



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ADJUDICATION

## PROJECT REPORT

### Model Adjudication Rules

P3 1993 Working Group Model Adjudication Rules (CP 196)



**MODEL ADJUDICATION RULES**

**Prepared by**

**The Model Adjudication Rules Working Group**

**Office of the Chairman  
Administrative Conference of the United States**

**December 1993**



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\* When appointed, Dean Cox was Professor of Law, University of Oklahoma; Judge LeFelt was Deputy Director, Office of Administrative Law, State of New Jersey; Ms. Kohl was Administrative Judge (and later, Chairman), Atomic Safety & Licensing Appeal Panel, Nuclear Regulatory Commission; and Ms. Wilson was Associate General Counsel, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO. Judge Robie died shortly before completion of the project. In addition, Richard J. Leighton, Leighton & Regnery, Washington D.C. and John Vittone, Associate Chief Administrative Law Judge, Department of Labor participated in the early stages of the Working Group's deliberations. The Model Adjudication Rules do not necessarily represent the views of the members' organizations.

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Model Adjudication Rules  
by  
Michael P. Cox<sup>1</sup>

**Part ONE: Introduction**

The Administrative Conference of the United States (ACUS) began examining the feasibility and practicality of preparing model rules for agency adjudications during the 1980s<sup>2</sup>. ACUS forwarded to numerous federal agencies for comment the then, newly developed consolidated rules of procedure adopted by the Department of Labor (DOL)<sup>3</sup>. Specifically, the federal agencies were requested to review the DOL rules and to comment on whether the rules might be a starting point for developing uniform rules for agency adjudication. In general, the responses from the agencies did not support the development of uniform rules; however, another alternative began to emerge - - development of model adjudication rules. For example, one General Counsel observed:

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<sup>1</sup> Reporter, ACUS Model Adjudication Rules Working Group

<sup>2</sup> See, e.g., Draft Report to the Administrative Conference of the United States: "Uniform Rules of Administrative Practice and Procedure - History and Possibilities," by John L. Fitzgerald (November 1981).

<sup>3</sup> 29 CFR Part 18, 43 Fed Reg 32538 (July 15, 1983).

[T]he Administrative Conference may want to consider the development of model rules of procedure rather than striving to impose a uniform body of rules upon agencies functioning under existing rules. This model could serve as a basis for amendment of existing agency rules as well as providing an excellent resource for newly created agencies with adjudicatory functions.<sup>4</sup>

In 1988, the Chairman of ACUS announced the formation of a Working Group to study the feasibility of model rules of practice and procedure for use in formal adjudications before federal government agencies.<sup>5</sup> The Working Group was chaired by Alan W. Heifetz, Chief Administrative Law Judge, Department of Housing and Urban Development, and a member of ACUS. Professor Michael P. Cox, University of Oklahoma College of Law, Norman, Oklahoma, was named as Reporter for the Working Group; he is currently Dean of the Thomas M. Cooley Law School, Lansing, Michigan.

The Working Group held its first meeting on March 24, 1988. The Reporter was directed to gather representative agency adjudication practice and procedure rules. To do this, he contacted almost 125 administrative law judges, administrative judges, and agency

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<sup>4</sup> Letter, dated December 5, 1983, from General Counsel, CFTC, to Research Director, ACUS (page 2).

<sup>5</sup> In the interim, the State Practice and Procedure Committee of the American Bar Association's National Conference of Administrative Law Judges produced Model Administrative Procedure Rules for Central Panel Agencies. These Model Rules were approved on August 8, 1987, by the National Conference of Administrative Law Judges, Judicial Administrative Division, A.B.A.

general counsels and requested copies of the current practice and procedure rules of their agencies. In response to these requests, the Reporter received copies of fifty (50) different agency rules.<sup>6</sup> These fifty (50) sets of agency rules were catalogued and synthesized, and a draft outline of possible model adjudication rules was prepared for the second meeting of the Working Group held on September 9, 1988. In addition, the Working Group adopted a draft Purpose Statement that would guide its development of Model Adjudication Rules (MARs) over the next four years:

At present, trial-type adjudications are held before scores of federal agencies, each having its own set of practice and procedure rules. To the extent that formal adjudications present similar practice and procedure considerations, substantial benefits can be anticipated if similarity also existed in federal agency practice and procedure rules. Such benefits might include: a reduction of adjudication costs both for the government and for private parties; expedition and simplification of administrative proceedings; and simplification of participation in the administrative process by administrative law judges or other agency adjudicators, federal agency attorneys, private practitioners, and other persons dealing with federal agencies. In order to encourage and facilitate the reduction of differences among practice and procedure rules applicable to federal agency formal adjudications, these Model Rules are offered for consideration. \* \* \* The rules are offered as "model" rules; they are not intended to be obligatory or applicable to all situations.<sup>7</sup> Nevertheless, the Working Group encourages federal agencies

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<sup>6</sup> Although the fifty (50) agencies could be identified, for brevity, they are not listed.

In addition to the original fifty (50) sets of agency rules, approximately ten (10) additional sets of agency rules were supplied to the Reporter during the course of the Working Group's work and were considered by him in drafting the model adjudication rules.

<sup>7</sup> As the MARs were developed, it became apparent that some of the MARs might not apply to social security cases and they are so noted. In addition, where a decision of the Adjudicator constitutes final agency action (e.g., the decisions of Boards of Contract

to review the Model Rules with a view toward adopting them either in toto or individually as need arises, in order to effect a reduction of the differences among federal agency formal adjudication practice and procedure rules.

For the purpose of developing the MARs, the Working Group defined formal adjudications as trial-type proceedings, whether conducted pursuant to the federal Administrative Procedure Act (5 USC 551 et seq.), other statutes, or agency regulations or practice that offer an opportunity for an oral, fact-finding hearing before an agency adjudicator, whether or not an administrative law judge.

During the next four years, the Working Group met approximately every two months to consider draft MARs prepared by the Reporter. An initial consideration of the Working Group was which portion of the adjudication process should be covered. It decided that the MARs should begin with when an adjudication is initiated and should continue through any agency appeals process, that is, the entire adjudication process. Using this process, the Working Group developed fifty-eight (58) Model Adjudication Rules (MARs) and accompanying Comments. A request for public comment appeared in the January 28, 1993, issue of the Federal Register<sup>8</sup>; numerous comments were received, evaluated, and as appropriate, incorporated. The MARs are divided into four parts:

**I. General Provisions**

**II. The Prehearing Stage**

**III. The Hearing**

**IV. Appeal**

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Appeal), particular MARs may be inappropriate.

<sup>8</sup> 58 Fed. Reg. 6,382 (1993).

These Model Adjudication Rules are intended to benefit not only agencies that are seeking simplification of their existing hearing procedures, but also agencies that may be required to adopt practice and procedure rules for hearings entirely in new areas.

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ACUS Model Adjudication Rules (MARs)  
(1993)**

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## ACUS Model Adjudication Rules (1993)

### Definitions

#### MAR 100. Definitions

(A) "Adjudication" means a trial-type proceeding (whether conducted pursuant to the federal Administrative Procedure Act (5 U.S.C. §551 *et seq.*), other statutes, or agency regulations or practice) that offers an opportunity for an oral, fact-finding hearing before an Adjudicator, whether or not an administrative law judge.

(B) "Adjudicator" is one or more individuals who preside(s) at the reception of evidence and issues a decision. An Adjudicator may be an administrative law judge (ALJ) or any other presiding official who is qualified to so act.

(C) "Agency" is an agency as defined in 5 USC 552(f).

(D) "Alternative Dispute Resolution" means any procedure that is used in lieu of an adjudication to resolve issues in controversy, including, but not limited to, settlement, negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration, or any combination thereof.

(E) "[Docketed Party]" is a person required by law to participate in an adjudication; see MAR 130

(F) "Intervenor" is a person entitled by law or permitted by the agency to participate as a party; see MAR 130.

(G) "Limited Participant" is a person permitted by agency discretion to participate other than as a party; see MAR 130.

(H) "Motion" means a request made to the Adjudicator.

(I) "Party" is a person who has full participation rights in an adjudication.

(J) "Person" includes an individual, partnership, corporation, association, public or private organization, or governmental agency.

## ACUS Model Adjudication Rules (1993)

### Definitions

Comment 1: In these rules, "[the AA]" is used to mean "the adopting agency," and whenever "[the AA]" appears in a rule, the adopting agency would substitute its name for "[the AA]" in the particular rule.

Comment 2 (to Subsection (B)): Under the APA (5 USC 556(b)), the agency head or one or more members of the agency may preside over agency adjudications; however, few agencies make use of this alternative.

Comment 3 (to Subsection (B)): In these rules, "[Chief Adjudicator]" is used to mean some authority other than the Adjudicator, e.g., chief ALJ or Director, Office of Hearings. Whenever "[Chief Adjudicator]" appears in a MAR, the adopting agency would substitute the appropriate authority for "[Chief Adjudicator]" in the particular rule.

Comment 4 (to Subsection (D)): The definition of alternative dispute resolution is based on 5 U.S.C. 571(3).

Comment 5 (to Subsection (E)): Whenever "[Docketed Party]" or "[Docketed Parties]" appears in a MAR, the adopting agency would substitute for "[Docketed Party]" in the particular MAR the appropriate term(s), e.g., petitioners, respondents, applicants, defendants, and agency staff.

Comment 6 (to Subsection (G)): Participation by a "limited participant" is similar in concept to participation by an amicus curiae.

Comment 7 (to Subsection (I)): Subsequent MARs making reference to "party" include not only [Docketed Parties], but also Intervenors.

**ACUS Model Adjudication Rules (1993)**  
**Scope of Rules**

**MAR 101. Scope of Rules**

**(A) These rules of practice and procedure are applicable to the following types of adjudicatory proceedings before [the AA]:**

**(1) [name/statutory citation]**

**(2) [name/statutory citation]**

**.**  
**.**  
**.**

**(x) [name/statutory citation]**

**(B) These rules do not apply to:**

**(1) [name/statutory citation]**

**(2) [name/statutory citation]**

**.**  
**.**  
**.**

**(x) [name/statutory citation]**

**(C) In the absence of a specific provision, the Federal Rules of Civil Procedure shall serve as a general guide.**

**Comment 1: As an alternative to the recommended MAR, the Adopting Agency may wish to adopt a Scope of Rules provision that indicates that the MARs apply to all of its adjudications. If the recommended format is used, it is suggested that included/excluded adjudications be identified by name and authorizing statute, i.e., the U.S. Code citation.**

**Comment 2: The Federal Rules of Civil Procedure are not designed for use in administrative proceedings. Nonetheless, they can serve as a general guide where there are no specific provisions to cover a particular subject and, in fact, several agencies use them for that purpose, particularly insofar as discovery matters are concerned; see, e.g., FMSHRC, 29 CFR 2700.1(b) (general guidance); DOJ, 28 CFR 76.21(a) (discovery).**

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**ACUS Model Adjudication Rules (1993)**  
**Construction and Modification or Waiver of Rules**

**MAR 102. Construction and Modification or Waiver of Rules**

(A) These rules shall be liberally construed so as to secure the fair, expeditious, and least costly determination of all proceedings, consistent with consideration of the issues involved and protection of the rights of all interested persons.

