DRAFT

MODEL RULES OF REPRESENTATIVE CONDUCT

Submission to Working Group on Model Rules of Representative Conduct,
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Prepared by
The Model Rules of Representative Conduct Working Group

Office of the Chairman
Administrative Conference of the United States

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General Provisions

100. Definitions

(A) "Adjudication" means an agency proceeding—whether conducted pursuant to the federal Administrative Procedure Act, 5 U.S.C. § 551 et seq., other statutes, or agency regulations or practice—involving at least some presentation or oral argument resulting in some determination by an adjudicator that affects the rights or interests of parties.

(B) "Adjudicator" is one or more individuals who preside(s) at the presentation or oral argument at an adjudication. An adjudicator may be an Administrative Law Judge or any other presiding official or officials who are authorized to so act.

(C) "Agency" is an agency as defined in 5 U.S.C. § 551.

(D) "Knowingly" means done with actual knowledge of, or willful blindness to, the subject of the action.

(E) "Lawyer" means an individual who is licensed to practice law.

~~(E)~~(F) "Party" is a named person or entity required by law to participate in an adjudication.

~~(F)~~(G) "Participant" means a party to an adjudication, or an intervenor or other interested person allowed to participate in the adjudication.

~~(G)~~(H) ""Person" means an individual or entity, other than the agency or an individual acting on the agency's behalf.

~~(H)~~(I) "Presiding adjudicator" is the adjudicator responsible for conducting and resolving a specific agency proceeding.

~~(I)~~(J) "Representation" refers to the acts of a representative on behalf of a participant in an adjudication.

~~(J)~~(K) "Represented participant" means a participant in an adjudication whose interests are presented by a representative.

~~(K)~~(L) "Representative" is an individual appearing in an adjudication on behalf of a participant. A representative may be a licensed ~~attorney~~ lawyer or a non-lawyer, but may not be a federal ~~attorney~~ lawyer or other employee of the agency before whom they appear. See comment 2 to Rule 101.

~~(L)~~(M) "Tribunal" means any agency adjudicative authority presiding over a proceeding, including appeals of an agency adjudication by another agency adjudicator or adjudicators.

Commented [LR1]: Consider, "...person or entity…". Comment is valid for each place "person" appears in this context. N.B. - DHS is a docketed party to immigration court proceedings.

Commented [SD2]: Suggested edit. Should this be flipped to read "person interested in the adjudication"? I don't feel strongly about it, but this wording seems a little odd.

Commented [WF3]: persons can be compelled to appear before an agency in an adjudication because they are subpoenaed to appear, but they would not be participants in the proceeding.

Commented [SD4]: The language in this definition is both a bit awkward--accompanied by a representative?--and inconsistent with the definition of "representative." Would it be possible to say something like "a participant. . .whose interests are presented/advocated/some other synonymous verb by a representative"?

Commented [LAR5]: Is the intention to capture all types of representation, limited appearances and friend of the court included?

Commented [LAR6]: EOIR notes that accredited representatives are not permitted to be attorneys, but does not object to the definition. We do recommend consideration of the term "practitioner" in lieu of "representative" for the provided definition.

Commented [SD7]: I recommend striking "private." Maybe I'm being too LSC-centric but we use the term "private attorney" to mean non-legal aid attorneys. I would be concerned that legal aid and attorneys who work for other nonprofits might read this as excluding them. I could also see people, particularly those who are not law trained, wondering what "private licensing" is.

Commented [SD8]: Global comment: the rules say "non-lawyer" in some places and "non-attorney" in others. I recommend using one or the other consistently through ... [1]

Commented [MG9R8]: Lou: Inclination is to use "Nonlawyer" throughout. Comment 1, Rule 202, speaks to this.

Commented [MG10]: Consider adding comment in Scope that agencies can create exceptions to apply to government attorneys volunteering or acting outside of the scope of their employment.

Commented [MG11R10]: Bill: Consider adding comment here for why we're not including federal attorneys, because there's another comment. ... [2]

Commented [JT12]: One of my concerns is whether the authors meant to emphasize the difference between an attorney and a lawyer.

Commented [JJ13]: Excluding "government attorneys" and "current government employees" from the definition of "representative" would be problematic, as representatives with State Service Organizations may be state governm ... [3]

101. Scope of Rules

(A) These Model Rules of Representative Conduct ("rules") are applicable to the following representatives before [the Agency]:

(1) ~~Licensed l~~Lawyers covered by the Agency Practice Act, 5 U.S.C. § 500;

(2) ~~Licensed l~~Lawyers authorized to act as representatives by other applicable statute or agency rule; and

(3) Non-lawyers who meet the applicable qualifications prescribed in rules 204-208, *infra*.

(B) These rules are not applicable to the following types of individuals wishing to serve as representatives before [the Agency]:

(1) Federal agency ~~attorneys~~ lawyers when they appear on behalf of their agency; and

(2) Other employees of the agency when they appear on behalf of their agency.

(C) On any question not addressed by specific statute, specific agency regulation, or these rules, representation is guided so far as practicable by the ABA Model Rules of Professional Conduct.

Official Comment

1. (To subsection (A)): As defined in rule 100, "lawyer" for purposes of these rules means an individual who is licensed to practice law.
2. (to subsection (B)): The conduct of federal agency lawyers and other employees acting on behalf of their agencies is governed by federal ethics and other provisions, including disciplinary proceedings and sanctions for violations of those provisions. *See, e.g.*, 5 C.F.R. § 2365.101 et seq. ("Standards of Ethical Conduct for Employees of the Executive Branch").
3. (to subsection (B)): Former agency employees who are non-lawyers are not precluded from serving as representatives provided they are qualified to do so under rule 204. 5 U.C.S. § 500(d)(3).

Commented [SD14]: Same recommendation to strike "private" as above.

Commented [LR15]: With some initiatives at certain State/local levels, we may see Government lawyers, and possibly non-lawyers, appear on behalf of respondents in immigration court proceedings.

Commented [JJ16]: Stating the rules are not applicable to government attorneys and non-lawyer government employees could erroneously exclude organizational and/or one-time representatives as discussed above. Perhaps there is a way to better differentiate representatives from those who are working for/representing the agency, as I assume that is the intent.

Commented [LV17]: I modeled this after the Adjudication Rules, but am not sure this will not create unintended consequences. I welcome comments from the subcommittee and will have to think about this more.

Commented [WGMR18R17]: Comment from Lea Robbins:
Would it be better to say "...by the ABA Model Rules of Professional Conduct or, for licensed attorneys, their governing state bar rules." I like referring to the ABA Model Rules in general, especially for non-attorney reps, but may be better and more specific to refer to attorneys' state bar rules, which could conflict with the ABA Model Rules?

Commented [WG19R17]: Comment from Lauren Alder Reid:
Perhaps only referring to the local rules of conduct and professionalism, and those relevant to the agency, would be preferred as holding non-lawyers to these Model Rules could prove challenging. If we do include Government employees in the set to whom the rules apply, such reference would also need to include applicable Federal Rules/requirements.

Commented [SD20R17]: I agree with Lauren's concern about trying to hold representatives who are not attorneys to the Model Rules. At least with community justice workers, they're bound to comply with the authorities under which they practice in their respective states. Those authorities do not necessarily incorporate or reference the ABA Model Rules or state bar rules (although I believe the Alaska CJW program does reference or incorporate AK bar rules).

102. Construction, Modification, or Waiver of Rules

(A) These rules must be liberally construed to secure fair, expeditious, and accessible representation of participants in agency adjudications.

(B) These rules must be interpreted, to the extent permissible, to be consistent with the United States Constitution, the Administrative Procedure Act, 5 U.S.C. § 551 et. seq, the Agency Practice Act, 5 U.S.C. § 500, and other applicable law. To the extent that a rule is not consistent with any of the above, applicable law controls.

(C) Except to the extent that waiver or modification would otherwise be contrary to law, an adjudicator may, after adequate notice and explanation to all interested persons, modify or waive any of these rules upon a determination that no party will be prejudiced and that the ends of justice will be served.

Commented [LR21]: There may be a specific reason for using the word "inexpensive" here, but, if not, I think replacing it with "reasonable" or even something like "affordable" would be better, as "inexpensive" makes me think of "cheap" or "cut-rate," which has a negative connotation.

Commented [LAR22R21]: Concur with the comment above, though also note that the Government should generally not be involved in fee arrangements absent cause (e.g., publication of a list of low-cost providers).

Commented [LV23]: Another rule to think about as we go along. I like the flexibility here, but am concerned about unintended consequences. This is also modeled after the ACUS Adjudication Rules.

REPRESENTATIVE QUALIFICATIONS

200. In General

In accordance with applicable law, including these rules, a participant in an adjudication may be represented by a representative.

201. Consent

(A) Unless otherwise prohibited by law, a participant must provide consent to representation to the presiding adjudicator, agency, or tribunal.

(B) A record of that consent must be included in the administrative record of the adjudication.

(C) [The Agency] may provide systematized methods of providing consent, such as:

(1) Standardized consent forms;

(2) Notices of appearance for representatives that indicate consent;

(3) Other similar mechanisms that allow for reliable and uniform records of participant consent to representation.

(D) Consent may be withdrawn by the participant upon the participant providing notice of such withdrawal to the presiding adjudicator.

Official Comment

1. (to subsection (A)): The Agency Practice Act only requires ~~licensed attorneys~~ lawyers who are "a member in good standing of the bar of the highest court of a State" to file a written declaration that they are qualified under the Act to serve as a representative. Absent statutory authority to adopt consent requirements by regulation, the Agency Practice Act has been interpreted to "prohibit[] agencies from erecting their own supplemental admission requirements for duly admitted members of a state bar." Polydoroff v. ICC, 773 F.2d 372, 374 (D.C. Cir. 1985). This prohibition does not, however, translate to agency disciplinary actions against ~~attorney~~ lawyer representatives, *see id.*, or to consent requirements promulgated through valid agency regulation. Levine v. Saul, 2020 WL 5258690 (D.R.I. 2020).
2. (to subsection (A)): A participant's consent must identify the representative, either individually or as part of an accredited organization as described in ~~Rule~~ rule 209. Consent may be provided verbally or in writing, including by electronic means.
3. (to subsection (A): Limitations on the scope of representation are discussed in ~~Rule~~ rule 301.
4. (to subsection (D)): Notice of withdrawal of consent may be provided verbally or in writing to the presiding adjudicator, and must be part of the official record in the adjudication. In circumstances where consent was withdrawn and there was an existing fee arrangement between the participant and representative relating to the adjudication, the amount, if any, of fees owed to the representative shall be governed by applicable law, including the rules herein regarding scope of representation. *See* ABA Model Rule of Professional Conduct 1.5; Rule 301, *infra*.

Commented [WGMR24]: Nina Olson: "in writing or in the presence of the adjudicator"?

Commented [LR25]: Concern regarding the precision here. While it lends itself to interpretation that "presiding adjudicator" could mean to the tribunal through a filing, or by mere presence sitting with the representative at counsel table, the plain language interpretation -- consent must be provided directly to a presiding adjudicator -- would be operationally burdensome on all involved.

Commented [LR26]: Would it be against any relevant authority to say "...identify the representative by name OR affiliation"? I ask because it would be administratively efficient for at least some agencies to recognize firms or entities as representatives, and not just individuals, which is more consistent with modern business practices (this is true in the Social Security law context but SSA does not currently recognize firms as representatives).

Commented [MG27R26]: Cross reference to 209? Also noting an accredited organization.

Commented [MG28R26]: Move to official comment?

Commented [LV29R26]: See comment 2

Commented [LR30]: If "presiding adjudicator" is maintained above, perhaps, "The Agency may provide systematized methods of providing consent, including through filings with the Agency, such as:…".

Commented [MG31]: Needs an "and" or "or."

Commented [LV32]: This is just a stab at what the subcommittee discussed in the first meeting; maybe it should go in the official comments?

Commented [LV33]: I meant for this to be less passive than the original note, but am not sure it is better.

Commented [LR34]: Must there also be participant consent to honor the representative's withdrawal?

Commented [LAR35]: Has ACUS evaluated whether retroactive application of this point would impact existing agency operations/processes?

Commented [LR36]: If consent is required, and intended to be accepted verbally, can the Agency provide case information to the representative in advance of the first hearing? These seems to present a challenge it effective representation.

Commented [LAR37]: What if representative withdraws? This is another situation where the Government is overseeing fee arrangements. Strongly advise against this part of the provision.

Commented [LV38R37]: This rule only governs consent of the participant. I am updating the withdrawal provisions (those not based on consent) in Rule 307 to include a similar comment about handling fees when rep withdraws. Wh … [4]

Commented [MG39R37]: Resolved but pinned in case Lauren attends a future meeting.

202. Representation by ~~Licensed Lawyer~~Lawyers

(A) ~~Licensed l~~Lawyers may serve as representatives in an agency adjudication:

(1) In accordance with the Agency Practice Act, 5 U.S.C. § 500, or other applicable statute; or

(2) In accordance with any [Agency] regulation authorized by statute.

(B) ~~Licensed lawyer~~Lawyer representatives must affirm to [the designated agency official] that they are a member in good standing of [their licensing jurisdiction] and are not otherwise prohibited by law from acting as a representative.

Official Comment

1. (to subsection (A)(1), (2)): Some agency enabling acts specifically allow for additional credentialing of lawyer~~attorney~~ representatives. Consistent with its statute, the Department of Veterans Affairs (VA) has adopted a detailed accreditation process. *See* 38 U.S.C. § 5904(a)(2) (allowing the VA to establish accreditation standards beyond those contained in the Agency Practice Act). The VA process, however, still defers heavily to bar membership as evidence of a representative's qualifications. State bar membership in good standing creates a presumption that the lawyer~~attorney~~ representative meets the agency's character and fitness requirements for representatives upon submission of a "self-certification" by the representative to the Office of General Counsel of admission to practice "before any other court, bar, or State or Federal Agency." 38 C.F.R. § 14.629(b)(1)(i), (ii).
2. (to subsection (A)): Individual agencies may wish to specify which licensing jurisdictions qualify a lawyer~~n attorney~~ to serve as a representative. The Agency Practice Act makes clear that any lawyers~~attorney~~ who is a "member in good standing of the bar of the highest court of a State may represent a person before an agency." 5 U.S.C. § 500(b). Some agencies define the range of acceptable licensing jurisdictions more broadly. For instance, the Securities and Exchange Commission also permits lawyers~~attorneys~~ admitted to practice before the Supreme Court of the United States or the courts of Puerto Rico or the Virgin Islands to serve as representatives in agency adjudications. 17 C.F.R. § 201.102(b). The Social Security Administration permits lawyer~~attorney~~ representatives to practice before the agency provided they are licensed "to practice law before a court of a State, Territory, District, or island possession of the United States, or before the Supreme Court or a Federal court of the United States." *See* 20 C.F.R. § 404.1705(a). Adjudications that regularly involve foreign parties may consider permitting ~~attorneys~~ lawyers who are licensed outside the United States to serve as representatives in those proceedings.
3. (to subsection (B)): Affirmation of good standing may be provided orally or in writing, and must be included in the official record of the proceeding.

Commented [MG40]: We will use "licensed lawyer" – if just "lawyer," we must define "lawyer" as someone who has passed the bar to practice in the venue in which the representation occurs.

Commented [MG41]: Declare, state

Commented [SD42]: Suggested edit.

Commented [LR43]: "...or other agency record." DOJ/EOIR has a registry for those who are able to represent noncitizen respondent before the agency. Their affirmation of good standing is part of their ongoing eRegistration and is not held specifically as part of each hearing record, but is held by the system as a whole.

4. (to subsections (A), (B)): Agencies are encouraged to maintain records of ~~attorney~~ lawyer representatives who are qualified to practice before them.

Commented [JT44]: Were all the conditions in Section 203 addressed in a following section?

203. Representation by Non-Lawyers

(A) A non-lawyer may serve as a representative in an agency adjudication if the representative is determined to have the necessary qualifications to serve in that role, unless prohibited by law.

