

Comment from Public Member Chai R. Feldblum on *Nonlawyer Assistance and Representation*
October 28, 2024

I am sorry I haven't been able to attend either of the committee meetings, due to conflicts that I could not reschedule.

Here are some thoughts on the preamble and recommendations. I have also discussed these ideas with Nadine, Matt and Lea.

I think it is very useful that the preamble and recommendations speak to both nonlawyer representation (someone "standing in the shoes" of the participant) and general assistance in navigating the administrative process but not actually representing the participant.

However, I think this distinction needs to be made sharper for the reader in the preamble and some of the recommendations need to refer to assistance.

With regard to the preamble: My suggestion is to move the definition of "representation" and "assistance" up to the second paragraph of the preamble in order to highlight the meaning of each term. Representation will usually include assistance. In contrast, assistance will not include representation.

The preamble appropriately includes references to representation and assistance throughout. One exception is the paragraph on barriers which needs to include references to assistance.

Btw, with regard to making the distinction clearer with regard to a nonlawyer representative vs. a nonlawyer that is simply offering assistance -- one could call the latter person a "navigator" or "facilitator." Sometimes having a separate term like that can be helpful.

I also think we should highlight that ACUS has a long-standing history on the issue of the use of non-lawyers in agency adjudications and that it has focused again on this issue in several ways over the past few years. I think we should then explain what this recommendation adds to those previous efforts. I have made a few textual recommendations for the preamble along those lines.

With regard to the recommendations: I would keep just recommendation #1 under the Assistance heading – i.e., let them be there!

The second recommendation (about resourcing the assistance) is consistent with some of the other recommendations in the section on Coordination and Collaboration. That section should reference assistance in most (albeit not all) of its bullets. I have made some textual recommendations in that section.

In addition, recommendations 13 and 14 in the section on Transparency should apply to assistance as well.

My regrets again that I cannot participate in the committee meetings. I look forward to seeing many of you at the Plenary.

Other edits:

Line 5: add “from individuals who can help them navigate the proceedings.” at the end of the sentence.

Line 41: “applicability” of what?

Line 59: add “and assistance” after “representation”

Line 61: change “representatives” to “non-lawyer representation.” and add a sentence regarding the type of barriers that are created for assistance.

Line 64: Did the 1986 recommendation lay out the distinction between representation and assistance and recommend that agencies support both?

Lines 64-72: add the following sentence to the beginning of this paragraph and make the following changes so it reads as follows: The issue of nonlawyer representation and assistance has been a long-standing concern of ACUS. As early as 1986, ACUS recommended that agencies permit and encourage nonlawyer representation and assistance because [add a sentence that explains the rationale for that recommendation]. In 2024, ACUS issued two sets of recommendations focused on agency adjudicatory processes. The recommendations encouraged agencies to allow participants in many adjudications “to be represented by a lawyer or a lay person with relevant expertise” and to establish “rules authorizing accredited or qualified nonlawyer representatives to practice before the agency.” The recommendations did not, however, focus on assistance that did not constitute representation, nor did they delve deeply into the issues of nonlawyer representation and nonlawyer assistance. This Recommendation now identifies best practices for incorporating and increasing representation and assistance by permitting broader practice by nonlawyers in different types of adjudicative systems and providing guidance to make processes governing nonlawyer representation and assistance more accessible and transparent.

Line 123: add “and assistance” after representation

Line 129: add a bullet point for “Options for obtaining assistance in navigating the adjudicatory process from nonlawyers”

Line 142: add “or nonlawyers that can assist with navigating the agency’s processes.” to the end of the sentence.

Line 148: and “and nonlawyer assistance” after representation

Line 153: Whether this is worth the cost of doing will really be dependent on the size and resources of the agency. But it's fine to keep it as a recommendation. (Although a number of useful comments were made as to some of the difficulties with how this data is described.)