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RE: RIN 1125-AA83 or EOIR Docket No. No. 18-0301; A.G. Order No. 4841-202, Public Comment on Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances

I. INTRODUCTION

The Catholic Legal Immigration Network, Inc. (CLINIC)¹ submits these comments regarding the current Notice of Proposed Rulemaking (NPRM) that would allow practitioners to make limited appearances in immigration court. CLINIC strongly supports EOIR clarifying that practitioners can make limited appearances because such appearances allow more noncitizens to have access to counsel, at least for parts of their cases. CLINIC does have significant concerns about: 1) sections of the rule that are not written clearly or whose effects have not been fully analyzed, 2) adding burdens to pro bono attorneys, and 3) proposed changes to the discipline section of the regulation, all of which we explain further below.

Embracing the Gospel value of welcoming the stranger, CLINIC has promoted the dignity and protected the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs since its founding in 1988. CLINIC's network, originally comprised of 17 programs, has now increased to close to 400 diocesan and community-based programs in 48 states and the District of Columbia. CLINIC is the largest nationwide network of nonprofit immigration programs. Through its affiliates, CLINIC advocates for the just and humane treatment of noncitizens through direct representation, pro bono referrals, and engagement with policy makers. CLINIC provides direct representation and pro bono referrals through several projects: 1) the Board of Immigration Appeals (BIA) Pro Bono Project, 2) the Formerly Separated Families Project, 3) the Remote Motions to Reopen Project, 4) the *Estamos Unidos* project in Ciudad Juarez, Mexico, and) 5) the Religious Immigration Services Project. CLINIC also provides

¹ Victoria Neilson, Defending Vulnerable Populations (DVP) Managing Attorney authored these comments. The author would like to thank Michelle Mendez, DVP Director and Aimee Mayer-Salins, DVP staff attorney, for their contributions to this comment.

training and mentoring on removal defense issues as well as direct representation before the Board of Immigration Appeals, federal district courts, and the federal courts of appeals.

People of faith have consistently stood by the principle that all immigrants, especially the most vulnerable among us, deserve an immigration system that is fair and humane. As immigration law has become increasingly complex, it is more important than ever that those appearing before immigration courts have counsel. Expanding access to high quality counsel is central to CLINIC's mission. Representation of noncitizens is beneficial to both parties and the immigration judge. The Executive Office for Immigration Review (EOIR) itself has acknowledged the significant benefits to the respondent and the immigration judge that pro bono representation provides:

Pro bono representation benefits both the respondent and the court, providing respondents with welcome legal assistance and the judge with efficiencies that can only be realized when the respondent is represented. A capable pro bono representative can help the respondent navigate court rules and immigration laws and thereby assist the court in understanding the respondent's circumstances and interests in relief, if any is available. Pro bono representation in immigration court thus promotes the effective and efficient administration of justice.²

Similarly, when EOIR promulgated regulations in 2015 allowing for limited appearances in bond proceedings, it stated:

the Department [of Justice] anticipates that this rule will also have a positive economic impact on the Department, because increasing the number of individuals who are represented in their custody and bond proceedings will enable immigration judges to adjudicate proceedings in a more effective and timely manner, adding to the overall efficiency of immigration proceedings.³

CLINIC welcomes initiatives by EOIR that will expand access to counsel for individuals in removal proceedings. Like EOIR, CLINIC is concerned about the record backlog of removal cases and believes that the best way to improve the efficiency of removal proceedings, while also promoting fairness and due process, is through expanded representation. CLINIC believes all noncitizens should receive legal representation throughout their immigration court proceedings⁴ because the stakes are so high, with many noncitizens facing permanent separation from family members, or, in the case of asylum, possible persecution or death.⁵ We recognize that that goal of

² David Neal, Chief Immigration Judge, Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services (Mar. 10, 2008), <https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/08-01.pdf>.

³ Separate Representation for Custody and Bond Proceedings, 80 Fed. Reg. 59500-01 (Oct. 1, 2015).

⁴ Studies have found that noncitizens who are represented have better outcomes in their cases. See I. Eagly & S. Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 2 (2015); TRAC, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates* (Nov. 28, 2017), <https://trac.syr.edu/immigration/reports/491/>.

⁵ See, for example, Human Rights Watch, *Deported to Danger, United States Deportation Policies Expose Salvadorans to Death and Abuse*, (Feb. 5, 2020) <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and#>. (“In many of these more than 200 cases [that Human Rights Watch investigated], we found a clear link between the killing or harm to the deportee upon return and the reasons they had fled El Salvador in the first place.”).

universal representation is beyond the scope of the current rulemaking and therefore support EOIR's position to allow practitioners to make limited appearances, although we have concerns with a number of the proposed rules as they are currently written.

II. CLINIC OBJECTS TO THE NPRM PROCESS, WHICH ONLY ALLOWED 30 DAYS FOR COMMENTS IN THE MIDST OF A PANDEMIC

The Administrative Procedures Act (APA) § 553 requires that “interested persons” from the public have “an opportunity to participate in the rule making.” In general, the agencies, must afford “interested persons a reasonable and meaningful opportunity to participate in the rulemaking process.”⁶ DOJ acknowledges that this rule is a “significant regulatory action” under section 30(f) of Executive Order 12866, yet it also concludes that “the expected costs of this proposed rule are likely to be de minimis.”⁷ As explained below there would be costs to practitioners associated with this rule change.

In any event, CLINIC believes that all affected individuals should have ample time to submit comments on this proposed regulation and strongly objects to the government's shift from the established norm of allowing the public 60 days to comment on significant rules to allowing the public only 30 days. Given the importance of the public's participation in the rule-making process, Executive Order 12866 specifies that “in most cases [rulemaking] should include a comment period of not less than 60 days.”⁸ Executive Order 13563 explicitly states, “To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should **generally be at least 60 days.**”⁹

Indeed, when EOIR engaged in rulemaking in 2014 to allow practitioners to make limited appearances in bond hearings, EOIR gave the public 60 days to comment,¹⁰ and that rulemaking was much narrower in scope than the current rulemaking and did not follow on the heels of numerous other significant immigration rulemakings. Under any circumstances, the government should not provide such a short time period to comment on these extensive changes, but the ongoing COVID-19 pandemic makes this timeframe even more unreasonable.¹¹

⁶ *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).

⁷ 85 Fed. Reg. 61640, 61649-50 (Proposed Sep. 30, 2020).

⁸ See Exec. Order No. 12866 – Regulatory Planning and Review, § 6(a), 58 Fed. Reg. 51735 (Oct. 4, 1993).

⁹ See Exec. Order No. 13563 – Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011) (emphasis added).