(B) Except to the extent that waiver would otherwise be contrary to law, the Adjudicator(s) may, after adequate notice to all interested persons, modify or waive any of these rules upon a determination that no party will be prejudiced and that the ends of justice will be served.

**Comment 1:** Under the APA, agencies may establish policies and procedures that govern the exercise of the powers of its presiding officers. See Attorney General's Manual on the Administrative Procedure Act 75 (1947). Thus, in order to allow an Adjudicator to "handle" circumstances that may not be anticipated by these rules, a specific waiver provision is included.

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**ACUS Model Adjudication Rules (1993)**  
**Adjudicator - Assignment**

**MAR 110. Adjudicator: Assignment**

Adjudications shall be presided over by an Adjudicator who shall be designated by the [Chief Adjudicator].

Comment 1: The timing and assignment of the Adjudicator will vary greatly from agency to agency. It is noted that under 5 USC 3105, administrative law judges are to be "assigned to cases in rotation so far as practicable."

ACUS Model Adjudication Rules (1993)

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ACUS Model Adjudication Rules (1993)  
Adjudicator - Powers

MAR 111. Adjudicator: Powers

The Adjudicator shall have all powers necessary to the conduct of fair, expeditious, and impartial hearings, including the following:

- (A) to administer oaths and affirmations;
- (B) to issue subpoenas authorized by law;
- (C) to rule on offers of proof and receive relevant evidence;
- (D) to take depositions or have depositions taken when the ends of justice would be served;
- (E) to regulate the course of the hearing and the conduct of persons at the hearing;
- (F) to hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution;
- (G) to inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
- (H) to require the attendance at any conference held pursuant to Subsection (F) of at least one representative of each party who has authority to negotiate concerning resolution of the issues in controversy;
- (I) to dispose of procedural motions;
- (J) to make or recommend decisions;
- (K) to call and question witnesses;
- (L) to impose appropriate sanctions against any party or person failing to obey her/his order,

**ACUS Model Adjudication Rules (1993)**  
**Adjudicator - Powers**

refusing to adhere to reasonable standards of orderly and ethical conduct, or refusing to act in good faith; and

(M) to take any other action authorized by [the AA].

**Comment 1:** The powers of the Adjudicator enumerated by this rule generally are those described by the APA (5 USC 556(c)), as amended by PL 101-552 (1990). An Adjudicator can only be delegated powers enumerated in these MARs if the agency itself has the power. For example, not all agencies may have the authority to issue subpoenas or to administer oaths. As a consequence, such an agency may not delegate to its Adjudicator these powers. Each agency, therefore, must consult its organic statutory authority to determine which of the enumerated powers it possesses before delegating particular powers to its Adjudicator.

**Comment 2 (to Paragraph (C)):** Under this provision, the Adjudicator may on her/his own motion receive evidence into the record.

**Comment 3 (to Paragraph (E)):** This provision authorizes the Adjudicator to control the conduct not only of the parties, but also of witnesses, members of the public in attendance at the Adjudication, and others present at the Adjudication.

**Comment 4 (to Paragraph (K)):** Each agency should decide whether the Adjudicator should be able not only to question witnesses, but also to call them.

**Comment 5 (to Paragraph (L)):** Sanctions which might be appropriate include refusing to allow the support or opposition to a defense, prohibiting the introduction of designated matters into evidence, excluding testimony, or expelling a party or person from the hearing.

**Comment 6 (to Paragraph (M)):** Agency authority can be found in, e.g., rules, precedential orders, and the like.

ACUS Model Adjudication Rules (1993)  
Adjudicator - Withdrawal; Disqualification; Unavailability

MAR 112. Adjudicator: Withdrawal; Disqualification; or Unavailability

(A) Withdrawal or Disqualification of Adjudicator.

(1) An Adjudicator may at any time disqualify her/himself.

(2)(a) Prior to the filing of the Adjudicator's decision, any party may move that the Adjudicator disqualify her/himself on the ground of personal bias or other disqualification, by filing with the Adjudicator promptly upon discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.

(b) The Adjudicator shall rule upon the motion, stating the grounds therefor. If the Adjudicator concludes that the motion is timely and has merit, the Adjudicator shall forthwith disqualify her/himself and withdraw from the adjudication. If (s)he does not disqualify her/himself and withdraw from the adjudication, (s)he shall proceed with the adjudication, or if the hearing has been concluded, (s)he shall proceed with the issuance of her/his decision.

(c) An Adjudicator's denial of a motion for disqualification may be appealed at the conclusion of the proceeding unless the requirements of MAR 400 [Interlocutory Review] are satisfied.

(B) Unavailability of Adjudicator. In the event that the [Chief Adjudicator] finds that an Adjudicator is unable to perform the duties of Adjudicator or otherwise becomes unavailable, the [Chief Adjudicator] shall designate another Adjudicator to serve.

Comment 1: The APA (5 USC 556(b)) provides: "A presiding or participating employee [Adjudicator] may at any time disqualify [her/]himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee [Adjudicator], the agency [the AA] shall determine the matters as part of the record and decision in the case."

**ACUS Model Adjudication Rules (1993)**

**Adjudicator - Withdrawal; Disqualification; Unavailability**

Comment 2 (to Subsection (A)): A party must seek an Adjudicator's disqualification on the ground of bias promptly upon learning of the disqualifying information. A party may not await the outcome of the Adjudicator's decision to determine if the alleged bias affected the decision.

Comment 3 (to Paragraph (A)): Assignment of a substitute Adjudicator does not necessarily require the reopening or rehearing of the adjudication either in part or in whole; however, the substitute Adjudicator should do so to the extent necessary to resolve witness credibility.

Comment 4 (to Subsection (B)): For example, an Adjudicator may become otherwise unavailable because (s)he retires, (s)he obtains other employment, or the demands of another case so require.

Comment 5 (to Subsection (B)): Nothing in this rule is intended to restrict the power of the [Chief Adjudicator] to manage the agency's docket by transferring cases from one Adjudicator to another prior to the hearing for administrative convenience or efficiency.

**ACUS Model Adjudication Rules (1993)**  
**Ex Parte Communications**

**MAR 120. Ex Parte Communications**

(A) Except to the extent required for the disposition of ex parte matters as authorized by law, the Adjudicator may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate.

(B) Except to the extent required for the disposition of ex parte matters as authorized by law

(1) no interested person outside the agency shall make or knowingly cause to be made to the Adjudicator, [the AA], or any employee who is or may reasonably be expected to be involved in the decisional process an ex parte communication relevant to the merits of the adjudication;

(2) no member of the body comprising [the AA], the Adjudicator, or other employee who is or may reasonably be expected to be involved in the decisional process of the adjudication, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the adjudication.

(C) [The AA], the Adjudicator, or other employee who is or may reasonably be expected to be involved in the decisional process who receives, makes, or knowingly causes to be made a communication prohibited by this rule shall place in the public record of the adjudication:

(1) all such written communications;

(2) memoranda stating the substance of all such oral communications; and

(3) all written responses, and memoranda stating the substance of all oral responses, to the materials described in (1) and (2) above.

ACUS Model Adjudication Rules (1993)  
**Ex Parte Communications**

(D) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this rule, [the AA] or the Adjudicator may, to the extent consistent with the interests of justice, the policy of underlying statutes, and [the AA's] rules and precedents, require the party to show cause why its claim or interest in the adjudication should not be dismissed, denied, disregarded, or otherwise adversely affected by reason of such violation.

(E) The prohibitions of this rule shall apply beginning [time designated by [the AA]], but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of her/his acquisition of such knowledge.

Comment 1: This rule restates the position of the APA on ex parte communications. Subsection (A) is taken from 5 USC 554(d)(1), and subsections (B) - (E) are taken from 5 USC 557(d)(1). This provision does not preclude Adjudicators consulting with adjudicatory employees such as law clerks; see, e.g., Schulman, Separation of Functions in Formal Licensing Adjudications, 56 Notre Dame L. Rev. 351, 374-376 (1981).

Comment 2: Not all communication is prohibited. Inquiries about such matters as the status of the case, when it will be heard, and the like do not fall within the proscriptions of this rule.

Comment 3 (to Subsection (A)): This subsection expands the proscription beyond the APA concept of "fact in issue" contained in 5 USC 554 (d)(1).

Comment 4 (to Subsection (B)): An agency may wish to go beyond the APA and delete the "outside-the-agency" language to extend the proscription of ex-parte communications.

**ACUS Model Adjudication Rules (1993)**  
**Separation of Functions**

**MAR 121. Separation of Functions**

(A) The Adjudicator may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigating or prosecuting functions for [the AA].

(B) No officer, employee, or agent of [the AA] engaged in the performance of investigations or prosecutorial functions in connection with any adjudication shall, in that adjudication or one that is factually related, participate or advise in the decision of the Adjudicator, except as a witness or counsel in the adjudication or its appellate review.

Comment 1: The APA (5 USC 554(d)(2nd para)) provides that separation-of-functions proscriptions do not apply

- (1) in determining applications for initial licenses;
- (2) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- (3) to the agency or a member or members of the body comprising the agency.

An agency may wish to apply the proscriptions of this rule nevertheless to these proceedings or circumstances.

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**ACUS Model Adjudication Rules (1993)**

**Rights of [Docketed Party], Intervenor, and Limited Participant**

**MAR 130. Rights of [Docketed Party], Intervenor, and Limited Participant**

(A) The rights of a [Docketed Party] are determined by statute, these rules, and other applicable law.

(B) An intervenor's right to participate as a party may be restricted by order of the Adjudicator pursuant to statute, these rules, or other applicable law.

(C) At such times and in such manner as ordered by the Adjudicator, a limited participant may be permitted to make oral and/or written submissions.

**Comment 1:** Statutes, agency regulations, or authoritative court or agency decisions will delineate the differing participatory rights of various persons.

**Comment 2 (to Subsection (B)):** For example, an intervenor may or may not be permitted to participate in offers of settlement.

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ACUS Model Adjudication Rules (1993)  
**Representation**

MAR 140. Representation

(A) Any person may appear in an adjudication on her/his/its own behalf, by an attorney, or by authorized representative. Each person, attorney, or authorized representative shall file a notice of appearance. The notice shall state the name of the case (and docket number if assigned), the person on whose behalf the appearance is made, and the person's or representatives's mailing address and telephone number. Similar notice shall also be given for any withdrawal of appearance.

(B) (1) An attorney must be a member in good standing of the bar of the highest court of a State, the District of Columbia, or any territory or commonwealth of the United States. Her/his personal representation that (s)he is in good standing before any of such courts shall be sufficient proof thereof, unless otherwise ordered by the Adjudicator.

(2) Any person who is not an attorney qualified to appear under paragraph (B)(1) may appear in a representative capacity by filing, with her/his notice of appearance, a statement setting forth the basis of her/his authority to act as a representative.

