Michigan Immigrant Rights Center

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Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
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Submitted via www.regulations.gov

Re: Opposing Proposed Rule 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,

The Michigan Immigrant Rights Center (MIRC) submits this comment opposing the above-referenced rules proposed by the Department of Justice ("DOJ") amending the Executive Office for Immigration Review ("EOIR") regulations governing legal assistance to pro se individuals and the entry of appearances on their behalf.

MIRC is a legal resource center for Michigan's immigrant communities, employing nearly twenty attorneys and accredited representatives to represent individuals before EOIR and the United States Citizenship and Immigration Services ("USCIS"). We advise over 2,000 new clients per year, including hundreds with cases before EOIR and an increasing number of individuals in detention. Some of these cases are brief advice and service; others include full representation for detained respondents. Our attorneys have decades of collective experience representing non-citizens in removal proceedings on the detained and non-detained docket, seeking relief in immigration courts, in appeals and motions to the Board of Immigration Appeals ("BIA"), and in petitions for review in the U.S. Court of Appeals for the Sixth Circuit.

As practitioners, we generally support the concept of limited scope/unbundled legal services. In the State of Michigan, on January 1, 2018, rules promulgated by the Michigan Supreme Court went into effect which formalized the scope of unbundled legal assistance.[1] These rules permit limited appearances on behalf of litigants for discrete matters or hearings and drafting (full or partial) of pleadings, briefs and other papers without requiring the attorney's signature or name. Organizationally, we support that approach to unbundled legal services. We cannot support the approach proposed by EOIR[2] as it not only distorts the concept of limited scope legal services, but

[1] Order, ADM File No. 2016-41, Amendments of Rules 1.0, 1.2, 4.2 and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules, Michigan Supreme Court, September 20, 2017, available at https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2016-41_2017-09-20_FormattedOrder_AmendtOfMRPC1.0-1.2-4.2-4.3-MCR2.107-2.117-6.001.pdf

[2] 85 Fed. Reg. 61640 (Sept. 30, 2020)

actually harms both respondents and the counsel who regularly practice before EOIR. For the reasons that follow, we urge EOIR and DOJ to withdraw these proposed changes in their entirety.

I. MIRC objects to EOIR's 30-day comment period to respond to their comment for this Notice of Proposed Rulemaking (NPRM).

The DOJ has given the public a mere thirty (30) days to submit comments, without providing any explanation for this deviation from the customary sixty-day comment period. The change is difficult to understand, given the generally slow pace of the immigration court system and considerably slower pace dictated by the current public health crisis. Even presuming that these rule changes were necessary (which we do not concede), they are not particularly time-sensitive. It is hard to see justification for cutting short the process of review and comment, especially given the significant risk that these changes will wrongly consign our immigration system's most vulnerable participants to persecution or death in their home countries. Stakeholders should be given adequate time to comment on dramatic revisions to asylum procedures that will reduce access to life-saving asylum protections in the name of efficiency.

The shortened comment period is all the more egregious given that the U.S. remains in the midst of the COVID-19 pandemic. All MIRC staff continue to work from home to the greatest extent possible, often while caring for children and/or for sick family members. None of the MIRC staff members (and we suspect, attorneys across the country) are able to work at their pre-pandemic capacity. Many of our clients are facing even greater difficulties, as they experience layoffs, lost income, evictions, food insecurity, and of course, infection with COVID-19. As low-income immigrants and, in many cases, as people of color, our clients have felt the disparities of COVID-19 and have suffered disproportionately from infections and complications. The work of providing our clients with effective representation has therefore become exponentially harder. We also must expend additional energy to keep up with EOIR's and the Department of Homeland Security's ("DHS") daily operational changes during the pandemic.

Thirty days to comment on such a transformative proposal, under these conditions, is not a fair opportunity. Although we object to DOJ's unreasonable thirty-day timeframe, we submit this comment nonetheless, because we feel compelled to object to the proposed regulations.

II. MIRC disagrees with the analysis and alleged justification for implementing these changes.

On March 27, 2019, the DOJ published an Advanced Notice of Proposed Rulemaking (ANPRM) seeking public comments about the extent of limited representation before EOIR.[3] Based on the questions, it seemed that the ostensible purpose was to gather information about expanding limited scope representation options before EOIR so as to increase access to counsel for unrepresented respondents. While this was generally supported by the thirty commenters who responded to the ANPRM,[4] these initial responses to the eleven questions do not justify the breadth of the proposed changes that DOJ advances with this proposal, especially as they relate to pro se litigants.