(B) Non-lawyers granted limited permission to practice law by a State or other jurisdiction approved by [the Agency] to grant such permission are presumptively qualified to serve as representatives on matters within the scope of their limited permission to practice.

Official Comment

1. The term non-lawyer is used to describe individuals who are not licensed to practice law. While this is not the only term or phrase that could be used to describe this group, it was chosen by the committee for use in these rules because it is consistent with references to the same group in two prior ACUS recommendations and a recent (2023) report from the Legal Aid Interagency Roundtable. *See* Admin. Conf. of the U.S. Recommendation 2021-9, Regulation of Representatives in Agency Adjudicative Proceedings, 87 Fed. Reg. 1721 (Dec. 16, 2021); Admin. Conf. of the U.S. Recommendation 86-1, Nonlawyer Assistance and Representation 51 Fed. Reg. 25641 (June 19, 1986); Legal Aid Interagency Roundtable, Access to Justice in Federal Administrative Proceedings: Nonlawyer Assistance and Other Strategies (2023), https://www.justice.gov/d9/2023-12/2023%20Legal%20Aid%20Interagency%20Roundtable%20Report-508.pdf.
2. (to subsection (A)): This rule is designed to freely permit any non-lawyer consented to by the participant to act as a representative. It allows for disqualification of a chosen representative only in cases where there is some indication that the representative will not be willing or able to act in the best interests of the represented participant. Relevant factors in determining qualifications of representatives are provided in rule 204.
3. (to subsection (A)): Former agency employees who are non-lawyers are not precluded from serving as representatives provided they are qualified to do so under rule 204. 5 U.C.S. § 500(d)(3).
4. (to subsection (B)): For example, ~~Washington~~ Alaska provides that "[a] person not admitted to the practice of law in this state may receive permission to provide legal assistance in a limited capacity" when supervised by Alaska Legal Services Corporation. ~~limited permission to practice for "limited licensed technicians."~~ Order No. 1994, "Adopting Bar Rule 43.5 concerning waivers for non-lawyers trained and supervised by Alaska Legal Services Corporation" (Alaska Nov. 29, 2022). Wash. R. Admission to Practice 28. Representation qualification based on limited permission to practice is in addition to qualification for non-lawyers based on a license, rule 205, or due to individual accreditation through the agency, rule 207 or membership in an accredited organization. *See* rule 208.

Commented [MG45]: Deal with this issue in the definition of non-lawyer.

Commented [KL46]: There's a parallel movement in the states, ie experimenting with new categories of people who don't have a law degree but do provide legal information, advice and/or representation, not unlike many federal agencies allow in adjudicatory proceedings. Because no one wants to define a category of people by a negative ("*non*-lawyer), many different names and labels are being used. A sampling includes: allied legal professional, community justice workers, justice workers, navigators (*generally* limited to people who provide legal information not advice or representation), lay legal advocate, limited license legal technician, qualified tenant advocate, and more.

It's quite the can of worms for model rules intended to apply to multiple processes in many different agencies. On the other hand, these are "*model*" rules so it seems worth the exercise to see if there's a better reference than "non-lawyers". Maybe something like "approved representative"?

Commented [LAR47R46]: Is someone considered a non-lawyer if they are an attorney who is no longer licensed? Some states provide ability to practice for unlicensed attorneys in emeritus or pro bono status. Recommend consideration as to whether to include an official comment to avoid implication that someone who is suspended or disbarred is able to appear as a non-lawyer outside of the state in which they were licensed

Commented [MG48]: Definition and exceptions (translator, power of attorney, "in loco parentis")

Commented [JS49]: "By the [Agency]" suggests that the determination is made at the agency level, presumably in accordance with uniform criteria, and not by the individual adjudicator. But Rule 204 says the determination is to be made by the adjudicator. Should this read, "but the adjudicator"?

Commented [LR50]: Should this mirror the consent language of the attorneys section?

Commented [JS51]: The text of the rule does not say what the comment does. The comment is much more permissive, and I think preferable. The comment requires a showing that the representative is **not** willing or able to act in the best interests of the participant, whereas the language of the rule seems to require an affirmative showing of qualifications. Those are different standards. The fact that a representative does not have knowledge, experience, or education of the type described in Rule 204 does not necessarily mean t ... [5]

Commented [JS52]: I suggest using a state other than Washington as an example, such as Oregon. Washington has sunsetted its program and is not allowing new entrants, although current licensees are allowed to continue to practice.

Commented [SD53R52]: Concur with Jim. I'd recommend replacing this language with a discussion of the Alaska Supreme Court rules governing the practice of Community Justice Workers.

204. Qualifications for Non-Lawyer Representatives

(A) Among the factors to be considered in determining if a non-lawyer representative has the necessary qualifications to serve are:

(1) the representative's relationship to the represented participant;

(2) the representative's knowledge of the relevant subject matter;

(3) the representative's experience, if any, relating to the subject matter of the adjudication;

(4) the representative's education or training in matters relevant to the adjudication;

(5) the representative's expertise or skills in relation to the adjudication;

(6) the representative's character and professionalism;

(7) whether the representative has a pending charge or has been convicted of a crime that reflects adversely on the representative's fitness to serve as a representative before the agency; and

(8) whether the representative has knowingly disobeyed or attempted to disobey agency rules or adjudicator directions, or has assisted others in doing so.

(B) A non-lawyer representative will be presumed, subject to rebuttal, to lack the necessary qualifications to serve if the representative was previously disqualified or suspended from acting as a representative in the same or similar proceeding within the agency.

Official Comment

1. (to subsection (A)): The qualifications for non-lawyer representatives are not meant to limit non-lawyers' ability to act as representatives. They are designed to ensure only that a chosen non-lawyer representative is willing and able to act in the best interests of the represented participant. Determinations regarding a non-lawyer representative's qualification under this rule should be made with deference to the participant's choice of representative.
2. (to subsection (A)): Determinations as to whether a non-lawyer is qualified under these rules may be made by the presiding adjudicator with respect to the representative's qualifications to participate in a specific proceeding, or by [the designated agency official] in cases where a representative's qualifications have been previously established under ~~Rules~~ rules 205-208.
3. (to subsection (A)): The first four factors to be considered in determining whether representation by a non-lawyer would be detrimental to the represented participant are derived from existing standards set by the Social Security Administration and the Department of Labor. 20 C.F.R. § 404.1705(a); 29 C.F.R. § 18.22(b)(2). Factors 7 and 8 are included in item 3(l) of ACUS Recommendation

Commented [JS54]: This language is open-ended and gives great discretion to the adjudicator. It would permit an adjudicator who is hostile to any non-lawyer participation to prohibit it in all cases. I would prefer a presumption in favor of the participant's choice and consent and a required showing like that described in the first comment to Rule 203.

Commented [LR55]: Request an official comment that allows for the consideration of access to support that can provide the expertise, skills, etc. if proper training (and other factors) are present.

Commented [Wirth56]: Can these be combined?

Commented [KL57]: I think we agreed to get rid of references to "character" determinations for nonlawyers in section 204. "Character and fitness" was deleted from two places but Sec.204 (6) still says "the representative's character and professionalism". Seems (6) should be deleted as well.

Commented [Wirth58R57]: Suggest changing to: whether there is any indication that the representative will not be willing or able to act in the best interests of the represented participant.

Commented [Wirth59]: Do we want to add, per comments to Rule 319:
C. A nonlawyer representative must report any circumstances that may affect their qualification within thirty (30) days of the change.

Commented [JS60]: See my comment to the comments to Rule 203. This language is very different from the text of the rule. I far prefer this language. The text of the rule requires no showing of detriment to the participant.

2021-9. Admin. Conf. of the U.S. Recommendation 2021-9, Regulation of Representatives in Agency Adjudicative Proceedings, 87 Fed. Reg. 1721 (Dec. 16, 2021).

4. (to subsection (A)): If the presiding adjudicator believes there is an additional reason why a non-lawyer representative does or does not have the requisite qualifications to serve as a representative in a specific proceeding, the adjudicator may consider that reason in their analysis. For example, a lawyer who was, but is no longer, licensed to practice law shall be treated under these rules as a non-lawyer representative. *See* Rule 100(L), *supra* (defining "lawyer" under these rules). The circumstances under which the individual ceased to be licensed will be relevant to their qualifications under rule 204. A former lawyer who allowed their license to expire in retirement, for instance, may have very strong qualifications under rule 204 based on their relevant experience and expertise, while an equally experienced individual who was disbarred for unethical conduct may not qualify to serve as a non-lawyer representative due to a lack of character or professionalism.

Commented [LV61]: For the working group: Do we need this, or does it give the adjudicator too much discretion?

Commented [SD62R61]: I would say yes, but that the other reason must be disclosed to the party and the proposed representative and the representative have the opportunity to rebut the reason. I also note that allowing this factor to be considered with respect to non-lawyers but not attorneys perpetuates inequities in the treatment/perception of lawyers versus non-lawyers.

Commented [LAR63]: Concern regarding the language affirmatively providing that retired attorneys can be "non-lawyer representative[s]" without additional context or deference to agency interpretation. EOIR does not permit former attorneys to become accredited representatives. (Also commenting on Section 205, Official Comment 1.)

~~206~~205. Non-Lawyer Representatives with ~~Professional~~ Licenses

(A) Non-lawyers who retain [~~examples of~~ specific relevant professional licenses for the Agency] or other ~~professional~~ licenses relevant to the subject matter of the adjudication should be presumed to have the requisite ~~character and fitness~~qualifications to serve.

(B) The presumption of ~~fitness~~ qualification for a ~~professionally~~ licensed, non-lawyer representative described in subsection (A) depends on the representative being a member in good standing of their ~~professional~~ licensing ~~organization~~ jurisdiction at the time of the representation and ~~are~~ not being otherwise prohibited by law from acting as a representative. ~~Non-lawyer representatives may demonstrate that they are a member in good standing of the licensing organization by filing a certification of good standing with the presiding adjudicator or some other official designated by the [Agency] for that purpose.~~

Official Comment

1. Lawyers who are no longer licensed to practice law shall be treated as non-lawyers under these rules. *See* Comment 4 to rule 204.

~~1.~~2. (to subsection (A)): For example, t~~T~~he Agency Practice Act expressly permits certified public accountants to act as a representative in adjudications before the Internal Revenue Service. 5 U.S.C. § 500(c). ~~Other examples of professional licenses that may be relevant to a proceeding are a medical license in SSA disability adjudications or an engineering license in environmental permitting hearings.~~

3. (to subsection (A)): The question of whether a license is in a field relevant to the subject matter of the adjudication is a question for the [designated Agency official], but should be interpreted broadly to include any field that may provide the representative with experience, education, or training that may be useful in the adjudication.

~~2.~~4. (to subsection (A)): ~~Professional~~ Relevant licenses may be broadly construed to include ~~a~~ recognition of any of the qualification(s) in rule 204 by ~~recognized~~ an established accreditation system ~~within a jurisdiction, such as a licensed social worker or health care professional being deemed qualified to serve as a representative in a social security benefits proceeding.~~

~~3.~~5. (to subsection (B)): Being a member in good standing of a ~~professional~~ licensing jurisdiction includes not being under active suspension or disbarment by that jurisdiction from engaging in the licensed ~~professional~~ activity. *See, e.g.*, 38 C.F.R. § 14.633(c)(5) (VA).

Commented [LR64]: Recommend some narrowing here, i.e., what is a "license"? Must it be Government-issued?

Commented [MG65]: David: This is too broad. It would appeal to allow orthopedic physicians to represent claimants in disability applications. Can we remove or soften?

Erin: Might need to be more precise here, to define "relevant to the subject matter."

Bill: I thought the target population here was groups licensed to be representatives (CPAs vis-a-vis IRS? Paralegals? VSOs?). Perhaps be more precise in our examples and descriptions.

Commented [JS66]: Suggested edit.

Commented [MG67]: David: Replace examples.

Commented [MG68R67]: Workgroup eliminated examples. Recommendation to consider providing additional examples, as available.

Commented [LR69]: See comment above.

~~207~~206. Law Students and Law Graduates as Representatives

(A) Current law students and law graduates who are not ~~yet~~ licensed to practice law may serve as non-lawyer representatives provided they:

(1) ~~act~~ Act under the supervision of a lawyer~~licensed attorney~~ or faculty member; and

(2) ~~a~~Are appearing without direct or indirect renumeration for their services from the party they are representing. ~~do not receive renumeration for their services.~~

(B) Law students or unlicensed law graduates who qualify to serve as representatives under subpart (A) must submit a statement certifying that they are under the supervision of a ~~licensed attorney~~lawyer or faculty member to the presiding adjudicator or any other official designated by the [Agency] for that purpose.

Official Comment

1. (to subsection (A)): The requirements for law students or unlicensed law graduates to serve as representatives do not apply to law students or law graduates who qualify as representatives because they are accredited non-lawyer representatives under rule 208 or designated as representatives by accredited organizations under rule 209.
2. (to subsection (A)): Current law students or law school graduates who are not yet licensed to practice law should be encouraged by agencies to serve as representatives under the supervision of a lawyer or an accredited representative or organization under these rules when they are otherwise qualified to serve as a non-lawyer representative. ~~Encouragement of students/graduates appearing with supervision.~~ This would include students participating in a supervised law school clinic, externship, or supervised pro bono opportunity. This subsection does not preclude current law students or law graduates who are not yet licensed to practice law from qualifying as non-lawyer representatives under rule 204.
~~1.~~3. (to subsection (A)): Direct or indirect renumeration would not include a stipend~~, etc.~~, but would include a salary or other compensation from a legal organization that was paid for services in connection with the representation.

Commented [LR70]: Suggested edit.

Commented [MG71]: Issue for follow up.

Commented [LR72]: Can the statement be submitted for the record as opposed to submission to a specific individual(s)?

Commented [LV73]: I think this captures what we discussed in the subcommittee meeting, but defer to the group.

Commented [SD74]: I'm not sure exactly what this means. Does it mean salary paid by an organization that is retained and paid by the party to represent them, like a firm? I assume it means the latter but would recommend clarifying.

~~208~~207. Accreditation of Non-Lawyer Representatives

(A) For non-lawyer representatives who do not hold other, relevant professional licenses in accordance with rule 20~~56~~, and as permitted by applicable law, the [Agency] may establish an accreditation system to ensure that such non-lawyer representatives have the necessary ~~character and fitness~~qualifications to serve.

(B) Any such accreditation system should include the criteria in rule ~~205~~204, as well as any additional criteria the [Agency] deems appropriate and relevant to establish a representative's ~~character and fitness~~qualifications.

(C) The Agency may decide that ~~A~~accreditation may operate prospectively to establish a presumption of ~~character and fitness~~qualification for the representative in future proceedings, but not for more than 3 years from the date of initial accreditation.

(D) If ~~the~~ an accredited representative engages in conduct ~~after receiving accreditation~~ that is inconsistent with the accreditation requirements, their accreditation may be revoked by the [Agency].

(E) An accredited representative must report to the Agency any circumstances that may affect their accreditation status within thirty (30) days of the change.

Official Comment

1. (to subsection (A)): For an example of an accreditation process for non-lawyer representatives, see the system adopted by the VA, 38 C.F.R. § 14.629(b). The United States Patent and Trademark Office also has a process for registering non-lawyer agents to serve as representatives in patent adjudications. 37 C.F.R. §§ 11.6, 11.7.
2. (to subsection (B)): Such additional criteria may include evidence ~~of good moral character and reputation or~~ of specific educational or other technical qualifications relevant to the proceedings, as well as whether the representative is accepting compensation for their services. 37 C.F.R. § 11.7; 38 C.F.R. § 14.630.
3. (to subsection (C)): The prospective nature of accreditation is designed as a benefit to representatives who are likely to appear before the agency in multiple proceedings during the applicable time frame. The [Agency] may elect to require accredited representatives to complete specified requirements, such as ~~CLE~~ continuing education courses, to maintain their accreditation during the designated period.
4. (to subsection (D)): Revocation shall be at the discretion of the presiding adjudicator in a given proceeding or [a designated ~~[~~Agency~~]~~ official]. Revocation should occur if at any time there exists evidence demonstrating that the representative engaged in conduct that would have prevented their accreditation in the first instance.

