



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Model Adjudication Rules (rev. 2018)

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ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

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* The Model Adjudication Rules and their related comments do not necessarily represent the views of the members' organizations. We are grateful for the contributions of colleagues of and alternates for our members, including Patricia M. Allen of the Executive Office for Immigration Review, Jack Barrett of the Bureau of Consumer Financial Protection, Brian J. Haring of the Office of Medicare Hearings and Appeals, and Kenny A. Wright of the Federal Trade Commission.

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

Vice Chairman's Foreword

[Placeholder]

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

Model Adjudication Rules (rev. 2018)
by Kent H. Barnett¹

The Administrative Conference of the United States (ACUS) promulgated 58 Model Adjudication Rules (MARs) and accompanying comments in 1993 for certain federal agency proceedings. Specifically, the MARs applied to “formal adjudication,” defined as trial-type proceedings—whether conducted pursuant to the federal Administrative Procedure Act (APA), other statutes, or agency regulations or practice—that offer an opportunity for an oral, fact-finding proceeding before an agency adjudicator, whether or not an administrative law judge (ALJ). The purposes of the MARs were to simplify and to render more consistent agency procedural rules. To that end, ACUS encouraged agencies to adopt the MARs in toto. But recognizing agencies’ different enabling statutes, different kinds of adjudications, and varying resources, ACUS encouraged agencies, in the alternative, to adopt individual rules and to use the MARs as a guide in crafting or revising their adjudication rules.

In July 2016, ACUS assembled the current MARs Working Group to consider revising the MARs. At its initial meeting, ACUS asked the Working Group to consider whether to revise the MARs in light of ACUS’s newly developed resources on agency adjudication, revisions to the Federal Rules of Civil Procedure (FRCP) since 1993, the increased use of electronic docketing systems and discovery, changes to agency-adjudication practices, and new and revised agency procedural rules. The Working Group met together or in smaller subgroups to discuss and propose revisions for the MARs numerous times over the next two years.

To obtain additional input from agencies, the Working Group administered a detailed survey to thirty-one federal agencies in the fall of 2016. The survey posed as many as 104 questions (depending on how the responding official answered posed questions) concerning a variety of procedural topics, asked agencies to identify matters for the Working Group’s consideration, and requested that agencies identify revisions or current areas of concern to their procedural adjudication rules within the past 15 years. Seventeen agencies responded and provided comments concerning approximately thirty topics.

Although some of the agencies’ concerns were either already addressed in the MARs or agency-specific concerns, agencies identified the following key areas for the Working Group’s consideration: adjudicator bias, attorney conduct, electronic filings and discovery, confidential and privileged information, expert witnesses, technological developments concerning the recording and holding of “virtual” hearings, and expedited administrative review. The Working Group used these survey responses as a guide in proposing revised model rules and comments.

The Working Group completed its initial draft revisions of the MARs in January 2018. The Working Group then shared its draft and met with the ACUS Committee on Adjudication in February 2018. The Working Group also solicited public comment after noticing its draft on the Federal Register in January 2018. After receiving the Committee’s and the public’s comments, the Working Group revised its draft and finalized the revised MARs in June 2018. The Working Group then presented the MARs at the June 2018 ACUS Plenary Session.

The Working Group revised wording and phraseology frequently throughout the MARs to

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ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

improve clarity and consistency with other federal statutes or rules. Moreover, the Working Group significantly revised the comments to provide agencies insights into other agencies' experience with the MARs or similar agency rules and to identify other useful materials for agencies to consider when drafting or revising their procedural rules. The most significant revisions to the MARs include the following:

- The revised MARs do not rely upon the term “formal adjudication.” The term commonly refers to “on the record” adjudications governed by the APA (to wit, 5 U.S.C. §§ 554, 556–557) over which an ALJ presides. But the term is misleading because numerous adjudications not governed by those APA sections or presided over by an ALJ have procedures whose formality rivals or exceeds adjudications with ALJs.² As with the original MARs, the revised MARs are not designed for inquisitorial proceedings, although they may be instructive.
- The Working Group has sought, where appropriate, to render the revised MARs more consistent with the FRCP as to the filing and service of records. These revisions include protecting private information, revising time-computation formulas, and revising the filing party’s certification requirements.
- The revised MARs include new rules on, among other things, foreign-language interpretations and translations, and sequestration of witnesses.
- The revised MARs’ discovery protective-order provisions account for various revisions to the FRCP.
- The revisions also recognize technology and provide adjudicators with discretion to use technology in a wide array of matters, including hearings and discovery. Moreover, the revised MARs provide significant revisions to the closing and reopening of the record.
- The revised MARs incorporate certain revisions to the FRCP and the Federal Rules of Appellate Procedure (FRAP). For instance, the revised MARs add new rules concerning the appellate record (Rule 411), additional evidence (Rule 412), and amicus briefs (Rule 421).

The Working Group intends these revised MARs to be applicable to a broad array of agency adjudications. The Working Group eschewed recommended rules, such as one concerning aggregate litigation,³ that would either likely affect only a small number of agencies or types

² See MICHAEL ASIMOW, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORT & RECOMMENDATIONS, ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 2–3 (2016) (referring to Type A, Type B, and Type C adjudications to indicate “on the record” ALJ adjudications governed by the specific adjudication provisions under the APA, non-ALJ adversarial hearings that are not governed by specific adjudication provisions under the APA, and adjudications without a trial-like hearing, respectively).

³ See Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregate Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Michael Sant’ Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2017).

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

of adjudication, or require significant agency-specific revisions.

As with the 1993 MARs, the Working Group encourages agencies to adopt the revised MARs in toto, after accounting for agency-specific matters that the MARs identify and revising comments as appropriate for use in agency-specific proceedings. For agencies that do not wish or are unable to adopt all revised MARs, the Working Group encourages them to adopt individual rules and use individual rules and comments as guides when drafting or revising their procedural rules. As agencies use the revised MARs and as they consider other agencies' experiences, they improve the uniformity, rationality, and consistency of federal administrative adjudication.

Table of Contents

GENERAL PROVISIONS

Rule 100. Definitions 1

Rule 101. Scope of Rules 3

Rule 102. Construction, Modification, or Waiver of Rules 4

Rule 110. Adjudicator Assignment 5

Rule 111. Adjudicator Authority 6

Rule 112. Adjudicator Impartiality, Recusal or Disqualification, or Unavailability 8

Rule 113. Individuals with Disabilities 11

Rule 114. Oral Testimony Interpretation and Interpreters 12

Rule 115. Foreign-Language Documents and Translations 14

Rule 120. Ex Parte Communications 15

Rule 121. Separation of Functions 17

Rule 130. Rights of [Docketed Parties], Intervenors, and Limited Participants 18

Rule 140. Representation 19

Rule 150. Form and Content of Filed Documents; Privacy Protections for Filings 20

Rule 151. Service and Filing of Documents 23

Rule 152. Amendment or Supplementation of Filed Documents 27

Rule 160. Time Computation 28

Rule 170. Motions 29

Rule 171. Subpoenas 30

Rule 180. Withdrawal or Dismissal 31

THE PREHEARING STAGE

Rule 200. Initiation of Adjudication 32

Rule 201. Consolidation or Severance of Adjudication 33

Rule 210. Intervention 34

Rule 211. Limited Participation 35

Rule 220. Prehearing, Settlement, and Other Conferences 36

Rule 230. General Discovery Provisions 38

Rule 231. Scope of Discovery 40

Rule 232. Supplementation of Discovery Response 41

Rule 233. Interrogatories 42

Rule 234. Depositions 43

Rule 235. Requests for Production of Records or Things for Inspection or Other Purposes 45

Rule 236. Requests for Admissions 46

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

Rule 237. Protective Order Concerning Discovery	48
Rule 238. Motion to Compel Discovery	50
Rule 239. Sanctions for Failure to Comply with Discovery Obligations	51
Rule 240. Settlement and Alternative Dispute Resolution	52
Rule 245. Prehearing Statement.....	54
Rule 250. Summary Decision	55

THE HEARING

Rule 300. Scheduling, Location, and Notice of Hearing	56
Rule 301. Type or Manner of Hearings	57
Rule 302. Sequestration of Witnesses.....	58
Rule 310. Failure of Party to Appear	59
Rule 320. Admissibility of Evidence.....	60
Rule 321. Objections to Evidence and Offers of Proof	61
Rule 322. Confidential, Sensitive, and Privileged Information.....	62
Rule 323. Official Notice.....	63
Rule 324. Evidentiary Stipulations.....	64
Rule 325. Written Testimony	65
Rule 326. Oaths and Oral Examination	66
Rule 327. Exhibits and Records	67
Rule 328. Witness Fees; Refusal to Testify.....	68
Rule 329. Burden of Going Forward with Evidence	69
Rule 330. Closing of the Administrative Record.....	70
Rule 340. Proposed Findings; Closing Arguments; Briefs.....	71
Rule 350. Record of Hearing	72
Rule 360. Decision of Adjudicator	73
Rule 370. Reopening of Case	74

ADMINISTRATIVE REVIEW

Rule 400. Interlocutory Review	75
Rule 410. Petitions for Review	77
Rule 411. Record Before the Agency	79
Rule 412. Additional Evidence	80
Rule 420. Appellate Briefs.....	81
Rule 421. Amicus Briefs	82
Rule 430. Oral Argument	83
Rule 440. Final Decision	84

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

Rule 450. Reconsideration.....85

GENERAL PROVISIONS

Rule 100. Definitions

- (A) “Adjudication” means a trial-type proceeding—whether conducted pursuant to the federal APA (5 U.S.C. § 551 et seq.), other statutes, or agency regulations or practice—that offers an opportunity for fact-finding before an adjudicator, whether or not an administrative law judge (ALJ).
- (B) “Adjudicator” is one or more individuals who preside(s) at the reception of evidence at a hearing. An adjudicator may be an ALJ or any other presiding official who is authorized to so act.
- (C) “Administrative record” includes the transcript or recording of the hearing and any transcribed or recorded conferences or oral arguments before the Adjudicator, all exhibits and stipulations filed in the proceeding, all exhibits excluded from the proceeding but preserved for purposes of administrative review, all party and limited participant filings, all written orders or decisions of the Adjudicator, any disclosure of ex parte contacts required under Rule 120 (Ex Parte Communications), any written statements of settlement, and any other matters required or permitted under these rules to be included, whether with or without leave from the Adjudicator.
- (D) “Agency” is an agency as defined in 5 U.S.C. § 551.
- (E) “Alternative dispute resolution” means any procedure that is used in lieu of or in addition to an adjudication to resolve issues in controversy, including, but not limited to: settlement, negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration, or any combination thereof.
- (F) “[Docketed Party]” is a named person required by law to participate in an adjudication.
- (G) “Intervenor” is a person either entitled by law or permitted by the agency to participate with full or limited rights as a party, despite not being a [Docketed Party] to an adjudication.
- (H) “Limited participant” is a person, who is not a party, permitted by agency discretion to participate in an adjudication.
- (I) “Motion” means a request made to the Adjudicator or to [the Agency], as may be appropriate.
- (J) “Party” is a [Docketed Party], agency, or intervenor in an adjudication.
- (K) “Person” includes an individual, partnership, corporation, association, public or private organization, or governmental agency.
- (L) “Record” (noun) is a document or other information that is inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form.
- (M) “Record” (verb) means to preserve or convert proceedings, discussions, or other actions in permanent form via audio, video, stenographic, or other reasonable means.
- (N) “Settlement Adjudicator” is an adjudicator other than the adjudicator presiding over a case, whom the [Chief Adjudicator] appoints to facilitate settlement or other dispute resolution under Rule 240 (Settlement and Alternative Dispute Resolution).

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

Official Comment

1. In these rules, “[the Agency]” is used to mean “the adopting agency,” and whenever “[the Agency]” appears in a rule, the adopting agency would substitute its name for “[the Agency]” in the particular rule.
2. (to subsection (B)): Under the APA (5 U.S.C. § 556(b)), the agency head or one or more members of the agency may preside over agency adjudications. Few agencies, however, make use of these alternatives.
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), who provides administrative oversight of or assistance to agency adjudicators. Whenever “[Chief Adjudicator]” appears in one of these rules, an agency would substitute the appropriate authority for “[Chief Adjudicator]” in the particular rule. Likewise, agencies may choose to substitute the title(s) of their adjudicators for “adjudicator” throughout these rules.
4. (to subsection (E)): The definition of alternative dispute resolution is based on 5 U.S.C. § 571(3).
5. (to subsection (F)): Whenever “[Docketed Party]” or “[Docketed Parties]” appear in one of these rules, an agency would substitute for “[Docketed Party]” in the particular rule the appropriate term(s), e.g., petitioners, respondents, applicants, defendants, and agency staff.
6. (to subsection (H)): Similar in concept to an amicus curiae in judicial proceedings, a “limited participant” is a nonparty who, in the tribunal’s discretion, is permitted to offer written or oral submissions, or both.
7. (to subsection (J)): The definition of “party”—by including named parties, agencies, and intervenors with limited or full participatory rights—is consistent with the definition of “party” in the APA, 5 U.S.C. § 551(3) (“[A] ‘party’ includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.”).
8. (to subsections (F), (G), and (H)): The status of [Docketed Parties], intervenors, and limited participants is addressed in Rule 130 (Rights of [Docketed Party], Intervenors, and Limited Participants).
9. (to subsection (L)): The definition of “record” is based on section 1–201(b)(31) of the Uniform Commercial Code.