¹⁰ See 80 Fed. Reg. 59500 (Published Oct. 1, 2015). (“On September 17, 2014, the Department published in the Federal Register a rule proposing to amend EOIR's regulations relating to representation of aliens in custody and bond proceedings. 79 FR 55659. The comment period ended November 17, 2014. The Department received ten comments. For the reasons set forth below, the proposed rule is adopted as a final rule without change.”).

¹¹ See Deb Perelman, *In the Covid-19 Economy, You Can Have a Kid or a Job. You Can't Have Both*. THE NEW YORK TIMES, Jul. 2, 2020, <https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-homeschooling.html>.

III. CLINIC'S COMMENTS ON THE SUBSTANCE OF THE PROPOSED RULE

CLINIC is generally supportive of any effort by EOIR to expand access to counsel.¹² Overall, CLINIC is supportive of the concepts behind the proposed rule, which, in the absence of a full right to counsel, would clarify that immigration practitioners could make limited appearances in immigration court and by assisting noncitizens to complete immigration court filings. CLINIC does have significant concerns about many of the details of the proposed rule, which we discuss below.

A. CLINIC Generally Supports EOIR's Clarification of the Terms "Practice," "Preparation," and "Representation" at 8 CFR §§ 1001.1(i), (k) and (m), but Has Concerns with the Proposed Rule's Confusing Rules for Practitioners Engaged in Preparation and Its Inconsistency with DHS Regulations.

The existing terms "practice" and "preparation" in the current rules at 8 CFR §§ 1001.1(i) and (k) have caused substantial confusion. Under the existing rule at 8 CFR § 1001.1(i), "practice" is defined as appearing on behalf of a noncitizen, but goes on to include the following confusing language, "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." 8 C.F.R. § 1001.1 (i). By including "another person **or** client" (emphasis added), the current rule implies that it is possible to submit documents to court on behalf of a non-client, but does not provide information on a mechanism to do so.

The current language at 8 CFR § 1001.1(k) defining "preparation" is more confusing still since it includes the term "practice" within it and says "the term preparation constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers." However, within this same section, the term "preparation" is then limited to exclude actions that consist "solely of assistance in the completion of blank spaces on printed Service forms." These overlapping and unclear definitions have caused confusion among practitioners.

CLINIC supports the clearer lines that the proposed rule draws between the definitions of "practice" and "preparation." Under the proposed rule, "practice" would involve "the exercise of legal judgment" and clearly be restricted to those individuals who are authorized to practice before immigration court. By way of contrast, "preparation" would be defined as "consisting solely of clerical assistance in the completion of forms, applications, or documents that are to be filed with or submitted to DHS, or any immigration judge or the Board, where such acts do not include the provision of legal advice or exercise of legal judgment." CLINIC believes this delineation between the exercise of legal judgment for "practice" and the clerical act of filling in blanks on forms for "preparation" is a more logical way of defining terms than the current definition.

¹² CLINIC was deeply troubled when the former attorney general sent a cease and desist letter to the Northwest Immigrants Rights Project for assisting noncitizens who would otherwise have had no access to counsel in completing their EOIR forms. Letter from Jennifer Barnes, EOIR Disciplinary Counsel, to Matt Adams (Apr. 4, 2017), *NWIRP v. Sessions*, No. 2:17-cv-00716-RAJ (W.D. Wash. filed May 8, 2017), Doc. No. 1-1, <https://www.nwirp.org/wp-content/uploads/2017/05/Dkt-1-1-exhibit.pdf>.

Section 1001.1(k) of 8 CFR specifically states, however, that “preparation before DHS is defined in accordance with 8 § CFR 1.2.” The term “preparation” in that section is defined identically¹³ to the current term at 8 CFR § 1001.1(k) that would be replaced under the proposed rule. CLINIC is concerned that having different definitions of the term “preparation” for practice before DHS and before EOIR is confusing and could lead practitioners to inadvertently not follow the proposed EOIR rules as a result of these conflicting definitions. For example, a practitioner could be assisting pro se asylum seekers at a clinic where the practitioner would have to follow a different set of rules to assist asylum seekers filing defensive applications from those who are filing affirmatively. If a practitioner assists an unaccompanied minor who is in removal proceedings but eligible to file affirmatively before United States Citizenship and Immigration Services (USCIS), it is not clear which rules the practitioner would be obligated to follow.

Given that the definitions of “preparation” would be different for EOIR practice and DHS practice if this rule is published, CLINIC does not understand why 8 CFR § 1001.1(k) includes “DHS” in the phrase “the completion of forms, applications, or documents that are to be filed with or submitted to DHS, or any immigration judge or the Board.” CLINIC suggests eliminating the phrase “submitted to DHS” since it would be more logical for submissions to DHS to be governed by DHS’s rules and definitions at 8 CFR § 1.2 than to be governed by EOIR rules. If EOIR publishes this rule, DHS would have a different definition of practice and preparation and its own rules should govern applications to DHS. Including “submitted to DHS” within the EOIR rule is confusing and could lead practitioners to run afoul of either DHS’s rules or EOIR’s rules by trying to comply with the differing rules.

CLINIC also opposes the proposed rule articulated in the final sentence of proposed 8 CFR § 1001.(k), “A practitioner may engage in preparation without engaging in practice or representation provided the preparation does not include the provision of legal advice and is disclosed in accordance with 8 CFR § 1003.17 or 8 CFR § 1003.38.” CLINIC does not believe that a practitioner should be subject to different rules for engaging in “preparation” from non-practitioners. Anyone who engages in preparation already has to complete the preparer box on the relief application form. The NPRM does not explain¹⁴ why practitioners who are able to appear before immigration court must go through the more onerous step of completing a limited representation Notice of Appearance Form (E-28) if they are merely engaging in the clerical act of filling in blanks, based solely on the fact that they are authorized to practice before immigration court.

CLINIC also generally supports the definition of “representation” at proposed 8 CFR § 1001(m). The final sentence of this section is confusing, however, and we recommend it be revised. That sentence states, “A practitioner may engage in practice as defined in paragraph (i)(2) of this section without engaging in representation provided the practice is disclosed in accordance with 8 CFR § 1003.17 or 8 CFR § 1003.38.” While we understand that this sentence intends to distinguish

¹³ That definition in whole is as follows, “Preparation, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed DHS forms, by one whose remuneration, if any, is nominal and who does not hold himself or herself out as qualified in legal matters or in immigration and naturalization procedure.” 8 CFR § 1.2.

¹⁴ Instead, it only states that instances where practitioners engage in preparation rather than practice would be “rare.” 85 Fed. Reg. 61646.

between making a full representation appearance in immigration court from the newly authorized ability for a practitioners to assist respondents in completing written submissions to the immigration court, the language of this section stating that the practitioner is not “engaging in representation” while simultaneously stating that the practitioner must complete a form entitled, “Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court” should be clearer. It seems that by entering a limited appearance on the specific document, the practitioner would be providing representation on that document. If EOIR does not view the limited assistance as an “appearance” or as “representation,” EOIR should change the title of the form¹⁵ which indicates that the practitioner is “appearing” as an “Attorney or Representative” on the case.

