

Nonlawyer Assistance and Representation

Amy Widman
Professor of Law
Rutgers Law School

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NONLAWYER ASSISTANCE AND REPRESENTATION

Amy Widman

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Introduction

Millions of people each year engage with administrative programs or participate in administrative adjudicative processes to access federal programs and resolve legal issues.¹ But many people, particularly low-income people and members of other underserved communities, are not always able to access representation or other forms of assistance that they may need to navigate administrative adjudications successfully.

One barrier to accessing representation or assistance is the critical shortage of affordable legal services.² Federal agencies have long innovated various ways to expand assistance and widen the pool of available representatives, however. For example, many agencies currently permit participants in agency adjudications to be represented by accredited or qualified nonlawyers. But agencies vary in their requirements and oversight of such forms of representation, making for less use of these options in many cases.

Another barrier is that nonlawyer practice is so highly discouraged by some state bars that potential nonlawyer representatives must be made aware of the opportunities and organizations that support such professionals. A 1986 Administrative Conference of the United States (ACUS) recommendation urged agencies to make affirmative regulations clearly describing the opportunities for nonlawyer representation.³ Even so, it is not clear that agencies have maximized their use of nonlawyer representation.

This report updates earlier work done in this area by mapping and defining the spectrum of nonlawyer representation and assistance that parties to administrative proceedings have

¹ WHITE HOUSE LEGAL AID INTERAGENCY ROUNDTABLE, ACCESS TO JUSTICE IN FEDERAL ADMINISTRATIVE PROCEEDINGS: NONLAWYER ASSISTANCE AND OTHER STRATEGIES 3 (2023) [hereinafter WH-LAIR REPORT].

² *Id.* at 19–20.

³ Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 85 Fed. Reg. 25,641 (July 16, 1986).

available to them today. The report describes who is appearing in federal agency adjudications on behalf of individuals, what the nonlawyer representatives do on behalf of individuals, the structure of the hearings where nonlawyers appear, and the regulatory scheme governing nonlawyers. The report also collects existing data as to lessons learned since some of these programs were first instituted, including how prevalent nonlawyers are in various settings, fluctuations in prevalence over time, what sorts of outcomes are produced by various forms of representation, and how various regulatory structures are working for their particular program goals. Finally, the report identifies areas in which certain forms of representation and assistance may still be underutilized in administrative proceedings and how agencies can continue to develop and expand such programs.

The information underlying this report was gained from a variety of methods, including: review of applicable statutes and policies governing nonlawyer representation; review of data and studies of various programs' experience with nonlawyer representation, as well as the background scholarly literature; interviews with a variety of stakeholders, including agency staff, adjudicators, legal service providers, nonlawyer representatives, and other professionals assisting the public in their interactions with government decision makers; and public comments received from an ACUS Request for Comments published in the federal register.⁴

The guiding framework for representation before administrative agencies is broad—the Administrative Procedure Act (APA) contains general language recognizing the right of parties compelled to appear before an agency to be “accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative[s],” while the Agency Practice Act generally does not authorize nor prohibit specific agency actions with respect to nonlawyer

⁴ Nonlawyer Assistance and Representation Request for Comments, 89 Fed. Reg. 55,913 (July 8, 2024).

representation before it.⁵ In some cases, Congress has chosen to directly authorize or otherwise govern representation in particular areas.⁶ In the absence of specific Congressional regulation, courts have repeatedly found that regulating representation is part of agencies' inherent power to regulate their processes.⁷ Agencies, then, are free to apply a range of considerations to nonlawyer representation, and they have.

Although the Administrative Procedure Act allows for nonlawyer representation at this very general level, research has uncovered statutory or regulatory authority specifically governing nonlawyer representation at roughly 20 agencies.⁸ This report focuses on a sampling of these regulatory schemes to explore the various models of nonlawyer participation throughout federal agency adjudication. The following considerations weighed on the choice of agencies and adjudications to research further: (1) the nature of the adjudication at issue (formal, “mass justice,” informal); (2) history and prevalence of nonlawyer representatives in agency proceedings; (3) ability to observe proceedings and/or interview agency adjudicators; and (4) innovations in expanding representation and assistance at the agency.⁹ Additionally, effort was

⁵ 5 U.S.C. § 555(b)

⁶ *See, e.g.*, 8 U.S.C. § 1229a(b)(6) (immigration courts); 35 U.S.C. § 2(b)(2)(D) (Patent and Trademark Office); 38 U.S.C. § 5904(a)(2) (Department of Veterans Affairs); 42 U.S.C. § 406(a)(1) (Social Security Administration); 43 U.S.C. § 1464 (Department of the Interior).

⁷ George M. Cohen, *Rules of Conduct for Representatives*, A GUIDE TO FEDERAL AGENCY ADJUDICATION 213, N. 9 (Jeremy S. Graboyes, ed., Am. Bar Ass'n, 3rd ed., 2023).

⁸ 5 U.S.C. § 500(d); *infra* Appendix B.

⁹ Other examples of nonlawyer representation exist throughout the federal apparatus. For example, the Department of Energy, Office of Hearings and Appeals, allows nonlawyer representatives in personnel security and whistleblower cases. Michael Asimow, *Federal Administrative Adjudication Outside the Administrative Procedure Act 127–28* (Sept. 11, 2019) (report to the Admin. Conf. of the U.S.) (“In initial hearings, DOE is represented by a lawyer. About half of respondents are represented (some representatives are non-lawyers). . . . The formality of DOE hearings varies by case type. About 20% are document-only hearings (meaning no live-witness testimony or cross-examination).”). *See also* 7 C.F.R. § 47.15(d)(1) (Department of Agriculture, Animal Welfare proceedings under the Perishable Agricultural Commodities Act). The regulations provide for disqualification of counsel or a lay representative because of unethical or unprofessional conduct. 7 C.F.R. § 47.15(d)(3) (allowing Secretary to bar counsel or other representative from participating in other hearings after notice and hearing upon report by the examiner). About 75% of litigants before the USDA National Appeals Division represent themselves or are assisted by a family member or friend. Connie Vogelmann, *Self-Represented Parties in Administrative Hearings 46* (Oct. 28, 2016) (report to the Admin. Conf. of the U.S.).

made to include various levels of formality and regulatory schemes in order to illustrate the range of existing models. Particular hearing and representation processes at the following fifteen agencies are explored in more depth:

- Department of Agriculture
- Department of Education
- Department of Health and Human Services
- Department of Homeland Security / U.S. Citizenship and Immigration Services (USCIS) and Federal Emergency Management Agency (FEMA)
- Department of Housing and Urban Development
- Department of the Interior
- Department of Justice / Executive Office for Immigration Review (EOIR)
- Department of Labor
- Department of the Treasury / Internal Revenue Service (IRS)
- Department of Veterans Administration
- Equal Employment Opportunity Commission
- Environmental Protection Agency
- Patent and Trademark Office
- Social Security Administration

I. Background

Because there is so much variation throughout the federal statutory and regulatory landscape, including variations among state programs implementing federal statutes, the report begins by defining the terminology used within it, as well as providing a history of ACUS recommendations in this area and an overview of the relevant socio-legal scholarship on representation types and regulation more generally.

A. Definitions

1. Nonlawyer Representation. The umbrella term nonlawyer representation is used here to encompass a variety of types of representation or performance of legal tasks by someone who is not licensed to practice law. Specific accreditation programs define the line between “practice” and other services within their particular programs, for example, the Department of Veterans

Affairs defines practice (or representation) as “assist[ing] claimants in the preparation, presentation, and prosecution of claims for benefits.”¹⁰ Examples of nonlawyers include other licensed professionals such as accountants; social workers; paralegals; law students; and others, including union representatives; human resources professionals; corporate officers; elected officials; tribal advocates; agency employees; community members; and family members.

The term nonlawyer representative has recently been criticized for defining someone by the lack of a credential,¹¹ but it currently remains the term used throughout the federal government at this point as well as in recent ACUS reports and recommendations.¹² This report aligns itself with the Model Rules of Representative Conduct. The model rules remind the reader that the “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 regarding representatives without an active law license. The model rules encourage agencies to remain attentive to the ongoing discussion within the legal community about terminology in this area and to consider updating their usage accordingly.”¹³

2. Assistance. The line between representation and assistance is somewhat blurry when it comes to federal agency procedures, but generally this report considers assistance to be tasks such as: educating someone on process, counseling someone about rights and remedies

¹⁰ 38 C.F.R. § 14.627(a).

¹¹ See, e.g., Olga V. Mack, *Petition for the American Bar Association (ABA) to Cease Using the Term “Nonlawyer,”* LINKEDIN (Apr. 3, 2024), <https://www.linkedin.com/pulse/petition-american-bar-association-aba-cease-using-term-olga-v-mack-h5upc/>; Comment from Rebecca L. Sandefur and Matthew Burnett on Nonlawyer Assistance and Representation (Sept. 6, 2024), <https://www.acus.gov/projects/nonlawyer-assistance-and-representation>.

¹² It is also sometimes termed lay representation. See, e.g., Asimow, *supra* note 9, at 71 (“Agencies should be permitted to license lay representatives (including requirements of an examination and experience), require them to be insured, make them subject to ethical conduct codes, and require the agency to protect the confidentiality of client-lay representative communications.”).

¹³ See *Working Group on Model Rules of Representative Conduct*, Preface, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/research-projects/working-group-model-rules-representative-conduct> (last visited Sept. 23, 2024).

generally, and, in some cases, helping someone navigate a benefits application. This work does not extend to preparing for or accompanying someone to a hearing or counseling on specific applicability.

3. Self-Representation. The line between assistance and representation extends to the concept of self-representation. Some consider a party to be self-represented even when they are joined by family or friends or other non-professional representation. In such situations, it is sometimes unclear whether the person is providing emotional support, technical or language assistance, or representation. However, for purposes of this report, all forms of assistance and support will be considered a form of nonlawyer representation and assistance. The term self-representation will be limited to situations where a person is unaccompanied and/or unassisted by any other person in their adjudications.¹⁴

4. Adjudication. This report incorporates the following practical definition of adjudication in the agency context: “a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program.”¹⁵ Administrative law divides adjudication into “formal” and “informal” categories; “formal” adjudication refers to those proceedings that are governed by the adjudication provisions of the APA (5 U.S.C. §§ 554, 556–557), and “informal” adjudication refers to those proceedings that are not governed by those provisions.. However, more recent scholarship has recognized nuance to the varieties of adjudication at

¹⁴ See Asimow, *supra* note 9, at 197 n.1 (“The term “self-represented” is used to denote parties who do not have professional representation, provided by either a lawyer or an experienced nonlawyer. Representation by a non-expert family member or friend is included in this recommendation’s use of the term “self-represented.”).

¹⁵ *Id.* at 8.

agencies and stakeholders like the American Bar Association and ACUS repeatedly recognize the following distinctions:¹⁶

- a. Type A. These proceedings follow all APA formal adjudication procedures.¹⁷ Hearings are adversarial, based on an exclusive record, and take place before an Administrative Law Judge (“ALJ”).
- b. Type B. These proceedings include a legally required opportunity for an evidentiary hearing, but the procedures for such hearings are not governed by the formal hearing procedures in the APA. While often trial-like in nature, the procedures for these proceedings derive from statutes other than the APA and from agency rules. Hearings are held before a non-ALJ adjudicator, such as an immigration judge or a patent judge. Some of the most well-known “mass justice” hearings fall under this category (see below for a definition of “mass justice”).¹⁸
- c. Type C. These are true informal proceedings, and there is no legally required opportunity for an evidentiary hearing.¹⁹ These proceedings take the form of decisions that affect individual legal rights through written documents, conferences, or other settings that do not resemble trials. The procedures are regulated by the governing statute and agency rules, subject only to due process minimums, although general neutrality and representation principles apply.

