



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ADJUDICATION DURING THE COVID-19 PANDEMIC: QUESTIONS FOR AGENCIES TO CONSIDER

April 14, 2020

Staff in the ACUS Office of the Chairman prepared the following questions that agency officials and adjudicators may find helpful in developing policies to manage disruptions related to the ongoing public health emergency. These questions are based on information contained in guidelines and orders that more than two dozen agencies have already made publicly available. ACUS is cataloging agency policies online at www.acus.gov/coronavirus-and-adjudication.

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Formulating Policies

- Who is setting policies in your office to manage pandemic-related disruptions (e.g., agency head, appellate body, system-wide chief judge, local chief judge, individual adjudicators through standing orders or ad hoc determinations)?
- Is your office able, or are individual adjudicators authorized, to relax or waive procedural requirements in general or during an emergency situation?
- Is your office evaluating and making policy changes that are intended to last for an indefinite period, through a specific date (subject to reevaluation), or during the duration of the public health emergency?
- What resources are available to your office to help make decisions about managing pandemic-related disruptions?

Filing and Submitting Documents

Mail and Fax Submissions

- Is your office still receiving or accepting mail and fax submissions?

Existing E-Filing Platforms

- If your office has an optional e-filing platform, are you encouraging or requiring parties to use it?
- Are there any limitations on the use of your office's e-filing platform for filing or other document submission tasks (e.g., transmitting voluminous documents or sensitive information)? Have you run into problems with its use?

Alternatives to E-Filing Platforms

- If your office does not have an e-filing platform, have you developed or considered developing a workaround (e.g. email, open or secure-access file-exchange service)?
- What protocols have you put in place for parties to submit filings and other documents electronically (e.g., direct parties to submit materials to a central email address or a docket clerk, direct parties to use a specific subject line, restrictions on file type or size, association with records upon receipt, etc.)?
- Are there any limitations on the use of email or a file-exchange service for filing or other document submission tasks (e.g., transmitting voluminous documents or sensitive information)? Have you run into problems with its use?

Waiving or Exceptions to Procedural Requirements

- Has your office waived or considered waiving requirements with which it may be difficult for parties to comply, such as filing requirements and deadlines for submitting pleadings, motions, responses, etc.; deadlines for submitting evidence; wet-signature requirements; and requirements that parties submit hard copies of filings or evidence?
- If your office has not waived such requirements as a matter of policy, can parties request exceptions, for example for good cause shown? If so, are there procedures in place for individual adjudicators to evaluate such requests? For example, is there a presumption of good cause for all or certain parties, or do individual parties bear the burden of demonstrating good cause?

Managing Discovery and Collecting Evidence

- How is the current emergency impacting parties' ability to conduct discovery, depose witnesses, or otherwise collect and submit evidence?
- How is your office handling preexisting discovery schedules? In the absence of an office-wide policy, are individual adjudicators taking steps to reexamine discovery schedules on their own initiative, or are parties taking the lead to request modification?
- Are there procedures in place for individual adjudicators to evaluate parties' requests that they modify discovery schedules? For example, is there a presumption of good cause for all or certain parties, or do individual parties bear the burden of demonstrating good cause?
- How is your office setting new discovery schedules, given the uncertainty surrounding the duration of the current crisis?
- Are you experiencing any disruptions processing subpoena requests or issuing subpoenas?

Serving Documents and Issuing Orders, Notices, and Decisions

Service by Mail or Fax

- If agency rules or policies require service by mail or fax, how is your office agency now handling service (e.g., maintain the status quo, require an alternative means of service during the emergency, encourage parties to waive service where appropriate)?

Existing E-Service Platforms

- If your office has an e-filing platform, are you encouraging or requiring parties to use it?
- Are there any limitations on the use of your office's e-filing platform for filing or other document submission tasks? Have you run into problems with its use?

Alternatives to E-Service Platforms

- If your office does not have an e-service platform, have you developed or considered developing a workaround (e.g., email, open or secure-access file-exchange service)?
- What protocols have you put in place for parties to serve documents electronically (e.g., direct parties to submit materials to a central email address, docket clerk, or directly to other parties; direct parties to use a specific subject line; restrictions on file type or size)?

