



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Agency Appellate Systems

### Committee on Adjudication

Proposed Recommendation | December 16, 2020

#### Proposed Amendments

**This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).**

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

11 Appellate review of hearing-level decisions can be structured in numerous ways. Two  
12 structures are most common. In the first, litigants appeal directly to the agency head, which may

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<sup>1</sup> Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

<sup>2</sup> Recommendation 2016-4 addressed agency adjudications in which an evidentiary hearing, though not governed by the formal hearing provisions of the Administrative Procedure Act (APA) (5 U.S.C. §§ 554, 556–57 (2018)), is required by statute, regulation, or executive order. Those adjudications, which are often as formal as APA adjudications in practice, far outnumber so-called APA adjudications. Although Recommendation 2016-4 addresses only non-APA adjudications, most of its best practice are as applicable to APA adjudications as non-APA adjudications. Some such practices, in fact, are modeled on the APA's formal hearing provisions.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

13 be a multi-member board or commission. In the second, litigants appeal to an appellate  
14 adjudicator or group of adjudicators—often styled as a board or council—sitting below the  
15 agency head. The appellate decision may be the agency’s final action or may be subject to  
16 further appeal within the agency (usually to the agency head).

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

26 With the exception of the appropriate standard for granting review, this  
27 Recommendation’s focus lies elsewhere. It addresses, and offers best practices with respect to,  
28 the following subjects: first, an agency’s identification of the purpose or objective served by its  
29 appellate review; second, its selection of cases for appellate review, when review is not required  
30 by statute; third, its procedures for review; fourth, its appellate decision-making processes; fifth,  
31 its management, administration, and bureaucratic oversight of its appellate system; and sixth, its  
32 public disclosure of information about its appellate system.<sup>4</sup>

<sup>3</sup> 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); Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983). Both recommendations concerned only the review of decisions in proceedings governed by the formal hearing provisions of the APA. Their principles, though, are not so confined.

<sup>4</sup> Christopher J. Walker & Matthew Lee Wiener, *Agency Appellate Systems* (Nov. 10, 2020) (Dec. 14, 2020) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-report-agency-appellate-systems>; <https://www.acus.gov/report/draft-report-agency-appellate-systems>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

43 This Recommendation proceeds from the recognition that agency appellate systems vary  
44 enormously—as to their purposes or objectives, governing substantive law, size, and resources—  
45 and that what may be a best practice for one system may not always be the best practice for  
46 another. In offering the best practices that follow, moreover, the Administrative Conference  
47 recognizes that (1) an agency’s procedural choices may sometimes be constrained by statute and  
48 (2) available resources and personnel policies may dictate an agency’s decision as to whether and  
49 how to implement some of the best practices that follow. The Administrative Conference makes  
50 this Recommendation subject to these important qualifications. The Recommendation is drafted  
51 accordingly.

Commented [CA1]: Proposed Amendment from Council # 1

RECOMMENDATION

Objectives of Appellate Review

- 52 1. Agencies should identify and publish in procedural regulations what the objective(s) or  
53 objectives their of appellate systems serve; disclose those objectives in procedural  
54 regulations; and design rules and processes, including especially the scope and standard  
55 of review, to serve them and they should design their processes and draft their procedural  
56 regulations accordingly. In particular, agencies should set their scope and standard of  
57 review to be consistent with the objectives of their appellate system.

Commented [CM2]: Proposed Amendment from Public Member Emily S. Bremer: If the original text of Paragraph 1 is retained, Ms. Bremer proposes the following amended language for Paragraph 1: “Agencies should identify and publish in procedural regulations the objective or objectives their appellate systems serve, and they should design their processes and draft their regulations accordingly. In particular, agencies should establish a scope and standard of review that is consistent with the objectives of their appellate system.”

