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MODEL RULES OF REPRESENTATIVE CONDUCT

Submission to Subcommittee on Representative Qualifications,
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Prepared by
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Office of the Chairman
Administrative Conference of the United States

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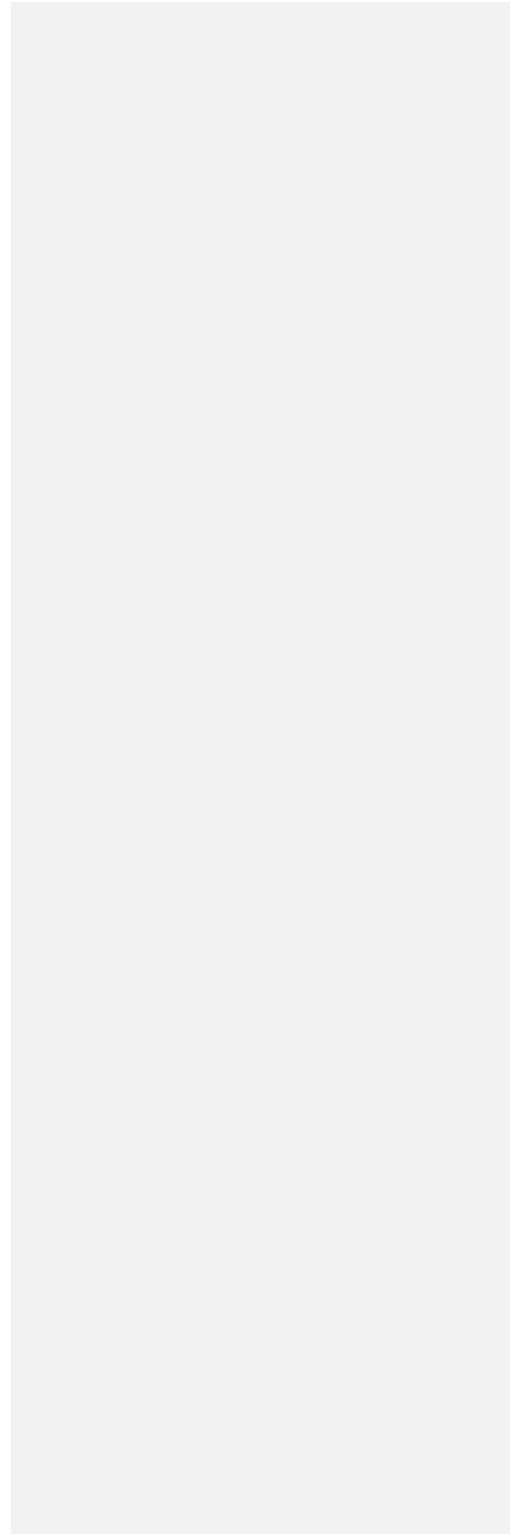
ENFORCEMENT AND DISCIPLINE

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GENERAL PROVISIONS

100. Definitions

- (A) “Adjudication” means an agency proceeding—whether conducted pursuant to the federal Administrative Procedure Act, 5 U.S.C. § 551 et seq., other statutes, or agency regulations or practice—involving at least some oral argument or presentation resulting in some determination by an adjudicator that affects the rights or interests of individual parties.
- (B) “Adjudicator” is one or more individuals who preside(s) at the oral argument or presentation of evidence at an adjudication. An adjudicator may be an ALJ or any other presiding official who is authorized to so act.
- (C) “Agency” is an agency as defined in 5 U.S.C. § 551.
- (D) “Docketed Party” is a named person required by law to participate in an adjudication.
- (E) “Intervenor” is a person either entitled by law or permitted by [the Agency] to participate with full or limited rights as a party, despite not being a docketed party to an adjudication.
- (F) “Limited participant” is a person, who is not a party, permitted by agency discretion to participate in an adjudication.
- (G) “Party” is a docketed party in an adjudication.
- (H) “Participant” means a party to an adjudication or a person compelled to appear before an agency in an adjudication, as well as an intervenor or limited participant in the adjudication.
- (I) “Representation” refers to the acts of a representative on behalf of a participant in an adjudication.
- (J) “Represented participant” means a participant in an adjudication who is accompanied in the adjudication by a representative.
- (K) “Representative” is an individual appearing in an adjudication on behalf of a participant. A representative may be a private licensed attorney or non-lawyer, but may not be a government lawyer or current government employee.
- (L) “Tribunal” means the agency adjudicative authority presiding over a proceeding, including the hearing appeals of an agency adjudication by another agency adjudicator or adjudicators.

Official Comment

Commented [WG1]: Comment from Lauren Alder Reid: Recommend spelling out as not previously identified. Consider providing a definition of the term in this section.

Commented [WG2]: Comment from Lauren Alder Reid: Consider, "...person or entity...". Comment is valid for each place "person" appears in this context. N.B. - DHS is a docketed party to immigration court proceedings.

Commented [LV3]: This maps the language of APA 555 and then goes further. I think it makes sense given that the model rules are primarily about qualifications and conduct, not whether to allow representation, but need advice as to the scope of this definition, since it will be used throughout.

Commented [WG4R3]: Comment from Lauren Alder Reid: Consider, perhaps, "is a docketed party, intervenor, or limited participant." Note, however, the odd construct of using the term "limited participant" to define "participant."

Commented [WGMRS]: Comment from Lea Robbins: This may be specific to SSA adjudications, but what about those contracting with the government? For example, medical experts and vocational experts that contract with SSA to provide testimony in administrative hearings. Do we want them covered by these rules or no?

Commented [WG6R5]: Comment from Lauren Alder Reid: Also, please consider that DHS represents the Government in immigration court proceedings. Further, is the intent only to capture Federal Government employees/lawyers in this paragraph? See comment to 101(B) as well.

101. Scope of Rules

(A) These rules of representative conduct are applicable to the following representatives before [the Agency]:

- (1) Licensed attorneys covered by the Agency Practice Act, 5 U.S.C. § 500;
- (2) Licensed attorneys authorized to act as representatives by other applicable statute or agency rule; and
- (3) Private non-lawyers who meet the applicable qualifications prescribed in rules 204-208, *infra*.

(B) These rules are not applicable to the following types of individuals wishing to serve as representatives before [the Agency]:

- (1) Government attorneys;
- (2) Non-lawyer government employees.

(C) On any question not addressed by specific statute, specific agency regulation, or these rules, representation is guided so far as practicable by the ABA Model Rules of Professional Conduct.

Official Comment

Commented [WG7]: Comment from Lauren Alder Reid: With some initiatives at certain State/local levels, we may see Government lawyers, and possibly non-lawyers, appear on behalf of respondents in immigration court proceedings.

Commented [LV8]: I modeled this after the Adjudication Rules, but am not sure this will not create unintended consequences. I welcome comments from the subcommittee and will have to think about this more.

Commented [WGMR9R8]: Comment from Lea Robbins: Would it be better to say "...by the ABA Model Rules of Professional Conduct or, for licensed attorneys, their governing state bar rules." I like referring to the ABA Model Rules in general, especially for non-attorney reps, but may be better and more specific to refer to attorneys' state bar rules, which could conflict with the ABA Model Rules?

Commented [WG10R8]: Comment from Lauren Alder Reid: Perhaps only referring to the local rules of conduct and professionalism, and those relevant to the agency, would be preferred as holding non-lawyers to these Model Rules could prove challenging. If we do include Government employees in the set to whom the rules apply, such reference would also need to include applicable Federal Rules/requirements.

Rule 102. Construction, Modification, or Waiver of Rules

- (A) These rules must be liberally construed to secure ~~the~~ fair, expeditious, and accessible inexpensive representation of participants in agency adjudications.
- (B) These rules must be interpreted, to the extent permissible, to be consistent with the United States Constitution, the Administrative Procedure Act, 5 U.S.C. § 551 et. seq, the Agency Practice Act, 5 U.S.C. § 500, and other applicable law. To the extent that a rule is not consistent with any of the above, applicable constitutional or statutory law controls.
- (C) Except to the extent that waiver or modification would otherwise be contrary to law, an adjudicator may, after adequate notice to all interested persons, modify or waive any of these rules upon a determination that no party will be prejudiced and that the ends of justice will be served.

Commented [WGMR11]: Comment from Lea Robbins: There may be a specific reason for using the word "inexpensive" here, but, if not, I think replacing it with "reasonable" or even something like "affordable" would be better, as "inexpensive" makes me think of "cheap" or "cut-rate," which has a negative connotation.

Commented [WG12R11]: Comment from Lauren Alder Reid: Concur with the comment above, though also note that the Government should generally not be involved in fee arrangements absent cause (e.g., publication of a list of low-cost providers).

Commented [LV13]: Another rule to think about as we go along. I like the flexibility here, but am concerned about unintended consequences. This is also modeled after the ACUS Adjudication Rules.

Official Comment

REPRESENTATIVE QUALIFICATIONS

200. In General

In accordance with applicable law, including these rules, a participant in a [Agency] adjudication may be represented by a third party.

