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**MODEL RULES OF REPRESENTATIVE CONDUCT**

Submission from the Working Group on Model Rules of Representative Conduct,  
June 6, 2024

Prepared by  
The Model Rules of Representative Conduct Working Group

Office of the Chair  
Administrative Conference of the United States

## FOREWORD

In 2021, the Administrative Conference of the United States recommended that federal agencies “consider adopting rules governing the participation and conduct of representatives in adjudicative proceedings to promote the accessibility, fairness, integrity, and efficiency of adjudicative proceedings.”\* The Conference identified considerations that agencies should take into account in developing rules that are appropriate for the programs they administer. To help agencies develop and implement such rules, the Conference also encouraged the Office of the Chair to promulgate model rules of representative conduct.

In 2023, I convened a working group to develop the model rules. In convening the working group, I sought to carry out the Conference’s recommendation that we “seek the input of a diverse array of agency officials and members of the public, including representatives who appear before agencies, and the American Bar Association.”

The reporter’s Preface to the rules explains the history and purpose of this endeavor, particularly the overarching goal of the model rules to create a transparent, easily accessible set of guidelines that will facilitate a wide range of representation in a broad array of agency proceedings. It falls to me, in this Foreword, only to add a few acknowledgments and issue a necessary disclaimer.

The Office of the Chair extends its profound gratitude to the members of the working group for giving so much of their time—always in the face of competing obligations—to this important initiative. Special thanks are owed to the group’s chair, Erin M. Wirth, the Chief Administrative Law Judge for the Federal Maritime Commission, and the group’s reporter, Louis J. Virelli, III, Professor of Law at Stetson University College of Law. Judge Wirth kept the project on a strict deadline and provided invaluable leadership throughout the group’s substantive discussions, and Professor Virelli ensured that the drafting met his exacting standards. Throughout the project, they led the group with a sense of mission, an inclusivity of multiple perspectives, and, of course, professionalism, warmth, and good cheer.

The Office of the Chair also thanks the following agencies and organizations for lending some of their best experts to the working group: the American Bar Association (including the Section of Administrative Law and Regulatory Practice), Department of Justice (Executive Office for Immigration Review), Department of Labor (Office of Workers’ Compensation Programs), Department of Veterans Affairs (Board of Veterans’ Appeals), Legal Services Corporation, National Labor Relations Board, National Organization of Social Security Claimants’ Representatives, National Organization of Veterans’ Advocates, Social Security Administration, and University of Virginia School of Law.

The views reflected in these *Rules* and the comments accompanying them, however well-considered, reflect the views only of the working group and its reporter, not those of the

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\* Admin. Conf. of the U.S., Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, 87 Fed. Reg. 1721 (Jan. 12, 2022).

Conference. That said, the values and best practices identified by the Conference in Recommendation 2021-9 informed the drafting of these rules.

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<sup>†</sup> The Model Rules of Representative Conduct and their related comments do not necessarily represent the views of the members' organizations. In addition to the members and staff counsel listed here, the Chair thanks Nancy J. Griswold, Lea Robbins, and Anthony Scire for their contributions as former members of the working group, as well as Alexandra F. Sybo for her former work as staff counsel.

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## PREFACE

Louis J. Virelli III<sup>‡</sup>

The Office of the Chair of the Administrative Conference of the United States (ACUS) convened a Working Group on Model Rules of Representative Conduct to assist agencies in adopting “rules governing the participation and conduct of representatives in adjudicative proceedings.” This working group was convened following the adoption of ACUS Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, on December 16, 2021. The working group was comprised of distinguished experts in the field of administrative adjudication, ranging from adjudicators and agency officials to private practitioners and academics. It first convened in February 2023 and met regularly throughout the following year to consider and ultimately approve a final draft of these model rules, which were presented to the 81<sup>st</sup> ACUS Plenary Session on June 13, 2024.

The overarching goal of the model rules is to create a transparent, easily accessible set of guidelines that facilitates a wide range of representation in a broad array of agency proceedings. Representation empowers participants to more thoroughly and effectively engage in agency proceedings and, as a result, promotes better outcomes in those proceedings. Such representation, however, must be guided by principles that help ensure the efficacy and integrity of that representation. These model rules codify those principles, which include protections against inadequate representation and corresponding remedies.

The model rules are organized into five sections:

- Scope of the Rules;
- Representative Qualifications;
- Representative Conduct;
- Enforcement; and
- Transparency

The section regarding the scope of the rules defines terms and addresses general questions such as to whom the model rules are intended to apply as well as how they should be interpreted. The section on representative qualifications focuses mostly on nonlawyer representatives, setting out factors for adjudicators to consider in determining whether a nonlawyer representative is qualified to act as a representative in a given proceeding. The section on representative conduct describes the standards of professional conduct expected of lawyer and nonlawyer representatives, from issues such as maintaining candor before the tribunal to avoiding conflicts of interest. The section on enforcement outlines the procedures and remedies

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<sup>‡</sup> Reporter, ACUS Model Rules of Representative Conduct Working Group. I am grateful to Rylie Pennell for her excellent research assistance.

available to address violations of the model rules, including the different remedies available for lawyer versus nonlawyer representatives, and the section on transparency describes how agencies can ensure that participants and representatives are aware of and able to understand the model rules and how they function.

During its deliberations, the working group encountered several issues that transcended multiple rules and, in some cases, multiple sections of rules. The most prominent of these issues was the distinction between lawyer and nonlawyer representatives, including the use of the term nonlawyer to describe representatives who do not hold an active law license at the time of their representation.