Section 1001.1(m) of 8 CFR also specifically states “representation before DHS is defined in accordance with 8 CFR § 1.2.” CLINIC has a similar concern here about the two agencies defining “representation” differently as with our concern regarding the different definitions of “practice” and “preparation” that EOIR and DHS would use if the current rule is finalized, we likewise are concerned that having differing rules for “representation” before DHS and EOIR would be confusing for practitioners. CLINIC reiterates the example used above, that practitioners assisting asylum seekers would have to follow different rules depending on whether the asylum application is defensive or affirmative, and for unaccompanied minors whose applications can be affirmative while the applicant is in removal proceedings, it is not clear which rules a practitioner should follow.

CLINIC is concerned that EOIR has engaged in this rulemaking without consulting DHS. As a result, the two agencies would define “practice” and “preparation,” and “representation” differently from one another. There is so much overlap on the forms and legal standards between the two agencies, it is irrational for these important concepts to have different definitions before each agency.

B. CLINIC Generally Supports EOIR’s Proposed Rule, 8 CFR § 1003.17, which Would Allow Practitioners to Make Limited Appearances and Assist Respondents in Completing Documents to Be Submitted to Immigration Court, but Has Significant Concerns with the Proposed Rule as Discussed in this Section

CLINIC strongly supports the ability of practitioners to provide limited appearance representation to noncitizens in removal proceedings. CLINIC believes that all respondents should have a legal right to competent, free or low-cost legal representation. However, recognizing that many respondents must proceed *pro se*, CLINIC believes that limited representation is better than no representation. CLINIC also agrees that when practitioners provide legal assistance on documents submitted to the court, it is appropriate for the practitioners to identify themselves to ensure accountability in the event the practitioner commits malpractice or engages in fraud. CLINIC has significant concerns, however, with the requirements of proposed 8 CFR § 1003.17, which would oblige practitioners to file newly created E-28s any time the practitioner engages in “practice” or “preparation” of a form.¹⁶ These concerns are discussed below.

¹⁵ This comment addresses the revised forms EOIR has drafted in Section F below.

¹⁶ Proposed rule 8 CFR § 1003.17 (d) states, “A practitioner who engages in practice as defined in 8 CFR 1001.1(i)

1. Practitioners Should Not Have to File an E-28 for Assistance with Forms Because the E-28 Would Be Duplicative with the Preparer Box on the Forms and Too Onerous

CLINIC believes that if practitioners assist respondents with completing forms, the practitioner should be able to identify themselves through the use of the “preparer” box on the forms without duplicating information through the filing of an E-28. For example, Form I-589 requires preparers to include their state bar number if they are attorneys or their accredited representative number if they are accredited representatives. Form I-485 has a checkbox where the preparer must indicate whether they are an attorney or accredited representative, or whether they are not an attorney or accredited representative. By way of contrast, the EOIR Form 42B, for applications for cancellation of removal has a preparer box, but does not collect information about whether the preparer is an attorney or accredited representative. CLINIC recommends that the preparer box be made uniform across forms submitted to EOIR and that that section of the form would allow a practitioner to specify whether they engaged in practice or preparation on the form. As discussed more fully below, requiring practitioners to complete an E-28 each time they assist a *pro se* applicant to complete a form would be unduly onerous in practice, and completing the preparer section of the form would serve the same purpose of providing the practitioner’s contact information and signature, thereby holding the practitioner accountable for their work on the form.

CLINIC has significant concerns about the practicality of a practitioner completing an E-28 solely for assisting with application completion. For example, CLINIC has a project, *Estamos Unidos*, that assists asylum seekers who have been forced to remain in Mexico under the Migrant Protection Protocols (MPP). The CLINIC attorney in Mexico regularly assists asylum seekers, almost none of whom speak English, have any understanding of the U.S. legal system, or are able to obtain full representation, to complete their Forms I-589. When the attorney finishes completing the form with the *pro se* asylum seeker, she reviews the form with the asylum seeker, and writes her name and attorney information as the form’s preparer. She then hands the Form I-589 to the asylum seeker, and the asylum seeker submits the form in court on the next MPP hearing date.

Under the proposed rule, our *Estamos Unidos* project attorney would be required to complete an E-28 each time she assists a *pro se* asylum seeker to fill out a Form I-589. When a practitioner completes an E-28, they are required to serve the form on DHS counsel. Thus, as a practical matter, practitioners assisting *pro se* respondents with completing forms, could no longer simply hand the application form to the individual to file on their own; the practitioner would have to mail the E-28 to DHS. However, under a proposed EOIR rule dated February 28, 2020, every

but not representation, must file Form EOIR–28 disclosing the practice.” The exact language that this section of the proposed rule cross-references is, “The term practice means 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 . . .(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.” [Emphasis added.] CLINIC is concerned that the proposed rule could be read to require a practitioner to complete an E-28 after engaging in a consultation with a *pro se* noncitizen. CLINIC suggests that DOJ strike the “potentially before EOIR” language from the proposed rule since EOIR would not have jurisdiction over a noncitizen or over the actions of the practitioner who assists them before they have a case pending with EOIR.

EOIR form, including the I-589, would require a fee.¹⁷ As a result, the practitioner would be unable to submit the form to EOIR without first assisting the *pro se* respondent to pay the fee with USCIS¹⁸ or to apply for a fee waiver, for those applications that are still eligible for a fee waiver.¹⁹ For asylum seekers stranded in Mexico under MPP, it is difficult to imagine how they could pay the asylum application fee at all, if EOIR publishes the final rule requiring this fee. Under the USCIS payment instructions, a respondent must submit a check or money order,²⁰ but those who are in Mexico, even if they have the money to pay for the asylum application, would not have access to a U.S. checking account or a U.S. money order.

Even for practitioners assisting asylum seekers and other respondents who are not subject to MPP and are on U.S. soil, the requirement to submit an E-28, and therefore submit the form and fee, would mean that in many cases the practitioner would be unable to complete their *pro se* assistance in a single meeting with the respondent. CLINIC is concerned that adding the additional responsibilities associated with serving and filing an E-28 would create significantly more work on each limited appearance case, and would therefore lead to fewer *pro se* respondents receiving even limited assistance from counsel.

If the practitioner does not submit the form along with the E-28 themselves, the practitioner could face other problems.²¹ The practitioner may conclude that it is not possible for the practitioner to file the form after assisting the *pro se* respondent to complete a form, especially where the *pro se* respondent indicates that they will need to pay the EOIR fee in person or where the practitioner completes the form in a one-time meeting and the *pro se* respondent does not bring the required fee with them.