Official Comment

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201. Consent

- (A) Unless otherwise prohibited by law, a participant must must provide consent to representation in writing to the presiding adjudicator. The written consent must identify the representative by name and be submitted to the adjudicator or some other official designated by the [Agency] for that purpose in advance of the adjudication.
- (B) ~~The written~~ A record of that consent must be included in the administrative record of the adjudication.
- (C) The [Agency] may provide systematized methods of providing consent, such as:
- (1) Standardized consent forms;
 - (2) Notices of appearance for representatives that indicate consent;
 - (3) Other similar mechanisms that allow for reliable and uniform records of participant consent to representation. Mechanics of utilizing standardized form or applicable rule; Notice of appearance/physical appearance at a hearing
- Parties can submit consent in these forms:
- Standardized form, etc
- (D) Consent may be withdrawn by the participant upon the participant providing notice of such withdrawal. Withdrawal of consent may be provided to the presiding adjudicator.

Official Comment

1. (to subsection (A)): The Agency Practice Act only requires licensed attorneys who are “a member in good standing of the bar of the highest court of a State” to file a written declaration that they are qualified under the Act to serve as a representative. Absent statutory authority to adopt consent requirements by regulation, the Agency Practice Act has been interpreted to “prohibit[] agencies from erecting their own supplemental admission requirements for duly admitted members of a state bar.” *Polydoroff v. ICC*, 773 F.2d 372, 374 (D.C. Cir. 1985). This prohibition does not, however, translate to agency disciplinary actions against attorney representatives, *see id.*, or to consent requirements promulgated through valid agency regulation. *Levine v. Saul*, 2020 WL 5258690 (D.R.I. 2020).
2. (to subsection (A)): A participant's consent must identify the representative, either individually or as part of an accredited organization as described in Rule 209. Consent may be provided verbally or in writing, including by electronic means. Provision of consent can include oral, verbal, written, electronic consent.

Commented [WGMR14]: Nina Olson: “in writing or in the presence of the adjudicator”?

Commented [WG15]: Comment from Lauren Alder Reid: Concern regarding the precision here. While it lends itself to interpretation that “presiding adjudicator” could mean to the tribunal through a filing, or by mere presence sitting with the representative at counsel table, the plain language interpretation -- consent must be provided directly to a presiding adjudicator -- would be operationally burdensome on all involved.

Commented [WGMR16]: Comment from Lea Robbins: Would it be against any relevant authority to say “...identify the representative by name OR affiliation”? I ask because it would be administratively efficient for at least some agencies to recognize firms or entities as representatives, and not just individuals, which is more consistent with modern business practices (this is true in the Social Security law context but SSA does not currently recognize firms as representatives).

Commented [WGMR17R16]: Cross reference to 209? Also noting an accredited organization.

Commented [WGMR18R16]: Move to official comment?

Commented [LV19R16]: See comment 2

Commented [WG20]: Comment from Lauren Alder Reid: If “presiding adjudicator” is maintained above, perhaps, “The Agency may provide systematized methods of providing consent, including through filings with the Agency, such as:...”.

Commented [LV21]: This is just a stab at what the subcommittee discussed in the first meeting; maybe it should go in the official comments?

Commented [WG22]: Comment from Lauren Alder Reid: Must there also be participant consent to honor the representative's withdrawal?

Commented [LV23]: I meant for this to be less passive than the original note, but am not sure it is better.

Commented [WG24]: Comment from Lauren Alder Reid: If consent is required, and intended to be accepted verbally, can the Agency provide case information to the representative in advance of the first hearing? This seems to present a challenge to effective representation.

3. (to subsection (A): Limitations on the scope of representation are discussed in rule [redacted]. limitations on scope of representation (cross-reference)
4. ~~4.~~ Fees(to subsection (D)): Notice of withdrawal of consent may be provided verbally or in writing to the adjudicator, and must be part of the official record in the adjudication. In circumstances where consent was withdrawn and there was an existing fee arrangement between the participant and representative relating to the adjudication, the amount, if any, of fees owed to the representative shall be determined in accordance with applicable law, including the rules herein regarding scope of representation. See ABA Model Rule of Professional Conduct 1.5; rule [redacted], *infra*.

Commented [WG25]: Comment from Lauren Alder Reid: What if representative withdraws? This is another situation where the Government is overseeing fee arrangements. Strongly advise against this part of the provision.

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202. Representation by Licensed Attorneys

(A) Licensed attorneys may serve as representatives in an agency adjudication:

- (1) In accordance with the Agency Practice Act, 5 U.S.C. § 500, or other applicable statute;
- (2) In accordance with any [Agency] regulation authorized by statute.

(B) Licensed attorney representatives must ~~demonstrate~~ ~~reaffirm~~ ~~to~~ ~~the~~ ~~designated agency official~~ that they are a member in good standing of [their licensing jurisdiction] and are not otherwise prohibited by law from acting as a representative. ~~Attorney representatives may demonstrate that they are a member in good standing of [their licensing jurisdiction] by filing a certification of good standing with the presiding adjudicator or some other official designated by the [Agency] for that purpose.~~

Commented [WGMR26]: Declare, state

© ~~Agencies are encouraged to create records regarding representatives who are authorized to practice in front of them.~~

Commented [WGMR27]: Move elsewhere.

Commented [LV28R27]: See below

Official Comment

1. (to subsection (A)(1), (2)): Some agency enabling acts specifically allow for additional credentialing of attorney representatives. Consistent with its statute, the Department of Veterans Affairs (VA) has adopted a detailed accreditation process. *See* 38 U.S.C. § 5904(a)(2) (allowing the VA to establish accreditation standards beyond those contained in the Agency Practice Act). The VA process, however, still defers heavily to bar membership as evidence of a representative's qualifications. State bar membership in good standing creates a presumption that the attorney representative meets the agency's character and fitness requirements for representatives upon submission of a "self-certification" by the representative to the Office of General Counsel of admission to practice "before any other court, bar, or State or Federal Agency." 38 C.F.R. § 14.629(b)(1)(i), (ii).
2. (to subsections (B) and (CA)): Individual agencies may wish to specify which licensing jurisdictions qualify an attorney to serve as a representative. The Agency Practice Act makes clear that any attorney who is a "member in good standing of the bar of the highest court of a State" may represent a person before an agency." 5 U.S.C. § 500(b). Some agencies define the range of acceptable licensing jurisdictions more broadly. For instance, the Securities and Exchange Commission also permits attorneys admitted to practice before the Supreme Court of the United States or the courts of Puerto Rico or the Virgin Islands to serve as representatives in agency adjudications. 17 C.F.R. § 201.102(b). The Social Security Administration permits attorney representatives to practice before the agency provided they are licensed "to practice law before a court of a State, Territory, District, or island possession of the United States, or before the Supreme Court or a Federal court of the United States." *See* 20 C.F.R. §

404.1705(a). [Agency] adjudications that regularly involve foreign parties may consider permitting attorneys who are licensed outside the United States to serve as representatives in those proceedings.

3. (to subsection (B)); Affirmation of good standing may be provided orally or in writing, and must be including in the official record of the hearingWritten statement, oral declaration on the record in the hearing, etc.
4. (to subsections (A), (B)): Agencies are encouraged to maintain records of attorney representatives who are qualified to practice before them.

Commented [WG29]: Comment from Lauren Alder Reid: "...or other agency record." DOJ/EOIR has a registry for those who are able to represent noncitizen respondent before the agency. Their affirmation of good standing is part of their ongoing eRegistration and is not held specifically as part of each hearing record, but is held by the system as a whole.

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203. Waiver of Good Standing Requirement for Licensed Attorneys

- (A) If an attorney representative is not a member in good standing of [their licensing jurisdiction], they may not serve as a representative in an adjudication without prior written approval of the presiding adjudicator.
- (B) Such approval shall only be granted in cases when the adjudicator determines that the representative has the necessary character and fitness to serve in that capacity.
- (C) The adjudicator may condition that approval on the attorney representative completing continuing legal education (CLE) or other relevant training in areas deemed relevant by the adjudicator.

Official Comment

- (to subsection (A)): Individual agencies may wish to specify which licensing jurisdictions qualify an attorney to serve as a representative. **See comment 2 to rule 202, supra.**
- (to subsection (B)): Rules **204-207** provide factors for an adjudicator to consider in determining if a representative meets the minimum character and fitness requirements.
- (to subsection (C)): 38 C.F.R. § 14.629(b)(1)(iii) (outlining CLE requirement for certification of representatives appearing before the Department of Veterans Affairs).

Commented [WGMR30]: Deal with this issue in the definition of non-lawyer.

204203. Representation by ~~Non-Lawyers~~ Lay Advocates

(A) A non-lawyer may serve as a representative in an agency adjudication if ~~the represented participant consents on the record to the representation and the representative is determined by the [Agency] to have the necessary character and fitness qualifications~~ to serve in that role.

~~(A)(B) Non-lawyers granted limited permission to practice law by a State or other jurisdiction approved by [the Agency] to grant such permission are presumptively qualified to serve as representatives on matters within the scope of their limited permission to practice.~~

Official Comment

1. Adequate consent is determined by the requirements set forth in rule 201.

2.1. (to subsection (A)): This rule is designed to freely permit any non-lawyer chosen by the person appearing before the agency to act as a representative. It allows for disqualification of a chosen representative only in cases where there is some indication that the representative will not be willing or able to act in the best interests of the represented participant. Relevant factors in determining character and fitness qualifications of representatives are provided in rule 204.

2. (to subsection (A)): Former agency employees who are non-lawyers are not precluded from serving as representatives provided they are qualified to do so under satisfy the character and fitness requirements in rule 204. 5 U.C.S. § 500(d)(3).