Rule 101. Scope of Rules

- (A) These rules of practice and procedure are applicable to the following types of adjudications before [the Agency]:
 - (1) [name/statutory citation]
 - (2) [name/statutory citation]
 - (3) [name/statutory citation]
- (B) These rules are not applicable to the following types of adjudications before [the Agency]:
 - (1) [name/statutory citation]
 - (2) [name/statutory citation]
 - (3) [name/statutory citation]
- (C) On any procedural question not addressed by specific statute, the APA, or these rules, the Adjudicator is guided so far as practicable by the FRCP and FRAP.

Official Comment

1. If an agency adopts this rule, it should identify included and excluded adjudications by name and authorizing statute, i.e., the U.S. Code citation. As an alternative to this rule, an agency may wish to adopt a Scope of Rules provision that indicates that these rules apply to all of its adjudications.
2. (to subsection (C)): The FRCP 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. In fact, several agencies use them for that purpose, particularly insofar as discovery matters are concerned. *See, e.g.*, 29 C.F.R. § 2700.1(b) (Federal Mine Safety and Health Review Commission) (general guidance); 28 C.F.R. § 76.21(a) (Department of Justice) (discovery).
3. To ensure that parties are aware of agency procedural rules and their scope, agencies should make their adjudication materials readily accessible on their websites. *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

Rule 102. Construction, Modification, or Waiver of Rules

- (A) These rules must be liberally construed to secure the fair, expeditious, and inexpensive determination of all adjudications.
- (B) These rules must be interpreted, to the extent permissible, to be consistent with the U.S. Constitution, the APA, and other applicable statutory law. To the extent that any of these rules are not consistent, applicable constitutional or statutory law controls.
- (C) Except to the extent that waiver or modification would otherwise be contrary to law, the Adjudicator 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.

Official 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)*. However, sometimes circumstances arise that these rules may not address. To allow the Adjudicator to adapt to such circumstances, a specific waiver provision is included.

Rule 110. Adjudicator Assignment

Adjudications must be presided over by an adjudicator designated by the [Chief Adjudicator].

Official Comment

1. The timing and assignment of the Adjudicator may vary from agency to agency. Under 5 U.S.C. § 3105, ALJs are to be “assigned to cases in rotation so far as practicable.”

Rule 111. Adjudicator Authority

The Adjudicator has all authority necessary to conduct fair, expeditious, and impartial adjudications. Such authority includes, but is not limited to, the authority to:

- (A) administer oaths and affirmations;
- (B) issue subpoenas authorized by law;
- (C) receive relevant evidence and rule upon the admission of evidence and offers of proof;
- (D) preside over depositions or cause depositions to be taken when the ends of justice would be served;
- (E) regulate the course of the hearing and the conduct of persons at the hearing;
- (F) 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) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
- (H) require the attendance at any conference held pursuant to Rule 111(F) of at least one representative of each party who has authority to negotiate concerning resolution of the issues in controversy;
- (I) dispose of procedural motions;
- (J) make or recommend decisions;
- (K) call and question witnesses;
- (L) order curative measures to remedy the filing or other disclosure of sensitive information, as identified in Rule 150(C), that should have been redacted under these rules;
- (M) impose appropriate sanctions against any party or person failing to obey her/his order, refusing to adhere to reasonable standards of orderly and ethical conduct, or refusing to act in good faith; and
- (N) take any other action authorized by [the Agency].

Official Comment

1. The authority of adjudicators enumerated by this rule generally is described by the APA (5 U.S.C. § 556(c)). An adjudicator can be delegated authority enumerated in these rules only if the agency itself has the authority. For example, not all agencies may have the authority to issue subpoenas or to administer oaths. Consequently, such an agency may not delegate to its Adjudicator this authority. Each agency, therefore, must consult its organic statutory authority to determine the extent of enumerated authority it possesses before delegating particular authority to its adjudicators.
2. (to subsection (C)): Under this provision, the Adjudicator may on her/his own authority receive evidence into the administrative record.
3. (to subsection (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.

4. (to subsection (K)): Each agency should decide whether the Adjudicator should be able not only to question witnesses, but also to call them.
5. (to subsection (M)): Appropriate sanctions may include refusing to allow the support or opposition to a claim or defense, prohibiting the introduction of designated evidence, excluding testimony, or expelling a party or person from the hearing.
6. (to subsection (N)): Agency authority can be found in, e.g., rules and precedential orders.

Rule 112. Adjudicator Impartiality, Recusal or Disqualification, or Unavailability

- (A) *Impartiality.* The Adjudicator must conduct his or her functions in an impartial manner.
- (B) *Recusal of Adjudicator.*
- (1) *Recusal by Adjudicator.* The Adjudicator may at any time recuse her/himself.
 - (2) *Disqualification Sought by Party.*
 - (a) Before the filing of the Adjudicator’s decision, any party may move that the Adjudicator recuse her/himself on the ground of personal bias or basis for 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 must rule upon the motion, stating the grounds therefor. If the Adjudicator concludes that the motion is timely and has merit, the Adjudicator must promptly recuse her/himself and withdraw from the adjudication. If (s)he does not recuse her/himself and withdraw from the adjudication, (s)he must proceed with the adjudication.
 - (c) A party may seek review of the Adjudicator’s denial of a motion for disqualification only at the conclusion of the proceeding, unless the requirements of Rule 400 (Interlocutory Review) are satisfied.
- (C) *Unavailability of Adjudicator.* If the [Chief Adjudicator] finds that the Adjudicator is unable to perform her/his duties or otherwise becomes unavailable, the [Chief Adjudicator] must designate another adjudicator to serve.

Official Comment

1. The APA (5 U.S.C. § 556(b)) provides as follows: “The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee 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, the agency shall determine the matter as part of the record and decision in the case.”
2. (to subsection (B)): *See* Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 5, 81 Fed. Reg. 94,312 (Dec. 23, 2016) (recommending that agencies’ procedural regulations provide that adjudicators can be disqualified due to bias, and that procedural regulations and manuals explain when and how parties should raise claims of bias and how agencies can resolve them). This rule does not specify a recusal or disqualification standard. Others have noted the difficulty of “finding the appropriate, specific set of governing [ethical] rules” for agency adjudicators. *See, e.g.,* James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1194 (2006) (citing various state and federal standards governing recusals and other ethical considerations for administrative adjudicators); *see generally* Patricia E. Salkin, *Judging Ethics for Administrative*

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

Law Judges, 11 WIDENER J. PUB. L. 7 (2002) (discussing the treatment of ethics primarily for state administrative adjudicators). Because promulgating a code of ethical conduct for adjudicators goes beyond the scope of these rules, each agency should determine the appropriate standard for recusal or disqualification in its adjudications. Agencies may find useful guidance in the ABA Model Code of Judicial Conduct, which applies to both judicial officers and administrative adjudicators. ABA Model Code of Judicial Conduct (2011). Agencies should consider the ethical standards of the Office of Government Ethics (OGE), 5 C.F.R. pt. 2635, when determining the appropriate standards for recusal or disqualification, especially as they relate to the disqualification of federal employees from participating in particular matters due to the appearance of loss of impartiality, *id.* §§ 2635.501–2635.503. Agencies may supplement OGE’s ethical standards pursuant to executive order and OGE regulation. Exec. Order 12,764, § 3, 54 Fed. Reg. 15,159, 15,160 (April 14, 1989), *amended by* Exec. Order 12,731, 55 Fed. Reg. 42,547 (Oct. 17, 1990); 5 C.F.R. § 2635.105. *See also* Admin. Conf. of the U.S., Proposed Recommendation, *Administrative Judges*, ¶ 7 (April 19, 2018) (recommending that agencies consider providing guidance on OGE’s standards governing disqualification of federal employees from participating in particular matters due to the appearance of loss of impartiality); *id.* ¶ 9 (recommending that agencies consider adopting supplemental regulations pertaining to the disqualification of administrative judges (i.e., non-ALJ adjudicators) from particular hearings that augment OGE’s standards governing disqualification of federal employee from matters due to the appearance of loss of impartiality).

3. (to subsection (B)(2)): A party must seek the Adjudicator’s disqualification promptly after learning the disqualifying information that serves as the basis for the motion. A party may not await the outcome of the Adjudicator’s decision to determine if the alleged bias affected the decision if the party, before the Adjudicator issued her/his decision, knew (or should have known) of the information that serves as the basis for the motion. This rule does not limit a party’s ability to assert that an adjudicator’s (or an agency’s) decision evidences the Adjudicator’s improper bias against a party. For examples of cases examining allegations of improper bias on the part of adjudicators, see *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); *Antoniou v. SEC*, 877 F.2d 721 (8th Cir. 1989).
4. (to subsection (B)(2)): An agency may consider assigning another adjudicator who is not involved with the proceeding in which a disqualification motion is filed (or a related proceeding) to decide the motion.
5. (to subsection (C)): For example, an adjudicator may become otherwise unavailable because (s)he becomes ill or incapacitated, retires, withdraws, is disqualified, obtains other employment, or the demands of another case so require.
6. (to subsection (C)): 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 or otherwise provide a fair adjudication.

7. (to subsection (C)): Nothing in this rule is intended to restrict the authority of the [Chief Adjudicator] to manage the agency's docket by transferring cases from one adjudicator to another before the hearing for administrative convenience or efficiency.

Rule 113. Individuals with Disabilities

For any portion of the proceeding (including in connection with any conference or hearing), the Adjudicator must take due account of any disclosed physical or mental disability of a party, limited participant, representative, or witness.

Official Comment

1. An individual may not be excluded from participating in an adjudication because of a disability. The Rehabilitation Act expressly provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency . . .” 29 U.S.C. § 794(a). The Americans with Disabilities Act similarly provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.
2. Each agency is obligated to comply with the Americans with Disabilities Act, the Rehabilitation Act, and applicable federal regulations concerning appropriate actions to facilitate the participation of disabled individuals. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 301 (1985). (“[T]o assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made.”). The Adjudicator may be specifically empowered to take appropriate action to ensure the appropriate participation of disabled individuals. *See, e.g., U.S. EEOC Handbook for Administrative Judges*, July 1, 2002, Chapter 7, II, C. available at <https://www.eeoc.gov/federal/ajhandbook.cfm#hearing>.
3. Agencies should consider and adopt more detailed procedures to address the needs of hearing and visually impaired parties, limited participants, representatives and witnesses, including rules regarding the payment of fees or costs incurred to address the impairment.

Rule 114. Oral Testimony Interpretation and Interpreters

- (A) Any party or limited participant who anticipates a need for an interpreter during any part or all of an adjudication must promptly notify the Adjudicator and identify any specific language and dialect for which an interpreter is needed and the participant or participants who will require the interpretation services.
- (B) Any interpreter must establish her or his qualifications to the satisfaction of the Adjudicator and state, under oath, that the interpreter is (1) competent to interpret the identified language and dialect, and (2) will do so accurately to the best of the interpreter's ability, before performing interpretive services for the proceeding.
- (C) A qualified interpreter who testifies under oath to her or his qualifications, and who promises to translate accurately to the best of his or her ability, is permitted to assist with the proceeding, subject to general rules of procedure or evidence applicable to any party, limited participant, or witness.

