

Appendix A: Recommendation 73-1



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recommendation 73-1

Adverse Agency Publicity

(Adopted June 8, 1973)

Adverse agency publicity—that is, statements made by an agency or its personnel which invite public attention to an agency's action or policy and which may adversely affect persons identified therein¹—can cause serious and sometimes unfair injury. Where a reasonable and equally effective alternative is not available, adverse agency publicity is often necessary to warn of a danger to public health or safety or a threat of significant economic harm, or to serve other legitimate public purposes. However, adverse agency publicity is undesirable when it is erroneous, misleading or excessive or it serves no authorized agency purpose.

Agency practices regarding adverse publicity vary widely. Some agencies use adverse publicity as the primary method of enforcement; for some others it is merely action incidental to formal sanctions. Agency rules seldom establish procedures or standards for the use of adverse agency publicity, and it is almost never subject to effective judicial review.

In meeting these concerns, this recommendation addresses agency use of adverse publicity in connection with investigatory, rulemaking and agency adjudicatory processes as well as informal agency actions. It recommends the adoption of agency rules containing minimum standards and structured practices governing the issuance of publicity.

Recommendation

Each agency should state in its published rules the procedures and policies to be followed in publicizing agency action or policy, and internal operating practices should assure compliance. In the adoption of such procedures and policies, each agency should balance the need for adequately serving the public interest and the need for adequately protecting persons affected by adverse agency publicity in accordance with the following standards:

¹ Publicity as used here is distinguished from the mere decision to make records available to the public rather than preserve their confidentiality. That decision is governed by separate criteria set forth in the Freedom of Information Act (5 U.S.C. 552) and is not within the scope of this recommendation.



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1. All adverse agency publicity should be factual in content and accurate in description. Disparaging terminology should be avoided.

2. Adverse agency publicity relating to regulatory investigations of specifically identified persons or pending agency trial-type proceedings should issue only in limited circumstances in accordance with the criteria outlined below.

a. Where an agency determines that there is a significant risk the public health or safety may be impaired or substantial economic harm may occur unless the public is immediately notified, it may use publicity as one of the means of speedily and accurately notifying the affected public. However, where public harm can be avoided by immediate discontinuance of an offending practice, a respondent should be allowed an opportunity, where feasible, to cease the practice (pending a legal test) in lieu of adverse agency publicity.

b. Where it is required in order to bring notice of pending agency adjudication to persons likely to be desirous of participating therein or likely to be affected by that or a related adjudication, the agency should rely on publicity to the extent necessary to provide such notice even though it may be adverse to a respondent.

c. Where information concerning adverse agency action is available to the public regardless of agency publicity measures and is likely to result in media publicity, adverse agency publicity should be issued only to the extent necessary to foster agency efficiency, public understanding, or the accuracy of news coverage.

3. Adverse agency publicity not included in paragraph 2 above should issue only after the agency has taken reasonable precautions to assure that the information stated is accurate and that the publicity fulfills an authorized purpose.

4. Where information in adverse agency publicity has a limited basis—for example, allegations subject to subsequent agency adjudication—that fact should be prominently disclosed. Any respondent or prospective respondent in an agency proceeding should, if practicable and consistent with the nature of the proceeding, be given advance notice of adverse agency publicity relating to the proceeding and a reasonable opportunity to prepare in advance a response to such publicity.

5. Where adverse agency publicity is shown to be erroneous or misleading and any person named therein requests a retraction or correction, the agency should issue the



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retraction or correction in the same manner (or as close thereto as feasible) as that by which the original publicity was disseminated.

Citations:

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