The practitioner could hand the respondent the completed E-28 along with the completed application form and instruct the *pro se* respondent to serve a copy of the form on DHS along with the application, and to submit a copy of the E-28 to the court along with the application. However, once the practitioner hands the application form to the *pro se* respondent, the practitioner would have no control over whether the respondent actually submits the E-28 form, and, as discussed below, the proposed rule would amend 8 CFR § 1003.102(t) to require discipline against practitioners for not submitting an E-28. Practitioners could therefore legitimately fear handing the

¹⁷ See, 85 Fed. Reg. 11866 (Proposed Feb. 28, 2020). CLINIC opposed the proposed rule imposing a fee on asylum seekers in the strongest possible terms. See CLINIC, CLINIC Submits Comments in Opposition to Proposed EOIR Fee Rule, Urges the Justice Department to Rescind, (Mar. 30, 2020) <https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comments-opposition-proposed-eoir-fee-rule>. [Hereinafter CLINIC EOIR fee comment.].

¹⁸ EOIR does not currently have a mechanism to accept payment for applications for relief, so to pay a fee, a respondent must submit paperwork to a USCIS service center, see <https://www.uscis.gov/sites/default/files/document/forms/PreOrderInstr.pdf> or obtain a special form (a “buck slip”) from DHS counsel that allows them to fee-in the application in person at a USCIS office.

¹⁹ Under the proposed EOIR fee rule, there would be no ability for asylum seekers to file for a fee waiver. See 85 Fed. Reg. 11874, n.21. (“While the immigration judge has discretion as to whether to grant the motion [for a fee waiver], no such grant will occur if the underlying application for relief is a DHS form and DHS regulations prohibit such a waiver.”).

²⁰ See note 14, *supra*.

²¹ The NPRM states “The NOEA [Notice of Entry of Appearance] form would then be filed with EOIR concomitantly with whatever filing was the subject of the legal assistance,” but it does not specify whether the E-28 and filing should be filed by the practitioner or by the *pro se* respondent. See 85 Fed. Reg. 61646.

E-28 with the application to the respondent because if the respondent does not file the E-28 along with the application form, the practitioner would be liable for discipline.

For these reasons, CLINIC believes that for assistance in completing application forms, E-28s should not be required. CLINIC suggests that, instead, EOIR and DHS revise the preparer information on application forms to collect further information such as the attorney number or accredited representative number, and whether the practitioner has engaged in practice or preparation. CLINIC believes this solution would allow EOIR to hold practitioners accountable for their actions in assisting to complete the forms, but would not result in the burdens described above which would likely result in fewer *pro se* respondents receiving limited assistance from counsel.

2. CLINIC Agrees that Practitioners Who Assist with Motions Must Identify Themselves but Has Practical Concerns about Submitting an E-28 for Limited Assistance with Motions

CLINIC strongly supports the proposed rule allowing practitioners to engage in limited representation. CLINIC also believes that practitioners should fully identify themselves when engaging in practice before the immigration court but, as described above, CLINIC has practical concerns about requiring practitioners to submit E-28 forms with motions.

CLINIC has the same concerns expressed above about the inability to hand a *pro se* respondent a motion to file themselves if there is a fee associated with the motion, such as a motion to reopen.²² As with filing an application form that requires a fee, practitioners assisting *pro se* respondents would be forced to choose among the bad options of handing the motion and E-28 to the respondent and hoping that the respondent properly serves and files the E-28, filing the E-28 without the feed-in motion, or taking on a greater role in assisting the *pro se* respondent to pay the fee, and thereby potentially not being able to assist as many *pro se* respondents.

Even for motions that are more straightforward and do not require a fee, such as a change of venue motion, under the proposed rule, the practitioner would have to file an E-28. While assisting with motions that do not require a fee would not result in the challenges associated with paying an EOIR fee, the practitioner would face the added burden of having to serve and submit the motion themselves in order to ensure that the E-28 is properly filed.

3. CLINIC Opposes the Proposed Regulation's Different Requirements for Practitioners Who Engage in Preparation and Non-Practitioners Who Engage in Preparation

As discussed above, the proposed rule would refine the definitions of “practice” and “preparation.” However, under the proposed 8 CFR § 1003.17(d), “A practitioner who engages in preparation as defined in 8 CFR 1001.1(k) must file Form EOIR–28 disclosing the preparation.”

²² If the proposed EOIR fee rule goes into effect, even motions to reopen for asylum would be subject to the motion to reopen filing fee of \$145 before the court or the extraordinary fee of \$895 before the BIA. CLINIC strongly opposes the requirement that asylum seekers pay a fee for a motion to reopen, and opposes the fee increases that will put justice out of reach for many noncitizens. See CLINIC EOIR fee comment, *supra* note 17.

Thus, practitioners (defined as attorneys and accredited representatives) would be required to file an E-28 even if they engage in preparation rather than practice. The proposed rule does not impose a similar requirement on non-practitioners who, of course, are not eligible to file E-28 forms. The NPRM states “In all other cases—i.e., in which a non-practitioner engages in preparation—no separate form would need to be filed; however, any preparer instructions or disclosure would need to be completed upon assistance of any kind with a form requesting that information.”²³ Likewise, the proposed rule says, “Nothing in this section shall be construed as relieving the preparer of an application or form that requires disclosure of the preparation from complying with the disclosure requirements of the application or form. . .” 8 CFR § 1003.17(f). It is irrational to impose a greater burden on practitioners than on the general public if they are engaging in the exact same activity of transcribing information onto a form. Requiring an E-28 in such situations may discourage practitioners from providing this assistance to *pro se* respondents.

While the NPRM states that it would be very rare for practitioners to not exercise legal judgment in completing a form,²⁴ there are instances, such as when assisting a *pro se* respondent to complete a Change of Address form, a Freedom of Information Act Request, or to complete an EOIR-approved template change of venue motion²⁵ when practitioners would just complete blanks on a form. The NPRM does not explain why practitioners must take the extra step of also completing an E-28 when, for example, paralegals would not have to do so. Since the proposed rule explicitly defines preparation as activities that do not involve the exercise of legal judgment, there is no reason that practitioners should be required to file form E-28 for preparation.