- Are there any limitations on the use of email or a file-exchange service for service (e.g., transmitting voluminous documents or sensitive information)? Have you run into problems with its use?

Issuing Orders, Notices, and Decisions

- For offices that ordinarily mail notices, orders, and decisions to parties, are you continuing to do so? If so, have you developed protocols to continue or delay mailing?
- If not, have you developed an electronic alternative such as email, e-service, or posting on an agency website?

Accessing Dockets and Evidentiary Records

- Can adjudicators and staff in your office access and manage case dockets and evidentiary records remotely? If not, do they have access to paper records or are there workarounds so they can continue working their assigned cases?
- Can parties and counsel in pending proceedings access case dockets and evidentiary records remotely? If not, are there other workarounds that will allow hearings to go forward?

Conducting Hearings

In-Person Hearings

- Is your office still conducting in-person hearings in some or all cases?
- For cases in which your office is holding in-person hearings:
 - How are you evaluating potential conflicts with state and local orders on travel and public assembly?
 - Are there any barriers arising from access limitations imposed by other agencies or courts whose facilities your office uses?
 - What restrictions, if any, has your office placed on in-person practice (e.g., restricting access to the hearing room, maintaining social distancing, requiring that parties submit all evidence electronically before the hearing)?
 - Has your office developed a policy on requests that in-person hearings be postponed or converted to remote hearings? Or are there procedures in place for individual adjudicators to evaluate parties' requests for postponement or conversion? For example, is there a presumption of good cause for all or certain parties, or do individual parties bear the burden of demonstrating good cause?

- For cases in which your office is not holding in-person hearings, are you:
 - Postponing the in-person hearing?
 - Postponing the in-person hearing but permitting parties to individually request conversion to a remote hearing?
 - Postponing the in-person hearing but permitting both parties to jointly request conversion to a remote hearing?
 - Offering the parties, individually or jointly, the choice of postponing the in-person hearing or going ahead with a remote hearing?
 - Converting the in-person hearing by default to a remote hearing but permitting parties to individually request postponement?
 - Converting the in-person hearing by default to a remote hearing but permitting parties to jointly request postponement?

Postponed Hearings

- Is your office postponing hearings for an indefinite period or working to reschedule hearings after a certain date?
- Has your office encountered any challenges rescheduling postponed hearings or otherwise managing cases in which a hearing is postponed?
- For cases in which your office sua sponte postpones upcoming hearings, has your office developed a policy on responding to objections or requests for conversion to a remote hearing? Is there a presumption in favor of the request or must there be a showing of good cause?

Remote Hearings—Legal Considerations

- Does your office generally have legal authority to use remote hearings?
- How is your office providing public access to remote hearings in appropriate situations?
- For cases in which your office sua sponte converts upcoming in-person hearings to remote hearings, has your office developed a policy on responding to objections or requests for postponement? Is there a presumption in favor of the request or must there be a showing of good cause?

Remote Hearings—Practical Considerations

- Does your office have the technological capacity to conduct video or telephone hearings under ordinary circumstances? Are adjudicators and adjudicative staff generally comfortable managing video or conference-call technology and performing other required tasks such as recording or transcribing the hearing?
- Does your office have the technological capacity to conduct video or telephone hearings in which all or most participants—adjudicator, adjudicative staff, parties, counsel, witnesses, other interested persons—are physically in different locations? Are adjudicators and adjudicative staff generally comfortable managing video or conference-call technology and performing other required tasks under these circumstances?
- Are agency and non-agency participants generally able to troubleshoot technological issues that may arise during remote hearings?
- Do agency participants have easy access to responsive IT support? Do non-agency participants have easy access to responsive IT support?
- How should adjudicators handle cases where technical problems complicate the hearing? Have you developed a policy on when technical problems raise due process concerns?
- How should adjudicators handle cases in which a party fails to join an audio or video hearing (e.g., contact the party immediately, postponement by default, postponement for good cause, dismissal or summary judgment, sanctions)?
- How should adjudicators handle cases in which a hearing recording or transcription is unsuccessful?
- Are parties able to effectively examine and cross-examine witnesses in remote hearings?