5. Mass Justice. As with prior ACUS reports and recommendations involving nonlawyer representation, “the term ‘mass justice’ is used here to categorize an agency program in which a

¹⁶ Asimow, *supra* note 9, at 3–4.

¹⁷ 5 U.S.C. §§ 554, 556–57.

¹⁸ See, e.g., VA.

¹⁹ Michael Asimow, *Fair Procedure in Informal Adjudication* (Dec. 7, 2023) (report to the Admin. Conf. of the U.S.)

large number of individual claims or disputes involving personal or family matters come before an agency; e.g., the Old Age Survivors and Disability Insurance administered by the Social Security Administration.”²⁰ Previous use of the term in ACUS reports and recommendations focus on federal agency proceedings characterized by high volumes of decisions regarding benefits or some immigration matters.

6. Frontline Adjudication. Bureaucratic decision-making “made by agency employees, not ALJs or other forms of administrative judges, following review of an administrative record, which could consist solely of an application but may also require inspections, conferences, and negotiations.”²¹ This type of decision-making is often used for initial decisions in mass justice programs.²²

B. Previous ACUS Reports and Recommendations

As referenced above, ACUS has done much of the foundational work on the use of nonlawyers in federal agency adjudication. This section will summarize previous ACUS reports, findings, and recommendations as well as current initiatives by ACUS and partner agencies to address contemporary nonlawyer assistance.

Almost 40 years ago, ACUS first studied the use of nonlawyer representatives in administrative adjudication and recommended best practices to expand such opportunities, finding that “[f]ederal agency experience and statistics indicate that qualified persons who are

²⁰ Recommendation 86-1, *supra* note 3, at 25,641 n.1. Note: The quote does not include the Supplemental Security Income program that is also administered by SSA.

²¹ Matthew A. Gluth, *Frontline Decision-Making*, in A GUIDE TO FEDERAL AGENCY ADJUDICATION 259 (Jeremy S. Graboyes, ed., Am. Bar Ass’n, 3rd ed., 2023).

²² There is often extensive development at these initial determinations. For example, at the Social Security Administration, State agencies (also known as DDSs) conduct initial and reconsideration determinations under contract with SSA. The State agency develops the record in accordance with 20 CFR 404.1512 and 416.912). This development includes requesting medical records from the claimant’s medical sources and, if warranted, a consultative physical and/or mental status examination. State agency medical consultants provide medical opinions regarding the claimant’s impairments at both the initial and reconsideration determinations.

not lawyers generally are capable of providing effective assistance to individuals in mass justice agency proceedings.”²³ And indeed the federal government has some long-running programs to certify and oversee nonlawyer “accredited” or “authorized” representatives.

In 1986, ACUS recommended that agencies “take the steps necessary to encourage—as well as eliminate inappropriate barriers to—nonlawyer assistance and representation.”²⁴ Again in 2016, while examining procedural rules for various types of agency adjudications, ACUS recommended that “[a]gencies should permit non-lawyer representation. Agencies should have the discretion to (a) establish criteria for appearances before the agency by non-lawyer representatives or (b) require approval on a case-by-case basis. Agencies should permit limited representation by lawyers or non-lawyers, when appropriate (i.e., representation of a party with respect to some issues or during some phases of the adjudication).”²⁵ Additionally, a 2020 ACUS recommendation on regulation of representatives in agency adjudicative proceedings led to the formation of a working group to develop a model code for representation, including by nonlawyers.²⁶ And in 2023, ACUS recommended that agencies allow participants in many adjudications “to be represented by a lawyer or a lay person with relevant expertise” and to

²³ “A substantial number of individuals involved in Federal ‘mass justice’ agency proceedings need and desire assistance in filling out forms, filing claims, and appearing in agency proceedings, but are unable to afford assistance or representation by lawyers. A lack of assistance or representation reduces the probability that an individual will obtain favorable results in dealing with an agency. Further, unassisted individuals are more likely than those who are assisted to cause a loss of agency efficiency by requiring more time, effort, and help from the agency. Federal agencies currently provide help to persons involved in agency proceedings through information given by agency personnel and through funding of legal aid programs and approval or payment of attorney fee awards. . . . This recommendation focuses on the potential for increasing the availability of assistance by nonlawyers.” Recommendation 86-1, *supra* note 3, at 25,641–42.

²⁴ *Id.* at 25,642.

²⁵ Admin. Conf. of the U.S. Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 14, 81 Fed. Reg. 94,314, 94,316 (Dec. 23, 2016).

²⁶ George M. Cohen, Regulation of Representatives in Agency Adjudicative Proceedings (Dec. 3, 2021) (report to the Admin. Conf. of the U.S.). *See also Working Group on Model Rules of Representative Conduct*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/research-projects/working-group-model-rules-representative-conduct> (last visited Sept. 23, 2024).

establish “rules authorizing accredited or qualified nonlawyer representatives to practice before the agency.”²⁷

Yet there is still much more to understand about the extent and character of representation by associated professionals and others who are not lawyers, as well as the various models of accreditation and oversight undertaken by various agencies in various types of adjudicatory settings.²⁸ This report aims to describe and analyze these various models of nonlawyer representation throughout administrative adjudication in order to develop best practices for building out more opportunities for representation in federal adjudication.

C. Other studies and data.

In addition to the foundational work by ACUS and other federal agencies studying and encouraging the expansion of access to justice through nonlawyer representation in federal adjudication, various organizations and scholars have studied nonlawyer representation. This section reviews the information gathered through review of these sources.

Research establishes that nonlawyers providing legal advice in particular situations is both effective and beneficial.²⁹ In one particular study based in England and Wales, researchers found that in cases similar to the types of administrative adjudications described in this report,

²⁷ Admin. Conf. of the U.S., Recommendation 2023-5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing*, ¶ 5, 89 Fed. Reg. 1509, 1510 (Jan. 10, 2024); Admin. Conf. of the U.S., Recommendation 2023-6, *Identifying and Reducing Burdens on the Public in Administrative Proceedings*, ¶ 14b, 89 Fed. Reg. 1511, 1513 (Jan. 10, 2024).

²⁸ In 2023, a report by the White House Legal Aid Interagency Roundtable found that many people still “need assistance to access and obtain fair outcomes” in administrative adjudications and promoted expanding the availability of nonlawyers in federal agency adjudications. WH-LAIR REPORT, *supra* note 1, at 19. This assistance remains out of reach for many.

²⁹ See Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality and Public Harms*, 16 STAN. J. C.R. & C.L. 283 (2020); see also HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998); but see Anna Carpenter, Alyx Mark, and Colleen Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 L. & SOC. INQUIRY 1023 (2017) (assessing findings from lawyer and nonlawyer representation in one administrative tribunal and concluding that nonlawyers are trained by the ALJs through practice and can offer successful outcomes to routine matters but due to that on the job training, these nonlawyer representatives are less suited to challenge law).

nonlawyers actually outperformed lawyers.³⁰ Evaluation of the use of accredited representatives in immigration proceedings through interviews with accredited representatives at five California nonprofits, similarly concluded that accredited representatives “provide a key service to the non-citizen community, but that greater collaboration between accredited representatives and attorneys would better optimize the legal resources available for immigrants.”³¹

While many agencies do not track or make accessible data regarding type of representation, a few agencies with long-standing programs to oversee nonlawyer representatives do make some basic data on nonlawyer representation available. For example, SSA published a breakdown of representation at social security hearings from 1979–2015, illustrating nonlawyer representation at the hearings level vacillating between a low of 9 percent of representation to a high of 21 percent.³² Other agencies make available the names of authorized nonlawyer representatives and, in some cases, lists of disqualified representatives (including both lawyers and nonlawyers).

State court experiences further support these findings, particularly with programs that have expanded representation by developing community justice workers to advocate in state agencies implementing federal benefits.³³ The Alaska Legal Aid community justice worker program, for example, trains community members to advocate in SNAP benefits cases, and the

³⁰ See Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 *L. & SOC’Y REV.* 765, 795 (2003).

³¹ Brittany Benjamin, Note, *Accredited Representatives and the Non-Citizen Access to Justice Crisis: Informational Interviews with Californian Recognized Organizations to Better Understand the Work and Role of Non-Lawyer Accredited Representatives*, 30 *STAN. L. & POL’Y REV.* 263, 270 (2019); *see also* Stefanie K. Davis, *Access to Justice, A GUIDE TO FEDERAL AGENCY ADJUDICATION 237-238* (Jeremy S. Graboyes, ed., Am. Bar Ass’n, 3rd ed., 2023) (reviewing similar reports of competency of nonlawyer representation).

³² *See Social Security Administration (SSA) Annual Data for Representation at Social Security Hearings*, SOC. SEC. ADMIN., <https://www.ssa.gov/open/data/representation-at-ssa-hearings.html>. Data from the Appeals Council for 2023 reflects roughly 70 percent lawyer representation, 10 percent nonattorney representation. The remaining 20 percent of cases before the Appeals Council in 2023 were unrepresented.

³³ *Community Justice Worker Program*, ALASKA LEGAL SERVS. CORP., <https://www.alsc-law.org/cjw/> (last visited Sept. 18, 2024).

data generated from this program shows its effectiveness, with “100% success rate in resolving SNAP delay issues for clients; [and a total of] \$359,898 increase in monthly benefits for clients and back payments paid to clients [totaling] \$1,224,943” since the program began in 2022.³⁴

As part of the research for this report, ACUS published a Request for Comments in the Federal Register. A total of 14 responses were received from a variety of stakeholders, including legal aid and other nonprofits providing nonlawyer representation services, nonlawyer representatives, scholars, and people navigating federal processes on their own.³⁵ These responses supported much of the research and data examined above, including additional support for the finding that nonlawyers provide skilled representation. One response included the acknowledgement that, “[w]hile most of our lawyers are generalists, our paralegals concentrate almost exclusively on Social Security disability applications and overpayment cases. Some of our paralegals, particularly those with decades of experience, are highly familiar with the system and can be even more effective advocates than many of our attorneys—at least, that is the general consensus among the attorneys who work with them.”³⁶ Responses also provided vivid illustrations of the need for expanded forms of representation and the effect these programs have on people’s lives.

Additionally, however, responses described situations where nonlawyer representatives were treated differently than lawyer representatives by various decision-makers, for example, being challenged about their qualifications. One response included the following quote from an experienced nonlawyer representative: “For the most part, I feel like I am treated professionally

³⁴ SNAP Advocate data, on file with author.

³⁵ Nonlawyer Assistance and Representation; Request for Comments, 89 Fed. Reg. 55,913 (July 8, 2024). All comments are published on the ACUS website: <https://www.acus.gov/projects/nonlawyer-assistance-and-representation>.

³⁶ Comment from Legal Aid of West Virginia on Nonlawyer Assistance and Representation 2–3 (Sept. 6, 2024).

but not necessarily equally.”³⁷ Responses also shared experiences with various regulatory schemes governing nonlawyer practice, describing issues such as delays in certification due to agency backlog and a lack of data illustrating aspects of these programs.

Finally, to accommodate as many potential stakeholders as possible, focus groups were held with all types of representatives to discuss their experiences in more detail. Similar themes emerged from the focus group discussions, including: the need for more specific, centralized, and digital trainings for nonlawyer representatives; the importance of portability of credentials for nonlawyer representatives; a need for more agency outreach and support for alternative forms of representation as a career path; underutilization of some programs; and overall need for more transparency and awareness.

