



Regulation of Representatives in Agency **Adjudicative Proceedings**

Commented [OC1]: Proposed amendment from the Committee to change the title of the Recommendation.

Ad Hoc Committee on Regulation of Representatives in Agency Proceedings

Proposed Recommendation for Committee | November 16, 2021

1 Many agencies have adopted rules governing the participation and conduct of attorneys
2 and, in some programs, non-attorneys who represent parties in adjudicative proceedings. These
3 rules may address a wide array of topics, including who can represent parties in adjudications,
4 how representatives must conduct themselves, and how the agency enforces rules of conduct.
5 Some agencies have drafted their own rules. Others have adopted rules developed by state bar
6 associations or the American Bar Association's (ABA) *Model Rules of Professional Conduct*.
7 Agencies provide public access to their rules in different ways, including publishing them in the
8 *Federal Register* and *Code of Federal Regulations* and posting them on their websites. Some
9 agencies have provided explanatory materials to help representatives, parties, and the public
10 understand how the rules operate.

11 Agency authority to set qualifications for who may serve as a representative depends on
12 whether the potential representative is an attorney or non-attorney. For attorneys, the generally
13 applicable Agency Practice Act provides, with some exceptions, that "any individual who is a
14 member in good standing of the bar of the highest court of a State may represent a person before
15 an agency,"¹ though some statutes authorize agencies to impose additional qualification
16 requirements. Agencies generally have greater discretion under the Administrative Procedure
17 Act and agency- or program-specific statutes to determine whether persons who are not attorneys
18 may act as representatives and, if they may, establish the qualifications for doing so.

19 As a general matter, agencies have legal authority to establish rules governing the

¹ 5 U.S.C. § 500(b).



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20 conduct of representatives and to take actions against representatives found to have violated such
21 rules. Courts have consistently found such authority inherent in agencies' general rulemaking
22 power or their power to protect the integrity of their processes.² Agencies' disciplinary authority
23 is not limitless, however, and agencies must determine what their governing statutes allow.

24 Agencies that adopt rules governing representatives will need to make a number of
25 decisions as they decide the type of rules to adopt and how they will apply those rules. They
26 must determine whether the rules will apply only to attorney representatives or will also apply to
27 non-attorney representatives. They must decide whether to borrow language from rules drafted
28 by other entities (state bars, ABA) or to draft their own rules. They must determine the particular
29 conduct that the rules will regulate and whether to apply the same rules to attorneys and non-
30 attorneys. And if they decide to adopt rules governing who may practice before the agency, they
31 must ensure that they comply with the Agency Practice Act for rules applied to attorneys and
32 determine the qualification standards, if any, they will establish for non-attorneys.

33 Once agencies have decided to adopt rules, they also must determine how to enforce
34 those rules. Agencies may do so in various ways, ranging from warning representatives that
35 further misconduct may be penalized up to disqualifying a representative from appearing in the
36 current adjudication or future adjudications or imposing a monetary penalty. Agencies must
37 satisfy themselves that they have the legal authority to undertake any such actions. Agencies also
38 must decide whether to implement a program for reciprocal discipline, which involves agencies'
39 imposing discipline on a representative found to have engaged in misconduct by another
40 jurisdiction, or for referral procedures, which involve reporting attorneys' misconduct to another
41 jurisdiction for purposes of taking possible disciplinary action.

42 Agencies that have adopted rules must ensure that representatives, parties, and the public
43 can easily access the rules. Agencies also must decide whether to provide additional explanatory

² 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); *Polydoroff v. ICC*, 773 F.2d 372, 374 (D.C. Cir. 1985); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 580–82 (2d Cir. 1979); *Koden v. U.S. DOJ*, 564 F.2d 228, 233 (7th Cir. 1977).



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44 materials and, if so, ensure that those are also easily accessible.

45 This Recommendation recognizes that agency adjudicative proceedings vary widely in
46 their purpose, complexity, and governing law. Some processes are trial-like; others are informal.
47 Some are adversarial; others are non-adversarial. Given the extensive variation in agencies'
48 needs and available resources, this Recommendation focuses primarily on setting forth the
49 various options agencies should consider in deciding whether to adopt rules and deciding on the
50 content of those rules. It takes no position on whether agencies should allow non-attorney
51 representatives. For agencies that decide to adopt rules for attorneys and, if they elect to do so,
52 non-attorneys, the Recommendation offers best practices for ensuring that those rules are
53 disseminated widely and that representatives, parties, and the public can understand the rules and
54 how agencies go about enforcing them.