Commented [CA3]: Proposed Amendment from Council # 2



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**Procedures for Appellate Review**

- 58 2. Agencies should promulgate and publish procedural regulations governing agency  
59 appellate review in the *Federal Register* and codify them in the *Code of Federal*  
60 *Regulations*. These regulations should cover all significant procedural matters pertaining  
61 to agency appellate review, including but not limited to the following:
- 62 a. the objectives of the agency’s appellate review system;
  - 63 b. the timing and procedures for initiating review, including any available  
64 interlocutory review;
  - 65 c. the standards for granting review, if review is discretionary;
  - 66 d. the standards for permitting participation by interested persons and amici;
  - 67 e. the standard of review;
  - 68 f. the allowable and required submissions by litigants and their required form and  
69 contents;
  - 70 g. the procedures and criteria for designating decisions as precedential and the legal  
71 effect of such designations;
  - 72 h. the record on review and the opportunity, if any, to submit new evidence;
  - 73 i. the availability of oral argument or other form of oral presentation;
  - 74 j. the standards of and procedures for reconsideration and reopening, if available;
  - 75 k. any administrative or issue exhaustion requirements that must be satisfied before  
76 seeking agency appellate or judicial review, including a clear statement as to  
77 whether agency appellate review is a mandatory prerequisite to judicial review;
  - 78 l. openness of proceedings to the public and availability of video or audio streaming  
79 or recording; ~~and~~  
80 m. in the case of multi-member appellate boards, councils, and similar entities, the  
81 authority to assign decision-making authority to fewer than all members (e.g.,  
82 panels); and  
83 ~~m.n.~~ whether seeking agency appellate review automatically stays the  
84 effectiveness of the appealed agency action until appeal is resolved, and, if not,

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

85 [how a party seeking agency appellate review may request such a stay and the](#)  
86 [standards for deciding whether to grant it.](#)

- 87 3. Agencies should include in the procedural regulations governing their appellate  
88 programs: (a) a brief statement or explanation of each program’s review authority,  
89 structure, and decision-making components; and (b) for each provision based on a  
90 statutory source, an accompanying citation to that source.
- 91 4. When revising existing or adopting new appellate rules, agencies should consider the  
92 appellate rules (Rules 400–450) in the Administrative Conference’s *Model Rules of*  
93 *Agency Adjudication* (rev. 2018) **in deciding what their rules should provide.**
- 94 5. When materially revising existing or adopting new appellate rules, agencies should use  
95 notice-and-comment procedures or other mechanisms for soliciting public input,  
96 notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the costs  
97 clearly outweigh the benefits of doing so.

**Case Selection for Appellate Review**

- 98 6. Based on the agency-specific objectives of appellate review, agencies should decide  
99 whether the granting of review should be mandatory or discretionary (assuming they have  
100 statutory authority to decide); if discretionary, the criteria for granting review should  
101 track the objectives of the appellate system, and they should be published in the  
102 procedural regulations.
- 103 7. Agencies should consider implementing procedures for sua sponte appellate review of  
104 non-appealed hearing-level decisions, as well as for the referral of cases or issues by  
105 hearing-level adjudicators to the appellate entity for interlocutory review.

**Commented [CM4]:** Proposed Amendment from Public Member Jonathan R. Siegel



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Appellate Decision-making Processes and Decisions