The model rules are designed to regulate all representatives in adjudicative proceedings. There is an inevitable substantive distinction, however, between lawyer and nonlawyer representatives because lawyer representatives are regulated by existing statutory and other legal provisions. For example, lawyer representatives are governed by the Agency Practice Act, 5 U.S.C. § 500, which generally permits licensed lawyers to serve as representatives in agency proceedings, as well as by their licensing jurisdictions and various ethics codes. Moreover, consistent with Recommendation 2021-9 and American Bar Association (ABA) policy, these model rules regulate the conduct of lawyer representatives only in a particular adjudication, not with respect to practice before the agency generally. The model rules do not address the conduct of federal agency lawyers and other employees acting on behalf of their agencies because they are governed by federal ethics standards and other provisions, which include disciplinary proceedings and sanctions for violations of those provisions.

Agencies have far less external guidance, and thus more flexibility, regarding the qualifications and conduct of nonlawyers serving as representatives. The model rules offer agencies a new, comprehensive framework for identifying and regulating qualified nonlawyer representatives. The model rules regulate nonlawyer representatives more broadly in that they apply beyond a nonlawyer's role in a particular adjudication. They take into account the fact that representation by a nonlawyer may differ from that of a lawyer while also recognizing that nonlawyer representatives play a crucial role in providing effective representation, often for those who would otherwise not be represented. Model rules regulating nonlawyers' qualifications and conduct are therefore important in preserving the overall quality of agency adjudication. Providing agencies with guidelines for how to incorporate nonlawyer representatives into agency proceedings more easily and consistently allows for greater representation of participants without sacrificing the efficacy or integrity of that representation.

The substantive distinction between lawyer and nonlawyer representatives raises the question of how best to refer to each group. The working group agreed that the label lawyer representative, which borrows from the ABA Model Rules of Professional Conduct, is sufficiently clear to refer to representatives with an active license to practice law. The group also recognized that there is an ongoing discussion, particularly at the state level, about the best way to describe representatives who do not hold an active law license. After much discussion, the working group chose to refer to this group as nonlawyer representatives for two reasons. First, the group concluded, based on two prior ACUS recommendations and a 2023 report from the

Legal Aid Interagency Roundtable, that the term nonlawyer is currently an accepted way within the legal community to refer to representatives without an active law license. Moreover, the working group could not identify any word or phrase that it felt better captured the full range of individuals and responsibilities associated with representation by nonlawyers in adjudicative proceedings. The working group's decision to use the term nonlawyer is not meant to suggest any deficiencies in representation offered by such individuals, nor should it deter an individual agency from adopting a different term in its own regulations regarding representatives without an active law license. The working group encourages agencies to remain attentive to the ongoing discussion within the legal community about terminology in this area and to consider updating their rules accordingly.

Another recurring issue was the question of fees for representatives. The working group recognizes that some agencies have their own rules or other mechanisms for addressing fees and that those agencies may choose not to adopt the model rules addressing fees. For agencies without existing fee standards, the working group concluded that the model rules offer an approach to fees that could be helpful to such agencies despite differences among their proceedings.

The working group also spent considerable effort on the transparency and accessibility of the model rules. The working group drafted the model rules with the intent that they would be codified by adopting agencies. It also focused on less formal means of communication, such as online publication of selected information, to ensure that all potential participants and representatives, including nonlawyer representatives, would have easy access to the information required to participate fully in agency proceedings. The model rules include a provision that would require agencies publish adopted rules in the *Code of Federal Regulations* and the *Federal Register*. The working group recognizes that agencies may have their own rules and practices involving publication. Agencies should take those into account when deciding whether to adopt this model rule.

Throughout its deliberations, the working group focused on crafting model rules that, while designed to function together as a comprehensive and coherent set of guidelines for representatives in agency adjudications, also account for the significant variability in agency practice and procedure and offer flexibility to individual agencies to choose which rules best fit their proceedings. The working group encourages agencies to adopt the model rules in their entirety but in the alternative recommends that agencies consider adopting sections, individual rules, or parts of rules to meet their specific needs. As ACUS has recommended in Recommendation 2021-9, agencies should group such rules together and label them as "Rules of Conduct for Representatives."

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## GENERAL PROVISIONS

### 100. Definitions

- (A) “Adjudication” means an agency proceeding—whether conducted pursuant to the federal Administrative Procedure Act, 5 U.S.C. § 551 et seq., other statutes, or agency regulations or practice—involving at least some presentation or oral argument resulting in some determination by an adjudicator that affects the rights or interests of parties.
- (B) “Adjudicator” means one or more individuals who preside(s) at the presentation or oral argument in 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” means an agency as defined in 5 U.S.C. § 551.
- (D) “Knowingly” means done with actual knowledge of, or willful blindness to, the subject of the action.
- (E) “Lawyer” means an individual who is licensed to practice law.
- (F) “Nonlawyer” means an individual who is not licensed to practice law at the time of their representation, even if they previously held a law license.
- (G) “Party” means a named person or entity required by law to participate in an adjudication.
- (H) “Participant” means a party to an adjudication or an intervenor or other interested person allowed to participate in the adjudication.
- (I) “Person” means an individual or entity other than the agency or an individual acting on the agency’s behalf.
- (J) “Presiding adjudicator” means the adjudicator responsible for conducting and resolving a specific agency proceeding.
- (K) “Representation” refers to the acts of a representative on behalf of a participant in an adjudication.
- (L) “Represented participant” means a participant on behalf of whom a representative appears in an adjudication.
- (M) “Representative” means an individual appearing in an adjudication on behalf of a participant. A representative may be a lawyer or a nonlawyer but may not be a federal lawyer or other employee of the agency before whom they appear. See Comment 2 to Rule 101 for a discussion of exceptions under these rules for federal agency lawyers and other employees acting on behalf of their agencies.

