

DRAFT

MODEL RULES OF REPRESENTATIVE CONDUCT

Submission to Subcommittee on Representative Qualifications,
April 7, 2023

Prepared by
The Model Rules of Representative Conduct Working Group

Office of the Chairman
Administrative Conference of the United States

TABLE OF CONTENTS

GENERAL PROVISIONS

Rule 100. Definitions	1
Rule 101. Scope of Rules	2
Rule 102. Construction, Modification, or Waiver of Rules	3

REPRESENTATIVE QUALIFICATIONS

Rule 200. In General	4
Rule 201. Consent	5
Rule 202. Representation by Licensed Attorneys	6
Rule 203. Waiver of Good Standing Requirement for Licensed Attorneys	7
Rule 204. Representation by Non-Lawyers	8
Rule 205. Character and Fitness for Non-Lawyer Representatives	9
Rule 206. Non-Lawyer Representatives with Professional Licenses	10
Rule 207. Law Students and Law Graduates as Representatives	11
Rule 208. Accreditation of Non-Lawyer Representatives	12
Rule 209. Accreditation of Organizations	13
Rule 210. Requirements for Organizational Accreditation	14

REPRESENTATIVE CONDUCT

Rule 300.

ENFORCEMENT AND DISCIPLINE

Rule 400.

TRANSPARENCY AND REPORTING

Rule 500.

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 ALJ or any other presiding official who is 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) “Limited participant” is a person, who is not a party, permitted by agency discretion to participate in an adjudication.
- (G) “Party” is a docketed party in an adjudication.
- (H) “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 limited participant in the adjudication.
- (I) “Representation” refers to the acts of a representative on behalf of a participant in an adjudication.
- (J) “Represented participant” means a participant in an adjudication who is accompanied in the adjudication by a representative.
- (K) “Representative” is an individual appearing in an adjudication on behalf of a participant. A representative maybe a private licensed attorney or non-lawyer, but may not be a government lawyer or current government employee.

Commented [LV1]: This maps the language of APA 555 and then goes further. I think it makes sense given that the model rules are primarily about qualifications and conduct, not whether to allow representation, but need advice as to the scope of this definition, since it will be used throughout.

Official Comment

101. Scope of Rules

(A) These rules of representative conduct 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.

Official Comment

Commented [LV2]: I modeled this after the Adjudication Rules, but am not sure this will not create unintended consequences. I welcome comments from the subcommittee and will have to think about this more.

Rule 102. Construction, Modification, or Waiver of Rules

- (A) These rules must be liberally construed to secure the fair, expeditious, and inexpensive 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.

Commented [LV3]: Another rule to think about as we go along. I like the flexibility here, but am concerned about unintended consequences. This is also modeled after the ACUS Adjudication Rules.

Official Comment

DRAFT

REPRESENTATIVE QUALIFICATIONS

200. In General

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

Official Comment

DRAFT

201. Consent

- (A) Unless otherwise prohibited by law, a participant must consent in writing to representation. The written consent must identify the representative by name and be submitted to the adjudicator or some other official designated by the [Agency] for that purpose in advance of the adjudication.
- (B) The written consent must be included in the administrative record of the adjudication.

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).

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 demonstrate that they are a member in good standing of [their licensing jurisdiction] and are not otherwise prohibited by law from acting as a representative. Attorney representatives may demonstrate that they are a member in good standing of [their licensing jurisdiction] by filing a certification of good standing with the presiding adjudicator or some other official designated by the [Agency] for that purpose.

Official Comment

1. (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 subsections (B) and (C)): 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). [Agency] adjudications that regularly involve foreign parties may consider permitting attorneys who are licensed outside the United States to serve as representatives in those proceedings.

203. Waiver of Good Standing Requirement for Licensed Attorneys

- (A) If an attorney representative is not a member in good standing of [their licensing jurisdiction], they may not serve as a representative in an adjudication without prior written approval of the presiding adjudicator.
- (B) Such approval shall only be granted in cases when the adjudicator determines that the representative has the necessary character and fitness to serve in that capacity.
- (C) The adjudicator may condition that approval on the attorney representative completing continuing legal education (CLE) or other relevant training in areas deemed relevant by the adjudicator.

Official Comment

1. (to subsection (A)): Individual agencies may wish to specify which licensing jurisdictions qualify an attorney to serve as a representative. **See comment 2 to rule 202, *supra*.**
2. (to subsection (B)): Rules **204-207** provide factors for an adjudicator to consider in determining if a representative meets the minimum character and fitness requirements.
3. (to subsection (C)): 38 C.F.R. § 14.629(b)(1)(iii) (outlining CLE requirement for certification of representatives appearing before the Department of Veterans Affairs).

204. Representation by Non-Lawyers

A non-lawyer may serve as a representative in an agency adjudication if the represented participant consents on the record to the representation and the representative is determined by the [Agency] to have the necessary character and fitness to serve in that role.

Official Comment

1. Adequate consent is determined by the requirements set forth in [rule 201](#).
2. This rule is designed to freely permit any nonlawyer chosen by the person appearing before the agency 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 character and fitness of representatives are provided in [rule 205](#).
3. Former agency employees who are non-lawyers are not precluded from serving as representatives provided they satisfy the character and fitness requirements in [rule 205](#). 5 U.C.S. § 500(d)(3).