3. (to subsection (B)): For example, Washington provides limited permission to practice for "limited licensed technicians." Wash. R. Admission to Practice 28. Representation qualification based on limited permission to practice is in addition to qualification for non-lawyers based on a license, rule 205, or due to individual accreditation through the agency, rule 207 or membership in an accredited organization. See rule 208.

Commented [WG31]: Comment from Karen Lash: There's a parallel movement in the states, ie experimenting with new categories of people who don't have a law degree but do provide legal information, advice and/or representation, not unlike many federal agencies allow in adjudicatory proceedings. Because no one wants to define a category of people by a negative ("non-lawyer"), many different names and labels are being used. A sampling includes: allied legal professional, community justice workers, justice workers, navigators (generally limited to people who provide legal information not advice or representation), lay legal advocate, limited license legal technician, qualified tenant advocate, and more.

It's quite the can of worms for model rules intended to apply to multiple processes in many different agencies. On the other hand, these are "model" rules so it seems worth the exercise to see if there's a better reference than "non-lawyers". Maybe something like "approved representative"?

Commented [WG32R31]: Comment from Lauren Alder Reid:

Is someone considered a non-lawyer if they are an attorney who is no longer licensed? Some states provide ability to practice for unlicensed attorneys in emeritus or pro bono status. Recommend consideration as to whether to include an official comment to avoid implication that someone who is suspended or disbarred is able to appear as a non-lawyer outside of the state in which they were licensed

Commented [WG33]: Working Group members to follow up with colleagues and advocates.

Commented [WGM34]: Definition and exceptions (translator, power of attorney, "in loco parentis")

Commented [MG35]: Comment from Jim Sandman: "By the [Agency]" suggests that the determination is made at the agency level, presumably in accordance with uniform criteria, and not by the individual adjudicator. But Rule 204 says the determination is to be made by the adjudicator. Should this read, "but the adjudicator"?

Commented [WG36]: Comment from Lauren Alder Reid: Should this mirror the consent language of the attorneys section?

Commented [MG37]: Comment from Jim Sandman: The text of the rule does not say what the comment does. The comment is much more permissive, and I think preferable. The comment requires a showing that the representative is not willing or able to act in the best interests of the participant, whereas the language of the rule seems to require an affirmative showing of qualifications. Those are different standards. The fact that a representative does not have knowledge, experience, or education of the type described in Rule 204 does not necessarily mean that the representative is not able to act in the best interests of the participant.

Commented [MG38]: Comment from Jim Sandman: I suggest using a state other than Washington as an example, such as Oregon. Washington has sunsetted its program and is not allowing new entrants, although current licensees are allowed to continue to practice.

205204. Character and Fitness Qualifications Standards for Non-Lawyer Representatives

- (A) Among the factors to be considered by the adjudicator in determining if a non-lawyer representative has the necessary character and fitness qualifications to serve are:
- (1) the representative's relationship to the represented participant;
 - (2) the representative's communication skills and knowledge of the relevant subject matter;
 - (3) the representative's relevant experience, if any, relating to the subject matter of the adjudication;
 - (4) the representative's relevant education or training in matters relevant to the adjudication;
 - (5) the representative's relevant expertise or skills in relation to the adjudication;
 - (6) the representative's character and professionalism;
 - (7) whether the representative has been charged with or convicted of a crime that reflects adversely on the representative's fitness to serve as a representative before the agency; and
 - (8) whether the representative has knowingly disobeyed or attempted to disobey agency rules or adjudicator directions, or has assisted others in doing so.
- (B) A non-lawyer representative will be presumed to lack the necessary character and fitness qualifications to serve if:
- (1) the representative's participation is prohibited by law; or
 - (2) the representative was previously disqualified or suspended from acting as a representative in the same or similar proceeding within the agency.

Official Comment

1. (to subsection (A)): The first four factors to be considered in determining whether representation by a non-lawyer would be detrimental to the represented participant are derived from existing standards set by the Social Security Administration and the Department of Labor. 20 C.F.R. § 404.1705(a); 29 C.F.R. § 18.22(b)(2). Factors 7 and 8 are included in item 3(l) of ACUS Recommendation 2021-9.
2. (to subsection (A)): If an adjudicator believes there is an additional reason why a non-lawyer representative does or does not have the requisite character and fitness, the adjudicator may consider that reason in their analysis.

Commented [MG39]: Comment from Jim Sandman: This language is open-ended and gives great discretion to the adjudicator. It would permit an adjudicator who is hostile to any non-lawyer participation to prohibit it in all cases. I would prefer a presumption in favor of the participant's choice and consent and a required showing like that described in the first comment to Rule 203.

Commented [WG40]: Comment from Lauren Alder Reid: Request an official comment that allows for the consideration of access to support that can provide the expertise, skills, etc. if proper training (and other factors) are present.

Commented [MG41]: Comment from Karen Lash: I think we agreed to get rid of references to "character" determinations for nonlawyers in section 204. "Character and fitness" was deleted from two places but Sec.204 (6) still says "the representative's character and professionalism". Seems (6) should be deleted as well.

Commented [MG42]: Comment from Jim Sandman: I question making a mere charge a factor.

Commented [MG43]: Comment from Jim Sandman: See my comment to the comments to Rule 203. This language is very different from the text of the rule. I far prefer this language. The text of the rule requires no showing of detriment to the participant.

206205. Non-Lawyer Representatives with Professional Licenses

- (A) Non-lawyers who retain other ~~professional licenses~~ relevant to the subject matter of the adjudication should be presumed to have the requisite ~~character and fitness qualifications~~ to serve.
- (B) The presumption of ~~fitness-qualification~~ for a ~~professionally~~-licensed, non-lawyer representative described in subsection (A) depends on the representative being a member in good standing of their ~~professional licensing organization-jurisdiction~~ at the time of the representation ~~and are not being otherwise prohibited by law from acting as a representative~~. ~~Non-lawyer representatives may demonstrate that they are a member in good standing of the licensing organization by filing a certification of good standing with the presiding adjudicator or some other official designated by the [Agency] for that purpose.~~

Commented [WG44]: Comment from Lauren Alder Reid: Recommend some narrowing here, i.e., what is a "license"? Must it be Government-issued?

Commented [MG45]: Edit by Jim Sandman

Official Comment

1. (to subsection (A)): The Agency Practice Act expressly permits certified public accountants to act as a representative in adjudications before the Internal Revenue Service. 5 U.S.C. § 500(c). Other examples of professional licenses that may be relevant to a proceeding are a medical license in SSA disability adjudications or an engineering license in environmental permitting hearings.
2. (to subsection (A)): The question of whether a license is in a field relevant to the subject matter of the adjudication is a question for the [Agency], but should be interpreted broadly to include any field that may provide the representative with experience, education, or training that may be useful in the adjudication.
- 2.3. (to subsection (A)): ~~Professional-Relevant licenses may be broadly construed to include a recognition of any of the qualification(s) in rule 204 by recognized an established accreditation system within a jurisdiction. For example, [redacted]~~

Commented [WG46]: Comment from Lauren Alder Reid: See comment above.

Commented [LV47]: I am hoping for illustrative examples from the subcommittee here

207206. Law Students and Law Graduates as Representatives

- (A) Current law students and law graduates who are not yet licensed may serve as non-lawyer representatives provided they:
 - (1) act under the supervision of a licensed attorney or faculty member; and
 - (2) ~~are appearing without direct or indirect remuneration for their services from the party they are representing. do not receive remuneration for their services.~~
- (B) Law students or unlicensed law graduates who qualify to serve as representatives under subpart (A) must submit a statement certifying that they are under the supervision of a licensed attorney or faculty member to the adjudicator or any other official designated by the [Agency] for that purpose.

Commented [WG48]: Comment from Lauren Alder Reid: Recommend, "...licensed to practice law..."

Commented [WGMR49]: Issue for follow up.

Commented [WG50]: Comment from Lauren Alder Reid: Can the statement be submitted for the record as opposed to submission to a specific individual(s)?

Official Comment

- 1. (to subsection (A)): The requirements for law students or unlicensed law graduates to serve as representatives do not apply to law students or law graduates who qualify as representatives because they are accredited non-lawyer representatives under rule 208 or designated as representatives by accredited organizations under rule 209.
- 2. (to subsection (A)): Current law students or recent graduates who are not yet licensed to practice law should be encouraged by agencies to serve as representatives under the supervision of a licensed attorney or an accredited representative or organization under these rules when they are otherwise qualified to serve as a non-lawyer representative. Encouragement of students/graduates appearing with supervision. This would include students participating in a supervised law school clinic, externship, or supervised pro bono opportunity.
- 3. (to subsection (A)): Direct or indirect remuneration would not include a stipend, etc., but would include a salary or other compensation from a legal organization that was paid for services in connection with the representation.

Commented [LV51]: I think this captures what we discussed in the subcommittee meeting, but defer to the group.

208207. Accreditation of Non-Lawyer Representatives

- (A) For non-lawyer representatives who do not hold other, relevant professional licenses in accordance with [rule 2056](#), and as permitted by applicable law, the [Agency] may establish an accreditation system to ensure that such non-lawyer representatives have the necessary [character and fitness qualifications](#) to serve.
- (B) Any such accreditation system should include the criteria in [rule 205](#), as well as any additional criteria the [Agency] deems appropriate and relevant to establish a representative's [character and fitness qualifications](#).
- (C) ~~The Agency may decide that A~~ accreditation may operate prospectively to establish a presumption of [character and fitness qualification](#) for the representative in future proceedings, but not for more than 3 years from the date of initial accreditation.
- (D) If ~~the-an accredited~~ representative engages in conduct [after receiving accreditation](#) that is inconsistent with the accreditation requirements, their accreditation may be revoked by the [Agency].

