pattern or practice of failing to submit the necessary forms in connection with acts of practice or preparation for discipline to be imposed.[46]

[43] Although the BIA issues transcripts of proceedings, these transcripts are not sent to detained respondents until they receive a briefing schedule, typically with as little as two weeks or less to submit their briefs - too late for *pro bono* placement of a case.
[44] 85 Fed. Reg. at 61,649.
[45] *Id.*
[46] 8 C.F.R. § 1003.102(t).

As described extensively above, our LOP service teams work under great strain to provide services to an overwhelming number of pro se individuals. It is not uncommon for an LOP provider to interact, through general and individual orientations, with dozens of individuals over the course of one day, doing their best to provide clear and individualized assistance to each person. Imposing sanctions, or even the threat of sanctions, on such providers betrays a punitive and harmful intent. We question whether EOIR's true motivation behind this proposal is to dissuade LOP and other legal service providers entirely from engaging in what this Rule would render the risky endeavor of delivering information and legal assistance to *pro se* individuals facing removal proceedings.

For these reasons, we recommend that that the "pattern and practice" requirement remain in place in the regulations governing attorney discipline, and that the agency reverse course with regard to its approach to LOP and other legal service providers.

VII. The 30 day period provided for comment is insufficient for meaningful notice and comment

Finally, in light of our organizations' interest in commenting on the substance of the Proposed Rules, we strongly object to the expedited time frame for this proposed rule. We draft these comments at the height of a global pandemic that has already afflicted 8.8 million lives with this highly infectious disease and killed 226,606 in the United States.[47] In the midst of this pandemic, our organizations and legal service organizations nationally are doing our best to continue providing high volume and high quality services to meet the crushing needs of communities impacted not only by the virus but by the ever-changing nature of court and agency protocol and procedure.

Although this comment is timely submitted, the rushed 30 day timeframe impairs our organization's ability to prepare thorough comments, as many of our staff members are required to work remotely and face disruptions in normal modes of attorney-client communication and provision of LOP services. In light of these circumstances, the truncated notice-and-comment period flies in the face of reasonable regulatory practices.

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In conclusion, our organizations take offense at the generally hostile tone taken throughout this comment toward limited representation and support for pro se respondents in immigration court. We were surprised to read, for example, in footnote 8, EOIR's observation that it "expects practitioners to engage only rarely in acts of preparation, because of the inherent likelihood that a practitioner will exercise legal judgment or provide legal advice while performing otherwise

[47] *See* Johns Hopkins University, Coronavirus Resource Center, World Map (last accessed on October 27, 2020), https://coronavirus.jhu.edu/map.html.

ministerial tasks such as serving as a scribe in filling out a form."[48] Such a derisive approach to acts of legal orientation and preparation are nothing short of toxic coming from EOIR, an agency overseeing the cases of hundreds of thousands of individuals with backlogged proceedings and chaotic operating procedures. We would hope that EOIR would do everything in its power to support, not obstruct, the provision of quality know-your-rights and legal orientation programming to the more than half of respondents appearing before the court without the assistance of counsel.

It is in that spirit that we urge EOIR to amend the Proposed Rules in line with the above recommendations, in furtherance of basic due process protections and in accord with the legal requirements placed on your agency by the FY20 Appropriations Act requiring the continued integrity of the Legal Orientation Program.

Please contact Heidi Altman, National Immigrant Justice Center, haltman@heartlandalliance.org, or Claudia Cubas, Capital Area Immigrants' Rights Coalition, claudia.cubas@caircoalition.org with questions.

Sincerely,

Capital Area Immigrants' Rights (CAIR) Coalition
Catholic Charities Atlanta
Catholic Legal Services, Archdiocese of Miami
Diocesan Migrant & Refugee Services, Inc.
Esperanza Immigrant Rights Project
Immigrant & Refugee Services, Catholic Charities, NY
Legal Services of New Jersey
National Immigrant Justice Center
Pennsylvania Immigration Resource Center (PIRC)
Rocky Mountain Immigrant Advocacy Network
The Florence Immigrant & Refugee Rights Project

[48] 85 Fed. Reg. at 61646, n. 8.