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MODEL RULES OF REPRESENTATIVE CONDUCT

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Prepared by
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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 oral argument or presentation resulting in some determination by an adjudicator that affects the rights or interests of individual parties.
- (B) “Adjudicator” is one or more individuals who preside(s) at the oral argument or presentation of evidence 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) “Docketed Party” is a named person required by law to participate in an adjudication.
- (E) “Intervenor” is a person either entitled by law or permitted by [the Agency] to participate with full or limited rights as a party, despite not being a docketed party to an adjudication.
- (F) “Knowingly” means done with actual knowledge of, or willful blindness to, the subject of the action.
- (G) “Limited participant” is a person, who is not a party, permitted by agency discretion to participate in an adjudication.
- (H) “Party” is a docketed party in an adjudication.
- (I) “Participant” means a party to an adjudication or a person compelled to appear before an agency in an adjudication, as well as an intervenor or other interested person in the adjudication.
- (J) “Person” means an individual or entity, other than the agency or an individual acting on the agency’s behalf.
- (K) “Presiding adjudicator” is the adjudicator responsible for conducting and resolving a specific agency proceeding.
- (L) “Representation” refers to the acts of a representative on behalf of a participant in an adjudication.
- (M) “Represented participant” means a participant in an adjudication who is accompanied in the adjudication by a representative.
- (N) “Representative” is an individual appearing in an adjudication on behalf of a participant. A representative may be a private licensed attorney or

non-lawyer, but may not be a government attorney or current government employee.

- (O)“Tribunal” means any agency adjudicative authority presiding over a proceeding, including appeals of an agency adjudication by another agency adjudicator or adjudicators.

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101. Scope of Rules

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

- (1) Licensed attorneys covered by the Agency Practice Act, 5 U.S.C. § 500;
- (2) Licensed attorneys authorized to act as representatives by other applicable statute or agency rule; and
- (3) Private 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) Government attorneys;
- (2) Non-lawyer government employees.

(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.

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 constitutional or statutory law controls.
- (C) Except to the extent that waiver or modification would otherwise be contrary to law, an adjudicator may, after adequate notice 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.

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REPRESENTATIVE QUALIFICATIONS

200. In General

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

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201. Consent

- (A) Unless otherwise prohibited by law, a participant must provide consent to representation to the presiding adjudicator..
- (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 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 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 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 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 determined in accordance with applicable law, including the rules herein regarding scope of representation. *See* ABA Model Rule of Professional Conduct 1.5; Rule 301, *infra*.

202. Representation by Licensed Attorneys

- (A) Licensed attorneys 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;
 - (2) In accordance with any [Agency] regulation authorized by statute.
- (B) Licensed attorney 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 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 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 an attorney to serve as a representative. The Agency Practice Act makes clear that any 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 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 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 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 including in the official record of the proceeding.
4. (to subsections (A), (B)): Agencies are encouraged to maintain records of attorney representatives who are qualified to practice before them.

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.
- (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 provides limited permission to practice for “limited licensed technicians.” 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**.

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 been charged with or 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 to lack the necessary qualifications to serve if:
- (1) the representative's participation is prohibited by law; or
 - (2) 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 are 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 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 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.

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205. Non-Lawyer Representatives with Licenses

- (A) Non-lawyers who retain other licenses relevant to the subject matter of the adjudication should be presumed to have the requisite qualifications to serve.
- (B) The presumption of qualification for a licensed, non-lawyer representative described in subsection (A) depends on the representative being a member in good standing of their licensing jurisdiction at the time of the representation and not being otherwise prohibited by law from acting as a representative.

Official Comment

1. (to subsection (A)): The 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 licenses that may be relevant to a proceeding are a medical license in SSA disability adjudications or an engineering license in environmental permitting hearings.
2. (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.
3. (to subsection (A)): Relevant licenses may be broadly construed to include recognition of any of the qualification(s) in rule 204 by an established accreditation system, such as a licensed social worker or health care professional being deemed qualified to serve as a representative in a social security benefits proceeding.
4. (to subsection (B)): Being a member in good standing of a licensing jurisdiction includes not being under active suspension or disbarment by that jurisdiction from engaging in the licensed activity. *See, e.g.*, 38 C.F.R. § 14.633(c)(5) (VA).

