

ACUS Model Rules of Representative Conduct

DRAFT Project Plan

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I. Overview

This Project Plan is designed to describe the structure, procedures, and goals of the ACUS Working Group on the Model Rules of Representative Conduct. It is based on ACUS Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings* adopted on December 16, 2021, and on the corresponding Report of the same name authored by Working Group member Professor George M. Cohen on December 3, 2021.¹

The Plan outlines the procedures for drafting the Model Rules; the substantive framework of those rules, including the proposed topics to be covered; and a tentative schedule of Working Group meetings and deliverables for the project. This Plan is meant to be preliminary in that it is subject to change by the Working Group as it deems necessary, including the timing and format of meetings and deadlines.

II. Framework of Model Rules

The following is a proposed structure for the Model Rules. It is of course subject to review and amendment by the Working Group, and is based on items identified as relevant in ACUS Recommendation 2021-9 and the accompanying Report, as well as relevant portions of the Model Rules of Professional Conduct governing attorneys.

First is an introductory section explaining the purpose of the Rules and how agencies may adopt some or all of them, depending on their specific responsibilities and needs. This section will also define the scope of the Rules, namely that they address the conduct of representatives “in agency adjudicative proceedings involving at least some oral argument or presentation resulting in some determination that affects the rights or interests of individual parties.”²

Second is a series of rules addressing who may serve as a representative in an agency adjudication, including professional qualifications and character requirements for licensed attorneys as well as non-attorneys acting as representatives.

Third is a collection of rules governing the specific conduct of individuals serving as representatives before an agency adjudicator as well as ethical guidelines applicable to those individuals.

Fourth is a set of rules regarding enforcement of the rules and potential discipline resulting from violations by representatives. This section includes procedures for filing and

¹ See George M. Cohen, *Regulation of Representatives in Agency Adjudicative Proceedings* (Dec. 3, 2021) (report to the Admin. Conf. of the U.S.).

² *Id.*

adjudicating alleged rules violations and questions about how to incorporate state rules of professional conduct for licensed attorneys serving as representatives under the Rules.

The final section consists of rules addressing agency transparency and communication regarding the Model Rules and agency adoptions thereof.

The following chart is a preliminary outline of the topics proposed to be included in each of the aforementioned sections of the Model Rules, as well as the section of Recommendation 2021-9 or the Model Rules of Professional Conduct that addresses that topic. This outline is subject to change upon review by the Working Group and relevant subcommittees (see below).

| Subject of Model Rule | Recommendation 2021-9 | ABA Model Rule |
|---|-----------------------|----------------|
| I. Introduction | | |
| II. Qualifications of a Representative | | |
| A. Attorneys | | |
| • Agency Practice Act | | |
| • Bar licensure | | |
| • Certification by agency | | |
| • Qualification exams | | |
| • CLE requirements | | |
| B. Non-Attorneys | | |
| • Professional licensure | | |
| • ALJ / AJ discretion | | |
| • Certification by agency | | |
| • Character requirements | | |
| • Competence | | |
| • Consent | | |
| • Agency customs | | |
| • Criminal convictions | 3(k) | 8.4 |
| • Rules violations | 3(l) | 8.4 |
| III. Representative Conduct & Ethics | | |
| A. Competent representation | | |
| • Disruptive behavior | 3(a) | |
| • Frivolous claims | 3(d) | 3.1 |
| • Behavior prejudicial to the administration of justice | 3(e) | |
| • Diligence / Diminished capacity | 3(f) | 1.1/1.3/1.14 |
| • Withdrawal of representation | 3(g) | 1.16 |
| • Delay | 3(h) | 3.2 |
| • Material misrepresentations | 3(i) | 3.3 |
| • Candor | 3(i) | 3.3 |