Comment 1 (to Subsection (A)): An agency may wish to consider requiring identification of an emergency point of contact in case the attorney or representative is not available.

Comment 2 (to Subsection (B)): The Agency Practice Act (5 USC 500(b)) limits the authority of agencies to restrict attorneys to practice before agencies; with respect to most other representatives, an agency may set such qualifications as it may see fit (see 5 USC 500(c) - (f)); see, Cox, Regulation of Attorneys Practicing Before Federal Agencies, 34 Case W. Res. L. Rev. 173 - 238 (1983/1984). An agency may also wish to consider adding a provision which would allow a law student to appear, etc.

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ACUS Model Adjudication Rules (1993)  
Service of Documents

MAR 150. Service of Documents

(A) Service by [the AA]. [The AA] or the Adjudicator shall serve one copy of all orders, notices, decisions, rulings on motions, and similar documents issued by [the AA] or the Adjudicator upon each party and limited participant in accordance with paragraph (C), below. Every document served by [the AA] or the Adjudicator shall be accompanied by a certificate of service that provides the information in the form described in paragraph (B), below.

(B) Service by Others. Unless otherwise ordered by [the AA] or the Adjudicator, one copy of all documents filed with [the AA] or the Adjudicator shall be served upon each party and limited participant by the persons filing them. Every document filed with [the AA] or the Adjudicator and required to be served upon all parties and limited participants shall be accompanied by a certificate of service signed by (or on behalf of) the party making the service, stating that such service has been made. Certificates of service should be in substantially the following form:

"I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by [specify the method]:

"(1) [name/address]

.

.

.

(x) [name/address]

"Dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

(Signature) \_\_\_\_\_  
For \_\_\_\_\_  
Capacity \_\_\_\_\_."

**ACUS Model Adjudication Rules (1993)**  
**Service of Documents**

(C) How service may be made. Service may be made by first-class mail or by other more expeditious methods of service such as personal or overnight delivery, FAX, or electronic means; however, [the AA] or the Adjudicator may place appropriate limitations on service by FAX or electronic means.

(D) Who shall be served. Unless otherwise ordered by [the AA] or the Adjudicator, all documents shall be filed pursuant to MAR 151 (Filing of Documents) and served upon counsel and representatives of record, or if not represented, the parties and limited participants themselves. Service upon such counsel or representative shall constitute service upon the party or limited participant.

(E) Where service is to be made. Service shall be made at the address of the party's or limited participant's counsel or representative, or, if not represented, at the address of the residence or principal place of business of the party or limited participant.

(F) When service is complete. If service is made by personal or overnight delivery, delivery is complete when the document is handed to the person to be served or delivered to the person's office during business hours or, if the person to be served has no office, is delivered to the person's residence and deposited in a conspicuous location. If service is by first-class mail, FAX, or other electronic means, service is complete upon deposit in the mail or upon electronic transmission.

Comment 1 (to Subsection (C)): Although many agency rules do not acknowledge recent technology (e.g., FAX and electronic means), these methods not only are acknowledged but authorized for service by these model rules. If service is by electronic means (e.g., computer) agencies should address special problems that may arise such as original signatures, authentication, and retention of hard copy. In addition, service by FAX or electronic means may be inappropriate because of a party's inability or unwillingness to receive service by these methods. Where service is other than by personal delivery, the Adjudicator shall establish appropriate procedures. Methods of service may be addressed at the prehearing conference, if any, to determine whether a uniform method of service is desirable or feasible.

**ACUS Model Adjudication Rules (1993)**  
**Service of Documents**

**Comment 2 (to Subsection (F)):** With regard to service by first-class mail, see MAR 160 (Time Computation).

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**ACUS Model Adjudication Rules (1993)**  
**Filing of Documents and Other Materials**

**MAR 151. Filing of Documents and Other Materials**

(A) All documents, and other materials relating to an adjudication, shall be filed with \_\_\_\_\_ [designated location] \_\_\_\_\_, \_\_\_\_\_ [address(es)] \_\_\_\_\_, \_\_\_\_\_ [telephone/FAX number(s)] \_\_\_\_\_.

(B) Unless otherwise ordered by \_\_\_\_\_, an original and \_\_\_\_\_ copies of each document (including exhibits and the like) are to be filed. Copies need not be signed, but the name of the person signing the original shall be shown on each copy.

(C) Filing may be made by first-class mail or by other more expeditious methods of filing such as personal or overnight delivery, FAX, or electronic means; however, [the AA] or the Adjudicator(s) may place appropriate limitations on filing by FAX or electronic means.

(D) In any proceedings when, upon inspection, it appears that a document (or other material) tendered for filing does not comply with the requirements of these rules, the [docket clerk or other designated, official person] may decline to accept the document (or other material) for filing and return it unfiled or may accept it and advise the person tendering it of the deficiency and require the deficiency to be corrected.

Comment 1 (to Subsection (A)): An agency may wish to consider whether the office of the assigned Adjudicator should be designated as a filing location under this rule.

Comment 2 (to Subsection (B)): Each agency must decide for itself how many copies are required and who is authorized to change the number of required copies. Consideration should be given to the cost of requiring additional copies.

Comment 3 (to Subsection (C)): Although many agency rules do not acknowledge recent technology (e.g., FAX and electronic means), these methods not only are acknowledged but also authorized for filing by these rules. If filing is by electronic means (e.g., computer) agencies should address special problems that may arise, such as original signatures, authentication, volume limitations, and retention of hard copy. Each agency

**ACUS Model Adjudication Rules (1993)**  
**Filing of Documents and Other Materials**

must ensure that any filing by electronic means results in the agency having a complete, legible, and permanent copy of the document transmitted. In addition, filing by FAX or electronic means may be inappropriate because of a party's inability or unwillingness to send or receive filing by these methods. Methods of filing may be addressed at the prehearing conference, if any, to determine whether a uniform method of filing is desirable or feasible.

**Comment 4 (to Subsection (C)):** With regard to filing by first-class mail, see MAR 160 (Time Computation).

**Comment 5 (to Subsection (D)):** If an agency does not wish to authorize the designated filing location to perform the functions under this subsection, the subsection should be deleted. In such circumstances, the parties may move to strike a non-complying document or seek other appropriate relief.

ACUS Model Adjudication Rules (1993)  
Form and Content of Filed Documents

MAR 152. Form and Content of Filed Documents

(A) Necessary Information. A filed document shall state clearly:

- (1) the name of [the AA],
- (2) the name of the proceeding,
- (3) the name and designation (such as "applicant," "petitioner," or "respondent") of the filing party,
- (4) the type of filing (e.g., petition, notice, motion to dismiss, etc.),
- (5) any assigned docket number of the case, and
- (6) the filing party's or other filing person's address, telephone number, and facsimile transmission number (if any).

(B) Specifications.

- (1) All filed documents created by a party shall:
  - (a) be 8½ by 11 inches in size except, when necessary, tables, charts, and other attachments may be larger if folded to the size of the filed documents to which they are physically attached;
  - (b) be only on one side of the page and be typewritten, printed, or otherwise reproduced by a process that pro-

ACUS Model Adjudication Rules (1993)  
Form and Content of Filed Documents

duces permanent and plainly legible copies;

(c) be double-spaced except for footnotes and long quotations, which may be single-spaced;

(d) have a left margin of at least 1½ inches and other margins of at least 1 inch; and

(e) be bound on the left side, if bound.

(2) Illegible documents will not be accepted.

(3) All documents shall be in the English language or, if in a foreign language, accompanied by a certified translation.

(C) Signature. The original of every filed document shall be signed by the submitting party or its attorney or other authorized representative of record. Except as otherwise provided, filed documents need not be verified or accompanied by an affidavit. The signature constitutes a certification by the signing person that (s)he has read the filed document, that to the best of her/his knowledge, information, and belief the statements made therein are true, and that it is not interposed for delay. See MAR 151, Comment 3.

Comment 1 (to Subsection (A)): Because of the diverse responsibilities of individual agencies which affect the types of filed documents required to conduct their business, no attempt has been made to identify particular, subject-specific filed documents (e.g., complaint/answer, petition/response, etc.). Each agency should determine the types and specific requirements for the filed documents necessary to conduct its adjudications including, e.g., the name of the tribunal, board, or appropriate forum. Consideration should be given to

**ACUS Model Adjudication Rules (1993)**  
**Form and Content of Filed Documents**

including sample document formats (and other appropriate guidance) in an appendix to this rule, especially in proceedings where non-attorneys will be participating.

**Comment 2 (to Subsection (B)):** An agency may wish to consider requiring a table of contents if filed documents such as briefs or memoranda exceed twenty pages.

**Comment 3 (to Paragraph B(1)):** The specificity of paragraph B(1) reflects requirements generally found most frequently in current agency rules. With regard to filing by electronic means, agencies may want to consider additional specifications as technology evolves.

**Comment 4 (to Paragraph (B)(1)(b)):** Each agency should determine whether double-sided reproduction is permitted or encouraged.

**Comment 5 (to Paragraph (B)(1)(d)):** An agency should consider whether it wishes to designate the type font (e.g., courier versus elite) and the pitch size (e.g., 10 pt versus 12 pt.).

**Comment 6:** Attention is directed to MAR 140 (Representation), MAR 150 (Service of Documents), MAR 151 (Filing of Documents and Other Materials), and MAR 153 (Amendment or Supplementation of Filed Documents).

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**ACUS Model Adjudication Rules (1993)**  
**Amendment or Supplementation of Filed Documents**

**MAR 153. Amendment or Supplementation of Filed Documents**

(A) A party shall amend or supplement a previously filed document if the party learns of a change in the facts that may affect the outcome of the adjudication.

(B) The Adjudicator may approve other amendments or supplements to filed documents.

ACUS Model Adjudication Rules (1993)

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ACUS Model Adjudication Rules (1993)  
Time Computation

MAR 160. Time Computation

(A) In computing any period of time prescribed in these rules, the day from which the designated period begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or federal holiday. When the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and federal holidays shall be excluded in the computation.

(B) If service is by first-class mail, three (3) days shall be added to the designated period for response.

Comment 1 (to Subsection (A)): For guidance as to what constitutes a federal holiday, see Rule 6(a), Federal Rules of Civil Procedure.

Comment 2: Extension of time periods in general would be covered by MAR 102 (Construction/Waiver MAR's). Almost all agency rules follow the pattern of Rule 6(a), FRCP [Subsection (A)] and many follow the concept of Rule 6(e), FRCP [Subsection (B)]. Limiting language for federal holidays [Subsection (A)] is also found in Rule 6(a), FRCP; however, Rule 6(a) lists all current federal holidays with the limiting language being used to cover potential unprovided for federal holidays, that is, on occasion, federal offices are closed for reasons such as the Inauguration, weather, etc. An agency may wish to allow for such contingencies in computing time periods.

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ACUS Model Adjudication Rules (1993)  
Motions

MAR 170. Motions

(A) (1) All motions shall state the specific relief requested and the basis therefor and, except as provided in paragraph (2) below, shall be in writing.