Audio-Only (Telephone) Hearings

- What hardware and software or service does your office use to conduct audio-only hearings (e.g., personal phones, agency-provided phones, softphone with an agency phone number, CenturyLink, Viber)?
- Does your office organize the audio conference and direct participants to call in at the scheduled hearing time, or does your office contact the parties at the scheduled hearing time? If the latter, do you rely on contact information in the file or require participants to provide contact information before the hearing?
- Has your office encountered any practical challenges conducting telephone hearings (e.g., audio quality challenges, insufficient bandwidth, unstable feed, interruptions from non-participants)?

- For agencies that have experience conducting telephone hearings, have you developed best practices that officials at other agencies may find helpful?

Video Hearings

- What service or software does your office use to conduct video hearings (e.g., proprietary, Zoom, Skype, WebEx, MS Teams, GoToMeeting)?
- Has your office encountered any practical challenges conducting video hearings (e.g., image or audio quality challenges, bandwidth problems, unstable feed, interruptions from non-participants)?
- For agencies that have experience conducting telephone hearings, have you developed best practices that officials at other agencies may find helpful?

Alternatives to Oral Hearings

- Are there any instances in which it would be fair, accurate, and efficient to require or permit a written hearing in lieu of an oral hearing?
- Are there any instances in which it would be fair, accurate, and efficient to offer parties the opportunity for a decision on the record? If so, can parties dissatisfied with an on-the-record decision later request an oral hearing?

Processing Appeals

- Have agency appellate bodies encountered any specific issues (e.g., filing appeals, oral argument, quorum requirements among multi-member panels, open meeting requirements, public participation, case processing delays)?

Managing Alternative Dispute Resolution

- Is your office continuing to conduct mediation, settlement, and other alternative dispute resolution (ADR) proceedings?
- Is your office encouraging parties to consider ADR in lieu of a hearing due to pandemic-related disruptions?
- How is your office conducting remote ADR proceedings (e.g., videoconference, telephone)?
- Has your office implemented any best practices to facilitate ADR in an environment in which all participants and staff may be remote?

Communicating Information and Updates

Providing Information to Adjudicators and Staff

- What information and updates are you providing to adjudicators and staff about changes in policies and procedures due to pandemic-related disruptions?
- How are you providing information and updates to adjudicators and staff about changes in policies and procedures due to pandemic-related disruptions (e.g., all-hands meeting, individual conversations, written FAQs, formal training)?
- To whom should adjudicators and staff address questions about changes in policies and procedures when they arise?
- Have you solicited or received any feedback from adjudicators or staff about the success of your office's pandemic-related policies?

Providing Information to Parties and Counsel with Pending Cases

- What information and updates are you providing to parties and counsel with pending cases about changes in policies and procedures due to pandemic-related disruptions?
- When are you notifying parties and counsel about changes in policies and procedures?
- How are you providing information and updates to specific parties and counsel (e.g., agency or office website, mailed notice, e-mailed notice, e-service platform, telephone)?
- How should parties and counsel contact your office (e.g., email account to which staff have remote access, voicemail to which staff have remote access)?
- Are there any special instructions for parties and counsel who contact your office (e.g., leave a message including case number and call-back information)?
- How should parties and counsel *not* contact your office (e.g., in person, mail, fax, voicemail to which staff do not have remote access)?
- Should parties and counsel be aware of ex parte prohibitions if they contact your office?
- Have you solicited or received any feedback from parties or counsel about the success of your office's pandemic-related policies?

Providing Information to the General Public

- What information and updates is your office making available to the general public about changes in policies and procedures due to pandemic-related disruptions?

- How is your office making information and updates about changes in policies and procedures available to the general public (e.g., updates to office or agency homepage; dedicated, continuously updated webpage accessible from homepage; individual notices and orders posted to agency website; Federal Register notice; social media)?
- How should members of the general public contact your office?
- How should members of the general public *not* contact your office?
- Have you solicited or received any public feedback about the success of your office's pandemic-related policies?