(N) “Tribunal” means any agency adjudicative authority presiding over a proceeding, including over 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) Lawyers covered by the Agency Practice Act, 5 U.S.C. § 500;
  - (2) Lawyers authorized to act as representatives by other applicable statute or agency rule; and
  - (3) Nonlawyers who meet the applicable qualifications prescribed in Rules 204–207.
- (B) These rules are not applicable to the following types of individuals wishing to serve as representatives before [the Agency]:
- (1) Federal agency lawyers when they appear on behalf of their agency; and
  - (2) Other employees of the agency when they appear on behalf of their agency.
- (C) On any question not addressed by specific statute, specific agency regulation, or these rules, representation is guided so far as practicable by the ABA Model Rules of Professional Conduct.

### *Official Comment*

1. (to subsection (A)): As defined in Rule 100, “lawyer” for purposes of these rules means an individual who is licensed to practice law.
2. (to subsection (B)): Federal ethics and other provisions govern the conduct of federal agency lawyers and other employees acting on behalf of their agencies, including disciplinary proceedings and sanctions for violations of those provisions. *See, e.g.*, 5 C.F.R. § 2365.101 et seq. (“Standards of Ethical Conduct for Employees of the Executive Branch”).
3. (to subsection (B)): Former agency employees who are nonlawyers are not precluded from serving as representatives provided they meet the applicable qualifications in Rules 204–207. *See, e.g.*, 5 U.S.C. § 500(d)(3).

## **102. Construction, Modification, or Waiver of Rules**

- (A) These rules should 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, the applicable law controls.
- (C) Except to the extent that waiver or modification would otherwise be contrary to law, the presiding adjudicator may, after adequate notice and explanation to all participants, modify or waive any of these rules upon a determination that no participant 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 representative.

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## 201. Consent

- (A) Unless otherwise prohibited by law, a participant must provide consent to representation to the presiding adjudicator, agency, or tribunal.
- (B) A record of that consent must be included in the official 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; or
  - (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 lawyers who are “a member in good standing of the bar of the highest court of a State” to file a written declaration that they are qualified under the Act to serve as a representative. 5 U.S.C. § 500(b). 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 lawyer representatives or to consent requirements promulgated through valid agency regulation. *Polydoroff v. ICC*, 773 F.2d 372, 374 (D.C. Cir. 1985); *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 Rules 208–209. 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. The adjudicator or any other responsible Agency official should freely grant withdrawal of consent and terminate the representation provided the participant’s withdrawal of consent will not have a materially adverse impact on the proceeding or the participant’s interest therein. In circumstances where consent was withdrawn and there was an existing fee arrangement between the participant and representative relating to the adjudication, the amount, if any, of fees owed to the representative shall be governed by applicable law, including the rules herein

regarding fees and scope of representation. *See* MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2020); Rules 301, 308.

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## 202. Representation by Lawyers

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

- (1) In accordance with the Agency Practice Act, 5 U.S.C. § 500, or other applicable statute; or
- (2) In accordance with any [Agency] regulation authorized by statute.

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

### *Official Comment*

1. (to subsection (A)): Some agency statutes specifically allow for additional credentialing of lawyer representatives. Consistent with its statute, the Department of Veterans Affairs (VA) has adopted a detailed accreditation process. *See* 38 U.S.C. § 5904(a)(2) (allowing the VA to establish accreditation standards beyond those contained in the Agency Practice Act). The VA process, however, still defers heavily to bar membership as evidence of a representative's qualifications. State bar membership in good standing creates a presumption that the lawyer 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 may qualify a lawyer to serve as a representative. The Agency Practice Act makes clear that any lawyer "who is a member in good standing of the bar of the highest court of a State may represent a person before an agency." 5 U.S.C. § 500(b). Some agencies define the range of acceptable licensing jurisdictions more broadly. For instance, the Securities and Exchange Commission also permits lawyers 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. *See* 17 C.F.R. § 201.102(b). The Social Security Administration permits lawyer 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 lower Federal court of the United States." 20 C.F.R. § 404.1705(a). For adjudications that regularly involve foreign parties, agencies may consider permitting lawyers who are licensed outside the United States to serve as representatives in those proceedings.
3. (to subsection (B)): Affirmation of good standing may be provided orally or in writing and must be included in the official record of the proceeding.

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

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### 203. Representation by Nonlawyers

- (A) Nonlawyers may serve as representatives in an agency adjudication if they are determined to have the necessary qualifications to serve in that role, unless prohibited by law.
- (B) Nonlawyers 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 nonlawyer is used to describe individuals who are not licensed to practice law at the time of their representation, even if they previously held a law license. 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 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25,641 (July 16, 1986); LEGAL AID INTERAGENCY ROUNDTABLE, ACCESS TO JUSTICE IN FEDERAL ADMINISTRATIVE PROCEEDINGS: NONLAWYER ASSISTANCE AND OTHER STRATEGIES (2023).
2. (to subsection (A)): This Rule is designed to freely permit any nonlawyer 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 nonlawyer representatives are provided in Rule 204.
3. (to subsection (A)): Former agency employees who are nonlawyers are not precluded from serving as representatives provided they are qualified to do so under Rule 204. 5 U.S.C. § 500(d)(3).
4. (to subsection (B)): For example, Alaska provides that “[a] person not admitted to the practice of law in this state may receive permission to provide legal assistance in a limited capacity” when supervised by Alaska Legal Services Corporation. ALASKA BAR R. 43.5 (Alaska 2022) (“Waiver to Engage in the Limited Practice of Law for Non-Lawyers Trained and Supervised by Alaska Legal Services Corporation”). Representation qualification based on limited permission to practice is in addition to qualification for nonlawyers based on a license, or due to individual accreditation through the agency, or membership in an accredited organization. *See* Rules 205, 207, 208.