Official Comment

1. The federal government is committed to language access. *See, e.g.*, Exec. Order No. 13,166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 11, 2000).
2. Rule 326 (Oaths and Oral Examination) specifically provides for the administration of oaths to interpreters at the hearing stage of a proceeding.
3. Each agency will need to determine who bears the cost of interpretation. Some agencies may choose to require the party or limited participant calling a witness to bear the expense and burden of providing interpretation. Other agencies may wish to adopt a rule requiring that an interpreter be provided at agency expense for particular specified proceedings or in certain identified circumstances. *See, e.g.*, Social Security Administration Hearings, Appeals, and Litigation Law Manual at I-2-6-10, available at <https://www.ssa.gov/OP Home/hallex/I-02/I-2-6-10.html>.
4. Some foreign language interpreters are “certified” by an accrediting entity. *See, e.g.*, American Translators Association (<https://www.atanet.org/certification>). An agency may
 - (1) require a “certified” interpreter, *see* 28 U.S.C. § 1827 (requiring the Director of the Administrative Office of the U.S. Courts to develop a program for certified and otherwise qualified interpreters for the courts of the United States),
 - (2) adopt a self-certification procedure, *see e.g.*, Immigration Court Practice Manual 3.3(a) and Appendix H, available at https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practice_manual.pdf, or
 - (3) [require membership in a recognized professional translators’ association](#), *see, e.g.*, International Federation of Translators (<http://www.fit-ift.org>).

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

5. This rule derives, in part, from the Immigration Court Practice Manual 4.11, available at https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practice_manual.pdf.

Rule 115. Foreign-Language Documents and Translations

- (A) All documents filed with the agency or offered for the record of a proceeding must be in the English language or accompanied by an authenticated English translation.
- (B) An affidavit or declaration in English by a person who does not understand English must include a separate translator's declaration or affidavit under oath stating that the underlying affidavit or declaration has been read to the person in a language that the person understands and that, to the best of the translator's knowledge, the affiant understood it before signing. The translator's declaration or affidavit must also state facts demonstrating that the translator is competent to translate the language of the witness as well as a representation that the interpretation was true and accurate to the best of the translator's abilities.
- (C) A translator's affidavit or declaration authenticating the translation of a foreign-language document must be typed, signed by the translator, and must identify and accompany the foreign-language document. If a translator's affidavit or declaration is filed in connection with the translation of multiple documents, the certification must specify the documents covered by the translator's affidavit or declaration. A translator's affidavit or declaration must include facts providing a basis to conclude that the translator is competent to translate the language of the document and a representation that the translation is true and accurate to the best of the translator's abilities.
- (D) A translated document accompanied by a proper translator's affidavit or declaration is admissible in the proceedings to the same extent as it would be if it were not translated.

Official Comment

1. This provision derives from the Immigration Court Practice Manual 3.3(a), available at https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practice_manual.pdf. See also 8 C.F.R. § 1003.33.

Rule 120. Ex Parte Communications

- (A) Except as required for the disposition of ex parte matters 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. This provision does not, however, preclude the Adjudicator from consulting with adjudicatory employees such as law clerks.
- (B) Except as required for the disposition of ex parte matters authorized by law,
 - (1) no interested person outside the agency may make or knowingly cause to be made to the [the Agency] 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 Agency] or other employee who is or may reasonably be expected to be involved in the decisional process of the adjudication may 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 Agency], 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 must place in the public administrative record:
 - (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.
- (D) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this rule, [the Agency] or the Adjudicator may, to the extent consistent with the interests of justice, the policy of underlying statutes, and [the Agency'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 apply beginning [time designated by [the Agency]], but in no case do they begin to apply later than when an adjudication is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions apply upon her/his acquisition of such knowledge.

Official Comment

1. This rule is similar to the APA's prohibition on ex parte communications. Subsection (A) is similar to, but broader than, 5 U.S.C. § 554(d)(1). Although the prohibition in 5 U.S.C. § 554(d)(1) extends only to "fact[s] in issue," this rule extends to all matters relevant to the merits of the adjudication. Subsections (B) through (E) are taken from 5 U.S.C. § 557(d)(1).
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 this rule's

proscriptions.

Rule 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 investigative or prosecutorial functions for [the Agency].
- (B) No officer, employee, or agent of [the Agency] engaged in investigative or prosecutorial functions in connection with any adjudication may, 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.

Official Comment

1. See the APA (5 U.S.C. § 554(d)) for separation-of-functions proscriptions for ALJs. Notably, the APA's proscriptions do not apply to other agency adjudicators. To protect non-ALJ adjudicators' independence, agencies should consider requiring separated functions for all agency adjudicators. *See* Admin. Conf. of the U.S., Proposed Recommendation, Administrative Judges (April 19, 2018)).
2. The APA (5 U.S.C. § 554(d)) 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.

Rule 130. Rights of [Docketed Parties], Intervenors, and Limited Participants

- (A) The rights of a [Docketed Party] are determined by statute, these rules, and other applicable law.
- (B) The Adjudicator may, pursuant to statute, these rules, or other applicable law, restrict an intervenor's participation.
- (C) A limited participant may make oral submissions, written submissions, or both, as the Adjudicator permits.

Official Comment

1. The definitions of these three statuses ([Docketed Party], intervenor, and limited participant) are in Rule 100 (Definitions). Rules 210 (Intervention) and 211 (Limited Participation) provide further guidance on intervention or limited participation.
2. Aside from these rules, agencies should consult statutes, agency regulations, or authoritative judicial or agency decisions, which may delineate the participatory rights of various parties and persons.
3. (to subsection (B)): For example, an intervenor may or may not be permitted to participate in offers of settlement.

Rule 140. Representation

- (A) Any person may appear in an adjudication on her/his own behalf, by an attorney, or, if permitted by the adjudicator or agency, by authorized representative who qualifies under this rule. Each person, attorney, or authorized representative must file a notice of appearance. The notice must 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 representative's mailing address and telephone number. Similar notice must also be given for any withdrawal of appearance.
- (B) 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. She/he must file with [the Agency] a written declaration that she/he is currently qualified as provided by this subsection and is authorized to represent the person on whose behalf she/he acts.
- (C) Any person who is not an attorney qualified to appear under Rule 140(B) 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 under Rule 140(D).
- (D) A person is authorized to serve as a representative under Rule 140(C) _____.

Official 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.
2. (to subsections (B) and (C)): The Agency Practice Act limits the authority of agencies to restrict attorneys from practicing before agencies. *See* 5 U.S.C. § 500(b). With respect to most other representatives, an agency may set such qualifications as it sees fit. *See* 5 U.S.C. § 500(c)–(f). Similarly, an agency may wish to add a provision, if applicable, limiting representation by former members or employees in specified circumstances. *See* 16 C.F.R. § 4.1(b) (FTC) (appearances). An agency may also wish to consider adding a provision that would allow a law student to appear, subject to the supervision of an attorney authorized to appear under Rule 140(B).
3. (to subsection (D)): Because of the variety of possible qualifications necessary for different agency adjudications, these Rules do not provide a uniform standard for representative authorization. For examples, see those qualifications for representatives before the Social Security Administration (https://www.ssa.gov/representation/conduct_standards.htm) and the Department of Veterans Affairs (<https://www.benefits.va.gov/vso/index.asp>).

Rule 150. Form and Content of Filed Documents; Privacy Protections for Filings

(A) *Necessary Information.* A filed document must state clearly:

- (1) the name of [the Agency],
- (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, fax number (if any), and email address (if any).

(B) *Specifications.*

- (1) All filed documents created by a party must:
 - (a) be 8 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 in permanent and plainly legible form;
 - (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 must be in the English language or, if in a foreign language, accompanied by an authenticated English translation.

(C) *Confidentiality and Privacy Protections.*

- (1) Unless [the Agency] orders otherwise, in an electronic or paper filing with the agency that contains an individual's social-security number, driver’s license number, passport number, taxpayer-identification number, birthdate, an individual’s mother’s maiden name, the name of an individual known to be a minor, an individual’s physical or email address, an individual’s telephone number, or a financial-account or credit-card number, a party or nonparty making the filing may include only
 - (a) the last four digits of any social-security number and any taxpayer-identification number;
 - (b) the year of an individual’s birth;
 - (c) the first letter of an individual’s mother’s maiden name;
 - (d) the city, state, and country of an individual’s physical address;

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

- (e) a minor's initials; and
 - (f) the last four digits of the financial-account or credit-card number.
- (2) The redaction requirement under this subsection does not apply to the record of a court or other tribunal, if that record was not subject to a redaction requirement when originally filed.
 - (3) The Adjudicator may order that a filing be made under seal with or without redaction. The Adjudicator may later unseal the filing or may order the person who made the filing to file a redacted version for the public administrative record. [The Agency] must retain the unredacted copy as part of the administrative record.
 - (4) For good cause, the Adjudicator may order redaction of additional information, including national security, business-proprietary, medical, or other sensitive personal information.
 - (5) A person waives the protection of this subsection as to the person's own information by filing it without redaction and not under seal.
- (D) *Signature.* The original of every filed document must 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, that it is not interposed for delay, and that it complies with this rule.

Official Comment

1. Attention is directed to related rules: Rule 140 (Representation), Rule 151 (Service and Filing of Documents), and Rule 152 (Amendment or Supplementation of Filed Documents).
2. (to subsection (A)): Because the diverse responsibilities of individual agencies influence which types of filed documents are necessary 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. Agencies should consider including sample document formats (and other appropriate guidance) in an appendix to this rule, especially in adjudications where nonattorneys participate.
3. (to subsection (B)): An agency may wish to consider requiring a table of contents if filed documents such as briefs or memoranda exceed a specified number of pages or words.
4. (to subsection (B)(1)): The specificity of Rule 150(B)(1) reflects requirements generally found in current agency rules. As to filing by electronic means, agencies may want to consider additional specifications consistent with its electronic-filing technology or as such technology evolves. *See* Rule 151 (Service and Filing of

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

Documents).

5. (to subsection (B)(1)(b)): Each agency should determine whether double-sided reproduction is permitted or encouraged.
6. (to subsection (B)(1)(d)): Each agency should consider whether it wishes to designate the type font (e.g., Times New Roman) and the pitch size (e.g., 10 point versus 12 point).
7. (to subsection (C)): The privacy protections in this rule are based on FRCP 5.2. Agencies should consider whether they should require the redaction of other sensitive information. *See* Office of Mgmt. & Budget M-07-16, *Safeguarding Against and Responding to the Breach of Personally Identifiable Information*, May 22, 2007. Other common sensitive information may concern Federal Tax Information or Protected Health Information.
8. (to subsection (D)): Where an affidavit is required or permitted under these rules, a sworn declaration made under penalty of perjury may be substituted if it complies with the requirements of 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury).
9. (to subsection (D)): See Rule 151(B)(3) (Service and Filing of Documents) for matters related to electronic signatures.

Rule 151. Service and Filing of Documents

- (A) *Service.* All documents in the adjudication must be served as set forth below.
- (1) *Service by [the Agency].* [The Agency] or the Adjudicator must serve one copy of all orders, notices, decisions, rulings on motions, and similar documents issued by [the Agency] or the Adjudicator upon each party and limited participant in accordance with Rule 151(A)(3) below. Every document served by [the Agency] or the Adjudicator must be accompanied by a certificate of service that provides the information in the form described in Rule 151(C)(2) below.
 - (2) *Service by Party or Limited Participant.*
 - (a) *In General.* Unless these rules provide otherwise or the Adjudicator orders otherwise, each of the following papers must be served on every party and limited participant:
 - (i) a document filed after the document initiating the adjudication under Rule 200 (Initiation of Adjudication);
 - (ii) a discovery paper required to be served on a party or limited participant;
 - (iii) a written motion, except one that may be heard ex parte;
 - (iv) a written notice or appearance or any similar document; and
 - (v) any other document permitted to be filed by [the Agency] rules or by the Adjudicator.
 - (b) *If a Party Fails to Appear.* No service is required on a party who is in default for failing to appear. But a document that asserts a new claim against such a party must be served on that party.
 - (3) *Service: How Made.*
 - (a) *Service on Whom.*
 - (i) If a party or limited participant is represented by an attorney or authorized representative, service under this rule must be made on the attorney or authorized representative unless the Adjudicator orders service on the party or limited participant.
 - (ii) If a party or a limited participant is not represented, service under this rule must be made on the parties and limited participants themselves.
 - (b) *Service in General.* A document is served under this rule by:
 - (i) handing it to the person;
 - (ii) leaving it at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or
 - (iii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;
 - (iv) mailing it to the person's last known address in which event service is complete upon mailing;

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

- (v) leaving it with [the Agency’s] clerk if the person has no known address;
 - (vi) sending it by electronic means if the person consented in writing—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or
 - (vii) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agent designated to make delivery.
- (c) *Using [the Agency] Facilities.* Parties or limited participants who lack access to technology capable of making electronic service may request that the Agency permit the use of [the Agency’s] electronic-transmission facilities to make service.

(B) Filing.