(2) Unless otherwise ordered by the Adjudicator, a motion may be made orally during a conference or the hearing. After an opportunity for response, the Adjudicator may rule on the motion immediately or may direct that the motion and response be submitted in writing pursuant to paragraph (A)(1).

(B) Unless otherwise directed by the Adjudicator, any party may file a response in support of or in opposition to any written motion within ten (10) days after service of the motion. If no response is filed within the response period, the party failing to respond shall be deemed to have waived any objection to the granting of the motion. The moving party shall have no right to reply to the response; however, the Adjudicator may in her/his discretion permit a reply to be filed.

(C) Except for procedural matters, the Adjudicator may not, without assent of the parties, grant a written motion prior to the expiration of the time for filing responses. Any party adversely affected by the ex parte grant of a motion for a procedural order may request reconsideration, vacation, or modification of the order within \_\_\_\_\_ days of service of the order. The Adjudicator may deny a written motion without awaiting a response or may allow oral argument (including that made by telephone).

(D) The Adjudicator may summarily deny dilatory, repetitive, or frivolous motions. Unless otherwise ordered by the Adjudicator, the filing of a motion does not stay a proceeding.

(E) All motions and responses thereto shall comply with MAR 150 (Service of Documents) and MAR 151 (Filing of Documents and Other Materials).

**ACUS Model Adjudication Rules (1993)**  
**Motions**

**Comment 1: The Adjudicator is not obligated to grant a motion simply because no response is filed thereto.**

ACUS Model Adjudication Rules (1993)  
**Subpoenas**

MAR 171. Subpoenas

Upon request of a party, the Adjudicator may issue a subpoena requiring

(A) attendance of a witness for purpose of giving testimony, and

(B) production of documents or things for inspection or other purposes.

Upon motion of a person served with a subpoena (or by a party), the Adjudicator may quash or modify the subpoena for good cause shown.

Comment 1: This MAR is only appropriate if [the AA] is authorized to issue subpoenas and that power has been delegated to the Adjudicator. This rule does not prevent an agency from issuing subpoenas in blank to a requesting party. A subpoena may be used to require attendance at a deposition or a trial.

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ACUS Model Adjudication Rules (1993)  
Withdrawal or Dismissal

MAR 180. Withdrawal or Dismissal

(A) Withdrawal.

(1) An adjudication may be withdrawn without an order of the Adjudicator

(a) by the filing of a stipulation of all parties who have appeared in the adjudication, or

(b) by the filing of a notice of withdrawal by the [party initiating the Adjudication] at any time before another party has served a responsive pleading or, if there is none, before the introduction of evidence at the hearing.

A notice of withdrawal may not be filed by a party who has previously withdrawn or been dismissed from an Adjudication based on (or including) the same claim. Unless otherwise stated in the notice of withdrawal or stipulation, a withdrawal is without prejudice.

(2) Except as provided above, an adjudication may not be withdrawn except by order of the Adjudicator and upon such terms and conditions as the Adjudicator deems proper.

(B) Dismissal. Any party may move to dismiss the adjudication or any request for relief sought therein for:

(1) failure of another party to comply with these rules or with any order of the Adjudicator, or

(2) failure to prosecute the adjudication.

**ACUS Model Adjudication Rules (1993)**  
**Withdrawal or Dismissal**

Unless the Adjudicator specifies otherwise, a dismissal under this subsection, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.

**Comment 1 (to Subparagraph (A)(1)(b)):** Each agency should determine for itself the most appropriate term to describe the person who may file a notice of withdrawal, e.g., the plaintiff, the party seeking relief, etc.

**Comment 2:** See Rule 41, FRCP.

**Comment 3:** Failure to show a right to relief based upon the facts or law should be raised pursuant to MAR 250 (Summary Decisions).

ACUS Model Adjudication Rules (1993)  
Initiation of Adjudication

MAR 200. Initiation of Adjudication

(A) An adjudication is initiated when \_\_\_\_\_.

(B) The document initiating the adjudication shall state briefly the nature of the proceeding, the identity of known parties, the jurisdiction under which the adjudication is initiated, the general allegations of fact, the legal authority that constitutes a basis for the adjudication, and the nature of the relief sought.

Comment 1: For purposes of these rules, preparation for an adjudication, investigation, etc. are not considered to be part of the adjudication. Many agency rules relating to initiation or commencement of an adjudicatory proceeding are process specific; a complaint, appeal, a charging letter, an order to show cause, or a petition/request for relief is identified as the particular "vehicle" that initiates or commences the adjudication. As a consequence, each agency must decide and designate at what point the adjudication is "initiated."

Comment 2: Where an adjudication is initiated by the filing of a complaint or similar document, an agency may wish to consider requiring the filing of an answer or other responsive document.

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ACUS Model Adjudication Rules (1993)  
Consolidation or Severance of Adjudication

MAR 201. Consolidation or Severance of Adjudication

(A) Consolidation. The Adjudicator may, upon motion or on her/his own motion, with reasonable notice and opportunity to object provided to all parties affected, consolidate any or all matters at issue in two or more adjudications docketed under these rules where common parties, fact questions, or applicable law exist and where such consolidation would expedite or simplify consideration of the issues and the interests of justice would be served. Consolidation shall not prejudice any rights under these rules and shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred. For purposes of this rule, no distinction is made between joinder and consolidation of adjudications.

(B) Severance. Unless directed otherwise by ([the AA]) ([Chief Adjudicator]), the Adjudicator may by motion or on her/his own motion, for good cause shown, order any adjudication severed with respect to some or all parties, claims, and issues.

Comment 1 (to Subsection (A)): Each agency should determine who is the appropriate authority to order consolidation. It should be observed that matters once consolidated can subsequently be severed if appropriate. In some agencies, a motion for consolidation or severance may more appropriately be made to the [Chief Adjudicator] or [the AA].

Comment 2 (to Subsection (B)): Consideration should be given whether inefficient, piecemeal adjudication may occur if severance is ordered. Severance may also impact on administrative finality.

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ACUS Model Adjudication Rules (1993)  
Intervention

MAR 210. Intervention.

(A) Any person who desires to participate in an adjudication as an intervenor shall file a motion to intervene. Unless ordered otherwise by the Adjudicator, a motion to intervene shall be filed not later than \_\_\_\_\_.

(B) A motion to intervene shall:

(1) indicate the legal basis that supports the motion to intervene;

(2) set forth the property, financial, or other interest of the movant in the adjudication;

(3) identify the specific aspect or aspects of the adjudication as to which the movant wishes to intervene; and

(4) state any other facts or reasons why the movant should be permitted to intervene.

(C) Any party to an adjudication may file within \_\_\_\_\_ days a response to a motion to intervene after the motion is filed.

(D) In ruling on a motion to intervene, the Adjudicator shall consider the factors in subsection (B).

(E) If the Adjudicator determines that a movant does not meet the requirements under this Rule to be an intervenor, the Adjudicator may view the motion to intervene as if it had been timely filed as a motion to participate as a limited participant under MAR 211 (Limited Participation).

Comment 1 (to Subsection (A)): For filing requirements, see MAR 151 (Filing of Documents and Other Materials). Non-timely motions to intervene are not specifically provided for and are not encouraged; however, a non-timely motion may be received if the Adjudicator makes an appropriate finding, e.g., the non-timely filing was for good cause, no party will be prejudiced, the public will not be disserved, justice will be served, and/or the intervention will contribute to the record. See MAR 102 (Construction and Waiver of Rules).

**ACUS Model Adjudication Rules (1993)**  
**Intervention**

**Comment 2 (to Subsection (D)):** Threshold substantive requirements for intervention vary by agency and may be provided by statute, regulation or other authority.

ACUS Model Adjudication Rules (1993)  
**Limited Participation**

MAR 211. Limited Participation

(A) A person wishing to participate in an adjudication other than as a party shall file a motion to participate as a limited participant. The motion shall state concisely the reasons why the person wishes to participate in the adjudication and the extent of participation desired.

(B) The Adjudicator may grant the motion if (s)he finds that the person making the motion may contribute materially to the Adjudicator's ability to make an informed decision in the adjudication. The Adjudicator shall give the person making the motion notice of her/his decision on the motion.

Comment 1: See MAR 100(F) (Definition of "Limited Participant") and MAR 151 (Filing of Documents and Other Materials).

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ACUS Model Adjudication Rules (1993)  
Prehearing Statement

MAR 220. Prehearing Statement.

(A) The Adjudicator may require all parties to an adjudication to prepare prehearing statement(s) at a time and in the manner to be established by the Adjudicator. To the extent possible, joint statements should be prepared.

(B) Prehearing statement(s) shall, unless otherwise ordered by the Adjudicator, set forth briefly the following matters:

(1) issues involved in the adjudication;

(2) stipulated facts together with a statement that the party (or parties) have communicated or conferred in a good faith effort to reach stipulations to the fullest extent possible;

(3) facts in dispute;

(4) witnesses and exhibits to be presented during the hearing, including any stipulations relating to authenticity of documents and witnesses as experts;

(5) a brief statement of applicable law;

(6) the conclusion to be drawn; and

(7) estimated time required for presentation of the party's (or parties') case.

(C) The Adjudicator may, for good cause shown, permit a party to introduce facts or argue points of law outside the scope of the facts and law outlined in the prehearing statement.

(D) Failure to file a prehearing statement, unless a waiver has been granted by the Adjudicator, may result in dismissal of a party from the adjudication, dismissal of a complaint (if any), entering a judgment against the party, or imposition of such other sanctions as may be appropriate in the circumstances.

ACUS Model Adjudication Rules (1993)

**Prehearing Statement**

e.g., addresses of witnesses, brief descriptions of intended testimony, and copies of exhibits, if available. Prehearing statements may be inappropriate in some instances, e.g., social security cases.

**Comment 2 (to Subsection (D)):** In mass justice cases, sanctions may be inappropriate.

**Comment 3 (to Subsection (D)):** This power does not limit the Adjudicator's power under MAR 111(L).

**ACUS Model Adjudication Rules (1993)  
Prehearing, Settlement, and Other Conferences**

**MAR 221. Prehearing, Settlement, and Other Conferences.**

(A) With due regard for the convenience of all the parties, the Adjudicator may direct the parties to attend one or more conferences, prior to or during the course of the hearing, when the Adjudicator finds they are warranted. Reasonable notice of the time, place, and purpose of the conference(s) shall be given to the parties and other persons, if any, who are participating or seek to participate in the adjudication. A conference shall be held in person and on the record, unless the Adjudicator concludes that personal attendance by the Adjudicator and the parties is unwarranted or impractical; in this instance, the conference may be held by telephone or other appropriate means.

(B) Parties shall come to all conferences fully prepared for a useful discussion of all issues involved in the conference, both procedural and substantive, and authorized to negotiate with respect thereto.

(C) Unless excused by the Adjudicator for good cause shown, failure of a party to attend a conference, after being served with reasonable notice of the time and place thereof, shall constitute a waiver of all objections to the agreements reached in the conference and to any order or ruling with respect thereto.