[\(E\) An accredited representative must report to the Agency any circumstances that may affect their accreditation status within thirty \(30\) days of the change.](#)

Official Comment

- (to subsection (A)): For an example of an accreditation process for non-lawyer representatives, see the system adopted by the VA, 38 C.F.R. § 14.629(b). The United States Patent and Trademark Office also has a process for registering non-lawyer agents to serve as representatives in patent adjudications. 37 C.F.R. §§ 11.6, 11.7.
- (to subsection (B)): ~~Such additional criteria may include evidence of good moral character and reputation or~~ of specific educational or other technical qualifications relevant to the proceedings, as well as whether the representative is accepting compensation for their services. 37 C.F.R. § 11.7; 38 C.F.R. § 14.630.
- (to subsection (C)): The prospective nature of accreditation is designed as a benefit to representatives who are likely to appear before the agency in multiple proceedings during the applicable time frame. The [Agency] may elect to require accredited representatives to complete specified requirements, such as CLE courses, to maintain their accreditation during the designated period.
- (to subsection (D)): Revocation shall be at the discretion of the adjudicator in a given proceeding or a designated [Agency] official. Revocation should occur if at any time there exists evidence demonstrating that the representative engaged in conduct that would have prevented their accreditation in the first instance.

Commented [MG52]: Comment from Jim Sandman: Should the reference be to Rule 204? I don't understand what the Rule 205 criteria are for representatives who don't hold professional licenses.

Commented [MG53]: Comment from Jim Sandman: Could an agency require accreditation of **all** non-lawyer representatives, and, as an accreditation requirement impose more restrictive requirements than those in Rule 204?

Commented [WG54]: Comment from Lauren Alder Reid: Recommend including a comment (if not part of the section) that the representatives must agree to notifying the Agency of any such change in their qualifications after accreditation. Further recommend there be a requirement for an occasional renewal of the accreditation (e.g., three years).

Commented [MG55]: Comment from Jim Sandman: See comment above. Could this be required of **all** non-lawyer representatives?

5. (to Subsection (E)): The agency may require the accredited representative to report the change in their status to all offices where they have pending cases, including loss of accreditation.

DRAFT

209208. Accreditation of Organizations

- (A) The [Agency] may provide accreditation for organizations, which may in turn designate members of their organization as representatives in [Agency] adjudications.
 - (1) If the [Agency] decides on its own to pursue accreditation for an organization, it should require the organization to submit documentation to the [Agency] establishing that the organization meets the accreditation requirements of **rule 210209**.
 - (2) An organization may submit a request for accreditation to the [Agency]. Such requests for accreditation must be accompanied by **documentary evidence** documentation from the organization establishing that it meets the accreditation requirements of **rule 210209**.

Official Comment

- 1. (to subsection (A)): The Department of Homeland Security and Department of Justice Executive Office of Immigration Review (EOIR) both use organizational accreditation to identify representatives in immigration hearings. 8 C.F.R. § 292.1(a)(4) (defining a qualified representative as a “person representing an organization . . . who has been accredited by the Board”); EOIR, Accredited Representatives Roster, *available at* <https://www.justice.gov/eoir/page/file/942311/download>.

Commented [WG56]: Comment from Lauren Alder Reid: "An individual whom EOIR has authorized to represent immigration clients on behalf of a recognized organization, and whose period of accreditation is current and has not expired. A partially accredited representative is authorized to practice solely before DHS. A fully accredited representative is authorized to practice before DHS, and upon registration, to practice before the Immigration Courts and the Board [of Immigration Appeals]." 8 CFR 1292.1(a)(4). Please note that DHS does not identify/accredit representatives; rather, DOJ/EOIR accredits representatives to appear before both agencies.

210209. Requirements for Organizational Accreditation

- (A) Law firms, or Non-profit religious, charitable, social service, or similar organizations established in the United States may be accredited by the [Agency] to designate representatives to participate in agency adjudications if those organizations:
- (1) have adequate experience, education, knowledge, and information to render the organization fit to identify representatives of requisite character and fitness; and
 - (2) make only nominal charges and assess no excessive membership dues for represented participants.
- (B) If an accredited organization within the meaning of subsection A no longer satisfies the accreditation requirements, representatives designated by the organization shall no longer be permitted to serve in agency adjudications and the organization's accreditation shall be revoked until such time as the organization is able to come into compliance with those requirements. An accredited organization and representative must report to the Agency any circumstances that may affect their accreditation status within thirty (30) days of the change.
- (C) This rule does not apply to legal licensing organizations, such as state bar associations.

Official Comment

1. (to subsection (A)): The requirements are derived from those set forth by the Department of Homeland Security for its organization accreditation program. 8 C.F.R. § 292.2. Some agencies prefer to only accredit organizations established in the United States.
 2. (to subsection (B)): Adjudicators in individual adjudications should not permit non-lawyer representatives who were designated by unaccredited organizations or organizations that no longer meet accreditation requirements to participate in adjudications before the [Agency].
 3. (to Subsection (B)): The agency may require the accredited organization and representative to report the change in their status to all offices where they have pending cases, including loss of accreditation.
- 2.4. (to subsection (C)): members of legal licensing organizations would ostensibly be governed by the rules pertaining to representation by attorneys in **rule 202**.

Commented [WGMR57]: Comment from Lea Robbins: I know this was derived from DHS rules, but I'm curious if there are reasons against expanding "organizational accreditation" to private law firms...

Commented [WG58]: Comment from Lauren Alder Reid: Based on our experience at DOJ/EOIR, strongly caution against this practice.

Commented [WG59]: Comment from Lauren Alder Reid: DHS does not accredit representatives. See comment above.

Commented [WG60]: Comment from Lauren Alder Reid: It would be very difficult to make this determination in real time.

300. In General

- (A) Unless explicitly stated otherwise, these rules governing the conduct of representatives in agency adjudications apply equally to lawyer and non-lawyer representatives.
- (B) ~~Nothing in these rules should be construed to limit or in any way amend~~ lawyer representatives' obligations under other applicable rules of conduct.

Commented [MG61]: Comment from George Cohen: Not clear how this is supposed to work with Rule 8.5(b)(1).

Official Comment

1. (to subsection (A)): The applicability of these rules to lawyer representatives is limited to the extent that it only "affect[s] such attorney's participation in a particular proceeding before it," rather than ~~leading imposing to~~ some disciplinary or other remedial measures impacting a lawyer's ability to serve as a representative in a separate proceeding. See ABA Section of Administrative Law and Regulatory Practice, Report to the House of Delegates: Resolution, 2, n.2 (February 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing attorney representatives in agency adjudication).
2. (to subsection (B)): The phrase "other applicable rules of conduct" includes the "applicable rules of conduct for the jurisdiction(s) in which the attorney is licensed to practice." 29 C.F.R. § 18.22(c). ~~None of these rules are intended to be inconsistent with other professional conduct rules governing lawyer representatives. If they are found to be potentially inconsistent, they should, wherever possible, be interpreted in accordance with the applicable rule(s) of professional conduct for attorneys.~~

Commented [MG62]: Comment from George Cohen: I think sanctions under these rules could "lead to" other disciplinary actions, even if they are not treated as sanctions triggering reciprocal discipline. ALJ's could, for example, refer lawyers to disciplinary authorities.

Commented [LV63]: I am not sure this is necessary, but left it in to get the subcommittee's thoughts.

301. Scope of Representation and Allocation of Authority Between Participant and Representative

- (A) A representative shall act in accordance with the represented participant's decisions concerning the proceeding objectives of the representation, including any decisions relating to resolution of the proceeding, such as settlement. A representative is not necessarily required to seek the participant's authorization with respect to technical or tactical matters pertaining to the proceeding about which the representative has relevant knowledge or expertise that the participant does not.
- (B) A representative may take such action on behalf of the participant as the representative is explicitly or impliedly authorized to carry out in connection with the proceeding.
- (C) Representation does not constitute an endorsement of the represented participant's political, economic, social, or moral views or activities.
- (D) A representative shall not counsel or assist a represented participant to engage in conduct that the representative knows is unlawful, criminal or fraudulent, but a representative may counsel or assist the participant in making a good faith effort to determine the validity, scope, meaning, or application of the law.
- (E) A representative shall not solicit a participant who has given the representative sufficient notice that they do not wish to be represented by them, the participant does not wish to be represented by that representative.

Official Comment

- (to subsection (A)): The participant may, at the outset of or during the proceeding, authorize their representative in advance to take specific action, and the representative may rely on that authorization absent a material change in the circumstances surrounding the action. Conversely, the participant may revoke the advance authorization at any time. Such revocation precludes the representative from relying on the advance authorization.
- (to subsection (A)): A representative is not necessarily required to seek the participant's authorization with respect to technical or tactical matters pertaining to the proceeding about which the representative has relevant knowledge or expertise that the participant does not. In the case of attorney representatives, or in some cases non-lawyer representatives with specific technical expertise or a relevant license under **rule 205**, this will likely include procedural and other tactical decisions pertaining to the conduct of the proceeding. Other non-lawyer representatives should consult with the represented participant to ensure that the participant is informed and able to retain the desired measure of control over the proceeding.
- (to subsection (B)): Implied authorization is determined in the context of the representative's relationship with the participant and the representative's role in the proceeding. For example, authorization should be presumed for an attorney

Commented [LV64]: Note that only the USPTO and JAG currently have rules addressing scope of representation.

