October 30, 2020

Lauren Alder Reid, Assistant Director Office of Policy
U.S. Department of Justice
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041
Submitted via http://www.regulations.gov

Re: EOIR Docket No. 18-0301, A.G. Order No. 4841-2020
RIN: 1125-AA83; Document Number 2020-20045


Dear Assistant Director Alder Reid:

The Advocates for Human Rights (“The Advocates” or “AHR”), provides this comment to the Proposed Rule on Professional Conduct for Practitioners. While we unequivocally support the stated goal of promoting accountability for those who assist people facing removal proceedings, we are concerned that the Proposed Rule will erode due process rights of migrants and undermine Congressional intent. In particular, the Proposed Rule threatens to exacerbate the ongoing problem of access to counsel, which disparately affects poor and detained people appearing before immigration courts. By creating a greater potential for disciplinary action against legal advocates assisting people in removal proceedings, the Proposed Rule risks chilling legal assistance, while doing nothing to address the very real problem of predatory behavior by those who practice law without a license or without BIA accreditation. The best way to address these practices is to provide access to counsel at government expense for those who cannot afford an attorney in immigration proceedings. To the extent that the Proposed Rule undermines access to counsel and, by extension, to a fundamentally fair hearing, it contravenes international human rights law and is incompatible with the Government’s obligations under international agreements.

The Government’s attempt to justify the Proposed Rule overlooks the aims of the Proposed Rule, which could be more efficiently and effectively addressed by creating a universal right to counsel for individuals in removal proceedings, at the expense of the Government. The objectives of the Proposed Rule include promoting accountability for those assisting individuals in immigration court proceedings, as well as deterring fraudulent or substandard “ghostwriting.” However, the market for ghostwriters and notarios, who prey on desperate individuals in immigration

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proceedings, would be dramatically reduced if individuals in removal proceedings were instead provided with counsel at the expense of the Government. Access to well-trained, federally funded attorneys who are familiar with the U.S. immigration process not only ensures high quality legal representation and effective advocacy for individuals in immigration proceedings, but benefits the immigration court system as a whole by efficiently utilizing Executive Office for Immigration Review (“EOIR”) resources.

**About the Organization Submitting this Comment**

The Advocates for Human Rights (“The Advocates” or “AHR”) is a nonprofit, nongovernmental organization headquartered in Minneapolis, Minnesota. Founded in 1983, The Advocates for Human Rights’ mission is to implement international human rights standards to promote civil society and reinforce the rule of law. Holding Special Consultative Status at the United Nations, The Advocates regularly engages UN human rights mechanisms. The Advocates has provided free legal representation to asylum seekers for nearly four decades, working with more than 10,000 cases to assess, advise, and represent in asylum proceedings. In addition to legal representation, The Advocates also works with women’s and LGBTI human rights defenders worldwide to document persecution, repression, and death at the hands of state and non-state actors on account of their identities, and to train and support those activists as they advocate for accountability and safety. The Advocates is a global expert in women's human rights, particularly in the area of domestic violence, and partners with women’s human rights defenders to document threats to life and freedom faced by women due to government failure to protect people from human rights abuses. The Advocates has worked in Central and Eastern Europe, the former Soviet Union, the Caucasus, Central Asia, Mongolia, Morocco, Nepal, Mexico, Haiti, and the United States. At the request of government officials, embassies, and NGOs, The Advocates helps draft laws that promote the safety of women and has provided commentary on new and proposed domestic violence laws in nearly 30 countries. The Advocates works with host country partners to document violations of women's human rights, including domestic violence, and to train police, prosecutors, lawyers, and judges to implement effective domestic violence laws. In addition, The Advocates’ Stop Violence Against Women website serves as a forum for information, advocacy, and change, and, working with the UN, The Advocates developed the Legislation and Justice sections of the UN Women's Virtual Knowledge Center to End Violence Against Women.

**The Proposed Rule May Exacerbate the Existing Representation Gap**

In immigration removal proceedings, where people’s lives and liberty hang in the balance, access to counsel is essential for a fundamentally fair day in court. Nevertheless, barriers to accessing counsel persist and representation rates among non-citizens in removal proceedings are low.\(^2\) Data collected in 2016 shows that nationally, just 37 percent of all respondents appearing before the immigration courts are represented.\(^3\) A mere 14 percent of detained respondents appearing before the immigration courts are represented.\(^4\) These statistics represent the circumstances prior to the

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\(^4\) *Id.* at n. 6, citing Eagly & Shafer, *Access to Counsel in Immigration Court*. 
COVID-19 pandemic, which has only further stymied access to resources in immigration proceedings. Non-citizens with representation are significantly more likely to succeed than those without representation on their claims for relief or terminating their proceedings. In stark contrast, pro se litigants face limited access to important resources due to detention, language barriers, and compressed timelines for adjudication. This is to say nothing of the additional barriers faced by children, asylum seekers, and victims of other human rights abuses who may be experiencing trauma and medical issues that inhibit their ability to present their case.