II. The Agencies

This section introduces the agencies studied, describing how both the formality of the particular adjudication at issue as well as the models of nonlawyer representation vary throughout the federal agencies.³⁸ As discussed above, agency adjudications range from highly formal, trial-type adversarial procedures before administrative law judges to informal, inquisitorial procedures before hearing officers or other decision-makers. Technically, even highly atomized decision-making by agency employees can be considered an adjudication. Logically then, what it means to “represent” someone in an agency decision-making procedure also varies widely. In order to better understand how nonlawyer representatives function in various adjudicatory settings, it makes sense to contextualize the nonlawyer practice within the

³⁷ *Id.* at 2.

³⁸ See Appendix A for an alphabetized compilation of narrative descriptions of each agency adjudication and the structure of nonlawyer practice within that agency.

particular type of adjudication in which the representation occurs. This report focuses on 15 different agency adjudications, described in detail in Appendix A.

A. Nonlawyer Representation in Various Types of Adjudications

1. Formal Adjudications (Type A)

Nonlawyer representation is perhaps less common at formal adjudications, although this may be due to less comprehensive regulations governing their path. However, there are specific examples of nonlawyer representation in these types of hearings. The examples from the agencies and adjudications studied in this Report include Black Lung benefits cases at the Department of Labor, civil penalty cases before the EPA, and probate matters at the Interior Board of Indian Appeals within the Department of the Interior. The Report also considers FINRA arbitrations (which are conducted by FINRA, a self-regulatory organization subject to Securities and Exchange Commission oversight).³⁹

Each of these hearings follows the APA procedures for formal adjudication.⁴⁰ Each hearing also allows nonlawyer representation through its agency regulations, however none of these entities or ALJs takes an active role in certifying or supervising nonlawyer representation. The type of nonlawyer representation in these matters varies, from community-based health clinics for miners in Black Lung cases to law school clinics with law students supervised by faculty attorneys in FINRA arbitrations, to family and other community members in probate matters in tribal communities. Overall, nonlawyer representation in the four Type A hearings studied is a small percentage of representation for those adjudications.

³⁹ FINRA differs from many of the other examples in that it is not a federal agency. It is included as a potentially useful agency-like paradigm of incorporating nonlawyer representatives into decision making.

⁴⁰ See 5 U.S.C. § 554, 556–57. For more information about the specific procedures, see descriptions in Appendix A.

Although formal APA-style hearings resemble court trials, there are important differences which should allow for expanding nonlawyer representation. For example, in many administrative adjudications, the exchange of all relevant documentary evidence and witness testimony is often automatic and facilitated by the ALJ. Additionally, the rules of evidence are relaxed as compared to the Federal Rules of Evidence (due, in part, to the lack of factfinding by lay jurors). These procedural flexibilities benefit nonlawyer representatives who may not have been exposed to the FRE or other trial advocacy skills in as much detail as a lawyer. Thus, Type A agency adjudications are considered the most formal due to their adherence to the statutory procedures in the APA, but even these hearings are not as procedurally complex as a full court trial.

2. Informal Evidentiary Adjudications that Lean Formal (Type B)

Although often leaning formal, and sometimes incorporating similar hallmarks of adversarial adjudications, these adjudications are not subject to the specific procedures in the APA's formal adjudication provisions and are thus known in some administrative law parlance as "informal." They are, however, subject to procedures laid out in their relevant guiding statutes and agency rules. These Type B adjudications can be further subdivided, as many "mass justice" adjudications also fit this Type B model. It is within these types of statutory-specific procedures that we see the most robust regulatory structure governing nonlawyer representation.

The agencies and adjudications studied that represent this type of informal evidentiary adjudication include adversarial adjudications, like patent prosecutions before the Patent and Trademark Office⁴¹ and claims of employment discrimination by employees of certain federal

⁴¹ According to the Congressional Research Service, many consider PTAB adjudications to be informal, in part because patent judges are non-ALJ decision-makers. See BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW 9 n.75. However, the Federal Circuit

agencies before the Equal Employment Opportunity Commission.⁴² Patent prosecutions closely resemble formal APA hearings, except that they are before a patent judge rather than an ALJ. Likewise, EEOC hearings take place before administrative judges (AJs), rather than ALJs but in other respects resemble trials. In both of these programs, the nonlawyer representatives tend to be subject-matter experts and in both cases judges felt that expanding the available pool of nonlawyer representatives could be useful.

Another adversarial evidentiary adjudication that fits this model are immigration adjudications in immigration courts and the Board of Immigration Appeals. The Department of Justice authorizes certain nonlawyers to represent noncitizens in these and other adjudications.⁴³ Hearings before an Immigration Judge also resemble courtroom trials, with the full range of motion practice and witness examination. There are more than 200 Immigration Judges in over 50 immigration courts nationwide. Administrative appeals can be made to the Board of Immigration Appeals only for certain case types, including: removal cases, removal rescission cases, asylum-only proceedings, and withholding-only proceedings.⁴⁴ Appeals at the Board of Immigration Appeals are generally on paper, without argument. There are roughly 400 fully accredited nonlawyers representing people in these hearings.⁴⁵

has applied APA procedures to PTAB hearings. See, e.g., *id.* (citing *Novartis AG v. Torrent Pharmaceuticals Ltd.*, 853 F.3d 1316 (Fed. Cir. 2017)).

⁴² See 29 C.F.R. § 1614.605.

⁴³ For a summary of the removal process, see Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* 9–12 (June 7, 2012) (draft report to the Admin. Conf. of the U.S.). Also, note that the DOJ accreditation also extends to more informal, nonadversarial adjudications at DHS.

⁴⁴ BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL § 1.4 (rev. 2022) [hereinafter BIA PRACTICE MANUAL].

⁴⁵ This number is roughly estimated from the overall number of 2500 accredited representatives and agency estimates that about 85 percent of those are partially accredited (and appear only before DHS, see below). For a California-specific study of accredited representatives, see *“Accredited Representatives: Bridging California’s Immigration Legal Services Gap,”* State Bar of California, Office of Access and Inclusion, May 2024 (reporting a similar 15 percent of California Accredited Representatives as fully accredited)

Much of the previous research involving nonlawyers has been in the area of “mass justice.”⁴⁶ These hearings are a form of non-adversarial Type B hearings, and sometimes involve initial determinations that are better categorized as Type C frontline adjudication. Mass justice hearings are also characterized by very high volume and low representation rates. These hearings also generally relate to large benefits programs and, as such, were originally designed to be more claimant-friendly and accessible by a person without representation.

This report reviews two mass justice agency hearings: Social Security disability and veterans benefits. Although there is disagreement as to whether SSA adjudications are formal adjudications under the APA,⁴⁷ they are treated here as Type B adjudications because of the significant differences between an informal, non-adversarial Social Security disability hearing and the type of formal, adversarial adjudication to which the APA applies. Both Social Security disability and veterans benefits hearings are evidentiary in nature and contain hallmarks of formal procedure regulated by their governing statutes. In addition to the hearing stage, mass justice hearings contain multiple interactions between claimant and agency at the pre-hearing stages. Previous ACUS studies have confirmed that many people involved in these types of adjudications “have certain unmet needs for assistance at all levels of agency process. Particularly needed is assistance with filling out forms and attending informal interviews and conferences prior to commencement of any formal proceeding. A high volume of agency decisions affecting ordinary citizens is made at these early non adversarial stages.”⁴⁸

⁴⁶ Cite ACUS 1980s Reports

⁴⁷ *Compare* Hearings Held by Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. 73138, 73139 (Nov. 16, 2020), with Michael Asimow, Federal Administrative Adjudication Outside the Administrative Procedure Act 6, 26 (Sept. 11, 2019) (report to the Admin. Conf. of the U.S.).

⁴⁸ Zona Fairbanks Hostetler, *Nonlawyer Assistance to Individuals in Federal Mass Justice Agencies: The Need for Improved Guidelines*, 2 ADMIN. L.J. 85, 87 (1988).

The Social Security Administration (SSA) is perhaps the most well-known mass justice agency. At the application (initial) stage, the majority of people are unrepresented. The second stage in the process, reconsideration, has a higher rate of representation.⁴⁹ Both of these proceedings involve extensive development of the medical evidence.⁵⁰ The third level of review is a hearing before an ALJ; however, these hearings are non-adversarial by design and the ALJ may take a very active role in developing the record.⁵¹

SSA authorizes qualifying nonlawyer individuals to assist clients with their claims for Social Security benefits.⁵² The final stage of agency adjudication is an appeal of the ALJ decision to the Appeals Council. At the Appeals Council level, the majority of claimants are represented by a lawyer. Claimants are slightly more likely to be unrepresented as opposed to represented by a nonlawyer at the Appeals Council level.⁵³

Adjudications at the VA are also mass justice adjudications and, like SSA, lean more inquisitorial. The process begins when a veteran files a claim. At this stage, the VA has a “duty to assist” and takes responsibility for making sure the application is complete, assisting with

⁴⁹ The relevant data does not distinguish between types of representation. *See Representative Rates by Adjudicative Level FY 2014 – FY 2023*, SOC. SEC. ADMIN., <https://www.ssa.gov/foia/resources/proactivedisclosure/2023/Representative%20Rates%20by%20Adjudicative%20Level%20FY%202014%20-%20FY%202023.pdf> (last visited Sept. 18, 2024).

⁵⁰ In accordance with the requirements of 20 CFR 404.1512 and 415.912, this development includes requesting medical records from the claimant’s medical sources and, if warranted, a consultative physical and/or mental status examination. State agency medical consultants provide opinions regarding the claimant’s impairments at both the initial and reconsideration levels. For certain disability claims, the reconsideration process includes a hearing by a disability hearing officer (DHO). *See* 20 C.F.R. § 404.915. The initial and reconsideration levels are administered largely by state agencies under agreements with SSA.

⁵¹ For example, the ALJ may order a consultative examination and the Hearing Office staff usually obtain new evidence after the reconsideration determination. The representative may and often do, submit medical evidence to the ALJ. The ALJ may also obtain evidence from a medical expert who will provide a medical opinion on the claimant’s impairments. The ALJ may also obtain vocational expert evidence regarding the claimant’s past relevant work or the existence of jobs in the national economy.

⁵² *See* 20 C.F.R. § 404.1710; *see also* 20 C.F.R. § 416.1540.

⁵³ *See* charts provided by AC for fiscal years 2022 and 2023.

evidence-gathering, and scheduling the physical exam with a licensed physician.⁵⁴ If this initial decision is unfavorable, the veteran has three options: either submit new evidence; request review of the original evidence by a higher-level review officer; or appeal to the Board of Veterans' Appeals (BVA). If the veteran chooses to appeal to the BVA, that level could involve a review of the evidence or submission of new evidence with or without a request for hearing. Nonlawyer representation is common at all of these levels, and the VA does not have a lawyer on the government side. The final review stage is at the US Court of Appeals for Veterans Claims, and at this point the VA is represented by a lawyer.

VA authorizes and encourages nonlawyers to assist veterans. At the initial claims level, the vast majority of claimants are represented by nonlawyer representatives, and specifically those connected through the Veteran Service Organizations (VSOs). VSOs are explicitly prohibited from receiving fees related to providing service to represented claimants at the initial level.⁵⁵ The success rate of lawyers and nonlawyer representatives before BVA is higher than the success rate with no representation.⁵⁶

3. Informal (Type C)

Truly informal proceedings, those known as "Type C," make up the bulk of administrative decision-making. Though informal in terms of APA or other statutorily-required procedure, these hearings range from low stakes, for example, obtaining a campground permit, to very high stakes, for example, renewing a national bank charter. The majority of these informal

⁵⁴ 38 U.S.C. § 5103A; 38 C.F.R. § 3.159.