- (1) *Required Filings; Certificate of Service.* Any document after the document initiating the adjudication that is required to be served—together with a certificate of service—must be filed within a reasonable time after service. But unless the Adjudicator orders otherwise, discovery requests and responses must not be filed until they are used in the adjudication.
- (2) *How Filing Is Made—In General.* A document is filed by delivering it:
 - (a) to the appropriate office designated by [the Agency]; or
 - (b) to an adjudicator who agrees to accept it for filing, and who must then note the filing date on the document and promptly send it to [the Agency].
- (3) *Electronic Filing, Signing, or Verification.* Documents may be filed, signed, or verified by electronic means, so long as the electronic means comply with any applicable [Agency] rule.
- (4) *Acceptance by [the Agency].* The appropriate office designated by [the Agency] must not refuse to file a document solely because it is not in the form prescribed by these rules or by an [Agency] practice.

(C) Certificate of Service.

- (1) Every document filed with [the Agency] or the Adjudicator and required to be served upon all parties and limited participants must be accompanied by a certificate of service signed by (or on behalf of) the party making the service, that provides the information in the form described in Rule 151(C)(2) below.
- (2) 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 in this proceeding at the address indicated by [specify the method]:

- (a) [name/address]
- (b) [name/address]

Date: [Month, Day, Year]

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

Signature _____
For _____
Capacity _____”

Official Comment

1. This rule is a substantial revision of the previous version. It incorporates the provisions of FRCP 5, modified where appropriate. Because the FRCP govern the service of documents in the federal courts, and because many state courts have modeled their rules on the FRCP, agency practitioners are likely familiar with FRCP 5, and they and agencies can look to decisions under the FRCP for guidance. FRCP 5 includes provisions relating to the filing of documents and service. The original MARs contained filing provisions in former Rule 150, but they are revised to mirror the language in FRCP 5 and are thus included in Rule 151(B).
2. Agency rules and practice vary considerably regarding how parties serve documents initiating an adjudication. Accordingly, this rule does not prescribe rules for service of such documents. Each agency must consider how parties should do so, taking into consideration the nature of its adjudication process. *See* Rule 200 (Initiation of Adjudication).
3. For time computation, see Rule 160 (Time Computation), which was substantially revised to be consistent with revised FRCP 6.
4. The FRCP contemplate proceedings initiated by seizing property. To the extent an agency has such a proceeding, a suggested rule regarding service is the following:

Seizing Property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.
5. (to subsection (A)(3)(a)): Some agencies regularly have adjudications with numerous parties, limited parties, or both. If that is the case, the agency may want to adopt a rule regarding modifications to service requirements including, for example, rules limiting the class of parties or limited participants on whom pleadings or other documents need be served, and rules providing for the presumed and automatic denial of any cross-claim, counterclaim, or affirmative defense.
6. (to subsections (A)(3)(b)(vi) and (A)(3)(c)): These rules acknowledge and encourage the use of technology in effectuating service and filing. In addition, to the extent agencies maintain or participate in electronic filing and communication services (e.g., PACER), filing and service by those means is permitted so long as there are exceptions for parties who lack access to the necessary technology. If service or filing is by electronic means, agencies should address special problems that may arise such as original signatures, authentication, and retention of hard copies. Each agency must ensure that any filing by electronic means results in the agency

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

having a complete, legible, and permanent copy of the document transmitted. Methods of service of filing may be addressed at the prehearing conference, if any, to determine whether a uniform method of service or filing is desirable or feasible.

7. (to subsections (A) and (B)): A rule may require electronic filing only if reasonable exceptions are allowed.
8. (to subsection (B)(2)): An agency may wish to consider whether the office of the Adjudicator should be designated as a filing location under this rule.
9. (to subsection (B)(3)): If an agency does not provide for electronic filing, or if it does but permits paper filing from parties who do not have access to technology necessary for electronic filing, an agency must decide how many paper copies are required and who is authorized to change the number of required copies. Agencies should consider the cost of requiring additional copies.
10. (to subsection (B)(4)): If an agency adopts this rule requiring that it must accept a nonconforming document for filing, it should include a rule providing for a mechanism to allow parties to move to strike a noncomplying document or seek other appropriate relief. Nothing in this rule limits the adjudicator's discretion to reject a document that fails to conform to formatting requirements.

Rule 152. Amendment or Supplementation of Filed Documents

- (A) Until the proceedings under these rules conclude, or the Adjudicator or Agency has made a dispositive ruling, a party must amend or supplement a previously filed document upon learning that the filing is incomplete or incorrect in some material respect.
- (B) The Adjudicator may approve other amendments or supplements to filed documents, when justice so requires.

Rule 160. Time Computation

- (A) In computing any time period prescribed in these rules, the day from which the designated period begins to run is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or federal holiday. Intermediate Saturdays, Sundays, and federal holidays are included in the computation.
- (B) When a party may or must act within a specified time after being served and service is made under Rule 151(A)(3)(b)(iv) (mail), (v) (leaving it with [the Agency]), or (vii) (other means consented to), three days are added after the period would otherwise expire under Rule 160(A).

Official Comment

1. Rule 102 (Construction, Modification, or Waiver of Rules) covers extension of periods.
2. (to subsection (A)): This approach to time computation tracks FRCP 6(a). The earlier version of these rules excluded Saturdays, Sundays, and federal holidays in the computation when the period of time prescribed was seven (7) days or fewer. An agency adopting the new approach should ensure that its time periods are adjusted as necessary to account for this change.
3. (to subsection (A)): For guidance as to what constitutes a federal holiday, see FRCP 6(a)(6). In addition, FRCP 6(a)(3) covers potential, sporadic federal holidays. For instance, on occasion, federal offices are closed for reasons such as the Inauguration or weather. An agency may wish to allow for such contingencies in computing time periods.
4. (to subsection (B)): *See* FRCP 6(d) (Additional Time After Certain Kinds of Service).

Rule 170. Motions

(A) *How Made.*

- (1) All motions must state the basis for the specific relief requested and be in writing, except as provided in Rule 170(A)(2).
- (2) Unless the Adjudicator orders otherwise, a motion may be made orally during a conference or hearing. After providing an opportunity for response, the Adjudicator may rule on the motion immediately or may order that the motion and response be submitted in writing pursuant to Rule 170(A)(1).

(B) Unless the Adjudicator orders otherwise, any party may file a response in support of or in opposition to any written motion within 10 days after service of the motion. If no response is filed within the response period, the party failing to respond will be deemed to have waived any objection to the granting of the motion. The movant will 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 the Adjudicator orders otherwise, the filing of a motion does not stay an adjudication.

(E) All motions and responses thereto must comply with Rule 151 (Service and Filing of Documents).

Official Comment

1. The Adjudicator is not obligated to grant a motion simply because no response is filed.
2. The Agency may wish to consider describing with specificity whether motions for reconsideration are permitted, the scope of matters on which such motions may be filed, the standards necessary for reconsideration and the procedures for briefing and resolving such motions. By way of example, although the FRCP do not contain provisions for motions to reconsider generally, they do include several rules relating to “reconsideration” of certain matters under specified circumstances. *See* FRCP 54(b), 59(e), 60.
3. (to subsection (C)): Agencies must consider the number of days within which parties must seek relief from an ex parte order.

Rule 171. Subpoenas

- (A) Upon a party's request, a subpoena for testimony, records, or things shall be issued by [the Agency].
- (B) 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.

Official Comment

1. Agencies may consider delegating the authority to issue subpoenas to the Adjudicator.
2. This rule is only appropriate if an adopting agency is authorized to issue subpoenas. 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, for instance, a deposition or a hearing.
3. (to subsection (A)): If required by agency procedural rules, a subpoena "shall be issued" on request of a party and on a statement or showing of general relevance and reasonable scope of the evidence sought. *See* 5 U.S.C. § 555(d).

Rule 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 document responding to the [initiating document] or, if there is none, before the introduction of evidence at the hearing.
- (2) 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.
- (3) 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.*

- (1) Any party may move to dismiss the adjudication or any request for relief sought therein for:
 - (a) failure of another party to comply with these rules or with any order of the Adjudicator, or
 - (b) failure to prosecute the adjudication.
- (2) 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.

Official Comment

1. See FRCP 41 (Dismissal of Actions).
2. Motions for failure to state a claim should be made pursuant to Rule 250 (Summary Decision).
3. Agencies that utilize administrative class-action procedures might opt to create a rule authorizing or requiring the Adjudicator to approve settlements reached by the parties in aggregated adjudications (i.e., “agency class actions”). See 29 C.F.R. § 1614.204 (EEOC class-complaint procedures); *id.* § 1614.204(g)(4) (settlement-approval provision); accord FRCP 23(e). For guidance on using aggregation procedures, see Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016).
4. (to subsection (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.

THE PREHEARING STAGE

Rule 200. Initiation of Adjudication

- (A) An adjudication is initiated when _____.
- (B) The document initiating the adjudication must briefly state the following:
- (1) nature of the proceeding,
 - (2) the identity of known parties,
 - (3) the jurisdiction under which the adjudication is initiated,
 - (4) general allegations of fact and the issues to be adjudicated,
 - (5) the legal authority that constitutes a basis for the adjudication, and
 - (6) the nature of the relief sought.

Official Comment

1. For purposes of these rules, preparation for an adjudication, investigation, etc., are not considered part of the adjudication. Many agency rules relating to initiation or commencement of an adjudication are process specific; a complaint, review, a charging letter, an order to show cause, or a petition/request for relief is identified as the particular means of initiating the adjudication. As a consequence, each agency must decide and designate, as guided by statute or agency regulations, when the adjudication is “initiated.”
2. Agency rules should specify the means by which an incomplete or inadequate initiating document may be corrected.
3. Where an adjudication is initiated by the filing of a complaint or similar document, an agency may wish to consider requiring or permitting the filing of an answer or other responsive document. Moreover, the agency should consider how service of the initiating document should occur and on whom the document should be served. Provisions on the service of the initiating document may be included in this rule or Rule 151 (Service and Filing of Documents) with a cross-reference to this rule and Rule 151.
4. Agency rules should be clear as to appropriateness of joinder of parties and claims. *See* FRCP 18, 19, 20.
5. Rule 300 (Scheduling, Location, and Notice of Hearing) addresses expedited proceedings.

Rule 201. Consolidation or Severance of Adjudication

- (A) *Consolidation.* The Adjudicator may, upon a party’s motion or on her/his own authority, 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 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 must not prejudice any rights under these rules and must 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 [the Agency or Chief Adjudicator] orders otherwise, the Adjudicator may by motion or on her/his own authority, for good cause shown, order any adjudication severed with respect to some or all parties, claims, and issues.

Official Comment

1. This rule deals with consolidation of cases or dockets, not joinder of claims or parties. *See* Comment 4, Rule 200 (Initiation of Adjudication). For guidance on developing procedures for assigning similar cases to the same adjudicator or panel of adjudicators, see Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, ¶ 4, 81 Fed. 40,260 (June 21, 2016).
2. (to subsection (A)): Each agency should determine the appropriate authority to order consolidation. In some agencies, a motion for consolidation or severance may more appropriately be made to the [Chief Adjudicator] or [the Agency].
3. (to subsection (A)): In the case of consolidation, the Adjudicator may require the parties to file consolidated pleadings and other filings, which may result in adjudicatory efficiencies.
4. (to subsection (B)): Matters once consolidated may be severed, if appropriate. When deciding whether to sever a matter, the Adjudicator must consider whether severance will lead to inefficient, piecemeal adjudication.

Rule 210. Intervention

- (A) Any person who desires to participate in an adjudication as an intervenor must file a motion to intervene. Unless ordered otherwise by the Adjudicator, a motion to intervene must be filed not later than ____ days after [initiation or notice] of the adjudication.
- (B) A motion to intervene must:
 - (1) specify the legal basis that supports the motion to intervene;
 - (2) set forth the movant’s property, financial, or other interest in the adjudication;
 - (3) specify the 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 may file a response within ____ days after a motion to intervene is filed.
- (D) In ruling on a motion to intervene, the Adjudicator must consider the factors in Rule 210(B). The adjudicator must also specify whether the movant, if granted intervenor status, has full or limited participatory rights. If the Adjudicator grants limited participatory rights, the Adjudicator must specify the nature of the limitations.
- (E) If the Adjudicator determines that a movant does not meet the requirements under this rule to intervene, 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 Rule 211 (Limited Participation).

Official Comment

- 1. (to subsection (A)): For filing requirements, see Rule 151 (Service and Filing of Documents). These rules do not specifically provide for or encourage untimely motions to intervene. However, the Adjudicator may grant an untimely motion if the Adjudicator makes an appropriate finding, e.g., the delay was for good cause, no party will be prejudiced, the public will not be disserved, justice will be served, and the intervention will contribute to the administrative record. In some circumstances, a party’s interest in intervention may arise long after the deadline for intervention. For that reason, the Adjudicator should retain discretion to permit intervention after the deadline has passed. *See* Rule 102 (Construction, Modification, and Waiver of Rules).
- 2. (to subsection (D)): Threshold substantive requirements for intervention vary by agency and may be provided by statute, regulation, or other authority. Agency rules should, as necessary, clarify the substantive requirements for intervention.