Commented [JS75]: Should the reference be to Rule 204? I don't understand what the Rule 205 criteria are for representatives who don't hold professional licenses.

Commented [JS76]: Could an agency require accreditation of **all** non-lawyer representatives, and, as an accreditation requirement impose more restrictive requirements than those in Rule 204?

Commented [LR77]: Recommend including a comment (if not part of the section) that the representatives must agree to notifying the Agency of any such change in their qualifications after accreditation. Further recommend there be a requirement for an occasional renewal of the accreditation (e.g., three years).

Commented [Wirth78R77]: Would 207(E) and comment 5 be sufficient?

Commented [JS79]: See comment above. Could this be required of **all** non-lawyer representatives?

Commented [SD80]: Presiding adjudicator?

~~4.~~5. (to Subsection (E)): The agency may require the accredited representative to report the change in their status, including loss of accreditation, to all offices where they have pending ~~cases~~proceedings~~, including loss of accreditation~~.

~~209~~208. Accreditation of Organizations

(A) The [Agency] may provide accreditation for organizations, which may in turn designate members of their organization as representatives in [Agency] adjudications.

(1) If the [Agency] decides on its own to pursue accreditation for an organization, it should require the organization to submit documentation to the [Agency] establishing that the organization meets the accreditation requirements of rule ~~210~~209.

(2) An organization may submit a request for accreditation to the [Agency]. Such requests for accreditation must be accompanied by ~~documentary evidence~~documentation from the organization establishing that it meets the accreditation requirements of rule ~~210~~209.

Official Comment

1. (to subsection (A)): The ~~Department of Homeland Security and~~ Department of Justice Executive Office of Immigration Review (EOIR) defines an accredited representative as "[a]n individual whom EOIR has authorized to represent immigration clients on behalf of a recognized organization, and whose period of accreditation is current and has not expired." 8 C.F.R. § 1292.1(a)(4). EOIR accredits representatives for both itself and the Department of Homeland Security.~~both use organizational accreditation to identify representatives in immigration hearings. 8 C.F.R. § 292.1(a)(4) (defining a qualified representative as a "person representing an organization . . . who has been accredited by the Board")~~; *See also* EOIR, Accredited Representatives Roster, *available at* https://www.justice.gov/eoir/page/942311/download.

Commented [JJ81]: The concept of general accreditation for law firms as an organization, as opposed to the accreditation of individual attorneys employed by that firm, may be a concern.

Commented [LR82]: "An individual whom EOIR has authorized to represent immigration clients on behalf of a recognized organization, and whose period of accreditation is current and has not expired. A partially accredited representative is authorized to practice solely before DHS. A fully accredited representative is authorized to practice before DHS, and upon registration, to practice before the Immigration Courts and the Board [of Immigration Appeals]." 8 CFR 1292.1(a)(4). Please note that DHS does not identify/accredit representatives; rather, DOJ/EOIR accredits representatives to appear before both agencies.

~~210~~209. Requirements for Organizational Accreditation

(A) Law firms~~,~~ or ~~Non~~non-profit religious, charitable, social service, or similar organizations established in the United States may be accredited by the [Agency] to designate representatives to participate in agency adjudications if those organizations:

(1) have adequate experience, education, knowledge, and information to render the organization fit to identify qualified representatives ~~of requisite character and fitness~~; and

(2) make only nominal charges and assess no excessive membership dues for accredited representatives~~ed participants~~.

(B) If an accredited organization ~~within the meaning of~~described in subsection A no longer satisfies the accreditation requirements, representatives designated by the organization shall no longer be permitted to ~~serve participate/~~represent parties in agency adjudications and the organization's accreditation shall be revoked until such time as the organization is able to come into compliance with those requirements. An accredited organization and representative must report to the Agency any circumstances that may affect their accreditation status within thirty (30) days of the change in circumstances.

(C) This rule does not apply to legal licensing organizations, such as state bar associations.

Official Comment

1. (to subsection (A)): The requirements are derived from those set forth by the Department of Justice Executive Office for Immigration Review ~~Homeland Security for its organization accreditation program~~. 8 C.F.R. § 292.2. Some agencies prefer to only accredit organizations established in the United States.
2. (to subsection (B)): To the extent reasonably possible, presiding ~~Adjudicators~~ adjudicators ~~in individual adjudications~~ should not permit non-lawyer representatives who were designated by unaccredited organizations or organizations that no longer meet accreditation requirements to participate in proceedings over which that adjudicator presides~~adjudications before the [Agency]~~.
3. (to Subsection (B)): The agency may require the accredited organization and representative to report the change in their status to all offices where they have pending cases, including loss of accreditation.

~~2.~~4. (to subsection (C)): members of legal licensing organizations would ostensibly be governed by the rules pertaining to representation by ~~attorney~~lawyers in ~~rule~~ rule 202.

Commented [WGMR83]: Comment from Lea Robbins: I know this was derived from DHS rules, but I'm curious if there are reasons against expanding "organizational accreditation" to private law firms...

Commented [LR84]: Based on our experience at DOJ/EOIR, strongly caution against this practice.

Commented [SD85]: "Described in"? I'm not sure "meaning" is the right word here because (A) is not a definition.

Commented [SD86]: "Participate" or "represent parties" for consistency with rules' overall usage?

Commented [SD87]: Suggested edit.

Commented [LR88]: DHS does not accredit representatives. See comment above.

Commented [LR89]: It would be very difficult to make this determination in real time.

REPRESENTATIVE CONDUCT

300. In General

(A) Unless explicitly stated otherwise, these rules governing the conduct of representatives in agency adjudications apply equally to lawyer and non-lawyer representatives.

(B) Nothing in these rules should be construed to limit ~~or in any way amend lawyer~~ lawyer representatives' obligations under other applicable rules of conduct.

Official Comment

1. (to subsection (A)): The applicability of these rules to ~~lawyer~~ lawyer representatives is limited to the extent that it only "affect[s] such attorney's participation in a particular proceeding before it," rather than ~~leading~~ imposing~~to~~ some disciplinary or other remedial measures impacting a lawyer's ~~lawyer's~~ ability to serve as a representative in a separate proceeding. *See* ABA Section of Administrative Law and Regulatory Practice, Report to the House of Delegates: Resolution, 2, n.2 (February 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing ~~attorney~~lawyer representatives in agency adjudication).
2. (to subsection (B)): The phrase "other applicable rules of conduct" includes the "applicable rules of conduct for the jurisdiction(s) in which the attorney is licensed to practice." 29 C.F.R. § 18.22(c). ~~None of these rules are intended to be inconsistent with other professional conduct rules governing lawyer representatives. If they are found to be potentially inconsistent, they should, wherever possible, be interpreted in accordance with the applicable rule(s) of professional conduct for attorneys.~~

Commented [MG90]: Comment from George Cohen: Not clear how this is supposed to work with Rule 8.5(b)(1).

Commented [MG91]: Comment from George Cohen: I think sanctions under these rules could "lead to" other disciplinary actions, even if they are not treated as sanctions triggering reciprocal discipline. ALJ's could, for example, refer lawyers to disciplinary authorities.

Commented [LV92]: I am not sure this is necessary, but left it in to get the subcommittee's thoughts.

301. Scope of Representation and Allocation of Authority Between Participant and Representative

(A) A representative shall act in accordance with the represented participant's decisions concerning the ~~proceeding~~objectives of the representation, including any decisions relating to resolution of the proceeding, such as settlement. A representative is not necessarily required to seek the participant's authorization with respect to technical or tactical matters pertaining to the proceeding about which the representative has relevant knowledge or expertise that the participant does not.

(B) A representative may take such action on behalf of the participant as the representative is explicitly or impliedly authorized to carry out in connection with the proceeding.

(C) Representation does not constitute an endorsement of the represented participant's political, economic, social, or moral views or activities.

(D) A representative shall not counsel or assist a represented participant to engage in conduct that the representative knows is ~~unlawful~~criminal or fraudulent, but a representative may counsel or assist the participant in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(E) A representative shall not solicit a participant when the representative has received adequate notice from the participant that the participant does not want to receive further communications from the representative~~A representative shall not solicit a participant who has given the representative sufficient notice that they do not wish to be represented by them~~~~the participant does not wish to be represented by that representative~~.

Official Comment

1. (to subsection (A)): The participant may, at the outset of or during the proceeding, authorize their representative in advance to take specific action, and the representative may rely on that authorization absent a material change in the circumstances surrounding the action. Conversely, the participant may revoke the advance authorization at any time. Such revocation precludes the representative from relying on the advance authorization.
2. (to subsection (A)): ~~A representative is not necessarily required to seek the participant's authorization with respect to technical or tactical matters pertaining to the proceeding about which the representative has relevant knowledge or expertise that the participant does not.~~ In the case of ~~attorney~~lawyer representatives, or in some cases non-lawyer representatives with specific technical expertise or a relevant license under rule 205, this will likely include procedural and other tactical decisions pertaining to the conduct of the proceeding. Other non-lawyer representatives should consult with the represented participant to ensure that the participant is informed and able to retain the desired measure of control over the proceeding.

Commented [LV93]: Note that only the USPTO and JAG currently have rules addressing scope of representation.

This rule, like that of both the USPTO and JAG, tracks the language of ABA Model Rule 1.2 and its comments.

Commented [MG94]: Edit by Jim Sandman: My edit is to conform to the language of Rule 1.2(a) of the Model Rules of Professional Conduct. "Concerning the proceeding" would encompass procedural matters, which comment 2 says are for the representative. The language of MRPC Rule 1.2 reflects the difference between "ends" and "means" that seems to be intended here, but that "concerning the proceeding" doesn't capture.

Commented [MG95]: Comment from Jim Sandman: This concept should be in the rule itself and not just in a comment. See Model Rule of Professional Conduct 1.2 (a) for wording.

Commented [MG96]: Comment from George Cohen: Is this necessary given Rule 310[C}?

Commented [MG97]: Comment from George Cohen: Why not "criminal or fraudulent," as in Rule 1.2(d)? Is violation of an agency rule "unlawful"?

Commented [MG98]: Comment from George Cohen: I would say "the participant does not wish to be represented by that representative" to avoid ambiguity and other difficulties. Perhaps move to Rule 201 on Consent?

Commented [MG99]: Compare with this language:

A representative shall not solicit a participant when the representative has received adequate notice from the participant that the participant does not want to receive further communications from the representative.

And determine proper place for this in Rules as a whole.

Commented [SD100R99]: I prefer the language in the comment and ask whether the comment language should use "shall not" instead of "may not."

Commented [MG101]: Comment from George Cohen: I'm not sure a lawyer can accept advance authorization from a client to settle a matter under Rule 1.2(a).

Commented [MG102]: Comment from Jim Sandman: This concept should be in the rule itself and not just in a comment. See Model Rule of Professional Conduct 1.2 (a) for wording.

3. (to subsection (B)): Implied authorization is determined in the context of the representative's relationship with the participant and the representative's role in the proceeding. ~~For example, authorization should be presumed for an attorney representative making procedural or other tactical decisions within the proceeding.~~ ~~Non-lawyer r~~Representatives without relevant experience or expertise should consult with the participant more frequently and on a wider range of issues that arise during the proceeding, absent an advance authorization described in comment 1 above.
4. (to subsection (D)): Whether a representative knows that a participant's conduct is unlawful refers both to the representative's actual knowledge of such conduct, as well as to any willful blindness on the part of the representative to the existence and nature of the participant's conduct. ~~See Rule 1.0 (defining knowledge for purposes of these rules).~~

Commented [MG103]: Comment from Stefanie Davis: Why should authorization be presumed for an attorney? Plenty of baby lawyers handle administrative proceedings with zero or limited experience practicing in front of a tribunal and, regrettably, with little knowledgeable supervision in some instances. If the rules are intended to require a baseline level of competency in law and practice across representatives, I think the commentary should avoid appearing to give attorneys more leeway and less responsibility to consult with their clients than they expect from other qualified representatives.

I'm also trying to figure out how it makes sense for a party represented by a lawyer would be entitled to less interest or voice in making tactical decisions than one who is not. I feel like I must be missing something.

302. Competence

(A) A representative must provide competent representation to a represented participant.

(B) Competent representation requires the relevant knowledge, skills, preparation, and thoroughness to reasonably represent the participant in the proceeding.

(C) A clear lack of competence on behalf of a representative may be grounds for removal of that representative from the proceeding by the presiding adjudicator [or ~~[~~any other responsible Agency official]~~or dismissal of the representative by the represented participant~~.

Official Comment

1. (to subsection (B)): Preparation and thoroughness include understanding the relevant legal issues and evidence and investigating the relevant facts and law. Sufficiency of the preparation may depend upon the status or role of the representative. For example, a family-member representative might be held to a different expectation than a~~n attorney~~lawyer. ~~a good faith attempt on the representative's behalf to understand the relevant legal issues and evidence in the case.~~
2. (to subsection (C)): Removal of a representative by the [responsible Agency official] for lack of competence should be reserved for situations where the adjudicator determines that the representative no longer exhibits sufficient qualifications under R~~r~~ule 204. In such instances, the [responsible Agency official] should consult with the represented participant before rendering a decision.
3. (to subsection (C)): Termination of a representative by the represented participant is governed by rule 307. A lack of competence is presumed a valid grounds for termination under rule 307.

Commented [MG104]: Comment from George Cohen: I don't think dismissal by the participant should be limited to a "clear" lack of competence.

Commented [WM105]: Do you want to add a comment that competence requires knowledge of the benefits and risks of technology?

Commented [MG106]: Comment from George Cohen: Why is "good faith" the standard? Usual standard is reasonableness. Why limit to "understanding" the "legal issues and evidence"? What about inquiry into the facts and law?

Commented [MG107]: Comment from Stefanie Davis: The representative's part? Not sure behalf is the correct term here.

Commented [MG108]: Edit by Jim Sandman

303. Diligence

(A) A representative should act promptly and diligently in ~~their representation~~representing a participant.

(B) Diligent representation requires that the representative not undertake the responsibility of serving as a representative if ~~they do~~the representative does not have adequate time and resources to do so competently.

(C) Promptness requires a representative to meet all filing and other deadlines associated with the proceeding, including deadlines for responses to requests for information. It is not a violation of a representative's duty to act promptly to request reasonable extensions of applicable deadlines from the adjudicator [or ~~[~~other responsible Agency Official].

(D) ~~Notwithstanding a withdrawal from representation pursuant to rule 307, d~~Diligence requires a representative to carry through to completion all tasks pertaining to the representation, including an appeal of an adverse decision if the represented participant so decides.

(E) If the represented participant demonstrates diminished capacity to make considered decisions on their own behalf, the representative should as far as reasonably possible, maintain a normal participant-representative relationship with the participant, and continue to represent the participant's interest in the proceeding. If the representative cannot adequately represent the participant's interest and believes the participant is at risk of substantial harm due to the participant's diminished capacity, the representative may take protective action.

Official Comment

1. (to subsection (B)): The term "competently" refers to ~~Rule~~rule 302.

~~1.~~2. (to subsection (D)): This is true ~~U~~unless the representative has withdrawn under ~~Rule~~rule 307 or the participant has withdrawn their consent to the representation under ~~Rule~~rule 201.

~~2.~~3. (to subsection (E): "Protective action" may include consulting with individuals with the ability to protect the participant, such as family members or professional services. It could also include employing surrogate decision making tools like durable powers of attorney or consulting appropriate resources, such as agencies for aging, long-term care, or adult protection. In all cases, ~~the protective~~protective action should be taken in the participant's best interest.

Commented [MG109]: Comment from George Cohen: Rule 1.3 adds a reasonableness requirement

Commented [MG110]: Edit by George Cohen.

Commented [MG111]: Edit by George Cohen.

Commented [MG112]: Comment from George Cohen: Is this intended to be a strict liability rule?