206. Law Students and Law Graduates as Representatives

- (A) Current law students and law graduates who are not licensed to practice law may serve as non-lawyer representatives provided they:
- (1) act under the supervision of a licensed attorney or faculty member; and
 - (2) are appearing without direct or indirect remuneration for their services from the party they are representing.
- (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 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 recent graduates who are not yet licensed to practice law should be encouraged by agencies to serve as representatives under the supervision of a licensed attorney or an accredited representative or organization under these rules when they are otherwise qualified to serve as a non-lawyer representative. This would include students participating in a supervised law school clinic, externship, or supervised pro bono opportunity.
3. (to subsection (A)): Direct or indirect remuneration would not include a stipend, but would include a salary or other compensation from a legal organization that was paid for services in connection with the representation.

207. Accreditation of Non-Lawyer Representatives

- (A) For non-lawyer representatives who do not hold other, relevant professional licenses in accordance with **rule 205**, and as permitted by applicable law, the [Agency] may establish an accreditation system to ensure that such non-lawyer representatives have the necessary qualifications to serve.
- (B) Any such accreditation system should include the criteria in **Rule 204**, as well as any additional criteria the [Agency] deems appropriate and relevant to establish a representative's qualifications.
- (C) The Agency may decide that accreditation may operate prospectively to establish a presumption of qualification for the representative in future proceedings, but not for more than 3 years from the date of initial accreditation.
- (D) If an accredited representative engages in conduct 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 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 continuing education courses, to maintain their accreditation during the designated period.
4. (to subsection (D)): Revocation shall be at the discretion of the 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.
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 proceedings.

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

Official Comment

1. (to subsection (A)): The 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.; *See also* EOIR, Accredited Representatives Roster, *available at* <https://www.justice.gov/eoir/page/file/942311/download>.

209. Requirements for Organizational Accreditation

- (A) Law firms or 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; and
 - (2) make only nominal charges and assess no excessive membership dues for accredited representatives.
- (B) If an accredited organization within the meaning of subsection A no longer satisfies the accreditation requirements, representatives designated by the organization shall no longer be permitted to serve 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.
- (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 . 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 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.
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.
4. (to subsection (C)): members of legal licensing organizations would ostensibly be governed by the rules pertaining to representation by attorneys in **Rule 202**.

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 attorney representatives' obligations under other applicable rules of conduct.

Official Comment

1. (to subsection (A)): The applicability of these rules to attorney representatives is limited to the extent that it only “affect[s] such attorney’s participation in a particular proceeding before it,” rather than imposing some disciplinary or other remedial measures impacting an attorney’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 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).

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 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 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 who has given the representative sufficient notice that 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)): In the case of attorney 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.
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. 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 100 (defining "knowledge" for purposes of these rules).

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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].

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 an attorney.
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 Rule 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.

303. Diligence

- (A) A representative should act promptly and diligently in representing a participant.
- (B) Diligent representation requires that the representative not undertake the responsibility of serving as a representative if 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) 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 302.
2. (to subsection (D)): This is true unless the representative has withdrawn under Rule 307, or the participant has withdrawn their consent to the representation under Rule 201.
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 decisionmaking tools like durable powers of attorney or consulting appropriate resources, such as agencies for aging, long-term care, or adult protection. In all cases, protective action should be taken in the participant's best interest.

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 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.*

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305. Organization as a 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 decisionmaking authority on behalf of the organization for purposes of the proceeding.

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306. Confidentiality

- (A) Except as permitted by subsection (B), a representative 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 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) enable a representative to respond to an accusation of wrongdoing by the represented participant against the representative in the proceeding; or
 - (4) comply with 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.