4. CLINIC Urges EOIR to Amend the Proposed Rule to Require Service of Documents Related to the Filing on the Practitioner as well as the Pro Se Respondent

As discussed above the proposed rule would require practitioners to submit a newly created E-28 form whenever they assist a respondent in completing a document that would be filed with the immigration court. The proposed rule makes clear that when a practitioner enters only a limited appearance, “No subsequent withdrawal motion is necessary for Form EOIR–28 filed under this paragraph (d), but a new Form EOIR–28 must be filed for each subsequent act of preparation or practice that does not constitute representation.” Proposed 8 CFR § 1003.17(d). Under the proposed rule, EOIR would continue to regard the respondent as *pro se*, even after a practitioner enters a limited appearance on the new E-28 form. The NPRM states:

Under the proposed rule, EOIR would consider individuals to be *pro se* if a practitioner has not filed an NOEA [Notice of Entry of Appearance] form noticing that the practitioner is serving as the individual’s legal representative in immigration proceedings. The filing of an amended NOEA form indicating that a practitioner has engaged in non-representative practice or preparation would not alter the alien’s representation status.²⁶

²³ 85 Fed. Reg. 61647. The NPRM also clearly states, “Only practitioners are affected by the proposed rule.” *Id.*

²⁴ 85 Fed. Reg. 61646.

²⁵ See DOJ, Have You Moved?, at 5, https://www.justice.gov/sites/default/files/pages/attachments/2016/01/14/have_you_moved.pdf.

²⁶ 85 Fed. Reg. 61647.

CLINIC agrees that when a practitioner assists a *pro se* respondent to submit a filing that EOIR should generally continue to treat the respondent as though they are unrepresented. Most importantly, “As with all *pro se* respondents, the individuals would remain responsible for their own representation while in court, including receiving notice of upcoming hearings and deadlines.”²⁷ CLINIC is pleased that EOIR would serve the *pro se* respondent directly and make them responsible for subsequent court appearances.

CLINIC recommends, however, that DHS and EOIR should also serve any papers related to the filing on the practitioner. If the practitioner must file an E-28, it would also be important that DHS or EOIR serve responsive papers or orders on the practitioner since the practitioner could potentially be sued for malpractice or have a respondent file a disciplinary complaint based on the limited appearance representation; practitioners would have a need to know the outcome of the portion of the case on which they provided assistance.²⁸

CLINIC is also concerned that, as when EOIR first implemented limited appearance for bond proceedings only, that once a practitioner submits an E-28, even for a limited purpose, EOIR may erroneously enter the practitioner in the EOIR system as counsel. A study on increasing immigration court efficiency commissioned by EOIR found, among other things that, “Many courts of all types and sizes are understaffed, which impacts case processing, court morale, and office culture. Staff across all positions indicated that, on average, they have less time than they need to finish their tasks each day.”²⁹ EOIR should issue guidance to court personnel about the new rule when it is published and if EOIR personnel incorrectly enter a limited appearance as full representation, the practitioner should not be required to submit a motion to withdraw, which would take critical time for practitioners that they could be using to provide representation to those in need.

5. CLINIC Is Concerned that Proposed 8 CFR § 1003.17(b) Would Eliminate All Oral Friend of the Court Arguments

Section 1003.17(b) of 8 CFR would prevent practitioners from “advocating in a legal capacity on behalf of a respondent in open court without filing Form EOIR–28 noticing that individual’s entry of appearance as a respondent’s legal representative.” This portion of the proposed rule would effectively eliminate a practitioner’s ability to appear as a “friend of the court.” While CLINIC acknowledges that friend of the court appearances are increasingly rare,³⁰

²⁷ *Id.*

²⁸ CLINIC is particularly concerned about that DOJ fully accredited representatives receive these responses. Pursuant to 8 CFR §§ 1003.108(a)(3) and (b) because EOIR adjudicates their applications to practice before the immigration court. CLINIC is concerned that if DHS or an immigration judge believes an accredited representative provided ineffective assistance on a document that an accredited representative submitted to the court, the representative should receive copies of the responsive papers or order since the very agency, EOIR, that adjudicates the submitted document also adjudicates the representative’s accreditation.

²⁹ Department of Justice, Executive Office for Immigration Review, *Legal Case Study Summary Report*, Booz Allen Hamilton at 19, (Apr. 6, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_oramance_metrics_foia_request_booz_allen_hamilton_case_study.pdf [hereinafter “Booz Allen EOIR Study”].

³⁰ In the past a friend of the court might argue for administrative closure, but the attorney general has foreclosed this argument in most cases by issuing *Matter of Castro Tum*, 27 I&N Dec. 271 (A.G. 2018). In fact, that decision arose

there may be instances when a practitioner encounters an unaccompanied child in court, a mentally impaired person, or a rare language speaker, and wishes to advance a general argument on their behalf, such as for a continuance. Under the proposed rule, a practitioner could only do so by first obtaining an E-28, which may be too time-consuming to do in open court. Moreover, if the practitioner wished to speak on behalf of an unrepresented respondent because that respondent has a legal incapacity issue, the practitioner would likely not feel comfortable completing the certification on the newly proposed E-28. Furthermore, since a practitioner could only address the court if the respondent is in court to sign a limited appearance E-28, a practitioner would never be able to make a friend of the court argument on behalf of a respondent at risk of receiving an *in absentia* removal order for not being present in the courtroom.³¹ CLINIC believes that, in limited circumstances, it can be beneficial to the immigration judge to hear from a practitioner in court, and that requiring the practitioner to enter an appearance will foreclose the ability to do so.³²

C. CLINIC Generally Supports EOIR’s Proposed Rule, 8 CFR § 1003.38 That Would Allow Practitioners to Make Limited Appearances and Assist Respondents in Completing Documents to Be Submitted to the Board of Immigration Appeals but Does Not Believe They Should Have to Complete a Notice of Appearance Form.

CLINIC has similar concerns regarding the requirements to file notices of appearance before the Board of Immigration Appeals (BIA) as it does with filing E-28s before the immigration court. On the one hand, it is often helpful for the attorney who represented the respondent before the immigration court to assist in filing the Notice of Appeal, since that form must be filed within 30 days of the immigration judge’s order, and must generally be filed without having a written decision to which a practitioner can refer. The proposed rule would allow prior counsel to exercise their legal judgment in completing that form without being obligated to appear as counsel at the briefing stage of the appeal, which would generally benefit respondents who might otherwise have to fill out the Notice of Appeal form without any legal assistance.

However, as discussed above, CLINIC is concerned about the practicalities of providing this assistance to *pro se* respondents, especially if EOIR finalizes its proposed rule that would

specifically in the context of a practitioner who appeared as a friend of the court and sought to prevent an *in absentia* order being entered against an unaccompanied child who did not appear in immigration court arguably due to a lack of notice of the hearing. See Matthew Archambeault, *The Repercussions of How the Administration Has Handled Matter of Castro-Tum*, Think Immigration, (Aug. 14, 2018) <https://thinkimmigration.org/blog/2018/08/14/the-repercussions-of-how-the-administration-has-handled-matter-of-castro-tum/>.