[3] 84 Fed. Reg. 11446 (Mar. 27, 2019)
[4] 85 Fed. Reg. 61641-61645 (Sept. 30,2020)

As stated above, organizationally, we support the concept of unbundled legal services when the implementing rules (and practitioners) have mutually agreed upon what services and activities are permitted. Here, that is not the case. In thirty days and as described in Section 1, it is impossible to constructively engage with DOJ in a way that ensures adequate protections for advocates and respondents, especially given the harshness of how the proposed rule affects pro se litigants and nonprofits serving them.

In response to a question about options for expanded, limited representation, 26 of 30 appeared to support options that included limited appearances for all hearings and case types, limited appearances as they relate to specific forms of relief, limited appearances as they relate to specific motions, limited appearances at master calendar hearings only, and limited appearances without regard to distinguishing between private and pro bono, among others.[5] Notwithstanding these responses, the DOJ states that its proposed rule "would not expand in-court representation beyond the existing provisions for custody and proceedings."[6] This is in direct contravention to the majority of comments.

Moreover, the DOJ proposes that when an attorney or accredited representative (hereafter, practitioner) assists a *pro se* individual with "drafting, writing, or filing applications, motions, forms, petitions, briefs, and other documents before EOIR," they must complete and submit a Notice of Entry of Appearance as Attorney or Representative (EOIR-27 or EOIR-28, depending on the venue) for each matter, in all circumstances![7] Nothing in the responses to the ANPRM supports such a drastic and dramatic re-envisioning of the use of EOIR-27 and EOIR-28 for *pro se* respondents.

"Consistent with this change, the Department proposes to amend the definitions of 'practice' and 'preparation' to distinguish between acts that involve the provision of advice or exercise of legal judgment (practice) and acts that consist of purely non-legal assistance (preparation)."[8] Again, nothing in the responses to the ANPRM support such a drastic expansion of the definitions for practice. We will examine these asinine changes in the sections below. For these reasons, we urge DOJ to withdraw this rule in its entirety.

III. MIRC vehemently opposes the new definitions for "practice" and "preparation" and the proposed manner of implementation by filing E-28s and E-27s

1. Practice

Under the current regulations, the term practice is defined, at 8 C.F.R. § 1001.1(i) as

> 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 DHS, or any immigration judge, or the Board.

The proposed rulemaking seeks to drastically expand the definition to consist of

[5] Id. at 61641-61642.
[6] Id. at 61645.
[7] Id.
[8] Id.

> the act or acts of giving of legal advice or exercise of legal judgment on any matter or potential matter before or with EOIR and
> (1) Appearing in any case in person on behalf of another person or client in any matter before or with EOIR, including the act or acts of appearing in open court and submitting, making, or filing pleadings, briefs, motions, forms, applications, or other documents or otherwise making legal arguments or advocating on behalf of a respondent in open court, or attempting to do any of the foregoing on behalf of a respondent; or
> (2) Assisting 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.[9]

The differences between the scope of what constitutes practice currently and prospectively could not be more pronounced and foreboding for any practitioner seeking to work in immigration law. Before even arriving at subsections (1) and (2), the rule essentially gives notice to every practitioner that almost any interaction with a client or potential client whereby they would be applying facts to law are implicated here: providing "any legal advice," exercising any "legal judgment" for someone who currently has or *might* have a case before EOIR. Essentially, the definition of practice is envisioned as almost the entire practice of law related to clients who are now, *or could one day be*, in removal proceedings. This tongue-in-cheek description of the scope actually seems to be consistent with DOJ's super-expansive definition, which specifically includes

> 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 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 a respondent or petitioner, in person or through a filing.[10] (emphasis added)

As practitioners who not only represent hundreds of respondents in removal proceedings each year, but also as a nonprofit legal services firm providing free, pro se legal advice to thousands of Michiganders each year, including with brief advice cases, the scope of this proposed definition is frightening. It encapsulates everything we—and really, all practitioners—do for our clients. And while that may be a helpful definition from a disciplinary perspective to describe the scope of legal assistance someone might receive—and ensure accountability for advice/assistance provided—that, unfortunately, is a naïve interpretation for the actual purpose of this rule.