⁵⁵ 38 C.F.R. § 14.636(b). Statutory language allows compensation for nonlawyers at the BVA level, but not at the VARO level.

⁵⁶ According to BVA's 2022 Annual Report, attorneys were successful in 42.1 percent of their cases, agents 34.6 percent (non-lawyer "agents" must pass an examination and take CLE courses), others 35.7 percent, and those with no representation 29.2 percent. The various VSOs fell within a range of 32.5 percent (American Legion) to 35.7 percent (Military Order of the Purple Heart). 2022 BVA ANN REP. 49. These statistics do not cover success rates at the VARO level, only the BVA level.

adjudications involve unrepresented parties.⁵⁷ As such, these hearings tend to have long-standing programs incorporating nonlawyer representation, as well as the most variety in terms of regulatory structure for nonlawyer representation.

The agency hearings studied in this report that exemplify these types of informal proceedings include some removal⁵⁸ and other naturalization-related decisions made by the Department of Homeland Security through the office of United States Citizenship and Immigration Services (USCIS); collection due process hearings through the Internal Revenue Service of the United States Treasury; and debt recoupment hearings through the Federal Emergency Management Agency, also under DHS.

Hearings by DHS personnel at USCIS consist of paper and/or interviews with staff in order to gather information needed for the decision. Similarly, collection due process hearings at IRS resemble a discussion between the taxpayer and an Appeals Settlement Officer. This interview-type setting is emblematic of the very informal Type C adjudications that incorporate both frontline decision-making and roles for assistance with greater frequency than the more adjudicatory hearing and representation models seen above.

Debt recoupment hearings at FEMA tend to come to the agency from Treasury, once a collection is activated. While these hearings look a bit more like the typical lawyer-driven process than the interviews above, the general hallmarks of an inquisitorial, non-evidentiary hearing remain. There are no lawyers representing FEMA on the agency side. Few people are

⁵⁷ Asimow, *supra* note 9, at 101 (“Although § 555(b) takes no position on whether there is a right to lay representation, lay representation is a practical necessity in most cases of Type C adjudication where the relatively low monetary stakes and the party’s likely inability to pay preclude hiring a lawyer.”).

⁵⁸ “Numerous adjudicatory decisions by immigration personnel do not trigger adjudicatory hearings and thus should be considered Type C adjudication. For example, there is no right to an adjudicatory hearing in connection with expedited removal by a DHS officer at ports of entry of an alien who makes no claim to refugee status. 8 U.S.C. § 1225(b)(1)(A)(i). *Id.* at 151 n.714 (citing Jennifer Lee Koh, *Removal in the Shadows of Immigration Courts*, 90 S. Cal. L. Rev. 181 (2017)) (discussing EOIR).

represented before the agency, although nonlawyer representation is allowed under the regulations.⁵⁹ When a person is represented by someone other than a lawyer, it tends to be a family member or friend who is offering support and guidance.

B. Models of Nonlawyer Practice

As the previous section illustrates, federal agency adjudication includes an immense variety of adjudicatory schemes, ranging in formality. And throughout each type of adjudication, nonlawyer representatives exist. But the level of detail the agency has prescribed regarding the qualifications, accreditation, training, and supervision of such nonlawyer representatives also varies immensely. The variation in models reflects a variety of factors, including: volume of claims; type of claimant (institutional, corporate, or individual); access to representation among claimants; complexity of matter; formality of hearing; statutory design; agency resources; federalism concerns; and nonprofit engagement. Other considerations related to the development of nonlawyer practice before the agency are power differentials among parties and their signaling effects,⁶⁰ for example: is the hearing one in which the government is enforcing against an individual party or is someone attempting to claim benefits; is the government represented by a lawyer; are the nonlawyers primarily representing individuals or larger institutions and corporations; and the number of adjudications annually. This section will map out the various models of nonlawyer practice throughout the federal statutory and regulatory landscape.

1. Detailed regulatory schemes

The model first in mind when discussing nonlawyer representation tends to be the detailed regulatory schemes, often including certification, training, and oversight components. These schemes tend to be found in long-standing programs affecting high-volume adjudications.

⁵⁹ 44 C.F.R. § 206.115(b).

⁶⁰ See Victor D. Quintanilla et al., *The Signaling Effect of Pro se Status*, 42 L. & SOC. INQUIRY 1091 (2017).

Perhaps because these models have been around a long time and affect so many people, they also are the most heavily studied.⁶¹ The nonlawyer representatives are professionalized and most often embedded in, or trained by, nonprofit organizations. These programs tend to be most developed where the adjudication is less adversarial in theory, meaning the agency design was meant to be inquisitorial, and the agency does not have a lawyer on its side. The main exception is the DOJ accredited representative program, which covers the adversarial immigration adjudications before immigration judges and the Board of Immigration Appeals.

There are two types of nonlawyer representatives who appear at various levels of agency adjudication at SSA. The first is a trained and registered representative entered into the direct payment process, who must meet eligibility criteria, pass a written examination, and complete continuing education courses.⁶² These representatives are referred to as Eligible for Direct Pay Non-Attorneys (EDPNAs).⁶³ Alternatively, a claimant can be represented by a family member or other representative of their choosing, and these representatives are not part of the direct payment process.⁶⁴ If the claimant appears for an SSA ALJ hearing without a representative (except in a few specific situations), the ALJ will advise the claimant of the right to representation.⁶⁵ At times, ALJs might recommend that a family member is actually a witness rather than a representative. All representatives must abide by rules of conduct.⁶⁶

⁶¹ See Part I.C.

⁶² 20 C.F.R. §§ 404.1717, 416.1517. *See also* Changes to the Administrative Rules for Claimant Representation and Provisions for Direct Payment to Entities, 89 Fed. Reg. 67,542 (Aug. 21, 2024) (clarifying relationships between representatives and entities with respect to direct pay arrangements).

⁶³ See <https://www.ssa.gov/representation/nonattyrep.htm>

⁶⁴ 20 C.F.R. §§ 404.1705, 416.1505. These representatives are not eligible for direct payment and, at times, an ALJ might suggest that the representative is actually a witness.

⁶⁵ See HALLEX I-2-1-80.B. *See also* 20 C.F.R. § 416.1607.

⁶⁶ 20 C.F.R. §§ 404.1740, 416.1540.

The claimant must also file a written notice of representation, signed by the prospective representative for consideration.⁶⁷ SSA representatives may help clients navigate administrative processes, including filing initial claims for benefits, obtaining medical evidence from the claimant's medical sources, post-denial appeals before administrative law judges (ALJ's), and non-adversarial hearing presentations to support claims.⁶⁸ Internal statistics show that the vast majority of representatives, however, are lawyers.⁶⁹

SSA's Office of General Counsel (OGC) oversees representatives. SSA representatives are bound by specific ethical standards and affirmative duties, including competence and diligent client representation, maintaining confidentiality, prompt communication, and fair dealing with clients, the SSA, and third parties.⁷⁰

The OGC ensures that representatives adhere to SSA regulations and ethical standards, providing oversight and disciplinary actions when necessary.⁷¹ Additionally, the agency publishes resources for nonlawyer representatives on its website, providing guidance on tasks such as submitting evidence and asking for a favorable decision from ALJ in the course of the proceedings.⁷² Representatives may be disqualified or face disciplinary actions for misconduct including engaging in deceitful practices or misrepresenting material facts to prospective claimants or the SSA, and demanding or charging a fee outside of the reasonable past-due

⁶⁷ See 20 C.F.R. § 404.1707

⁶⁸ *Program Operations Manual System*, GN 03970.010, SOC. SEC. ADMIN. (Apr. 2, 2018), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0203970010>.

⁶⁹ SSA numbers post-interview PDF in Folder; see also 20 C.F.R. § 416.1540

⁷⁰ See 20 C.F.R. § 404.1740

⁷¹ See 20 CFR 404.1750 et seq.

⁷² *Information for Representatives*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/rep_info.html (last visited Sept. 23, 2024).

benefits amount, as such crimes reflect adversely on their fitness to represent clients before the SSA.⁷³

To become an accredited representative at the VA, nonlawyers must maintain accreditation through ongoing education within a Veteran Service Organization (VSO), possess certification from the VSO, and pass an exam administered by the VA.⁷⁴ VA's OGC oversees accredited representatives, ensuring compliance with VA standards as well as handling complaints or disciplinary actions.⁷⁵ Representative qualification may be suspended or canceled for misconduct including charging and accepting unlawful compensation in the assistance of a claim, knowingly presenting fraudulent information, and other unethical or deceitful practices which operate counterintuitively to the competence and evidence required before the Board.⁷⁶ VA representatives must adhere to ethical standards, including faithfully executing claimant representation, competent representation, and engaging in honest dealings with veterans and the VA.⁷⁷

The Department of Justice provides a pathway for law students,⁷⁸ law graduates not yet admitted to the Bar,⁷⁹ reputable individuals with a pre-existing relationship to the person represented, accredited representatives, and accredited officials of a foreign government to

⁷³ 42 U.S.C. § 406.

⁷⁴ *VA Accredited Representatives FAQ*, VETERANS BENEFITS ADMIN., <https://www.benefits.va.gov/vso/> (Aug. 8, 2024).

⁷⁵ *Accreditation, Discipline, & Fees Program*, VETERANS BENEFITS ADMIN., <https://www.va.gov/ogc/accreditation.asp> (Sept. 17, 2024); 38 U.S.C. § 5902; 38 C.F.R. § 14.631.

⁷⁶ 38 C.F.R. § 14.633.

⁷⁷ Standards of Conduct. VA.gov. <https://www.va.gov/OGC/docs/Accred/StandardsofConduct.pdf>.

⁷⁸ “The student must file a statement that he or she is participating under the direct supervision of a faculty member, licensed attorney, or accredited representative, in a legal aid program or clinic conducted by the law school or non-profit organization and is appearing without remuneration from the respondent.” Asimow, *supra* note 9, at 153 n.727.

⁷⁹ “The law graduate must file a statement that he or she is appearing under the supervision of a licensed attorney or accredited representative without remuneration. In the case of law students or graduates, the IJ (or other official before whom he or she wishes to appear) has discretion not to permit such appearance or to require the presence of the supervising faculty member, attorney, or accredited representative.” *Id.* at 153 n.728.

represent people in more formal hearings before immigration courts and the Board of Immigration Appeals.⁸⁰ The “accredited representative” category is the largest source of nonlawyer representatives before immigration judges.

The Department of Justice operates the Recognition and Accreditation program, which recognizes nonprofit organizations to provide such services through accredited representatives.⁸¹ According to the 2023 WH-LAIR Report, there are roughly 2,300 accredited representatives providing such services.⁸²

Adjudicators who work in these systems and were interviewed for this project tended to agree that the quality of representation is similar between lawyers and nonlawyers in these hearings. However, interviews with various stakeholders also noted that these agency accreditation programs can suffer from unstable funding and backlog. In some cases, the accreditation process itself is vulnerable to politicization. These issues can result in the partner nonprofits facing hurdles in their own planning, which ultimately leads to fewer nonlawyers to fulfill the opportunity envisioned by the accreditation program in the first place.

