

MEMORANDUM

TO: Ad Hoc Committee on Regulation of Representatives in Agency Proceedings
FROM: Jeremy Graboyes, Principal Deputy Research Director
DATE: November 5, 2021
SUBJECT: Statutory Authority of Federal Agencies to Admit to Practice and Regulate the Conduct of Representatives in Agency Proceedings

This memorandum addresses federal administrative agencies' statutory authority to admit individuals to represent persons in proceedings before them and to regulate representatives' conduct. Part I addresses relevant statutes that apply to agencies broadly, most notably the Agency Practice Act and the Administrative Procedure Act. Part II addresses statutes that govern the admission or regulation of representatives by particular agencies. By way of illustration, it describes statutory provisions applicable to 14 agencies and agency subcomponents.

As an initial matter, it is important to note that courts have consistently found that the authority to regulate the conduct of representatives is inherent in agencies' general rulemaking authority or their power to protect the integrity of their processes, regardless of whether Congress has explicitly authorized them to do so by statute.¹

I. Generally Applicable Statutes

At least three generally applicable statutes—the Agency Practice Act, the Administrative Procedure Act, and the Alternative Dispute Resolution Act—govern how federal agencies can regulate representatives who practice before them. Another generally applicable statute, the Ethics in Government Act,² governs who can practice before agencies but does not assign responsibility for the Act's implementation and enforcement to individual agencies.

A. Agency Practice Act

The Agency Practice Act provides generally that “[a]n individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.”³ As

¹ See e.g., *Checkovsky v. SEC*, 23 F.3d 452, 456 (D.C. Cir. 1994); *Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986) (“[A]gencies have been given the power to police the conduct of those who practice before them.”); *Polydoroff v. ICC*, 773 F.2d 372, 374 (D.C. Cir. 1985) (“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.”); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 580–82 (2d Cir. 1979) (“These concerns [about the integrity of agency processes] have led courts to reject challenges to the authority of other agencies to discipline attorneys practicing or appearing before them.”); *Koden v. U.S. DOJ*, 564 F.2d 228, 233 (7th Cir. 1977) (“It is elementary that any court or administrative agency which has the power to admit attorneys to practice has the authority to disbar or discipline attorneys for unprofessional conduct.”); see also *Goldsmith v. Bd. of Tax Appeals*, 270 U.S. 117, 122 (1926) (rejecting arguments that the absence of explicit statutory authorization to regulate attorney conduct indicated that Congress did not intend the Board of Tax Appeals to exercise such power).

² 18 U.S.C. § 203 *et seq.*

³ 5 U.S.C. § 500(b).

noted below, the Act also entitles certified public accountants to represent persons before the Internal Revenue Service.⁴

By its own terms, the Agency Practice Act does not grant or deny others the right to represent persons in agency proceedings or authorize former agency employees to represent persons before the agencies where they previously worked “when the representation is prohibited by statute or regulation.”⁵ Moreover, the Act does not “authorize or limit the discipline, including disbarment” of representatives.⁶ As noted above, courts have consistently found such authority inherent in agencies’ general rulemaking authority and power to protect the integrity of their processes.⁷

B. Administrative Procedure Act

Several provisions of the Administrative Procedure Act relate to representation. The Act makes clear that parties and persons compelled to appear before agencies are entitled to be represented by an attorney or, “if permitted by the agency, by other qualified representative.”⁸ The Act does not itself “grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.”⁹

Less explicitly, the Act’s formal-hearing provisions specify that, “[s]ubject to published rules of the agency and within its powers,” presiding officials may, among other things, “regulate the course of the hearing” and “take other action authorized by agency rule consistent with this subchapter.”¹⁰ The Act grants each agency “authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise.”¹¹

C. Alternative Dispute Resolution Act

The Alternative Dispute Resolution Act of 1990 directed each agency, in developing a policy on the use of alternative dispute resolution (ADR), to “develop a policy with regard to the representation by persons other than attorneys of parties in alternative dispute resolution proceedings.”¹² The Act specified that non-attorneys may represent persons in proceedings that agencies determine do “not necessitate representation or assistance by an attorney” (e.g., are not “so complex or specialized that only attorneys may adequately provide such representation or assistance”), so long as they meet “any requirement of the agency to provide representation or assistance in such a claim or dispute.”¹³

⁴ *Id.* § 500(c)

⁵ *Id.* § 500(d).

⁶ *Id.*

⁷ *See supra* note 1.

⁸ 5 U.S.C. § 555(b).

⁹ *Id.*

¹⁰ 5 U.S.C. § 556(c)(5), (11).

¹¹ 5 U.S.C. § 559.

¹² 5 U.S.C. § 571 note.

¹³ *Id.*

Agencies that permit representation by non-attorneys must “ensure that any rules pertaining to disqualification of attorneys from practicing before the agency shall also apply, as appropriate, to other persons who provide representative or assistance.”¹⁴ Such agencies must also “establish effective agency procedures for enforcing such rules of practice and for receiving complaints from affected persons.”¹⁵

II. Agency- and Program-Specific Statutes

Congress has, in some cases, specifically authorized or directed individual agencies to regulate representatives for purposes of one or more of programs they administer. The following sections describe provisions governing 13 agencies and agency subcomponents. These sections are intended to be illustrative and may not exhaustively catalog all such provisions.