Rather, when read in context with proposed 8 C.F.R. § 1003.17(d), the true nature of this proposal comes to light as a vehicle to prevent pro se respondents from having access to high-quality legal advice and assistance. Specifically, that provision would require a practitioner who engages in practice before the immigration court, as defined above, to:

> file Form EOIR–28 disclosing the practice[11] …. No subsequent withdrawal motion is necessary for Form EOIR–28 filed under this paragraph (d), but a new Form EOIR–28

[9] Id. at 61651.
[10] Id. at 61646
[11] Practice, as defined in proposed 8 C.F.R. § 1001.1(i),

must be filed for each subsequent act of preparation or practice that does not constitute representation.

And for respondents with cases—now or in the future—before the BIA, this would be required the filing of an E-27, per proposed 8 C.F.R. § 1000.38(j). What this means in practice (read: normal idiomatic phrase, not the proposed re-definition) is that a practitioner would be required to generate AND THEN FILE an E-28 or E-27 following almost every conversation with a pro se litigant. Let me provide some context for why this proposal is inane and actually destroys the ability of any current or potential pro se respondent to secure free, limited scope legal assistance.

MIRC is a nonprofit legal service provider representing hundreds of respondents each year with cases before EOIR. At the same time, we also operate a detention hotline for respondents detained in the four IGSA-contracted facilities in Michigan so they can secure, at a minimum, free legal advice. MIRC is one of two nonprofit legal service providers on the EOIR pro bono list in Michigan.[12] Accordingly, MIRC regularly represents these detainees in full-scale removal defense or limited term engagements, like bond hearings or appeals. In 2019, for example, MIRC helped over 350 detained respondents calling from detention with, at a minimum, legal advice specifically tailored to the facts of their individual cases. Most respondents—we hope—took our advice. Some did not. Some secured private counsel. If this rule were implemented, practitioners at MIRC would be required to generate and then file E-28s and E-27s in all of these cases. And should a respondent call back with additional questions, that would mean another E-28 or E-27. Or both if the respondent had questions about appeals (even if this was not yet ripe). If this proposal became a final rule, this would mean that MIRC's practitioners would be preparing and filing hundreds—more likely thousands when non-detained current and future respondents are factored in—E-28s and E-27s annually for no sound purpose except to comply with this fatuous rule. Also, so they avoid being sanctioned and can actually represent clients, in-person, at EOIR, too.

This proposal, in effect, discourages nonprofit legal service providers from actually providing assistance to *pro se* respondents given the onerous and inane procedural requirements. Documentation and filing alone would take up so much time that the nonprofit would not be able to serve as many respondents, thereby leading to less pro se assistance and more deportations for an already under-resourced group. Under the guise of protecting pro se respondents, this proposal does just the opposite. And maybe that's the point. It would be consistent with the recent spate of attempts by EOIR and DHS, separately and combined, to severely limit and restrict access to all forms of relief.[13] Punishing the nonprofits and private attorneys who provide free legal advice and assistance to pro se respondents does not seem so unreasonable under that framing.

Further, creating one definition for practice before EOIR and utilizing another before DHS, at 8 C.F.R. § 1.2 makes no logical sense. Thus, where it would be inappropriate and unlawful for a practitioner to render legal advice to a pro se respondent without filing a Notice of Entry of Appearance, there would be no consequence to do the same when advising the same respondent about consular processing, renewing work authorization, or really, any matter before DHS.

[12] https://www.justice.gov/eoir/file/ProBonoMI/download

[13] See, e.g. 85 Fed. Reg. 59692 (Sept. 23, 2020); 85 Fed. Reg. 56339 (Sept. 11, 2020); 85 Fed. Reg. 52491 (Aug. 26, 2020); 85 Fed. Reg. 36264 (June. 15, 2020); 85 Fed. Reg. 67202 (Oct. 21, 2020); 84 Fed. Reg. 62374 (Nov. 14, 2019)

It would be impossible to meaningfully comply with the scale and scope of this rule if our organization—and dozens of nonprofit legal service providers assisting pro se litigants (many of whom are detained) across the country—to prepare and submit E-28s and/or E-27s following each conversation. We strive to memorialize our legal advice in letters to clients, but to be required to generate E-28s and E-27s every time we "exercise legal judgment regarding specific facts of a case" or provide "legal advice" is impossible. Well, it could be possible if the goal is to prevent practitioners, nationally, from providing any form of legal assistance to current and future pro se respondents beyond basic information. Being an organization on the court-provided pro bono list will become a sham absent. For these reasons, the proposed rules must be withdrawn in their entirety.