Because these programs cover such a high volume of adjudications and tend to involve vulnerable populations and claims of benefits with monetary remedies, there is a potential that bad actors might enter the market without proper credentials. Interviewees mentioned examples of disbarred attorneys or otherwise unqualified people attempting to receive certification under these programs. In other cases, bad actors operate outside of the accreditation process entirely to

⁸⁰ *Id.* at 72 n.320.

⁸¹ *Recognition and Accreditation (R&A) Program*, U.S. DEP’T OF JUST., EXEC. OFF. IMMIGR. REV. (May 13, 2024), <https://www.justice.gov/eoir/recognition-and-accreditation-program>; 8 C.F.R. § 1292.1(a)(4); BIA PRACTICE MANUAL, *supra* note 44, § 2.4. Nonlawyer representation before DHS on immigration-related matters, discussed in more detail below, is done through partial accreditation under the Department of Justice accredited representation program.

⁸² WH-LAIR REPORT, *supra* note 1, at 30.

fill a need that is not being met when accreditation processes for new nonlawyers are backlogged.

2. Specialized expertise

This model of nonlawyer representation is seen with agencies and claims that involve highly technical expertise.⁸³ Because of this specialization, nonlawyer representatives here tend to be professionals in other fields that undertake this work as an extension of their expertise. Qualifications for these sorts of programs rely heavily on examinations or other professional licensing schemes to ascertain the particular subject matter expertise required for representation.

To become a patent agent, one must possess a degree which qualifies them to understand the technical aspects of inventions and must pass the USPTO registration examination, which tests knowledge of patent law and USPTO procedures.⁸⁴ The Office of Enrollment and Discipline (OED) oversees patent agent conduct and ensures compliance with USPTO regulation, including review and tracking of registration examination applicants.⁸⁵ The OED has the authority to investigate complaints and impose sanctions for misconduct, which can include suspension or discipline before the USPTO.⁸⁶

A patent agent may be disqualified or disciplined for various reasons, including misrepresentation or fraud of material facts, conflicts of interest adversely affecting a client, negligence in handling patent applications or related matters, and commingling of funds.⁸⁷ Patent

⁸³ For more on the role of specialized expertise in agency adjudications, see Jonathan Rose, *Nonlawyer Practice Before Federal Agencies Should Be Encouraged*, 37 ADMIN. L. REV. 363 (1985).

⁸⁴ *Becoming a Patent Practitioner*, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/learning-and-resources/patent-and-trademark-practitioners/becoming-patent-practitioner> (last visited Sept. 23, 2024).

⁸⁵ *Information for Current Practitioners*, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/learning-and-resources/patent-practitioners/current-practitioners> (last visited Sept. 23, 2024).

⁸⁶ *Id.*

⁸⁷ Will Covey, *Professional Responsibility for IP Practitioners*, U.S. PATENT & TRADEMARK OFF., https://www.aipla.org/docs/default-source/committee-documents/bcp-files/wcovey_pripp.pdf?sfvrsn=a31a5138_2 (last visited Sept. 23, 2024).

agents are bound by the USPTO’s Code of Professional Responsibility, which mandates competence and diligence to clients with necessary legal and technical expertise, confidentiality with client information, communication informing clients about the status of cases or inquiries, and fair dealing with clients, the USPTO, and third parties.⁸⁸

The IRS authorizes qualified professionals to assist clients with their federal tax matters, including certain types of tax preparation (for example, responses to IRS-issued Information Document requests) and representation before the IRS. Aside from lawyers, representatives can be Enrolled Agents (EAs) or Certified Public Accountants (CPAs).⁸⁹ Other categories of people may perform limited representation or tax preparation duties on behalf of taxpayers, including enrolled actuaries and enrolled retirement plan agents.⁹⁰ To become an IRS representative, EAs must pass the special enrollment examination (“SEE”) and undergo a background check through the IRS, while CPAs must maintain their professional licensing. The regulations provide extensive ethical obligations to clients for all nonlawyer representatives, similar to those imposed on lawyers.⁹¹

The IRS Office of Professional Responsibility (OPR) ensures that representatives comply with IRS regulations and ethical standards.⁹² The OPR investigates conduct complaints and can impose disciplinary actions, including suspension or disbarment from practice before the IRS.⁹³ Main grounds for disqualification from practice include engaging in disreputable conduct and

⁸⁸ 37 C.F.R. § 11.100–.901 (Rules of Professional Conduct). See 37 C.F.R. ch. I, subch. A, pt. 11 for detailed regulations about registration of patent attorneys and agents.

⁸⁹ The role of Third Party Designee is post-preparation and filing of the return. The current (2023) Form 1040 Instructions describe Third Party Designees.

⁹⁰ 31 C.F.R. § 10.3.

⁹¹ 31 C.F.R. § 10.20-10.37

⁹² *Office of Professional Responsibility and Circular 230*, IRS (Aug. 20, 2024), <https://www.irs.gov/tax-professionals/office-of-professional-responsibility-and-circular-230>; 31 C.F.R. subtit. A, pt. 10.

⁹³ *Id.*

unethical practices before the IRS including misrepresentation, failure to exercise due diligence, and failure to disclose and resolve conflicts of interest in handling tax matters.⁹⁴

Another form of the expertise model is seen in the Department of Labor.⁹⁵ The regulatory model looks rather broad at first glance, but the ALJ is given discretion to decide qualifications.⁹⁶ According to the OALJ, the majority of nonlawyer representation is seen with Black Lung benefits cases.⁹⁷ In these cases, the employers are generally represented by large law firms. The claimants, however, are represented by nonlawyers in roughly a quarter of cases.⁹⁸ The lay representatives tend to be employed by clinics; the largest such clinic is Stone Mountain Health Services Lay Advocacy Program.⁹⁹ These nonprofits are experts in the health and related issues encountered by miners and the Black Lung Benefits program and rely on that specialized knowledge to represent claimants. A similar version of this type of expertise model appears with civil penalty claims before the EPA.

In the DOL and EPA cases, a respondent defending against a violation might receive representation from someone with an industry group or guild that knows the particular industry

⁹⁴ 31 C.F.R. §§ 10.22, 10.29, 10.51–.52.

⁹⁵ 29 C.F.R. § 18.22.

⁹⁶ § 18.22(b)(2) (“An individual who is not an attorney . . . may represent a party or subpoenaed witness upon the judge’s approval. The individual must file a written request to serve as a non-attorney representative that sets forth the name of the party or subpoenaed witness represented and certifies that the party or subpoenaed witness desires the representation. The judge may require that the representative establish that he or she is subject to the laws of the United States and possesses communication skills, knowledge, character, thoroughness and preparation reasonably necessary to render appropriate assistance. The judge may inquire as to the qualification or ability of a non-attorney representative to render assistance at any time. The judge may deny the request to serve as non-attorney representative after providing the party or subpoenaed witness with notice and an opportunity to be heard.”).

⁹⁷ Roughly 15 percent of these cases have lay representatives.

⁹⁸ According to ALJs, a very small percentage are self-represented, estimated at or below 5% of claimants.

⁹⁹ Stone Mountain cites the following outcomes on their website: “From July 1, 2016, to June 30, 2017, SMHS lay advocates were involved in a total of 317 awards from the Department of Labor District Director’s Offices and the Office of Administrative Law Judges from around the country. This generated \$4,345,897.39 in backpay benefits monies to the miners and their families, in addition to \$226,388.19 in monthly benefits. This does not include medical benefits. Over the course of four years (7/1/13 – 6/30/17), SMHS assisted with 1058 Federal Black Lung Claims that received favorable decisions for monetary awards. The total amount of backpay benefits monies to the miners and their families was \$10,968,928.32. Even though we are allowed to collect a percentage of the money awarded to the miners, we do not do so.” *Black Lung Program Services*, STONE MOUNTAIN HEALTH SERVS. <https://www.stonemountainhealthservices.org/black-lung-program-services.html> (last visited Sept. 23, 2024).

and relevant regulations. Unlike the patent and tax representation, the agency does not certify or oversee the representatives and there are no specific qualifications required. But the groups offering representation have industry or substance expertise due to their related work.

One form of specialized expertise that is often folded into various regulations is the law student representative. In these cases, agencies and related entities work with law school clinics, for example, low income taxpayer clinics and FINRA investor advocacy clinics, to specifically allow law students to represent people provided the student has an attorney supervisor, often a faculty member, at the clinic. There is evidence that these programs expand competent representation for people who otherwise could not afford representation.

3. Institutional/familial pro se

Some agencies allow for representation by a nonlawyer but only where there is a specific connection to the matter. This could encompass, for example, a family member of the claimant or a corporate officer of an institutional claimant. The Report categorizes this as a particular form of nonlawyer representation and distinct from self-representation.

The Department of Interior allows the following nonlawyers to practice before the agency:

An individual who is not otherwise entitled to practice before the Department may practice in connection with a particular matter on his own behalf or on behalf of (i) A member of his family; (ii) A partnership of which he is a member; (iii) A corporation, business trust, or an association, if such individual is an officer or full-time employee; (iv) A receivership, decedent's estate, or a trust or estate of which he is the receiver, administrator, or other similar fiduciary; (v) The lessee of a mineral lease that is subject to an operating agreement or sublease which has been approved by the Department and which grants to such individual a power of attorney; (vi) A Federal, State, county,

district, territorial, or local government or agency thereof, or a government corporation, or a district or advisory board established pursuant to statute; or (vii) An association or class of individuals who have no specific interest that will be directly affected by the disposition of the particular matter.¹⁰⁰

There is no formal certification process for appearance at the Department of Interior.¹⁰¹ Once a representative signs a paper in a proceeding, that signature functions as certification that the individual is authorized to practice before the Department.

Representatives in arbitrations before FINRA are governed by the rules of FINRA Dispute Resolution Services. FINRA rules also follow the institutional pro se model, allowing a member of a partnership and a bona fide officer of a corporation, trust, or association to represent those institutions as a nonlawyer representative before an adjudicator.¹⁰² Finally, EPA also reported institutional pro se representation for civil penalty cases involving smaller businesses. In these cases, the head of the business or another officer might represent the business. The ALJ practice manual for the EPA allows for nonlawyer representation, specifically naming corporate officers or partners. The manual further acknowledges a role for specialized expertise, noting that “such representatives can be useful if they have had substantial prior experience in administrative litigation proceedings or have significant expertise in the particularities of the disputed issues.”¹⁰³

Similar institutional pro se model shows up elsewhere, but without the regulatory structure specifically allowing certain corporate, business, or family representatives. At some

¹⁰⁰ 43 C.F.R. § 1.3(b)(3)(i)–(vii).

¹⁰¹ § 1.3.

¹⁰² FINRA R. 9141(b).

¹⁰³ EPA, OFF. ADMIN. L. JUDGES, PRACTICE MANUAL 6 (2013) [hereinafter EPA PRACTICE MANUAL], https://www.epa.gov/sites/default/files/2013-09/documents/alj-practice-manual_0.pdf.

agencies additional provisions like this exist alongside more explicit representation models. At the IRS, for example, Section 10.7(c) of Circular 230 authorizes non-practitioner representatives and representation based on relationship to a taxpayer, including an immediate family member; a general partner of a partnership; a fulltime employee of an individual or entity employer; and a bona fide officer of a corporation, association, or “organized group.”

4. Individual choice

In addition to the regulatory schemes described above, there is a “catch-all” model of nonlawyer representation that is actually under-regulated and under-developed. In these cases, regulations allow for a claimant to have a lawyer or authorized representative, but there are no agency-mandated criteria. Often the only requirement is an appearance sheet or individual claimant/respondent consent to representation.