(D) The Adjudicator may order that any or all of the following be addressed or furnished before, at, or after, the conference:

(1) motions to intervene and motions to appear as a limited participant;

(2) motions for consolidation or severance of parties or issues in the adjudication;

(3) method of service and filing;

(4) identification, simplification, and clarification of the issues;

**ACUS Model Adjudication Rules (1993)  
Prehearing, Settlement, and Other Conferences**

(5) requests for amendment of the pleadings;

(6) stipulations and admissions of fact and of the content and authenticity of documents;

(7) a discussion of the desirability of limiting and grouping witnesses, so as to avoid duplication of expert witnesses;

(8) disclosure of the names of expert and other witnesses (together with a brief narrative summary of their expected testimony) and of documents or other physical exhibits that are intended to be introduced into evidence or used as testimonial aids;

(9) a recommended schedule for the exchange of final witness lists, prepared testimony, and documents, with due regard for the convenience of the parties;

(10) requests for official notice and that particular matters be resolved by reliance upon the agency's substantive standards, regulations, and rules;

(11) offers of settlement;

(12) proposed date, time, and place of the hearing, with due regard for the convenience of all parties; and

(13) such other matters as may aid in the disposition of the adjudication.

(E) A conference shall be recorded, unless otherwise directed by the Adjudicator, and made part of the adjudication record.

(F) The Adjudicator may dispose of any procedural matters on which (s)he is authorized to rule during the course of the adjudication at the conference.

**ACUS Model Adjudication Rules (1993)**  
**Prehearing, Settlement, and Other Conferences**

(G) Actions taken as a result of a conference shall be reduced to writing, unless the Adjudicator concludes that a stenographic transcript will suffice or the Adjudicator elects to make a statement on the record at the hearing summarizing the actions taken.

**Comment 1: Under the APA (5 USC 556(c)(6) - (8)), the Adjudicator is encouraged to hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution.**

**Comment 2 (to Subsection (E)): Recorded includes, but is not limited to, audio tape, video tape, stenographic recordation, and the like.**

**Comment 3 (to Subsection (G)): If a party objects to the report, or a portion thereof, (s)he may file a motion with the Adjudicator.**

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ACUS Model Adjudication Rules (1993)

Discovery: General

MAR 230. Discovery: General

(A) Following the initiation of the adjudication, discovery shall begin at, and be completed by, such time as the Adjudicator directs.

(B) Unless otherwise ordered by the Adjudicator, parties may obtain discovery by one or more of the following methods:

- (1) written interrogatories (MAR 233);
- (2) depositions upon oral examination or written questions (MAR 234);
- (3) requests for production of documents or things for inspection or other purposes (MAR 235);
- (4) requests for admission (MAR 236); or
- (5) any other method permitted by the Adjudicator.

(C) Unless the Adjudicator upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, the methods of discovery may be used in any sequence. The fact that a party is conducting discovery shall not operate to delay any other party's discovery.

Comment 1: Neither the APA nor the Constitution necessarily requires discovery in an adjudication. Whether, and the extent to which, discovery is allowed is a matter for each agency to determine based on its statutes and policies. As a consequence, if an agency limits, or does not permit, discovery, it might wish to modify or omit portions of MARs 230 - 239. Agencies should strive to conduct discovery expeditiously and in a cost-effective fashion.

Comment 2: Abuse of discovery methods may be controlled by MAR 237 (Protective Order).

Comment 3 (to Subsection (A)): An agency may wish to establish by rule when discovery begins and ends rather than leaving this to determination by the Adjudicator.

**ACUS Model Adjudication Rules (1993)**

**Discovery: General**

**Comment 4 (to Subsection (B)):** An agency may wish to consider whether authority exists for other specific discovery methods and whether they should be specifically identified, e.g., entry upon land or other property, physical and mental examinations, etc.

**Comment 5:** Rule 26(a) [Discovery Methods], FRCP and Rule 26(d) [Sequence and Timing], FRCP provide the basic pattern for agency rules dealing with this subject; see also Rule 29 (Stipulations Regarding Discovery Procedure), FRCP.

ACUS Model Adjudication Rules (1992)

Discovery: Scope

MAR 231. Discovery: Scope

(A) Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the Adjudication, whether it relates to the case or defense of the party seeking discovery or to the case or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of discoverable matter.

(B) It is not ground for objection that the information sought will be inadmissible at the hearing if such information appears reasonably calculated to lead to the discovery of admissible evidence.

Comment 1: Rule 26(b) [Scope of Discovery], FRCP, provides the basic pattern for agency rules on this subject.

Comment 2: Prehearing procedures that may include requirements for exchange of information may assist in narrowing the issues for discovery. See MAR 220 (Prehearing Statement) and MAR 221 (Prehearing, Settlement, and Other Conferences).

Comment 3: With regard to the interplay between discovery and the FOIA, see ACUS Recommendation 83-4, 1 CFR 305.83-4.

ACUS Model Adjudication Rules (1992)

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**ACUS Model Adjudication Rules (1993)**  
**Discovery: Supplementation of Response**

**MAR 232. Discovery: Supplementation of Response**

A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement the response to include information thereafter acquired, as follows - -

(A) A party is under a duty to supplement in a timely fashion a response with respect to any question directly addressed to:

(1) the identity and location of persons having knowledge of discoverable matters, and

(2) the identity of each person expected to be called as an expert witness, the subject matter on which the person is expected to testify, and the substance of the testimony.

(B) A party is under a duty to amend in a timely fashion a response if the party later obtains information upon the basis of which:

(1) the party knows the response was incorrect when made, or

(2) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(C) An additional duty to supplement responses may be imposed by order of the Adjudicator or by agreement of the parties or prior to the hearing through new requests for supplementation of prior responses.

**ACUS Model Adjudication Rules (1993)**  
**Discovery: Supplementation of Response**

Comment 1: See Rule 26(e), FRCP which does not impose an obligation to update on a party who has supplied information during discovery except for particular circumstances.

ACUS Model Adjudication Rules (1993)  
Interrogatories

MAR 233. Interrogatories

(A) Any party may serve upon any other party written interrogatories.

(B) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney or other representative making them. Answers and objections shall be made within \_\_\_\_ days after the service of the interrogatories. The party submitting the interrogatories may move for an order under MAR 239 [Sanctions for Failure to Comply] with respect to any objection or other failure to answer an interrogatory.

(C) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Adjudicator may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

(D) It is a sufficient answer to such interrogatories to specify the records from which the answer may be derived or ascertained where:

(1) the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and

(2) the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.

**ACUS Model Adjudication Rules (1993)**  
**Interrogatories**

The party serving the interrogatory shall be afforded reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. The specification shall include sufficient detail to permit the interrogating party to locate and identify the individual records from which the answer may be ascertained.

**Comment 1 (to Subsection (A)):** An agency may wish to consider whether the number of interrogatories a party may propound without an order of the Adjudicator should be limited.

**Comment 2:** See Rule 33 (Interrogatories to Parties), FRCP.

ACUS Model Adjudication Rules (1993)  
Depositions

MAR 234. Depositions

(A) Notice. Upon written notice to the witness and to all other parties, a party may take the testimony of a witness by deposition and may request the production of specified documents or materials by the witness at the deposition. The notice shall state the purpose and general scope of the deposition; the time and place it is to be taken; the name and address of the person before whom the deposition is to be taken; the name and address of each witness from whom a deposition is to be taken; and a specification of the documents and materials that the witness is requested to produce. The notice shall be not less than \_\_\_\_ days before the deposition.

(B) Deposition of an Organization. If the deposition of a public or private corporation, partnership, association, or governmental agency is ordered, the organization so named shall designate one or more officers, directors, or agents to testify on its behalf, and may set forth, for each person designated, the matters on which (s)he will testify. The persons so designated shall testify as to matters reasonably known to them.

(C) Procedure at Deposition. Depositions may be taken before any disinterested person having power to administer oaths in the place where the deposition is to be taken. Each witness deposed shall be placed under oath or affirmation, and the other parties shall have the right to cross-examine. The witness being deposed may have counsel or another representative present during the deposition. The questions propounded and all answers and objections shall be reduced to writing, read by or to and subscribed by the witness, and certified by the person before whom the deposition was taken. The parties may stipulate, or the Adjudicator may upon motion order, that the testimony at a deposition be recorded by other than stenographic means. The party requesting the deposition shall make appropriate arrangements for necessary facilities and personnel.

(D) Motion to Terminate or Limit Examination. During the taking of a deposition, a party or the witness may request suspension of the deposition on the grounds of bad faith in the conduct of the examination, oppression of the witness or party, or

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**Depositions**

improper questioning or conduct. Upon request for suspension, the deposition will be adjourned. The objecting party or witness must immediately move the Adjudicator for a ruling on the objection(s). The Adjudicator may then limit the scope or manner of taking the deposition; see MAR 237 [Protective Order].

**(E) Foreign Country Deposition.** Where a deposition is taken in a foreign country, it may be taken before a person having power to administer oaths in that location, or before a secretary of an embassy or legation, consul general, consul, vice consul or consular agent of the United States, or before such other person or officer as may be agreed upon by the parties by written stipulation filed with the Adjudicator.

**(F) Waiver of Deposing Officer's Disqualification.** Objection to taking a deposition because of the disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could have been discovered with reasonable diligence.

**Comment 1 (to Subsection (A)):** When a deposition involves parties and/or witnesses outside the continental United States, an agency may want to consider extending the notice period.

**Comment 2 (to Subsection (C)):** Unless the parties otherwise agree, the expense of the deposition is to be borne by the party requesting the deposition.

**Comment 3 (to Subsection (E)):** In foreign countries, depositions may have to be taken pursuant to applicable treaties and protocols.

ACUS Model Adjudication Rules (1993)  
Requests for Production of Documents or Things  
for Inspection or Other Purposes

MAR 235. Requests for Production of Documents or Things  
for Inspection or Other Purposes

(A) Any party may serve on any other party a request to produce and/or permit the party, or someone acting on its behalf, to inspect and copy any specified document(s) (i.e., any written, printed, recorded, or graphic matter, regardless of form, characteristic, or medium) or to inspect and copy, test, or sample any tangible things, that contain or may lead to relevant information and that are in the possession, custody, or control of the party upon whom the request is served.

(B) Any party may serve on any other party a request to permit entry upon designated property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or area.

(C) Each request shall set forth with reasonable particularity the property to be inspected and shall specify a reasonable time, place, and manner for making the inspection and performing the related acts.

(D) The party upon whom the request is served shall respond within \_\_\_\_ days after the service of the request. The response shall state, with respect to each item, that inspection and related activities will be permitted as requested, unless there are objections, in which case the reasons for each objection shall be stated.

Comment 1 (to Subsection (A)): Issues involving conversion of data compilations into usable form should be handled by motion on a case-by-case basis; see MAR 238 [Motion to Compel Discovery].

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ACUS Model Adjudication Rules (1993)  
Requests for Admissions

MAR 236. Requests for Admissions

(A) Any party may serve on any other party a written request for admission of the truth of any matters relevant to the adjudication set forth in the request that relate to statements or opinions of fact or of application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter of which an admission is requested shall be separately set forth.