³¹ One of CLINIC’s staff members who engaged in volunteer work with asylum seekers subject to MPP described a situation where the asylum seeker presented herself at the port of entry on the day of her hearing and was turned away by Customs and Border Protection because they did not believe her “tear sheet” was legitimate. When our staff member called the San Diego immigration court, the clerk said that they could not do anything and that the only way to bring this issue to the judge’s attention would be for someone to attend court in person in San Diego and tell the judge. Under the proposed rule, no one would be permitted to serve as a “friend of the court” to convey this information to the judge.

³² Last year, EOIR Director McHenry issues a memo prohibiting friend of the court practice. See James McHenry, EOIR, Legal Advocacy by Non-Representative in Immigration Court, (Nov. 21, 2019), <https://www.justice.gov/eoir/page/file/1219301/download>. CLINIC believes that in some limited circumstances it is appropriate for practitioners to advance arguments on behalf of those who are unable to do so themselves.

increase appeals fees to \$975.³³ CLINIC predicts that many more respondents filing Notices of Appeal would need to file fee waiver applications along with the Notice of Appeal.³⁴ For those noncitizens who could afford the fee, it would likely be impractical for them to pay in many of the settings in which a pro bono attorney would provide limited assistance. While EOIR has recently created a portal that allows for online payment of the BIA appeal fee and motions fees,³⁵ presumably a noncitizen would need to have a U.S.-issued credit card or at least bank account in order to pay the fees online. As a result of the asylum EAD rule published on August 25, 2020, which prohibits asylum seekers from applying for an EAD until 365 days after their asylum application has been filed,³⁶ paired with the currently pending asylum procedures rule which would require most asylum applications to receive a decision within 180 days of filing,³⁷ most asylum seekers would be unable to obtain an EAD while their defensive asylum application is pending. Therefore, most asylum seekers would be unable to obtain a social security number and would often not be able to obtain a bank account or credit card and, in turn, would not be able to use the EOIR payment portal. Thus, those asylum seekers who could afford the appeal fee, would often have to use a money order to pay and would likely not have that with them when meeting with a pro bono attorney for one-time assistance. Respondents who are subjected to MPP would almost never have a credit card or a U.S. bank account, creating added hurdles for attorneys seeking to provide them with limited assistance in filing a Notice of Appeal.

Practitioners would again be left to choose among bad options: giving the respondent the completed Notice of Appeal form, along with the E-27 and hoping the respondent files the two forms together once the respondent has the funds to do so; filing the E-27 without the Notice of Appeal form which might confuse the court; or taking responsibility for filing both the E-27 form and the Notice of Appeal form itself, which might not be possible if the practitioner is providing one-time assistance to noncitizens who are detained or who are stranded in Mexico under MPP. CLINIC suggests that instead of requiring practitioners to submit an E-27 when assisting with an E-26, Notice of Appeal, that the form be amended to include a preparer information box, and that completion of this box be deemed sufficient to provide accountability in the practitioner's role in completing the form.

D. CLINIC Strongly Opposes EOIR's Proposed Revision to Rule, 8 CFR § 1003.102(t) That Would Subject Practitioners to Discipline for a Single Instance of Not Completing a Notice of Appearance Form

CLINIC strongly opposes the proposed revision to 8 CFR § 1003.102(t) that would create a mandatory discipline provision for any practitioner who does not file a required E-28. Under the existing rule, a practitioner “shall be subject to disciplinary sanctions in the public interest if he or she: . . . Has been deemed to have *engaged in a pattern or practice* of failing to submit [Notice of Appearance] forms, in compliance with applicable rules and regulations.” [Emphasis added.] The proposed rule would eliminate the phrase “pattern and practice,” stating instead that a practitioner:

³³ See CLINIC EOIR fee rule comment, *supra* note 17.

³⁴ *Id.*

³⁵ See EOIR Payment Portal, <https://epay.eoir.justice.gov/index>.

³⁶ See 8 CFR § 208.7(a)(1)(ii).

³⁷ See 8 CFR § 1003.31(c).

shall be subject to disciplinary sanctions in the public interest if he or she: . . . Engages in representation as that term is defined in 8 CFR 1.2 or 1001.1(m), practice as the term is defined in 8 CFR 1.2 or 1001.1(i), or preparation as that term is defined in 8 CFR 1.2 or 1001.1(k), and fails to submit a signed and completed Form EOIR–27, Form EOIR–28, or Form G–28 in compliance with applicable rules and regulations. . . Proposed 8 CFR § 1003.102(t).

Under the proposed rule, read literally, a single instance of a practitioner not submitting a Notice of Appearance form would lead to mandatory—the regulation says “shall” not “may”—discipline. Indeed, the NPRM supports this reading, stating, “Moreover, because practitioners may engage in non-representative practice outside of court under the proposed rule, the importance of the disclosure requirements of the NOEA forms for both aliens and immigration judges is heightened, and the damage from *just one* instance of failing to file the appropriate form is accordingly greater.”³⁸

CLINIC urges EOIR to keep the “pattern and practice” language in the regulation and to change the “shall discipline” language to “may discipline.” We believe that making discipline possible but not mandatory would allow the agency to exercise its judgment in determining whether or not discipline is warranted. In some cases, it is appropriate to discipline practitioners who do not file notices of appearance when they are required to do so, but CLINIC is concerned that requiring the Office of Disciplinary Counsel to address instances of practitioners who may reasonably be confused by this regulation may divert limited resources away from addressing *notario* fraud, which is a more significant threat to the immigrant community.³⁹ CLINIC is particularly concerned about the likely increases in disciplinary proceedings under the proposed rule in light of the proposed rule itself, which would substantially alter the requirements of when practitioners must submit notices of appearance.

E. CLINIC Strongly Opposes EOIR’s Proposed Revision to Rule 8 CFR § 1003.102(u) that Would Subject Practitioners to Discipline for a Sample Document Being Filed with the Immigration Court by Someone Other than the Practitioner.

CLINIC also strongly opposes the proposed change to 8 CFR §1003.102(u). The existing regulation states that, a practitioner “shall be subject to disciplinary sanctions in the public interest if he or she: . . . Repeatedly *files* notices, motions, briefs, or claims that reflect little or no attention to the specific factual or legal issues applicable to a client’s case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client.” [Emphasis added.] The proposed rule would change two words that significantly alter the meaning and scope of this section. Under the proposed rule, a practitioner:

shall be subject to disciplinary sanctions in the public interest if he or she: . . . *Repeatedly drafts* notices, motions, briefs, or claims *that are later filed* with DHS or EOIR that reflect little or no attention to the specific factual or legal issues applicable to a client’s case, but

³⁸ 85 Fed. Reg 61649. [Emphasis added].

rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client. . . Proposed 8 CFR § 1003.102(u). [Emphasis added].