Rule 211. Limited Participation

- (A) A person wishing to participate in an adjudication other than as a party must file a motion to participate as a limited participant. The motion must state concisely the reasons why the movant wishes to participate in the adjudication and the extent of participation desired.
- (B) Any party may file a response within ____ days after a motion to participate as a limited participant is filed.
- (C) The Adjudicator may grant the motion, in whole or part, upon finding that the movant will contribute materially to the Adjudicator’s ability to make an informed decision in the adjudication. The Adjudicator must give the movant notice of her/his decision on the motion.

Official Comment

1. See Rule 100(H) (definition of “limited participant”), Comment 6 to Rule 100 (stating that participation by a “limited participant” is similar in concept to participation by an amicus curiae), Rule 130 (Rights of [Docketed Party], Intervenors, and Limited Participants), and Rule 151 (Service and Filing of Documents).

Rule 220. Prehearing, Settlement, and Other Conferences

- (A) With due regard for the convenience of all parties, the Adjudicator may order the parties to participate in one or more conferences, prior to or during the course of the adjudication. Reasonable notice of the time, place, and purpose of the conference(s) must be given to all parties and, if the Adjudicator has permitted their participation in prehearing conferences under Rule 211(C), limited participants. The notice must include a statement that failure to attend any properly noticed conference may lead to the waiver of any objections or agreements reached at the conference between the other participants. The conference may be held in the manner the Adjudicator determines is most efficient and convenient for the parties.
- (B) Parties must fully prepare for a useful discussion of all procedural and substantive issues involved in the conference. Representatives of parties participating in the conference must have authority to negotiate for their [client/principal] and arrive at terms at the conference.
- (C) Unless a party is excused by the Adjudicator for good cause shown or otherwise reserves its position as to issues discussed, a party's failure to participate in a conference, after being served with reasonable notice of its time and place, may constitute a waiver of all objections to any agreements reached in the conference and to any order or ruling with respect to any such agreements.
- (D) The Adjudicator may require that any or all of the following be addressed or furnished before, at, or after, a conference:
 - (1) motions to intervene or to appear as a limited participant;
 - (2) motions for joinder, consolidation, or severance;
 - (3) method(s) of service and filing;
 - (4) identification, simplification, and clarification of the issues;
 - (5) requests for amendment of filed documents;
 - (6) stipulations and admissions of fact and of the content and authenticity of records;
 - (7) the desirability of limiting and grouping witnesses to avoid duplication of testimony;
 - (8) disclosure of the names of expert and other witnesses and of records 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, summaries of testimony, prehearing and expert-witness reports, and other records, with due regard for the convenience of the parties;
 - (10) requests for official notice or that particular matters be resolved by reliance upon the agency's substantive standards, regulations, and rules;
 - (11) the utility of alternative dispute resolution under Rule 240 (Settlement and Alternative Dispute Resolution) and the status of offers of settlement, if any, and any remaining issues impeding settlement;
 - (12) proposed date, time, and place of the hearing, with due regard for the

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

- convenience of all parties;
- (13) motions in limine; and
- (14) such other matters as may aid in the disposition of the adjudication.
- (E) A conference may be recorded, if the Adjudicator orders, and made part of the administrative record.
- (F) The Adjudicator may dispose of any procedural matters on which (s)he is authorized to rule during the course of the conference.
- (G) A summary of actions taken at the conference must be made, whether in a written, audio, or video form. The Adjudicator may elect to make a written statement or order the parties to jointly prepare one for her/his review.

Official Comment

1. Under the APA (5 U.S.C. § 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. In-person conferences may be important in certain circumstances, but telephonic or video conferences may often be more efficient.
2. (to subsection (B)): It is best if a party’s representative at an adjudication has settlement authority. In some cases, however, the availability of the [client/principal] to respond in real-time to proposed agreements reached at the conference may suffice.
3. (to subsection (D)): A prehearing conference under this rule may serve similar purposes to the meet and confer requirements in FRCP 26(f). Agencies may consider developing forms to guide the parties’ discussion in conferences to plan for the disclosure and discovery of information during the prehearing stage.
4. (to subsection (D)(11)): This provision is not intended to mirror FRCP 68 (Offer of Judgment) but instead to inform the Adjudicator of the status of settlement negotiations.
5. (to subsection (E)): Many agencies do not record conferences. But for agencies that do, recording includes, but is not limited to, audio and video recording, stenographic recordation, and other reasonable means. *See* Rule 100(M) (definition of “record” (verb)).
6. (to subsection (G)): If a party objects to the administrative record or summary of actions taken at the conference, that party may file a motion with the Adjudicator.

Rule 230. General Discovery Provisions

- (A) Following the initiation of the adjudication, discovery must begin at, and be completed by, such time as the Adjudicator orders.
- (B) Unless the Adjudicator orders otherwise, parties may obtain discovery by one or more of the following methods:
 - (1) written interrogatories (Rule 233);
 - (2) depositions upon oral examination or written questions (Rule 234);
 - (3) requests for production of records or things for inspection or other purposes (Rule 235);
 - (4) requests for admission (Rule 236); or
 - (5) any other method permitted by the Adjudicator.
- (C) Unless the Adjudicator orders otherwise, the methods of discovery may be used in any sequence.
- (D) Every discovery request, response, or objection under Rules 230(B)(1), (B)(3), and (B)(4), must be signed by at least one attorney of record, or by the party personally. Other parties have no duty to act on an unsigned request, response, or objection. By signing, the attorney or party certifies that, to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, that the discovery request, response, or objection is:
 - (1) consistent with agency rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
 - (2) not made for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
 - (3) not unreasonable, unduly burdensome, or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the adjudication.

Official 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 Rules 230 through 239. Parties should strive to conduct discovery expeditiously and cost effectively.
2. FRCP 26(a) (Required Disclosures), 26(d) (Timing and Sequence), and 26(g) (Certification) provide the basic pattern for agency rules dealing with the matters in this rule. *See also* FRCP 29 (Stipulations About Discovery Procedure).
3. The Adjudicator can control abuse of discovery methods via Rules 237 (Protective Order Concerning Discovery) and 239 (Sanctions for Failure to Comply with Discovery Obligations).

4. (to subsection (A)): An agency may wish to establish by rule when discovery begins and ends rather than leaving this determination to the Adjudicator.
5. (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.
6. (to subsection (B)(3)): Records includes electronically stored information. *See* Rule 100(L) (definition of “record”).
7. (to subsection (D)): An agency may wish to add language indicating that nonspecific objections to discovery are unresponsive.

Rule 231. Scope of Discovery

(A) Parties may obtain discovery

- (1) regarding any matter, not privileged, that is relevant to the claims or defenses of the party seeking discovery or the claims or defenses of another party, including the existence, description, nature, custody, condition, and location of any records, or other tangible things, and the identity and location of persons having knowledge of discoverable matter; and
- (2) that is proportional to the needs of the case, considering the monetary and nonmonetary stakes in the adjudication, the parties' relative access to information, the parties' resources, the importance of the discovery in resolving the adjudication, and whether the burden or expense of the proposed discovery outweighs the likely benefit.

(B) Information within the scope of discovery need not be admissible in evidence to be discoverable.

Official Comment

1. This rule provides a broad scope of discovery, patterned on FRCP 26(b) (Scope of Discovery). Because agencies' discovery practices vary, agencies should consider whether to alter this rule for their adjudications.
2. As revised in 2015, FRCP 26(b)(1) incorporates proportionality into the scope of discovery. Because attorneys are likely to be familiar with the FRCP and because attorneys and agencies can turn to federal decisions concerning proportionality for guidance, this rule incorporates proportionality into the scope of discovery in administrative adjudication.
3. Prehearing procedures that include requirements for exchange of information may assist in narrowing the issues for discovery. *See* Rule 220 (Prehearing, Settlement, and Other Conferences) and 245 (Prehearing Statement).
4. For the interplay between discovery and the Freedom of Information Act, see Admin. Conf. of the U.S., Recommendation 83-4, *The Use of the Freedom of Information Act for Discovery Purposes*, 48 Fed. Reg. 57,463 (Dec. 30, 1983).

Rule 232. Supplementation of Discovery Response

A party who has responded to a request for discovery is under a duty to supplement the response to include information thereafter acquired until all proceedings under these rules conclude, as follows:

- (A) A party has a duty to supplement a response in a timely fashion 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 has a duty to amend a response in a timely fashion if the party later obtains information indicating that:
 - (1) the response was incorrect or incomplete when made, or
 - (2) the response, though correct when made, is no longer true or the circumstances are such that a failure to amend is in substance a knowing concealment of material information.
- (C) An additional duty to supplement responses may be imposed by the Adjudicator's order, by the parties' agreement, or through new requests before the hearing for supplementation of prior responses.

Official Comment

1. See FRCP 26(e), which imposes an obligation to supplement or amend discovery responses under particular circumstances.

Rule 233. Interrogatories

- (A) Any party may serve upon any other party written interrogatories.
- (B) Each interrogatory must be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for the objection must be stated in place of an answer. The answers must be signed by the person making them, and the objections signed by the attorney or other representative making them. Answers and objections must be made within ____ days after the service of the interrogatories. The interrogating party may move for an order under Rule 239 (Sanctions for Failure to Comply with Discovery Obligations) with respect to any objection or other failure to answer an interrogatory.
- (C) An otherwise proper interrogatory 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. The Adjudicator may, however, 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) If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's records, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:
 - (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and
 - (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

Official Comment

1. See FRCP 33 (Interrogatories to Parties).
2. (to subsection (A)): If the agency chooses to authorize parties to serve written interrogatories, the agency should consider whether it wishes to limit the number of interrogatories that may be propounded.

Rule 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 records or materials by the witness at the deposition.
- (1) The notice must 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 records and materials that the witness is requested to produce.
 - (2) The notice must 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 noticed, the organization so named must 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 must testify as to matters reasonably known to them.
- (C) *Procedure at Deposition.* Depositions may be taken before any disinterested person having authority to administer oaths in the place where the deposition is to be taken. Each witness deposed must be placed under oath or affirmation, and the other parties must 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 must be reduced to writing, read by or to and subscribed by the witness, and certified by the person before whom the deposition is 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 noticing the deposition must make appropriate arrangements for necessary facilities and personnel and bear the recording expenses.
- (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 improper questioning or conduct. Upon request for suspension, the deposition is 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 under Rule 237 (Protective Order Concerning Discovery) and provide for resumption of the deposition.
- (E) *Foreign Country Deposition.* Where a deposition is taken in a foreign country, it may be taken before a person having authority 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.

Official Comment

1. As with interrogatories, agencies should determine how many depositions may be noticed without an order from the Adjudicator. Agencies may also consider imposing durational limits on noticed depositions. *See* FRCP 30(d)(1).
2. (to subsection (A)): When a deposition involves parties or witnesses outside the continental United States, an agency may consider extending the notice period.
3. (to subsection (A)): For matters related to witness fees for a deponent, see Rule 328 (Witness Fees; Refusal to Testify).
4. (to subsection (A)): If a non-party witness refuses to appear pursuant to a notice, the [Agency] may issue a subpoena under Rule 171 (Subpoenas).
5. (to subsection (C)): Unless the parties otherwise agree, the party noticing the deposition bears the expense of the recording.
6. (to subsection (E)): In foreign countries, depositions may have to be taken pursuant to applicable treaties and protocols.

Rule 235. Requests for Production of Records or Things for Inspection or Other Purposes

- (A) Any party may serve on any other party a request to produce or to permit the party, or someone acting on its behalf, to inspect and copy any specified records, or to inspect and copy, test, or sample any tangible things, within the scope of discovery and that are in the possession, custody, or control of the party upon whom the request is served.
- (B) If the records to be produced are stored in electronic format, the records must be produced in the format required by agency rule or regulations. In the absence of general rules or regulations, the Adjudicator should require the parties to reach an agreement about the format of the production, e.g., native format, pdf files, or paper versions of the electronically stored records. If the parties cannot agree on the format of production, the Adjudicator may order production in a reasonable format.
- (C) 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.
- (D) Each request must set forth with reasonable particularity the property to be inspected and must specify a reasonable time, place, and manner for making the inspection and performing the related acts.
- (E) The party upon whom the request is served must respond within _____ days after the service of the request. The response must 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 must be stated.

Official Comment

1. (to subsections (A) and (B)): *See* Rule 100(L) (definition of “record”).
2. (to subsection (B)): In proceedings involving large volumes of electronically stored information, privilege review is likely to be the greatest cost. *See* FRE 502 for a model that attempts to reduce those costs.