## 204. Qualifications for Nonlawyer Representatives

- (A) Among the factors that may be considered in determining if a nonlawyer 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) Whether there is any indication that the representative will not be willing or able to act in the best interests of the represented participant;
  - (7) Whether the representative has a pending charge or has been convicted of a crime that reflects adversely on the representative's fitness to serve as a representative before the agency; and
  - (8) Whether the representative has knowingly disobeyed or attempted to disobey agency rules or adjudicator directions, or has assisted others in doing so.
- (B) A nonlawyer representative will be presumed, subject to rebuttal, to lack the necessary qualifications to serve if the representative was previously disqualified or suspended from acting as a representative in the same or similar proceeding within the agency.

### *Official Comment*

1. (to subsection (A)): The factors listed are designed to ensure only that a chosen nonlawyer representative is willing and able to act in the best interests of the represented participant. They are not meant to be exclusive. Determinations regarding a nonlawyer representative's qualifications under this Rule should be made with deference to the participant's choice of representative.
2. (to subsection (A)): Determinations as to whether a nonlawyer is qualified under these rules may be made by the presiding adjudicator with respect to the representative's qualifications to participate in a specific proceeding or by the designated agency official in cases where a representative's qualifications have been established under Rules 205–208. Relevant knowledge can include access to support that can provide the applicable expertise, skills, etc. if proper training (and other factors) are present.
3. (to subsection (A)): The first four factors to be considered in determining whether representation by a nonlawyer 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 derived from ACUS Recommendation 2021-9. Admin. Conf. of the U.S., Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, ¶ 3, 87 Fed. Reg. 1721, 1722 (Jan. 12, 2022).

4. (to subsection (A)): If the presiding adjudicator believes there is an additional reason why a nonlawyer does or does not have the requisite qualifications to serve as a representative in a specific proceeding, the adjudicator may consider that reason in their analysis. For example, a lawyer who was, but is no longer, licensed to practice law shall be treated under these rules as a nonlawyer representative. The circumstances under which the individual ceased to be licensed will be relevant to their qualifications under Rule 204. A former lawyer who allowed their license to expire in retirement, for instance, may have very strong qualifications under Rule 204 based on their relevant experience and expertise, while an equally experienced individual who was disbarred for unethical conduct may have insufficient qualifications to serve as a nonlawyer representative.
5. (to subsection (A)): The reasonableness of a representative's fee under Rule 308 is relevant to whether a representative is willing or able to act in the best interests of the represented participant under subsection (A)(6) of this Rule.

## 205. Nonlawyer Representatives with Licenses

- (A) Nonlawyers who retain [specific relevant professional licenses for the Agency] or 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, nonlawyer 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. Lawyers who are retired or no longer licensed to practice law shall be treated as nonlawyers under these rules. *See* Comment 4 to Rule 204.
2. (to subsection (A)): For example, the Agency Practice Act expressly permits certified public accountants to act as representatives in adjudications before the Internal Revenue Service. 5 U.S.C. § 500(c).
3. (to subsection (A)): The question of whether a license is in a field relevant to the subject matter of the adjudication is a question for the designated Agency official but should be interpreted broadly to include any field that may provide the representative with experience, education, or training that may be useful in the adjudication.
4. (to subsection (A)): Relevant licenses may be broadly construed to include recognition by an established accreditation system of any of the qualification(s) in Rule 204.
5. (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) In addition to qualifying as a nonlawyer representative under Rule 204, current law students and law graduates who have not yet been licensed to practice law should be presumed to have the requisite qualifications to serve provided they:
- (1) Act under the supervision of a lawyer; and
  - (2) Are appearing without direct or indirect remuneration for their services from the participant they are representing.
- (B) Law students or unlicensed law graduates who qualify to serve as representatives under subsection (A) must submit a statement certifying that they are under the supervision of a lawyer 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 nonlawyer representatives under Rule 207 or designated as representatives by accredited organizations under Rules 208 and 209.
2. (to subsection (A)): Current law students or law school graduates who are not yet licensed to practice law should be encouraged by agencies to serve as representatives under the supervision of a lawyer or an accredited representative or organization under these rules when they are otherwise qualified to serve as a nonlawyer representative. This would include students participating in supervised law school clinics, externships, or pro bono opportunities.
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 Nonlawyer Representatives

- (A) For nonlawyer representatives who do not hold other, relevant licenses under Rule 205, and as permitted by applicable law, the [Agency] may establish an accreditation system to ensure that such nonlawyer 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 operates prospectively to establish a presumption of qualification for the representative in future proceedings, but not for more than three (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 nonlawyer representatives, see the system adopted by the Department of Veterans Affairs, 38 C.F.R. § 14.629(b). The United States Patent and Trademark Office also has a process for registering nonlawyer agents to serve as representatives in patent adjudications. *See* 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. *See, e.g.*, 37 C.F.R. § 11.7 (USPTO); 38 C.F.R. § 14.630 (VA).
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 presiding adjudicator in a given proceeding or a designated Agency official. Revocation should occur if at any time there exists evidence demonstrating that the representative engaged in conduct that would have prevented their accreditation in the first instance.
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 and maintains a record of accredited representatives. *See U.S. DEP’T OF JUST. EXEC. OFF. FOR IMMIGR. REV., ACCREDITED REPRESENTATIVES ROSTER.*

## 209. Requirements for Organizational Accreditation

- (A) Nonprofit 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 in subsection (A) no longer satisfies the accreditation requirements, representatives designated by the organization shall no longer be permitted to represent parties in agency adjudications and the organization's accreditation shall be revoked until such time as the organization is able to come into compliance with those requirements. An accredited organization and representative must report to the Agency any circumstances that may affect their accreditation status within thirty (30) days of the change in circumstances.
- (C) This Rule does not apply to legal licensing organizations such as state bar associations.