EOIR undoubtedly recognizes the need to increase the availability and quality of representation in immigration court proceedings. EOIR oversees a host of programs facilitating nationwide pro bono and low-cost immigration practice by attorneys and Accredited Representatives, and also facilitates greater access to information by funding educational programs, among other initiatives. For example, the Legal Orientation Program ("LOP"), operating at 38 detention facilities across the country and conducted by 18 nonprofit legal service organizations provides detained individuals with basic information on rights, responsibilities, immigration court procedures, and potential avenues for relief. LOP also serves as a vehicle for referring meritorious cases to pro bono attorneys.

Despite the efforts of EOIR and numerous public interest organizations to close the representation gap, access to counsel remains elusive for the majority of respondents before immigration tribunals. Until the Government provides all migrants in removal proceedings access to a government-appointed attorney, these gaps will persist.

Accordingly, the objectives of the Proposed Rule, such as inhibiting “ghostwriting,” detailing new but unclear distinctions between “practice” and “preparation,” and increasing accountability for those who assist pro se individuals, must be considered in light of its unintended consequences – further exacerbating the representation gap. As outlined below, the Proposed Rule is not structured to address the issues of predatory and ineffective assistance which it seeks to alleviate. Instead, the rule threatens to exacerbate the representation gap. The increased threat of disciplinary action and the unclear distinctions in the rule mean that pro bono counsel and others may be discouraged from taking-on cases. This will violate the due process rights of migrants to access justice as it will effectively bar their ability to access counsel of their choosing. Thus, The Advocates suggests that provision of government-appointed counsel is the only way to truly combat these issues.

The Proposed Rule Erodes Due Process Rights of Migrants and Congressional Intent

The right to counsel at one’s own expense in removal proceedings has both constitutional and statutory foundations. The constitutional right arises from the Fifth Amendment’s guarantee of due

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5 Id. at 848; Id. at n. 7, citing Eagly & Shafer, Access to Counsel in Immigration Court, at 18-22.
6 The Office of Legal Access Programs (part of EOIR’s Office of Policy) hosts numerous initiatives aimed at improving the efficiency of immigration court hearings and raising the level of representation for individuals, including a List of Pro Bono Legal Service Providers, the Legal Orientation Program (LOP), Self-Help Legal Centers, and the BIA Pro Bono Project. The UNITED STATES DEPARTMENT OF JUSTICE, Office of Legal Access Programs, https://www.justice.gov/eoir/office-of-legal-access-programs (last visited Oct. 10, 2020).
process, while the statutory right is found in the Immigration and Naturalization Act ("INA") and related provisions of immigration law.

The Fifth Amendment guarantees that "[n]o person . . . shall be deprived of life, liberty, or property" without due process of the law.8 Aliens have been found to be encompassed by the Fifth Amendment’s usage of "person,"9 and removal can be seen as implicating an alien’s interest in liberty.10 Thus, courts have found that the right to counsel in immigration proceedings is crucial to fundamental fairness.11 “[A]lthough the Fifth Amendment does not mandate government-appointed counsel for aliens at removal proceedings, it indisputably affords an alien the right to counsel of his or her own choice at his or her own expense.”12 While there is no constitutionally derived universal right to counsel in immigration proceedings at the government’s expense, grounded in either the Fifth Amendment Due Process Clause or the Sixth Amendment, notions of fundamental fairness and due process are offended where access to counsel is inhibited, and nothing in the law prohibits providing government-appointed counsel.