Rule 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 records described in the request. Copies of records must 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 for which an admission is requested must be separately set forth.
- (B) 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 requesting party a sworn written answer.
- (C) If a matter is not admitted, the sworn written answer must specifically:
 - (1) deny the relevant matter(s) of which an admission is requested; or
 - (2) if not denied, set forth in detail the reasons why the party truthfully can neither admit nor deny the matter(s) for which an admission is requested; or
 - (3) state the objections by which some or all of the matters involved are privileged, irrelevant, or otherwise improper in whole or part.
- (D) A denial under Rule 236(C) must 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 must specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny under Rule 236(C) 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.
- (E) 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 must order that an answer be served.
- (F) Any matter admitted under this rule is conclusively established unless the Adjudicator on motion permits withdrawal or amendment of the admission or determines that it is contrary to law. 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.

Official Comment

1. If a party fails to admit the genuineness of a record or the truth of any matter requested, and if the party requesting the admission thereafter proves the genuineness of the record or the truth of the matter, agencies 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,

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

- (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
 - (4) there was other good reason for the failure to admit.
2. FRCP 36 (Requests for Admission) provides the pattern for this rule.

Rule 237. Protective Order Concerning Discovery

- (A) To protect against the improper use of discovery or the disclosure of confidential information, the Adjudicator may issue a protective order limiting certain discovery and providing for the protection of privileged, competitively sensitive, or sensitive personal information submitted as part of an adjudication.
- (B) 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 limitations:
 - (1) the discovery may not be had;
 - (2) the discovery may be had only on specified terms and conditions, including a designation of the time and place;
 - (3) the discovery may be had only by a method of discovery other than that selected by the seeking party;
 - (4) particular matters may not be inquired into, or that the scope of the discovery may be limited to particular matters;
 - (5) discovery may be conducted with no one present except persons designated by the Adjudicator;
 - (6) 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) the party or the other person from whom discovery is sought may file specified records or information under seal to be opened as the Adjudicator orders.
- (C) The Adjudicator may permit a movant seeking a protective order to make all or part of the showing of good cause in camera. Upon the movant's request, the Adjudicator must make a record of the in camera proceedings under this subsection. If the Adjudicator enters a protective order, any record of the in camera proceedings of such showing must be sealed and preserved and made available to [the Agency] or to a court in the event of appeal.
- (D) 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 [Agency] witness, any prior statement of the witness, and
 - (2) prescribe other appropriate measures to protect a witness.
- (E) Any party affected by any such action under Rule 237(D) must 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] [Agency] witness, any prior statement or statements, to prepare for cross-examination and for the presentation of the party's case.
- (F) The Adjudicator may order that evidence be preserved upon a showing that there is substantial reason to believe that such evidence would not otherwise be available at the hearing.

Official Comment

1. FRCP 26(c) (Protective Orders) provides the basic pattern for this rule. *See also* Admin. Conf. of the U.S., Recommendation 70-4, *Discovery in Agency Adjudication*, 38 Fed. Reg. 19,786 (July 23, 1973). For agencies that do not, as a general matter, permit discovery, FRCP 26(c) may provide helpful guidance to the appropriateness and the scope of any protective order.
2. (to subsection (D)): Unless an agency determines as a matter of policy that a need exists for witness protection, it may determine that this portion of the rule is unnecessary. *See* Admin. Conf. of the U.S., Recommendation 70-4, *Discovery in Agency Adjudication*, ¶ 8, 38 Fed. Reg. 19,786 (July 23, 1973).

Rule 238. 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 records 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 must:
- (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 that does one or more of the following: compel discovery in accordance with the request, enter a protective order under Rule 237 (Protective Order Concerning Discovery), or issue sanctions under Rule 239 (Sanctions for Failure to Comply with Discovery Obligations).

Official Comment

1. (to subsection (A)): Responses to a motion to compel are governed by Rule 170 (Motions).

Rule 239. Sanctions for Failure to Comply with Discovery Obligations

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, at any point in the adjudication:

- (A) infer that the admission, testimony, record, 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 will 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 upon records or other evidence withheld in support of any claim or defense;
- (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, records, or other evidence would have shown;
- (F) order that a filed record, or part of a filed record, or a motion or other submission by the party be stricken, or that decision on the filed records be rendered against that party, or both;
- (G) exclude the party or representative from the adjudication;
- (H) impose or require other curative measures; and
- (I) impose judgment against the offending party.

Official Comment

1. *See* FRCP 37 (Failure to Make Disclosures or to Cooperate in Discovery; Sanctions).
2. This rule does not limit or expand the Adjudicator's authority provided under Rule 111 (Adjudicator Authority) or other relevant statutory authority.
3. An agency's rules and regulations must make clear whether there are procedural prerequisites to the filing of a motion for sanctions. Some agencies, for example, may require the filing of a motion to compel prior to the filing of a motion for sanctions.
4. (to subsection (H)): Curative measures include such actions as extending the discovery period for the party denied discovery, ordering one or more additional depositions to remedy the failure to produce, awarding expenses to the movant, and ordering the producing party to conduct another search of its electronically stored information, including backup systems.

Rule 240. Settlement and Alternative Dispute Resolution

- (A) *Availability.* The parties must have the opportunity to submit a settlement to the Adjudicator or submit a request for alternative dispute resolution under Rule 240(D).
- (B) *Form.* A settlement must be in the form of a proposed settlement agreement, a consent order, and a motion for its entry, which must include the reasons it should be accepted and must be signed by the consenting parties or their authorized representatives.
- (C) *Content of Settlement Agreement.* The proposed settlement agreement must contain the following:
 - (1) an admission of all jurisdictional facts;
 - (2) an express waiver of further procedural steps before the Adjudicator or [the Agency], 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 will have the same force and effect as an order made after full hearing; and
 - (4) a statement that matters in the parties' filings required to be adjudicated, if any, 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 authority, may request that the [Chief Adjudicator] appoint a Settlement Adjudicator to conduct settlement negotiations or remit the proceeding to alternative dispute resolution as [the Agency] may provide or to which the parties may agree. The order appointing the Settlement Adjudicator may confine the scope of settlement negotiations to specified issues. The order must direct the Settlement Adjudicator to report to the [Chief Adjudicator] at specified times.
 - (2) If a Settlement Adjudicator is appointed, (s)he must:
 - (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] and 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 [Adjudicator or any other person who does not have a need to know under agency rules], and not appear as a witness in the case.
 - (3) Settlement negotiations conducted by the Settlement Adjudicator must terminate upon the order of the [Chief Adjudicator] issued after consultation with the Settlement Adjudicator.
 - (4) Notwithstanding the provisions of Rule 400 (Interlocutory Review), no decision concerning the appointment of a Settlement Adjudicator or the termination of the settlement negotiation is subject to review or rehearing by the Adjudicator or [the Agency].

ACUS Model Adjudication Rules (rev. 2018)
[June 2018 Draft]

- (E) The Adjudicator (or Settlement Adjudicator) may require that the attorney or other representative of each party be present and that the parties, or agents having full settlement authority, also be present or available by telephone.
- (F) None of the following is admissible in evidence—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
 - (1) furnishing, promising, or offering (or accepting, promising to accept, or offering to accept) a valuable consideration in compromising or attempting to compromise the claim; and
 - (2) conduct or a statement made during compromise negotiations about the claim.
- (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, consistent with Agency precedent.
- (H) The conduct of settlement negotiations must not unduly delay the adjudication.

Official Comment

1. *See generally* Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988), and Administrative Dispute Resolution Act of 1990, 5 U.S.C. § 571 et seq.
2. Agencies may wish to include in this rule a requirement that the Adjudicator or Settlement Adjudicator promptly notify [the Agency] of all approved settlements so that [the Agency] may have an opportunity to review the settlement or allow it to become final in the absence of such review.
3. (to subsection (D)): *See* Rule 100(N) (definition of “Settlement Adjudicator”).
4. (to subsection (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 settlement adjudicators in resolving particular cases and assist in an adjudicator’s professional development. *See* Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, ¶ D(4)(b), 53 Fed. Reg. 26,030 (July 11, 1988). Consistent with Rule 240(d)(2)(C), however, agency officials, parties, and others involved in the proceeding should not expose the Adjudicator to alternative-dispute-resolution discussions in matters before her/him.
5. (to subsection (F)): *See* FRE 408(a) (prohibited uses).
6. These rules do not address how agencies implement the Equal Access to Justice Act. Some agencies have specific regulations on point. For guidance on implementation of the Equal Access to Justice Act, see Admin. Conf. of the U.S., *Model Rules for Implementation of the Equal Access to Justice Act*, 51 Fed. Reg. 16659 (May 6, 1986).

Rule 245. Prehearing Statement

- (A) The Adjudicator may require all parties to prepare prehearing statement(s) at a time and in the manner to be established by the Adjudicator.
- (B) Prehearing statement(s) must, unless the Adjudicator orders otherwise, 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, including expert witnesses, and exhibits to be presented during the hearing, including any stipulations relating to authenticity of records and expert witnesses;
 - (5) a brief statement of applicable law;
 - (6) the proposed legal conclusions to be drawn and remedies sought; and
 - (7) estimated time required for presentation of the party's (or parties') case.
- (C) 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 document initiating the adjudication (if any), entry of judgment against the party, or imposition of such other sanctions or curative measures as may be appropriate in the circumstances.

Official Comment

1. This rule was originally promulgated as Rule 220. As part of the 2018 revisions, it was promulgated as Rule 245 to reflect that the prehearing statement will usually follow any permissible discovery.
2. Prehearing statements may vary by agency and may include, e.g., names of witnesses, brief descriptions of intended testimony, and copies of exhibits, if available. Prehearing statements may be inappropriate in some types of adjudications.
3. (to subsection (C)): This authority does not limit the Adjudicator's authority under Rule 111 (Adjudicator Authority).
4. (to subsection (C)): In aggregate adjudications, in which some affected parties may not be represented by counsel, sanctions may be inappropriate.

Rule 250. Summary Decision

- (A) Any party may, at least __ days before the date fixed for the hearing, move with or without supporting affidavits for full or partial summary decision in her/his favor. Any other party may, within __ days after service of the motion, serve opposing affidavits or counter-move for full or partial summary decision. The Adjudicator has discretion to set the matter for argument and call for the submission of briefs.
- (B) The Adjudicator may grant summary decision 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 must set forth such facts as would be admissible in evidence and must show affirmatively that the affiant is competent to testify to the matters stated therein.
- (D) When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion must set forth specific facts, by affidavits or as otherwise provided in this rule, showing that there is a genuine issue of material fact for the hearing. If a party opposing the motion declares via affidavit the reasons why that party cannot present, by affidavit or other evidence, facts essential to justify her/his opposition, the Adjudicator may deny the motion for summary decision or may order a continuance to permit affidavits or other evidence to be obtained or may make such other order as is just.
- (E) A ruling on all or any part of a motion for summary decision is not subject to interlocutory review, except to the extent such a ruling qualifies for interlocutory review as provided in Rule 400 (Interlocutory Review).

Official Comment

1. This rule operates in conjunction with Rule 170 (Motions).
2. See Admin. Conf. of the U.S., Recommendation 70-3, *Summary Decision in Agency Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973).

THE HEARING

Rule 300. Scheduling, Location, and Notice of Hearing

- (A) Unless the agency provides otherwise, the Adjudicator is responsible for scheduling the hearing with due regard for the convenience and expense to the parties, their representatives, and witnesses, and the availability of suitable hearing facilities and other relevant factors. The Adjudicator must provide written notice to all parties of the time, place, and date for the hearing, the legal authority under which the hearing is to be held, and the matters at issue, at least __ days before the date set for hearing. The hearing must be open to the public, unless the Adjudicator orders otherwise.
- (B) A request for a change in the time, place, or date of the hearing may be entertained by the Adjudicator. A hearing may be postponed by the Adjudicator for good cause, upon motion of a party or upon her/his own authority. A motion to postpone a hearing must be received at least __ days prior to the date set for hearing. A motion for postponement received less than __ days prior to the scheduled hearing will generally be denied unless good cause is shown for late filing.
- (C) At any time after commencement of an adjudication, any party may move to expedite the scheduling of a proceeding consistent with an agency's expedited hearing procedures. A party moving to expedite a proceeding must:
 - (1) describe the circumstances justifying expedition; and
 - (2) include affidavits to support any factual representations with the motion.

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

Official Comment

1. (to subsection (A)): Some agencies permit automated scheduling or allow the time, place, and date of the hearing to be set forth in a complaint or other charging document. Whenever practicable, a notice of hearing should indicate that the hearing will 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.
2. (to subsection (B)): In exercising discretion to change the date, place, or time 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.