| | | |
|--|-----------|-----------|
| • Scope of representation | | 1.2 |
| • Confidentiality | | 1.6 |
| B. Ethics | | |
| • Ex parte contacts | 3(b) | 1.7-1.8 |
| • Conflicts of interest (including former government employees / judges) | 3(c) | 1.11-1.12 |
| • Influencing judges | 3(j) | 3.5 |
| IV. Rule Enforcement / Discipline | | |
| A. Procedure | | |
| • Complaints (who may file, including referrals from ALJ/AJs) | 5(a), (b) | |
| • Hearings | 5(c)-(e) | |
| • Appeals | 5(f) | |
| • Frivolous complaints | 5(h) | |
| B. Discipline | | |
| • Enforcement responsibilities | 5(g) | |
| • Reporting violations | | |
| • Penalties / Reciprocity | 6-7 | |
| V. Transparency / Reporting | | |
| A. Publishing Rules | | |
| • Webpage | 10 | |
| • Commentary | 11-12 | |
| • Commentary | 13 | |
| B. Publishing Disciplinary Actions | | |
| • Webpage | 14 | |
| • Commentary | | |

III. Working Group Structure and Responsibilities

The Working Group will function—subject to the consent of the members—in two forms. The first is the full membership. This group will meet less frequently, but will be responsible for considering issues impacting the entire project, such as the preliminary plan for the project included here, the scope of the Working Group’s own responsibilities going forward, and final approval of the Model Rules. The bulk of the full Working Group’s contribution is anticipated to occur at the beginning and the end of the project.

The second manifestation of the Working Group will be as four subcommittees. Each subcommittee will assume primary responsibility for one of the four substantive categories covered by the Model Rules: Qualifications, Conduct, Enforcement, and Transparency. Membership in each subcommittee will be voluntary, with the expectation that each member of the Working Group will agree to participate in at least one subcommittee. Each subcommittee will have the opportunity to provide suggestions and feedback on the section of the Model Rules

to which it is assigned, including but not limited to recommendations about the subtopics to be included in each category and input into the specific language of each rule within that category.

Subcommittees are designed to ensure that Working Group members have an opportunity to provide substantive input into the Model Rules without the process becoming unduly burdensome. Subcommittee work, however, is not exclusive. Each Working Group member is free to participate in the formation, drafting, and editing of any and all of the Model Rules, including attending any subcommittee meetings, independent of whether they are a member of that subcommittee. Subcommittees will meet independently from the full Working Group, and their contribution will be focused on the middle stages of the project.

A meeting agenda and relevant materials to be considered will be circulated by email to the participants at least two weeks prior to any meetings of the full Working Group or any subcommittee. During these meetings, the Reporter or someone designated by him will be responsible for taking minutes of the meeting and recording a list of action items to be pursued following the meeting. For each action item, note will be made of who is responsible for completing that item and by when it is expected to be completed. For meetings involving feedback on draft Rules, participants will be encouraged to circulate their comments to other attendees, including the Reporter, roughly one week prior to that meeting.

IV. Proposed Meeting Schedule and Agendas

In light of the above regarding the Working Group’s structure and responsibilities, the following meeting schedule and agendas are proposed, subject to Working Group approval.

| Topic | Participants | Tentative Dates |
|---|-----------------------------|------------------------|
| Preliminary Planning and Strategy Meeting | Full Working Group | January-February 2023 |
| Discussion of Qualification Rules | Qualifications Subcommittee | March-April 2023 |
| Discussion of Conduct Rules | Conduct Subcommittee | June-July 2023 |
| Discussion of Enforcement Rules | Enforcement Subcommittee | September-October 2023 |
| Discussion of Transparency Rules | Transparency Subcommittee | November-December 2023 |
| Discussion of Model Rules | Full Working Group | January-February 2024 |
| Share Model Rules with ACUS Committee on Adjudication | Reporter | March 2024 |
| Finalize Model Rules and Share with ACUS Council | Full Working Group | April 2024 |
| Present Model Rules at Plenary Session | Reporter | June 2024 |