



October 30, 2020

Lauren Alder Reid, Assistant Director  
Office of Policy  
Executive Office for Immigration Review  
5107 Leesburg Pike, Suite 2616  
Falls Church, VA 22041

**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 Assistant Director Reid,

Innovation Law Lab 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.

Innovation Law Lab is a nonprofit organization dedicated to upholding the rights of immigrants and refugees. Founded in 2014 in response to the mass detention and deportation of asylum-seeking immigrant families, Innovation Law Lab specializes in the creation of scalable, highly replicable, and connected sites of resistance that create paradigm shifts in immigration representation, litigation, and advocacy. By bringing technology to the fight for immigrant justice, Innovation Law Lab empowers advocates to scale their impact and provide effective representation to immigrants in detention and in hostile immigration courts across the country. Innovation Law Lab works directly with low-income immigrants and the *pro bono* attorneys who serve them, providing legal services, direct representation, and tactical support before United States Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR).

We note that the Proposed Rule would make multiple changes to established practices and we are not commenting on every proposed change. The fact that we have not discussed a particular proposed change to the law in no way means we agree with it; it simply means we did not have the resources or the time, as explained below, to respond to every proposed change.

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

As an initial matter, Innovation Law Lab objects to the 30-day time period to respond to these proposed changes. We are in the midst of an unprecedented global pandemic and our organization and our partner 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 client communication and provision of services. In light of these circumstances, the truncated notice-and-comment period flies in the face of reasonable regulatory practices.

**II. The proposed definitions of “practice” and “preparation” are overly restrictive and the Notice of Entry of Appearance (NOEA) requirements are overly burdensome.**

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.”

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.”<sup>1</sup> 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 *pro se* services.

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<sup>1</sup> 8 C.F.R. §§ 1.1(i) and 1001.1(i) (“The term *practice* means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service, or any officer of the Service, or the Board.”).



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. This would prevent providers from determining the relevant information (from the multitude of complex immigration laws) to communicate to respondents who are receiving *pro se* or limited legal assistance.

The broadened scope of what constitutes practice would have drastically negative effects on numerous Law Lab projects, such as our Defend Asylum project, which utilizes *pro bono* attorneys and volunteers to conduct *pro se* asylum workshops, assist with various *pro se* motions, and provide information to *pro se* respondents regarding the immigration court process and the asylum system, as well as our Equity Corps of Oregon program, in which Law Lab acts as an information clearinghouse for *pro se* limited legal services delivery and links *pro se* respondents to *pro bono* counsel. Under the revised definition of “representation,” Innovation Law Lab could be prohibited from engaging in much of the work it currently provides within the context of its *pro bono* programs.

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.

This aspect of the proposed rule will have a negative effect on Law Lab’s Centers of Excellence, Equity Corps of Oregon, and Defend Asylum programs, as all three programs require actions that could be construed as legal research in relation to how each program locates and refers *pro se* respondents to *pro bono* attorneys. This proposed change could impede Innovation Law Lab’s ability to link *pro se* respondents to *pro bono* attorneys, thereby exacerbating the already severe crisis of underrepresentation in the immigration court system.

Additionally, 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.”<sup>2</sup> 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.

Many of Innovation Law Lab’s programs provide individualized educational services to *pro se* respondents facing removal proceedings. It is not only impractical to limit “preparation” in such a manner but entirely inconsistent with due process and judicial efficiency. Many *pro se* respondents lack knowledge of the U.S. immigration court system, do not speak English, and do not understand the inherent complexities of U.S. immigration law. By limiting “preparation” to mere transcription and translation, the rule will effectively deprive *pro se* respondents of due process and further exacerbate the immigration court’s already extensive backlog

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 Innovation Law Lab’s programs and other programs such as the Legal Orientation Program (LOP) and Immigration Court Helpdesk (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.

Moreover, 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

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<sup>2</sup> 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.



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.

Innovation Law Lab is concerned about the implications of the Proposed Rule on our programs’ 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.

Innovation Law Lab is further concerned with the effect this portion of the rule will have on our LOP and ICH partners to recruit volunteer attorneys and non-attorneys to assist with *pro se* and self-help workshop sessions where *pro se* form assistance occurs. As 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. This restriction would hamper Innovation Law Lab’s *pro se* projects in the same manner.

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. Innovation Law Lab opposes measures that would lead to further erosion of due process without providing material and tailored justifications for those measures. Innovation Law Lab is not an LOP or ICH provider, however, we work closely alongside and depend on partner organizations who are LOP and ICH providers, and many of our referrals come from ICH and LOP providers. We work with LOP and ICH networks to ensure that the due process rights of *pro se* respondents are upheld and support their programmatic work that offers comprehensive legal information services tailored to the needs of *pro se* individuals. Under these proposed rules, it will be nearly impossible for LOP and ICH providers to 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. Innovation Law Lab has the same concerns for its own programming.

### III. Conclusion

The proposed changes are highly unnecessary and extremely prejudicial to *pro se* respondents, to many of Innovation Law Lab's *pro bono* programs, and to Innovation Law Lab's partner organizations providing LOP and ICH services. This shameless attempt to further restrict access to effective legal representation and increase removals of vulnerable persons should be emphatically rejected.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact us should you have any questions about our comments or require further information.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen Manning".

Stephen Manning  
Executive Director  
Innovation Law Lab

A handwritten signature in black ink, appearing to read "Tess Hellgren".

Tess Hellgren  
Justice Catalyst Legal Fellow & Staff  
Attorney  
Innovation Law Lab

A handwritten signature in black ink, appearing to read "Jordan Cunnings".

Jordan Cunnings  
Director & Staff Attorney  
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A handwritten signature in black ink, appearing to read "Kelsey Provo".

Kelsey Provo  
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A handwritten signature in blue ink, appearing to read "Nadia Dahab".

Nadia Dahab  
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