A. Bureau of Justice Assistance (Justice Department)

Congress authorized the Bureau to issue “regulations governing the recognition of agents or other persons representing claimants” before it.¹⁶

B. Executive Office for Immigration Review (Justice Department)

By statute, each immigration judge has “authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter.”¹⁷ The statute also directs the Attorney General to define, by regulation, “frivolous behavior for which attorneys may be sanctioned” and to “impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.”¹⁸ The statute clarifies that this section should not be “construed as limiting the authority of the Attorney General to take actions with respect to appropriate behavior.”¹⁹

C. International Trade Commission

The Commission is directed to provide by regulation for such sanctions as it deems appropriate, “including disbarment from practice before the agency,” for violating the terms of a protective order.²⁰

D. Interior Department

Congress authorized the Secretary to “prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants” before the Department.²¹ Under the statute, the Secretary may require that would-be representatives first

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 34 U.S.C. § 10285(a).

¹⁷ 8 U.S.C. § 1229a(b)(1).

¹⁸ *Id.* § 1229a(b)(6).

¹⁹ *Id.*

²⁰ 19 U.S.C. § 1677f(c)(1)(B).

²¹ 43 U.S.C. § 1464.

“show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims.”²²

The statute authorizes the Secretary to, after notice and opportunity for a hearing, “suspend or exclude from further practice before his department any such person, agency, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud in any manner, deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, letter, or by advertisement.”²³

E. Labor Department

Statutory provisions governing the longshore and harbor workers’ compensation program direct the Secretary to prepare and disseminate a list of individuals who are not authorized to represent claimants under the program.²⁴ The Secretary must list any individuals determined, after notice and opportunity for a hearing, to have (1) been convicted of a crime in connection with representation of a claimant under any workers’ compensation statute; (2) engaged in fraud in connection with the presentation of a claim under any workers’ compensation statute; (3) been prohibited from representing claimants before any other workers’ compensation agency for reasons of professional misconduct similar to those listed in the statute; which are similar in nature to those which would be grounds for disqualification under this paragraph; or (4) accepted unapproved or excessive fees for claimants.²⁵ Determinations must “remain in effect for a period of not less than three years and until the Secretary finds and gives notice to the public that there is reasonable assurance that the basis for the determination will not occur.”²⁶

F. Patent and Trademark Office (Commerce Department)

The Agency Practice Act, by its terms, does not apply to practice before the Patent and Trademark Office with respect to patent matters.²⁷ Instead, a separate statute authorizes the Office to establish regulations governing the “recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office.” The Office may require would-be representatives “to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.”²⁸

The Director may suspend or exclude from further practice, either generally or in any particular case, any representative who, after notice and opportunity for a hearing, is shown “to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations [governing recognition and conduct of representatives], or who shall by word,

²² *Id.*

²³ *Id.*

²⁴ 33 U.S.C. § 931(2)(A).

²⁵ *Id.* § 931(2)(B).

²⁶ *Id.* § 931(2)(D).

²⁷ 5 U.S.C. § 500(e).

²⁸ 35 U.S.C. § 2(b)(2)(D).

circular, letter, or advertising, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having immediate or prospective business before the Office.”²⁹

G. Plant Variety Protection Office (Agriculture Department)

Congress directed the Secretary of Agriculture to “prescribe regulations governing the admission to practice and conduct of persons representing applicants or other parties before the Plant Variety Protection Office.”³⁰ The Secretary may, after notice and opportunity for a hearing, “suspend or exclude, either generally or in any particular case, from further practice before the [Office] any person shown to be incompetent or disreputable or guilty of gross misconduct.”³¹

H. Securities and Exchange Commission

The Sarbanes-Oxley Act directed the Commission to “issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issues.”³² Congress specified that such rules should require attorneys “to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof.”³³

A separate statutory provision authorizes the Commission to “censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission, after notice and opportunity for hearing in the matter (1) not to possess the requisite qualifications to represent others; (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct [as defined in the statute]; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder.”³⁴

I. Social Security Administration and Health and Human Services Department

Under the Social Security Act, any “attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Commissioner of Social Security.”³⁵

Congress authorized the Commissioner to prescribe rules and regulations governing the recognition of non-attorney representatives other than attorneys representing claimants before the

²⁹ 35 U.S.C. § 31.

³⁰ 7 U.S.C. § 2356.

³¹ *Id.*

³² 15 U.S.C. § 7245.

³³ *Id.*

³⁴ *Id.* § 78d-3(a).

