



Agency Appellate Systems

Committee on Adjudication

Proposed Recommendation for Committee | November 23, 2020

1 In Recommendation 2016-4,¹ the Administrative Conference offered best practices for
2 evidentiary hearings in administrative adjudications. Paragraph 26 recommended that agencies
3 provide for “higher-level review” (or “agency appellate review”) of the decisions of hearing-
4 level adjudicators.² This Recommendation offers best practices for such review. The
5 Administrative Conference intends this Recommendation to cover appellate review of decisions
6 resulting from (1) hearings governed by the formal hearing provisions of the Administrative
7 Procedure Act (APA) and (2) evidentiary hearings that are not governed by those provisions but
8 are required by statute, regulation, or executive order. Agencies may also decide to apply this
9 Recommendation to appellate review of decisions arising from other hearings, depending on
10 their level of formality.

¹ Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

² Recommendation 2016-4 addressed agency adjudications in which an evidentiary hearing, though not governed by the formal hearing provisions of the Administrative Procedure Act (APA) (5 U.S.C. §§ 554, 556-57 (2018)), is required by statute, regulation, or executive order. Those adjudications, which are often as formal as APA adjudications in practice, far outnumber so-called APA adjudications. Although 2016-4 addresses only non-APA adjudications, most of its best practice are as applicable to APA adjudications as non-APA adjudications. Some such practices, in fact, are modeled on the APA’s formal hearing provisions.



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11 Appellate review of hearing-level decisions can be structured in numerous ways. Two
12 structures are most common. In the first, litigants appeal directly to the agency head, which may
13 be a multi-member board or commission. In the second, litigants appeal to an appellate
14 adjudicator or group of adjudicators—often styled as a board or council—sitting below the
15 agency head. The appellate decision may be the agency’s final action or may be subject to
16 further appeal within the agency (usually to the agency head).

17 The Administrative Conference has twice before addressed agency appellate review. In
18 Recommendations 68-6 and 83-3, it provided guidance to agencies when establishing new, and
19 reviewing existing, organizational structures of appellate review.³ Both recommendations
20 focused on the selection of “delegates”—individual adjudicators, review boards composed of
21 multiple adjudicators, or panels composed of members of a multi-member agency—to exercise
22 appellate review authority vested in agency heads (including boards and commissions).
23 Recommendation 83-3 also addressed when agencies should consider providing appellate review
24 as a matter of right and when as a matter of discretion, and, in the case of the latter, under what
25 criteria.

26 With the exception of the appropriate standard for granting review, this
27 Recommendation’s focus lies elsewhere. It addresses, and offers best practices with respect to,
28 the following subjects: first, an agency’s identification of the purpose or objective served by its
29 appellate review; second, its selection of cases for appellate review, when review is not required

³ Both recommendations concerned only the review of decisions in proceedings governed by the formal hearing provisions of the APA. Their principles, though, are not so confined.



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30 by statute; third, its procedures for review; fourth, its appellate decision-making processes; fifth,
31 its management, administration, and bureaucratic oversight of its appellate system; and sixth, its
32 public disclosure of information about its appellate system.⁴

33 Most importantly, this Recommendation begins by suggesting that agencies identify, and
34 publicly disclose, the purpose(s) or objective(s) of their appellate systems. Appellate systems
35 may have different purposes, and any given appellate system may have multiple purposes.
36 Purposes or objectives can include the correction of errors, inter-decisional consistency of
37 decisions, policymaking, political accountability, management of the hearing-level adjudicative
38 system, organizational effectiveness and systemic awareness, and the reduction of litigation in
39 federal courts. The identification of purpose is important both because it dictates (or should
40 dictate) how an agency administers its appellate system—including what cases it hears and under
41 what standards of review it decides them—and provides a standard against which an agency’s
42 performance can be evaluated.

