



Regulation of Representatives in Agency Proceedings

Ad Hoc Committee on Regulation of Representatives in Agency Proceedings

Proposed Recommendation for Committee | October 29, 2021

1 [Preamble]

RECOMMENDATION

Adoption of Rules of Conduct

- 2 1. For federal agency adjudication systems in which parties are represented—either by
3 attorneys or non-attorney representatives—agencies should adopt rules or standards
4 governing the conduct of the representatives in adjudicative proceedings.
5 2. The objectives of the rules or standards described in Paragraph 1 should be to maintain
6 the fairness, integrity, and efficiency of the adjudicative proceedings.

Content of Rules

- 7 3. In drafting rules, agencies should consider whether to adopt or incorporate by reference
8 from rules promulgated by other authorities or instead draft their own rules. Agencies
9 should ensure that all adopted or incorporated rules are applicable to the adjudicative
10 proceedings they conduct and consider whether any modifications should be included.
11 Agencies should carefully scrutinize any rules originally designed to apply to attorneys
12 when applying those same rules to non-attorneys.
13 4. Topics agencies may wish to consider in their attorney conduct rules **include:**
14 a. Disruptive conduct;
15 b. Ex parte contacts with agency officials;
16 c. **Conflicts of interest;**

Commented [GY1]: For Committee discussion: Should this be limited to attorney representatives, given that some of the topics may apply exclusively, or at least primarily, to attorneys?

Commented [GY2]: For Committee discussion: should this topic be included?



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- 17 d. Frivolous claims;
- 18 e. Compliance with agency rules;
- 19 f. Obstruction of justice;
- 20 g. Competence;
- 21 h. Withdrawal;
- 22 i. Delay;
- 23 j. Candor toward the tribunal;
- 24 k. Improperly influencing the conduct of a judge or official; and
- 25 l. Commission of a criminal act; and
- 26 m. Attempts to violate conduct rules or knowingly assisting others in violating
- 27 conduct rules.

28 5. Agencies should, insofar as possible, avoid divergence between rules governing different
29 types of proceedings that would create needless complexity in practicing before the
30 agency or other agencies with a similar mission. This may entail harmonizing rules
31 among different components of the agency. It may also entail harmonizing rules across
32 agencies, especially in cases in which the same representatives commonly appear before
33 a group of agencies (e.g., financial agencies).

Qualification

- 34 6. Agency rules should address whether only lawyers may represent parties or whether non-
35 lawyer representatives may also do so.
- 36 7. In the case of lawyer representatives, agencies should not require that lawyers possess
37 any qualifications other than those permitted by 5 U.S.C. § 500 (Agency Practice Act),
38 which allows for representation by a member in good standing of the bar of the highest
39 court of a state as long as the member files a written declaration with the agency that the
40 member is in good standing and is authorized to represent the particular person on whose
41 behalf he or she is acting. Special qualification requirements should be used only if
42 specifically authorized by statute.
- 43 8. Agencies should establish qualification requirements for non-lawyer representatives.

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Commented [GY4]: For Committee discussion: Should the recommendation provide factors or considerations (e.g., legal complexity, availability of legal services, etc.)?

Commented [GY5]: For Committee discussion: Should the recommendation discuss the substance of what such requirements might entail?



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Discipline

- 44 9. Rules should address what actions an agency may take in the case of a violation of the
45 rules.
- 46 10. For rules applicable to attorneys, agency rules should identify any reciprocal disciplinary
47 procedures or referral procedures.
- 48 11. The rules should clearly indicate how the disciplinary process works. Among other
49 topics, they should address:
- 50 a. Who can make a complaint and how they can make it;
- 51 b. How notice of a complaint should be provided to the representative who is the
52 subject of the complaint;
- 53 c. Who adjudicates the complaint;
- 54 d. The procedure for adjudicating the complaint, including any rules governing the
55 submission of evidence and the making of arguments;
- 56 e. The manner in which a decision will be issued, including any applicable timeline
57 for issuing a decision;
- 58 f. Procedures for appealing a decision; and
- 59 g. Who is responsible for communicating the decision to other relevant authorities
60 and enforcing the decision within the agency.

Commented [GY6]: For Committee discussion: Should the recommendation provide more detail about or opine on the substance of this paragraph (e.g., laying out the range of disciplinary actions)?

Transparency

- 61 12. Agencies should publish all significant rules governing representatives' conduct in the
62 *Federal Register* and codify them in the *Code of Federal Regulations*.
- 63 13. Agencies should publish their rules for representatives' conduct on a single webpage or
64 in a single document on their websites and clearly label them using a term such as "Rules
65 of Conduct for Representatives." The agency should clearly indicate whether the rules
66 apply only to attorneys, non-attorneys, or both.
- 67 14. On the webpage described in Paragraph 13, agencies should also publish information
68 concerning qualifications for representatives (including for non-attorneys as applicable),

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- 69 how to file a complaint, and a summary of the disciplinary process.
- 70 15. On the relevant webpage, agencies should consider providing comments, illustrations,
- 71 and other explanatory materials to help clarify how the rules work in practice.
- 72 16. Agencies should consider publishing disciplinary actions, or summaries of them, on their
- 73 websites so as to promote transparency regarding the types of conduct that lead to
- 74 disciplinary action. When necessary to preserve recognized privacy interests, the agency
- 75 may consider redacting information about particular cases or periodically providing
- 76 summary reports describing the rules violated and the nature of the misconduct.