



## Nonlawyer Assistance and Representation in Agency Adjudications

Commented [AC1]: Proposed Council Amendment recommended by the Committee.

### Committee on Adjudication

#### Draft Recommendation for Committee | October 30, 2024

1 Millions of people each year participate in administrative adjudicative proceedings to  
2 access federal programs and resolve legal issues. Some adjudicative proceedings are simple  
3 enough—or could be made simple enough—for people to navigate on their own. But many are  
4 so complex, or involve such significant stakes, that people engaging with them benefit from  
5 representation by individuals with expertise in those programs or assistance.

6 Representation in adjudicative proceedings, whether by lawyers or nonlawyers, and  
7 assistance are particularly valuable, even in seemingly straightforward adjudicatory proceedings,  
8 when they help people access relevant and accurate information about agency programs,  
9 program eligibility, and information on how to correctly complete forms and submit required  
10 information.<sup>1</sup> For example, while digital technologies, such as online forms and virtual hearings,  
11 are effective strategies for increasing accessibility, they can also act as a barrier for people who  
12 lack access to digital tools or lack the skills to navigate these systems. Although these challenges  
13 can be present for anyone, those lacking assistance may become so overwhelmed that they give  
14 up and forego rights and benefits to which they are entitled.<sup>2</sup> In other instances, errors can be  
15 exacerbated by a lack of representation and lead to unfair outcomes.

16 Representation and assistance not only help participants in adjudicatory proceedings but  
17 also benefit agencies. Without representation or assistance, an individual may be less likely to  
18 properly and timely complete adjudicative requirements, which can delay proceedings.

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

<sup>2</sup> Pamela Herd, Donald Moynihan, & Amy Widman, Identifying and Reducing Burdens in Administrative Processes 41 (Dec. 5, 2023) (report to the Admin. Conf. of the U.S.).



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19 Additionally, those without representation or assistance may require more support from the  
20 agency, which can strain resources and reduce efficiency.<sup>3</sup>

21 Many people, however, particularly low-income people and members of historically  
22 underserved communities, are unable to access representation or assistance.<sup>4</sup> One barrier to  
23 accessing representation or assistance is the critical shortage of affordable legal services. This  
24 concern is particularly acute in remote and rural areas, where not only are lawyers relatively  
25 scarce, but they may not be accessible to people who need them due to the long distances.

26 Federal agencies have long innovated various ways to widen the pool of available  
27 representatives and expand assistance. For example, many agencies currently permit participants  
28 in agency adjudications to be represented by qualified or accredited nonlawyers.<sup>5</sup> In many  
29 instances, the decision maker (whether or not an administrative law judge) makes an informal  
30 determination whether a representative is “qualified,” but some adjudicative systems provide for  
31 a formal accreditation system to determine which nonlawyer representatives are qualified to  
32 practice in those systems.

33 Examples of nonlawyers who represent or assist parties in agency proceedings include  
34 other licensed professionals such as accountants, social workers, and paralegals; law students;  
35 union representatives; human resources professionals; corporate officers; tribal advocates;  
36 agency employees; community members; and family members. In administrative adjudication,

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<sup>3</sup> Admin. Conf. of the U.S., Recommendation 2016-6, *Self-Represented Parties in Administrative Proceedings*, 81 Fed. Reg. 94319 (Dec. 23, 2016); *see also*, Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25641 (July 16, 1986); WH-LAIR REPORT, *supra* note 1, at 19 (“Studies have shown that legal assistance improves legal outcomes.”).

<sup>4</sup> *See* Amy Widman, *Nonlawyer Assistance and Representation* (Oct. 2, 2024) (draft report to the Admin. Conf. of the U.S.).

<sup>5</sup> *See* 5 U.S.C. § 555(b) (“A person compelled to appear in person before an agency . . . is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.”). ACUS recognizes that there is an ongoing discussion about the best way to describe representatives who do not hold an active law license. For the purposes of this Recommendation, ACUS refers to this group as nonlawyer representatives because it is consistent with two prior ACUS recommendations and Model Rules of Representative Conduct, and the 2023 White House Legal Aid Interagency Roundtable. The decision to use the term nonlawyer is not meant to suggest any deficiencies in representation offered by such individuals, nor should it deter any individual agency from adopting a different term. ACUS encourages agencies to remain attentive to the ongoing discussion within the legal community about terminology in this area and to consider updating their usage accordingly.