43 This Recommendation proceeds from the recognition that agency appellate systems vary
44 enormously—as to their purposes or objectives, governing substantive law, size, and resources—
45 and that what may be a best practice for one system may not always be the best practice for
46 another. In offering the best practices that follow, moreover, the Administrative Conference
47 recognizes that an agency’s procedural choices may sometimes be constrained by statute. The
48 Recommendation is drafted accordingly.

⁴ Christopher J. Walker & Matthew Lee Wiener, *Agency Appellate Systems* (Nov. 10, 2020) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-agency-appellate-systems>.



RECOMMENDATION

Objectives of Appellate Review

- 49 1. Agencies should identify and publish in procedural regulations what objective or
50 objectives their appellate systems serve, and they should design their processes and draft
51 their procedural regulations accordingly. In particular, agencies should set their scope and
52 standard of review to be consistent with the objectives of their appellate system.

Procedures for Appellate Review

- 53 2. Agencies should promulgate and publish procedural regulations governing agency
54 appellate review in the *Federal Register* and codify them in the Code of Federal
55 Regulations. These regulations should cover all significant procedural matters pertaining
56 to agency appellate review, including but not limited to the following:
- 57 (a) the objectives of the agency's appellate review system;
 - 58 (b) the timing and procedures for initiating review, including any available interlocutory
59 review;
 - 60 (c) the standards for granting review, if review is discretionary;
 - 61 (d) the standards for permitting participation by interested persons and amici;
 - 62 (e) the standard of review;
 - 63 (f) the allowable and required submissions by litigants and their required form and
64 contents;
 - 65 (g) the procedures for designating decisions as precedential and the legal effect of such
66 designations;
 - 67 (h) the record on review and the opportunity, if any, to submit new evidence;
 - 68 (i) the availability of oral argument or other form of oral presentation;
 - 69 (j) the standards of and procedures for reconsideration and reopening, if available;
 - 70 (k) any administrative or issue exhaustion requirements that must be satisfied before
71 seeking agency appellate or judicial review;



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- 72 (l) openness of proceedings to the public and availability of video or audio streaming or
73 recording; and
- 74 (m) in the case of multi-member appellate boards, councils, and similar entities, the
75 authority to assign decision-making authority to fewer than all members (e.g.,
76 panels).
- 77 3. Agencies should include in the procedural regulations governing their appellate
78 programs: (a) a brief statement or explanation of each program's review authority,
79 structure, and decision making components; and (b) for each provision based on a
80 statutory source, an accompanying citation to that source.
- 81 4. When revising existing or adopting new appellate rules, agencies should consider the
82 appellate rules (Rules 400-450) in the Administrative Conference's *Model Rules of*
83 *Agency Adjudication* (rev. 2018) in deciding what the rules should provide.
- 84 5. When materially revising existing or adopting new appellate rules, agencies should
85 voluntarily use notice-and-comment procedures or other mechanisms for soliciting public
86 input, notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the
87 costs clearly outweigh the benefits of doing so.

Case Selection for Appellate Review

- 88 6. Based on the agency-specific objectives of appellate review, agencies should decide
89 whether the granting of review should be mandatory or discretionary (assuming they have
90 statutory authority to decide); if discretionary, the criteria for granting review should
91 track the objectives of the appellate system, and they should be published in the
92 procedural regulations.
- 93 7. Agencies should consider implementing procedures for sua sponte appellate review of
94 non-appealed hearing-level decisions as well as for hearing-level adjudicators to refer
95 cases or issues to the appellate entity for review.