307. Withdrawal 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; 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**.
- (B) A representative must submit a written request to withdraw to the adjudicator or [other responsible Agency official] . The written request must be included in the official record of the proceeding and be served on the participant.
- (C) The adjudicator or [other responsible Agency official] may permit a representative to withdraw from representing a participant if the representative can show good cause for the withdrawal or the withdrawal will not adversely impact either the proceeding or the participant's interest in the proceeding.
- (D) Withdrawal will also be allowed based on the participant's written consent and the approval of the adjudicator or [other responsible Agency official].
- (E) A participant may terminate the representation subject to the approval of the adjudicator or [other responsible Agency official].

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 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**.
3. (to subsection (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).
4. (to subsection (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 (D)): 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.

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

309. Compliance with Agency Rules

Representatives must comply with Agency rules governing adjudication, including [insert the relevant Agency rules].

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 an attorney include, in addition to agency rules, the rules of professional conduct and ethics of the jurisdictions in which the attorney is licensed to practice. 48 C.F.R. § 65101.35(a) (CBCA); *see* rule 300(B).

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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 a person 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.
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 representatives.
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.

311. Delay

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

Official Comment

1. Avoiding delay is related to, but distinct from, the promptness requirement in 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.

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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, or conceal material with potential evidentiary value 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 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).
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).

313. 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 may not make a claim in a proceeding that the representative knows or reasonably should know lacks an arguable basis in law or in fact, or 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 the representative has complied with subsections (A) and (B) of this section.

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 a material fact and are rendered false, fictitious, or fraudulent as a result of such omission. *See* 40 CFR 27.3(a) (EPA).
2. (to subsection (A)): This subsection also applies to claims in enforcement proceedings under **Rule 401**.
3. (to subsection (B)): 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 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).
7. (to subsection (C)): A signature should comply with [the agency's] rules and definitions regarding the qualifications and requirements for a valid signature.

314. Disruptive Conduct

- (A) A representative must refrain from engaging in conduct that interferes with the efficient, fair, or orderly conduct of the proceeding.
- (B) A representative must refrain from engaging in 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's fees) or experiencing prejudicial delay.

Official Comment

1. (to subsection (A)): 7 CFR § 1.328(a)(3) (USDA). This includes failure to act in a timely way or failure to follow an adjudicator's instructions.
2. (to subsection (B)): 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).

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 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.

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).

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 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) For purposes of this section *ex parte communication* means an oral or written communication with an 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.
- (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.

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 process in a 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 (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).

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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 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 (D) 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 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.

Official Comment

1. (to subsection (A)): Individuals who “are or may reasonably be expected to be involved in the decisional process” is defined in comment 2 to 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).

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 any lesser crime that reflects adversely on the practitioner's honesty, trustworthiness, or fitness as a representative in other respects.

Official Comment

1. The representative's prior criminal conduct is also a factor in their qualification to serve, as noted in **Rule 204(a)(7)**. 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. *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).

ENFORCEMENT AND DISCIPLINE

400. In General

- (A) An attorney representative in an [agency] proceeding is subject to the disciplinary authority of the [agency] with respect to that proceeding.
- (B) A non-lawyer representative is subject to the disciplinary authority of the agency generally.
- (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 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). 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 representatives beyond the scope of these rules.

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 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) A representative or participant in the proceeding may initiate an enforcement proceeding by making an oral or written complaint to the presiding adjudicator. The complaint shall be part of the record in that proceeding.
- (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 receive such complaints] 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.
- (C) Any complaint submitted under this rule 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.

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'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 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].
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.
8. (to subsection (C)): A complaint may be accompanied by any additional evidence or information pertaining to the alleged violation.
9. (to subsection (C)): The "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.").
10. (to subsection (C)): A written complaint may be submitted electronically or in hard copy.

402. Enforcement Hearings

- (A) The individual or entity alleged to have violated one or more of these rules in accordance with Rule 401 shall be entitled to a hearing prior to any sanctions or other discipline being imposed upon them under 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 and anyone else who the official presiding over the enforcement hearing determines to have relevant information.
- (C) The burden of proof in an enforcement proceeding is on the 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.
- (D) Violations must be proven by [a preponderance of the] evidence in order to justify discipline under Rules 404, 406, and 407.