Aliens are provided with a right to counsel by various provisions of the INA and other immigration-related statutes, as well as their implementing regulations. Section 292 of the INA generally governs aliens’ right to counsel, and provides that

In any removal proceeding before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.13

The Proposed Rule affects existing regulations, rules of procedure, and standards of professional conduct governing “practitioners” permitted to practice before EOIR.14 Because the amended regulations are ancillary to Section 292 of the INA, they should remain consistent with the Section 292’s intent to confer a right to counsel to individuals in removal proceedings.15

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8 U.S. Const., amend. V.
9 Kate M. Manuel, *Aliens’ Right to Counsel in Removal Proceedings: In Brief*, CONGRESSIONAL RESEARCH SERVICE, 7-7500 R43613 (MAR. 17, 2016) at n. 8, citing Reno v. Flores, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings”).
10 Kate M. Manuel, *Aliens’ Right to Counsel in Removal Proceedings: In Brief* at n. 9, citing Bridges v. Wixon, 326 U.S. 135, 154 (1945) (“[Because removal] visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom [,] . . . meticulous care must be exercised lest the procedure by which [an alien] is deprived of that liberty not meet the essential standards of fairness.”).
11 See, e.g., Dukane v. U.S. Attorney General, 399 F.3d 1269, 1273 (11th Cir. 2005) (“It is well established in this Circuit that an alien in civil deportation proceedings . . . has the constitutional right under the Fifth Amendment Due Process Clause . . . to a fundamentally fair hearing.”).
14 See EOIR Docket No. 18-0301, A.G. Order No. 4841-2020 RIN: 1125-20202, at 61645 (“[T]he Department is issuing this proposed rule, which would amend §§ 1001.1 (defining “practice” and “preparation”), 1003.17 (appearances before an Immigration Judge), and 1003.102 (grounds for disciplinary sanctions) of chapter V of Title 8 of the Code of Federal Regulations.”).
15 See Castro-O’Ryan v. U.S. Dept. of Immigration and Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) (noting that the caption of Section 292 of the INA, as well as the legislative history, indicates that Congress wanted to confer a right).
The Proposed Rule threatens to erode both due process rights of migrants and Congressional intent by chilling access to counsel, especially *pro bono* assistance. The Proposed Rule expands the basis for disciplinary action under 8 CFR 1003.102(t) and justifies doing so by attempting to offer definitions of “practice” and “preparation” under 8 CFR 1001.1(i) and (k). Under the new definitions, those assisting an individual in completing forms as “preparation” must take care to avoid providing legal advice or exercising legal judgment regarding a specific case, so as not to constitute “practice,” thus triggering the additional requirements to which “practice” is subject as compared to mere “preparation.” Yet, the proposed rule provides very little clarity regarding this fine line. This is particularly concerning for *pro bono* volunteers assisting legal aid organizations, for whom clear guidance on “preparation” and “practice,” as those terms are used to trigger any disciplinary proceedings, must be clear.

For instance, legal aid organizations like ours often use volunteers to assist individuals in immigration proceedings to fill out standard forms, under the close supervision of partnering legal aid organizations. Rather than act as mere scrivener of dry facts (name, address, place of birth, etc.), volunteers oftentimes need to further explain the meaning of certain questions appearing on standard forms if the client asks for further clarification. The Proposed Rule is unclear as to obligations of volunteer attorneys, translators, and supervising organizations in such instances.

By increasing the risk of disciplinary sanctions while maintaining the blurred line between practice and preparation, the Proposed Rule will deter *pro bono* participation in immigration legal aid clinics. By increasing the risk of disciplinary sanctions generally, legal aid organizations must accept a greater burden when assisting clients. As a result, migrants will face additional challenges in accessing counsel and, therefore, due process violations. The Advocates, thus, cautions against implementation of the rule in a way that will have a potential chilling effect on volunteerism and *pro bono* assistance in immigration court proceedings, as well as the additional harm to legal aid organizations like ours.

Not only does the rule impact *pro bono* assistance, it will impact access to counsel in immigration proceedings generally. Even paid attorneys will be dissuaded from taking-on cases or will adjust fees to reflect the additional potential liabilities of the unclear standards and expansive disciplinary procedures contained in the rule. Thus, even migrants who are not reliant on *pro bono* assistance will find their access to counsel rights impinged.

The Advocates encourages EOIR to respond to these concerns *not* by creating additional hurdles that will harm clients by limiting access to counsel, but by instead providing government-appointed counsel. The stakes in immigration cases are high, involving exile, loss of family and property, and even persecution or torture. These interests are sufficient to necessitate provision of counsel. The Department should not punish migrants for its failure to provide counsel by making it harder to access what counsel may be available.

**The Proposed Rule Does Not Address the Problem of Predatory Practices**

The Proposed Rule claims to address predatory provision of legal services by those who are incompetent or unlicensed. And, while the proposed mechanism will do nothing to stop predatory practices, it will erect an additional disincentive for licensed attorneys to advise people facing removal proceedings, as the only disciplinary mechanisms proposed will be for licensed attorneys,
not those who engage in the *unlicensed* practice of law. The Advocates encourages the Department to instead fund government-appointed counsel as a true means of deterring predatory actors.