³⁵ 42 U.S.C. § 406(a)(1); *see also* 42 U.S.C. § 1383(d)(2)(A) (applying section 406 to supplemental security income claims).

agency.³⁶ The Commissioner may require would-be representatives to “show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases.”³⁷

The Commission may, after notice and opportunity for a hearing, refuse to recognize or disqualify as a representative any “attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice or who has been disqualified from participating in or appearing before any Federal program or agency.”³⁸ The Commissioner may also refuse to recognize or disqualify as a non-attorney representative “any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice.”³⁹

More generally, the Commissioner may, after notice and opportunity for a hearing, “suspend or prohibit from further practice before the Commissioner any such person, agent, or attorney who refuses to comply with the Commissioner’s rules and regulations or who violates any provision of this section for which a penalty is prescribed.”⁴⁰ Any representative disqualified or suspended for collecting or receiving an excessive fee is barred from appearing before the agency as a representative until full restitution is made and the Commissioner decides to reinstate the person as a representative under agency rules.⁴¹

These same statutory provisions govern the Secretary of Health and Human Services with respect to certain aspects of the Medicaid program.⁴²

J. Surface Transportation Board

The Board may, subject to the Agency Practice Act, “regulate the admission of individuals to practice before it” and “impose a reasonable admission fee.”⁴³

K. Treasury Department

The Secretary may, subject to the Agency Practice Act, “regulate the practice of representatives of persons before the Department of the Treasury.”⁴⁴ Aside from attorneys, the Agency Practice Act specifies that any “individual who is duly qualified to practice as a certified public accountant in a State may represent a person before the Internal Revenue Service”⁴⁵

³⁶ 42 U.S.C. § 406(a)(1).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 42 U.S.C. § 1395ff(b)(1)(B)(iv).

⁴³ 49 U.S.C. § 1303(c).

⁴⁴ 31 U.S.C. § 330(a).

⁴⁵ 5 U.S.C. § 500(c).

The Secretary may require that would-be representatives show that they are of “good character” and “good reputation” and that they have “necessary qualifications to enable the representative to provide to persons valuable service” and “competency to advise and assist persons in presenting their cases.”⁴⁶

Congress authorized the Secretary to, after notice and opportunity for a proceeding, “suspend or disbar from practice before the Department, or censure, a representative who (1) is incompetent; (2) is disreputable; (3) violates regulations prescribed under this section; or (4) with intent to defraud, willfully and knowingly misleads or threatens the persons being represented or a prospective person to be represented.”⁴⁷ The Secretary also has authority to impose monetary penalties on any such representatives.⁴⁸

L. Veterans Affairs Department

Congress authorized the Secretary to “recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Secretary,”⁴⁹ except that the Secretary may not recognize representatives who have “been suspended or disbarred by any court, bar, or Federal or State agency to which the individual was previously admitted to practice has not been subsequently reinstated.”⁵⁰

Congress directed the Secretary to “prescribe in regulations (consistent with the Model Rules of Professional Conduct of the American Bar Association) qualifications and standards of conduct for individuals recognized under this section, including a requirement that, as a condition of being so recognized, an individual must (A) show that such individual is of good moral character and in good repute, is qualified to render claimants valuable service, and is otherwise competent to assist claimants in presenting claims; (B) have such level of experience or specialized training as the Secretary shall specify; and (C) certify to the Secretary that the individual has satisfied any qualifications and standards prescribed by the Secretary under this section.”⁵¹ The Secretary must provide in such rules that recognized representatives must annually report whether they remain in good standing in every jurisdiction to which they are admitted to practice or authorized to appear.⁵²

The Secretary may, after notice and opportunity for a hearing, suspend or exclude representatives “from further practice before the Department” for any of nine reasons, i.e., upon a showing that the representative “(1) has engaged in any unlawful, unprofessional, or dishonest practice; (2) has been guilty of disreputable conduct; (3) is incompetent; (4) has violated or refused to comply with any of the laws administered by the Secretary, or with any of the regulations or instructions governing practice before the Department; (5) has in any manner deceived, misled, or threatened any actual or prospective claimant; (6) has presented to the Secretary a frivolous claim, issue, or argument, involving conduct inconsistent with ethical

⁴⁶ 31 U.S.C. § 330(a).

⁴⁷ *Id.* § 330(c).

⁴⁸ *Id.*

⁴⁹ 38 U.S.C. § 5904(a)(1).

⁵⁰ *Id.* § 5904(a)(4).

⁵¹ *Id.* § 5904(a)(2).

⁵² *Id.* § 5904(a)(3).

standards for the practice of law; (7) has been suspended or disbarred by any court or bar to which such agent or attorney was previously admitted to practice, or has been disqualified from participating in or appearing before any Federal agency, and has not been subsequently reinstated; (8) has charged excessive or unreasonable fees, as determined by the Secretary in accordance with subsection (c)(3)(A); or (9) has failed to comply with any other condition specified in regulations prescribed by the Secretary for purposes of this subsection.”⁵³

Suspension or exclusion from practice for an excessive fee “shall continue until the agent or attorney makes full restitution to each claimant from whom the agent or attorney collected or received an excessive fee. If the agent or attorney makes such restitution, the Secretary may reinstate such agent or attorney under such rules as the Secretary may prescribe.”⁵⁴

⁵³ *Id.* § 5904(b).

⁵⁴ *Id.* § 5904(c)(3)(C).