Official Comment

1. (to subsection (A)): Nothing in this rule shall be construed to limit 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 if the adjudicator's actions with respect to the representative's conduct do not rise to the level of a sanction under 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.
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 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 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).
4. (to subsection (B)): If the agency is not the complainant, the agency may also offer evidence at the hearing.

5. (to subsection (C)): The agency or designated agency official responsible for submitting a complaint under **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.
6. (to subsection (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.”).
7. (to subsection (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”).

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403. Orders

- (A) The agency official presiding over an enforcement hearing under **Rule 402** shall issue an order resolving the allegations in the complaint. In the case of an enforcement proceeding initiated in a specific proceeding under **Rule 401(A)**, the presiding adjudicator shall issue an order in compliance with the requirements of this section.
- (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.”).

404. Sanctions

- (A) A representative found to have violated these rules in an order issued pursuant to **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 representative from future agency proceedings, including being permanently barred from serving as a representative before the agency; and
 - (4) [such other sanctions as the agency may deem appropriate].
- (B) In imposing a sanction, the agency official presiding 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;
 - (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 limiting motions, changing dates and times of proceedings, or excluding evidence.
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 attorneys by the relevant disciplinary authority).
4. (to subsection (A)): Attorney 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 representatives in agency adjudication).

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

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405. Reciprocal Discipline

- (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 under **Rule 404**, including suspension or disqualification.

Official Comment

1. (to subsection (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, disbaring, 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 (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 (B)): 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).
5. (to subsection (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 204**.
6. (to subsection (B)): A resolution in favor of the representative in response to a petition for review may result in the representative being free from reciprocal discipline under this section.

406. Petitions for Review

- (A) A representative may petition for review of an order under **Rule 403**.
- (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 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.
- (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 representative to exhaust administrative remedies in seeking review of an order under Rule 403.
- 3.
4. (to subsection (B)): The scope of review sought may include the issuance of a sanction under Rule 404.(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. (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 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).

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

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407. Referrals to a Disciplinary Authority

- (A) An 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.
- (B) An agency official in an enforcement proceeding may refer a complaint under **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 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 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.")

TRANSPARENCY AND REPORTING

500. In General

[The agency] 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.
2. “Relevant information pertaining to” these rules includes information pertaining to disciplinary actions under **Rule 502**.

501. Online Publication of Rules

- (A) 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) The disciplinary process for alleged violations of these rules, including the filing of a complaint for a violation of these rules by a representative;
 - (3) 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;
 - (4) Any adjudicator-specific procedural rules, such as standing orders; and
 - (5) Any documents that provide an overview of agency precedent applying these rules.

Official Comment

1. (to subsection (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.
2. (to subsection (B)): For examples of practice manuals, see, e.g., National Labor Relations Board, Manuals, <https://www.nlr.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 (B)): *See* Recommendation 2018-5, 84 Fed. Reg. at 2142 (recommending publication of adjudicator-specific procedural rules).
4. (to subsection (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”).

502. Online Publication of 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.
- (B) [The agency will also publish a summary of all disciplinary actions taken by [the agency] for violations of these rules on [the agency's] website.
- (C) The summary of disciplinary actions in subpart (B) 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.
- (D) Information in the summary and published order, other than the name of the representative subject to the disciplinary action, will be redacted to preserve recognized privacy interests, such as personally identifiable information, medical information, employment information, proprietary business information, and trade secrets.
- (E) 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 accessible in a single searchable 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).
2. (to subsection (B)): *See* 8 C.F.R. § 1003.106(c) (allowing for publication of disciplinary sanctions by DHS); www.justice.gov/eoir/attorney-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.
5. (to subsection (E)): “Accessible” has the same meaning in this context as “publicly available and accessible,” which is explained in the commentary to **Rule 500**, *supra*.
6. (to subsection (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).
7. (to subsection (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.

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