This rule, like that of both the USPTO and JAG, tracks the language of ABA Model Rule 1.2 and its comments.

Commented [MG65]: Edit by Jim Sandman: My edit is to conform to the language of Rule 1.2(a) of the Model Rules of Professional Conduct. "Concerning the proceeding" would encompass procedural matters, which comment 2 says are for the representative. The language of MRPC Rule 1.2 reflects the difference between "ends" and "means" that seems to be intended here, but that "concerning the proceeding" doesn't capture.

Commented [MG66]: Comment from Jim Sandman: This concept should be in the rule itself and not just in a comment. See Model Rule of Professional Conduct 1.2 (a) for wording.

Commented [MG67]: Comment from George Cohen: Is this necessary given Rule 310[C]?

Commented [MG68]: Comment from George Cohen: Why not "criminal or fraudulent," as in Rule 1.2(d)? Is violation of an agency rule "unlawful"?

Commented [MG69]: Comment from George Cohen: I would say "the participant does not wish to be represented by that representative" to avoid ambiguity and other difficulties. Perhaps move to Rule 201 on Consent?

Commented [MG70]: Compare with this language:

A representative may not solicit a participant when the representative has received adequate notice from the participant that the participant does not want to receive further communications from the representative.

And determine proper place for this in Rules as a whole.

Commented [MG71]: Comment from George Cohen: I'm not sure a lawyer can accept advance authorization from a client to settle a matter under Rule 1.2(a).

Commented [MG72]: Comment from Jim Sandman: This concept should be in the rule itself and not just in a comment. See Model Rule of Professional Conduct 1.2 (a) for wording.

representative making procedural or other tactical decisions within the proceeding. Non-lawyer representatives without relevant experience or expertise should consult with the participant more frequently and on a wider range of issues that arise during the proceeding, absent an advance authorization described in comment 1 above.

4. (to subsection (D)): Whether a representative knows that a participant's conduct is unlawful refers both to the representative's actual knowledge of such conduct, as well as to any willful blindness on the part of the representative to the existence and nature of the participant's conduct.

Commented [MG73]: Comment from Stefanie Davis: Why should authorization be presumed for an attorney? Plenty of baby lawyers handle administrative proceedings with zero or limited experience practicing in front of a tribunal and, regrettably, with little knowledgeable supervision in some instances. If the rules are intended to require a baseline level of competency in law and practice across representatives, I think the commentary should avoid appearing to give attorneys more leeway and less responsibility to consult with their clients than they expect from other qualified representatives.

I'm also trying to figure out how it makes sense for a party represented by a lawyer would be entitled to less interest or voice in making tactical decisions than one who is not. I feel like I must be missing something.

302. Competence

- (A) A representative must provide competent representation to a represented participant.
- (B) Competent representation requires the relevant knowledge, skills, preparation and thoroughness to reasonably represent the participant in the proceeding.
- (C) A clear lack of competence on behalf of a representative may be grounds for removal of that representative from the proceeding by the [responsible Agency official] ~~or dismissal of the representative by the represented participant.~~

Commented [MG74]: Comment from George Cohen: I don't think dismissal by the participant should be limited to a "clear" lack of competence.

Official Comment

1. (to subsection (B)): Preparation and thoroughness include understanding the relevant legal issues and evidence and investigating the relevant facts and law. Sufficiency of the preparation may depend upon the status or role of the representative. For example, a family-member representative might be held to a different expectation than an attorney. a good faith attempt on the representative's behalf to understand the relevant legal issues and evidence in the case.
2. (to subsection (C)): Removal of a representative by the [responsible Agency official] for lack of competence should be reserved for situations where the adjudicator determines that the representative no longer exhibits sufficient qualifications under rule 204. In such instances, the [responsible Agency official] should consult with the represented participant before rendering a decision.
3. (to subsection (C)): Termination of a representative by the represented participant is governed by rule 307. A lack of competence is presumed a valid grounds for termination under rule 307.

Commented [MG75]: Comment from George Cohen: Why is "good faith" the standard? Usual standard is reasonableness. Why limit to "understanding" the "legal issues and evidence"? What about inquiry into the facts and law?

Commented [MG76]: Comment from Stefanie Davis: The representative's part? Not sure behalf is the correct term here.

Commented [MG77]: Edit by Jim Sandman

303. Diligence

- (A) A representative should act promptly and diligently in ~~their~~ representation representing a participant.
- (B) Diligent representation requires that the representative not undertake the responsibility of serving as a representative if ~~they do~~ the representative does not have adequate time and resources to do so competently.
- (C) Promptness requires a representative to meet all filing and other deadlines associated with the proceeding, including deadlines for responses to requests for information. It is not a violation of a representative's duty to act promptly to request reasonable extensions of applicable deadlines from the [responsible Agency Official].
- (D) ~~Notwithstanding a withdrawal from representation pursuant to rule 307,~~ Diligence requires a representative to carry through to completion all tasks pertaining to the representation, including an appeal of an adverse decision if the represented participant so decides.
- (E) If the represented participant demonstrates diminished capacity to make considered decisions on their own behalf, the representative should as far as reasonably possible, maintain a normal participant-representative relationship with the participant, and continue to represent the participant's interest in the proceeding. If the representative cannot adequately represent the participant's interest and believes the participant is at risk of substantial harm due to the participant's diminished capacity, the representative may take protective action.

Official Comment

1. (to subsection (B)): The term "competently" refers to rule 302.
- 1-2. (to subsection (D)): Unless the representative has withdrawn or been terminated, pursuant to rules XXX or XXX.
- 2-3. (to subsection (E)): "Protective action" may include consulting with individuals with the ability to protect the participant, such as family members or professional services. It could also include employing surrogate decisionmaking tools like durable powers of attorney or consulting appropriate resources, such as agencies for aging, long-term care, or adult protection. In all cases, the protective action should be taken in the participant's best interest.

Commented [MG78]: Comment from George Cohen: Rule 1.3 adds a reasonableness requirement

Commented [MG79]: Edit by George Cohen.

Commented [MG80]: Edit by George Cohen.

Commented [MG81]: Comment from George Cohen: Is this intended to be a strict liability rule?

Commented [MG82]: Comment from George Cohen: This is very different from Rule 1.4 cmt. [4], which says a lawyer should carry through to conclusion matters undertaken UNLESS the relationship is terminated pursuant to Rule 1.16.

Commented [MG83]: Comment from George Cohen: It is unclear what this means. Rule 1.14 says that a lawyer should try to maintain a normal lawyer-client relationship to the extent possible. This sounds like a representative can just make decisions for the participant, which Rule 1.14 discourages.

Commented [MG84]: Comment from Stefanie Davis: Does this include relevant government agencies, like those on aging or long-term care?

304. Communication

A representative must reasonably communicate with their represented participant to ensure that the participant is able to make informed decisions pertaining to the objectives of the representation.

Commented [MG85]: Comment from George Cohen: Rule 1.4(b) says "reasonably necessary"

Official Comment

1. Communication from a representative to their represented participant should be done in using terms and a language that the participant is able to understand. See 8 C.F.R. § 1003.102(r) (DHS).
2. Communication should be ongoing throughout the course of the proceeding. Matters pertaining to the objectives of representation include status updates, significant developments affecting the timing or the substance of the representation, and requests for information. *Id.*

Commented [MG86]: Comment from George Cohen: Do you want to say "a" language? Is it OK to use a translator?

305. Organization as a ~~Client~~Participant

A representative representing an organization as a participant in a proceeding represents the organization acting through the organization's duly authorized constituents. The representative's obligations with respect to an organization participant are the same as those for an individual participant.

Official Comment

1. "Duly authorized constituents" refers to individuals within the organization who have ~~ultimate~~ decisionmaking authority on behalf of the organization for purposes of the proceeding.

Commented [MG87]: Comment from George Cohen: This term is not otherwise used in the rules. Use "participant" instead.

Commented [MG88]: Comment from George Cohen: I'm not sure it makes sense to have this as a separate rule, given that it says so little. First sentence could be dealt with in comment to Rule 301. Second sentence could be dealt with in definitions.

Commented [MG89]: Comment from George Cohen: In practice, "duly authorized constituents" do not always have "ultimate" decisionmaking authority.

DRAFT

306. Confidentiality

- (A) Except as ~~required-permitted~~ by subsection (B), a representative ~~should~~shall not reveal information relating to the representation of a participant unless the participant gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation.
- (B) A representative ~~must~~may disclose information relating to the representation of a participant in a proceeding if disclosure is necessary to:
- (i) prevent death or substantial bodily harm;
 - (ii) prevent the participant from engaging in criminal activity or committing fraud;
 - (iii) ~~the representative defending themselves against a false accusation of wrongdoing by the represented participant to enable a representative to respond to an accusation of wrongdoing by the represented participant against the representative in the proceeding;~~ or
 - ~~(iiiiv)~~ (iv) comply with ~~existing law~~ court orders or statutes.