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37 the border between representation and assistance can be blurry, even for the agency and its  
38 decision makers. “Representation” is used particularly to denote that the individual is “standing  
39 in the shoes” of the participant and can speak for that individual even when that person is not  
40 present. Other activities that likely indicate representation include counseling on specific  
41 applicability or signing official records.<sup>6</sup> “Assistance” is broader, and used to indicate many  
42 other forms of help that may be beneficial to a person in dealing with an agency; this may  
43 include educating someone on process, counseling someone about rights and remedies generally,  
44 and, in some cases, helping someone navigate a form or benefits application.

45 Increasing availability of nonlawyer representation and assistance can be particularly  
46 beneficial in meeting the needs of communities of special populations, including veterans and  
47 servicemembers, members of tribal communities, people with disabilities, people with criminal  
48 records, immigrants, and disaster survivors.<sup>7</sup> A member of one of these communities often  
49 benefits from representation and assistance provided by nongovernmental organizations,  
50 advocacy groups, and other members of the private sector already operating to meet the needs  
51 and face the challenges within those communities. These community ties function not only as a  
52 source of trust but also a deep source of knowledge and expertise that can bear on representation  
53 and assistance. That trust can in turn encourage trust in public institutions and adjudicative  
54 proceedings more generally. Agencies can engage with such groups to help increase availability  
55 and awareness of nonlawyer representation and assistance in these communities.

56 There are barriers to increasing availability of nonlawyer representation and other  
57 assistance, including barriers that agencies may be able to address through their rules regarding  
58 representation and assistance. Agencies vary in their requirements, oversight, and encouragement  
59 of such representation. Overly burdensome requirements for representatives to establish their  
60 qualifications or to become accredited to practice before particular agencies can reduce the  
61 availability of representatives. When agencies do not affirmatively inform participants of the

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<sup>6</sup> Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25641 (July 16, 1986) (FOOTNOTE 2).

<sup>7</sup> See WH-LAIR REPORT, *supra* note 1, at vii.



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62 availability of such representation or assistance, participants may not be aware of these  
63 resources.

64 In 1986, ACUS recommended that agencies permit and encourage nonlawyer  
65 representation and assistance.<sup>8</sup> More recent recommendations encourage agencies to allow  
66 participants in many adjudications “to be represented by a lawyer or a lay person with relevant  
67 expertise”<sup>9</sup> and establish “rules authorizing accredited or qualified nonlawyer representatives to  
68 practice before the agency.”<sup>10</sup> This Recommendation expands on the Conference’s previous  
69 recommendations by identifying best practices for incorporating and increasing representation  
70 and assistance by permitting broader practice by nonlawyers in different types of adjudicative  
71 systems and providing guidance to make processes governing nonlawyer representation and  
72 assistance more accessible and transparent.

### RECOMMENDATION

#### Availability of Nonlawyer Assistance

- 73 1. Agencies should permit nonlawyers, including friends, family members, or other  
74 individuals, to assist participants throughout the adjudicative process. For example,  
75 agencies should freely allow nonlawyers to help participants navigate and complete  
76 forms, obtain necessary documents and records, and accompany participants to  
77 interviews and hearings for moral support, unless there is reason to exclude such an  
78 individual from a hearing (e.g., causing disruption or adversely impacting testimony).
- 79 2. Agencies should encourage and expand opportunities for nonlawyer assistance through  
80 programs that authorize, train, educate, and certify individuals to provide participants

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<sup>8</sup> Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25641 (July 16, 1986).

<sup>9</sup> Admin. Conf. of the U.S., Recommendation 2023-5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing*, 89 Fed. Reg. 1509 (Jan. 10, 2024).

<sup>10</sup> Admin. Conf. of the U.S., Recommendation 2023-6, *Identifying and Reducing Burdens on the Public in Administrative Proceedings*, 89 Fed. Reg. 1511 (Jan. 10, 2024). In 2024, ACUS published Model Rules of Representative Conduct.



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81 with information, support, and dedicated assistance, either by staffing and operating such  
82 programs directly or providing guidance and grant funding to nonprofit organizations.

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### **Availability of Nonlawyer Representation**

84 3. To increase the availability of representation for participants in their adjudications,  
85 agencies should establish rules authorizing qualified (see paragraphs 4-5) and, as  
86 appropriate, accredited (see paragraphs 6-9) nonlawyer representatives to practice before  
87 them.

### **Qualifications of Nonlawyer Representatives**

88 4. Agencies should establish reasonable qualifications required for nonlawyer  
89 representatives to practice before them. Agencies should consider the factors listed in the  
90 Model Rules of Representative Conduct, such as the representative's relationship to the  
91 participant; their knowledge, expertise, or skill; and their fitness to serve, when  
92 determining whether a nonlawyer is qualified to represent a participant in an agency  
93 proceeding.