55 Although the Recommendation does not endorse harmonization of rules for its own sake,
56 it does urge agencies to consider whether achieving greater uniformity among different
57 adjudicative components within the agency or even across adjudicative components of multiple
58 agencies might prove valuable for representatives who practice before a variety of components
59 or agencies. It also recommends that the Administrative Conference's Office of the Chairman
60 prepare model rules that agencies can use when drafting their own rules.

RECOMMENDATION

Adoption of Rules Governing Participation and Conduct

- 61 1. For federal agency adjudication systems in which parties are represented—either by
62 attorneys or non-attorney representatives—agencies should consider adopting rules
63 governing the participation and conduct of representatives in adjudicative proceedings to
64 promote the accessibility, fairness, integrity, and efficiency of ~~that agency's~~ adjudicative
65 proceedings.

Rules of Conduct



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- 66 2. Agencies should consider whether to adopt or refer to rules promulgated by other
67 authorities or professional organizations or instead draft their own rules. Agencies should
68 ensure that the rules are appropriate for the adjudicative proceedings they conduct and
69 consider whether any modifications to adopted rules should be included. Agencies should
70 consider whether any rules applicable to attorneys should be applied to non-attorneys and
71 whether they should be modified before doing so.
- 72 3. Possible topics that agencies may wish to consider in their rules include actions likely to
73 occur during a particular adjudication and actions that may occur outside a particular
74 adjudication but that may still adversely affect the conduct of agency adjudications.
75 Topics agencies may wish to consider include the following:
- 76 a. Engaging in Cconduct that disrupts or is intended to disrupt an adjudication;
 - 77 b. Making Uunauthorized ex parte contacts with agency officials;
 - 78 c. Engaging in Representation of a client that conflicts with other interests,
79 including representation of another client, or the attorney’s personal interests;
 - 80 d. Filing frivolous claims or asserting frivolous defenses;
 - 81 e. Engaging in Conduct that is prejudicial to the administration of justice, including
82 conduct not limited to that occurring during an adjudication;
 - 83 f. Failing to provide competent representation;
 - 84 g. Unauthorized Withdrawal of Withdrawing from client representation without
85 authorization;
 - 86 h. Unreasonably delaying the conduct of an adjudication;
 - 87 i. Making a material intentional false statement;
 - 88 j. Improperly seeking to influence the conduct of a judge or official;
 - 89 k. Being Convicted of a crime or being subject to an official finding of a civil
90 violation that reflects adversely on the attorney’s fitness to represent clients
91 before the agency; and
 - 92 l. Knowingly disobeying or attempting to disobey agency rules (including conduct
93 rules) or adjudicators’ directions, or knowingly assisting others in doing so.
- 94 4. Agencies should consider whether divergence between rules governing different types of

Commented [OC2]: This item has been moved to the bottom of the list to reflect the fact that it primarily addresses offenses that rely upon other rules (other agency rules and inchoate offenses).



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95 adjudicative proceedings would create needless complexity in practicing before the
96 agency. This may entail harmonizing rules among different components of the agency. It
97 might also involve harmonization of style or language across rules as well as cross-
98 referencing of other agency rules. Agencies should also consider whether to harmonize
99 rules across agencies, especially in cases in which the same representatives commonly
100 appear before a group of agencies (e.g., financial agencies).

Qualification

- 101 ~~5. Agency rules should address whether only lawyers may represent parties or whether non-~~
- 102 ~~lawyer representatives may also do so.~~
- 103 ~~6. In the case of lawyer representatives, agencies should not require that lawyers possess~~
- 104 ~~any qualifications other than those permitted by 5 U.S.C. § 500 (Agency Practice Act),~~
- 105 ~~which allows for representation by a member in good standing of the bar of the highest~~
- 106 ~~court of a state as long as the member files a written declaration with the agency that the~~
- 107 ~~member is in good standing and is authorized to represent the particular person on whose~~
- 108 ~~behalf he or she is acting. Special qualification requirements should be used only if~~
- 109 ~~specifically authorized by statute.~~
- 110 ~~7. Agencies should consider establishing qualification requirements for non-lawyer~~
- 111 ~~representatives. Such requirements may include ...~~

Commented [OC3]: Per Committee discussion, elements in this section have been included in the preamble and consolidated in new Paragraph 8 below.

