



Regulation of Representatives in Agency Adjudicative Proceedings

Ad Hoc Committee on Regulation of Representatives in Agency Proceedings

Proposed Recommendation for Committee | November 8, 2021

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

RECOMMENDATION

Adoption of Rules ~~Governing Participation and Conduct~~

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

~~Content of Rules~~ Rules of Conduct

9 2. Agencies should consider whether to adopt or incorporate by reference -rules
10 promulgated by other authorities or instead draft their own rules. Agencies should ensure
11 that all adopted or incorporated rules are available at no cost to the public and are
12 applicable to the adjudicative proceedings they conduct and consider whether any
13 modifications to adopted or incorporated rules should be included. Agencies should
14 scrutinize any ~~rules originally designed to apply to attorneys when applying those same~~
15 ~~rules to non-attorneys~~ incorporated rules applicable to attorneys when applying them to
16 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?



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- 17 3. ~~Topics~~ [Possible topics] ~~Attorney conduct that~~ agencies may wish to consider in their
18 ~~conduct rules.~~ [whether incorporated or agency-drafted.] include conduct likely to occur
19 during a particular adjudication and conduct that may occur outside a particular
20 adjudication but that still may create a legitimate agency regulatory interest:
- 21 a. ~~Disruptive~~ Conduct intended to disrupt an adjudication;
 - 22 b. ~~Unauthorized~~ Ex parte contacts with agency officials;
 - 23 c. Representation of a client that ~~Conflicts~~ of with other interests, including
24 representation of another client, [a former client], or the attorney's personal
25 interests;
 - 26 d. Filing or defending frivolous claims;
 - 27 e. Knowingly disobeying valid ~~Compliance with~~ agency rules;
 - 28 f. ~~Obstruction~~ Conduct prejudicial to the administration of justice, including
29 conduct not limited to that occurring during a jurisdiction;
 - 30 g. Failure to provide ~~Competent~~ ee representation;
 - 31 h. ~~Unauthorized~~ Withdrawal of client representation;
 - 32 i. Delaying the conduct of an adjudication unless required by the client's legitimate
33 interests;
 - 34 j. ~~Candor~~ Knowingly making false statements ~~toward~~ the tribunal or failing to
35 correct such statements;
 - 36 k. Improperly seeking ~~influencing~~ the conduct of a judge or official; ~~and~~
 - 37 l. ~~Commission~~ Conviction of a ~~criminal act; felony or serious misdemeanor, or an~~
38 official finding of a civil violation, that reflects adversely on the attorney's fitness
39 to represent clients before the agency; and
 - 40 m. Attempts to violate conduct rules or knowingly assisting others in violating
41 conduct rules.
- 42 4. ~~Agencies should~~ consider whether divergence between rules governing different types of
43 adjudicative proceedings would create needless complexity in practicing before the
44 agency or other agencies with a similar mission. This may entail harmonizing rules
45 among different components of the agency. It might also involve harmonization of style

Commented [OC5]: Except where indicated by brackets, edits in this paragraph are proposed by Committee Member Russell Wheeler per request by the Committee during the 11/29 committee meeting. Bracketed words are additions or deletions suggested by the Office of the Chairman.



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46 ~~or language across rules as well as cross-referencing of other agency rules.~~ An agency
47 may also consider whether to harmonize rules across agencies, especially in cases in
48 which the same representatives commonly appear before a group of agencies (e.g.,
49 financial agencies).

Commented [OC6]: Should we retain this Paragraph? Is there a benefit to intra-agency harmonization, even if there's not a similar benefit to inter-agency harmonization?

Qualification

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

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

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

Commented [OC7]: See comment above about the recommendations not addressing the question of who may represent parties in agency proceedings.

Agency Action in Response to a Violation of Rules

Commented [OC8]: Foundational Question 3: What are the possible enforcement actions an agency might take for failure to comply with rules under foundational question 2? Agencies will, of course, need to determine whether they possess the authority to undertake any such action (as will be addressed in Preamble—see Graboyes memo).

61 ~~8.5.~~ Rules should address what actions an agency may take in the case of a violation of the
62 rules. Such actions may include . . .

63 ~~9.6.~~ For rules applicable to attorneys, agency rules should identify any reciprocal disciplinary
64 procedures or referral procedures.

65 ~~10.7.~~ The rules should clearly indicate how the disciplinary process works. Among
66 other topics, they should address:

- 67 a. Who can make a complaint and how they can make it;
- 68 b. How notice of a complaint should be provided to the representative who is the
69 subject of the complaint;
- 70 c. Who adjudicates the complaint;

- Possible actions include:
- Warning/reprimand
 - Referral to state bar
 - Referral to another agency component/IG for investigation/action
 - Disqualification from particular matter
 - Adverse publicity (e.g., publication of a decision finding misconduct, even if not accompanied by any other legal consequences)
 - Reduced fees in programs where the agency regulates fees charged by representatives
 - Suspension from practice before the agency for a specified time period or until some remedial action is taken
 - Disqualification from practice before the agency
 - Monetary sanctions



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- 71 d. The procedure for adjudicating the complaint, including any rules governing the
72 submission of evidence and the making of arguments;
- 73 e. The manner in which a decision will be issued, including any applicable timeline
74 for issuing a decision;
- 75 f. Procedures for appealing a decision; and
- 76 g. Who is responsible for communicating the decision to other relevant authorities
77 and enforcing the decision within the agency.

Transparency

78 ~~11~~.8. Agencies should publish all significant rules governing representatives' conduct
79 in the *Federal Register* and codify them in the *Code of Federal Regulations*.

80 ~~12~~.9. Agencies should publish their rules for representatives' conduct on a single
81 webpage or in a single document on their websites and clearly label them using a term
82 such as "Rules of Conduct for Representatives." The agency should clearly indicate
83 whether the rules apply only to attorneys, non-attorneys, or both.

84 ~~13~~.10. On the webpage described in Paragraph 12, agencies should also publish
85 information concerning qualifications for representatives (including for non-attorneys as
86 applicable), how to file a complaint, and a summary of the disciplinary process.

87 ~~14~~.11. On the relevant webpage, agencies should consider providing comments,
88 illustrations, and other explanatory materials to help clarify how the rules work in
89 practice.

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

Model Rules

95 ~~15~~.13. ACUS's Office of the Chairman should consider promulgating model rules of
96 conduct that would address the topics covered in Paragraph 3 above. The model rules

Commented [OC9]: Should this be limited to "significant" rules?



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97 should account for variation in agency practice and afford agencies the flexibility to
98 determine which rules apply to their adjudicative proceedings. In doing so, the Office of
99 the Chairman should seek the input of a diverse array of agency officials and members of
100 the public, including representatives who appear before agencies, and the American Bar
101 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).