Official Comment

1. (to subsection (A)): *See* 37 C.F.R. § 11.106 (USPTO).
2. ~~(to subsection (B)(iii)): Disclosure may also be required in response to an order by the [responsible Agency official].~~

Commented [MG90]: Comment from George Cohen: Why "should" as opposed to "shall"?

Commented [MG91]: Comment from George Cohen: Note this is stronger than Rule 1.6, which uses "may." I'm fine with this, but you may get pushback from the ABA.

Commented [MG92]: Comment from George Cohen: Do we want to say "disclose information to the responsible Agency official"?

Commented [MG93]: Edit by George Cohen

Commented [MG94]: Edit by George Cohen

Commented [MG95]: Comment by George Cohen: Does this include agency regulations?

Commented [MG96]: Comment from George Cohen: Why is this in a comment? Shouldn't it be part of B(iv)?

307. Withdrawal ~~and Termination~~ of Representation

- (A) A representative must withdraw from representing a participant if the representation will result in violation of these rules or other law; the representative's physical or mental condition materially impairs the representative's ability to represent the participant; or the representative is discharged.
- (B) A representative must submit a written request to withdraw to the [responsible Agency official] to withdraw for good cause to the [responsible Agency official]. The written request must be included in the official record of the proceeding and be served on the participant.
- ~~(A)~~(C) The [responsible Agency official] may permit a representative ~~may to~~ withdraw from representing a participant if the representative can show good cause for the withdrawal ~~and or~~ the withdrawal will not adversely impact the proceeding ~~or the~~ participant's interest in the proceeding.
- ~~(B)~~(A) A representative must submit a written request to withdraw for good cause to the [responsible Agency official]. The written request must be included in the official record of the proceeding and be served on the participant.
- (D) Withdrawal will also be allowed based on the participant's written consent and the approval of the [responsible Agency official].
- (C)(E) A participant may terminate the representation subject to the approval of the [responsible Agency official].
- (D) The participant may terminate the representation at any time, subject to liability for any outstanding obligations of the participant to the representative.
- (E) A representative may not solicit a participant when the representative has received adequate notice from the participant that the participant does not want to receive further communications from the representative.

Official Comment

- (to subsection (A)): Examples of good cause for withdrawal include: the participant's insistence on advancing frivolous claims (see rule 313), the participant's refusal to meet its obligations to the representative, including payment of fees or expenses (see rule 308) despite notice that failure to do so could result in withdrawal, the participant's insistence on pursuing an objective that the representative considers repugnant or imprudent, or the representative's inability to continue to provide competent representation to the participant. See 49 C.F.R. § 1103.18 (STB); 37 C.F.R. § 11.116(b) (USPTO); 32 C.F.R. § 776.35 (JAG).

Commented [MG97]: Need comment to flesh out this concept, and which rules are expected to be included, and how violation occurs (participant must require representative to violate them in course of representation).

Commented [MG98]: Comment from George Cohen: Do we want to consider a mandatory withdrawal rule for reasons such as those listed in Rule 1.16(a) (representation will violate the rules or other law; representative's mental or physical condition materially impairs the ability to serve as a representative? Or is the idea that there is no unilateral withdrawal under the rules; all withdrawals must go through the agency official? If so, maybe the rule should say that a representative may "seek to withdraw ... by showing."

Commented [MG99]: Comment from George Cohen: This is different from Rule 1.16(b), which allows withdrawal if there will be no adverse impact, even if there is no showing of good cause. However, Rule 1.16(c) says that a lawyer comply with an order of a tribunal to remain in the representation even if there is good cause. Is the idea that the adjudicator cannot allow withdrawal if there is no good cause and the participant does not consent, even if there will be no adverse impact?

Commented [MG100]: Consider adding this to the rule itself.

Commented [LV101]: I was wondering if this should be its own rule prior to the scope of representation rule (301), since it really deals with the relationship between the representative and participant prior to the actual representation. I decided to put it here because I did not think solicitation merited its own rule, but I welcome the committee's thoughts.

Commented [MG102R101]: Reply by Stefanie Davis: I think it should move. Placed as it is, this paragraph seems more like it's prohibiting harassment of former clients than proscribing solicitation of a potential client.

We have spent a LOT of time thinking about and regulating on solicitation issues; we're actually starting rulemaking on that issue now. Please let me know if any of that background would be helpful.

2. (to subsection (A)(C)): The impact of the representative's withdrawal may be mitigated by another representative agreeing to represent the participant. The withdrawing representative should take steps to protect the participant's interest in the proceeding, including providing adequate notice and, where possible, sufficient opportunity for participant to find new representation. A withdrawing representative must return any of participant's personal property and all relevant information about the representation to participant. *See, e.g.*, 20 C.F.R. § 404.1740(b)(3)(iv) (SSA). Confidentiality rules do not hinder the transfer of information relevant to the proceeding from one representative to another or from the withdrawing representative to the participant in a single proceeding.
3. (to subsections (C and E)): Participant's consent must be given on the record in the proceeding to the [responsible Agency official], and may be oral or in writing (including electronically). Termination of a representative should not impact the efficient conduct of the proceeding. The [responsible Agency official] should freely grant withdrawal or termination upon the participant's consent, provided the withdrawal or termination will not have a materially adverse impact on the proceeding or the participant's interest in the proceeding. The [responsible Agency official] should freely grant withdrawal upon the participant's consent, provided the withdrawal will not have a materially adverse impact on the participant's interest in the proceeding.
- 3.—
4. (to subsection (D)): The obligations referred to in this subsection include any fees owed by the participant to the withdrawing representative for services already rendered (rule 308).

308. Fees

- (A) Representatives may not charge unreasonable or excessive fees. When contested by the represented participant, the reasonableness of a fee shall be determined by the [responsible Agency official]. Some factors to be considered in determining whether a fee is reasonable include:
- The time and labor required;
 - The novelty and difficulty of the questions involved;
 - The skill required to properly represent the participant;
 - The fee customarily charged in the locality for similar services;
 - The amount involved and the results obtained;
 - The time limitations imposed by the participant or by the circumstances;
 - The nature and length of the representative's professional relationship with the participant; and
 - The experience, reputation, and ability of the representative.
- (B) Contingent fees are allowed where otherwise permissible by law.
- (C) Reasonable costs and expenses may be reimbursed by the participant provided the costs and expenses are directly related to the representation provided in the participant's proceeding and they are disclosed to, and agreed upon by, the participant in writing in advance of their accrual.
- (D) A fee request by a representative must be provided to the participant in advance and in writing and must be agreed to by the participant in writing before any fees are accrued.

Official Comment

1. (to subsection (A)): Reasonableness may also be impacted by a participant's ability to pay. A participant with a high ability to pay may not be charged more due their ability, but a participant with less ability to pay may require a lower fee in order for it to be reasonable. *See* 49 C.F.R. § 1103.20(a) (STB).
2. (to subsection (A)): *See, e.g.*, 8 C.F.R. § 1003.102(a)(1) (DHS).

309. Compliance with Agency Rules

Representatives must comply with Agency rules governing adjudication, including those governing the conduct of representatives in agency adjudications.

Commented [MG103]: Comment from George Cohen: Should this be "these rules"?

Official Comment

1. *See, e.g.,* Davy v. SEC, 792 F.2d 1418, 1421 (9th Cir. 1986) (“There can be little doubt that the Commission, like any other institution in which lawyers or other professionals participate, has authority to police the behavior of practitioners before it.”).
2. Standards applying to an attorney include, in addition to agency rules, the rules of professional conduct and ethics of the jurisdictions in which the attorney is licensed to practice. 48 C.F.R. § 65101.35(a) (CBCA); *see* rule 300(B).
3. Any remedies for violations of agency rules by attorney representatives must be limited to the proceeding in which those violations occurred. *See* ABA Section of Administrative Law and Regulatory Practice, Report to the House of Delegates: Resolution, 2, n.2 (February 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing attorney representatives in agency adjudication).

Commented [MG104]: Comment from Stefanie Davis: And other authorized representatives? Or are they exempt from remedies?

310. Candor with the Tribunal

(A) Representatives owe the tribunal a duty of candor.

(B) Candor before the tribunal means a representative may not:

- (i) knowingly make a false statement of fact or law or knowingly fail to correct a false statement of fact or law in the proceeding.
- (ii) knowingly fail to disclose legal authority adverse to the represented participant's position to the tribunal.
- (iii) knowingly present false or misleading evidence in the proceeding.

(C) If a representative knows that the represented participant has engaged in, or intends to engage in, criminal or fraudulent conduct related to the proceeding, the representative must take remedial measures, including if necessary disclosure to the tribunal.

Commented [MG105]: Comment from George Cohen: Rule 3.3(b) says "a person," which is not limited to the client.

Commented [MG106]: Addition by George Cohen

Official Comment

1. (to subsection (B)): The requirement that representatives act "knowingly" in order to violate their duty of candor reflects concerns about chilling zealous representation through over-enforcement of the candor requirement. Remedies for good faith errors or even negligent statements could cause representatives to hesitate in making creative or novel arguments sometimes required by zealous advocacy. This is especially true for non-lawyer representatives, who may have less experience presenting evidence and arguments before a tribunal than attorney representatives.
2. (to subsection (B)): The prohibition on knowingly false statements does not preclude a representative from refraining to present evidence if that representative reasonably suspects or believes it to be false.

Commented [MG107]: Comment from George Cohen: What about willful blindness, mentioned in the comment to Rule 301(D)?