The existing rule is a reasonable ethical provision: if a practitioner is providing full legal representation to a client, the practitioner has an ethical obligation to competently represent that client.⁴⁰ If a practitioner takes on full representation, the practitioner is obligated to fully analyze the client’s facts and the applicable law before submitting any brief or other filing with the court. It is reasonable that if a practitioner is providing full representation to a respondent in immigration court, the practitioner could be subject to discipline if the practitioner submits boilerplate briefs that are not on point for the respondent’s case or that do not include competent arguments that the case demands.

The proposed rule would require mandatory—again the language of the regulation is “shall” not “may”—discipline if a practitioner drafts a brief or other court filing that is later filed by someone else. CLINIC strongly opposes the breadth of this proposed rule. It is irrational and overreaching of EOIR to attempt to regulate what a practitioner “drafts.” For example, CLINIC regularly posts federal court and BIA amicus briefs on our website. CLINIC cannot prevent a *pro se* respondent, or even an unscrupulous practitioner, from filing with the court a brief that we have drafted and that is in the public domain.⁴¹ Likewise, CLINIC creates templates for other practitioners and, while we caution that they should not be submitted to court without the practitioner revising them,⁴² we have no control over what other practitioners do with those templates and we should not be subject to mandatory discipline for drafting them.

Presumably, EOIR changed the language to this portion of the regulation because it wishes to further regulate practitioners assisting *pro se* respondents by giving them template briefs. CLINIC reiterates our strong belief that every noncitizen who appears in immigration court should have competent counsel to represent them through all stages of the proceeding. Absent funding that would allow all noncitizens to be represented, many noncitizens, especially those in remote detention facilities, will have to face trained DHS attorneys on their own. Many such respondents, are fortunate to have a single one-on-one meeting with an immigration practitioner. Often after conducting a Know Your Rights training or having a consultation with a *pro se* respondent, a practitioner will see that a particular argument could be critical to the respondent’s case. For example, the Notice to Appear may be defective warranting termination, the respondent may be charged with a criminal ground of inadmissibility or deportability that does not fit categorically within the federal definition, or the respondent may have a common exception to the one year

⁴⁰ See for example, American Bar Association Model Rule 1.1, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/. (“A lawyer shall provide competent representation to a client...”).

⁴¹ Even if CLINIC did not post these briefs on our website, the federal court briefs would be available via PACER or other private legal research websites.

⁴² For example, one brief on CLINIC’s website includes the language, “This brief is intended to serve as a model brief to submit, or as a basis for oral argument to respond to immigration judges who demand that the asylum seeker state the particular social group(s) at a master calendar hearing as a prerequisite to scheduling the individual hearing. This brief is not intended to constitute legal advice. Asylum law is rapidly evolving. This brief was written in June 2018; practitioners must conduct their own research prior to submitting this, or any other sample brief.” See CLINIC, Sample Respondent’s Brief Regarding PSG Formulation Requirements, (June 6, 2018) <https://cliniclegal.org/resources/asylum-and-refugee-law/sample-respondents-brief-regarding-psg-formulation-requirements>.

filing deadline for asylum. These are but a few examples of situations where a *pro se* respondent would benefit from a general brief that outlines the law that is relevant to their case and summarizes facts that are the same or substantially similar to the respondent's.

Under the proposed rule, a practitioner would have to fear being disciplined for distributing a brief with the same legal argument to several *pro se* respondents, even if the argument clearly applied in every case because the immigration court may consider it “boilerplate.” This concern is amplified by the agency’s language in the NPRM about ghostwriting which takes up almost a full page of the ten page introductory material. CLINIC shares EOIR’s concern about “bad actors” and “notarios,” but is not convinced that the proposed rule would deter them since they generally do not disclose their work on cases anyway.⁴³ We are concerned that EOIR is conflating notarios with practitioners who provide template briefs as discussed above, so that *pro se* respondents can raise and preserve critical legal arguments that they would not be able to fully articulate without the assistance of counsel.

CLINIC strongly believes that practitioners should not be subject to discipline for drafting sample or template briefs or motions that may assist other practitioners formulate arguments or assist unrepresented respondents present an argument to the immigration court that they would not be able to make on their own. As written, the proposed rule could result in practitioners, including attorneys at CLINIC, being disciplined for posting a template brief on our website.

F. CLINIC Does Not Believe that the Proposed New Forms the Agency Has Made Available Adequately Allow the Public to Comment on the New Forms

Although one of the key aspects of the proposed rules would be changes to Notice of Entry of Appearance forms before the immigration court and the BIA, the agency did not make these forms available as part of the docket on the regulations.gov website. CLINIC is therefore concerned that many members of the public who comment on the proposed rule will have to do so without seeing the proposed revisions to the forms.

After multiple requests, to obtain copies of the proposed forms, CLINIC finally received copies of the existing forms from the Office of Policy on October 21, 2020, that include comment bubbles indicating where new language would need to be added.⁴⁴ For example, the text on the “draft” forms E-27 and E-28 has not been updated. Instead, there is a comment bubble that says:

Add a check box for “limited appearance” and the following:

1. a free field to describe work done,
2. fees charged

⁴³ See 85 Fed. Reg. 61648. The agency states, “Respondents and petitioners, through the proposed rule and education efforts, would know to avoid the assistance of practitioners or other bad actors who are unwilling to identify themselves on documents with which they assist. Practitioners or other bad actors’ refusal to do so would be a clear sign that the respondent or petitioner should seek assistance elsewhere.” CLINIC thinks this is overly optimistic given that DHS and EOIR forms have included preparer boxes for years and notarios do not generally complete them.

⁴⁴ We are attaching the three “revised” forms, Form E-26 Notice of Appeal from a Decision of an Immigration Judge, Form E-27 Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals, and Form E-28 Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court.

3. attestation and signature block for the practitioner that the practitioner has explained, and that the respondent/represented party understands, the limited nature of the representation
4. attestation and signature block for the respondent/represented party that the practitioner has explained the limited nature of the representation and that the respondent understands the limited nature of the representation

CLINIC urges the agency to create the actual draft forms, with the language it proposes to amend on the forms, and make the proposed new forms widely available to the public.

The language of the NPRM indicates that EOIR will substantially revise the existing forms, requiring:

For cases involving non-representative practice or preparation, the revised NOEA forms would require the practitioner to provide his or her name, contact information, BAR# or EOIR ID# (as applicable), general nature of work done, and fees charged, as well as to complete an attestation and certification on the NOEA form attesting that the practitioner has explained, and the individual understands, the limited nature of the assistance.⁴⁵

The proposed regulation also appears to contemplate changes to the form instructions. Proposed 8 CFR § 1003.17(e) states, “Any practitioner required to submit Form EOIR–28 under this paragraph must comply with all instructions on Form EOIR–28.” However, the proposed forms that were shared with CLINIC do not include any language revising the instructions.