205. Character and Fitness for Non-Lawyer Representatives

- (A) Among the factors to be considered by the adjudicator in determining if a non-lawyer representative has the necessary character and fitness to serve are:
- (1) the representative's relationship to the represented participant;
 - (2) the representative's communication skills and knowledge of the relevant subject matter;
 - (3) the representative's relevant experience, if any, relating to the subject matter of the adjudication;
 - (4) the representative's relevant education or training in matters relevant to the adjudication;
 - (5) the representative's relevant 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 character and fitness 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 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.
2. (to subsection (A)): If an adjudicator believes there is an additional reason why a non-lawyer representative does or does not have the requisite character and fitness, the adjudicator may consider that reason in their analysis.

206. Non-Lawyer Representatives with Professional Licenses

- (A) Non-lawyers who retain other professional licenses relevant to the subject matter of the adjudication should be presumed to have the requisite character and fitness to serve.
- (B) The presumption of fitness for a professionally licensed, non-lawyer representative described in subsection (A) depends on the representative being a member in good standing of the professional licensing organization at the time of the representation. Non-lawyer representatives may demonstrate that they are a member in good standing of the licensing organization by filing a certification of good standing with the presiding adjudicator or some other official designated by the [Agency] for that purpose.

Official Comment

1. (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 professional licenses that may be relevant to a proceeding are a medical license in SSA disability adjudications or an engineering license in environmental permitting hearings.
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 [Agency], 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.

207. Law Students and Law Graduates as Representatives

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

- (1) act under the supervision of a licensed attorney or faculty member; and
- (2) do not receive remuneration for their services.

(B) Law students or unlicensed law graduates who qualify to serve as representatives under subpart (A) must submit a statement certifying that they are under the supervision of a licensed attorney or faculty member to the 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**.

208. Accreditation of Non-Lawyer Representatives

- (A) For non-lawyer representatives who do not hold other, relevant professional licenses in accordance with [rule 206](#), and as permitted by applicable law, the [Agency] may establish an accreditation system to ensure that such non-lawyer representatives have the necessary character and fitness to serve.
- (B) Any such accreditation system should include the criteria in [rule 205](#), as well as any additional criteria the [Agency] deems appropriate and relevant to establish a representative's character and fitness.
- (C) Accreditation may operate prospectively to establish a presumption of character and fitness for the representative in future proceedings, but not for more than 3 years from the date of initial accreditation.
- (D) If the representative engages in conduct after receiving accreditation that is inconsistent with the accreditation requirements, their accreditation may be revoked by the [Agency].

Official Comment

1. (to subsection (A)): For an example of an accreditation process for non-lawyer representatives, see the system adopted by the VA, 38 C.F.R. § 14.629(b). The United States Patent and Trademark Office also has a process for registering non-lawyer agents to serve as representatives in patent adjudications. 37 C.F.R. §§ 11.6, 11.7.
2. (to subsection (B)): Such additional criteria may include evidence of good moral character and reputation or of specific educational or other technical qualifications relevant to the proceedings, as well as whether the representative is accepting compensation for their services. 37 C.F.R. § 11.7; 38 C.F.R. § 14.630.
3. (to subsection (C)): The prospective nature of accreditation is designed as a benefit to representatives who are likely to appear before the agency in multiple proceedings during the applicable time frame. The [Agency] may elect to require accredited representatives to complete specified requirements, such as CLE 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.

209. Accreditation of Organizations

- (A) The [Agency] may provide accreditation for organizations, which may in turn designate members of their organization as representatives in [Agency] adjudications.
- (1) If the [Agency] decides on its own to pursue accreditation for an organization, it should require the organization to submit documentation to the [Agency] establishing that the organization meets the accreditation requirements of **rule 210**.
 - (2) An organization may submit a request for accreditation to the [Agency]. Such requests for accreditation must be accompanied by documentary evidence from the organization establishing that it meets the accreditation requirements of **rule 210**.

Official Comment

1. (to subsection (A)): The Department of Homeland Security and Department of Justice Executive Office of Immigration Review (EOIR) both use organizational accreditation to identify representatives in immigration hearings. 8 C.F.R. § 292.1(a)(4) (defining a qualified representative as a “person representing an organization . . . who has been accredited by the Board”); EOIR, Accredited Representatives Roster, *available at* <https://www.justice.gov/eoir/page/file/942311/download>.

210. Requirements for Organizational Accreditation

- (A) 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 representatives of requisite character and fitness; and
 - (2) make only nominal charges and assess no excessive membership dues for represented participants.
- (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.
- (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 Homeland Security for its organization accreditation program. 8 C.F.R. § 292.2.
2. (to subsection (B)): Adjudicators in individual adjudications should not permit non-lawyer representatives who were designated by unaccredited organizations or organizations that no longer meet accreditation requirements to participate in adjudications before the [Agency].
3. (to subsection (C)): members of legal licensing organizations would ostensibly be governed by the rules pertaining to representation by attorneys in [rule 202](#).