Commented [MG113]: Comment from George Cohen: This is very different from Rule 1.4 cmt. [4], which says a lawyer should carry through to conclusion matters undertaken UNLESS the relationship is terminated pursuant to Rule 1.16.

Commented [MG114]: Comment from George Cohen: It is unclear what this means. Rule 1.14 says that a lawyer should try to maintain a normal lawyer-client relationship to the extent possible. This sounds like a representative can just make decisions for the participant, which Rule 1.14 discourages.

Commented [MG115]: Comment from Stefanie Davis: Does this include relevant government agencies, like those on aging or long-term care?

304. Communication

A representative must reasonably communicate with their represented participant to ensure that the participant is able to make informed decisions pertaining to the objectives of the representation.

Official Comment

1. Communication from a representative to their represented participant should be done ~~in~~ using terms and in a language that the participant is able to understand. *See* 8 C.F.R. § 1003.102(r) (DHS).
2. Communication should be ongoing throughout the course of the proceeding. Matters pertaining to the objectives of representation include status updates, significant developments affecting the timing or the substance of the representation, and requests for information. *Id*.

Commented [MG116]: Comment from George Cohen: Rule 1.4(b) says "reasonably necessary"

Commented [MG117]: Comment from George Cohen: Do you want to say "a" language? Is it OK to use a translator?

305. Organization as a ~~Client~~Participant

A representative representing an organization as a participant in a proceeding represents the organization acting through the organization's duly authorized constituents. The representative's obligations with respect to an organization participant are the same as those for an individual participant.

Official Comment

1. "Duly authorized constituents" refers to individuals within the organization who have ~~ultimate~~ decisionmaking authority on behalf of the organization for purposes of the proceeding.

Commented [MG118]: Comment from George Cohen: This term is not otherwise used in the rules. Use "participant" instead.

Commented [MG119]: Comment from George Cohen: I'm not sure it makes sense to have this as a separate rule, given that it says so little. First sentence could be dealt with in comment to Rule 301. Second sentence could be dealt with in definitions.

Commented [MG120]: Comment from George Cohen: In practice, "duly authorized constituents" do not always have "ultimate" decisionmaking authority.

306. Confidentiality

(A) Except as ~~required~~ permitted by subsection (B), a representative ~~should~~ shall not reveal information relating to the representation of a participant unless the participant gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation.

(B) A representative ~~must~~ may disclose information relating to the representation of a participant in a proceeding if disclosure is necessary to:

(1) prevent death or substantial bodily harm;

(2) prevent the participant from engaging in criminal activity or committing fraud;

(3) ~~the representative defending themselves against a false accusation of wrongdoing by the represented participant~~to enable a representative to respond to an accusation of wrongdoing by the represented participant against the representative in the proceeding; or

(~~iii~~4) comply with ~~existing law~~court orders or statutes.

Official Comment

1. (to subsection (A)): *See* 37 C.F.R. § 11.106 (USPTO). Disclosure in relation to conflict checks is impliedly authorized within the meaning of this subsection.

~~2. (to subsection (B)(iii)): Disclosure may also be required in response to an order by the [responsible Agency official].~~

Commented [WM121]: Do you want to add a permissive exception for a conflict check?

Commented [MG122]: Comment from George Cohen: Why "should" as opposed to "shall"?

Commented [MG123]: Comment from George Cohen: Note this is stronger than Rule 1.6, which uses "may." I'm fine with this, but you may get pushback from the ABA.

Commented [MG124]: Comment from George Cohen: Do we want to say "disclose information to the responsible Agency official"?

Commented [MG125]: Edit by George Cohen

Commented [MG126]: Edit by George Cohen

Commented [MG127]: Comment by George Cohen: Does this include agency regulations?

Commented [MG128]: Comment from George Cohen: Why is this in a comment? Shouldn't it be part of B(iv)?

307. Withdrawal ~~and Termination~~ of Representation

(A) A representative must withdraw from representing a participant if the representation will result in violation of any of the qualification requirements under these rules or any of the rules governing representative conduct~~these rules or other law~~; the representative's physical or mental condition materially impairs the representative's ability to represent the participant; or the participant withdraws their consent to the representation under rule 201.~~representative is discharged.~~

(B) A representative must submit a written request to withdraw to the adjudicator or [other responsible Agency official] ~~to withdraw for good cause to the [responsible Agency official]~~. The written request must be included in the official record of the proceeding and be served on the participant.

~~(A)~~(C) The adjudicator or [other responsible Agency official] may permit a~~A~~ representative ~~may~~ to withdraw from representing a participant if the representative can show good cause for the withdrawal ~~and~~ or the withdrawal will not adversely impact either the proceeding or the participant's interest in the proceeding.

~~(B)(A) A representative must submit a written request to withdraw for good cause to the [responsible Agency official]. The written request must be included in the official record of the proceeding and be served on the participant.~~

(D) Withdrawal will also be allowed based on the participant's written consent and the approval of the adjudicator or [other responsible Agency official].

~~(C)~~(E) A participant may terminate the representation subject to the approval of the adjudicator or [other responsible Agency official].

~~(D) The participant may terminate the representation at any time, subject to liability for any outstanding obligations of the participant to the representative.~~

~~(E) A representative may not solicit a participant when the representative has received adequate notice from the participant that the participant does not want to receive further communications from the representative.~~

Official Comment

1. In general, in circumstances where a representative withdraws and there was an existing fee arrangement between the participant and representative relating to the adjudication, the amount, if any, of fees owed to the representative shall be determined in accordance with applicable law, including the rules herein

Commented [WM129]: Do you want to add some language that is comparable to the newly amended MR 1.16? Or at least specify in the comment that reasons for mandatory withdrawal include the participants insistence on conduct that violates the law?

Commented [MG130]: Need comment to flesh out this concept, and which rules are expected to be included, and how violation occurs (participant must require representative to violate them in course of representation).

Commented [MG131]: Comment from George Cohen: Do we want to consider a mandatory withdrawal rule for reasons such as those listed in Rule 1.16(a) (representation will violate the rules or other law; representative's mental or physical condition materially impairs the ability to serve as a representative? Or is the idea that there is no unilateral withdrawal under the rules; all withdrawals must go through the agency official? If so, maybe the rule should say that a representative may "seek to withdraw … by showing."

Commented [MG132]: Comment from George Cohen: This is different from Rule 1.16(b), which allows withdrawal if there will be no adverse impact, even if there is no showing of good cause. However, Rule 1.16[c] says that a lawyer comply with an order of a tribunal to remain in the representation even if there is good cause. Is the idea that the adjudicator cannot allow withdrawal if there is no good cause and the participant does not consent, even if there will be no adverse impact?

Commented [MG133]: Consider adding this to the rule itself.

Commented [LV134]: I was wondering if this should be its own rule prior to the scope of representation rule (301), since it really deals with the relationship between the representative and participant prior to the actual representation. I decided to put it here because I did not think solicitation merited its own rule, but I welcome the committee's thoughts.

Commented [MG135R134]: Reply by Stefanie Davis: I think it should move. Placed as it is, this paragraph seems more like it's prohibiting harassment of former clients than proscribing solicitation of a potential client.

We have spent a LOT of time thinking about and regulating on solicitation issues; we're actually starting rulemaking on that issue now. Please let me know if any of that background would be helpful.

Commented [LR136]: (Originally from Rule 201):

What if representative withdrawals? This is another situation where the Government is overseeing fee arrangements. Strongly advise against this part of the provision.

Commented [LV137R136]: In the context of Rule 307, this is a question for the working group.

regarding scope of representation. *See* ABA Model Rule of Professional Conduct 1.5; Rule 301, *infra*.

2. (To subsection (A)): The rules governing representative conduct are rules 300-319.

~~1.~~3. (to subsection (~~A~~C)): Examples of good cause for withdrawal include: the participant's insistence on advancing frivolous claims or engaging in other illegal conduct (see rule 313~~),~~,); the participant's refusal to meet its obligations to the representative, including payment of fees or expenses (see rule 308) despite notice that failure to do so could result in withdrawal~~,~~ ; the participant's insistence on pursuing an objective that the representative considers repugnant or imprudent~~,~~ ; or the representative's inability to continue to provide competent representation to the participant. *See* 49 C.F.R. § 1103.18 (STB); 37 C.F.R. § 11.116(b) (USPTO); 32 C.F.R. § 776.35 (JAG).

~~2.~~4. (to subsection (~~A~~C)): The impact of the representative's withdrawal may be mitigated by another representative agreeing to represent the participant. The withdrawing representative should take steps to protect the participant's interest in the proceeding, including providing adequate notice and, where possible, sufficient opportunity for participant to find new representation. A withdrawing representative must return any of participant's personal property and all relevant information about the representation to participant. *See, e.g.*, 20 C.F.R. § 404.1740(b)(3)(iv) (SSA). Confidentiality rules do not hinder the transfer of information relevant to the proceeding from one representative to another or from the withdrawing representative to the participant in a single proceeding.

5. (to subsections (~~C~~ D~~and~~ E)): Participant's consent must be given on the record in the proceeding to the adjudicator or [other responsible Agency official], and may be oral or in writing (including electronically).

6. (to subsection (E)): Termination of a representative should not impact the efficient conduct of the proceeding. The adjudicator or [other responsible Agency official] should freely grant withdrawal or termination upon the participant's consent, provided the withdrawal or termination will not have a materially adverse impact on the proceeding or the participant's interest therein ~~the proceeding~~. ~~The [responsible Agency official] should freely grant withdrawal upon the participant's consent, provided the withdrawal will not have a materially adverse impact on the participant's interest in the proceeding.~~

~~3.~~

~~4. (to subsection (D)): The obligations referred to in this subsection include any fees owed by the participant to the withdrawing representative for services already rendered (rule 308).~~

308. Fees

(A) Representatives may not charge unreasonable or excessive fees. When contested by the represented participant, the reasonableness of a fee shall be determined by the adjudicator or [other responsible Agency official]. Some factors to be considered in determining whether a fee is reasonable include:

(1) ~~The~~ the time and labor required;

(2) ~~The~~ the novelty and difficulty of the questions involved;
(3) ~~The~~ the skill required to properly represent the participant;
(4) ~~The~~ the fee customarily charged in the locality for similar services;
(5) ~~The~~ the amount involved and the results obtained;
(6) ~~The~~ the time limitations imposed by the participant or by the circumstances;
(7) ~~The~~ the nature and length of the representative's professional relationship with the participant; and
(8) ~~The~~ the experience, reputation, and ability of the representative.

(B) Contingent fees are allowed where otherwise permissible by law.

~~(C)(B) Reasonable costs and expenses may be reimbursed by the participant provided the costs and expenses are directly related to the representation provided in the participant's proceeding and they are disclosed to, and agreed upon by, the participant in writing in advance of their accrual.~~

(C) A fee request by a representative must be provided to the participant in advance and in writing and must be agreed to by the participant in writing before any fees are accrued.

(D) Reasonable costs and expenses may be reimbursed by the participant provided the costs and expenses are directly related to the representation provided in the participant's proceeding and they are disclosed to, and agreed upon by, the participant in writing in advance of their accrual.

Official Comment

1. (to subsection (A)): Reasonableness may also be impacted by a participant's ability to pay. A participant with a high ability to pay may not be charged more due their ability, but a participant with less ability to pay may require a lower fee in order for it to be reasonable. *See* 49 C.F.R. § 1103.20(a) (STB).
2. (to subsection (A)): *See, e.g.*, 8 C.F.R. § 1003.102(a)(1) (DHS).

Commented [LAR138]: Citation is to DOJ/EOIR regulation, not DHS.

309. Compliance with Agency Rules

Representatives must comply with Agency rules governing adjudication, including [insert the relevant Agency rules ~~for this agency~~]~~those governing the conduct of representatives in agency adjudications~~.

Official Comment

1. *See, e.g.*, Davy v. SEC, 792 F.2d 1418, 1421 (9th Cir. 1986) ("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.").
2. Standards applying to a~~n attorney~~lawyer include, in addition to agency rules, the rules of professional conduct and ethics of the jurisdictions in which the ~~attorney~~lawyer is licensed to practice. 48 C.F.R. § 65101.35(a) (CBCA); *see* rule 300(B).
3. ~~Given that attorneys' professional conduct is already regulated under state law, any remedies Any remedies for violations of agency rules by attorney representatives must be limited to the proceeding in which those violations occurred. *See* ABA Section of Administrative Law and Regulatory Practice, Report to the House of Delegates: Resolution, 2, n.2 (February 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing attorney representatives in agency adjudication). The committee does not opine to what extent an agency may wish to apply limitations to sanctions to non-lawyer representations.~~

Commented [MG139]: Comment from George Cohen: Should this be "these rules"?

Commented [SD140]: And other authorized representatives? Or are they exempt from remedies?

Commented [MG141]: Move to enforcement section?

Commented [MG142R141]: Committee approves of moving this comment to Enforcement section.

Commented [LV143R141]: Deleted comment because same sentiment is repeated several times in enforcement section

310. Candor with the Tribunal

(A) Representatives owe the tribunal a duty of candor.

(B) Candor before the tribunal means a representative may not:

(1) knowingly make a false statement of fact or law or knowingly fail to correct a false statement of fact or law in the proceeding.

(2) knowingly fail to disclose legal authority adverse to the represented participant's position to the tribunal.

(3) knowingly present false or misleading evidence in the proceeding.

(C) If a representative knows that ~~the represented participant~~a person or entity has engaged in, or intends to engage in, criminal or fraudulent conduct related to the proceeding, the representative must take remedial measures, including if necessary disclosure to the tribunal.

Official Comment

1. (to subsection (B)): A "statement" in subsection (B)(1) includes oral and written representations.

~~1.~~2. (to subsection (B)): The requirement that representatives act "knowingly" in order to violate their duty of candor reflects concerns about chilling zealous representation through over-enforcement of the candor requirement. Remedies for good faith errors or even negligent statements could cause representatives to hesitate in making creative or novel arguments sometimes required by zealous advocacy. This is especially true for non-lawyer representatives, who may have less experience presenting evidence and arguments before a tribunal than ~~attorney~~lawyer representatives.

~~2.~~3. (to subsection (B)): The prohibition on knowingly false statements does not preclude a representative from refraining to present evidence if that representative reasonably suspects or believes it to be false.

Commented [MG144]: Comment from George Cohen: Rule 3.3(b) says "a person," which is not limited to the client.

Commented [MG145]: Subcommittee suggests adding "entity" to the definition of "person."

Commented [MG146]: Addition by George Cohen

Commented [GC147]: What about willful blindness, mentioned in the comment to Rule 301(D)? Recommend adding it to the definition of "knowing."

311. Delay

A representative shall not delay the proceeding, without good cause.

Commented [LAR148]: "Good cause" is not a well-developed term in case law. Recommend definition here or substituting the term with something with well-accepted definition.

Official Comment

1. Avoiding delay is related to, but distinct from, the promptness requirement in ~~rule~~ rule 303. Promptness requires representatives to adhere to deadlines and other scheduling obligations, and failing to do so could also constitute delay in violation of this rule. The requirement to avoid delay includes the entirety of the representative's conduct relating to the proceeding, including issues like the timing, scope, and nature of discovery requests, scheduling hearings and filing deadlines, and the engagement of alternative forms of dispute resolution, in addition to adhering to established deadlines.

312. Fairness

(A) A representative must act in a manner that furthers the efficient, fair, and orderly conduct of the proceeding.

(B) A representative may not falsify or unlawfully destroy, alter, ~~, falsify,~~ or conceal ~~relevant evidence~~material with potential evidentiary value~~, including witness testimony,~~ from the tribunal or another participant in the proceeding.

(C) A representative may not make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a valid discovery request.

(D) A representative shall treat witnesses fairly and with due consideration. A representative shall not seek to conceal a potential witness or corruptly influence a witness or otherwise interfere with a witness' ability to give accurate testimony.