(1) The matter is admitted unless, within \_\_\_\_\_ days after service of the request, or within such time as the Adjudicator allows, the party to whom the request is directed serves upon the party requesting the admission, a sworn written answer.

(2) The sworn written answer shall specifically:

(a) deny the relevant matter(s) of which an admission is requested;

(b) set forth in detail the reasons why the party truthfully can neither admit nor deny the matter(s) of which an admission is requested; or

(c) state the objections by which some or all of the matters involved are privileged, irrelevant, or otherwise improper in whole or part.

A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify her/his answer or deny only part of the matter of which an admission is requested, (s)he shall specify so much of it as is true and qualify or deny the remainder.

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**Requests for Admissions**

(3) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless (s)he states that (s)he has made reasonable inquiry and that the information known to, or readily obtainable by, her/him is insufficient.

(4) The party who has requested the admission(s) may move to determine the sufficiency of the answer(s) or objection(s). Unless the objecting party sustains her/his burden of showing that the objection is justified, the Adjudicator shall order that an answer be served.

(B) Any matter admitted under this rule is conclusively established unless the Adjudicator on motion permits withdrawal or amendment of the admission.

(C) Any admission made by a party under this rule is for the purpose of the adjudication and is not an admission by her/him for any other purpose, nor may it be used against her/him in any other proceeding.

Comment 1: If a party fails to admit the genuineness of a document or the truth of any matter requested, and if the party requesting the admission thereafter proves the genuineness of the document or the truth of the matter, [the AA] may wish to consider whether it should adopt a rule permitting a party to apply to the Adjudicator for an order requiring the other party to pay reasonable expenses incurred in making the proof, including attorney's fees. Such an order might be appropriate unless the Adjudicator finds, e.g., that:

(1) the admission sought was objectionable,

(2) the admission sought was of no substantial importance,

(3) the party failing to admit had reasonable ground to believe that (s)he might prevail on the matter,  
or

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**Requests for Admissions**

(4) there was other good reason for the failure to admit.

Comment 2: Rule 36, FRCP provides the pattern for this type of agency rule.

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Discovery: Protective Order

MAR 237. Discovery: Protective Order

(A) Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the Adjudicator may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the discovery may not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time and/or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the seeking party;
- (4) that particular matters may not be inquired into, or that the scope of the discovery may be limited to particular matters;
- (5) that discovery may be conducted with no one present except persons designated by the Adjudicator;
- (6) that a trade secret or other confidential research, development, or commercial information may not be disclosed or may be disclosed only in a designated way or only to designated persons; and
- (7) that the party or the other person from whom discovery is sought may file specified documents or information under seal to be opened as directed by the Adjudicator.

(B) The Adjudicator may permit a party or a person from whom discovery is sought, who is seeking a protective order, to make all

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**Discovery: Protective Order**

or part of the showing of good cause in camera. If such a showing is made, upon motion of the party or the person from whom discovery is sought an in camera record of the proceedings shall be made. If the Adjudicator enters a protective order, any in camera record of such showing shall be sealed and preserved and made available to [the AA] or to a court in the event of appeal.

(C) The Adjudicator may upon motion by a party or by a person from whom discovery is sought, and for good cause shown,

(1) restrict or defer disclosure by a party of the name of a witness or, in the case of an [AA] witness, any prior statement of the witness, and

(2) prescribe other appropriate measures to protect a witness.

Any party affected by any such action shall have an adequate opportunity, once learning of the name of the witness and obtaining a narrative summary of expected testimony, or in the case of a[n] [AA] witness, any prior statement or statements, to prepare for cross-examination and for the presentation of the party's case.

Comment 1 (to Subsection (C)): Unless an agency determines as a matter of policy a need exists for witness protection, it may determine that this part of the MAR is unnecessary. See ACUS Recommendation 70-4(8), 1 CFR 305.70-4(8).

Comment 2: Rule 26(c) [Protective Orders], FRCP provides the basic pattern for this type of agency rule; however, see also ACUS Recommendation 70-4 (1 CFR 305.70-4).

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**Motion to Compel Discovery**

**MAR 238. Discovery: Motion to Compel Discovery**

(A) If a party or other person upon whom a request for discovery has been served fails to answer a question propounded or to respond adequately, objects to a request, or fails to produce documents or other things for inspection or other purposes, the discovering party may move the Adjudicator for an order compelling discovery in accordance with the request. The motion shall:

- (1) state the nature of the request;
- (2) set forth the response or objection of the party or other person upon whom the request was served;
- (3) present arguments supporting the motion; and
- (4) attach copies of all relevant discovery requests and responses.

(B) The Adjudicator may enter an order compelling discovery in accordance with the request, enter a protective order under MAR 237, and/or issue sanctions under MAR 239.

Comment 1 (to Subsection (A)): Responses to a motion to compel are governed by MAR 170 (Motions).

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**Discovery: Sanctions for Failure to Comply**

**MAR 239. Discovery: Sanctions for Failure to Comply**

If a party fails to provide or permit discovery, the Adjudicator may take such action as is just, including but not limited to the following:

(A) infer that the admission, testimony, document, or other evidence would have been adverse to the party;

(B) order that, for the purposes of the Adjudication, the matters regarding which the order was made or any other designated facts shall be taken to be established in accordance with the claim of the party obtaining the order;

(C) order that the party withholding discovery not introduce into evidence or otherwise rely, in support of any claim or defense, upon documents or other evidence withheld;

(D) order that the party withholding discovery not introduce into evidence, or otherwise use in the hearing, information obtained in discovery;

(E) order that the party withholding discovery not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(F) order that a filed document, or part of a filed document, or a motion or other submission by the party be stricken, or that decision on the filed documents be rendered against that party, or both; and

(G) exclude the party or representative from the Adjudication.

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**Discovery: Sanctions for Failure to Comply**

Any such action may be taken by order at any point in the Adjudication.

Comment 1: See Rule 37, FRCP.

Comment 2: This rule does not limit the Adjudicator's power under MAR 111(L).

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**Settlement and Alternative Dispute Resolution**

**MAR 240. Settlement; Alternative Dispute Resolution**

(A) **Availability.** The parties shall have the opportunity to submit a settlement to the Adjudicator or submit a request for alternative dispute resolution under Subsection (D).

(B) **Form.** A settlement shall be in the form of a proposed settlement agreement, a consent order, and a motion for its entry, which shall include the reasons why it should be accepted and shall be signed by the consenting parties or their authorized representatives.

(C) **Content of Settlement Agreement.** The proposed settlement agreement shall contain the following:

(1) an admission of all jurisdictional facts;

(2) an express waiver of further procedural steps before the Adjudicator or [the AA], of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise to contest the validity of the consent order;

(3) a statement that the order shall have the same force and effect as an order made after full hearing; and

(4) a statement that matters in the pleading, if any, required to be adjudicated have been resolved by the proposed settlement agreement and consent order.

(D) **Settlement Adjudicator; Alternative Dispute Resolution.**

(1) The Adjudicator, upon motion of a party or upon her/his own motion, may request the [Chief Adjudicator] to appoint another Adjudicator to conduct settlement negotiations or remit the proceeding to alternative dispute resolution as [the AA] may provide or to which the parties may agree.

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**Settlement and Alternative Dispute Resolution**

The order appointing the Settlement Adjudicator may confine the scope of settlement negotiations to specified issues. The order shall direct the Settlement Adjudicator to report to the [Chief Adjudicator] at specified time periods.

(2) If a Settlement Adjudicator is appointed, (s)he shall:

(a) convene and preside over conferences and settlement negotiations between the parties and assess the practicalities of a potential settlement,

(b) report to the [Chief Adjudicator] describing the status of the settlement negotiations and recommending the termination or continuation of the settlement negotiations, and

(c) not discuss the merits of the case with the [Chief Adjudicator] or any other person, or appear as a witness in the case.

(3) Settlement negotiations conducted by the Settlement Adjudicator shall terminate upon the order of the [Chief Adjudicator] issued after consultation with the Settlement Adjudicator.

(4) No decision concerning the appointment of a Settlement Adjudicator or the termination of the settlement negotiation is subject to review by, appeal to, or rehearing by the Adjudicator or [the AA].

(E) The Adjudicator (or Settlement Adjudicator) may require that the attorney or other representative who is expected to try the case for each party be present and that the parties, or agents having full settlement authority also be present or available by telephone.

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**Settlement and Alternative Dispute Resolution**

(F) No evidence, statements, or conduct in settlement negotiations under this section will be admissible in any subsequent hearing, except by stipulation of the parties. Documents disclosed may not be used in litigation unless obtained through appropriate discovery or subpoena.

(G) The Adjudicator (or Settlement Adjudicator) may impose on the parties and persons having an interest in the outcome of the Adjudication such other and additional requirements as are necessary for the efficient resolution of the case.

(H) The conduct of settlement negotiations shall not unduly delay the hearing.

Comment 1: See generally ACUS Recommendation 88-5, 1 CFR 305.88-5 (agency use of settlement judges) and Administrative Dispute Resolution Act of 1990, 5 USC 571 et seq.

Comment 2: Some provisions in this rule, especially in subsection C, may not be appropriate for an agency if it does not have an interest in the substantive outcome of the particular adjudication.

Comment 3: Agencies may wish to include in this rule a requirement that the Adjudicator or Settlement Adjudicator promptly notify the [the AA] of all approved settlements so that [the AA] may have an opportunity to review the settlement or allow it to become final in the absence of such review.

Comment 4 (to Subsection (D)): Provision for a Settlement Adjudicator does not preclude the Adjudicator from exercising her/his powers under MAR 111(F).

Comment 5 (to Paragraph (D)(2)(c)): This confidentiality provision should not prevent Adjudicators within the same office from engaging in discussions of settlement and mediation techniques that may aid a Settlement Adjudicator in resolving particular cases and assisting in an Adjudicator's professional development. See ACUS Recommendation 88-5(4)(b), 1 CFR 305.88-5(4)(b).

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ACUS Model Adjudication Rules (1993)  
Summary Decision

MAR 250. Summary Decision

(A) Any party may, after commencement of the proceeding and at least \_\_\_\_\_ days before the date fixed for the hearing, move with or without supporting affidavits for a summary decision in her/his favor of all or any part of the proceeding. Any other party may, within \_\_\_\_\_ days after service of the motion, serve opposing affidavits or counter-move for summary decision. The Adjudicator may, in her/his discretion, set the matter for argument and/or call for the submission of briefs.

(B) The Adjudicator may grant such motion if the filed documents, affidavits, material obtained by discovery or otherwise, or matters officially noted, show that there is no genuine issue as to any material fact and that a party is entitled to a summary decision.

(C) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of her/his filed documents; the response to the motion, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(D) Should it appear from the affidavits of a party opposing the motion that (s)he cannot for reasons stated present by affidavit facts essential to justify her/his opposition, the Adjudicator may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or may make such other order as is just.

(E) The denial of all or any part of a motion for summary decision shall not be subject to interlocutory appeal except as provided in MAR 400 (Interlocutory Review).