### *Official Comment*

1. (to subsection (A)): The requirements in subsection (A) are derived from those set forth by the U.S. Department of Justice Executive Office for Immigration Review. 8 C.F.R. § 292.2(a). Some agencies prefer to only accredit organizations established in the United States, but this Rule does not preclude them from accrediting non-U.S. organizations.
2. (to subsection (B)): To the extent reasonably possible, presiding adjudicators should not permit nonlawyer 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, including loss of accreditation, to all offices where they have pending proceedings.
4. (to subsection (C)): Members of legal licensing organizations would be governed by the rules pertaining to representation by lawyers 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 nonlawyer representatives.
- (B) Nothing in these rules should be construed to limit lawyer representatives' obligations under other applicable law or rules of conduct.

#### *Official Comment*

1. (to subsection (A)): The applicability of these rules to lawyer 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 a lawyer’s ability to serve as a representative in a separate proceeding. *See* Jill E. Family, Am. Bar Ass’n Section of Admin. L. & Regul. Prac., *Report to the House of Delegates: Revised Resolution 500*, Report 500 at 2 n.2 (Feb. 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication).
2. (to subsection (B)): The phrase “other applicable . . . rules of conduct” includes the “applicable rules of conduct for the jurisdiction(s) in which the attorney is admitted to practice.” 29 C.F.R. § 18.22(c).

### **301. Scope of Representation and Allocation of Authority Between Participants and Representatives**

- (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 use false or deceiving information when soliciting a participant, nor shall they solicit a participant when the representative has received adequate notice from the participant that the participant does not want to receive further communications from the representative.

#### *Official Comment*

1. (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 an advance authorization at any time. Such revocation precludes the representative from relying on the advance authorization.
2. (to subsection (A)): In the case of lawyer representatives, or in some cases nonlawyer 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 nonlawyer 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 to this Rule.
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.

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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 a lawyer representative.
2. (to subsection (C)): Removal of a representative by the responsible Agency official for lack of competence should be reserved for situations where the responsible Agency official 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 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 presiding adjudicator [or any 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 or the representative has been terminated 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 decision-making tools like durable powers of attorney or consulting appropriate resources, such as agencies for aging, long-term care, or adult protection. In all cases, 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 language that the participant is able to understand. *See, e.g.*, 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. *See, e.g.*, 8 C.F.R. § 1003.102(r) (DHS).

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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*

"Duly authorized constituents" refers to individuals within the organization who have decision-making 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 such disclosure is necessary to:
- (1) Prevent death or substantial bodily harm;
  - (2) Prevent the participant from engaging in criminal activity or committing fraud or to prevent, rectify, or mitigate substantial injury resulting from such criminal activity or fraud;
  - (3) Enable a representative to respond to an accusation of wrongdoing by the represented participant against the representative in the proceeding;
  - (4) Detect and resolve conflicts of interest on behalf of the representative in the proceeding;
  - (5) Comply with the representative's duty of candor with the tribunal in Rule 310; or
  - (6) Comply with applicable law.
- (C) A representative shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a participant.

#### *Official Comment*

1. (to subsection (A)): *See, e.g.*, 37 C.F.R. § 11.106 (USPTO).
2. (to subsection (A)): This subsection is designed to encourage the participant to communicate fully and frankly with the representative, but it is not limited to matters communicated in confidence by the participant. It applies to all information relating to the representation, whatever its source.

### 307. Withdrawal or Termination of Representation

- (A) A representative must withdraw from representing a participant if:
1. The participant seeks to use or uses the representative's services to commit or further a crime or fraud;
  2. The representation will result in violation of any of the qualification requirements under these rules or any of the rules governing representative conduct; or
  3. The representative's physical or mental condition materially impairs the representative's ability to represent the participant.
- (B) The adjudicator [or any 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.
- (C) A representative must submit a written request to withdraw under subsections (A) or (B) to the adjudicator [or any other responsible Agency official]. The written request must be included in the official record of the proceeding and be served on the participant.
- (D) Withdrawal will also be allowed based on the participant's written consent and the approval of the adjudicator [or any other responsible Agency official].
- (E) A participant may terminate the representation subject to the approval of the adjudicator [or any other responsible Agency official].