Agency Action in Response to a Violation of Rules

- 112 ~~8.5.~~ Rules should address what actions an agency may take in the case of a violation of the
- 113 rules consistent with their authority to do so.
- 114 ~~9.6.~~ For rules applicable to attorneys, agency rules should identify any reciprocal disciplinary
- 115 procedures or referral procedures.
- 116 ~~10.7.~~ The rules should clearly indicate how the disciplinary process works. Among
- 117 other topics, they should address:
- 118 a. Who can make a complaint and how they can make it;
- 119 b. How notice of a complaint should be provided to the representative who is the



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- 120 subject of the complaint;
- 121 c. Who adjudicates the complaint;
- 122 d. The procedure for adjudicating the complaint, including any rules governing the
- 123 submission of evidence and the making of arguments;
- 124 e. The manner in which a decision will be issued, including any applicable timeline
- 125 for issuing a decision;
- 126 f. Procedures for appealing a decision;
- 127 g. Who is responsible for enforcing the decision within the agency and
- 128 communicating the decision to other relevant authorities; and
- 129 h. The process for identifying and dismissing complaints that are frivolous,
- 130 repetitive, meant to harass, or meant primarily to delay agency action, including
- 131 any consequences for persons filing such complaints.

Who Can Practice Before Agencies

132 8. Agencies should, in compliance with the Agency Practice Act (5 U.S.C. § 500), only
 133 establish additional rules governing which attorney representatives can practice before
 134 the agencies if authorized to do so by separate statute. With respect to non-attorneys,
 135 agencies should determine what rules, if any, they will establish to govern who can
 136 practice before the agencies.

Commented [OC4]: This section attempts to represent Committee consensus regarding the three paragraphs from the prior draft on qualification / appearance of non-attorneys, including moving the section immediately above the transparency section and consolidating the three paragraphs.

Transparency

137 9. When agencies adopt rules promulgated by another entity, which may in some instances
 138 be copyrighted, they should ensure that the rules are available to the public at no cost and
 139 that they provide links on their website or another mechanism for easily accessing those
 140 rules.

141 ~~11.~~ 10. Agencies should publish all significant rules governing representatives' conduct
 142 in the Federal Register and codify them in the Code of Federal Regulations.

Commented [OC5]: Please note submitted comment from the National Organization of Social Security Claimants' Representatives: In paragraph [9], we encourage the Committee to remove the word "significant" and instead recommend that agencies publish all rules of conduct in the Federal Register and the Code of Federal Regulations. It is not reasonable to expect representatives to follow rules of which they are unaware, and allowing agencies, representatives, and their clients to all have access to rules of conduct will reduce misunderstandings.



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- 143 ~~12.11.~~ Agencies should publish their rules for representatives’ conduct on a single
144 webpage or in a single document on their websites and clearly label them using a term
145 such as “Rules of Conduct for Representatives.” The agency should clearly indicate
146 whether the rules apply only to attorneys, non-attorneys, or both.
- 147 ~~13.12.~~ On the webpage described in Paragraph 11, agencies should also publish
148 information concerning qualifications for representatives (including for non-attorneys as
149 applicable), how to file a complaint, and a summary of the disciplinary process.
- 150 ~~14.13.~~ On the relevant webpage, agencies should consider providing comments,
151 illustrations, and other explanatory materials to help clarify how the rules work in
152 practice.
- 153 14. Agencies should consider publishing disciplinary actions, or summaries of them, on their
154 websites so as to promote transparency regarding the types of conduct that lead to
155 disciplinary action. When necessary to preserve recognized privacy interests, the agency
156 may consider redacting information about particular cases or periodically providing
157 summary reports describing the rules violated and the nature of the misconduct.

Model Rules

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

Commented [OC6]: 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).