



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Precedential Decision Making in Agency Adjudication

Committee on Adjudication

Draft Recommendation for Committee | October 21, 2022

1 [Preamble to be circulated to the Committee before the November 4 meeting.]



RECOMMENDATION

Use of Precedential Decision Making

- 2 1. Agencies should consider whether to treat appellate decisions, other than summary
3 dispositions unaccompanied by an opinion, as precedential. In determining whether all,
4 some, or no appellate decisions should be treated as precedential, agencies should
5 consider:
 - 6 a. The extent to which the agency regularly issues decisions that would be useful as
7 precedent in future cases and are written in a form that lends itself to use as
8 precedent in future cases;
 - 9 b. The extent to which the agency regularly issues decisions that largely concern
10 only case-specific factual determinations or the routine application of well-
11 established policies, rules, and interpretations to case-specific facts; or
 - 12 c. The extent to which the agency issues a large volume of decisions which
13 adjudicators cannot reasonably be expected to sift through to identify which
14 decisions merit closer attention.
- 15 2. In determining whether to treat an appellate decision as precedential, agencies that
16 distinguish between precedential and nonprecedential decisions should consider whether
17 the decision:
 - 18 a. Addresses an issue of first impression;
 - 19 b. Clarifies or explains a point of law or policy that has caused confusion among
20 adjudicators or litigants;
 - 21 c. Emphasizes or calls attention to an especially important point of law or policy that
22 has been overlooked or inconsistently interpreted or applied;
 - 23 d. Clarifies a point of law or policy by resolving conflicts among or by harmonizing
24 or integrating disparate cases on the same subject;
 - 25 e. Overrules, modifies, or distinguishes existing precedents;
 - 26 f. Accounts for changes in law or policy, whether resulting from a new statute,
27 agency rule, or court decision;



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- 28 g. Addresses an issue that the agency must address on remand from a court; or
29 h. May otherwise serve as a necessary, significant, or useful guide for adjudicators
30 or litigants in future cases.
- 31 3. Agencies should not prohibit parties from citing nonprecedential decisions in written or
32 oral arguments but should clarify when and for what purposes a party may cite a
33 nonprecedential decision and how the agency will consider it.

Processes and Procedures for Making Precedential Designations

- 34 4. Agencies should consider soliciting input—from appellate adjudicators not involved in
35 deciding the case—prior to designating an appellate decision as precedential.
- 36 5. Agencies should consider soliciting input—from adjudicators, other agency officials, the
37 parties to the case, and the public—whether to designate existing appellate decisions as
38 precedential or to resolve certain pending matters through precedential decisions.
- 39 6. Agencies should assess the value of amici participation or public comment in
40 precedential decision making and should consider actively soliciting amici participation
41 or public comments in cases of significance or high interest, for example by publishing a
42 notice in the *Federal Register*. Such participation may be especially important in cases
43 that address broad policy questions whose resolution requires consideration of general or
44 legislative facts as opposed to simple adjudicative facts particular to the parties.
- 45 7. When an agency rejects or disavows the holding of a precedential decision, it should
46 consider expressly overruling the decision, in whole or in part as the circumstances
47 dictate.

Availability of Precedential Decisions

- 48 8. For agencies that treat some appellate decisions as precedential, all appellate decisions
49 should, on their face, clearly state their precedential status. Such agencies should also
50 indicate the precedential status of appellate decisions in digests and indexes of cases that



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- 51 agencies make publicly available. Agencies should also clearly indicate when
52 precedential decisions have been overruled or modified.
- 53 9. Agencies should ensure that precedential decisions are effectively communicated to
54 adjudicators upon whom they are binding.
- 55 10. Agencies should consider posting on their websites brief summaries of precedential
56 decisions, a digest of precedential decisions, and an index, organized topically, of
57 precedential decisions.
- 58 11. Agencies should update any manuals, bench books, or other explanatory materials to
59 reflect developments in law or policy effected through precedential decisions.
- 60 12. Agencies should consider tracking, on their own or in coordination with commercial
61 databases, the subsequent history of precedential opinions, including whether the case
62 was remanded by a federal court or the opinion was overturned, modified, or
63 distinguished by the agency in another case. Such tracking, if made available to agency
64 officials and the public, would provide valuable information and enable users to quickly
65 focus on pertinent sources and access information that might otherwise be missed.

Rules on Precedential Decision Making

- 66 13. As part of their rules of practice, published in the *Federal Register* and codified in the
67 *Code of Federal Regulations*, adjudicative agencies should adopt rules regarding
68 precedential decision making. These rules should:
- 69 a. State whether all, some, or none of an agency's appellate decisions are treated as
70 precedential.
- 71 b. If the agency considers some but not all of its decisions as precedential, describe
72 the criteria and process for designating decisions as precedential;
- 73 c. If the agency considers some but not all of its decisions as precedential, describe
74 any process for overruling or modified precedential decisions;
- 75 d. If the agency considers some but not all of its decisions as precedential, describe
76 any opportunities for amicus or other public participation in precedential decision
77 making;



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- 78 e. If the agency considers some but not all of its decisions as precedential, specify
79 who has authority to designate decisions as precedential (for example, the
80 adjudicator who decides a case, the entire adjudicative body, etc.)
- 81 f. Explain the legal effect of appellate decisions in subsequent cases;
- 82 g. Explain the criteria and process for overruling precedential decisions; and
- 83 h. Explain when and for what purposes a party may cite a nonprecedential decision,
84 and how the agency will consider it.
- 85 14. Agencies should use clear and consistent terminology in their rules relating to
86 precedential decisions. Agencies that distinguish between “published” decisions and
87 “nonpublished” or “unpublished” decisions should identify the relationship between these
88 terms and the terms “precedential” and “nonprecedential.”
- 89 15. When adopting new or materially amending existing procedural regulations on the
90 subjects addressed above, agencies should voluntarily use notice-and-comment
91 procedures or other mechanisms for soliciting public input, notwithstanding the
92 procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the costs clearly outweigh the
93 benefits of doing so.