Official Comment

1. (to subsection (A)): Candor, diligence and promptness are all factors in the efficient, fair and orderly conduct of the proceeding. See ~~rules~~ rules 303, 311, and 312.
2. (to subsection (D)): The language of this subsection was derived from a regulation of the Surface Transportation Board, 49 C.F.R. § 1103.25(b).
~~2.~~3. (to subsection (D)): For example, a representative may not counsel or assist a witness to testify falsely. *See* ABA Model Rule of Professional Conduct 3.4(b).

Commented [GC149]: Does this add anything to Rules 303 and 311?

Commented [Wirth150]: Very similar to 314(A). Suggest deleting here.

Commented [MG151]: Comment from George Cohen: Add "unlawfully," which appears in Rule 3.4(a)?

Commented [MG152]: Comment from George Cohen: Add "alter," which appears in Rule 3.4(a)?

Commented [MG153]: Comment from George Cohen: Perhaps add the witness testimony material from Rule 312(B) here.

Commented [MG154]: Cite to ABA.

313. ~~Frivolous~~ Improper Claims

(A) A representative may not make a claim in a proceeding that the representative knows or has reason to know is false, fictitious, or fraudulent~~;~~.

(B) A representative ~~must~~ may not make a claim in a proceeding that the representative knows or reasonably should ~~have known~~know lacks an arguable basis in law or in fact, or ~~is taken~~is made for an improper purpose, such as to harass or to cause unnecessary delay.

(C) A representative's signature on any document making a claim shall constitute certification that ~~they have~~the representative has complied with subsections (A) and (B) of this section.

~~(D) Failure to comply with the requirements of this section may result in sanctions against the representative. Sanctions may include reprimand, censure, suspension from further participation in the proceeding, monetary penalties, and payment of an opposing party's fees. The represented participant shall not be sanctioned for the conduct of their representative. receive any sanctions.~~

Official Comment

1. (to subsection (A)): False, fictitious or fraudulent statements include written statements that assert a material fact which is false, fictitious, or fraudulent and written statements that omit~~s~~ a material fact and ~~is~~ are rendered false, fictitious, or fraudulent as a result of such omission. *See* 40 CFR 27.3(a) (EPA).
~~1.~~2. (to subsection (A)): This subsection also applies to claims in enforcement proceedings under rule 401.
~~2.~~3. (to subsection (B)): ~~Statements~~ Claims lacking an arguable basis in law or in fact, or taken for an improper purpose include oral and written statements and arguments, requests for discretionary relief, and filings of complaints, motions, and appeals. 8 C.F.R. § 1003.102(j).
4. (to subsection (B)): Claims have an arguable basis in ~~law or~~ fact if they have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. 40 C.F.R. § 27.3(a) (EPA).
5. (to subsection (B)): A claim or statement does not lack an adequate basis in law if it is a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. 19 C.F.R. § 210.4(c)(2) (ITC).
6. (to subsection (B)): Use of boilerplate language without any reference to the specific circumstances of the proceeding may constitute a claim or statement lacking an adequate basis in law or fact. 8 C.F.R. § 1003.102(u) (EOIR).
~~3.~~ (to subsection (C)): A signature should comply with [the agency's] rules and definitions regarding the qualifications and requirements for a valid signature.
~~4. A claim or statement does not lack an adequate basis in law if it is a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. 19 C.F.R. 210.4(c)(2) (ITC).~~

Commented [JJ155]: The word "claim" is a defined term in the VA system and is more strict than the term appears to be used in the rule (as evidenced by official comment 3). Perhaps the rule could use a different term?

Commented [Wirth156R155]: Would "Statements" work?

Commented [MG157]: Comment from George Cohen: Isn't this covered by Rule 310(B)(i)?

Commented [MG158]: Comment from George Cohen: Everywhere else "may not" is used. Should use it here for consistency.

Commented [MG159]: Comment from George Cohen: Tense should be consistent.

Commented [MG160]: Comment from George Cohen: Why "taken" as opposed to "made"?

Commented [GC161]: Suggested edit.

Commented [GC162]: Suggested edit.

Commented [LV163]: Covered by Rule 404. Only question is whether to leave the first sentence and a reference to Rule 404?

Commented [MG164]: Comment from Stefanie Davis: Stray sentence fragment.

Commented [GC165]: Why a specific sanctions section for this rule? Why not a general sanctions section applicable to all rules?

Commented [MG166R165]: To be reviewed by enforcement subcommittee for possible move to that section.

Commented [MG167]: Comment from George Cohen: Should this be "claims"?

Commented [LV168]: For committee review

Commented [GC169]: How does this square with Rule 310(B)(i)' s "knowing" requirement? Does Rule 310(B)(i) apply only to oral statements?

Commented [MG170R169]: Subcommittee suggests resolving this in definition section.

Commented [MG171]: Comment from George Cohen: This comment seems more directed to fact. Law is dealt with in next comment.

7. ~~(to subsection (B)): Use of boilerplate language without any reference to the specific circumstances of the proceeding may constitute a claim or statement lacking an adequate basis in law or fact. 8 C.F.R. § 1003.102(u) (EOIR).~~

314. Disruptive Conduct

(A) A representative must refrain from engaging in conduct that interferes with the ~~speedy~~efficient, fair, or orderly~~, or fair~~ conduct of the ~~hearing~~proceeding.

(B) A representative must refrain from engaging in ~~contumelious~~ disruptive, offensive, or otherwise obnoxious conduct in a proceeding.

(C) A representative may not engage in an act or omission related to a proceeding that wrongfully causes another person involved in that proceeding to experience material and substantive injury, including, but not limited to, incurring expenses (such as ~~attorney~~lawyer's fees) or experiencing prejudicial delay.

~~(D) An adjudicator or tribunal may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in a proceeding before them any representative or represented participant who refuses to comply with the adjudicator's directions, or who is disorderly, disruptive, or engages in contemptuous conduct.~~

Official Comment

1. (to subsection (A)): 7 CFR § 1.328(a)(3) (USDA). This includes ~~the~~ failure to act in a timely way or ~~a~~ failure to follow an adjudicator's instructions.
2. (to subsection (B)): ~~"Contumelious~~ Disruptive, offensive, or otherwise obnoxious conduct~~"~~ includes, but is not limited to, conduct that would constitute contempt of court in a judicial proceeding, as well as directing threatening or intimidating language, gestures, or actions at an adjudicator or anyone else involved in the proceeding. *See* 8 CFR § 1003.102(g) (EOIR); 20 C.F.R. § 404.1740(c)(7)(ii)(A) (SSA).
3. (to subsection (C)): 12 C.F.R. § 1209.74(a)(2) (FHFA).
4. (to subsection (D)): 10 CFR § 2.314(C)(1) (NRC).

Commented [MG172]: Edit by George Cohen. Comment: Suggested for consistency.

Commented [MG173]: Comment from George Cohen: Seems duplicative of Rule 312. And why "hearing" here but "proceeding" in Rule 314(B)-(D)?

Commented [MG174]: Comment from Stefanie Davis: I recommend replacing this with a plain language term, possibly drawing from the examples in the comment. I understand the value in mirroring existing language in agency rules but this language strikes me as particularly inaccessible to other authorized representatives (and, frankly, some lawyers).

Commented [MG175R174]: Comment from George Cohen: I know this appears in a number of agency rules but it seems archaic.

Commented [SD176]: Is the agency itself "another person" that may be materially and substantively injured by a representative's actions? If not, should "person" be changed to a defined term such as "party" or "participant"?

Commented [MG177R176]: Subcommittee recommends revisiting when defining "person."

Commented [Wirth178R176]: Recommend: participant, defined in Rule 100 above as "a party to an adjudication, or an intervenor or other interested person allowed to participate in the adjudication."

Commented [MG179]: Comment from George Cohen: This seems a little broad. What if two parties are both claiming some benefit but only one is entitled to it? If the representative helps one of them get the benefit, the other will incur a material and substantive injury.

Commented [GC180]: Why "adjudicator" rather than "tribunal"?

Commented [MG181R180]: Subcommittee refers to enforcement subcommittee for possible moving to that section. Consider also resolving this through the definitions section.

Commented [LV182]: Covered by Rule 404. Only question is whether to leave a general sentence about the possibility of sanctions and a reference to Rule 404?

Commented [GC183]: Why a separate sanctions section here? Same question as for Rule 313(D).

Commented [MG184R183]: Subcommittee refers to enforcement subcommittee for possible moving to that section.

315. Obstruction of Justice

(A) A representative may not engage in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process. Conduct prohibited by this subsection generally includes any action or inaction that seriously impairs or interferes with the adjudicative process when the representative knew or reasonably should have known to avoid such conduct, including:

(1) providing misleading or false information to the adjudicator, tribunal, or another participant in the proceeding;
(2) interfering or attempting to interfere with any lawful effort by the adjudicator or the other participants in the proceeding to obtain any record or information relevant to the proceeding; and
(3) attempting to corruptly influence witnesses or potential witnesses in the proceeding.

~~(B) Violation of subsections (A) or (B) at any phase of a proceeding may be grounds for a representative's removal or suspension from a proceeding.~~

Official Comment

1. (to subsection (A)(i)): 8 C.F.R. § 1003.102(n) (EOIR); 20 C.F.R. § 404.1740(c)(7) (SSA).
2. (to subsection (A)(ii)): 31 C.F.R. § 1020(b) (IRS).
3. (to subsection (A)(iii)): 49 C.F.R. § 1103.25(b) (STB).
4. (to subsection (B)): 12 C.F.R. § 308.6(b) (FDIC).

Commented [MG185]: Comment from George Cohen: How does this work with the "knowing" standard of Rule 310(B)(i) & (iii)?

Commented [GC186]: Why "adjudicator" rather than "tribunal"?

Commented [MG187R186]: Subcommittee suggests possibly resolving this in definition section.

Commented [LV188]: Covered by Rule 404. Only question is whether to leave a general sentence about the possibility of sanctions and a reference to Rule 404?

Commented [GC189]: Same question about a rule-specific sanctions provision rather than a general one.

Commented [MG190R189]: Subcommittee refers to enforcement committee for possible move to that section.

Commented [SD191]: Violation of subsection (A)?

Commented [MG192R191]: Subcommittee refers to enforcement committee for possible move to that section.

316. Ex Parte Contacts

(A) Except as provided in subsection (B) of this rule, no representative or represented participant shall knowingly make or knowingly cause to be made to the adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process an *ex parte* communication relevant to the merits of the proceeding.

(B) An adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process in a proceeding may discuss the merits of the ~~case~~ proceeding with a representative or represented participant only if all participants in the proceeding or their representatives have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.

(C) If the adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process in a proceeding receives an *ex parte* communication in violation of this section, the adjudicator shall place in the public record of the proceeding:

(1) All such written communications;
(2) Memoranda stating the substance of all such oral communications; and
(3) All written responses, and memoranda stating the substance of all oral responses thereto.

(D) Upon receipt or knowledge of a communication knowingly made or knowingly caused to be made by a representative or represented participant in violation of this section, the adjudicator may, to the extent consistent with the interests of justice and applicable statutes, require the representative or represented participant to show cause why the represented participant's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

~~(E) Any representative who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to appropriate sanctions by the adjudicator including, but not limited to, exclusion from the proceeding and/or future agency proceedings.~~

(~~F~~E) For purposes of this section *ex parte communication* means an oral or written communication with an ~~adjudicator~~ adjudicator, tribunal, or anyone who is or may reasonably be expected to be involved in the decisional process in a proceeding that is not on the public record and does not include all participants and representatives in a proceeding.

(~~G~~F) A communication that does not concern the merits of an adjudicatory proceeding, such as a request for status of the proceeding or communications concerning the agency's administrative functions or procedures, does not constitute an impermissible *ex parte* communication.

Commented [MG193]: Comment from George Cohen: I'm not sure it makes sense to have a prohibition relevant to participants included in rules directed at representatives. Many agencies already have ex parte rules for participants.

Commented [MG194]: Comment from George Cohen: I'm not sure why "knowingly" applies to "cause to be made" but not "make," especially since (D) applies "knowingly" to both.

Commented [MG195]: Comment from Geoge Cohen: Again, I'm not sure why a rule directed at adjudicators should be included in rules directed at representatives.

Commented [MG196]: Comment from George Cohen: Same comment as to (C)

Commented [GC197]: Again, I don't see why there should be a separate sanctions provision for this rule.

Commented [LV198R197]: This is accommodated in sanctions section

Commented [MG199]: Comment from George Cohen: I think this definition needs to be made consistent with subsection (A). This subsection defines an ex parte communication as one made to an adjudicator. Subsection (A) says a representative may not make an ex parte communication to an adjudicator or another person involved in the decisional process.

Commented [MG200]: Edit by George Cohen. Comment: Suggested to make the rule more consistent with subsections (A) and (F)

Official Comment

1. (to subsection (A)): 7 C.F.R. § 1.151 (USDA). Ex parte communications are prohibited from the time the representative or represented participant has knowledge that the matter will be considered by the adjudicator until the adjudicator has rendered a final decision on the case. 4 C.F.R. § 28.147 (GAO).
2. (to subsection (A)): Individuals who are or may reasonably be expected to be involved in the decisional ~~making~~ process in a~~ny~~ proceeding include, but are not limited to, members of an adjudicator's staff or other agency employees who may be assigned to hear or to participate in the decision of a particular matter. 12 C.F.R. § 622.7(j) (FCA);17 C.F.R. § 10.10(a)(1) (CFTC).

~~3. (to subsection (E)): 12 C.F.R. § 109.9(d) (OCC); 12 C.F.R. § 1081.110(d)(2) (BCFP).~~

~~4.~~3. (to subsection (G)): Administrative functions or procedures include, but are not limited to, filing and discovery deadlines and requirements, intra-agency review procedures, and adjudicator assignments. 12 C.F.R. § 1209.14(a)(2) (FHFA); 39 C.F.R. § 955.33 (USPS).

Commented [LV201]: I would appreciate any examples that members of the subcommittee may be aware of.

317. Bias and Conflicts of Interest

(A) A representative shall not represent a participant if the representative is biased against that participant and that bias will prevent the representative from engaging in good faith representation of the participant's interests in the proceeding.

(B) A representative shall not represent a participant if the representation involves a concurrent conflict of interest. Conflicts exist in proceedings where one or more of the following will be compromised: preserving confidentiality between the representative and the represented participant; maintaining independence of judgment; and avoiding positions adverse to a represented participant.

(C) A representative with a conflict of interest as described in subsection (B) above may still represent a participant if:

(1) The representative reasonably believes that ~~they~~ the representative will be able to provide competent and diligent representation to each affected participant;
(2) The representation is not prohibited by law;
(3) The representation does not involve the assertion of a claim by one participant against another participant represented by the representative in the same proceeding; and
(4) Each affected participant gives informed consent.

(D) No former employee of the agency, including former agency adjudicators, shall be permitted to represent any participant in a proceeding before the agency in any matter in which, by reason of employment with the agency, the former employee participated personally and substantially or acquired personal knowledge of.

(E) No member of a firm of which a former agency employee, including a former agency adjudicator, is a member may represent or knowingly assist a participant in an agency proceeding if the restrictions of subsection (AD) of this rule apply to the former agency employee in that particular proceeding, unless the firm isolates the former agency employee in such a way to ensure that the former agency employee cannot in any way assist in the representation.

(F) No close family member of an officer or employee of an agency may represent anyone in any proceeding administered by the agency in which the agency employee participates or has participated personally and substantially as an agency employee, or which is the subject of that employee's official responsibility.

Official Comment

1. (to subsection (A)): Bias refers to personal animosity between the representative and the represented participant, or a financial interest on behalf of the

Commented [MG202]: Edit by George Cohen

Commented [MG203]: Comment from George Cohen: I think this should be (D)

Commented [JJ204]: May be a high burden on former VA employees given an employee/adjudicator likely would have had numerous cases/claims on which they "participated" or "acquired personal knowledge of" over their VA career.