Comment 1: This Model Rule operates in conjunction with MAR 170 (Motions).

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**Summary Decision**

Comment 2: See ACUS Recommendation 70-3, 1 CFR 305.70-3 (summary decision in agency adjudication).

**ACUS Model Adjudication Rules (1993)**  
**Scheduling and Notice of Hearing**

**MAR 300. Scheduling and Notice of Hearing**

(A) The Adjudicator shall be responsible for scheduling the hearing. With due regard for the convenience of the parties, their representatives, or witnesses, the Adjudicator shall fix the time, place, and date for the hearing and shall notify all parties of the same.

(B) A request for a change in the time, place, or date of the hearing may be granted by the Adjudicator.

(C) At any time after commencement of a proceeding, any party may move to expedite the scheduling of a proceeding. A party moving to expedite a proceeding shall:

- (1) describe the circumstances justifying the expedition; and
- (2) incorporate in the motion affidavits to support any representations of fact.

Following timely receipt of the motion and any responses, the Adjudicator may expedite pleading schedules, prehearing conferences, and the hearing, as appropriate.

**Comment 1 (to Subsection (A)):** Whenever practicable, a hearing should be conducted in one continuous session or a series of consecutive sessions; however, the Adjudicator may at any time continue the hearing to a future date and may arrange to conduct the hearing in more than one location.

**Comment 2 (to Subsection (B)):** In exercising discretion to change the time, date, or place of the hearing, the Adjudicator should give due consideration to the same factors considered in initially scheduling the hearing. A change in the time, place, or date of a hearing might be appropriate to prevent substantial delay, expense, or detriment to the public interest, or to avoid undue prejudice to a party.

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**ACUS Model Adjudication Rules (1993)**  
**Failure of Party to Appear**

**MAR 310. Failure of Party to Appear**

A default decision may be entered against a party failing to appear at a hearing unless such party shows good cause for the failure to appear.

Comment 1: A default decision is a matter clearly within the discretion of the Adjudicator.

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ACUS Model Adjudication Rules (1993)  
Evidence - Admissibility

MAR 320. Evidence: Admissibility

The Adjudicator shall admit any relevant oral or documentary evidence that is not privileged. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable than it would be without the evidence. The Adjudicator may, however, exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, by confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Comment 1: In 1986, ACUS adopted Recommendation 86-2: "Congress should not require agencies to apply the Federal Rules of Evidence, with or without the qualification 'so far as practicable,' to limit the discretion of presiding officers to admit evidence in formal adjudications" [1 CFR 305.86-2]; see Pierce, *Use of Federal Rules of Evidence in Federal Agency Adjudications*, 39 Admin. L. Rev. 1 - 26 (1987). The approach of this MAR is also consistent with the position taken by both the Federal Bar Association (1991) and the American Bar Association (1992). They recommended that federal agencies be encouraged to examine whether and to what extent rules patterned after the FRE might be appropriate for agency adjudication. Some federal administrative agencies have found it useful, or have been required by statute (e.g., 29 USC 260(b)), to apply the FRE or a modified version of the FRE; see, e.g., 24 CFR 104 et seq. (HUD) and 29 CFR 18.101 et seq. (Labor). See also Graham, *Application of the Rules of Evidence in the Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. Ill. R. Rev. 353 - 412 (1991). FRE 401 and 403 are the bases for the second and third sentences. The first sentence restates the APA standard.

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ACUS Model Adjudication Rules (1993)  
**Evidence - Objections and Offers of Proof**

MAR 321. Evidence: Objections and Offers of Proof

(A) A party shall state briefly the grounds for objection to the admission or exclusion of evidence. Rulings on all objections shall appear in the record. Only objections made before the Adjudicator may be raised on appeal.

(B) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record.

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ACUS Model Adjudication Rules (1993)  
Evidence - Confidential and Sensitive Information

MAR 322. Evidence: Confidential and Sensitive Information

(A) Without limiting the discretion of the Adjudicator to give effect to applicable privileges, the Adjudicator may limit introduction of evidence or issue such protective or other orders that in her/his judgment are required to prevent undue disclosure of classified, confidential, or sensitive matters, which include, but are not limited to, matters of a national security, business, personal, or proprietary nature. Where the Adjudicator determines that information in documents containing classified, confidential, or sensitive matters should be made available to another party, the Adjudicator may direct the party to prepare an unclassified or non-sensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.

(B) If the Adjudicator determines that the procedure described in Subsection (A) is inadequate and that classified or otherwise sensitive matters must form part of the record in order to avoid prejudice to a party, the Adjudicator may advise the parties and provide opportunity for arrangements to permit a party or representative to have access to such matters.

Comment 1: For agencies that deal with classified information, additional limitations may be required, such as in camera proceedings, obtaining security clearances, or giving counsel for a party access to classified information and documents subject to assurances against further disclosure.

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Evidence - Official Notice

MAR 323. Evidence: Official Notice

The Adjudicator may take official notice of such matters as might be judicially noticed by the courts or of other facts within the specialized knowledge of the agency as an expert body. Where a decision or part thereof rests on the official notice of a material fact not appearing in the evidence in the record, the fact of official notice shall be so stated in the decision, and any party, upon timely request, shall be afforded an opportunity to show the contrary.

Comment 1: The APA states at 5 USC 556(e): "When an agency decision rests on official notice of a material fact not appearing in the record, the party is entitled, on timely request, to an opportunity to show the contrary."

Comment 2: Under case law, an agency under some circumstances may be permitted to look beyond the facts developed for the record proper, e.g., to facts developed in other cases. See *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 529 - 530 (1946) and the cases cited therein.

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**ACUS Model Adjudication Rules (1993)**  
**Evidence - Stipulations**

**MAR 324. Evidence: Stipulations**

The parties may by stipulation in writing at any stage of the proceeding or orally at the hearing agree upon any pertinent facts in the proceeding. Stipulations may be received in evidence before, or at, the hearing and, when received in evidence, shall be binding on the parties to the stipulation.

**Comment 1:** It is desirable that facts be agreed upon by stipulation whenever practicable.

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ACUS Model Adjudication Rules (1993)  
Evidence - Written Testimony

MAR 325. Evidence: Written Testimony

The Adjudicator may accept and enter into the record direct testimony of witnesses made by verified written statement rather than by oral presentation at the hearing. Witnesses whose testimony is presented by verified written statement shall be available for cross-examination as may required.

Comment 1: 5 USC 556(d) provides that "[i]n . . . determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

Comment 2: This rule is not inconsistent with 5 USC 556(d) which provides: "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence . . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." See also Attorney General's Manual on the Administrative Procedure Act 124-127 (1947).

Comment 3: This rule does not preclude a witness from correcting or amending her/his written statement.

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ACUS Model Adjudication Rules (1993)  
Evidence - Cross-Examination

MAR 326. Evidence: Cross-Examination

Cross-examination shall be limited to the scope of the direct examination and, subject to the discretion of the Adjudicator, may be limited to witnesses whose testimony is adverse to the party desiring to cross-examine. Cross-examination will be permitted to the extent necessary for full and true disclosure of the facts. The Adjudicator may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Comment 1: See Comment 2 to MAR 325.

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ACUS Model Adjudication Rules (1993)  
Evidence - Exhibits and Documents

MAR 327. Evidence: Exhibits and Documents

(A) All exhibits shall be numbered and marked with a designation identifying the sponsor. The original of each exhibit offered in evidence or marked for identification shall be filed and retained in the docket of the proceeding, unless the Adjudicator permits the substitution of copies for the original document. Copies of each exhibit shall be supplied by the sponsoring party to the Adjudicator and to each other party to the proceeding.

(B) Unless otherwise directed by the Adjudicator, proposed exhibits to be offered upon direct examination shall be exchanged \_\_\_\_\_ days prior to the hearing. Proposed exhibits not so exchanged in accordance with the Adjudicator's order may be denied admission as evidence. The authenticity of all exhibits submitted or exchanged prior to the hearing, under direction of the Adjudicator, will be deemed admitted unless written objection is filed and served on all parties, or unless good cause is shown for failure to file such written objection.

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**ACUS Model Adjudication Rules (1993)**

**Evidence - Witness Fees; Oath or Affirmation; Refusal to Testify**

**MAR 328. Evidence: Witness Fees; Oath or Affirmation; Refusal to Testify**

**(A) Fees.** Witnesses, other than employees of a federal agency, summoned in an adjudication shall receive the same fees and mileage as witnesses in the courts of the United States.

**(B) Oath or Affirmation.** Witnesses shall testify under oath or affirmation.

**(C) Failure or Refusal to Testify.** If a witness fails or refuses to testify, the failure or refusal to answer any question found by the Adjudicator to be proper may be grounds for striking all or part of the testimony that may have been given by the witness, or for any other action deemed appropriate by the Adjudicator.

**Comment 1 (to Subsection (A)):** See MAR 100(C) (Definition of Agency).

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**ACUS Model Adjudication Rules (1993)**  
**Burden of Going Forward with Evidence**

**MAR 329. Burden of Going Forward with Evidence**

The proponent of a factual proposition shall have the burden of introducing evidence to support that proposition.

**Comment 1:** The burden of proof provision of the APA is 5 USC 556(d) which states: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." The ultimate burden of persuasion in any case depends on the substantive statute involved and the burden of persuasion may be allocated among parties, or shift from one party to another, depending on the issue. As a consequence, the model rule only addresses the initial burden of going forward with the evidence.

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ACUS Model Adjudication Rules (1993)  
Closing of Record

MAR 330. Closing of Record

At the conclusion of the hearing, the record shall be closed unless the Adjudicator directs otherwise. Once the record is closed, no additional evidence shall be accepted except upon a showing that the evidence is material and that there was good cause for failure to produce it in a timely fashion. The Adjudicator shall reflect in the record, however, any approved correction to the transcript.

Comment 1: In particular categories of adjudications (e.g., social security cases), an agency may wish to accord broader discretion in the Adjudicator to delay closing the record or to admit additional evidence after the record has been closed. See ACUS Recommendation 90-4(4), 1 CFR 305.90-4(4).

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ACUS Model Adjudication Rules (1993)  
Proposed Findings; Closing Arguments; Briefs

MAR 340. Proposed Findings; Closing Arguments; Briefs

Before the Adjudicator's decision and upon such terms that the Adjudicator may find reasonable, any party shall be entitled to file a brief, propose findings of fact and conclusions of law, or do both. At the close of the hearing, the Adjudicator may in her/his discretion hear oral argument. Any brief, proposed findings of fact and conclusions of law, and oral argument shall be included as part of the record.

Comment 1: Where an agency provides for oral decisions from the bench, this rule may be modified to permit the filing of a brief in the discretion of the Adjudicator.

Comment 2: 5 USC 557(c) provides:

Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions - -

- (1) proposed findings and conclusions; or
- (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
- (3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are part of the record and shall include a statement of - -

- (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
- (B) the appropriate rule, order, sanction, relief, or denial thereof.

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Record of Hearing

MAR 350. Record of Hearing

All hearings shall be recorded. Exhibits shall be incorporated into the record.

