Revised Model Rules for Implementation of the Equal Access to Justice Act

Ad Hoc Committee

Proposed Recommendation | June 13, 2019

The Equal Access to Justice Act (EAJA), first enacted in 1980, authorizes the award of attorney fees and other expenses to certain individuals, small businesses, and other entities who prevail against the federal government in judicial proceedings and certain adversarial agency adjudicative proceedings, when the position of the government is not substantially justified.\(^1\) The stated purpose of EAJA is to, among other things, “diminish the deterrent effect of seeking review of, or defending against, governmental action by providing” the award of certain costs and fees against the United States.\(^2\)

In the case of agency adjudications, agencies must establish “uniform procedures for the submission and consideration of applications for an award of fees and other expenses” “[a]fter consultation with the Chairman of the Administrative Conference of the United States.”\(^3\) To carry out this statutory charge, the Conference’s Chairman issued model rules in 1981 to help agencies establish uniform procedures for the submission and consideration of EAJA applications.\(^4\) Adoption of these model rules was intended to satisfy an agency’s obligation under section 504 of Title V of the United States Code to consult with the Chairman.\(^5\) In 1986, the

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\(^1\) 5 U.S.C. § 504.


\(^3\) 5 U.S.C. § 504(c)(1).


Chairman revised the 1981 model rules following the amendment and reauthorization of EAJA.\(^6\) Numerous agencies adopted the 1981 and 1986 model rules, including the Federal Trade Commission, the Consumer Financial Protection Bureau, the Securities and Exchange Commission, and the National Labor Relations Board.\(^7\)

In light of the amendments to EAJA made since 1986,\(^8\) as well evolving adjudicative practices since that time, the Conference’s Chairman decided to review and, as necessary, revise the 1986 model rules, just as it recently did in the case of the Model Adjudication Rules, which govern agency adjudication procedures generally.\(^9\) Rather than simply revise the rules itself the Chairman decided to put the rules before the membership of the Conference—first through an ad hoc committee of all interested members—for review so as to assure consideration of as broad a range of views as possible. The Conference considered, among other things, EAJA rules that agencies have issued since the promulgation of the 1986 model rules. Where appropriate, the Conference updated the model rules to reflect evolving practice and the latest EAJA amendments and made additional revisions to promote greater consistency and clarity. The Conference’s revised model rules appear in the appendix to this Recommendation.

Substantial changes have been made to the 1986 model rules. They include, most notably, the elimination of most of what was Subpart A. Subpart A of the 1986 model rules consisted of general provisions addressing, among other things, when EAJA applies, eligibility of applicants,

\(^6\) Id.


proceedings covered, standards for awards, allowable fees and expenses, rulemaking on
maximum rates for attorney fees, awards against other agencies, and delegations of authority.
The Conference recommends the elimination of these provisions because they address the
substantive standard for EAJA awards and other such matters beyond the Conference’s statutory
charge identified above. Other changes to the rules, including the addition of a definitions
section, have also been made to improve their clarity and comprehensibility.

RECOMMENDATION

The 1986 model rules should be replaced with the revised model rules for the
implementation of EAJA that follow.