Commented [JJ205]: For VA, this could be a high burden on the family member representative, especially in the modernized review system, as a claimant may have numerous adjudications over many years and before multiple VA adjudicators in continuing to pursue a claim, and who are assigned to the matter comparatively late in the process.

representative that is inconsistent with the best interests of the participant. Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 23 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report.

2. (to subsection (B)): 32 C.F.R. § 776.29(b)(2) (JAG). Maintaining independent judgment allows a representative to consider, recommend, and carry out any appropriate course of action for a represented participant without regard to the representative's personal interests or the interests of another. 32 C.F.R. § 776.29(b)(5) (JAG).
3. (to subsection (B)): A concurrent conflict of interest exists for a representative if their representation of one participant in the proceeding is directly adverse to their representation of another participant in the same or similar proceeding, or there is a significant risk that their representation of one or more participants will be materially limited by their responsibilities to another participant or former represented participant, or by a personal interest of the representative. 37 C.F.R. § 11.107 (USPTO).
4. (to subsection (C)): 37 C.F.R. § 11.107(b) (USPTO).
5. (to subsection (D)): 7 C.F.R. § 1.26(b)(3) (USDA); 31 C.F.R. § 8.37(b) (BATF).
6. (to subsection (E)): 31 C.F.R. § 10.25(c)(1) (IRS).
7. (to subsection (F)): 31 C.F.R. § 8.36 (BATF). Close family member refers to members of a former employee's immediate family, including parents, spouse, and children.

318. Improper Influence

(A) A representative may not attempt to influence the judgment of the adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process through:

(1) threats of political or personal reprisal;
(2) false accusations, duress or coercion
(3) offering something of monetary value, such as a loan, gift, entertainment, or unusual hospitality;
(4) intimidation, physical or otherwise;
(5) deception;
(6) public media pressure; and
(7) any other means prohibited by law.

(B) If a representative does attempt to influence an adjudicator in violation of subsection (A) of this rule, the adjudicator may, to the extent consistent with the interests of justice and applicable statutes, require the representative or represented participant to show cause why the represented participant's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

~~(C) Any representative who violates subsection (A) of this rule or who encourages or solicits another to violate that subsection, may be subject to any appropriate sanction or sanctions imposed by the adjudicator including, but not limited to, exclusion from the proceeding and/or future agency proceedings.~~

Official Comment

1. (to subsection (A)): Individuals who "are or may reasonably be expected to be involved in the ~~decisionmaking~~ decisional process" is defined in comment 2 to ~~rule~~ rule 316 involving ex parte contacts.
2. (to subsection (A)): 31 C.F.R. § 8.52(f) (BATF) (duress and coercion); 20 C.F.R. § 404.1740(c)(6) (unusual hospitality); 29 C.F.R. § 18.22(d)(1) (DOL) (intimidation); *Id.* (DOL); 38 C.F.R. § 18b.91 (VA) (media pressure).

Commented [JJ206]: Recommend an agency official, and not just the adjudicator, be contemplated, similar to other Rules.

Commented [MG207]: Comment from George Cohen: Since this is directed at an adjudicator, I don't see why it should be included in rules for representatives. Perhaps it could go in a separate section on sanctions and other consequences.

Commented [MG208]: Subcommittee flags this for potential revisiting when sanctions section is drafted, to ensure consistency and potential movement.

Commented [LV209]: Covered by Rule 404. Only question is whether to leave a general sentence about the possibility of sanctions and a reference to Rule 404?

Commented [GC210]: Same comment about whether it makes sense to have a separate sanction provision for this rule.

Commented [MG211R210]: Subcommittee refers this section to the enforcement subcommittee for potential movement.

319. Criminal Acts

A representative may be subjected to disciplinary sanctions if the representative has been found guilty of, or pleaded guilty or *nolo contendere* to, a felony or ~~to~~ any lesser crime that reflects adversely on the practitioner's honesty, trustworthiness, or fitness as a representative in other respects.

~~(A) Among the disciplinary sanctions available for representatives found to be in violation of subsection (A) are suspension from a proceeding or from all agency proceedings during a period of time, including permanently barred from serving as a representative before the agency disbarment.~~

Official Comment

1. ~~(to subsection (A)):~~ The representative's prior criminal conduct is also a factor in their qualification~~s~~ to serve, as noted in ~~see rule~~ rule 204(a)(7)~~, *supra*~~. That reference to prior criminal conduct is not limited to felonies and crimes that reflect on a representative's honesty and trustworthiness. It represents a broader inquiry into a representative's past conduct as one factor in the larger question of the representative's qualifications to serve.
2. ~~(to subsection (A)):~~ *See, e.g.,* 37 C.F.R. §11804(b) (USPTO). Examples of crimes that reflect adversely on a representative's honesty, trustworthiness, or fitness as a representative are those that involve interference with the administration of justice, misrepresentation, fraud, willful failure to file income tax returns, deceit, dishonesty, bribery, extortion, misappropriation, or theft. Attempt or conspiracy to commit such crimes is also grounds for disciplinary action. 8 C.F.R. § 1003.302(h) (EOIR).

Commented [GC212]: If this rule is about past conduct by the representative rather than conduct in the proceeding, I think it should go with the qualifications rules.

Commented [MG213R212]: Subcommittee decided to retain this for the moment but revisit to determine whether it should be moved to qualifications section, sanctions section, or other section.

Commented [Wirth214R212]: Is 204 now sufficient or do we need more?

Commented [GC215]: Again, I do not see the need for a sanctions provision for this rule as opposed to a general sanctions provision.

Commented [MG216R215]: Subcommittee flags this for possible removal to the sanctions section.

Commented [MG217]: Comment from George Cohen: Add "from practice before the agency"?

Commented [LV218]: Covered by Rule 404. Only question is whether to leave a general sentence about the possibility of sanctions and a reference to Rule 404?

Commented [MG219]: Subcommittee requests input from Bill Funk on consistency with ABA.

Commented [MG220]: Subcommittee flags these for potential revision depending on how decisions regarding this section and its placement in the model rules are resolved.

ENFORCEMENT AND DISCIPLINE

400. In General

(A) AA ~~n attorney~~lawyer representative in an [agency] proceeding is subject to the disciplinary authority of the [agency] with respect to that proceeding.

(B) A non-~~legal~~lawyer representative is subject to the disciplinary authority of the agency generally.

~~(A)~~(C) Any violation of these rules by a representative may be grounds for an enforcement proceeding and, if applicable, sanctions against the representative.

Official Comment

1. (to ~~S~~subsection (A)): Lawyer representatives shall only be subject to suspension or disqualification from an ongoing agency proceeding. *See* ABA Section of Administrative Law and Regulatory Practice, Report to the House of Delegates: Resolution, 2, n.2 (February 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication). The limitation of disciplinary authority in these rules to the particular proceeding does not limit whatever authority [the agency] may have to impose discipline on ~~attorney~~lawyer representatives beyond the scope of these rules.

Commented [EW221]: Comment to ABA policy on this?

Commented [LV222R221]: Probably good idea either way but check it's not covered in 401.

Commented [MG223]: Edit by William Funk

Commented [JJ224]: This seemingly indicates disparate treatment of different types of representatives before the agency, and for VA, individuals often represent multiple claimants before the agency at any one time.

Commented [MG225]: Addition by William Funk

401. Initiating Enforcement Proceedings

(A) If the alleged violation occurred during, or within the conduct of, a specific proceeding:

(1) The presiding adjudicator may initiate and resolve ~~the~~an enforcement proceeding regarding that alleged violation. To initiate an enforcement proceeding, the presiding adjudicator shall provide the subject of the alleged violation, as well as any other participants in the proceeding and their representatives, with a description of the conduct or circumstances giving rise to the alleged violation and of the rule or rules that were violated. The presiding adjudicator's description shall be part of the record in that proceeding.

(2) ~~. or a~~A representative or participant in th~~at~~e proceeding may initiate an enforcement proceeding by making ~~make~~ an oral or written complaint to the presiding adjudicator. The complaint ~~, which~~ shall be part of the record in that proceeding.

~~Proceedings to enforce a violation of one or more of these rules may be initiated by the submission of a complaint or, if the alleged violation occurred within the conduct of a specific proceeding, by the presiding adjudicator in that proceeding.~~ ~~The presiding adjudicator shall provide the defendant with a description of the conduct or circumstances giving rise to the alleged violation.~~

~~(iii) The burden of proof is on that presiding adjudicator.~~

(B) If the alleged violation does not occur within the conduct of a specific proceeding, proceedings to enforce a violation of one or more of these rules may be initiated by the submission of a written complaint to the [agency official designated to received such complaints] ~~in writing~~ by the Agency, an agency official designated to submit such complaints, a participant or representative in a proceeding, or a presiding adjudicator in a proceeding.

~~(A)~~(C) ~~(i)~~ Any complaint submitted under this rule ~~under subpart (A)~~ must identify the rule or rules alleged to be violated, as well as provide an account of the conduct or circumstances giving rise to the alleged violation.

~~(ii) Submission of a complaint shall be made to the [designated agency official] or, if the alleged violation or violations occurred within a specific proceeding, the presiding adjudicator in that proceeding.~~

~~(B) A complaint may be submitted by:~~

~~(i) The Agency;~~
~~(ii) An agency official designated to submit such complaints; or~~
~~(iii) If the alleged violation or violations occurred within a specific proceeding, a representative or participant in that proceeding.~~

Commented [MA226]: Should be subsection (i)

Commented [JJ227]: Regarding enforcement, I assume VA may prefer that enforcement proceedings be referred to/handled by an agency office/official, who would also issue any Order, rather than the presiding adjudicator. Similarly, I assume VA likely would prefer to keep any request to review an enforcement order/decision in line with its general review/appeal process (see, e.g., 14.633(h)).

Commented [MG228]: Edit by William Funk

Commented [LV229]: I went back and forth over including "Any other individual with knowledge of the alleged violation" and would like the subcommittee's views on whether such a provision would be useful.

~~(C) A complaint may be submitted in writing to the Agency, [the designated agency official], or the presiding adjudicator. A complaint under subsection (C)(iii) may be submitted orally to the presiding adjudicator and shall be part of the record in that proceeding.~~

Official Comment

1. In general, in an adjudication where one of the parties is the government (or an agency), any complaints with respect to the agency's representative should be made to that ~~attorney~~lawyer's office.
2. In general, rule 402 governs the conduct of an enforcement hearing, including in cases in which the presiding adjudicator initiates an enforcement proceeding. 29 C.F.R. § 102.177(b) (NLRB) ("[T]he Administrative Law Judge . . . has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing").
3. (to subsection (A)): A violation "within the conduct of" a proceeding means a violation involving the conduct of a representative acting in their capacity as a representative in that proceeding.
4. (to subsection (A)): References to "proceeding" or "specific proceeding" in this rule mean the underlying proceeding in which the representative committed ~~within which~~ the alleged rule violation ~~was committed by the representative~~. Only references to an "enforcement proceeding" refer to the proceeding addressing the substance of the alleged violation.
5. (to subsection (A)): A presiding adjudicator's "description" of an alleged violation under this subsection is synonymous with the oral or written complaint of a participant or their representative described elsewhere in this rule.
6. (to subsection (A)): In using these model rules, agencies applying them to adversarial proceedings where the agency is represented may divert disciplinary matters to a hearing under subsection XXX.X [reference subsection that allows for independent hearings by "~~an independent—not the presiding--adjudicator adjudicator rather than to the same official who's holding the hearing~~"]].
~~(to subsection (AB)): Rule 402 governs the conduct of an enforcement hearing, including in cases in which the presiding official initiates an enforcement proceeding. 29 C.F.R. § 102.177(b) (NLRB) ("[T]he Administrative Law Judge . . . has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing").~~
~~1. (to subsection (A)): In cases in which a presiding adjudicator initiates an enforcement proceeding, that presiding adjudicator must ensure that the allegations of rule violation(s) by the representative are part of the official record in the enforcement proceeding.~~
7. (to subsection (B)): A complaint submitted by the Agency or the [designated agency official] may be based on a referral of disciplinary violations from a state disciplinary authority or other federal or state agency with jurisdiction over the representative's professional conduct.

~~2.~~8. (to subsection (~~B~~C)): A complaint may be accompanied by any additional evidence or information pertaining to the alleged violation.

Commented [MG230]: Edit by William Funk

Commented [SD231]: Can we make this active?

Commented [MG232]: Edit by William Funk

Commented [MG233]: Edit by William Funk

Commented [MG234]: Edit by William Funk

~~3.~~9. (to subsection (C)): The ~~designated~~ "agency official designated to receive such complaints" may be the agency head, an agency adjudicator with supervisory responsibilities over other agency adjudicators, an agency adjudicator not involved in the specific proceeding in which the alleged violation took place, the presiding adjudicator, or a member of the agency's counsel's office, among other options. *See, e.g.*, 29 C.F.R. § 102.177(b) (NLRB) ("[T]he Administrative Law Judge, Hearing Officer, or Board has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing"); 38 C.F.R. § 14.633(b) (VA) (empowering the general counsel to sanction representatives); 8 C.F.R. § 292.3(d) (DHS) ("Complaints of criminal, unethical, or unprofessional conduct … by a practitioner before DHS must be filed with the DHS disciplinary counsel.").

~~4. (to subsection (DB)): A complaint submitted by the Agency or the [designated agency official] under parts (i) (ii) of this subsection may be based on a referral of disciplinary violations from a state disciplinary authority or other federal or state agency with jurisdiction over the representative's professional conduct.~~

10. (to subsection (~~E~~C)): A written complaint may be submitted electronically or in hard copy.

Commented [JJ235]: 38 CFR 14.633(b) does not use the term "sanction" but addresses cancellation of accreditation

Commented [MG236]: Edit by William Funk

402. Enforcement Hearings

(A) The ~~individual or entity~~representative alleged to have violated one or more of these rules in accordance with ~~a complaint submitted under Rule~~rule 401~~(B)~~ shall be entitled to a hearing prior to any sanctions or other discipline being imposed upon them under ~~Rule~~rule 404.

(B) A hearing under subsection (A) shall be conducted on the record and shall include opportunities for presentation of oral and written evidence by the alleged violator~~, the complainant,~~ and anyone else who the official presiding over the enforcement hearing determines to have relevant information.

~~(C) If a violation of these rules is alleged to have occurred within a specific proceeding, the allegation should be resolved, in the first instance, by the presiding adjudicator in that proceeding.~~

~~(D) If an alleged violation is not limited to a specific proceeding, then that alleged violation may be resolved by [the designated agency official].~~

~~(E)~~(C) The burden of proof in an enforcement proceeding is on the ~~complainant agency under Rule 401(C)~~B). person bringing forth the allegation of a violation, including the presiding adjudicator acting under rule 401(A) and those empowered under rule 401(B) to submit a complaint on behalf of the agency. ~~If an enforcement proceeding is initiated by the presiding official in a specific proceeding in response to an alleged violation of one or more of these rules in that specific proceeding under Rule 401(A), the burden of proof is on that presiding official.~~

~~(F)~~(D) Violations must be proven by ~~[clear and convincing~~a preponderance of the~~]~~ evidence in order to justify discipline under ~~Rule~~rules 404, 406, and 407.

Official Comment

1. (to subsection (A)): Nothing in this rule shall be construed to limit ~~the~~ an adjudicator's inherent power to manage the proceedings over which they preside. Adjudicators may issue oral warnings or other corrections of a representative's conduct on the record of the original proceeding without holding a hearing under this ~~Rule~~rule if the adjudicator's actions with respect to the representative's conduct do not rise to the level of a sanction under ~~Rule~~rule 404.
2. (to subsection (B)): Reference to an enforcement hearing being conducted "on the record" does not mean that enforcement hearings under this rule are subject to the adjudication provisions of §§ 554, 556 and 557 of the Administrative Procedure Act.
~~2.~~3. (to subsection (B)): Enforcement hearings should be conducted in accordance with relevant law, including existing agency rules, governing agency hearings in similar adjudications. *See* Rule 100(A) (defining "adjudication" for purposes of

Commented [MG237]: Edit by William Funk

Commented [JG238]: Does this invoke the APA and formal procedures?