There is very little information about this model, but data gathered for this report tends to show that these opportunities, even when they are codified, are not widely used. In some cases, the legal market is skewed by statutory constraints that not only disincentivize lawyers from working in these areas but also disincentivize robust investment in alternative forms of representation.¹⁰⁴ In other cases, the need is sporadic, which makes it harder to develop and implement a resourced training scheme.¹⁰⁵ Notably, this “catch-all” model most correlated with high numbers of unrepresented people. In these cases, adjudicators often saw their roles as very active and, because of this active role, felt that representation was not necessary.

The procedures at the EEOC allow a complainant “the right to be accompanied, represented, and advised by a representative of the complainant's choice.”¹⁰⁶ There is no

¹⁰⁴ Black Lung

¹⁰⁵ FEMA

¹⁰⁶ 29 C.F.R. § 1614.605.

regulation governing certification or qualifications for nonlawyer representatives. Informal estimates from adjudicators are that roughly half of complainants are unrepresented, and another 10-15% have nonlawyer representation. Non-attorney representatives in these hearings have included paralegals, union representatives, former employees from the same agency, and family members. There is no training or qualifications requirement. There have also been instances of disbarred attorneys representing claimants.¹⁰⁷ Although the agency has procedures to remove a representative, use of such procedures is extremely rare.

At FEMA, the vast majority of people are unrepresented, even though nonlawyer representatives are allowed and there are no qualification or training requirements. Even so, nonlawyer representation occurs infrequently. The only requirement is that the representative fills out a form and the claimant agrees to release information.¹⁰⁸ Nonlawyer representatives in past years have been legal aid staff or friends and family members of the claimant.

5. Assistance

In addition to nonlawyer representation, there are various forms of nonlawyer assistance that occur in agency proceedings which are not adjudicatory hearings. The assistance here leans more toward providing information and support, rather than appearing before a decision-maker in a tribunal alongside an individual. Because this type of assistance is not considered representation, there are constraints on the agency in terms of communicating with assistants and/or offering access to file materials.

One well-known example of this model is the Navigator program through the Department of Health & Human Services (HHS). This program allows individuals to assist clients with issues

¹⁰⁷ Although not allowed under current regulations, see 29 C.F.R. § 18.22, the agency does see this. See, e.g., *Ex Parte Wilson*, 833 S.E.2d 840 (S.C. 2019).

¹⁰⁸ *Form FF-104-FY-21-118*, FEMA, https://www.fema.gov/sites/default/files/documents/fema_authorization-release-information-under-privacy-act-form.pdf (last visited Sept. 23, 2024).

related to establishing eligibility for and enrolling in coverage for health benefits, including insurance affordability programs such as Medicare and Medicaid, through a funding opportunity known as a Federally-facilitated Exchange (FFE).¹⁰⁹

To become an HHS Navigator, eligible individuals and entities such as nonprofit groups and small business resource partners must apply with a funding request annually, and ensure each participating Navigator is prepared through CMS-approved training and a federally certified exam. An approved Navigator may serve in more than one FFE state.¹¹⁰

HHS representatives are overseen by the Centers for Medicare & Medicaid Services (CMS) and other relevant HHS agencies.¹¹¹ These bodies ensure that representatives remain compliant with agency regulations and standards. Representatives must demonstrate that they meet licensing standards under the Affordable Care Act, maintain program expertise, assist clients by providing fair, accurate, and impartial services, and prepare clients for hearings without providing tax or legal advice to support their claims.¹¹² Navigators are also required to “serve underserved or vulnerable populations” within the service area in FFE states.¹¹³

In a similar model, the Department of Housing and Urban Development (HUD) authorizes qualified individuals to assist clients with housing law issues, including applications for housing assistance, disputes with landlords, and navigating housing regulations including

¹⁰⁹ CTRS. FOR MEDICARE & MEDICAID SERVS., EXTERNAL FREQUENTLY ASKED QUESTIONS FOR THE 2024 COOPERATIVE AGREEMENT TO SUPPORT NAVIGATORS IN FEDERALLY-FACILITATED EXCHANGES (FUNDING OPPORTUNITY) 1 [hereinafter NAVIGATORS FAQ], <https://www.cms.gov/files/document/2024-navigator-nofo-faqs-applicants.pdf> (last visited Sept. 23, 2024).

¹¹⁰ *Id.* at 6.

¹¹¹ *Biden-Harris Administration Makes Largest Investment Ever in Navigators Ahead of HealthCare.gov Open Enrollment Period*, U.S. Dep’t Health & Human Servs. (Aug. 26, 2022), <https://www.hhs.gov/about/news/2022/08/26/biden-harris-administration-makes-largest-investment-ever-in-navigators-ahead-of-healthcare-gov-open-enrollment-period.html>.

¹¹² 45 C.F.R. § 155.210; Katie Keith, Navigator Funding Opportunity Departs From Trump Priorities, HEALTH AFFS. (June 8, 2021), <https://www.healthaffairs.org/content/forefront/navigator-funding-opportunity-departs-trump-priorities>.

¹¹³ 45 C.F.R. § 155.210(e)(8).

foreclosure. To become certified as a HUD certified counselor, individuals must have experience and undergo HUD-approved training, while delivering services at HUD-approved HCAs.¹¹⁴ HUD's Housing Counseling program aims to support a wide network of housing counseling agencies (HCAs).¹¹⁵

HUD's Office of Housing Counseling (OHC) oversees housing counselors and HCAs to ensure compliance with HUD regulations and ethical standards, and is a part of the Office of Housing/Federal Housing Administration (FHA).¹¹⁶ HUD investigates complaints and can impose disciplinary actions, as well as removal for inactivity or based on performance.¹¹⁷ Counselors must maintain updated codes of conduct, comply with conflict-of-interest requirements, and remain in compliance with all requirements.¹¹⁸

A related model of assistance is seen at the EPA Office of Administrative Law Judges, where staff attorneys provide assistance to respondents. The staff attorney does not represent the respondent but provides dedicated assistance to assigned respondents and their representatives.

6. State programs

State providers and regulators are working together to develop and oversee models of nonlawyer representation in and around federal agency adjudications through, for example, state legal services organizations interacting with federal agencies through their programs implemented by the states. Alaska Legal Services developed a model of community justice workers who represent people in SNAP benefits hearings at state administrative agencies

¹¹⁴ *Housing Counseling*, HUD EXCH., <https://www.hudexchange.info/programs/housing-counseling/> (last visited Sept. 23, 2024).

¹¹⁵ *Housing Counseling Program Overview*, HUD EXCH., <https://www.hudexchange.info/programs/housing-counseling/program-description/> (last visited Sept. 23, 2024).

¹¹⁶ *HUD Office of Housing Counseling*, HUD, https://www.hud.gov/program_offices/housing/hsg_counseling (last visited Sept. 23, 2024).

¹¹⁷ 24 CFR § 214.

¹¹⁸ *Code of Conduct for HUD Grant Programs*, HUD, https://www.hud.gov/program_offices/spm/gmomgmt/grantsinfo/conductgrants (last visited Sept. 23, 2024).

implementing the Federal Food Stamp Act. The collaboration between legal aid and the state bar was integral to the development of this program. The Alaska State Bar provides the regulatory authority, while Alaska Legal Aid provides training. Other legal services offices are expanding on this model to provide disaster relief services through community justice workers, supported by FEMA. In both of these examples, the underlying federal regulatory structure follows the claimant choice model discussed above. Although Alaska worked together across various institutions to codify their program, constitutional due process principles alongside the federal statutory language support the right to be represented by a community justice worker even where state laws may regulate representation in state courts.

III. Structural Considerations for Nonlawyer Practice

This section will synthesize the various programs discussed above to illustrate the range of policies governing the accreditation of nonlawyers and considerations of agency organization, as well as address the underlying federalism issue that arises as these programs connect to state and federal court jurisdictions. More detail on each particular program is described in the appendix attached below.

A. Program Evaluation

At the outset, it is clear that agencies are not generally tracking nonlawyer representation. The 2023 LAIR report notes that “our current understanding of people’s experiences and challenges navigating federal administrative proceedings is limited by the lack of rigorous data collection and research looking across federal programs from an access to justice lens.”¹¹⁹ Repeated comments received from the public and interviews with stakeholders back up this lack of data.

¹¹⁹ WH-LAIR REPORT, *supra* note 1, at 6.

Of the 15 programs studied for this report, only SSA offered accessible percentages of nonlawyer representative appearances at each stage of the process. This data was collected at the broadest categorization, basically offering representation rates for three categories: lawyer, nonlawyer, and self-representation. The DOJ has also published data about the number of people who have been accredited under its program, although these numbers do not adequately portray current representation rates. No agency is keeping data on the outcomes obtained by nonlawyer representatives. Without data on the frequency and characteristics of nonlawyer representation, it is impossible to understand the impacts of this work and move toward more opportunities that adequately meet the need.

B. Accreditation

Although only a handful of agencies currently take on an accreditation role, doing so can increase transparency and awareness while offering added protection against fraud. Interviews and commenters reported that accreditation programs run through agencies provide an important role in expanding access to justice and are designed to ensure that representatives adhere to high standards of professionalism and accountability. Agency accreditation programs can also address federalism tensions for programs implemented through state systems with strong attorney regulations.¹²⁰ Agencies that are taking on accreditation roles either specify certain qualifications and certification mechanisms for the individual representative, or in some cases, the nonprofit or other institution that will employ the nonlawyer representatives.

¹²⁰ See Asimow, *supra* note 9, at 71 (“A major advantage of adopting procedural regulations that recognize a right to lay representation is to preempt state unauthorized practice laws that may prohibit or otherwise regulate lay representation in civil and criminal cases.”). For an example of an accreditation process for nonlawyer representatives, see the system adopted by the VA. 38 C.F.R. § 14.629(b). The United States Patent and Trademark Office also has a process for registering nonlawyer agents to serve as representatives in patent adjudications. 37 C.F.R. §§ 11.6, 11.7.

Other agencies do not perform accreditation roles and either rely on clients or the market to regulate their choice of representative.¹²¹ Some agencies, like SSA, have two tracks (one with certification requirements, the other left entirely to the client) depending on whether the representative is eligible for direct fee agreements through the agency.¹²²

Accreditation programs run through the agency offer benefits, but stakeholders referred to backlogs due to underfunding as a barrier to fully realizing the mission of these programs. In one case, a single attorney with two assistants was tasked with adjudicating a backlog of 697 pending applications.¹²³ The accreditation timeline varies between agencies, with the shortest time between application and accreditation under two months at some agencies, to longer times of over six months to a year at other agencies. Slow accreditation processes can have serious implications, including nonprofits losing their own grant funding or otherwise needing to shutter programs. Moreover, agencies do not always publicly release information on pending applications and timelines, which makes it hard for partner nonprofits to staff and plan adequately.

The placement of an accreditation office within the agency organizational structure was also highlighted as a potential barrier, with stakeholders pointing to the importance of locating these agency roles in non-political units. When accreditation becomes subject to political directives, advocates are left responding to uncertainty as to requirements, which can create

¹²¹ Examples of this are regulations only providing the bare minimum, that a client certify a person to represent them.

¹²² SSA has regulatory standards of conduct that are applicable to all representatives so that the reader is not left with the impression that a non-certified, non-attorney representative can act without any standards. See 20 C.F.R. § 404.1740 and § 416.1540.

