

Public Availability of Adjudication Rules

Ad hoc Committee of the Committee on Administration and Management and the Committee on Adjudications

Proposed Recommendation for Committee | October 18, 2018

1 Every year, federal agencies conduct hundreds of thousands of adjudications, many of
2 which closely resemble litigation conducted in the federal court system.¹ In order to participate
3 meaningfully in the process, litigants appearing before federal agencies must have ready on-line
4 access both to the key materials associated with these adjudications (especially prior decisions)
5 and the procedural rules governing them. Administrative Conference Recommendation 2017-1
6 addresses the former set of materials, urging agencies to provide online access to the key
7 documents associated with adjudications.² This recommendation deals with the latter set of
8 materials, urging agencies to make procedural rules readily available online and providing best
9 practices as to how to present those materials in a manner that is most helpful to litigants and
10 ensures accessibility to the public.³ Both recommendations are limited to adjudications in which
11 either the Administrative Procedure Act (APA) or an agency-specific provision of law (be it a
12 statute, executive order, or regulation) requires an evidentiary hearing, although they may
13 provide useful guidance in the case of less formal adjudications.⁴

14 A number of different sources of law may create procedural rules that govern the actions
15 both of litigants and agency adjudicators. At the very least, these include: (a) the Fifth

¹ See Michael Sant'Ambrogio & Adam Zimmerman, *Aggregate Agency Adjudication 5* (June 9, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/aggregate-agency-adjudication-final-report_0.pdf.

² See Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

³ Another ongoing Administrative Conference project addresses the on-line availability of agency guidance documents. Admin. Conf. of the U.S., *Public Availability of Agency Guidance*, <https://www.acus.gov/research-projects/public-availability-agency-guidance>. This recommendation deals only with the limited class of those documents relating to adjudication procedure.

⁴ Using the nomenclature of Recommendation 2016-4, this includes both Type A and Type B adjudications. Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312 (Dec. 23, 2016); Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act 4* (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf.



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16 Amendment due process clause⁵; (b) the adjudicative provisions of the APA⁶; (c) agency or
17 program-specific statutes that set forth rules for particular types of adjudication; (d) agency-
18 promulgated rules of procedure (which will be referred to as “rules of practice” for purposes of
19 this recommendation) with legal effect that must be published in the *Federal Register* and *Code*
20 *of Federal Regulations* (CFR)⁷; (e) agency precedents as set forth in decisions by agency
21 officials authorized to engage in “final” action⁸; (f) standing orders and practice procedures
22 issued by individual adjudicators; and (g) agency-specific forms that litigants are required to use.

23 In addition, many agencies have issued a wide array of guidance documents that help
24 litigants navigate the adjudicative process and guide agency adjudicators and other agency
25 officials. These documents usually take the form of policy statements, and, like other forms of
26 agency guidance, they are not legally enforceable against private litigants appearing before the
27 agency.⁹ In certain instances, however, such policy statements may impose requirements on
28 agency officials or otherwise create legally enforceable rights for private litigants. First, an
29 agency may draft a guidance document (such as a case-processing manual) so as to require its
30 staff (but not private litigants) to adjudicate cases in a certain way. Second, an agency might
31 draft a guidance document—usually inadvertently—such that a litigant could reasonably
32 interpret it to create enforceable rights, with the result that a court may find it to be enforceable

⁵ U.S. CONST. amend. V.

⁶ 5 U.S.C. §§ 554–58.

⁷ 44 U.S.C. § 1505 (requiring documents having general applicability and legal effect to be published in the *Federal Register*); *id.* § 1510(a) (requiring the codification in the CFR of documents having general applicability and legal effect that have been published in the *Federal Register*); 1 C.F.R. §§ 5.2(c), 5.5, 5.9 (requiring that documents of general applicability and legal effect be published in the *Federal Register* and codified in the CFR).

⁸ 5 U.S.C. § 704. United States Supreme Court precedents may also be considered a binding source of law.

Whether lower-court decisions are binding is not addressed by the Conference.

⁹ *See, e.g.*, *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (holding that a “general statement of policy . . . does not establish a ‘binding norm’”); *see also* RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.3 (5th ed. 2010). The common practice of distinguishing between rules that have binding legal effect and guidance documents that do not by observing that only the former must go through notice-and-comment does not work for rules of practice. Rules of practice are legally enforceable, but all “rules of . . . procedure” enjoy their own exemption from notice-and-comment under the APA. 5 U.S.C. § 553(b)(A). In the realm of agency adjudication, agencies distinguish rules of practice from guidance documents by expressing their intent that the former are legally enforceable by and against private litigants. To the extent that an agency does not adequately disclaim any intention to create legally enforceable rights in the guidance documents it issues, a court may hold those guidance documents to be enforceable by (but not against) private litigants.



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33 against agency officials.¹⁰ This counsels in favor of careful drafting to ensure that any guidance
34 document an agency issues properly articulates its intent.