Commented [LV239R238]: No.

Commented [WF240R238]: Comment to Sub B to make this clear.

Commented [MG241]: Edit by William Funk

Commented [MG242]: Comment from William Funk:

I don't understand this subsection.

Commented [MG243]: Removed due to edits to 401. Need to ensure consistency.

Commented [LV244]: Tricky language here, although I think this accurately reflects what I was trying to describe. Could also be in a comment to this subsection if the subsection ended after "401(C)".

Commented [MG245]: Edit by William Funk

Commented [MG246]: Edit by William Funk

Commented [MG247]: Requires further workgroup discussion on whether an appropriate standard should be included, or an open bracket for agencies to insert their own standard.

Commented [LV248]: Borrowed from VA, but could certainly imagine a simple preponderance test - I defer to the wisdom of the subcommittee.

these rules as "an agency proceeding—whether conducted pursuant to the federal Administrative Procedure Act, 5 U.S.C. § 551 et seq., other statutes, or agency regulations or practice—involving at least some oral argument or presentation resulting in some determination by an adjudicator that affects the rights or interests of individual parties.") If the agency does not already have procedural rules in place to govern adjudications as defined in these ~~Rule~~rules, it should consider consulting the ACUS Model Rules of Agency Adjudication for guidance on best practices for conducting such adjudications. *See* Admin. Conf. of the U.S., Model Adjudication Rules § 100 et seq. (2018).

~~3.~~4. (to subsection (B)): If the agency is not the complainant, the agency may also offer evidence at the hearing.

~~4.~~5. (to subsection (~~D~~C)): The agency or designated agency official responsible for submitting a complaint under ~~Rule~~rule 401 should engage in an investigation of the allegations in that complaint prior to submitting the complaint in order to confirm that the allegations are supported by the evidence reasonably available at the time the complaint is submitted. *See, e.g.*, 29 C.F.R. § 102.177(d) (DHS) (authorizing "Investigating Officer," who is "head of the Division of Operations-Management," to conduct an investigation of alleged violations and make a recommendation regarding enforcement to the general counsel). Failure to perform such an investigation may be grounds for the dismissal of the complaint with prejudice.

~~5.~~6. (to subsection (~~F~~D)): 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

~~6.~~7. (to subsection (~~F~~D)): *See, e.g.*, 38 C.F.R. § 14.633(b) (VA). *See also* 29 C.F.R. § 18.23 (a)(2) (DOL regulation requiring proof by "reliable, probative, and substantial evidence of record").

Commented [MG249]: Edit by William Funk

Commented [MG250]: Ensure all subsections are correct.

Commented [MG251]: Edit by William Funk

Commented [MG252]: Edit by William Funk

Commented [JJ253]: It is 38 CFR 14.633(c), not (b), that addresses the standard of proof for the GC to cancel accreditation

403. Orders

(A) The ~~adjudicator~~ agency official presiding over an enforcement hearing under ~~Rule~~ rule 402 shall issue an order resolving the allegations in the complaint. In the case of an enforcement proceeding initiated ~~by the presiding adjudicator~~ in a specific proceeding under ~~Rule~~ rule 401(A), the presiding adjudicator shall issue an order in compliance with the requirements of this section ~~based on the allegations initially recorded by the presiding adjudicator~~.

(B) The order described in subsection (A) shall be in writing and shall be based on the official record of the enforcement proceeding. The order shall include the allegations and an explanation of its conclusions, including any findings of fact or conclusions of law that are relevant to that decision.

Official Comment

1. (to subsection (A)): See comment 2 to Rule 401 (requiring presiding adjudicator to put allegations of rule violations on the record of an enforcement proceeding initiated by that adjudicator).
2. (to subsection (B)): *See, e.g.*, 5 U.S.C. § 556(e) ("The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision."); 20 C.F.R. § 404.1770 (SSA) ("After the close of the hearing, the hearing officer will issue a decision or certify the case to the Appeals Council. The decision must be in writing, will contain findings of fact and conclusions of law, and be based upon the evidence of record.").

Commented [JJ254]: [Same comment as above.] Regarding enforcement, I assume VA may prefer that enforcement proceedings be referred to/handled by an agency office/official, who would also issue any Order, rather than the presiding adjudicator. Similarly, I assume VA likely would prefer to keep any request to review an enforcement order/decision in line with its general review/appeal process (see, e.g., 14.633(h)).

Commented [LV255]: Include in definitions section as "Enforcement Adjudicator"?

404. Sanctions

(A) A representative found to have violated these rules in an order issued pursuant to ~~Rule~~ rule 403 may be subject to the following sanctions:

(1) Reprimand or censure on the record in the proceeding;
(2) Suspension from further participation in the proceeding;
(3) Suspension of a non-~~attorney~~lawyer representative from future agency proceedings, including being permanently barred from serving as a representative before the agency; and
~~(3)~~(4) [such other sanctions as the agency may deem appropriate].
~~(4) Monetary penalties; and~~
~~(5) Payment of an opposing party's fees.~~

(B) In imposing a sanction, the agency official presiding ~~adjudicator in~~ over the enforcement proceeding may consider the following factors:

(1) Whether the representative has violated a duty owed to a client or compromised the integrity of the proceeding;
(2) Whether the representative acted intentionally, knowingly, or negligently;
(3) The amount of the actual or potential injury caused by the representative's misconduct; ~~and~~
(4) The existence of any aggravating or mitigating factors; and
(5) Such other factors as the agency official may deem appropriate.

Official Comment

1. (to subsection (A)): The represented participant shall not be sanctioned for the conduct of their representative. 10 C.F.R. § 2.314(C)(1) (NRC).
2. (To subsection (A)): These rules apply to sanctions and should not be construed to limit the adjudicating official's ability to manage the proceeding based on the conduct of a representative. Examples include ~~[list in 556(c)]~~ limiting motions, changing dates and times of proceedings, or excluding evidence.
~~2.~~3. (to subsection (A)): Reprimand and censure are similar sanctions, with reprimand traditionally being viewed as the less severe of the two. Both involve a formal statement by [designated agency official] disapproving of misconduct by the sanctioned party. *See, e.g.*, 47 C.F.R. § 124(a) (FCC) (empowering the Commission to "censure, suspend, or disbar any person" who engages in specified misconduct under that section); 43 C.F.R. § 1.6(b) (DOI) (permitting hearing officer to reprimand individual acting as representative in agency proceeding); ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 10(A)(4) (permitting reprimand of ~~attorney~~lawyers by the relevant disciplinary authority).

Commented [MG256]: Edit by William Funk

Commented [MG257]: Edit by William Funk

Commented [MG258]: Comment from William A. Stock: The inclusion of civil monetary penalties and fee shifting in Rule 404(A) for rule violations strikes me as problematic. An administrative agency before whom a representative is appearing may have no statutory authority to impose civil penalties, or only to impose them in limited circumstances. Similarly, lawyer disciplinary proceedings to do not normally involve monetary penalties.

The fee-shifting provision would only make sense in the context of an adversarial proceeding of two nongovernmental parties before an administrative agency – if the hearing is of a respondent before the agency, fee shifting to the government is just a fine by another name.

The enforcement provision may also need to take into account that the agency likely only has jurisdiction to sanction one of the two parties before it, since the government is represented by an agency employee and the adjudicator likely has no authority over that employee. As such, the model rules may want to place all issues of rules violations in an independent adjudication from the underlying proceeding, as is the case with the proceedings under 8 CFR 292.

4. (to subsection (A)): ~~Attorney~~Lawyer representatives shall only be subject to suspension or disqualification from an ongoing proceeding. *See* ABA Section of Administrative Law and Regulatory Practice, Report to the House of Delegates: Resolution, 2, n.2 (February 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing ~~attorney~~lawyer representatives in agency adjudication).

~~3.~~5. (to subsection (A)): The committee does not opine to what extent an agency may wish to apply limitations to sanctions to non-lawyer representations.

(to subsection (B)): ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 10(C).

~~4.~~

~~(to subsection (B)): Sanctions of monetary penalties and payment of an opposing party's fees should only be imposed after consideration of the representative's ability to pay and, in the case of fee shifting, the financial need of the opposing party. This is especially true for non-lawyer representatives.~~

~~5.~~6.

Commented [LV259]: Per committee instructions from Rule 309, comment 3.

Commented [MG260]: Move to enforcement section?

Commented [MG261R260]: Committee approves of moving this comment to Enforcement section.

Commented [MG262]: Edit by William Funk

405. Reciprocal Discipline

Commented [MA263]: Move this section before Petitions for Review.

(A) Representatives who have been publicly disciplined by a state disciplinary authority or other state or federal agency with authority over the representative's professional conduct shall report that disciplinary action to the presiding adjudicator in an ongoing proceeding or to the [designated agency official] prior to serving as a representative in a future proceeding.

(B) Discipline under subsection (A) may be grounds for sanction~~ed~~ under ~~R~~rule 404, including suspension or disqualification.

Official Comment

1. (to subsection (~~B~~A)): *See, e.g.*, 29 C.F.R. § 18.22(b)(1)(iii) (DOL) ("An attorney representative must promptly disclose to the judge any action suspending, enjoining, restraining, disbarring, or otherwise currently restricting the attorney in the practice of law in any jurisdiction where the attorney is licensed to practice law."); 20 C.F.R. § 404.1740(b)(7)-(9) (SSA).
2. (to subsection (A)): This subsection's disclosure requirement is focused on current disciplinary actions, meaning disciplinary actions that are in effect at the time that the representative is serving in that capacity in an agency proceeding. More structured reporting requirements, for instance with fixed cutoff dates for disclosure of past disciplinary actions, may also be useful.
3. (to subsection (~~A~~B)): *See, e.g.*, 12 C.F.R. § 263.94(d) (Fed Reserve Bd) (authorizing reciprocal censure, suspension and disbarment); 12 CFR 308.109(b)(1) (FDIC).
4. (to subsection (~~A~~B)): ~~Attorney~~Lawyer representatives shall only be subject to suspension or disqualification from an ongoing agency proceeding. *See* ABA Section of Administrative Law and Regulatory Practice, Report to the House of Delegates: Resolution, 2, n.2 (February 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing ~~attorney~~lawyer representatives in agency adjudication).
5. (to subsection (~~A~~B)): When determining whether to disqualify a non-lawyer representative based on suspension or disqualification, an agency should consider how the circumstances of the suspension or disqualification impact the non-lawyer representative's ability to serve based on the qualifications in ~~Rule~~rule 204.

~~1. (to subsection (B)): 29 C.F.R. § 18.22(b)(1)(iii) (DOL) ("An attorney representative must promptly disclose to the judge any action suspending, enjoining, restraining, disbarring, or otherwise currently restricting the attorney in the practice of law in any jurisdiction where the attorney is licensed to practice law."); 20 C.F.R. § 404.1740(b)(7)-(9) (SSA).~~

6. (to subsection (~~C~~B)): A resolution in favor of the representative in response to ~~their~~a petition for review may result in the representative being free from reciprocal discipline under this section.

~~405~~406. Petitions for Review

(A) A ~~non-lawyer~~ representative may petition for review of an order under ~~Rule~~rule 403 ~~concluding that the representative has violated one or more of these rules~~.

(B) The petition for review shall be submitted to the [designated agency official] within ~~—~~14 days of the order finding a violation. It shall include all issues of fact or law from the adjudicator's order under ~~Rule~~rule 403 that the representative wishes to be reviewed by the [designated reviewing official].

(C) The [designated reviewing official] shall review findings of fact for support by substantial record evidence and any conclusions of law de novo.

(D) The [designated reviewing official] shall issue an order resolving the issues raised in the petition for review. The order shall be issued promptly, in writing, and as part of the official record of the proceeding.

~~(D)~~(E) The underlying proceeding should not be stayed pending a petition for review.

Official Comment

1. (to subsection (A)): An order finding no rules violation by the representative shall be treated as final and not subject to review. All other determinations shall be subject to judicial review as prescribed by applicable law.
2. (to subsection (A)): This subsection does not require a ~~non-lawyer~~ representative to exhaust administrative remedies in seeking review of an order under rule 403.
3. ~~1.~~ (to subsection (B)): The scope of review sought may include the issuance of a sanction under rule 404.
4. (to subsection (B)): Any relevant issues of fact or law not included in a petition for review should be deemed waived and ineligible for inclusion in a future petition, provided those issues of fact or law were reasonably ascertainable by the representative at the time of their initial petition.
5. ~~2.~~ (to subsection (C)): Petitions for review should be conducted in accordance with relevant law, including existing agency rules, governing agency hearings in similar adjudications. *See* Rule 100(A) (defining "adjudication" for purposes of these rules as "an agency proceeding—whether conducted pursuant to the federal Administrative Procedure Act, 5 U.S.C. § 551 et seq., other statutes, or agency regulations or practice—involving at least some oral argument or presentation resulting in some determination by an adjudicator that affects the rights or interests of individual parties.") If the agency does not already have procedural rules in place to govern adjudications as defined in these ~~Rule~~rules, it

Commented [MG264]: Comment from William Funk:

1) Delete section altogether and let the person go to court 2) if not, do we want to require exhaustion? if so, we need the appropriate language and stay the effect of order pending review.

Commented [MG265R264]: Comment from Jeremy: Consider splitting between attorneys and non-attorneys.

Commented [MG266R264]: Bill agrees. Considers limiting to sanctions that expand beyond the particular proceeding.

Commented [WF267]: They may want review of the sanction in addition to the finding of a violation.

Commented [JJ268]: [Same comment as above.] Regarding enforcement, I assume VA may prefer that enforcement proceedings be referred to/handled by an agency office/official, who would also issue any Order, rather than the presiding adjudicator. Similarly, I assume VA likely would prefer to keep any request to review an enforcement order/decision in line with its general review/appeal process (see, e.g., 14.633(h)).

Commented [LV269]: This is a value judgment that requires subcommittee discussion. This is just a placeholder.

should consider consulting the ACUS Model Rules of Agency Adjudication for guidance on best practices for conducting such adjudications. *See* Admin. Conf. of the U.S., Model Adjudication Rules § 100 et seq. (2018).

~~3.~~6. (to subsection (C)): 5 U.S.C. § 706(2)(e) (substantial evidence); *Id.* at § 557(b) (de novo review of legal conclusions).

~~406~~407. ~~Disciplinary~~ Referrals to a Disciplinary Authority

(A) An ~~adjudicator~~ agency official in an enforcement proceeding shall refer an order concluding that a representative violated one or more of these rules to any state disciplinary authority or other state or federal agency with jurisdiction over the representative~~s' professional conduct~~.

(B) An agency official ~~adjudicator~~ in an enforcement proceeding may refer a complaint under ~~Rule~~rule 401 alleging a violation of one or more of these rules to any state disciplinary authority or other state or federal agency with jurisdiction over the representatives' professional conduct.

(C) Referrals pursuant to the above subsections may be pursued independent of any agency decision regarding sanctions under ~~Rule~~rule 404.

Official Comment

1. (to subsection (A)): 29 C.F.R. § 18.23(b) (DOL) (mandating referral for representative disqualifications).
2. (to subsections (A) and (B)): "State disciplinary authority . . . with jurisdiction" includes all state professional licensing organizations and accrediting entities. These referral rules should not be read to limit or otherwise interfere with any other ethical obligations to report violations. *See, e.g.*, ABA Model Rules of Professional Conduct, Rule 8.3(a) ("A lawyer who knows that another lawyer ~~ahs~~has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer . . . shall inform the appropriate professional authority.")

Commented [LV270]: This seemed unnecessary to me, but I may be missing something.

Commented [JG271]: Consider adding proceeding for intra-agency referrals.

Commented [LV272]: DOL is a bit of an outlier; most agencies have permissive referral rules

407. Reciprocal Discipline

Commented [MA273]: Move this section before Petitions for Review.

Representatives who have been publicly disciplined by a state disciplinary authority or other state or federal agency with authority over the representative's professional conduct may be sanctioned under Rule 404, including being disqualified from serving as a representative.