- 106 8. Whenever possible, agencies should consider maintaining electronic case management  
107 systems ~~(eCMS)~~ that ensure that hearing records are easily accessible to appellate  
108 adjudicators. Such ~~an eCMS~~ systems may include the capability for electronic filing.
- 109 9. Although the randomized assignment of cases to appellate adjudicators is typically an  
110 appropriate docketing method for an agency appellate system, agencies should consider  
111 the potential benefits of sorting and grouping appeals on the appellate docket, such as  
112 reduced case processing times and more efficient use of adjudicators', staff attorneys',  
113 and law clerks' skills and time. Criteria for sorting and grouping cases may include ~~the~~  
114 size of a case's record, complexity of a case's issues, subject matter of a case, and  
115 similarity of a case's legal issues to those of other pending cases.
- 116 10. Consistent with the objectives of the agency's appellate system and in light of the costs of  
117 time and resources, agencies should consider adopting an appellate model of judicial  
118 review in which the standard of review is not de novo with respect to findings of fact and  
119 application of law to facts. For similar reasons, many agencies should consider limiting  
120 the introduction of new evidence on appeal that is not already in the administrative record  
121 from the hearing-level adjudication.
- 122 11. Taking agency resources into account, agencies should emphasize concision, readability,  
123 and plain language in their appellate decisions and explore the use of decision templates,  
124 summary dispositions, and other quality-improving measures.
- 125 12. Agencies should establish clear criteria and processes for identifying and selecting  
126 appellate decisions as precedential, especially for appellate systems with objectives of  
127 policymaking or inter-decisional consistency.
- 128 13. Agencies should assess the value of oral argument and amicus participation in their  
129 appellate system based on the agencies' identified objectives for appellate review and  
130 should establish ~~clear~~ rules governing both. Criteria ~~which that~~ may favor oral argument  
131 and amicus participation include issues of high public interest, issues of concern beyond



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

132 the parties to the case, specialized or technical matters, and a novel or substantial  
133 question of law, policy, or discretion.

### **Administration, Management, and Bureaucratic Oversight**

134 14. Agency appellate systems should promptly transmit their precedential decisions to all  
135 appellate program adjudicators and, directly or through hearing-level programs, to  
136 hearing-level adjudicators (as appropriate). Appellate programs should include in their  
137 transmittals, when feasible, brief summaries of the decision.

138 15. Agencies should notify their adjudicators of significant federal court decisions reviewing  
139 the agencies' decisions and, when providing notice, explain the significance of those  
140 decisions to the program. As appropriate, agencies should notify adjudicators if the  
141 agency will not acquiesce in a particular decision of the federal courts of appeals.

142 16. Agencies in which decision making relies extensively on their own precedential decisions  
143 should consider preparing or having prepared indexes and digests—with annotations and  
144 comments, as appropriate—to identify those decisions and their significance.

145 17. As appropriate, agency appellate systems should communicate with agency rule-writers  
146 and other agency policymakers—and, as appropriate, institutionalize communication  
147 mechanisms—to address whether recurring issues in their decisions should be addressed  
148 by rule rather than precedential case-by-case adjudication.

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

### **Public Disclosure and Transparency**

154 19. Agencies should disclose on their websites any rules (sometimes styled as “orders”), and  
155 statutes authorizing such rules, by which an agency head has delegated review authority  
156 to appellate adjudicators.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 157 20. Regardless of whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs  
158 their appellate review system, agencies should consider announcing, livestreaming, and  
159 maintaining video recordings on their websites of appellate proceedings (including oral  
160 argument) that present significant legal and policy issues likely to be of interest to  
161 regulated parties and other members of the public. Brief explanations of the issues to be  
162 addressed by oral argument may usefully be included in website notices of oral argument.
- 163 21. Agencies should include on their websites brief and accessibly written explanations as to  
164 how their internal decision-making processes work and, as appropriate, include links to  
165 explanatory documents appropriate for public disclosure. Specific subjects agencies  
166 should consider addressing include: the process of assigning cases to adjudicators (when  
167 fewer than all of the programs' adjudicators participate in a case), the role of staff, and  
168 the order in which cases are decided.
- 169 22. When posting decisions on their websites, agencies should distinguish between  
170 precedential and non-precedential decisions. Agencies should also include a brief  
171 explanation of the difference.
- 172 23. When posting decisions on their websites, agencies should consider including, as much as  
173 practicable, brief summaries of precedential decisions and, for precedential decisions at  
174 least, citations to court decisions reviewing them.
- 175 24. Agencies should include on their websites any digests and indexes of decisions they  
176 maintain. It may be appropriate to remove material exempt from disclosure under the  
177 Freedom of Information Act or other laws.
- 178 25. Agencies should affirmatively solicit feedback concerning the functioning of their  
179 appellate systems and provide a means for doing so on their websites.