#### *Official Comment*

1. (to subsection (A)): The rules governing representative conduct are Rules 300–319.
2. (to subsection (B)): Examples of good cause for withdrawal include: the participant's insistence on initiating improper proceedings 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 despite notice that failure to do so could result in withdrawal (*see* Rule 308); 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, e.g.*, 49 C.F.R. § 1103.18 (STB); 37 C.F.R. § 11.116(b) (USPTO); 32 C.F.R. § 776.35 (JAG).
3. (to subsection (B)): 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 the participant to find new representation. *See, e.g.*, 20 C.F.R. § 404.1740(b)(3)(iv)

- (SSA). A withdrawing representative must return any of the participant's personal property and all relevant information about the representation. 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.
4. (to subsection (D)): A participant's consent must be given on the record in the proceeding to the adjudicator or any other responsible Agency official and may be oral or in writing, including by electronic means.
  5. (to subsection (E)): Termination of a representative is akin to withdrawal of consent by the participant under Rule 201 and should not impact the efficient conduct of the proceeding. The adjudicator or any 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 any 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 to their ability, but a participant with less ability to pay may require a lower fee in order for it to be reasonable. *See, e.g.*, 49 C.F.R. § 1103.20(a) (STB).
2. (to subsection (A)): The agency may have separate rules governing fees. Consult those rules. These rules are not meant to replace those. *See, e.g.*, 8 C.F.R. § 1003.102(a)(1) (EOIR, DOJ); 38 C.F.R. § 14.636 (VA).
3. (to subsection (A)): The bracketed material reflects that only some agencies regulate fees. We leave to the agencies that do to decide whether to regulate fees for both lawyers and nonlawyer representatives, only nonlawyer representatives, or neither.

### 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.,* Polydoroff v. ICC, 773 F.2d 372, 374 (D.C. Cir. 1985) (“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 appearing before it.”).
2. Standards applying to a lawyer include, in addition to agency rules, the rules of professional conduct and ethics of the jurisdictions in which the lawyer is licensed to practice. *See* Rule 300(B); *see, e.g.,* 48 C.F.R. § 65101.35(a) (CBCA).

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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; or
  - (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 nonlawyer representatives, who may have less experience presenting evidence and arguments before a tribunal than lawyer representatives.
3. (to subsection (B)): The prohibition on knowingly false statements does not preclude a representative from refraining from presenting 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*

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 from the tribunal or another participant in the proceeding material with potential evidentiary value.
- (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, 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. *See* 49 C.F.R. § 1103.25(a)–(b).
3. (to subsection (D)): For example, a representative may not counsel or assist a witness to testify falsely. *See* MODEL RULES OF PRO. CONDUCT r. 3.4(b) (AM. BAR ASS'N 2020).

### 313. Improper Initiation of Proceedings

- (A) A representative may not initiate a proceeding that the representative knows or reasonably should know is false, fictitious, or fraudulent.
- (B) A representative may not initiate 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 initiating a proceeding 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 proceedings include proceedings in which a material fact is asserted that is false, fictitious, or fraudulent or a material fact is omitted and the proceeding is rendered false, fictitious, or fraudulent as a result of such omission. *See, e.g.*, 40 C.F.R. § 27.3(a) (EPA).
2. (to subsection (A)): This subsection also applies to claims in enforcement proceedings under Rule 401.
3. (to subsection (B)): Proceedings 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. 19 C.F.R. § 210.4(c) (ITC).
4. (to subsection (B)): A proceeding does not lack an adequate basis in law if it is based on a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. *See, e.g.*, 19 C.F.R. § 210.4(c)(2) (ITC).
5. (to subsection (B)): Use of boilerplate language without any reference to the specific circumstances of the proceeding may constitute a lack of an adequate basis in law or fact. *See, e.g.*, 8 C.F.R. § 1003.102(u) (EOIR, DOJ).
6. (to subsection (C)): A signature should comply with the agency's rules 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 participant involved in that proceeding to experience material and substantive injury, including, but not limited to, incurring expenses (such as lawyer's fees) or experiencing prejudicial delay.

#### *Official Comment*

1. (to subsection (A)): *See, e.g.*, 7 C.F.R. § 1.328(a)(3) (USDA). This includes failure to act in a timely way or failure to follow the presiding 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 the presiding adjudicator or anyone else involved in the proceeding. *See, e.g.*, 8 C.F.R. § 1003.102(g) (EOIR, DOJ); 20 C.F.R. § 404.1740(c)(7)(ii)(A) (SSA).
3. (to subsection (C)): *See, e.g.*, 12 C.F.R. § 1209.74(a)(2) (FHFA); 10 C.F.R. § 2.314(c)(1) (NRC).

### 315. Obstruction of Justice

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 act or omission 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 presiding adjudicator, tribunal, or another participant in the proceeding;
- (2) Interfering or attempting to interfere with any lawful effort by the presiding 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*

*See, e.g.*, 8 C.F.R. § 1003.102(n) (EOIR, DOJ); 20 C.F.R. § 404.1740(c)(7) (SSA); 31 C.F.R. § 10.20(b) (IRS); 49 C.F.R. § 1103.25(b) (STB); 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 in a proceeding 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 official record of the proceeding.
- (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 Rule, the adjudicator shall place in the official 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 presiding 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 part of the official record of the proceeding and does not include all participants and representatives in the proceeding.
- (F) A communication that does not concern the merits of an adjudicatory proceeding, such as a request for status of the proceeding or communication concerning the agency's administrative functions or procedures, does not constitute an impermissible ex parte communication.

*Official Comment*

1. 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. *See, e.g.*, 17 C.F.R. § 10.10(a)(1) (CFTC).
2. (to subsection (A)): *See, e.g.*, 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 or anyone who is or may reasonably be expected to be involved in the decisional process in the proceeding until a final decision in the proceeding is rendered. *See, e.g.*, 4 C.F.R. § 28.147 (GAO).
3. (to subsection (F)): *See, e.g.*, 12 C.F.R. § 1209.14(a)(2) (FHFA); 39 C.F.R. § 955.33 (USPS). Administrative functions or procedures include, but are not limited to, filing and discovery deadlines and requirements, intra-agency review procedures, and adjudicator assignments.

