



Administrative Conference Recommendation 2021-9

Regulation of Representatives in Agency Adjudicative Proceedings

Adopted December 16, 2021

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

Agency authority to set qualifications for who may serve as a representative depends on whether the potential representative is an attorney or non-attorney. For attorneys, the generally applicable Agency Practice Act provides, with some exceptions, that "any individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency,"² though some statutes authorize agencies to impose additional qualification requirements. Agencies generally have greater discretion under the Administrative Procedure Act and agency- or program-specific statutes to determine whether persons who are not attorneys

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

² 5 U.S.C. § 500(b).



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may act as representatives and, if they may, to establish the qualifications for doing so.

As a general matter, agencies have legal authority to establish rules governing the conduct of representatives and to take actions against representatives found to have violated such rules.³ Courts have consistently found such authority inherent in agencies' general rulemaking power or their power to protect the integrity of their processes.⁴ Agencies' disciplinary authority is not limitless, however, and agencies must determine what their governing statutes allow.

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

Once agencies have decided to adopt rules, they also must determine how to enforce those rules. Agencies may enforce rules in various ways, ranging from reminders or warnings to more serious actions, including disqualifying a representative from appearing in the current adjudication or future adjudications or imposing a monetary penalty. Agencies must determine that they have the legal authority to undertake any such actions. Agencies also must determine whether to implement a program for reciprocal discipline, which involves imposing discipline on a representative found to have engaged in misconduct by another jurisdiction, or for referral procedures, which involve reporting attorneys' misconduct to another jurisdiction for purposes of

³ See, e.g., 5 U.S.C. § 301.

⁴ See, e.g., *Checkovsky v. SEC*, 23 F.3d 452, 456 (D.C. Cir. 1994); *Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986); *Polydoroff v. ICC*, 773 F.2d 372, 374 (D.C. Cir. 1985); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 580–82 (2d Cir. 1979); *Koden v. U.S. DOJ*, 564 F.2d 228, 233 (7th Cir. 1977).



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taking possible disciplinary action.

Agencies that have adopted rules must ensure that representatives, parties, and the public can easily access the rules. Agencies also must decide whether to provide additional explanatory materials and, if so, ensure that those are also easily accessible.

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

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

RECOMMENDATION

Adoption of Rules Governing Participation and Conduct

1. For federal agency adjudication systems in which parties are represented—either by attorneys or non-attorney representatives—agencies should consider adopting rules governing the participation and conduct of representatives in adjudicative proceedings to



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promote the accessibility, fairness, integrity, and efficiency of adjudicative proceedings.

Rules of Conduct

2. Agencies should consider whether to adopt or reference rules promulgated by other authorities or professional organizations or instead draft their own rules. Agencies should ensure that the rules are appropriate for the adjudicative proceedings they conduct and consider whether any modifications to adopted rules should be included. Agencies should consider whether any rules applicable to attorneys should be applied to non-attorneys and whether they should be modified before doing so.
3. Possible topics that agencies might consider in their rules include representatives' actions that are likely to occur during a particular adjudication and actions that might occur outside a particular adjudication but that might still adversely affect the conduct of agency adjudications. Topics agencies might consider include the following:
 - a. Engaging in conduct that disrupts or is intended to disrupt an adjudication;
 - b. Making unauthorized ex parte contacts with agency officials;
 - c. Engaging in representation of a client that conflicts with other interests, including representation of another client, or the attorney's personal interests;
 - d. Filing frivolous claims or asserting frivolous defenses;
 - e. Engaging in conduct that is prejudicial to the administration of justice, including conduct not limited to that occurring during an adjudication;
 - f. Failing to provide competent representation;
 - g. Improperly withdrawing from client representation;
 - h. Unreasonably delaying the conduct of an adjudication;
 - i. Making a material intentional false statement;
 - j. Improperly seeking to influence the conduct of a judge or official;
 - k. Being convicted of a crime or being subject to an official finding of a civil violation that reflects adversely on the attorney's fitness to represent clients before the agency; and
 - l. Knowingly disobeying or attempting to disobey agency rules (including conduct



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rules) or adjudicators' directions, or knowingly assisting others in doing so.

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

Agency Action in Response to Allegations of a Violation of Rules

5. Agencies should specify in their rules how they will respond to an allegation of a violation of their conduct rules, and they should publish these rules consistent with Paragraphs 9 through 12. Among other topics, agencies should address:
 - a. Who can make a complaint and how to make it;
 - b. How notice of a complaint should be provided to the representative who is the subject of the complaint;
 - c. Who adjudicates the complaint;
 - d. The procedure for adjudicating the complaint, including any rules governing the submission of evidence and the making of arguments;
 - e. The manner in which a decision will be issued, including any applicable timeline for issuing a decision;
 - f. Procedures for appealing a decision;
 - g. Who is responsible for enforcing the decision within the agency and communicating the decision to other relevant authorities; and
 - h. The process for identifying and dismissing complaints that are frivolous, repetitive, meant to harass, or meant primarily to delay agency action, including any consequences for persons filing such complaints.



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Agency Action in Response to a Violation of Rules

6. Rules should address what actions an agency may take in the case of a violation of the rules consistent with their authority to do so, including informal warnings short of sanctions and the range of available sanctions.
7. For rules applicable to attorneys, agencies should consider whether to adopt any reciprocal disciplinary procedures or referral procedures.

Who Can Practice Before Agencies

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

Transparency

9. Agencies should publish their rules governing representatives' conduct in the *Federal Register* and codify them in the *Code of Federal Regulations*.
10. When agencies adopt rules promulgated by another entity, which may in some instances be copyrighted, they should ensure that the rules are reasonably available to the public such as by providing links on the agencies' websites or other mechanisms for easily accessing those rules.
11. Agencies should also publish their rules governing representatives' conduct on a single webpage or in a single document on their websites and clearly label them using a term such as "Rules of Conduct for Representatives." The agency should indicate clearly whether the rules apply only to attorneys, non-attorneys, or both.
12. On the webpage or in the document described in Paragraph 11, agencies should also publish information concerning qualifications for representatives (including for non-attorneys as applicable), how to file a complaint, and a summary of the disciplinary



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process.

13. On the webpage or in the document described in Paragraph 11, agencies should consider providing comments, illustrations, and other explanatory materials to help clarify how the rules work in practice.
14. Agencies should consider publishing disciplinary actions, or summaries of them, on the webpage or in the document described in Paragraph 11 so as to promote transparency regarding the types of conduct that lead to disciplinary action. When necessary to preserve recognized privacy interests, the agency may consider redacting information about particular cases or periodically providing summary reports describing the rules violated, the nature of the misconduct, and any actions taken.

Model Rules

15. ACUS's Office of the Chairman should consider promulgating model rules of conduct that would address the topics in this Recommendation. The model rules should account for variation in agency practice and afford agencies the flexibility to determine which rules apply to their adjudicative proceedings. In doing so, the Office of the Chairman should seek the input of a diverse array of agency officials and members of the public, including representatives who appear before agencies, and the American Bar Association.