[Preamble forthcoming]

[NOTE: the recommendations below are identical to the recommendations found in the
November 10, 2020 draft ACUS report Agency Appellate Systems by Christopher J. Walker &
Matthew Lee Wiener, available at https://www.acus.gov/report/draft-report-agency-appellate-
systems]

RECOMMENDATION

A. Objectives of Appellate Review

1. Agencies should identify what objective or objectives are served by their appellate
   systems, and they should design their processes and draft their procedural regulations
   accordingly.

2. Agencies should publicly announce—preferably by codifying them in procedural
   regulations—the objective or objectives of their appellate systems.

B. Procedural Law of Appellate Review

1. Agencies should address all significant procedural matters governing agency appellate
   review in procedural regulations—often styled as a “rules of practice” or “rules of
   procedure”—published in the Code of Federal Regulations rather than relegating them to
   non-legislative rules or other documents. Significant procedural matters unique to agency
   appellate review include:
(a) the availability of interlocutory review;

(b) the procedures for initiating review;

(c) the standards for granting review, if review is discretionary;

(d) the scope and standard of review;

(e) the allowable and required submissions by litigants—including petitions, motions, and briefs—and their required contents;

(f) the procedures for designating decisions as precedential and the legal effect of such designations;

(g) the record on review and the opportunity, if any, to submit new evidence;

(h) the availability of oral argument and amicus participation;

(i) the availability of and procedures for reconsideration;

(j) in the case of multi-member appellate boards, councils, and the like, the authority to assign decision-making authority to fewer than all members (e.g., panels); and

(k) any administrative exhaustion requirements that must be satisfied before seeking judicial review.

2. Agencies should consider including in the procedural regulations governing their appellate programs: (a) a brief statement or explanation of the program’s review authority, structure, and decision making components; and (b) for each provision based on a statutory source, an accompanying citation to that source.

3. When revising existing or adopting new appellate rules, agencies should review the appellate rules (Rules 400-450) in the Administrative Conference’s Model Rules of
37Agency Adjudication (rev. 2018) (Appendix B to this Report) in deciding what the rules
38should provide.

394. When adopting new or materially amending existing procedural regulations, agencies
40should voluntarily use notice-and-comment procedures or other mechanisms for
41soliciting public input, notwithstanding the procedure-rules exemption of 5 U.S.C. §
42553(b)(A), unless the costs clearly outweigh the benefits of doing so.

C. Case Selection for Appellate Review

431. Based on the agency-specific objectives for appellate review, agencies should consider
44whether review should be mandatory or discretionary (assuming they have statutory
45authority to do so); if discretionary, the standards for granting review should track the
46purposes of the appellate system, and they should be published in the procedural
47regulations.

482. Agencies should consider implementing procedures for sua sponte appellate review of
49non-appealed hearing-level adjudications as well as for hearing-level adjudicators to refer
50cases to them for interlocutory review.

D. Appellate Decision-making Processes and Decisions

511. Whenever possible, agencies should maintain a single or integrated electronic case
52management systems (ECMs) for both hearing-level and appellate program, or otherwise
53design their ECMs to ensure that hearing records are easily accessible to appellate
54adjudicators.

552. Agencies should explore ways to implement screening methods for appeals and, where
56appropriate, the grouping of appeals on the merits based on difficulty, common legal
57issue, subject matter, or other relevant factors in order to better leverage adjudicator
58expertise and economies of scale.

Commented [GY1]: The Committee may wish to discuss with the consultants their intended definition of “screening” in this recommendation and in the two that follow.
3. Agencies should consider how to better utilize staff attorneys and law clerks at both the screening and merits stages.

4. Agencies should consider utilizing artificial intelligence and machine learning to assist in screening and sorting appeals.

5. Agencies should set their scope and standard of review to be consistent with agency-specific objectives for their appellate system. For most appellate systems, it is not advisable to have a de novo standard of review. Nor is it prudent to have a de novo scope of review where appellants can freely introduce any new evidence on appeal.

6. Agencies should strive to improve the readability and overall quality of their appellate decisions, including an emphasis on plain language and experimentation with decision templates and other quality-improving measures.

7. Agencies should establish clear criteria and processes for publishing precedential opinions, especially for appellate systems with objectives of policymaking or interdecisional consistency.

8. Agencies should assess the value of oral argument and amicus participation in their appellate system and should establish clearer rules for both.

E. Administration, Management, and Bureaucratic Oversight

1. Agency appellate systems should promptly transmit their precedential decisions to all program adjudicators and, directly or through hearing-level programs, to hearing-level adjudicators (as appropriate). Appellate programs should include in their transmittals, when feasible, summaries and explanatory materials.

2. Agency appellate systems should notify their adjudicators of significant federal-court decisions reviewing the agencies’ decisions and, when providing notice, explain the significance of those decisions to the program. As appropriate, agencies should notify
82 adjudicators of any policies governing whether and when they will acquiesce in the
decisions of the federal courts of appeals.

3. Agency appellate systems whose decision making relies extensively on their own
precedential decisions should consider preparing indexes and digests—with annotations
and comments, as appropriate—to help adjudicators identify those decisions and their
significance.

4. Agency appellate systems should regularly communicate with agency rule-writers and
other agency policymakers—and, as appropriate, institutionalize communication
mechanisms—to address whether interpretations and policies addressed in their decisions
should be addressed by rule rather than case-by-case adjudication. Appellate programs
should also address with agency policymakers, congressional liaisons, and other
appropriate officials any needed statutory amendments that the program may identify.

5. The Office of the Chairman of the Administrative Conference should provide for, as
authorized by statute, the “interchange among administrative agencies of information
potentially useful in improving” (5 U.S.C. § 594(2)) agency appellate systems. The
subjects of interchange might include electronic case management systems, procedural
innovations, quality-assurance reviews, and common management problems.

F. Public Disclosure and Transparency

1. Agencies should disclose on their websites any rules (sometimes styled as “orders”) by
which an agency head has delegated review authority to appellate adjudicators.

2. Whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs their appellate
review system, agencies should consider announcing, livestreaming, and maintaining
video recordings on their websites of appellate proceedings (including oral argument)
that present significant legal and policy issues likely to be of interest to regulated parties
3. Agencies should include on their websites brief and accessibly written explanations as to how their internal decision-making processes work and, as appropriate, include links to explanatory documents appropriate for public disclosure. Specific subjects agencies should consider addressing include: the assignment of cases to adjudicators (when fewer than all the programs adjudicators participate in a case), the role of staff, and the order in which cases are decided.

4. When posting decisions on their website, agencies should clearly distinguish between precedential and non-precedential decisions. Agencies should also include a brief explanation of the difference.

5. When posting decisions on their website, agencies should consider, as practicable, including brief summaries of precedential decisions and, for precedential decisions at least, citations to court decisions reviewing them.

6. Agencies should include on their website any digests and indexes of decisions they maintain. It may be appropriate to remove any material exempt from disclosure under the Freedom of Information Act or other laws.