311. Delay

A representative shall not delay the proceeding, without good cause.

Official Comment

1. Avoiding delay is related to, but distinct from, the promptness requirement in rule 303. Promptness requires representatives to adhere to deadlines and other scheduling obligations, and failing to do so could also constitute delay in violation of this rule. The requirement to avoid delay includes the entirety of the representative's conduct relating to the proceeding, including issues like the timing, scope, and nature of discovery requests, scheduling hearings and filing deadlines, and the engagement of alternative forms of dispute resolution, in addition to adhering to established deadlines.

312. Fairness

- (A) A representative must act in a manner that furthers the efficient, fair, and orderly conduct of the proceeding.
- (B) A representative may not destroy, falsify, or conceal relevant evidence, including witness testimony, from the tribunal or another participant in the proceeding.
- (C) A representative may not make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a valid discovery request.
- (D) A representative shall treat witnesses fairly and with due consideration. A representative shall not seek to corruptly influence a witness or otherwise interfere with a witness' ability to give accurate testimony.

Official Comment

1. (to subsection (A)): Candor, diligence and promptness are all factors in the efficient, fair and orderly conduct of the proceeding. See rules 303, 311, and 312.
2. (to subsection (D)): The language of this subsection was derived from a regulation of the Surface Transportation Board, 49 C.F.R. § 1103.25(b).

Commented [MG108]: Comment from George Cohen: Does this add anything to Rules 303 and 311?

Commented [MG109]: Comment from George Cohen: Add "unlawfully," which appears in Rule 3.4(a)?

Commented [MG110]: Comment from George Cohen: Add "alter," which appears in Rule 3.4(a)?

Commented [MG111]: Comment from George Cohen: Perhaps add the witness testimony material from Rule 312(B) here.

313. Frivolous Claims

- (A) A representative may not make a claim in a proceeding that the representative knows or has reason to know is false, fictitious, or fraudulent;
- (B) A representative must not make a claim in a proceeding that the representative knows or reasonably should have known lacks an arguable basis in law or in fact, or is taken for an improper purpose, such as to harass or to cause unnecessary delay.
- (C) A representative's signature shall constitute certification that they have the representative has complied with subsections (A) and (B) of this section.
- (D) Failure to comply with the requirements of this section may result in sanctions against the representative. Sanctions may include reprimand, censure, suspension from further participation in the proceeding, monetary penalties, and payment of an opposing party's fees. The represented participant shall not be sanctioned for the conduct of their representative. receive any sanctions.

Official Comment

- (to subsection (A)): False, fictitious or fraudulent statements include written statements that assert a material fact which is false, fictitious, or fraudulent and written statement that omits a material fact and is rendered false, fictitious, or fraudulent as a result of such omission. See 40 CFR 27.3(a) (EPA).
- (to subsection (B)): Statements lacking an arguable basis in law or in fact, or taken for an improper purpose include written statements and arguments, requests for discretionary relief, and filings of motions and appeals. 8 C.F.R. § 1003.102(j).
- (to subsection (B)): Claims have an arguable basis in law or fact if they have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. 40 C.F.R. § 27.3(a) (EPA).
- A claim or statement does not lack an adequate basis in law if it is a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. 19 C.F.R. 210.4(c)(2) (ITC).
- (to subsection (B)): Use of boilerplate language without any reference to the specific circumstances of the proceeding may constitute a claim or statement lacking an adequate basis in law or fact. 8 C.F.R. § 1003.102(u) (EOIR).

Commented [MG112]: Comment from George Cohen: Isn't this covered by Rule 310(B)(i)?

Commented [MG113]: Comment from George Cohen: Everywhere else "may not" is used. Should use it here for consistency.

Commented [MG114]: Comment from George Cohen: Tense should be consistent.

Commented [MG115]: Comment from George Cohen: Why "taken" as opposed to "made"?

Commented [MG116]: Comment from George Cohen: Add "on any document making a claim"?

Commented [MG117]: Edit by George Cohen

Commented [MG118]: Comment from Stefanie Davis: Stray sentence fragment.

Commented [MG119]: Comment by George Cohen: Why a specific sanctions section for this rule? Why not a general sanctions section applicable to all rules?

Commented [MG120]: Comment from George Cohen: Should this be "claims"?

Commented [MG121]: Comment from George Cohen: How does this square with Rule 310(B)(i)'s "knowing" requirement? Does Rule 310(B)(i) apply only to oral statements?

Commented [MG122]: Comment from George Cohen: This comment seems more directed to fact. Law is dealt with in next comment.

314. Disruptive Conduct

- (A) A representative ~~must refrain from engaging~~ **may not** in conduct that interferes with the ~~speedy, orderly, or fair~~ **conduct of the hearing**.
- (B) A representative must refrain from engaging in **contumelious** or otherwise obnoxious conduct in a proceeding.
- (C) A representative may not engage in an act or omission related to a proceeding that ~~causes another person involved in that proceeding to experience material and substantive injury~~, **including, but not limited to, incurring expenses (such as attorney's fees) or experiencing prejudicial delay**.
- (D) An **adjudicator** ~~may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in a proceeding before them any representative or represented participant who refuses to comply with the adjudicator's directions, or who is disorderly, disruptive, or engages in contemptuous conduct~~.

Official Comment

- (to subsection (A)): 7 CFR 1.328(a)(3) (USDA). This includes the failure to act in a timely way or a failure to follow an adjudicator's instructions.
- (to subsection (B)): "Contumelious or otherwise obnoxious conduct" includes, but is not limited to, conduct that would constitute contempt of court in a judicial proceeding, as well as directing threatening or intimidating language, gestures, or actions at an adjudicator or anyone else involved in the proceeding. *See* 8 CFR 1003.102(g) (EOIR); 20 C.F.R. § 404.1740(c)(7)(ii)(A) (SSA).
- (to subsection (C)): 12 C.F.R. § 1209.74(a)(2) (FHFA).
- (to subsection (D)): 10 CFR § 2.314(C)(1) (NRC).

Commented [MG123]: Edit by George Cohen. Comment: Suggested for consistency.

Commented [MG124]: Comment from George Cohen: Seems duplicative of Rule 312. And why "hearing" here but "proceeding" in Rule 314(B)-(D)?

Commented [MG125]: Comment from Stefanie Davis: I recommend replacing this with a plain language term, possibly drawing from the examples in the comment. I understand the value in mirroring existing language in agency rules but this language strikes me as particularly inaccessible to other authorized representatives (and, frankly, some lawyers).

Commented [MG126R125]: Comment from George Cohen: I know this appears in a number of agency rules but it seems archaic.

Commented [MG127]: Comment from Stefanie Davis: Is the agency itself "another person" that may be materially and substantively injured by a representative's actions? If not, should "person" be changed to a defined term such as "party" or "participant"?

Commented [MG128]: Comment from George Cohen: This seems a little broad. What if two parties are both claiming some benefit but only one is entitled to it? If the representative helps one of them get the benefit, the other will incur a material and substantive injury.

Commented [MG129]: Comment from George Cohen: Why "adjudicator" rather than "tribunal"?

Commented [MG130]: Comment from George Cohen: Why a separate sanctions section here? Same question as for Rule 313(D).

315. Obstruction of Justice

(A) A representative may not engage in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process. Conduct prohibited by this subsection generally includes any action or inaction that seriously impairs or interferes with the adjudicative process when the representative knew or reasonably should have known to avoid such conduct, including:

- (i) providing misleading or false information to the adjudicator or another participant in the proceeding;
- (ii) interfering or attempting to interfere with any lawful effort by the adjudicator or the other participants in the proceeding to obtain any record or information relevant to the proceeding; and
- (iii) attempting to corruptly influence witnesses or potential witnesses in the proceeding.

(B) Violation of subsections (A) or (B) at any phase of a proceeding may be grounds for a representative's removal or suspension from a proceeding.

Commented [MG131]: Comment from George Cohen: How does this work with the "knowing" standard of Rule 310(B)(i) & (iii)?

Commented [MG132]: Comment from George Cohen: Why "adjudicator" rather than "tribunal"?

Commented [MG133]: Comment from Stefanie Davis: Violation of subsection (A)?

Commented [MG134]: Comment from George Cohen: Same question about a rule-specific sanctions provision rather than a general one.

Official Comment

1. (to subsection (A)(i)): 8 C.F.R. § 1003.102(n) (EOIR); 20 C.F.R. § 404.1740(c)(7) (SSA).
2. (to subsection (A)(ii)): 31 C.F.R. 1020(b) (IRS).
3. (to subsection (A)(iii)): 49 C.F.R. § 1103.25(b) (STB).
4. (to subsection (B)): 12 C.F.R. § 308.6(b) (FDIC).

316. Ex Parte Contacts

- (A) Except as provided in subsection (B) of this rule, no representative or represented participant shall make or knowingly cause to be made to the adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process an *ex parte* communication relevant to the merits of the proceeding.
- (B) An adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process may discuss the merits of the case with a representative or represented participant if all participants in the proceeding or their representatives have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.
- (C) If the adjudicator receives an *ex parte* communication in violation of this section, the adjudicator shall place in the public record of the proceeding:
- (i) All such written communications;
 - (ii) Memoranda stating the substance of all such oral communications; and
 - (iii) All written responses, and memoranda stating the substance of all oral responses thereto.
- (D) Upon receipt of a communication knowingly made or knowingly caused to be made by a representative or represented participant in violation of this section, the adjudicator may, to the extent consistent with the interests of justice and applicable statutes, require the representative or represented participant to show cause why the represented participant's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.
- (E) Any representative who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to appropriate sanctions by the adjudicator including, but not limited to, exclusion from the proceeding and/or future agency proceedings.
- (F) For purposes of this section *ex parte communication* means an oral or written communication with an adjudicator that is not on the public record and does not include all participants and representatives in a proceeding.
- (G) A communication that does not concern the merits of an adjudicatory proceeding, such as a request for status of the proceeding or communications concerning the agency's administrative functions or procedures, does not constitute an impermissible *ex parte* communication.