Rule 301. Type or Manner of Hearings

The Adjudicator has discretion, as consistent with agency policy and practice, to determine what type or manner of hearing is appropriate, including in-person hearings, or remote hearings conducted by video conference or teleconference.

Official Comment

1. Given technological innovations, agencies should consider new forms of hearings after due consideration of such factors as costs, availability of parties and witnesses to travel to the hearing site, and the advantages or disadvantages of using certain technology. Moreover, agencies should consider providing guidance to adjudicators on the type and manner of hearings to promote uniformity among adjudicators and transparency for parties.
2. ACUS has issued two recommendations on the topic of video hearings: Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities For Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011), and Recommendation 2014-7, *Best Practices for Using Video Teleconferencing Hearings*, 79 Fed. Reg. 75,119 (Dec. 17, 2014).

Rule 302. Sequestration of Witnesses

- (A) The Adjudicator, upon motion of a party or upon her/his own authority, may sequester witnesses to ensure that their testimony will not be influenced by the testimony of other witnesses.
- (B) As part of her/his sequestration order, the Adjudicator must notify the affected witnesses and parties of the terms of the sequestration.

Official Comment

1. The NLRB set forth a model sequestration rule in *Greyhound Lines*, 319 N.L.R.B. 554 (1995); *see also* FRCP 615 (Excluding Witnesses). Agencies should decide the extent to which witnesses should be sequestered or excluded in their adjudications. *See* Rule 320, Comment 2.

Rule 310. Failure of Party to Appear

Where the Adjudicator has specified potential sanctions in the notice of hearing, a default judgment or summary dismissal may be entered against a party for failure to appear at a scheduled hearing. If the Adjudicator has not specified potential sanctions in the notice of hearing, a party failing to appear at a scheduled hearing must be given an opportunity to show good cause for failure to appear prior to entry of default judgment or summary dismissal.

Official Comment

1. A default judgment or summary dismissal for failure to appear at a scheduled hearing is a matter within the discretion of the Adjudicator.
2. It is best practice to explain potential sanctions for failure to appear at the scheduled hearing in the notice of hearing.

Rule 320. Admissibility of Evidence

A party is entitled to present her/his case or defense by any evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Any evidence may be received, but the Adjudicator must provide for the exclusion of irrelevant, immaterial, privileged, or unduly repetitious evidence.

Official Comment

1. Congress granted agencies broad discretion to promulgate procedural rules governing adjudications. *See* 5 U.S.C. § 559 (“Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise.”).
2. In 1986, ACUS adopted Recommendation 86-2, *Use of Federal Rules of Evidence in Federal Agency Adjudications*, 51 Fed. Reg. 25,642 (July 16, 1986): “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.” *Id.* ¶ 1. The approach of this rule is also consistent with the position of both the Federal Bar Association (1991) and the American Bar Association (1992). They recommended that agencies be encouraged to examine whether and to what extent rules patterned after the FRE might be appropriate for agency adjudication. Some agencies have found it useful, or have been required by statute (e.g., 29 U.S.C. § 160(b)), to apply the FRE or a modified version of the FRE (*see, e.g.*, 24 C.F.R. § 26.24 et seq. (HUD) and 29 C.F.R. § 18.101 et seq. (DOL)). Via procedural rules or similar transparent guidance, agencies should provide a comprehensive account of the evidentiary rules that apply in adjudication and inform the public to the extent, if any, that the FRE apply to its adjudications.
3. The first sentence restates the APA standard on admissibility (5 U.S.C. § 556(d)). FRE 401 (Test for Relevant Evidence), 402 (General Admissibility of Relevant Evidence), and 403 (Reasons to Exclude) are the bases for the second sentence.
4. The APA permits agencies, when “determining claims for money or benefits or applications for initial licenses,” to “adopt procedures for the submission of all or part of the evidence in written form” as long as the parties are not prejudiced thereby. 5 U.S.C. § 556(d).
5. Recent revisions to FRE 502 address disclosure of a communication or information covered by the attorney-client privilege or work-product protection, as defined in the rule, in a federal proceeding or to a federal office or agency, and the scope of the waiver in federal or state proceedings.

Rule 321. Objections to Evidence and Offers of Proof

- (A) A party must state briefly the grounds for objection to the admission or exclusion of evidence. Rulings on all objections must appear in the administrative record. Only objections made before the Adjudicator may be raised on review.
- (B) Whenever evidence is excluded from the hearing, the party offering such evidence may make an offer of proof, which must be included in the administrative record for purposes of administrative or judicial review. The Adjudicator retains the discretion to determine the method or manner of the offer of proof.

Official Comment

1. Rejected exhibits must be adequately marked for identification and placed in a separate file for a reviewing authority's consideration. *See* Rule 327(B) (Exhibits and Records).

Rule 322. Confidential, Sensitive, and Privileged Information

- (A) Unless the Adjudicator orders otherwise, the parties must redact all evidence proffered for admission in the same manner as required under Rule 150 (Form and Content of Filed Documents; Privacy Protections for Filings). The provisions of Rule 150 concerning filing under seal, waiver, and the application of redaction requirements to additional information apply to proffered evidence for admission.
- (B) Nothing in this rule limits the discretion of the Adjudicator to give effect to applicable privileges or permit full disclosure of the evidence without redaction as necessary for fair consideration of the evidence.

Official 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 records subject to assurances against further disclosure.
2. This rule applies in tandem with Rules 150(C) (Form and Content of Filed Documents; Privacy Protections for Filings) and 237 (Protective Orders Concerning Discovery). Agencies should consider whether good reason exists in their particular hearings for treating filings differently from proffered evidence. Likewise, the Adjudicator should consider how any prior orders governing discovery under Rule 237 apply, if at all, to matters at the hearing.

Rule 323. Official Notice

The Adjudicator may officially notice such matters as might be judicially noticed by courts or such facts within the specialized knowledge of the agency as an expert body. When a decision or part thereof rests on the official notice of a material fact not appearing in the evidence in the administrative record, any party, upon timely request, must have an opportunity to show the contrary. The fact of official notice, if taken with or without a party's challenge, must be stated in the decision.

Official Comment

1. The APA states at 5 U.S.C. § 556(e): “When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, the party is entitled, on timely request, to an opportunity to show the contrary.” *See also, e.g.*, 16 C.F.R. 3.43(f) (FTC) (“If official notice is requested or is taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to disprove such noticed fact.”).
2. Under case law, an agency under some circumstances may be permitted to look beyond the facts developed for the administrative record, e.g., to facts developed in other cases. *See United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 529–30 (1946) (citing additional cases).

Rule 324. Evidentiary Stipulations

- (A) The parties may stipulate in writing at any stage of the adjudication, or agree orally at the hearing, to any or all pertinent facts in the adjudication, unless the stipulation is determined by the Adjudicator to be contrary to law. Stipulations may be received in evidence before or at the hearing, and when received in evidence, will be binding on the parties to the stipulation. 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 or stipulated to in prehearing statements.
- (B) Parties waive their right to a hearing on any stipulated fact(s) and their right to any hearing whatsoever if they stipulate all pertinent facts.

Official Comment

1. It is desirable that facts be stipulated whenever practicable.

Rule 325. Written Testimony

The Adjudicator may accept and enter into the administrative 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 must be available for cross-examination as may be required.

Official Comment

1. Agencies may permit or require written testimony only as the APA, other statutes, and agency rules allow. The APA, 5 U.S.C. § 556(d), provides that “[i]n rule making [not covered by these rules] or 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.” It is important to note, however, that not all agencies allow written testimony in adjudication. *See, e.g., Shamokin Filler Company*, 34 FMSHRC 1897, 1909 (2012) (explaining why 5 U.S.C. § 556(d) and 29 C.F.R. § 2700.63(b) give parties the right to present oral direct testimony at a hearing and concluding that the ALJ erred in requiring advanced written direct testimony); *see also* 29 C.F.R. § 2200.69 (providing that witnesses in Occupational Safety and Health Review Commission adjudications must be examined orally under oath or affirmation).
2. This rule does not preclude a witness from correcting or amending her/his written statement.

Rule 326. Oaths and Oral Examination

- (A) Witnesses must testify under oath or affirmation. Interpreters must also ascribe by oath or affirmation to the accuracy of the translation.
- (B) To the extent that cross-examination is permissible or required under Rule 320 (Admissibility of Evidence) or other law, cross-examination is limited to the scope of the direct examination and, subject to the Adjudicator’s discretion, may be limited to witnesses whose testimony is adverse to the party desiring to cross-examine. The Adjudicator has discretion to permit inquiry into additional matters as if on direct examination, particularly when it would obviate the need to recall the witness.

Official Comment

1. Agencies should consider application of FRE 611 (Mode and Order of Examining Witnesses and Presenting Evidence).
2. This rule is consistent with the scope of cross-examination under the APA, 5 U.S.C. § 556(d) (“A party is entitled . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts.”). *Accord* Rule 320 (Admissibility of Evidence).

Rule 327. Exhibits and Records

- (A) All exhibits offered in evidence by a party must be marked for identification before or during the hearing and must be numbered and marked with a designation identifying the sponsor. The original of each exhibit offered in evidence or marked for identification must be filed and retained in the administrative record of the adjudication, unless the Adjudicator permits the substitution of copies for the original record. The sponsoring party must supply copies of each exhibit to the Adjudicator and to each other party. A party may withdraw an exhibit from the administrative record during the hearing or at the conclusion of the hearing only with the Adjudicator's permission.
- (B) All exhibits offered but denied admission into evidence, except exhibits denied admission because of excessive size, weight, or other characteristic that prohibits convenient transportation or storage, must be placed in a separate file designated for rejected exhibits. A party may offer into evidence photographs, models, or other representations of any exhibit denied admission because of excessive size, weight, or other characteristic that prohibits convenient transportation or storage
- (C) Unless the Adjudicator orders otherwise, proposed exhibits to be offered upon direct examination must 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. A party concedes the authenticity of all exhibits submitted or exchanged prior to the hearing, under the Adjudicator's direction, unless that party files and serves on all parties written objection, or unless good cause is shown for failure to file and serve such written objection.

Rule 328. Witness Fees; Refusal to Testify

- (A) *Fees.* Witnesses, other than employees of the Agency or employees otherwise compensated by another agency or employer, summoned in an adjudication are entitled to the same fees and mileage as witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same will severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage must be paid by the party at whose instance the witness appears, whether at a deposition or hearing.
- (B) *Failure or Refusal to Testify.* If a witness fails or refuses to testify, the failure or refusal to answer any question that the Adjudicator deems proper may be grounds for striking all or part of the testimony that the witness may have given, or for any other action that the Adjudicator deems appropriate.

Official Comment

1. For matters related to depositions, see Rule 234 (Depositions).
2. (to subsection (A)): *See* Rule 100(D) (definition of “agency”).
3. (to subsection (A)): Witness fees and allowances in administrative proceedings are governed by 5 U.S.C. § 503. For allowances in judicial proceedings, see 28 U.S.C. § 1821.
4. (to subsection (B)): In determining whether a question is proper under this rule, the Adjudicator should consider that a witness may assert the Fifth Amendment privilege against self-incrimination “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.” *Maness v. Meyers*, 419 U.S. 449, 464 (1975) (quoting *Kastigar v. United States*, 406 U.S. 441, 444 (1972)).

Rule 329. Burden of Going Forward with Evidence

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

Official Comment

1. The burden-of-proof provision of the APA is 5 U.S.C. § 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, this rule only addresses the initial burden of going forward with the evidence.

Rule 330. Closing of the Administrative Record

At the conclusion of the hearing, the Adjudicator, unless ordering otherwise, must close the administrative record. Once the administrative record is closed, no additional evidence will be accepted except upon a showing that the evidence is material and that there was good cause for failure to produce it prior to closing the administrative record.

Official Comment

1. In particular categories of adjudications, such as those in which both parties may not be represented by counsel, an agency may wish to accord broader discretion to the Adjudicator to delay closing the administrative record or to admit additional evidence after its closure. *See* Admin. Conf. of the U.S., Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, ¶ 4, 55 Fed. Reg. 34,213 (Aug. 22, 1990).
2. *See* Rule 100(C) (definition of “administrative record”). The closing of the administrative record after the hearing does not preclude the Adjudicator or agency from supplementing the administrative record with filings, decisions, orders, and materials from any administrative appellate proceedings that occur after the closing of the administrative record under this rule. The purpose of this rule is to limit those materials upon which the Adjudicator can rely in deciding the matter.

