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


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

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

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

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

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

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

RECOMMENDATION

Objectives of Appellate Review

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

Procedures for Appellate Review

2. Agencies should promulgate and publish procedural regulations governing agency appellate review in the *Federal Register* and codify them in the Code of Federal Regulations. These regulations should cover all significant procedural matters pertaining to agency appellate review, including but not limited to the following:

(a) the objectives of the agency’s appellate review system;
(b) the timing and procedures for initiating review, including any available interlocutory review;
(c) the standards for granting review, if review is discretionary;
(d) the standards for permitting participation by interested persons and amici;
(e) the standard of review;
(f) the allowable and required submissions by litigants and their required form and contents;
(g) the procedures for designating decisions as precedential and the legal effect of such designations;
(h) the record on review and the opportunity, if any, to submit new evidence;
(i) the availability of oral argument or other form of oral presentation;
(j) the standards of and procedures for reconsideration and reopening, if available;
(k) any administrative or issue exhaustion requirements that must be satisfied before seeking agency appellate or judicial review;
(l) openness of proceedings to the public and availability of video or audio streaming or recording; and

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

3. Agencies should include in the procedural regulations governing their appellate programs: (a) a brief statement or explanation of each 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.

4. When revising existing or adopting new appellate rules, agencies should consider the appellate rules (Rules 400-450) in the Administrative Conference’s Model Rules of Agency Adjudication (rev. 2018) in deciding what the rules should provide.

5. When materially revising existing or adopting new appellate rules, agencies should voluntarily use notice-and-comment procedures or other mechanisms for soliciting public input, notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the costs clearly outweigh the benefits of doing so.

Case Selection for Appellate Review

6. Based on the agency-specific objectives of appellate review, agencies should decide whether the granting of review should be mandatory or discretionary (assuming they have statutory authority to decide); if discretionary, the criteria for granting review should track the objectives of the appellate system, and they should be published in the procedural regulations.

7. Agencies should consider implementing procedures for sua sponte appellate review of non-appealed hearing-level decisions as well as for hearing-level adjudicators to refer cases or issues to the appellate entity for review.
Appellate Decision-making Processes and Decisions

8. Whenever possible, agencies should consider maintaining electronic case management systems (eCMS) that ensure that hearing records are easily accessible to appellate adjudicators. Such an eCMS may include the capability for electronic filing.

9. Although the randomized assignment of cases to appellate adjudicators is an appropriate default docketing method for an agency appellate system, agencies should consider the potential benefits of sorting and grouping appeals on the appellate docket, including reduced case processing times. Criteria for sorting and grouping cases may include: size of a case’s record; complexity of a case’s issues; subject matter of a case; and similarity of a case’s legal issues to those of other pending cases.

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

11. 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.

12. Taking agency resources into account, agencies should strive for readable, quality appellate decisions with an emphasis on plain language and ease of judicial review. Agencies should explore the use of decision templates and other quality-improving measures.

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

14. Agencies should assess the value of oral argument and amicus participation in their appellate system and should establish clearer rules for both.
15. 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.

16. 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
adjudicators of any policies governing whether and when they will acquiesce in the
decisions of the federal courts of appeals.

17. Agency appellate systems in which 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.

18. 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.

19. 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.
Public Disclosure and Transparency

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

21. Regardless of 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 and other members of the public. Brief explanations of the issues to be addressed by oral argument might usefully be included in website notices of oral argument.

22. 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.

23. 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.

24. 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.

25. 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.