**Comment 1:** Recorded includes, but is not limited to, audio tape, video tape, stenographic recordation, and the like. If a transcript is prepared, generally it must be made available to any person at a cost not to exceed the actual cost of duplication; see 5 USC Appendix 2, Federal Advisory Committee Act, Section 11 (Availability of transcripts; "agency proceeding"):

(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act [i.e., "effective upon expiration of ninety days following enactment of Pub.L. 92-463 on Oct. 6, 1972"], agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

**Comment 2:** See also 5 USC 555(c): "A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a non-public investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony."

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**ACUS Model Adjudication Rules (1993)**  
**Decision of Adjudicator**

**MAR 360. Decision of Adjudicator**

(A) The Adjudicator shall prepare a decision containing:

- (1) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record;
- (2) an order as to the final disposition of the case, including relief, if appropriate;
- (3) the date upon which the decision will become effective [e.g., \_\_\_\_ days after issuance]; and
- (4) a statement of further right to appeal.

(B) The decision of the Adjudicator shall be based upon a consideration of the whole record.

**Comment 1: See 5 USC 556(e): "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties."**

**Comment 2: See also 5 USC 556(d) and 5 USC 557(c)(A).**

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Interlocutory Review

MAR 400. Interlocutory Review

(A) Application for interlocutory review shall be made to the Adjudicator. The application shall not be certified to [the AA] except when the Adjudicator determines that:

- (1) the ruling involves a dispositive question of law or policy about which there is substantial ground for difference of opinion; or
- (2) an immediate ruling will materially advance the completion of the proceeding; or
- (3) the denial of an immediate ruling will cause irreparable harm to a party or the public.

(B) Any application for interlocutory review shall:

- (1) be filed with the Adjudicator within \_\_\_ days after the Adjudicator's ruling;
- (2) designate the ruling or part thereof from which appeal is being taken;
- (3) set forth the ground on which the appeal lies; and
- (4) present the points of fact and law relied upon in support of the position taken.

Any party that opposes the application may file a response within \_\_\_ days after service of the application.

(C) Proceedings Not Stayed. The filing of an application for review and the grant of review shall not stay proceedings before the Adjudicator unless (s)he or [the AA] shall so order. [The AA] will not consider the motion for a stay unless the motion shall have first been made to the Adjudicator.

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**Interlocutory Review**

**Comment 2:** An agency may wish to consider whether to provide interlocutory review in particular situations (e.g., an adverse ruling on a motion to disqualify the Adjudicator; a ruling suspending an attorney from participation in the proceeding; a ruling denying or terminating intervention or limited participation; or a ruling requiring the production of information claimed to be privileged) even if the Adjudicator has denied the application. In such instances, the agency may also wish to consider whether to provide by rule that if it does not reverse the Adjudicator's denial of the application for interlocutory review within \_\_\_ days, the Adjudicator's ruling is affirmed. See ACUS Recommendation 71-1 [1 CFR 305.71-1].

ACUS Model Adjudication Rules (1993)  
Petitions for Review

MAR 410. Petitions for Review

(A) Any person adversely affected or aggrieved by the Adjudicator's decision may file with [the AA] a petition for review within \_\_\_\_ days after issuance of the Adjudicator's initial decision. Two or more parties may join in the same petition.

(B) A petition for review, no more than \_\_\_\_ pages in length, shall be filed only upon one or more of the following grounds:

(1) A finding of material fact is not supported by substantial evidence;

(2) a necessary legal conclusion is erroneous;

(3) the decision is contrary to law or to the duly promulgated rules or decisions of [the AA];

(4) a substantial question of law, policy, or discretion is involved; or

(5) a prejudicial error of procedure was committed.

(C) Each issue shall be plainly and concisely stated and shall be supported by citations to the record when assignments of error are based on the record, and by statutes, regulations, cases, or other principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law not presented to the Adjudicator.

(D) A statement in opposition to the petition for review may be filed, within \_\_\_\_ days after the date on which petitions are due.

(E) Review by [the AA] shall not be a matter of right but within the sound discretion of [the AA]. A petition not granted within \_\_\_\_ days after the issuance of the Adjudicator's decision is deemed denied.

(F) [The AA], at any time within \_\_\_\_ days after the issuance of the Adjudicator's decision, may review the decision on its own motion. Where [the AA], by regulation or order, provides for

**ACUS Model Adjudication Rules (1993)**  
**Petitions for Review**

the issuance of a recommended decision, no petition for review is required.

(G) A petition for review under this section is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final agency action. The effect of filing a petition for review is to stay the decision of the Adjudicator.

**Comment 1 (to Subsection (A)):** Depending on agency statute or regulations, Adjudicators ordinarily issue either initial decisions or recommended decisions. Initial decisions become effective as the agency's decision unless a party seeks review or the agency, on its own initiative, elects to review the decision. Recommended decisions do not go into effect without further agency action and are issued in those cases where the agency will automatically review the decision; see 5 USC 557(b). Agencies ordinarily have somewhat different procedures for review of initial and recommended decisions. For the purpose of filing petitions for agency review, this MAR is limited to initial decisions. In the case of recommended decisions, however, an agency must take affirmative action to provide for review (such as by directing the filing of exceptions and briefs) and to render a final decision (such as by issuing its own decision or affirming the Adjudicator's recommended decision).

**Comment 2 (to Subsection (A)):** ACUS has recommended that agencies establish an administrative review regime that limits the scope of agency review of decisions of Adjudicators in routine cases but authorizes agencies, on their own motion or upon request of a party, to review significant questions of policy, fact, procedure, or discretion fully as if the agency were making an initial decision. See ACUS Recommendation 68-6, Delegation of Final Authority Subject to Discretionary Review by the Agency, 1 CFR 305.68-6. Some statutes accord parties an automatic right of review by the agency. In such circumstances, agencies must modify the MAR to provide for automatic appeal; see, e.g., NLRB [29 CFR 102.45 and 102.46].

**Comment 3 (to Subsection (E)):** In the interest of encouraging prompt appellate review of an Adjudicator's decision, the MAR provides that petitions for discretionary review that are not granted within a period of time are deemed denied. Alternatively, agencies may elect in their regulations to stay an initial decision automatically any time a petition for discretionary review is filed until such time as the agency has disposed of the petition. Caveat: "Effectiveness" of a decision is not necessarily the same as "finality" (see Comment 1, MAR 440).

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**Petitions for Review**

Comment 4 (to Subsection (G)): The APA allows agencies to require an adversely affected party to ask a "superior agency authority" to review a subordinate agency decision before going to court, provided that subordinate decision is "inoperative," i.e., not final, while the party is seeking review by the superior agency authority. 5 U.S.C. 557(b) and 704. In Darby v. Cisneros, 113 S. Ct. 2539, 125 L.Ed. 2d 113 (1993), the Supreme Court held that, when agency regulations simply authorize - - but do not require - -a party to seek administrative review, a party does not fail to exhaust required administrative remedies by foregoing the option of seeking administrative review. Subsection (G) explicitly provides that the filing of a petition for review under MAR 410 is an administrative prerequisite to filing a petition for judicial review. Such approach retains ultimate decisional responsibility with the agency and avoids judicial review of issues on which the agency has not had an opportunity to rule. In some cases, an agency may wish to provide that exhaustion of administrative remedies is not a prerequisite to judicial review. In addition, there may be situations where an agency for policy or management reasons may choose to allow the Adjudicator's decision to become operative pending administrative review by a superior administrative authority. In these latter cases, the Adjudicator's decision is immediately judicially reviewable.

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ACUS Model Adjudication Rules (1993)  
Appellate Briefs

MAR 420. Appellate Briefs

(A) Unless [the AA] directs otherwise, a party shall file a brief in support of its petition for review within \_\_\_\_ days after [the AA] grants the petition. If a petitioner fails to file a timely brief, the order granting review may be vacated. Other parties may file any briefs they wish considered by [the AA] within \_\_\_\_ days after the petitioner's brief is served. If [the AA] orders review on its own motion, all parties shall file any briefs they wish considered by [the AA] within \_\_\_\_ days of the order.

(B) Except by permission of [the AA], briefs shall not exceed \_\_\_\_ pages.

Comment 1: The APA accords an agency on review of an Adjudicator's decision "all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 USC 557(b). Nonetheless, agencies typically do not review every issue decided by an Adjudicator. Because agencies (like the courts) ordinarily impose page limitations for appellate briefs, parties must be selective about the issues they raise for appellate review.

Comment 2: Agencies may adapt these regulations to provide that briefs supporting the petition for review shall be filed on the same date and responsive briefs filed at a later date. Agencies may also authorize the filing of reply briefs in appropriate cases.

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Oral Argument

MAR 430. Oral Argument

[The AA] may permit oral argument in its discretion. The order scheduling a case for oral argument will contain the allotment of time for each party and order of presentation for oral argument before [the AA].

Comment 1: Oral argument is not a mandatory part of the appellate process. It is designed to permit an agency to address issues that may have been left unresolved in the briefs or about which agency members have questions.

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**ACUS Model Adjudication Rules (1993)**  
**Final Decision**

**MAR 440. Final Decision**

(A) If no petitions for review are filed, and [the AA] has not taken review of the Adjudicator's decision on its own initiative, the decision shall become effective and will be the final decision of [the AA] \_\_\_\_ days after issuance.

(B) When a case stands submitted for final decision on the merits, [the AA] will dispose of the issues presented by entering an appropriate order which will include findings and conclusions and the reasons or bases therefor. In appropriate cases, [the AA] may simply affirm the decision.

**Comment 1: Effectiveness and finality of a decision should not necessarily be taken as synonymous concepts. See Comment 4 (to Subsection (G)) to MAR 410.**

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ACUS Model Adjudication Rules (1993)  
**Reconsideration**

MAR 450. Reconsideration

(A) Any party to a proceeding may file a motion for reconsideration of a final order issued by [the AA].

(B) Unless the time is shortened or enlarged by [the AA], motions for reconsideration shall be filed within \_\_\_\_ days after service of the final order issued by [the AA].

(C) A motion for reconsideration shall be no more than \_\_\_\_ pages and shall state, briefly and specifically, the matters of record alleged to have been erroneously decided, the ground(s) relied upon, and the relief sought. No responses to motions for reconsideration shall be filed unless requested by [the AA].

**Comment 1:** Agencies which do not want to provide for reconsideration should not adopt this rule.

**Comment 2:** Some statutes make the filing of a petition for rehearing or reconsideration with an agency a jurisdictional prerequisite for judicial review; see, e.g., 15 USC 717r (Natural Gas Act). Many agencies allow petitions for reconsideration as a matter of discretion. This MAR provides for motions for reconsideration of final agency decisions. Because reconsideration is intended to be an exceptional remedy, the MAR provides that no responses to motions for reconsideration shall be filed unless requested by the agency. This provision follows the approach taken in Rules 35 and 40 of the Federal Rules of Appellate Procedure with respect to petitions for rehearing and suggestions of rehearing en banc.

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**(End of ACUS Model Adjudication Rules [1993])**



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