¹²³ KAREN Sullivan, CATH. LEGAL IMMIGR. NETWORK, THE SEVERELY UNDER-RESOURCED R&A PROGRAM IS AN ESSENTIAL TOOL TO MEET GROWING NEEDS FOR AFFORDABLE IMMIGRATION LEGAL SERVICES 7 (2021), <https://www.cliniclegal.org/resources/federal-administrative-advocacy/policy-brief-severely-under-resourced-ra-program>.

problems for nonprofits in planning their capacity as well as making it harder for applicants to prepare for success.

1. Qualifications

Agencies vary immensely in the specificity and depth of the qualifications necessary to represent someone before them. ACUS’s Model Rules of Representative Conduct lists the following factors that may be considered by agencies when determining qualifications for nonlawyer representation:

- (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.¹²⁴

This list summarizes the variety of models in this report. Factors 1-5 connect to the various existing models of nonlawyer practice reviewed in this report, some of which focus more heavily on relationship and community expertise, while others tend toward specialized knowledge or skill or training in the particular subject matter. Factors 6-8 relate loosely to a form of “character and fitness” requirement seen with law licensure generally and to varying levels of

¹²⁴ Draft Model Rules of Representative Conduct 2024.04.09, Section 204(A)

specificity in agency nonlawyer representation. Stakeholders spoke of uncertainty around character and fitness requirements as a barrier, and in some instances where there is no agency accreditation role, the adjudicators have discretion to decide whether the nonlawyer representative is competent. For example, some adjudicators felt that in a non-adversarial hearing it was less helpful to have non-professional representation because nonlawyer representatives could make the proceeding lean more adversarial, adding procedures and time. In some cases adjudicators encouraged family members to appear as witnesses rather than representatives.¹²⁵

The various models of nonlawyer representation studied in this report reveal the following correlations between qualifications and adjudication characteristics: the most transparent credentialed certification programs are seen where specialized knowledge is at its height, as with patent agents at PTO or enrolled agents at IRS. In these programs, barriers to entry are high, but qualifications are objectively stated: professional licensing, mandatory training, exams. Mass justice agencies tend to also have very detailed regulations, and here the focus is on training and compensation. The assistance programs, like the HHS Navigators and HUD housing counselors, also have both strong individual and institutional regulatory requirements.

Some programs provide a menu of nonlawyer representation pathways. For example, the IRS has the specialized expertise pathway, but also the institutional/familial pro se pathway. The SSA has a detailed regulatory scheme for nonlawyers who enter the direct payment program and a more diffuse claimant choice model for nonlawyers who do not accept payment.

2. Training

¹²⁵ SSA notes

When training is mandated by the regulatory structure, there is also a spectrum of training models. For the highly regulated accreditation programs at DOJ, SSA, and VA, the training consists of mandatory benchmarks that nonprofits have developed into comprehensive training modules.¹²⁶ The programs vary in the specificity of training components. There can be value in this flexibility, allowing for nonprofits to expand programs and try new training materials over time.¹²⁷ This model requires organized, recognized, and funded nonprofit stakeholders to take on the training, however. Other models for training include law schools and their clinical faculty, community organizers, or the agency itself. One particularly successful training model is exemplified by the VIISTA program, which combines the law school clinic route with the nonprofit delivery model, allowing for a much more scalable program.¹²⁸

Although programs and clinics are providing these training outlets, more could be done to develop and grow these opportunities. The EEOC recently started issuing procedural guidance specifically intended for complainants not represented by attorneys;¹²⁹ the guidance currently covers the discovery process, motion practice, and filing and responding to motions for summary judgment--sample documents are also provided. Additional procedural guidance is expected to follow. Adjudicators spoke of opportunities to train union representatives, who appear as nonlawyer representatives on behalf of federal workers and could be organized to represent more employees before the EEOC, where currently roughly half of federal employee complainants are

¹²⁶ “Through its Office of Legal Access Programs (OLAP), EOIR operates the Legal Orientation Program (LOP) which funds nonprofit organizations that provide services to litigants, including training of attorneys and lay representatives.” Asimow, *supra* note 9, at 154.

¹²⁷ See, e.g., VIISTA and the VSO work

¹²⁸ Comment from Debra L. Rhode Center on the Legal Profession on Nonlawyer Assistance and Representation 3 (Sept. 6, 2024).

¹²⁹ See Information for Complainants Who are Not Represented by Attorneys | U.S. Equal Employment Opportunity Commission (eoc.gov).

unrepresented. Focus group participants echoed this need, and pointed to changing guidance as one particular problem that made it hard to develop necessary trainings.

Law school clinics are another opportunity to support and develop training programs. Some clinics have dwindled in areas where need remains high, such as with FINRA investor advocacy clinics. The number of investor advocacy clinics, which provide a valuable service to low-dollar investors, declined by more than half after FINRA stopped funding these programs. Due to some concern with how these clinics related to state regulations on the practice of law, FINRA recently proposed a rule codifying that students subject to attorney supervision were explicitly permitted to represent clients in FINRA Dispute resolutions systems.¹³⁰ The SEC originally approved the proposed rule, citing favorable discussion and comments.¹³¹ However, the rule is currently being reconsidered, with some concern that prohibition on payment for nonlawyer representatives might decrease access.¹³²

3. Oversight/Sanctions

Many of the nonlawyer representative programs studied do not require direct lawyer supervision.¹³³ Some do require institutional oversight by a recognized nonprofit, and those institutions are also subject to sanctions for any unethical behavior by individual representatives.

Most agencies have some sort of procedure for sanctioning representatives for unethical behavior; however, these procedures are rarely used. Some procedures lack enforcement

¹³⁰ See Notice of Proposed Rule Change Relating to Qualifications for Representatives in FINRA Arbitrations and Mediations, 88 Fed. Reg. 71,051 (Oct. 13, 2023). Note that the rule primarily focused on prohibiting non-attorney representatives (NARs) from representing parties in FINRA DRS for compensation, based on negative client experiences and outcomes with NARS.

¹³¹ See Order Approving Proposed Rule Change Relating to Qualifications for Representatives in FINRA Arbitrations and Mediations, 89 Fed. Reg. 3481 (Jan. 18, 2024).

¹³² See *Filling the Gap: Comments on the Proposal to Amend FINRA's Code of Arbitration Procedure and Code of Mediation Procedure to Modify the Qualifications for Representatives in Arbitrations and Mediations*, U.S. SEC. & EXCH. COMM'N (Apr. 8, 2024), <https://www.sec.gov/newsroom/speeches-statements/peirce-finra-04082024>.

¹³³ See, e.g., 8 C.F.R. 1292.11(e).

mechanisms, requiring agencies to refer egregious behavior to another enforcement agency, including state attorneys general. According to interviews in the selected case studies, disbarred lawyers continue to appear as nonlawyer representatives in various areas. Agency staff described situations where regulations disqualify disbarred lawyers, yet the agency did not always have a way to know about the disqualification because state bars do not always track whether the lawyer is inactive, retired, or disbarred. Many stakeholders felt that disbarred attorneys should not be eligible to represent anyone as a nonlawyer representative, and some, but not all, regulations specifically noted this prohibition.¹³⁴

Where regulations permit sanctions, common regulatory language tends to focus on the representative's duty to provide accurate information rather than ethical duties to clients, such as conflicts and confidentiality. For example, SSA regulations allow for sanctions for deceitful practices or misrepresenting material facts to prospective claimants or the SSA.¹³⁵ The Department of Labor also focuses on a representative's duty to the tribunal rather than aspects of client confidentiality.¹³⁶ A few agencies specifically reference ABA ethics rules, which are broader and do incorporate the duties to clients.¹³⁷

C. Dedicated Funding/Resources

Accreditation programs and program evaluation take resources. Agencies need and do not always have dedicated budget lines to properly manage nonlawyer representation, particularly the agencies that are running detailed or specialized accreditation programs. Shifting or under-resourced agency budgets also makes it harder for partnering nonprofits to plan out their own

¹³⁴ See, for example, EEOC regs (do not prohibit disbarred attys, there have been some recurring issues)

¹³⁵ *Program Operations Manual System*, *supra* note 64; 20 C.F.R. § 404.1740; 20 C.F.R. § 416.1540; HALLEX I-1-1-40, C.

¹³⁶ Cite DOL ethics.

¹³⁷ 43 C.F.R. § 1.6(a) (DOI).

capacity. Commenters suggested that agencies should be sure to account for the offsetting benefit that expanding representation offers both to claimants and implementation of programs when allocating resources.¹³⁸ Repeated commenters also highlighted the expansion of accreditation opportunities as an antidote to fraudulent and predatory behavior, which offers yet another benefit to the calculation and should be factored into assessments of cost.

Agencies also offer financial support to partner nonprofits through grant funding opportunities to cover the work provided by nonlawyer representatives.¹³⁹ The nonprofit organizations that will train and support expanded nonlawyer representatives need more access to federal support and grants. For example, HHS recently amended a rule to also allow administrative costs of foster care legal representation in Indian tribal child welfare cases for any representative of an Indian tribe, lawyer or non-lawyer, to be claimed in providing services.¹⁴⁰

D. Interagency coordination

Due to the resources required to develop and implement accreditation programs, and the immense variation currently scattered across agencies, there is opportunity here for expanded interagency coordination. The most prominent example of this coordination is the accreditation done by DOJ for representatives before DHS and EOIR. Combining functions across agencies can make sense for various agencies with overlapping subject matters. Beyond combining accreditation roles, agencies can coordinate to create consistency in their nonlawyer representation regulations within similar models. Finally, nonlawyer roles are referred to throughout federal statutes and regulations by varying terminology, which creates confusion and

¹³⁸ Comment from UnidosUS on Nonlawyer Assistance and Representation 4–7 (Sept. 6, 2024); Comment from CLINIC on Nonlawyer Assistance and Representation 5–7 (Sept. 6, 2024).

¹³⁹ Cite responses to RFI

¹⁴⁰ Foster Care Legal Representation, 89 Fed. Reg. 40,400 (May 10, 2024) (amending 34 C.F.R. § 1356.60(c)(4)(iii)).

hinders uptake of opportunities. Coordination in the language used to capture various tasks done by nonlawyer representatives could also help to publicize and grow these opportunities.

Expanding and coordinating representation should also be aligned with the interagency work currently being done on process simplification and burden reduction.¹⁴¹ For example, many agencies spoke of the connection between building out support for self-represented people as integral to the resources provided for their nonlawyer representatives as well. All of these components of access to justice ideally are working toward the same goal of providing a scaffolded and satisfactory experience for people navigating agency decision-making processes.

E. Federalism

Although the Supreme Court has made clear that the federal government is free to regulate representation before its agencies,¹⁴² a potential for conflict remains between rules for representation before federal agencies and state bar regulations prohibiting unauthorized practice of law, particularly when a state agency is adjudicating a matter governed by federal law.¹⁴³

As the Congressional Research Service explained, “[t]here may be potential federal preemption issues with regard to some state UPL laws that may conflict with federal immigration regulations permitting non-attorneys to represent persons free of charge in proceedings before the DHS/USCIS and the EOIR. The federal regulations do not permit representatives to engage in a for-profit business providing immigration legal services. They define “preparation” in the context of legal practice as meaning the study of the fact and law of a case and preparation of auxiliary documents in a proceeding coupled with legal advice, but not as including assistance in completing a form where the person providing such assistance does not purport to be qualified in

¹⁴¹ WH-LAIR REPORT, *supra* note 1, at 13–17; Pamela Herd, Donald Moynihan & Amy Widman, Identifying and Reducing Burdens in Administrative Process 40–42 (Dec. 5, 2023) (report to the Admin. Conf. of the U.S.).