The Advocates agrees that the unlicensed practice of law, predatory business practices which target people unfamiliar with the United States’ legal system or the English language, and incompetent assistance by well-meaning but unqualified individuals all are real and serious problems. The Proposed Rule correctly notes that migrants are harmed by predatory actors, such as “*notarios*” who promise to or engage in providing legal services, but who are not licensed to do so. The Proposed Rule, unfortunately, will do nothing to stop these unscrupulous practices. Predatory actors operate outside of the law. They are practicing law without a license, typically in violation of state criminal laws, and likely guilty of swindling clients. Adding an additional disciplinary mechanism through EOIR does not create further disincentives to prevent them from acting in the first place. If the criminal system does not dissuade them, an EOIR mechanism surely will not. Indeed, the proposed rule actually provides no way to punish these actors.

**Providing Limited Representation Makes Sense, But Must Not Chill Access to Counsel**

The Advocates supports the Proposed Rule’s creation of a limited entry of appearance by a licensed attorney or Accredited Representative that allows for the documentation of assistance in preparing legal filings, without the requirement of entry of appearance as attorney of record. Like the recent change that allows for entry of appearance in bond hearings, we expect that this flexibility will encourage limited-scope representation. This new mechanism also will provide clarity and allow future counsel to follow-up in the event of ineffective assistance or for other information. In our experience, it would certainly be helpful to have a record of who assisted migrants in proceedings. It would also be helpful for counsel to have the ability to provide that information without having to enter a full appearance. We recognize that many legal ethics obligations already require attorneys to provide such information; however, we also reaffirm that ensuring access to counsel in immigration proceedings requires flexibility that does not require full representation. Legal aid and *pro se* clinics, for example, significantly increase access to justice and efficiency in proceedings. We support allowing attorneys or organizations like ours to provide information without having to commit to full representation for the life of a case.

Yet, we are also concerned that such a requirement will not eliminate predatory or ineffective assistance and may, instead, decrease access to counsel if implemented improperly. We encourage the Department to provide clarity regarding the form and certification requirements—following similar clarity as with the Form E-28, for example—to ensure that *pro bono* assistance is not discouraged. We also demand that any such requirement be implemented in such a way that does not impinge on due process rights and access to counsel, and that such a rule not be used as a pretext for punishing or dissuading practitioners who provide assistance to people in immigration proceedings.

As explained elsewhere, additionally, we fervently caution against any disciplinary procedures that create confusion with existing disciplinary processes through state licensure authorities and criminal/civil court systems. These standards provide predictable and clear standards for when one is providing legal advice, requiring a license. They also set-up clear expectations for practitioners on the disciplinary procedures that may be faced. This allows legal professionals and legal aid organizations like ours—as well as malpractice insurance providers—to operate with clarity and
established expectations. The proposed rule provides an unnecessary layer to this established system and will upset these predictable standards. Unfortunately, however, it will do so without eliminating the predatory and ineffective legal services provisions it claims to target.

Thus, the Department should refer to these established mechanisms rather than creating additional burdens and confusion. In addition, it should provide free, government-appointed counsel to all migrants in proceedings who cannot afford an attorney. As outlined, below, this is the only means to truly tackle the issues outlined in the regulation.

**The Department Should Withdraw the Proposed Rule in Favor of Universal Representation**

United Nations special rapporteurs and independent experts have emphasized the importance of ensuring access to counsel in civil cases, particularly where counsel is necessary to secure basic human needs. In a March 2013 report to the UN General Assembly, the Special Rapporteur on the Independence of Judges and Lawyers explained that, “[l]egal aid is an essential component of a fair and efficient justice system founded on the rule of law….It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights” and that “beneficiaries of legal aid should be extended to any person who comes into contact with the law and does not have the means to pay for counsel.”

The United States has acknowledged that inequities exist in its justice system for those who are unable to afford civil representation, including in immigration proceedings, and that, while the United States has made some efforts to address the issue, the initiatives “while laudable, fall far short of adequately responding to the justice gap.” For example, the Legal Services Corporation (“LSC”), with the aim of promoting equal access to justice and that provides grants for civil legal assistance to low-income Americans, is overly restricted in the types of services it can provide (for example, only certain categories of immigrants, such as victims of human trafficking, domestic violence or sexual assault, are eligible for services from LSC-funded programs). These restrictions not only “severely limit the independence and flexibility of LSC grantees,” they also create a patchwork approach to systemic change and uphold the disparities in access to civil justice that exist in immigration proceedings.