Commented [MG135]: Comment from George Cohen: I'm not sure it makes sense to have a prohibition relevant to participants included in rules directed at representatives. Many agencies already have *ex parte* rules for participants.

Commented [MG136]: Comment from George Cohen: I'm not sure why "knowingly" applies to "cause to be made" but not "make," especially since (D) applies "knowingly" to both.

Commented [MG137]: Comment from George Cohen: Again, I'm not sure why a rule directed at adjudicators should be included in rules directed at representatives.

Commented [MG138]: Comment from George Cohen: Same comment as to (C)

Commented [MG139]: Comment from George Cohen: Again, I don't see why there should be a separate sanctions provision for this rule.

Commented [MG140]: Comment from George Cohen: I think this definition needs to be made consistent with subsection (A). This subsection defines an *ex parte* communication as one made to an adjudicator. Subsection (A) says a representative may not make an *ex parte* communication to an adjudicator or another person involved in the decisional process.

Commented [MG141]: Edit by George Cohen. Comment: Suggested to make the rule more consistent with subsections (A) and (F)

Official Comment

1. (to subsection (A)): 7 C.F.R. § 1.151 (USDA). *Ex parte* communications are prohibited from the time the representative or represented participant has

knowledge that the matter will be considered by the adjudicator until the adjudicator has rendered a final decision on the case. 4 C.F.R. § 28.147 (GAO).

2. (to subsection (A)): Individuals who are or may reasonably be expected to be involved in the decisionmaking process in any proceeding include, but are not limited to, members of an adjudicator's staff or other agency employees who may be assigned to hear or to participate in the decision of a particular matter. 12 C.F.R. 622.7(j) (FCA); 17 C.F.R. § 10.10(a)(1) (CFTC).
3. (to subsection (E)): 12 C.F.R. § 109.9(d) (OCC); 12 C.F.R. § 1081.110(d)(2) (BCFP).
4. (to subsection (G)): Administrative functions or procedures include, but are not limited to, filing and discovery deadlines and requirements, intra-agency review procedures, and adjudicator assignments. 12 C.F.R. § 1209.14(a)(2) (FHFA); 39 C.F.R. § 955.33 (USPS)

Commented [LV142]: I would appreciate any examples that members of the subcommittee may be aware of.

DRAFT

317. Bias and Conflicts of Interest

- (A) A representative shall not represent a participant if the representative is biased against that participant and that bias will prevent the representative from engaging in good faith representation of the participant's interests in the proceeding.
- (B) A representative shall not represent a participant if the representation involves a concurrent conflict of interest. Conflicts exist in proceedings where one or more of the following will be compromised: preserving confidentiality between the representative and the represented participant; maintaining independence of judgment; and avoiding positions adverse to a represented participant.
- (C) A representative with a conflict of interest as described in subsection (B) above may still represent a participant if:
- (i) The representative reasonably believes that ~~they~~ the representative will be able to provide competent and diligent representation to each affected participant;
 - (ii) The representation is not prohibited by law;
 - (iii) The representation does not involve the assertion of a claim by one participant against another participant represented by the representative in the same proceeding; and
 - (iv) Each affected participant gives informed consent.
- (D) No former employee of the agency, including former agency adjudicators, shall be permitted to represent any participant in a proceeding before the agency in any matter in which, by reason of employment with the agency, the former employee participated personally and substantially or acquired personal knowledge of.
- (E) No member of a firm of which a former agency employee, including a former agency adjudicator, is a member may represent or knowingly assist a participant in an agency proceeding if the restrictions of subsection (A) of this rule apply to the former agency employee in that particular proceeding, unless the firm isolates the former agency employee in such a way to ensure that the former agency employee cannot assist in the representation.
- (F) No close family member of an officer or employee of an agency may represent anyone in any proceeding administered by the agency in which the agency employee participates or has participated personally and substantially as an agency employee, or which is the subject of that employee's official responsibility.

Commented [MG143]: Edit by George Cohen

Commented [MG144]: Comment from George Cohen: I think this should be (D)

Official Comment

1. (to subsection (A)): Bias refers to personal animosity between the representative and the represented participant, or a financial interest on behalf of the representative that is inconsistent with the best interests of the participant. Michael Asimow,

Evidentiary Hearings Outside the Administrative Procedure Act 23 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

2. (to subsection (B)): 32 C.F.R. 776.29(b)(2) (JAG). Maintaining independent judgment allows a representative to consider, recommend, and carry out any appropriate course of action for a represented participant without regard to the representative's personal interests or the interests of another. 32 C.F.R. § 776.29(b)(5) (JAG).
3. (to subsection (B)): A concurrent conflict of interest exists for a representative if their representation of one participant in the proceeding is directly adverse to their representation of another participant in the same or similar proceeding, or there is a significant risk that their representation of one or more participants will be materially limited by their responsibilities to another participant or former represented participant, or by a personal interest of the representative. 37 C.F.R. § 11.107 (USPTO).
4. (to subsection (C)): 37 C.F.R. § 11.107(b) (USPTO).
5. (to subsection (D)): 7 C.F.R. § 1.26(b)(3) (USDA); 31 C.F.R. § 8.37(b) (BATF).
6. (to subsection (E)): 31 C.F.R. § 10.25(c)(1) (IRS).
7. (to subsection (F)): 31 C.F.R. § 8.36 (BATF). Close family member refers to members of a former employee's immediate family, including parents, spouse, and children.

318. Improper Influence

- (A) A representative may not attempt to influence the judgment of the adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process through:
- (i) threats of political or personal reprisal;
 - (ii) false accusations, duress or coercion
 - (iii) offering something of monetary value, such as a loan, gift, entertainment, or unusual hospitality;
 - (iv) intimidation, physical or otherwise;
 - (v) deception;
 - (vi) public media pressure; and
 - (vii) any other means prohibited by law.
- (B) If a representative does attempt to influence an adjudicator in violation of subsection (A) of this rule, the adjudicator may, to the extent consistent with the interests of justice and applicable statutes, require the representative or represented participant to show cause why the represented participant's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.
- (C) Any representative who violates subsection (A) of this rule or who encourages or solicits another to violate that subsection, may be subject to any appropriate sanction or sanctions imposed by the adjudicator including, but not limited to, exclusion from the proceeding and/or future agency proceedings.

Commented [MG145]: Comment from George Cohen: Since this is directed at an adjudicator, I don't see why it should be included in rules for representatives. Perhaps it could go in a separate section on sanctions and other consequences.

Commented [MG146]: Comment from George Cohen: Same comment about whether it makes sense to have a separate sanction provision for this rule.

Official Comment

1. (to subsection (A)): Individuals who are or may reasonably be expected to be involved in the decisionmaking process is defined in comment 2 to rule 316 involving ex parte contacts.
2. (to subsection (A)): 31 C.F.R. § 8.52(f) (BATF) (duress and coercion); 20 C.F.R. § 404.1740(c)(6) (unusual hospitality); 29 C.F.R. § 18.22(d)(1) (DOL) (intimidation); *Id.* (DOL); 38 C.F.R. § 18b.91 (VA) (media pressure).

319. Criminal Acts

- (A) A representative may be subjected to disciplinary sanctions if the representative has been found guilty of, or pleaded guilty or *nolo contendere* to, a felony or to any lesser crime that reflects adversely on the practitioner's honesty, trustworthiness or fitness as a representative in other respects.
- (B) Among the disciplinary sanctions available for representatives found to be in violation of subsection (A) are suspension from a proceeding or from all agency proceedings during a period of time, including permanent disbarment.

Commented [MG147]: Comment from George Cohen: If this rule is about past conduct by the representative rather than conduct in the proceeding, I think it should go with the qualifications rules.

Commented [MG148]: Comment from George Cohen: Again, I do not see the need for a sanctions provision for this rule as opposed to a general sanctions provision.

Commented [MG149]: Comment from George Cohen: Add "from practice before the agency"?

Official Comment

1. (to subsection (A)): The representative's prior criminal conduct is also a factor in their qualifications to serve, see rule 204(a)(7), *supra*. That reference to prior criminal conduct is not limited to felonies and crimes that reflect on a representative's honesty and trustworthiness. It represents a broader inquiry in a representative's past conduct as one factor in the larger question of the representative's qualifications to serve.
2. (to subsection (A)): 37 C.F.R. §11804(b) (USPTO). Examples of crimes that reflect adversely on a representative's honesty, trustworthiness or fitness as a representative are those that involve interference with the administration of justice, misrepresentation, fraud, willful failure to file income tax returns, deceit, dishonesty, bribery, extortion, misappropriation, or theft. Attempt or conspiracy to commit such crimes is also grounds for disciplinary action. 8 C.F.R. § 1003.302(h) (EOIR).