¹⁴² *Sperry v. Florida*, 373 U.S. 379 (1963).

¹⁴³ See Cohen, *supra* note 25, at [redacted]; Recommendation 86-1, *supra* note 3, ¶ 3.

legal matters and receives nominal remuneration. Federal laws and regulations may preempt state laws permitting immigration consultants/assistants to engage in activities for a fee when federal law limits those activities to attorneys and fee-free accredited/qualified representatives.”¹⁴⁴ Previous ACUS reports have also noted the potential friction between federally-sanctioned nonlawyer programs and differing state licensing requirements.¹⁴⁵

Some agencies are actively exploring ways to address potential conflicts, as illustrated by the current rule discussions at FINRA regarding law student practice. Other agencies, like VA, make clear that representing someone outside of the agency’s detailed regulatory scheme, particularly with respect to unauthorized charging for a service, is unauthorized practice of law.¹⁴⁶

IV. Other Recurring Themes with Nonlawyer Representation

Given the variation of agencies and the immense spectrum of both substance and procedure that occurs under the broad umbrella of “agency adjudication,” it is impossible to generalize who exactly is appearing in federal agency adjudications on behalf of individuals, when these representatives are not lawyers. The above agency case studies, and the various regulatory models they illustrate, are meant to provide a bit of context for this variation, while also exploring how representation works in these various settings. Taking those examples as a starting point and zooming out a bit illustrates the following recurring themes that agencies and policy-makers should keep in mind when assessing regulatory structures for nonlawyer

¹⁴⁴ MARGARET MIKYUNG LEE, CONG. RSCH. SERV., R40822, LEGAL ETHICS IN IMMIGRATION MATTERS: LEGAL REPRESENTATION AND UNAUTHORIZED PRACTICE OF LAW 11 (2009). Note that state agencies and state bars vary as to whether nonlawyer representation before the agency violates unauthorized practice of law.

¹⁴⁵ Cohen, *supra* note 25, at 12.

¹⁴⁶ 38 U.S.C. § 5901.

representation: community expertise and trust; collaboration opportunities; connection to burden reduction efforts generally; and the need for model ethics rules.

A. The role of community

Throughout the research and interview process, both agency staff and advocates mentioned the importance of community ties for many of the nonlawyer representatives. This was often reported with the VA program and the representatives that work for the VSOs. In this case, the representatives are also veterans and share this experience with the people they are representing. This shared experience creates a foundation of trust.¹⁴⁷ An example building on the role of community expertise is seen with the VA’s Tribal Representation Expansion Project, which granted General Counsel authorization for representation by tribal-identified representatives to represent Native American Veterans.¹⁴⁸ There are now two Tribal VSOs recognized by VA to provide services to Native American Veterans.

Community ties and the associated trust that comes with these ties was a repeated theme in the immigration area as well. One organization commented that without “direct ties or trust in a community, it is often difficult to connect non-citizens with attorneys and legal representatives.”¹⁴⁹ Another example of the strong role that community ties plays with nonlawyer representatives is seen with the probate matters at the Department of the Interior. In probate cases, tribal members often have deeper understanding around probate issues specific to

¹⁴⁷ So strong is the trust between VSO and claimant, that it was not until 1988 that attorneys were allowed to charge for services. There had been decades of belief that attorneys preyed upon veterans and VSOs were the antidote to this predatory behavior. See Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 KAN. L. REV. 514 (2019); 38 U.S.C. § 7263(c)–(d).

¹⁴⁸ See, e.g., Department of Veterans’ Affairs Tribal Representation Expansion Project, 87 Fed. Reg. 8342 (Feb. 14, 2022); 38 C.F.R. 14.630.

¹⁴⁹ Comment from CLINIC on Nonlawyer Assistance and Representation 2 (Sept. 6, 2024).

tribal land and tribal members. Community ties function as not only a source of trust, but also a deep source of knowledge and expertise that can bear on representation tasks.

Yet another form of community expertise is on display in EEOC hearings, where other employees can represent certain federal employees with discrimination claims. In this case, the community knowledge is one of workplace colleagues placed in a similar environment and knowledgeable about that particular culture. In all of these cases, the trust formed by a shared community increases access to legal representation, which can encourage trust in public institutions and adjudications more generally.¹⁵⁰

Recognition of community expertise can help build programs that reach many more people, particularly in rural areas or areas otherwise not as well-served by lawyers. And in many cases, the type of knowledge that comes from community expertise allows for better understanding of the facts of a particular matter.

B. The need for collaboration

Collaboration is often key to providing more access to justice. One theme that ran throughout interviews and comments was the need for agencies to collaborate with nonprofits, higher education institutions and academics, and states in order for these programs to realize their fullest potential. There are both nonprofit organizations and law school clinics that are doing the implementation work of training and mentoring nonlawyer representatives, and more support from the federal government can help these groups meet the vast need.

Collaborations with the bar also play an important role. Lawyer mentors, required in immigration matters, were mentioned by stakeholders as vital to the success of the DOJ accreditation program. Other responses mentioned that because of the collaboration between

¹⁵⁰ WH-LAIR REPORT, *supra* note 1, at 25.

nonlawyers and lawyers in Social Security matters, and the need for a warm handoff on matters that continue on appeal to a court, it would be helpful for regulations to allow representation by an organization rather than only an individual, particularly where no fees are requested.

A recent Institute for the Advancement of the American Legal System (IAALS) report further recommends federal agencies collaborate with states on continuing to expand representation, pointing out that:

Up to this point, no state has included a representative from a federal agency on a task force or working group, but at least one state engaged federal agencies in other ways. For example, advocates from North Carolina met with the Department of Justice Antitrust Division and the Federal Trade Commission to review their 2023 legislative proposal and to provide feedback on their recommendations for the community justice worker model and limited licensing model, as well as to seek letters of support. Bringing federal agencies into the regulatory innovation fold could be a logical step.¹⁵¹

Finally, collaborations with academic researchers are necessary in order to generate evidence-based policy on expanding representation. Researchers can help to evaluate program outcomes, particularly if agency data on representation is collected and shared by the agency. Facilitating these connections and information-sharing can increase empirical study of nonlawyer representation which will help agencies to increase access to representation and assistance.

C. The connection to burden reduction efforts

Multiple interviews covered simplification and burden reduction efforts as part of expanding nonlawyer representation. This connection came up in two different ways: (1) agencies taking an active role publicizing nonlawyer representation and communicating

¹⁵¹ IAALS, *Unlocking Legal Regulation* 5 (2024).

opportunities for people to receive assistance and representation beyond hiring a lawyer; and (2) simplifying processes for all, which has the added benefit of creating an adjudicatory process that lends itself to training and professionalizing multiple types of representatives and assistance. Particularly for the institutional/familial pro se and individual choice models where there is no training or qualifications required, simplification processes like checklists could help nonlawyer representatives marshal the non-legal expertise they bring to the adjudication.

Burden reduction efforts can work symbiotically with expansion of nonlawyer representation. Consideration of burdens faced by representatives is a necessary component. As an aspect of burden reduction, stakeholders noted that some agencies have processes that create access hurdles for authorized nonlawyers to adequately represent their clients. For example, repeated commenters alluded to nonlawyer representatives having trouble accessing client files and needing to go through cumbersome phone procedures in order to obtain information needed for representation.¹⁵² Other commenters noted that lack of transparency around nonlawyer representatives and their contact information made it harder for nonlawyer representatives to organize professionally.

D. Ethical concerns

Increasing the focus on ethics through affirmative rules for all representatives is important. And some agencies do indeed have professional conduct rules that, in many cases, mimic lawyer-client protections or even incorporate the ABA Canons of Professional Ethics.¹⁵³

The recently developed Model Rules of Representative Conduct takes on many of these concerns, including how to best regulate confidentiality and conflicts of interest with nonlawyer

¹⁵² See, e.g., Comment from Taylor C. Lodise, Esq., on Nonlawyer Assistance and Representation 3–4 (Sept. 6, 2024) (discussing SSA).

¹⁵³ See 43 C.F.R. § 1.6(a) (DOI).

representatives who are not currently regulated by ABA ethics codes. Many of the regulations studied include language about ethical practice, but as mentioned above this language is often tailored toward truth to the tribunal and avoiding outright illegal behavior. More guidance is needed throughout the agencies as to nonlawyer and client interactions, particularly with respect to advertising, conflicts of interest, and confidentiality. Interviewees mentioned vulnerable populations, particularly children, where ethical codes focused on client interactions are vital.

Another recurring issue related to ethics is protecting the public from fraudulent or predatory behavior. Some of this behavior could be ameliorated through ethics rules more clearly addressing advertising and conflicts of interest in the realm of nonlawyer representation.¹⁵⁴ In one specific example, a law meant to increase benefits for veterans was quickly derailed by for-profit agents taking large cuts of veteran awards in exchange for assistance with filing medical claims.¹⁵⁵ Since the agents claim to be educating, not representing, veterans, they operate outside the accreditation scheme entirely.¹⁵⁶ According to one news article, “VA officials said there is little they can do, thanks in part to a decision by Congress in 2006 to remove criminal charges from the law forbidding entities from charging veterans for claims help.”¹⁵⁷

In other cases, there is a separate problem of people outside the regulatory scheme entirely posing as credentialed, such as with notarios.¹⁵⁸ This is less a problem with nonlawyer representation and more a problem of people not having access to credible representatives. In

¹⁵⁴ See also Lisa Rein, *Veterans Became Eligible for Billions. These Firms Saw a Chance to Profit.*, WASH. POST (May 23, 2024, 5:00 AM), <https://www.washingtonpost.com/politics/2024/05/23/va-benefits-for-profit-companies-pact-act/>.

¹⁵⁵ *Id.*

¹⁵⁶ Joshua Friedman and Krystle Good, *WARNO: They Call Themselves “Coaches” or “Consultants” and Advertise Their Ability to Assist You with Your VA Benefits Claim but May not Be Accredited to Practice Before the VA*, CFBP BLOG (Feb. 15, 2023), <https://www.consumerfinance.gov/about-us/blog/coaches-consultants-advertise-ability-to-assist-with-va-benefits-claim-but-may-not-be-accredited/>.

¹⁵⁷ Rein, *supra* note 156.

¹⁵⁸ [Insert footnote describing notarios.]

these cases, some advocates felt that increasing skilled nonlawyer representation would combat any market for fraudulent actors who may prey on potential clients.¹⁵⁹ Other advocates recommended the agencies include, and oversee, in their nonlawyer regulations certain types of particular matters where fraud is prevalent and which currently exist outside regulatory structures, for example, tax return preparers.¹⁶⁰

Conclusion

Too many people are still unable to secure legal representation in federal administrative adjudications, either it is too expensive, unavailable or otherwise inaccessible. Even so, federal agencies have led the way to increasing nonlawyer representation for decades. In many cases, these programs have provided people with life-altering representation and assistance when navigating various administrative adjudications. This report surveys 15 such programs in order to develop a template of the various models of such representation. The goal is that by understanding the possible menu of regulatory structures and how they work in various types of adjudication settings, agencies and stakeholders can better consider how and where agencies can expand and strengthen these opportunities.

¹⁵⁹ See also Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 L. & INEQ. 425, 428 (2011).

¹⁶⁰ U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105217, IRS EFFORTS TO OVERSEE REFUNDABLE CREDITS HELP PROTECT TAXPAYERS BUT ADDITIONAL ACTIONS AND AUTHORITY ARE NEEDED 35 (2022).