Appellate Decision-making Processes and Decisions

- 96 8. Whenever possible, agencies should consider maintaining electronic case management
97 systems (eCMS) that ensure that hearing records are easily accessible to appellate
98 adjudicators. Such an eCMS may include the capability for electronic filing.
- 99 9. Although the randomized assignment of cases to appellate adjudicators is an appropriate
100 default docketing method for an agency appellate system, agencies should consider the
101 potential benefits of sorting and grouping appeals on the appellate docket, including
102 reduced case processing times. Criteria for sorting and grouping cases may include: size
103 of a case’s record; complexity of a case’s issues; subject matter of a case; and similarity
104 of a case’s legal issues to those of other pending cases.
- 105 10. Agencies should consider utilizing artificial intelligence and machine learning to assist in
106 screening and sorting appeals.
- 107 11. For most appellate systems, it is not advisable to have a de novo standard of review. Nor
108 is it prudent to have a de novo scope of review where appellants can freely introduce any
109 new evidence on appeal.
- 110 12. Taking agency resources into account, agencies should strive for readable, quality
111 appellate decisions with an emphasis on plain language and ease of judicial review.
112 Agencies should explore the use of decision templates and other quality-improving
113 measures.
- 114 13. Agencies should establish clear criteria and processes for selecting and publishing
115 precedential opinions, especially for appellate systems with objectives of policymaking
116 or inter-decisional consistency.
- 117 14. Agencies should assess the value of oral argument and amicus participation in their
118 appellate system and should establish clearer rules for both.



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Administration, Management, and Bureaucratic Oversight

- 119 15. Agency appellate systems should promptly transmit their precedential decisions to all
120 program adjudicators and, directly or through hearing-level programs, to hearing-level
121 adjudicators (as appropriate). Appellate programs should include in their transmittals,
122 when feasible, summaries and explanatory materials.
- 123 16. Agency appellate systems should notify their adjudicators of significant federal-court
124 decisions reviewing the agencies' decisions and, when providing notice, explain the
125 significance of those decisions to the program. As appropriate, agencies should notify
126 adjudicators of any policies governing whether and when they will acquiesce in the
127 decisions of the federal courts of appeals.
- 128 17. Agency appellate systems in which decision making relies extensively on their own
129 precedential decisions should consider preparing indexes and digests—with annotations
130 and comments, as appropriate—to help adjudicators identify those decisions and their
131 significance.
- 132 18. Agency appellate systems should regularly communicate with agency rule-writers and
133 other agency policymakers—and, as appropriate, institutionalize communication
134 mechanisms—to address whether interpretations and policies addressed in their decisions
135 should be addressed by rule rather than case-by-case adjudication. Appellate programs
136 should also address with agency policymakers, congressional liaisons, and other
137 appropriate officials any needed statutory amendments that the program may identify.
- 138 19. The Office of the Chairman of the Administrative Conference should provide for, as
139 authorized by statute, the “interchange among administrative agencies of information
140 potentially useful in improving” (5 U.S.C. § 594(2)) agency appellate systems. The
141 subjects of interchange might include electronic case management systems, procedural
142 innovations, quality-assurance reviews, and common management problems.



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Public Disclosure and Transparency

- 143 20. Agencies should disclose on their websites any rules (sometimes styled as “orders”) by
144 which an agency head has delegated review authority to appellate adjudicators.
- 145 21. Regardless of whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs
146 their appellate review system, agencies should consider announcing, livestreaming, and
147 maintaining video recordings on their websites of appellate proceedings (including oral
148 argument) that present significant legal and policy issues likely to be of interest to
149 regulated parties and other members of the public. Brief explanations of the issues to be
150 addressed by oral argument might usefully be included in website notices of oral
151 argument.
- 152 22. Agencies should include on their websites brief and accessibly written explanations as to
153 how their internal decision-making processes work and, as appropriate, include links to
154 explanatory documents appropriate for public disclosure. Specific subjects agencies
155 should consider addressing include: the assignment of cases to adjudicators (when fewer
156 than all the programs adjudicators participate in a case), the role of staff, and the order in
157 which cases are decided.
- 158 23. When posting decisions on their website, agencies should clearly distinguish between
159 precedential and non-precedential decisions. Agencies should also include a brief
160 explanation of the difference.
- 161 24. When posting decisions on their website, agencies should consider, as practicable,
162 including brief summaries of precedential decisions and, for precedential decisions at
163 least, citations to court decisions reviewing them.
- 164 25. Agencies should include on their website any digests and indexes of decisions they
165 maintain. It may be appropriate to remove any material exempt from disclosure under the
166 Freedom of Information Act or other laws.