94 5. Agencies should clarify that an individual who is disbarred from practicing law is not  
95 qualified to serve as a nonlawyer representative before the agency.

### **Accreditation of Nonlawyer Representatives**

96 6. In addition to establishing qualifications for nonlawyer representatives, the following  
97 types of agencies should consider developing and implementing formal accreditation  
98 programs for nonlawyer representatives to help ensure the quality and competency of  
99 representation in their adjudicative proceedings:

100 a. Agencies conducting adversarial adjudications with evidentiary hearings;

101 b. Agencies that adjudicate a high volume of cases involving historically  
102 underserved communities; and

103 c. Agencies with adjudications that involve specialized or technical subject matter.



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- 104 7. Agencies with accreditation programs should consider requiring initial training and  
105 continuing education for nonlawyer representatives, either by providing such training or  
106 continuing education directly or by working with organizations that employ, train,  
107 educate, or mentor nonlawyer representatives.
- 108 8. Agencies should regularly review the requirements of their accreditation programs to  
109 ensure they are adequate without adding additional, unnecessary burdens.
- 110 9. Agencies should dedicate adequate funding and other resources to their programs for  
111 accrediting, educating, and regulating nonlawyer representatives who practice before  
112 them, to ensure availability of representation and reduce wait times for accreditation.

### **Oversight and Enforcement**

- 113 10. Agencies should establish rules to govern the conduct and ethical obligations of  
114 nonlawyer representatives. Agencies should consider adopting in whole or in part the  
115 Model Rules of Representative Conduct.
- 116 11. Agencies should establish procedures for reviewing allegations or evidence of  
117 noncompliance by nonlawyer representatives with their rules of conduct; adjudicating  
118 alleged violations by nonlawyer representatives; and imposing sanctions on nonlawyer  
119 representatives found to have violated the rules of conduct. Agencies should also ensure  
120 they have procedures for enforcing such sanctions.
- 121 12. Agencies should provide for administrative review of any sanctions imposed on  
122 nonlawyer representatives for violation of relevant conduct rules.

### **Transparency**

- 123 13. To improve participants' awareness of options for representation, including by qualified  
124 or accredited nonlawyers, agencies should inform participants about such options early  
125 and throughout adjudications, including at levels of decision-making prior to an  
126 opportunity for a hearing.
- 127 14. Agencies should publish the following on their websites and in the *Code of Federal*  
128 *Regulations*:



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- 129           a. Rules prescribing the qualifications required for nonlawyer representatives;  
130           b. Rules for accrediting, educating, and regulating nonlawyer representatives, for  
131           agencies with formal accreditation programs; and  
132           c. Rules governing the conduct and ethical obligations of nonlawyer representatives,  
133           as well as procedures for adjudicating alleged violations of these rules and  
134           imposing sanctions.
- 135 15. Agencies should publish on their websites the names of nonlawyer representatives who  
136       have been sanctioned.

### **Coordination and Collaboration**

- 137 16. Agencies with overlapping subject matters, similar adjudication systems, or similar  
138       regulatory structures for nonlawyer representation should identify opportunities for  
139       interagency coordination of accreditation or education programs for nonlawyer  
140       representatives, to save resources and promote consistency.
- 141 17. When authorized by law, agencies should expand grant funding opportunities for  
142       nonprofit organizations that employ, educate, or mentor nonlawyer representatives.
- 143 18. Agencies should work with law and other professional school clinics to expand programs  
144       allowing students to serve as nonlawyer representatives under the supervision of lawyers  
145       or other accredited professionals.
- 146 19. Agencies should engage with community-based organizations, nongovernmental  
147       organizations, advocacy groups, and other organizations that can assist in building trust  
148       among participants and improve nonlawyer representation by bringing knowledge of and  
149       expertise in issues facing those communities.
- 150 20. Agencies should collaborate with state bar associations and other relevant licensing  
151       authorities to reduce the effect that state prohibitions against unauthorized practice of law  
152       may have on the ability of nonlawyers to represent parties before them.

### **Data**



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153 21. Agencies should gather and maintain baseline comparative data on representation,  
154 including by nonlawyers, to (1) help agencies and others assess whether rules and  
155 procedures regarding nonlawyer representation and assistance are achieving agency goals  
156 in making such representation available and accessible; and (2) identify opportunities for  
157 expanding access to representation. Such data should include, at a minimum, the type and  
158 number of nonlawyer representatives; the outcomes, in aggregate, of cases in which  
159 parties are represented by nonlawyers; the number of pending applications for  
160 accreditation; and average wait time for applications to be reviewed. Such data should be  
161 made publicly available and regularly updated.