Representatives who have been disciplined under subsection (A) shall report that suspicion or disqualification to the presiding adjudicator in an ongoing agency proceeding or to the [designated agency official] prior to serving as a representative in a future agency proceeding.

Representatives subject to discipline under subsection (A) may challenge such suspension of disqualification by filing a petition for review with the agency. The petition shall seek review of the decision of the state disciplinary authority or other state or federal agency with authority over the representative's professional conduct. Such petition for review shall following the procedures outlined in Rule 405.

Official Comment

(to subsection (A)): *See, e.g.*, 12 C.F.R. § 263.94(d) (Fed Reserve Bd) (authorizing reciprocal censure, suspension and disbarment); 12 CFR 308.109(b)(1) (FDIC).

(to subsection (A)): Attorney representatives shall only be subject to suspension or disqualification from an ongoing agency proceeding. *See* ABA Section of Administrative Law and Regulatory Practice, Report to the House of Delegates: Resolution, 2, n.2 (February 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing attorney representatives in agency adjudication).

(to subsection (A)): When determining whether to disqualify a non-lawyer representative based on suspension or disqualification, an agency should consider how the circumstances of the suspension or disqualification impact the non-lawyer representative's ability to serve based on the qualifications in Rule 204.

~~(TO SUBSECTION (B)): 29 C.F.R. § 18.22(B)(1)(III) (DOL) ("AN ATTORNEY REPRESENTATIVE MUST PROMPTLY DISCLOSE TO THE JUDGE ANY ACTION SUSPENDING, ENJOINING, RESTRAINING, DISBARRING, OR OTHERWISE CURRENTLY RESTRICTING THE ATTORNEY IN THE PRACTICE OF LAW IN ANY JURISDICTION WHERE THE ATTORNEY IS LICENSED TO PRACTICE LAW."); 20 C.F.R. § 404.1740(B)(7)–(9) (SSA).~~

~~(TO SUBSECTION (C)): A RESOLUTION IN FAVOR OF THE REPRESENTATIVE IN RESPONSE TO THEIR PETITION FOR REVIEW MAY RESULT IN THE REPRESENTATIVE BEING FREE FROM RECIPROCAL DISCIPLINE UNDER THIS SECTION.~~

~~408. IMPROPER COMPLAINTS~~

~~A FRIVOLOUS COMPLAINT FROM A REPRESENTATIVE OR PARTY IN A PROCEEDING UNDER RULE 401(C)(III) SHALL CONSTITUTE A VIOLATION OF THESE RULES AND BE SUBJECT TO THE SAME DISCIPLINARY PROCEDURES AND CONSEQUENCES AS ANY OTHER RULE VIOLATION.~~

~~*OFFICIAL COMMENT*~~

Commented [WF274]: Make comment to Merits filings section (313).

Commented [LV275R274]: Added as comment to rule 313: Improper Claims

TRANSPARENCY AND REPORTING

500. In General

[The agency] ~~shall~~ will take all reasonable measures to ensure that these rules and all relevant information pertaining to them are publicly available and accessible, including by publishing these rules in the Federal Register and the Code of Federal Regulations whenever [the agency] is permitted to do so by law.

Official Comment

1. "Publicly available and accessible" means publicly available in a way that is clear, logical, and comprehensive. Admin. Conf. of the U.S. Recommendation 2018-5, Public Availability of Adjudication Rules, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019). The information must be easily recognized by lawyer and non-lawyer representatives as well as represented participants in agency adjudication.

~~1.~~2. "Relevant information pertaining to" these rules includes information pertaining to disciplinary actions under rule 502.

Commented [EW276]: To be moved, possibly as a comment to 500, or possibly to 502, or to introduction/preface.

~~501. Publication of Rules~~

~~[The agency] shall publish these rules in the Federal Register and the Code of Federal Regulations whenever the agency is permitted to do so by law.~~

~~In addition to publication in the Federal Register and Code of Federal Regulations under subsection (A), these rules shall be made readily accessible to all potential representatives and participants in agency adjudication through publication on [the agency's] website.~~

~~The material published on [the agency's] website under subsection (B) shall be published as one easily searchable file with a table of contents listing the rule titles. The full text of the rules or a hyperlink to a single document containing the rules shall be published on a single webpage and shall state clearly that the rules apply to both lawyer and non-lawyer representatives.~~

~~*Official Comment*~~

~~(to subsection (B)): Admin. Conf. of the U.S. Recommendation 2018-5, Public Availability of Adjudication Rules, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019) ("Recommendation 2018-5").~~

~~(to subsection (B)): "Readily accessible ... through publication on the agency website" means publicly available in a way that is clear, logical, and comprehensive. Recommendation 2018-5, 84 Fed. Reg. at 2142. The information must be easily recognized by lawyer and non-lawyer representatives as well as represented participants in agency adjudication. Rules should be considered easily recognized if they are labeled in plain language and prominent typeface through either headings or hyperlinks on the website.~~

~~(to subsection (B)): The rules or the hyperlink thereto shall be clearly marked as "Rules of Conduct for Representatives" or something substantially similar.~~

Commented [MA277]: Consolidated into comments in 500, with editorial leeway.

Lou: General rule about transparency/publication with commentary referring to publication in CFR, second rules about publication on website, based on Erin's and Jeremy's comments below.

Commented [EW278]: To be moved, possibly as a comment to 500, or possibly to 502, or to introduction/preface.

Commented [JG279]: Consider combining into 502.

~~502~~501. Online Publication of ~~of Other Relevant Information~~ Rules ~~on the Agency Website~~

(A) ~~In addition to publishing these rules in accordance with Rule 501, [the agency] shall publish separately on its website information summarizing the~~ In addition to publishing these rules in the Federal Register and Code of Federal Regulations in accordance with rule 500, [the agency] will publish these rules on [the agency's] website.

(B) [The agency] will also publish on its website the following information pertaining to these rules:

(1) The qualifications to serve as a representative, including as a non-lawyer representative;

(2) ~~, and t~~The disciplinary process for alleged violations of these rules, including the filing of a complaint for a violation of these rules by a representative ~~will be available separately on its web site~~;

~~(1) .~~

~~(2)~~

(3) ~~[The agency] shall also consider~~ publishing ~~guidance G~~Any guidance documents related to these rules, such as practice manuals or fact sheets for representatives that summarize or otherwise explain the rules in ways easily digestible by participants and representatives, especially non-lawyer representatives ~~will also be available separately on its web site.~~;

~~(3)~~

~~(4)~~

~~(5)~~(4) ~~[The agency] shall consider publishing a~~Any adjudicator-specific procedural rules, such as standing orders~~, will be available separately on their~~ its ~~website.~~; and

~~(6)~~

~~(7)~~(5) ~~[The agency] shall consider publishing g~~Guidance ~~d~~Any documents ~~on its website~~ that provide an overview of agency precedent applying these rules ~~will also be available separately on its website~~.

Official Comment

1. (to subsection (~~B~~A)): Admin. Conf. of the U.S. Recommendation 2018-5, Public Availability of Adjudication Rules, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019) ("Recommendation 2018-5"). Rules will be labeled in plain language and prominent typeface through either headings or hyperlinks on [the agency's] website. The rules or the hyperlink thereto will be clearly marked as "Rules of Conduct for Representatives" or something substantially similar. The full text of the rules or a hyperlink to a single document containing the rules will be published on a single webpage and shall state clearly that the rules apply to both lawyer and non-lawyer representatives.
~~(to subsection (B)): "Readily accessible … through publication on the agency website" means publicly available in a way that is clear, logical, and comprehensive. Recommendation 2018-5, 84 Fed. Reg. at 2142. The information~~

Commented [MA280]: Lou will consider the best way to structure this section.

Commented [MA281]: Bill: Reads like Recommendation language, not Rule language.

Commented [MA282R281]: Subcommittee endorsed the language Bill proposed to resolve this issue.

Jeremy: Add 'consideration' issues to comments?

Commented [JG283]: Might need a rule instead saying all guidance documents related to representation should be put on website. Beware of language that suggests the agency should create guidance documents.

~~must be easily recognized by lawyer and non-lawyer representatives as well as represented participants in agency adjudication. Rules should be considered easily recognized if they are labeled in plain language and prominent typeface through either headings or hyperlinks on the website.~~

~~(to subsection (B)): The rules or the hyperlink thereto shall be clearly marked as "Rules of Conduct for Representatives" or something substantially similar.~~

~~1.~~2. (to subsection (B)): For examples of practice manuals, see, e.g., National, Labor Relations Board, Manuals, https://www.nlrb.gov/guidance/key-reference-materials/manuals-and-guides; and U.S Department of Justice Executive Office of Immigration Review, Policy Manual, https://www.justice.gov/eoir/eoir-policy-manual. For a sample fact sheet, see U.S. Department of Veterans Affairs, Office of General Counsel, https://www.va.gov/ogc/accreditation.asp. The decision to issue guidance documents should take into account the likely need for clarification of a given rule or set of rules in order to make them easily accessible to non-lawyer participants and representatives, as well as the agency resources required and the likelihood the documents will alleviate any confusion about the text of a specific rule or rules.

3. (to subsection (~~CB~~)): *See* ~~Admin. Conf. of the U.S.~~ Recommendation 2018-5, ~~Public Availability of Adjudication Rules,~~ 84 Fed. Reg. ~~2142,~~at 2142 ~~(Feb. 6, 2019)~~ (recommending publication of adjudicator-specific procedural rules).

~~2.~~

4. (to subsection (~~D~~B)): *See* Recommendation 2018-5, 84 Fed. Reg. at 2143 (recommending publication on agency websites of "explanatory materials aimed at providing an overview of relevant agency precedents").

~~503~~502. Online Publication of ~~Information Relating to~~ Disciplinary Actions

(A) If a disciplinary action resulted in a written order, the full text of the order or a hyperlink to a single document containing the order will be published on [the agency's] website. The order will be made available as one easily searchable file.

~~(A)~~(B) ~~[The agency] shall publish~~ aThe agency will also publish a ~~A~~ summary of all disciplinary actions taken by [the agency] for violations of these rules ~~will be available~~ on [the agency's] website.

~~(B)~~(C) The summary of disciplinary actions in subpart (B) ~~required in subpart A shall~~ will include the following information:

(1) the name of any representative who was a subject of the disciplinary action;
(2) the date of the disciplinary action;
(3) the rule(s) that were violated;
(4) a brief description of the conduct constituting the violation;
(5) the nature of the discipline imposed; and
(6) whether the disciplined representative remains in good standing to act as a representative in future adjudications or, if known, when that representative is eligible to regain such standing.

~~(C) Information in the summary required under subpart A shall be redacted to preserve recognized privacy interests.~~

~~(D) If disciplinary action resulted in a written order, the full text of the order or a hyperlink to a single document containing the order shall will be published on [the agency's] website. The order shall be made available as one easily searchable file.~~

(D) Information in the summary and published order, other than the name of the representative subject ~~of~~to the disciplinary action, will be redacted to preserve recognized privacy interests, such as personally identifiable information, ~~client's information, private~~ medical information, employment information, proprietary business information, ~~or~~and trade secrets.

(E) ~~[The agency] shall publish separately in a manner that is readily accessible in a single searchable document on [the agency's] website, the names of all~~ The names of all representatives who have been a subject of disciplinary action by [the agency] and the number of disciplinary actions against that representative will be ~~readily~~ accessible in a single searchable ~~document~~file on [the agency's] website.

Official Comment

1. (to subsection (A)): *See* 8 C.F.R. § 292.3(h)(3) (explaining that DHS "may … disclose to the public" disciplinary actions).

Commented [MA284]: Consider comment on ways to petition for removal of your name from the list of sanctioned reps.

Commented [MA285]: Jeremy: Reorg like 502.

A: The agency will maintain a website that contains (A), (B), and (C).

B: Redaction

Commented [JJ286]: OGC and/or OIT would need to address any concerns with, or the feasibility of, posting agency disciplinary actions online as I assume it would fall to their office(s).

Commented [MA287]: Track FOIA/Privacy Act elements for examples, ID'ing well-recognized privacy interests.

Commented [SD288]: Add comment that rep might have a privacy interest in their name but we consider the public interest of disclosure to outweigh the privacy interest.

Commented [RR289R288]: Consider taking out phrase "other than the name of the rep …" from rule if we insert this Comment.

2. (to subsection (B)): *See* 8 C.F.R. § 1003.106(c) (allowing for publication of disciplinary sanctions by DHS); www.justice.gov/eoir/atorney-discipline-program (providing links to a list of disciplined representatives, including all of the information in subsection B other than a description of the specific rules that were violated or the conduct constituting the violation).
3. (to subsection (D)): 5 U.S.C. § 552(b)(4), (6); *see also* United States Department of the Interior, Office of Inspector General, *FOIA Exemptions and Exclusions*, (last visited Feb. 20, 2024), https://www.doioig.gov/complaints-requests/foia/foia-exemptions-and-exclusions#:~:text=Examples%20of%20exemption%206%20records,birth%2C%20etc.%3B%20and%20payroll.
4. (to subsection (D)): A representative whose name is subject to disclosure under subsection (D) may file a petition for review under rule 405 seeking to remove their name from the published list of representatives who have been subject to disciplinary action for violating these rules.
~~3.~~5. (to subsection (~~C~~E)): "~~Readily a~~Accessible" has the same meaning in this context as "publicly available and accessible," which is explained in the commentary to ~~Rule~~rule 5001~~(B)~~, *supra*.
~~4.~~6. (to subsection (~~C~~E)): Admin. Conf. of the U.S. Recommendation 2021-9, Regulation of Representatives in Agency Adjudicative Proceedings, 87 Fed. Reg. 1721, 1722 (Dec. 16, 2021).
~~5.~~7. (to subsection (~~D~~E)): *See, e.g.,* OGC's List of Sanctioned Representatives, https://www.ssa.gov/foia/OGC_SanctionedReps_current.pdf.; 19 C.F.R. § 351.313 (Int'l Trade Admin) ("The Department will maintain a public register of attorneys and representatives suspended or barred from practice."). Although a representative subject to disciplinary action may have a privacy interest in nondisclosure of their name in connection with that action, [the agency] has determined that the public interest in disclosure outweighs the privacy interest of the representative in this regard.

Page 1: [1] Commented [SD8] Stefanie Davis 3/5/2024 11:13:00 AM

Global comment: the rules say "non-lawyer" in some places and "non-attorney" in others. I recommend using one or the other consistently throughout; probably "non-lawyer" because that's what's used here and it's a plainer language term than "non-attorney."

Page 1: [2] Commented [MG11R10] Matthew Gluth 3/6/2024 1:32:00 PM

Bill: Consider adding comment here for why we're not including federal attorneys, because there's another comment.

Lou: Consider also adding that comment to Scope because it is odd to have comments in definitions.

Bill: If someone were reading something front-to-back, it would be a red flag here. Consider reference to comment in Scope.

Page 1: [3] Commented [JJ13] John Jones 3/6/2024 10:57:00 AM

Excluding "government attorneys" and "current government employees" from the definition of "representative" would be problematic, as representatives with State Service Organizations may be state government employees, and one-time representatives under 38 CFR 14.630 could theoretically be government attorneys or employees (at a federal, state, or local level).

Page 5: [4] Commented [LV38R37] Louis Virelli 3/5/2024 12:17:00 PM

This rule only governs consent of the participant. I am updating the withdrawal provisions (those not based on consent) in Rule 307 to include a similar comment about handling fees when rep withdraws. Whether that language should be included n the comment to Rule 307 is a question for the working group.

Page 8: [5] Commented [JS51] Jim Sandman 3/5/2024 12:20:00 PM

The text of the rule does not say what the comment does. The comment is much more permissive, and I think preferable. The comment requires a showing that the representative is **not** willing or able to act in the best interests of the participant, whereas the language of the rule seems to require an affirmative showing of qualifications. Those are different standards. The fact that a representative does not have knowledge, experience, or education of the type described in Rule 204 does not necessarily mean that the representative is not able to act in the best interests of the participant.