35 Under existing law, agencies are required to publish all rules of practice in the *Federal*
36 *Register* and then to codify these rules in the CFR.¹¹ Agencies are also required to publish such
37 rules of practice online.¹² But agencies are not required to publish associated guidance
38 documents either online or in the *Federal Register*. And no law dictates how agencies are to
39 organize the materials on their websites. Finally, how the agency characterizes any guidance
40 documents it makes publicly available is critically important, as a court may enforce a guidance
41 document that a litigant reasonably interprets to create legally enforceable rights against the
42 agency.

43 A review of existing agency websites reveals that agency practices vary widely. Some
44 publish all relevant statutes, rules of practice, precedents, standing orders, forms, and guidance
45 documents online, whereas others publish few or none of these things. Of those that do publish
46 such documents, some identify the sources of law from which the rules derive and clearly
47 delineate between rules of practice and (non-binding) guidance documents, whereas others do
48 not. Finally, some websites are much more effective than others in organizing these materials
49 and placing them in a logical location on the agency website such that they are easily accessible
50 to litigants.

51 This recommendation offers best practices to optimize agencies' online presentation of
52 procedural rules for agency adjudications. Implementation of these best practices will benefit
53 not only private litigants, who need ready access to procedural rules in order to litigate
54 effectively, but also agencies, which, among other things, have a strong interest in ensuring that
55 non-binding explanatory materials are clearly labeled as such. They will also advance the
56 purpose of the E-Government Act and recent amendments to the Freedom of Information Act,

¹⁰ See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 235–36 (1974) (concluding that guidance document that served “solely [as] an internal-operations brochure” and provided “that all directives that ‘inform the public of privileges and benefits available’” was binding on agency). This is roughly an application of the *Accardi* principle set forth in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266 (1954). This principle holds that agencies and their department heads cannot “sidestep” their own procedural regulations.

¹¹ 44 U.S.C. §§ 1505, 1510(a); 1 C.F.R. §§ 5.2(c), 5.5, 5.9.

¹² E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (amending 44 U.S.C. § 3501).



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57 which expand affirmative disclosure by federal agencies and ensure that key agency documents
58 are made available online.¹³

59 **RECOMMENDATIONS**

60 **Recommendations Relating to Publication on Agency Websites**

- 61 1. Agencies should provide access on their websites to, and keep updated, all procedural
62 materials that apply to agency adjudications on their websites, including as relevant: (a)
63 the provisions of the APA relating to adjudication (5 U.S.C. §§ 554–58); (b) statutory
64 provisions providing procedural rules for adjudication; (c) rules of practice; (d) agency
65 precedents, which often are catalogued in explanatory materials; (e) guidance documents
66 that provide information on adjudicative procedures, including guides designed for
67 agency litigants and adjudicators (e.g., manuals, bench books), excepting those covered
68 by a FOIA exemption that the agency intends to invoke; (f) adjudicator-specific practice
69 procedures applicable across multiple cases, such as standing orders; and (g) agency-
70 specific forms that litigants must use.
- 71 2. In publishing the materials pursuant to Recommendation 1, agencies should present the
72 materials in a clear, logical, and comprehensive fashion. An example of such
73 presentation is to display the materials published under Recommendation 1 in an easy-to-
74 read table. When possible, agencies should delineate between binding and nonbinding
75 materials.
- 76 3. Rules of practice should be accessible on agency websites in one easily searchable
77 format. The rules should include a table of contents listing the rule titles. The rule titles
78 should be hyperlinked to the rule text. The numbering system in the searchable format
79 should mirror the CFR’s numbering system and provide a link to the official version of
80 the CFR.
- 81 4. When an agency’s mission consists exclusively or almost exclusively of conducting
82 adjudications, the agency should link to its materials published under Recommendation 1
83 on the agency’s homepage. When conducting adjudications is merely one of an agency’s

Commented [RB1]: Note to Ad Hoc Committee: Wording used is drawn from Recommendation 2017-1, *Adjudication Materials on Agency Websites*.

¹³ 5 U.S.C. § 552(a)(2).



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84 many functions, the agency should link to its rules and guidance from a location on the
85 website that is both dedicated to adjudicatory materials and logical in terms of a person's
86 likelihood of finding the documents in the selected location, such as an enforcement or
87 adjudications page.

88 **Recommendations Relating to Guidance Documents**

- 89 5. Agencies should consider publishing explanatory materials aimed at providing the public
90 an overview of relevant agency precedents that apply the rules of practice.
- 91 6. Where possible, guidance documents should note at the beginning or atop the first page
92 whether or to what extent they are binding and include a reference to the binding rules of
93 practice. A text box could be placed explicitly stating that the document is not a binding
94 legal authority.
- 95 7. Explanatory materials should cite, when applicable, statutes, rules of practices, and
96 adjudicative precedents relating to adjudication procedures.
- 97 8. To facilitate ease of understanding, explanatory materials should adhere to ACUS's
98 Recommendation 2017-3 – Plain Language in Regulatory Drafting. The agency should
99 tailor these documents to meet the needs of the members of the public who typically
100 appear before the agency. For example, an agency with many pro se litigants may wish
101 to provide detailed, step-by-step instructions covering each step of the litigation process.