Ultimately, the best way that the United States can uphold its obligations to human rights rules and norms and protect due process rights in immigration proceedings is to create a federally-funded public counsel program for our immigration system. Preserving the fairness of immigration court representation upholds trust in the legal process and strengthens the legitimacy of the very

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18 Id. at 35.

19 Supra note 34.


21 Supra note 34.
institution itself.\textsuperscript{22} This is best accomplished by the United States establishing properly-funded, trained, and competent public counsel that advocate for the rights of immigrants. It will help level the significant gaps in the power dynamic between immigration officials and respondents, and ensure that the immigration process is handled smoothly and effectively. In addition to the legal and moral impetus for providing federally-funded counsel for immigrants, doing so would improve immigration outcomes and would promote efficiencies in our immigration system. The Government has encouraged the EOIR to analyze the ways in which it can improve court efficiency aimed at improving legal representation.\textsuperscript{23} A study has demonstrated that federally-funded counsel would pay for itself, by reducing the cost of detention and the cost of federal outlays for, among other things, legal orientation programs, foster care for children of detained parents, and transportation.\textsuperscript{24}

Representation presence (including the time at which representation is obtained) in immigration proceedings underscores the absolute necessity of universal representation, as studies have demonstrated that frequently, representation is notably absent in the process.\textsuperscript{25} Ensuring representation from the outset would better guarantee due process rights as migrants would not have to seek time to secure counsel and would be aware of their rights from the outset. Very few migrants are represented at the initial hearing and must know to request a continuance to find an attorney. Even if they are aware that they can request time to find an attorney, it is becoming exceedingly rare that the judge grants a continuance for an immigrant to seek representation.\textsuperscript{26} Even if a continuance is granted, securing representation is not certain (on average for detained, never detained and released respondents, counsel is obtained 57% of the time).\textsuperscript{27}

Most importantly, federally-funded counsel would significantly alleviate the concerns raised in the proposed rule. Federally-funded counsel would ensure that migrants receive effective assistance, as such counsel would be highly familiar with the EOIR framework. By ensuring counsel from the outset, migrants would be at less risk of turning to predatory service providers as they would not be scrambling to secure and pay for counsel while navigating the complex immigration court process. They would also be less reliant on community groups or others who provide well-meaning but ineffective assistance. This is particularly true for those in detained proceedings as obtaining counsel while detained can be nearly impossible due to lack of communications access, loss of financial support while detained, and the increased timeframe for detained cases that discourage many pro bono services and private attorneys from taking such cases. Furthermore, because such counsel would be held to specific standards, the disciplinary procedures outlined in the rule would be all the more unnecessary.

\textsuperscript{22} Supra note 24.
\textsuperscript{23} H.R. REP. No. 113-171, at 38 (2013) (“The Committee encourages EOIR, within the funding provided, to explore ways to better serve vulnerable populations such as children and improve court efficiency through pilot efforts aimed at improving their legal representation.”).
\textsuperscript{25} Supra note 29 at 21.
\textsuperscript{26} Supra note 29 at 33 (finding that only fourteen percent of detained immigrants are granted additional time to find counsel).
\textsuperscript{27} Supra note 29 at 34 (explaining that 36% of detained respondents seeking counsel actually found counsel, versus 71% of respondents who were never detained and 65% of respondents who were released).
Additionally, federally-funded counsel would expedite the time in which cases can be resolved and reduce the EOIR backlog. Continuances for detained immigrants can be exceedingly costly for the Government, as immigration detention is estimated to cost tax payers over $3 billion per year. Providing government-appointed counsel would speed up the time in which cases are resolved, as 53 percent of immigration proceedings have at least one continuance, and “almost 51 percent of all court adjudication time was incurred due to time requested to find an attorney.”

Federally-funded universal counsel to represent non-citizens would fill the critical gap of ensuring that counsel obtained from the outset in order to effectively and expeditiously resolve immigration cases, as immigrants would appear for their first hearing already with counsel.

For the foregoing reasons, therefore, The Advocates for Human Rights calls on the Department to withdraw the Proposed Rule and focus its efforts on creating on federally funded counsel to represent immigrants.

Sincerely,

Michele Garnett McKenzie
Deputy Director

28 Supra note 42 at 11 (finding that fifty-three percent of immigration have at least one continuance of which sixty-two percent of continuances are requested by immigrant respondents, and of the continuances requested by respondents, twenty-three were to allow the immigrant to seek representation and twenty-one percent were requested by respondents to prepare for the case).


30 Supra note 29 at 9.