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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:
  - (1) Preserving confidentiality between the representative and the represented participant;
  - (2) Maintaining independence of judgment; and
  - (3) Avoiding positions adverse to a represented participant.
- (C) A representative with a conflict of interest as described in subsection (B) of this Rule 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 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 as to ensure that the former agency employee cannot in any way assist in the representation.
- (F) No close family member of a current or former employee of an agency may represent anyone in any proceeding administered by the agency in which the current or former agency employee participates or has participated personally and substantially as an agency employee, or which is or was 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. 25, 2016) (report to the Admin. Conf. of the U.S.).
2. (to subsection (B)): *See, e.g.*, 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 (a) their representation of one participant in the proceeding is directly adverse to their representation of another participant in the same or similar proceeding, or (b) 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. *See, e.g.*, 37 C.F.R. § 11.107(a) (USPTO).
4. (to subsection (C)): *See, e.g.*, 37 C.F.R. § 11.107(b) (USPTO).
5. (to subsection (D)): *See, e.g.*, 7 C.F.R. § 1.26(b)(3) (USDA); 31 C.F.R. § 8.37(b) (BATF).
6. (to subsection (E)): *See, e.g.*, 31 C.F.R. § 10.25(c)(1) (IRS).
7. (to subsection (F)): *See, e.g.*, 31 C.F.R. § 8.36 (BATF). Close family member refers to members of a current or 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 tribunal, adjudicator, or anyone who is or may reasonably be expected to be involved in the decisional process in a proceeding 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 presiding 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)): Comment 1 to Rule 316, involving *ex parte* contacts, defines “[i]ndividuals who are or may reasonably be expected to be involved in the decisional process in a proceeding.”
2. (to subsection (A)): *See, e.g.*, 31 C.F.R. § 8.52(f) (BATF); 20 C.F.R. § 404.1740(c)(6) (SSA); 49 C.F.R. § 1103.13 (unusual hospitality); 29 C.F.R. § 18.22(d)(1) (DOL) (intimidation); 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 representative's honesty, trustworthiness, or fitness as a representative in other respects.

#### *Official Comment*

1. A nonlawyer 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.
2. Lawyer representatives shall only be subject to suspension or disqualification from an ongoing agency proceeding. *See* Jill E. Family, Am. Bar Ass'n Section of Admin. L. & Regul. Prac., *Report to the House of Delegates: Revised Resolution 500*, Report 500 at 2 n.2 (Feb. 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication).
3. *See, e.g.*, 37 C.F.R. §11.804(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. § 1003.102(h) (EOIR, DOJ).

## ENFORCEMENT AND DISCIPLINE

### 400. In General

- (A) A lawyer representative in an [agency] proceeding is subject to the disciplinary authority of the [agency] with respect to that proceeding.
- (B) A nonlawyer 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*

(to subsection (A)): Lawyer representatives shall only be subject to suspension or disqualification from an ongoing agency proceeding. *See* Jill E. Family, Am. Bar Ass'n Section of Admin. L. & Regul. Prac., *Report to the House of Delegates: Revised Resolution 500*, Report 500 at 2 n.2 (Feb. 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication). The limitation of disciplinary authority in these rules to the particular proceeding does not limit whatever authority the agency may have to impose discipline on lawyer 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:
- (1) The Agency;
  - (2) An agency official designated to submit such complaints;
  - (3) A participant or representative in a proceeding; or
  - (4) 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 in which one of the parties is the government (or an agency), any complaints with respect to the agency's representative should be made to that representative's office.
2. In general, Rule 402 governs the conduct of an enforcement hearing, including in cases in which the presiding adjudicator initiates an enforcement proceeding. 29 C.F.R. § 102.177(b) (NLRB) (“[T]he Administrative Law Judge . . . has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing.”).
3. (to subsection (A)): A violation “within the conduct of” a proceeding means a violation involving the conduct of a representative acting in their capacity as a representative in that proceeding.

4. (to subsection (A)): References to “proceeding” or “specific proceeding” in this Rule mean the underlying proceeding in which the representative committed the alleged rule violation. 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 adversarial proceedings where [the agency] is represented, disciplinary matters may be diverted to a hearing before an adjudicator other than the presiding adjudicator. *See* Comment 3 to Rule 402 (describing “an official presiding over the enforcement hearing” as including “the presiding adjudicator; another agency official, including another agency adjudicator, not involved in the initial proceeding; or anyone else designated by agency rule or other legal provision”).
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 cancel a representative’s accreditation for failure to comply with regulatory requirements); 8 C.F.R. § 292.3(d)(1) (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 representative 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) Any allegation of violation of the rules must be demonstrated by a preponderance of the evidence.
- (D) Violations must be supported by [a preponderance of the] evidence in order to justify discipline under Rules 404, 405, 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. The presiding adjudicator 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)): "The official presiding over the enforcement hearing" can include the presiding adjudicator; another agency official, including another agency adjudicator, not involved in the initial proceeding; or anyone else designated by agency rule or other legal provision.
4. (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 presentation or oral argument resulting in some determination by an adjudicator that affects the rights or interests of 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).

5. (to subsection (B)): If the agency is not the complainant, the agency may also offer evidence at the hearing.
6. (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) (NLRB) (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.
7. (to subsection (C)): As explained in Rule 401, an enforcement hearing can be initiated by the agency acting as an adverse party, a nonagency adverse party, or by the presiding adjudicator in the proceeding. Adverse parties carry the burden of proof as proponents of any order resulting from the enforcement hearing. A presiding adjudicator who initiates an enforcement hearing has a responsibility to ensure that any order resulting from that hearing is supported by a preponderance of the evidence.
8. (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.”).
9. (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”).