2. Preparation

MIRC incorporates by reference the arguments in the above section regarding practice and substitutes the proposed definition for preparation, as defined in 8 C.F.R. § 1001.1(k). For these reasons, the proposed rules must be withdrawn in their entirety.

IV. DOJ cannot rulemake its way out of a consent agreement nor Constitutionally-protected rights

This rulemaking appears to be EOIR's attempt to stifle and limit organizations like MIRC and the Northwest Immigrant Rights Project (NWIRP), among others, from assisting *pro se* respondents. It already attempted, in 2017, to prevent NWIRP from providing limited scope legal assistance to *pro se* respondents. As it describes the problem in its Complaint for Declaratory and Injunctive Relief,

> EOIR now insists on a Hobson's choice: either NWIRP must commit to full legal representation of ***every*** immigrant in removal proceedings it presently assists (which is plainly impossible), or NWIRP must refrain from providing them ***any*** form of legal assistance—not even a brief consultation. EOIR's cease-and-desist order to NWIRP will deprive thousands of immigrants—including asylum seekers and unaccompanied children—of the chance to consult with a NWIRP lawyer to evaluate their potential claims for legal residence. EOIR's interpretation will also deprive otherwise unrepresented immigrants of legal advice they need to understand United States law, and assistance with navigating the immigration court system.
>
> EOIR's new edict purports to control not just the appearance of attorneys in removal proceedings but their communications with clients (and even potential clients) and other limited assistance provided outside of an active EOIR proceeding. (emphases original)[14]

That is, in essence, what EOIR is attempting to do again by redefining practice and requiring attestations. In other words, either nonprofit legal service providers like MIRC and NWIRP must, in the context of pro se assistance, (a) submit attestations—on E-28s and E-27s— to EOIR

[14] *NWIRP v Sessions*, No. 2:17-cv-00716 (W.D.Wa May 8, 2017) at *2. MIRC incorporates by reference the arguments made in the complaint about how these actions by EOIR restrict and prevent *pro se* respondents from being able to secure limited scope legal assistance.

following the briefest of consultations, (b) agree to full representation on all cases, or (c) not provide legal advice at all. None of those options can be sustained. Doing so not only violates the actual text and spirit of the Consent Agreement[15] in the above cited case, but also the First Amendment rights of nonprofits like MIRC and NWIRP to screen, consult, advise, and otherwise assist pro se litigants. The restrictions imposed by this rule is vague, overbroad, excessively burdensome, arbitrary, and capricious. Moreover, it interferes and shreds the well-established principles of confidentiality and attorney-client privilege that is a bedrock of practicing law. In so doing, it also violates the Tenth Amendment by attempting to impose restrictions on the practice of law as would otherwise be reserved by the state. For these reasons, the proposed rules must be withdrawn in their entirety.

V. Conclusion

In summation, this proposed rulemaking has little to do with encouraging or supporting practitioners with expanding limited scope legal assistance, especially as it applies to helping *pro se* respondents. Quite the opposite. The onerous, proposed requirements presented her strongly deter such assistance. No practitioner will violate their duties of confidentiality or candor to participate in a sham procedure of ostensibly notifying EOIR every time they perform legal advice. MIRC generally supports opportunities for unbundled legal assistance, but in no way can we sustain the permutation as envisioned by this proposed rule. Accordingly, this feculent rule must be withdrawn before its odious effect further contaminate and ruin EOIR's prestige and decorum as a neutral arbiter of justice. For the abovementioned reasons, we urge the DOJ to withdraw this rule in its entirety.[16]

Respectfully submitted,

Ruby R

Ruby Robinson
Managing Attorney

[15] *NWIRP v. Sessions*, No. 2-17-cv-00716 (W.D. Wa. Apr. 17, 2019)

[16] We also support the reasoning to withdraw the rulemaking in its entirety based on the comment submitted by the Immigrant Legal Resource Center