Regulation of Representatives in Agency Adjudicative Proceedings

Ad Hoc Committee on Regulation of Representatives in Agency Proceedings

Proposed Recommendation for Committee | November 8, 2021

[The next version of the recommendation will include a Preamble, the contents of which will depend on the resolution of the various questions before the Ad Hoc Committee during its November 8, 2021 meeting.]

RECOMMENDATION

Adoption of Rules Governing Participation and Conduct

1. For federal agency adjudication systems in which parties are represented—either by attorneys or non-attorney representatives—agencies should consider adopting rules governing the participation and conduct of representatives in adjudicative proceedings, if they will to promote the accessibility, fairness, integrity, and efficiency of that agency’s adjudicative proceedings.

Content of Rules Rules of Conduct

2. Agencies should consider whether to adopt or incorporate by reference rules promulgated by other authorities or instead draft their own rules. Agencies should ensure that all adopted or incorporated rules are available at no cost to the public and are applicable to the adjudicative proceedings they conduct and consider whether any modifications to adopted or incorporated rules should be included. Agencies should scrutinize any rules originally designed to apply to attorneys when applying those same rules to non-attorneys; incorporate rules applicable to attorneys when applying them to non-attorneys and modify them accordingly.

Commented [OC1]: Proposed amendment from the Committee to change the title of the Recommendation. Original title is “Regulation of Representatives in Agency Proceedings.”

Commented [OC2]: Should the recommendation not address the question of who may represent persons in agency proceedings? Instead, the preamble would simply note that the appearance of lawyers is governed by 5 U.S.C. § 500 and specific statutes and that ACUS is not taking a position on when agencies should admit non-lawyers to serve as representatives.

Commented [OC3]: Foundational Question 1: What kinds of conduct rules should agencies adopt or consider adopting for lawyers and/or non-lawyers?

– For lawyers
  • Should we dictate possible topics for rules to cover? And should they be limited to actions in particular proceedings (e.g., items listed in 3(a)-(k), (m)) or also include actions outside of the specific proceeding (item 3(l))? If we include actions outside of the specific proceeding, should they be limited to those that bear upon practice before the agency (e.g., a criminal act reflecting dishonesty)?
  • Do considerations of efficiency or uniformity counsel in favor of greater use of incorporation of rules from other authorities? If so, should we encourage agencies to incorporate rules where possible?

– For non-lawyers (if included)
  • Should we dictate possible topics? If so, consider whether the items on the list for lawyers also apply to non-lawyers. Are there other topics that should apply specifically to non-lawyers (especially in light of the fact that non-lawyers may not otherwise be regulated by an independent authority)?

Commented [OC4]: Should this text be moved to transparency section?
3. Topics [Possible topics] Attorney conduct that agencies may wish to consider in their conduct rules, whether incorporated or agency-drafted, include conduct likely to occur during a particular adjudication and conduct that may occur outside a particular adjudication but that still may create a legitimate agency regulatory interest:

   a. Disruptive conduct intended to disrupt an adjudication;
   b. Unauthorized ex parte contacts with agency officials;
   c. Representation of a client that conflicts with other interests, including representation of another client, a former client, or the attorney’s personal interests;
   d. Filing or defending frivolous claims;
   e. Knowingly disobeying valid Compliance with agency rules;
   f. Obstruction conduct prejudicial to the administration of justice, including conduct not limited to that occurring during a jurisdiction;
   g. Failure to provide competent representation;
   h. Unauthorized withdrawal of client representation;
   i. Delaying the conduct of an adjudication unless required by the client’s legitimate interests;
   j. Candor: Knowingly making false statements toward the tribunal or failing to correct such statements;
   k. Improperly seeking influencing the conduct of a judge or official; and
   l. Conviction of a criminal act: felony or serious misdemeanor, or an official finding of a civil violation, that reflects adversely on the attorney’s fitness to represent clients before the agency; and

   m. Attempts to violate conduct rules or knowingly assisting others in violating conduct rules.

4. Agencies should consider whether divergence between rules governing different types of adjudicative proceedings would create needless complexity in practicing before the agency or other agencies with a similar mission. This may entail harmonizing rules among different components of the agency. It might also involve harmonization of style.
or language across rules as well as cross-referencing of other agency rules. An agency may also consider whether to harmonize rules across agencies, especially in cases in which the same representatives commonly appear before a group of agencies (e.g., financial agencies).

**Qualification**

5. Agency rules should address whether only lawyers may represent parties or whether non-lawyer representatives may also do so.

6. In the case of lawyer representatives, agencies should not require that lawyers possess any qualifications other than those permitted by 5 U.S.C. § 500 (Agency Practice Act), which allows for representation by a member in good standing of the bar of the highest court of a state as long as the member files a written declaration with the agency that the member is in good standing and is authorized to represent the particular person on whose behalf he or she is acting. Special qualification requirements should be used only if specifically authorized by statute.

7. Agencies should consider establishing qualification requirements for non-lawyer representatives. Such requirements may include . . .

**Agency Action in Response to a Violation of Rules**

8. Rules should address what actions an agency may take in the case of a violation of the rules. Such actions may include . . .

9. For rules applicable to attorneys, agency rules should identify any reciprocal disciplinary procedures or referral procedures.

40-7. The rules should clearly indicate how the disciplinary process works. Among other topics, they should address:

   a. Who can make a complaint and how they can make it;

   b. How notice of a complaint should be provided to the representative who is the subject of the complaint;

   c. Who adjudicates the complaint;
d. The procedure for adjudicating the complaint, including any rules governing the submission of evidence and the making of arguments;

e. The manner in which a decision will be issued, including any applicable timeline for issuing a decision;

f. Procedures for appealing a decision; and

g. Who is responsible for communicating the decision to other relevant authorities and enforcing the decision within the agency.

**Transparency**

11. Agencies should publish all significant rules governing representatives’ conduct in the Federal Register and codify them in the Code of Federal Regulations.

12. Agencies should publish their rules for representatives' conduct on a single webpage or in a single document on their websites and clearly label them using a term such as “Rules of Conduct for Representatives.” The agency should clearly indicate whether the rules apply only to attorneys, non-attorneys, or both.

13. On the webpage described in Paragraph 12, agencies should also publish information concerning qualifications for representatives (including for non-attorneys as applicable), how to file a complaint, and a summary of the disciplinary process.

14. On the relevant webpage, agencies should consider providing comments, illustrations, and other explanatory materials to help clarify how the rules work in practice.

15. Agencies should consider publishing disciplinary actions, or summaries of them, on their websites so as to promote transparency regarding the types of conduct that lead to disciplinary action. When necessary to preserve recognized privacy interests, the agency may consider redacting information about particular cases or periodically providing summary reports describing the rules violated and the nature of the misconduct.

**Model Rules**

16. ACUS’s Office of the Chairman should consider promulgating model rules of conduct that would address the topics covered in Paragraph 3 above. The model rules...
should account for variation in agency practice and afford agencies the flexibility to
determine which rules apply to their adjudicative proceedings. In doing so, the Office of
the Chairman should seek the input of a diverse array of agency officials and members of
the public, including representatives who appear before agencies, and the American Bar
Association.

Commented [OC10]: There’s ample precedent for ACUS’s Office of the Chairman undertaking these types of activities, whether requested in a recommendation or not (see, e.g., Model Adjudication Rules, Model EAJA Rules, Clarifying Statutory Access to Judicial Review of Agency Action Statutory Drafting Project, Working Group on Compiling Administrative Records).