Rule 340. Proposed Findings; Closing Arguments; Briefs

- (A) Before the Adjudicator’s decision and upon such terms that the Adjudicator may find reasonable, any party is entitled to file a brief, and propose findings of fact, conclusions of law, and orders. The Adjudicator has discretion to hear oral argument. Any brief, proposed findings of fact, conclusions of law, orders, and any oral argument must be included as part of the administrative record.
- (B) When providing oral decisions from the bench, the Adjudicator may permit or preclude the filing of briefs.

Official Comment

1. The APA, 5 U.S.C. § 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—
 - (1) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
 - (2) the appropriate rule, order, sanction, relief, or denial thereof.”

Rule 350. Record of Hearing

- (A) All hearings must be recorded and made part of the administrative record. Exhibits admitted into evidence, or exhibits proffered and rejected by the Adjudicator and placed in a rejected exhibit file, and evidentiary stipulations at the hearing, become part of the administrative record.
- (B) The Adjudicator must reflect in the administrative record any approved correction to the transcript.

Official Comment

1. 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 U.S.C. App. 2, Federal Advisory Committee Act, § 11 (Availability of transcripts; “agency proceeding”):
 - (1) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.
 - (2) As used in this section “agency proceeding” means any proceeding as defined in [5 U.S.C. § 551(12)].
2. *See also* 5 U.S.C. § 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 nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.”
3. *See* Rule 100(C) (definition of “administrative record”).

Rule 360. Decision of Adjudicator

The Adjudicator must prepare a decision containing:

- (A) findings of fact, conclusions of law, and discretionary determinations based on consideration of the whole administrative record;
- (B) an order as to the final disposition of the case, including relief, if appropriate;
- (C) the date upon which the decision will become effective (e.g., ____ days after issuance);
and
- (D) a statement of further right to review.

Official Comment

1. *See* 5 U.S.C. §§ 556(d) & (e), 557(c)(3)(A).

Rule 370. Reopening of Case

- (A) A decision that has otherwise become final may be reopened:
- (1) upon the Adjudicator’s order, within __ days of the notice of the decision to correct a clerical error or for good cause shown;
 - (2) upon a party’s motion to reopen for good cause filed within __ days of the notice of the decision; or
 - (3) upon the Adjudicator’s order at any time if there is evidence that the hearing decision may have been procured by fraud or similar fault.
- (B) “Good cause” for reopening requires both
- (1) new and material evidence that was not
 - (a) available to the proponent and
 - (b) actually or constructively known by the proponent; and
 - (2) an obvious error was made at the time of the decision.
- (C) For purposes of reopening a case, evidence is “new and material” when:
- (1) the evidence is not part of the existing administrative record;
 - (2) the evidence is relevant to issues adjudicated in the prior decision; and
 - (3) the evidence shows that the decision may be contrary to the weight of the evidence, whether or not a different conclusion is ultimately reached after reopening.
- (D) If the Adjudicator determines that good cause exists to reopen the decision, Rule 320 (Admissibility of Evidence) governs the admissibility of new evidence.

Official Comment

1. Agencies should consult their enabling legislation to determine whether and under what circumstances reopening may be possible.
2. If a party is dissatisfied with the Adjudicator’s decision but does not seek review of that decision within the required time under Rule 440 (Final Decision), the decision becomes final and no longer subject to review. However, under certain circumstances, the Adjudicator may reopen and revise a decision that is otherwise final.
3. A change in legal interpretation or subsequent administrative ruling which might have resulted in a different result if it had been in effect at the time of the decision does not constitute good cause unless the interpretation or ruling clearly contemplated retroactive effect.
4. Motions for reconsideration may be appropriate when the case has not been closed. *See* Rules 170 (Motions) & 450 (Reconsideration). But once the case is closed, this rule governs whether the case should be reopened.

ADMINISTRATIVE REVIEW

Rule 400. Interlocutory Review

- (A) Interlocutory review should be handled on an expedited basis.
- (B) A party that seeks interlocutory review of a decision, or part thereof, of an Adjudicator must file a petition with the Adjudicator. The petition must:
 - (1) be filed with the Adjudicator within ____ days after the Adjudicator's decision;
 - (2) designate the decision (or part thereof) from which review is sought; and
 - (3) set forth the grounds on which review is sought, including all applicable points of fact and law, and the reasons why interlocutory review is warranted under Rule 400(D).
- (C) Any party that opposes the petition may file a response within ____ days after service of the petition.
- (D) The Adjudicator must certify the ruling for interlocutory review by [the Agency] if the Adjudicator determines that:
 - (1) the decision involves a controlling question of law about which there is substantial ground for difference of opinion; and
 - (2) an immediate review will materially advance the completion of the adjudication, or subsequent review by [the Agency] will provide an inadequate remedy.
- (E) Within ____ days after the Adjudicator's ruling on a petition to certify a decision under Rule 400(B), the petitioner may apply to [the Agency], whether or not the Adjudicator has certified the decision under Rule 400(D), to allow the interlocutory review sought in the petition. The application must reference the petition filed under Rule 400(B), all filings made with the Adjudicator in support of or in opposition to the petition, and the Adjudicator's decision on the petition. The application must not otherwise set forth the grounds on which interlocutory review is sought or contain any argument, unless [the Agency] orders otherwise. No response to any application made under this subsection may be permitted unless [the Agency] orders otherwise.
- (F) Any petition or application filed under this rule may be summarily dismissed whenever the Adjudicator or [the Agency], respectively, determines that review is not appropriate.
- (G) [The Agency] may, on its own motion, certify an order for interlocutory review under this rule in its discretion.
- (H) If [the Agency] decides to allow interlocutory review, [the Agency] must decide the matter on the basis of the administrative record and briefs submitted to the Adjudicator, without further briefs or oral argument, unless [the Agency] orders otherwise.

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- (I) The filing of an application for interlocutory review and the certification of a ruling for interlocutory review does not stay proceedings before the Adjudicator unless (s)he or [the Agency] so orders.

Official Comment

1. An agency may wish to consider whether to provide interlocutory review in particular situations (e.g., an adverse ruling on a motion for the Adjudicator's recusal; a ruling suspending an attorney from participation in the adjudication; 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 petition. 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* Admin. Conf. of the U.S., Recommendation 71-1, *Interlocutory Appeal Procedures*, 38 Fed. Reg. 19,787 (July 23, 1973).
2. The approach taken in this rule is largely consistent with ACUS Recommendation 71-1. The rule's two-step process—Adjudicator certifies decision, Agency then decides whether to take review—tracks the general statute governing interlocutory appeals of orders of the federal district courts. *See* 28 U.S.C. § 1292(b). Specific types of district-court orders may be subject to other rules. *See, e.g.,* Fed. R. Civ. P. 23(f) (allowing a court of appeals to permit an appeal of a district court granting or denying a class-action certification whether or not the district court has certified the order for appeal). The rule departs from § 1292(b) in allowing an Agency to hear interlocutory review even if the Adjudicator does not certify the decision for review under Rule 400(D). It is anticipated that interlocutory review in the absence of certification will be permitted only in the narrowest circumstances.

Rule 410. Petitions for Review

- (A) Any party may file with [the Agency] a petition for review within ____ days after issuance of the Adjudicator’s decision. Two or more parties may join in the same petition.
- (B) A petition for review, no more than ____ words, must 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 Agency];
 - (4) a substantial question of law, policy, or discretion is involved; or
 - (5) a prejudicial error of procedure was committed.
- (C) Each issue must be plainly and concisely stated and must be supported by citations to the administrative record when assignments of error are based on the administrative record, and by statutes, regulations, cases, or other principal authorities relied upon. Except for good cause shown, no assignment of error by any party may 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 Agency] is not a matter of right but within the sound discretion of [the Agency]. A petition not granted within ____ days after the issuance of the Adjudicator’s decision is deemed denied.
- (F) [The Agency], at any time within ____ days after the issuance of the Adjudicator’s decision, may review the decision on its own authority.
- (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. Unless the agency provides otherwise, the effect of filing a petition for review is to stay the decision of the Adjudicator.

Official 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 U.S.C. § 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 rule 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).

ACUS Model Adjudication Rules (rev. 2018)
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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 authority 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* Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973). Some statutes accord parties an automatic right of review by the agency. In such circumstances, agencies must modify this rule to provide for automatic review. *See, e.g.*, 29 C.F.R. §§ 102.45, 102.46 (National Labor Relations Board).
3. (to subsection (E)): In the interest of encouraging prompt appellate review of an adjudicator's decision, this rule 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. N.B. "Effectiveness" of a decision is not necessarily the same as "finality." *See* Comment 1, Rule 440 (Final Decision).
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), 704. In *Darby v. Cisneros*, 509 U.S. 137 (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. Rule 410(G) explicitly provides that, unless the agency provides otherwise, the filing of a petition for review is an administrative prerequisite to filing a petition for judicial review. This 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.

Rule 411. Record Before the Agency

[The Agency] must decide each matter on the basis of the whole administrative record.

Rule 412. Additional Evidence

- (A) Upon its own motion or the motion of any party, [the Agency] may allow the submission of additional evidence.
- (B) A party may file a motion for leave to adduce additional evidence before the issuance of a decision by [the Agency]. The motion must show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously.
- (C) [The Agency] may, as appropriate, accept or hear additional evidence, or remand or refer the proceedings to the Adjudicator for the taking of additional evidence.

Official Comment

1. 5 U.S.C. § 557(b) provides, “On appeal from or review of the initial decision, the agency has all of the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”

Rule 420. Appellate Briefs

- (A) Unless [the Agency] orders otherwise, a party must file a brief in support of its petition for review within ____ days after [the Agency] 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 Agency] within ____ days after the petitioner’s brief is served. If [the Agency] orders review on its own motion, all parties must file any briefs they wish considered by [the Agency] within ____ days of the order, unless the Agency otherwise orders.
- (B) Except by permission of [the Agency], a brief must not exceed ____ words.

Official 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 U.S.C. § 557(b). Nonetheless, agencies typically do not review every issue decided by an adjudicator. Because agencies (like courts) ordinarily impose limitations on the length of appellate briefs, parties must be selective about the issues they raise for appellate review.
2. Agencies may adapt these regulations to provide that briefs supporting the petition for review must be filed on the same date and responsive briefs filed later. Agencies may also authorize the filing of reply briefs in appropriate cases.

Rule 421. Amicus Briefs

- (A) Any agency of the United States or limited participant in the proceedings below may file an amicus-curiae brief with [the Agency]. Any other amicus curiae may file a brief only with the consent of [the Agency] after the filing of a motion under Rule 421(B) or with the consent of the parties and a statement to that effect included with the brief.
- (B) A motion for leave to file must accompany the brief and state
 - (1) the movant’s interest in the adjudication, and
 - (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.
- (C) Any amicus brief filed by anyone (other than an agency of the United States), including by limited participants in the proceedings below, must state whether a party’s counsel authored the brief in whole or in part, a party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief, and a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identify each such person.
- (D) Except by permission of [the Agency], an amicus-curiae brief may not exceed ____ words.
- (E) An amicus curiae must file its brief, accompanied by a motion when necessary under these rules, no later than 7 days after the party which amicus curiae supports files its principal brief. An amicus curiae that does not support either party must file its brief no later than 7 days after the brief filed by the last filing party.
- (F) Except by [the Agency’s] permission, an amicus curiae may not file a reply brief.

Official Comment

1. This rule largely draws from FRAP 29.

Rule 430. Oral Argument

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

Official 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.

Rule 440. Final Decision

- (A) If no petition for review is filed, and [the Agency] has not taken review of the Adjudicator's decision on its own authority, the decision becomes the final decision of [the Agency] _____ days after issuance.
- (B) When a case stands submitted for final decision on the merits, [the Agency] 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 Agency] may simply adopt the Adjudicator's decision.

Official Comment

1. Effectiveness and finality of a decision are not necessarily synonymous concepts. See Comment 4 (to subsection (G)) to Rule 410 (Petitions for Review).

Rule 450. Reconsideration

- (A) Any party may file a motion for reconsideration of a final order issued by [the Agency].
- (B) Unless the time is shortened or enlarged by [the Agency], motions for reconsideration must be filed within _____ days after service of the final order issued by [the Agency].
- (C) A motion for reconsideration must be no more than _____ words and must 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 may be filed unless requested by [the Agency].

Official Comment

1. Agencies which do not want to provide for reconsideration should not adopt this rule.
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 U.S.C. § 717r (Natural Gas Act). Many agencies allow petitions for reconsideration as a matter of discretion. This rule provides for motions for reconsideration of final agency decisions. Because reconsideration is intended to be an exceptional remedy, the rule provides that no responses to motions for reconsideration may be filed unless requested by the agency. This rule follows the approach taken in FRAP 35 and 40 with respect to petitions for rehearing and suggestions of rehearing en banc.