



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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 a 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

Commented [GY1]: For consistency with ACUS formatting conventions, numbering of the Paragraphs below no longer restarts with each subheading, and lettering of subheadings has also been removed.

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 ~~for~~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;~~ objectives of review
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 ~~for~~ of appellate review, agencies should decide
89 whether the granting of review should be mandatory or discretionary (assuming they have
90 statutory authority to ~~de-~~ decide); if discretionary, the criteria for granting review
91 should 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 adjudications decisions as well as for hearing-level
95 adjudicators to refer cases or issues to the appellate entity for review.

Commented [GY2]: Consider language to clarify whether "review" here is intended as interlocutory review, post-decisional review, or both.



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, according to such criteria as intake
- 105 methods for assigning appeals by the grouping of appeals on the merits based on
- 106 difficulty, common legal issue, subject matter, or other relevant factors in order to better
- 107 leverage adjudicator expertise and economies of scale.
- 108 ~~10. Agencies should consider how to best use staff attorneys and law clerks at both the~~
- 109 ~~screening and merits stages.~~
- 110 10. Agencies should consider utilizing artificial intelligence and machine learning to assist in
- 111 screening and sorting appeals.
- 112 11. For most appellate systems, it is not advisable to have a de novo standard of review. Nor
- 113 is it prudent to have a de novo scope of review where appellants can freely introduce any
- 114 new evidence on appeal.
- 115 12. Taking agency resources into account, Agencies should strive to improve the for
- 116 readability, quality and overall quality of their appellate decisions, including with an
- 117 emphasis on plain language and ease of judicial review. Agencies should explore the use
- 118 of and experimentation with decision templates and other quality-improving measures.

Commented [GV3]: The Committee delegated re-drafting of this Paragraph to staff. In addition to reorganizing the clauses, this version removes the word “screening” and instead describes the activities that “screening” is meant to describe.

Commented [WC4]: Comment to Committee: I would move #10 to the end of #9, and say something like: “If an agency utilizes methods to sort and group appeals, it should consider utilizing artificial and machine learning to assist in those efforts.”

Commented [GY5]: See reference made to “staff attorneys” in the redrafted Paragraph 9 above.

Commented [GY6]: In light of the focus of this Recommendation and two pending ACUS projects on the use of AI, staff recommends that the Committee consider removing this Paragraph.

Commented [GY7]: Prior committee deliberation on this Paragraph was unresolved. Paragraph 1 does urge that scope and standard of review be consistent with objectives of an agency’s appellate review system.

Commented [WC8]: Comment to Committee: I would suggest something along the following lines: “In setting their scope and standard of review to be consistent with the objectives for their appellate system, in many circumstances agencies should consider adopting an appellate model of judicial review where the standard of review is not de novo with respect to findings of fact and application of law to facts. Similarly, many agencies should consider limiting the introduction of new evidence on appeal that is not already in the administrative record from the hearing-level adjudication.”

Commented [WC9]: Note to Committee: I would add “use of decision templates, artificial intelligence and machine learning, and other quality-improving measures.”



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119 13. Agencies should establish clear criteria and processes for selecting and publishing
120 precedential opinions, especially for appellate systems with objectives of policymaking
121 or inter-decisional consistency.

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

Administration, Management, and Bureaucratic Oversight

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

128 16. Agency appellate systems should notify their adjudicators of significant federal-court
129 decisions reviewing the agencies' decisions and, when providing notice, explain the
130 significance of those decisions to the program. As appropriate, agencies should notify
131 adjudicators of any policies governing whether and when they will acquiesce in the
132 decisions of the federal courts of appeals.

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

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

Commented [GY10]: In earlier deliberations, it was suggested that this paragraph include what factors an agency should consider when assessing the value of oral argument and amicus participation. The report does not specify what factors may or should be part of such an assessment.

Commented [WC11]: Note to Committee: Consider adding "in their appellate system based on the agencies' identified objectives for appellate review and should..."

Commented [GY12]: Member comment: it might be useful to add the word "precedential" before "case-by-case adjudication" so as to avoid covering "non-precedential" decisions (especially since the issue of "precedential" versus "non-precedential" decisions is addressed in a previous paragraph). Would it not make sense to limit the paragraph to decisions that have precedential/ generally-binding impact?



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

Public Disclosure and Transparency

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

150 21. Regardless of whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs
151 their appellate review system, agencies should consider announcing, livestreaming, and
152 maintaining video recordings on their websites of appellate proceedings (including oral
153 argument) that present significant legal and policy issues likely to be of interest to
154 regulated parties and other members of the public. Brief explanations of the issues to be
155 addressed by oral argument might usefully be included in website notices of oral
156 argument.

157 22. Agencies should include on their websites brief and accessibly written explanations as to
158 how their internal decision-making processes work and, as appropriate, include links to
159 explanatory documents appropriate for public disclosure. Specific subjects agencies
160 should consider addressing include: the assignment of cases to adjudicators (when fewer
161 than all the programs adjudicators participate in a case), the role of staff, and the order in
162 which cases are decided.

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

Commented [GY13]: Member comment: suggest deleting “Government in the Sunshine Act” as it would not apply in most situations. Instead, suggest beginning as: “Appellate review system, agencies should consider announcing, livestreaming, and maintaining audio or video recordings...”

Commented [GY14]: Member comment: suggest adding “process of” here.



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

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

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Commented [GY15]: Member comment: suggest adding a new paragraph at the end that would say: "Agencies should affirmatively solicit suggestions for rule changes on its website." (Drawing this from the report at page 27, footnote 119.)