### 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 Rule.
- (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 relevant findings of fact or conclusions of law.

#### *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(1) (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 nonlawyer 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 the represented participant 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 presiding adjudicator'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 a designated agency official disapproving of misconduct by the sanctioned party. *See, e.g.*, 47 C.F.R. § 1.24(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); MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 10(A)(4) (permitting reprimand of lawyers by the relevant disciplinary authority).

4. (to subsection (A)): Lawyer representatives shall only be subject to suspension or disqualification from an ongoing proceeding. *See* Jill E. Family, Am. Bar Ass'n Section of Admin. L. & Regul. Prac., *Report to the House of Delegates: Revised Resolution 500*, Report 500 at 2 n.2 (Feb. 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication).
5. (to subsection (A)): The working group does not opine to what extent an agency may wish to apply limitations to sanctions to nonlawyer representations.
6. (to subsection (B)): MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 10(C) (AM. BAR ASS'N 2002).

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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) (FRB) (authorizing reciprocal censure, suspension and disbarment); 12 C.F.R. § 308.109(b)(1) (FDIC).
4. (to subsection (B)): Lawyer representatives shall only be subject to suspension or disqualification from an ongoing agency proceeding. *See* Jill E. Family, Am. Bar Ass'n Section of Admin. L. & Regul. Prac., *Report to the House of Delegates: Revised Resolution 500*, Report 500 at 2 n.2 (Feb. 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication).
5. (to subsection (B)): When determining whether to disqualify a nonlawyer representative based on suspension or disqualification, an agency should consider how the circumstances of the suspension or disqualification impact the nonlawyer representative's ability to serve as a representative in the agency proceeding 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 under Rule 406 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 Rules 403 and 404.
- (B) The petition for review shall be submitted to the [designated reviewing official] within 14 days of the order finding a violation. It shall include all issues of fact or law from the presiding 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. (to subsection (B)): The scope of review sought may include the issuance of a sanction under Rule 404.
4. (to subsection (B)): Any relevant issues of fact or law not included in a petition for review should be deemed waived and ineligible for inclusion in a future petition, provided those issues of fact or law were reasonably ascertainable by the representative at the time of their initial petition.
5. (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 presentation or oral argument resulting in some determination by an adjudicator that affects the rights or interests of 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); 5 U.S.C. § 557(b) (de novo review of legal conclusions).

#### **407. Referrals to a Disciplinary Authority**

- (A) An agency official presiding over an enforcement hearing shall refer an order concluding that a representative violated one or more of these rules to any state disciplinary authority or other state or federal agency with jurisdiction over the representative's professional conduct.
- (B) An agency official presiding over 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)): *See, e.g.*, 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.*, MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2020) ("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 are publicly available and accessible, including by publishing them in the *Federal Register* and the *Code of Federal Regulations*.

#### *Official Comment*

“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*, ¶ 2, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019). The information must be easily recognized by lawyer and nonlawyer representatives as well as participants in agency adjudication.

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## 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 nonlawyer 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 nonlawyer 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*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019). 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 nonlawyer representatives.
2. (to subsection (B)): For examples of practice manuals, see, e.g., *Manuals*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/guidance/key-reference-materials/manuals-and-guides> (last visited June 6, 2024), and *EOIR Policy Manual*, U.S. DEP'T OF JUST. EXEC. OFF. OF IMMIGR. REV., <https://www.justice.gov/eoir/eoir-policy-manual> (last visited June 6, 2024). For a sample fact sheet, see *Office of General Counsel*, U.S. DEP'T OF VETERANS AFFS., <https://www.va.gov/ogc/> (last visited June 6, 2024). 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 nonlawyer 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* Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019) (recommending publication of adjudicator-specific procedural rules).
4. (to subsection (B)): *See* Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 5, 84 Fed. Reg. 2142, 2143 (Feb. 6, 2019) (recommending publication on agency websites of “explanatory materials aimed at providing an overview of relevant agency precedents”).

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## 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 that resulted in a written order on [the agency's] website.
- (C) The summary of disciplinary actions in subsection (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); *Attorney Discipline Program*, U.S. DEP’T OF JUST. EXEC. OFF. OF IMMIGR. REV., <http://www.justice.gov/eoir/attorney-discipline-program> (last visited June 6, 2024) (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 FOIA Exemptions and Exclusions*, U.S. DEP’T OF THE INTERIOR, OFF. OF INSPECTOR GEN.,

<https://www.doioig.gov/complaints-requests/foia/foia-exemptions-and-exclusions> (last visited June 6, 2024).

4. (to subsection (D)): A representative whose name is subject to disclosure under subsection (D) may file a petition for review under Rule 406 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.” *See* Comment to Rule 500.
6. (to subsection (E)): Admin. Conf. of the U.S., Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, ¶ 14, 87 Fed. Reg. 1721, 1722 (Jan. 12, 2022).
7. (to subsection (E)): *See, e.g., OGC’s Sanctioned Reps*, SOC. SEC. ADMIN. OFF. OF THE GEN. COUNS., [https://www.ssa.gov/foia/OGC\\_SanctionedReps\\_current.pdf](https://www.ssa.gov/foia/OGC_SanctionedReps_current.pdf) (last visited June 6, 2024); 19 C.F.R. § 351.313 (ITA) (“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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