It is difficult to fully comment on EOIR’s plan to require practitioners to disclose fees on the E-28 without seeing the language on the form and instructions as to what exactly must be disclosed. CLINIC does not believe it is appropriate for EOIR—the agency that adjudicates the document the practitioner assisted in completing—to require information about the cost of the service. There may be situations where a practitioner invests substantial time in researching and investigating potential claims before assisting the respondent to submit a document. The regulations do not specify whether the practitioner should be including the time they put into the case before completing the document in the fee charged. It would be unfair to ethical practitioners to assume a high fee is too large without knowing the exact parameters of the practitioner’s work. For example, the practitioner may have invested considerable time in determining the outcome of an arrest and whether or not the respondent is eligible for a particular form of relief. If the practitioner does not detail the work done, it may appear to DHS and the immigration judge that the practitioner has charged an inflated fee. On the other hand, if the practitioner discloses on the E-28 the scope of the investigative work performed, the practitioner may have to reveal information that is detrimental to the respondent’s case. A truly unscrupulous practitioner could simply write zero or a low amount in the form and tell the *pro se* respondent that the fee covered some other aspect of the service provided.⁴⁶ In any event, the contours of a practitioner-client

⁴⁵ 85 Fed. Reg. 61647.

⁴⁶ Without seeing an actual draft of the proposed form, it is not possible to see where on the form this information would be required and whether practitioners who provide full representation might be confused into thinking that they also must disclose their fees.

relationship, even if it is limited in scope, is confidential and requiring practitioners to disclose their fees to the government, without a specific allegation of malpractice or fraud, violates the terms of that confidential relationship.

CLINIC notes another example where it does not appear that the agency has given adequate thought to revising the forms. The preamble to the proposed rule states that attorneys who do not have EOIR numbers would be able to write in their state bar number rather than an EOIR number.⁴⁷ CLINIC strongly supports this allowance, given that many pro bono attorneys are not primarily immigration practitioners and it would be onerous for them to have to obtain an EOIR number merely to complete a form in a clinic, especially during the COVID pandemic. However, the “revised” E-28 does not amend the form or instructions to allow an attorney to use their state bar number rather than an EOIR number.

It is not possible for CLINIC, or any other members of the public, to give feedback on the language of the proposed amendments, without even seeing the proposed language.

G. CLINIC Does Not Believe the Agency Adequately Evaluated the Impact of the Proposed Rule on Practitioners

CLINIC does not believe that EOIR adequately evaluated the impact of the proposed rule on practitioners. According to the NPRM, the additional certification that practitioners would be required to complete would increase the burden of completing forms E-27 and E-28 by two minutes, from six minutes to eight minutes, stating that the practitioner would need an additional two minutes to “to provide fee information and complete the attestation and certification.”⁴⁸ Since it appears that EOIR has not even drafted the new proposed forms, CLINIC questions how the agency was able to calculate the time required to complete the forms. Indeed, the proposed forms seem like an afterthought, which highlights the seeming arbitrary nature of EOIR’s consideration process.⁴⁹ The NPRM also only appears to account for the time it would take to write the newly required information on the form, but does not account for the significant time it may take a practitioner to explain what their role is in the case, what the scope of the representation will be, and the rights of the respondent to seek counsel for full representation.

Moreover, the proposed rule would require practitioners to submit E-28s on behalf of *pro se* respondents where they would not have had to do in the past or under the settlement agreement in *Northwest Immigrants Rights Project v. Sessions*.⁵⁰ The NPRM does not even attempt to take into consideration the added time for practitioners who would have to file E-28s when they did not have to do so previously, (making the proper starting point zero minutes rather than six minutes

⁴⁷ *Id.*

⁴⁸ 85 Fed. Reg. 61651.

⁴⁹ The NPRM also includes a 60 day comment period for information collection on the proposed forms, but it does not appear that the forms have even been drafted yet, and the pdfs with comment bubbles were not provided until October 21, 2020—more than three weeks after the proposed rule was published.

⁵⁰ See, See NWIRP, *NWIRP Reaches Settlement With DOJ to Continue to Provide Assistance to Unrepresented Individuals in Deportation Proceedings*, (Apr. 17, 2019) <https://www.nwirp.org/nwirp-reaches-settlement-with-doj-to-continue-to-provide-assistance-to-unrepresented-individuals-in-deportation-proceedings/#:~:text=Sessions%2C%20a%20lawsuit%20filed%20in,unrepresented%20immigrants%20in%20deportation%20proceedings>.

for any calculation of increased time). Finally, and perhaps most significantly, the NPRM does not take into account the additional time and money a practitioners would have to expend in serving the E-28 on DHS and filing it with the immigration court. As discussed above, in many *pro se* clinic settings, the practitioner would not file the forms themselves, but rather would give them to the *pro se* applicant to do so. Under the proposed rule, practitioners may feel that they are required to serve and file the E-28 along with the document to which it is attached which could add hours to their work on each case, especially if they are responsible for ensuring proper submission of the application fee.

IV. CONCLUSION

CLINIC strongly believes that all noncitizens should be represented by competent counsel in removal proceedings. CLINIC supports the general concept in this NPRM that if a noncitizen cannot secure full representation for their removal proceedings, they should be able to benefit from limited representation by practitioners. However, CLINIC is concerned that it would be impractical to file E-28s in many situations in which the proposed rule would require them. CLINIC is also very concerned that the proposed rule could lead to substantially more disciplinary proceedings against practitioners who are trying to help respondents who would otherwise be completely unrepresented. CLINIC is concerned that the regulations would lead to increased disciplinary proceedings and therefore lead fewer practitioners to agree to provide limited representation.

As Pope Francis has said, “thousands of persons are led to travel [here] in search of a better life for themselves and for their loved ones, in search of greater opportunities . . . We must not be taken aback by their numbers, but rather view them as persons, seeing their faces and listening to their stories, trying to respond as best we can to their situation. To respond in a way which is always humane, just and fraternal.”⁵¹ CLINIC likewise believes that the most vulnerable among us deserve compassion, fairness and due process in the adjudication of their claims for relief. In this vein, CLINIC submits the above comments in opposition to the proposed changes.

Thank you for your consideration of these comments. Please do not hesitate to contact Jill Marie Bussey, Director of Advocacy, at jbussey@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,



Anna Gallagher
Executive Director

⁵¹ *Transcript: Read the Speech Pope Francis Gave to Congress*, TIME, Sept. 24, 2015, <https://time.com/4048176/pope-francis-us-visit-congress-transcript/>.