



## Agency Appellate Systems

### Committee on Adjudication

#### Proposed Recommendation for Committee | November 13, 2020

1 [Preamble forthcoming]

2 [NOTE: the recommendations below are identical to the recommendations found in the  
3 November 10, 2020 draft ACUS report *Agency Appellate Systems* by Christopher J. Walker &  
4 Matthew Lee Wiener, available at [https://www.acus.gov/report/draft-report-agency-appellate-](https://www.acus.gov/report/draft-report-agency-appellate-systems)  
5 [systems](https://www.acus.gov/report/draft-report-agency-appellate-systems)]

#### RECOMMENDATION

##### A. Objectives of Appellate Review

- 6 1. Agencies should identify what objective or objectives are served by their appellate  
7 systems, and they should design their processes and draft their procedural regulations  
8 accordingly.
- 9 2. Agencies should publicly announce—preferably by codifying them in procedural  
10 regulations—the objective or objectives of their appellate systems.

##### B. Procedural Law of Appellate Review

- 11 1. Agencies should address all significant procedural matters governing agency appellate  
12 review in procedural regulations—often styled as a “rules of practice” or “rules of  
13 procedure”—published in the *Code of Federal Regulations* rather than relegating them to  
14 non-legislative rules or other documents. Significant procedural matters unique to agency  
15 appellate review include:



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- 16 (a) the availability of interlocutory review;
- 17 (b) the procedures for initiating review;
- 18 (c) the standards for granting review, if review is discretionary;
- 19 (d) the scope and standard of review;
- 20 (e) the allowable and required submissions by litigants—including petitions, motions,  
21 and briefs—and their required contents;
- 22 (f) the procedures for designating decisions as precedential and the legal effect of such  
23 designations;
- 24 (g) the record on review and the opportunity, if any, to submit new evidence;
- 25 (h) the availability of oral argument and amicus participation;
- 26 (i) the availability of and procedures for reconsideration;
- 27 (j) in the case of multi-member appellate boards, councils, and the like, the authority to  
28 assign decision-making authority to fewer than all members (e.g., panels); and
- 29 (k) any administrative exhaustion requirements that must be satisfied before seeking  
30 judicial review.
- 31 2. Agencies should consider including in the procedural regulations governing their  
32 appellate programs: (a) a brief statement or explanation of the program’s review  
33 authority, structure, and decision making components; and (b) for each provision based  
34 on a statutory source, an accompanying citation to that source.
- 35 3. When revising existing or adopting new appellate rules, agencies should review the  
36 appellate rules (Rules 400-450) in the Administrative Conference’s *Model Rules of*



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37 *Agency Adjudication* (rev. 2018) (Appendix B to this Report) in deciding what the rules  
38 should provide.

39 4. When adopting new or materially amending existing procedural regulations, agencies  
40 should voluntarily use notice-and-comment procedures or other mechanisms for  
41 soliciting public input, notwithstanding the procedure-rules exemption of 5 U.S.C. §  
42 553(b)(A), unless the costs clearly outweigh the benefits of doing so.

### C. Case Selection for Appellate Review

43 1. Based on the agency-specific objectives for appellate review, agencies should consider  
44 whether review should be mandatory or discretionary (assuming they have statutory  
45 authority to do so); if discretionary, the standards for granting review should track the  
46 purposes of the appellate system, and they should be published in the procedural  
47 regulations.

48 2. Agencies should consider implementing procedures for sua sponte appellate review of  
49 non-appealed hearing-level adjudications as well as for hearing-level adjudicators to refer  
50 cases to them for interlocutory review.

### D. Appellate Decision-making Processes and Decisions

51 1. Whenever possible, agencies should maintain a single or integrated electronic case  
52 management systems (ECMs) for both hearing-level and appellate program, or otherwise  
53 design their ECMs to ensure that hearing records are easily accessible to appellate  
54 adjudicators.

55 2. Agencies should explore ways to implement screening methods for appeals and, where  
56 appropriate, the grouping of appeals on the merits based on difficulty, common legal  
57 issue, subject matter, or other relevant factors in order to better leverage adjudicator  
58 expertise and economies of scale.

**Commented [GY1]:** The Committee may wish to discuss with the consultants their intended definition of “screening” in this recommendation and in the two that follow.



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- 59 3. Agencies should consider how to better utilize staff attorneys and law clerks at both the  
60 screening and merits stages.
- 61 4. Agencies should consider utilizing artificial intelligence and machine learning to assist in  
62 screening and sorting appeals.
- 63 5. Agencies should set their scope and standard of review to be consistent with agency-  
64 specific objectives for their appellate system. For most appellate systems, it is not  
65 advisable to have a de novo standard of review. Nor is it prudent to have a de novo scope  
66 of review where appellants can freely introduce any new evidence on appeal.
- 67 6. Agencies should strive to improve the readability and overall quality of their appellate  
68 decisions, including an emphasis on plain language and experimentation with decision  
69 templates and other quality-improving measures.
- 70 7. Agencies should establish clear criteria and processes for publishing precedential  
71 opinions, especially for appellate systems with objectives of policymaking or inter-  
72 decisional consistency.
- 73 8. Agencies should assess the value of oral argument and amicus participation in their  
74 appellate system and should establish clearer rules for both.

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

- 75 1. Agency appellate systems should promptly transmit their precedential decisions to all  
76 program adjudicators and, directly or through hearing-level programs, to hearing-level  
77 adjudicators (as appropriate). Appellate programs should include in their transmittals,  
78 when feasible, summaries and explanatory materials.
- 79 2. Agency appellate systems should notify their adjudicators of significant federal-court  
80 decisions reviewing the agencies' decisions and, when providing notice, explain the  
81 significance of those decisions to the program. As appropriate, agencies should notify



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- 82 adjudicators of any policies governing whether and when they will acquiesce in the  
83 decisions of the federal courts of appeals.
- 84 3. Agency appellate systems whose decision making relies extensively on their own  
85 precedential decisions should consider preparing indexes and digests—with annotations  
86 and comments, as appropriate—to help adjudicators identify those decisions and their  
87 significance.
- 88 4. Agency appellate systems should regularly communicate with agency rule-writers and  
89 other agency policymakers—and, as appropriate, institutionalize communication  
90 mechanisms—to address whether interpretations and policies addressed in their decisions  
91 should be addressed by rule rather than case-by-case adjudication. Appellate programs  
92 should also address with agency policymakers, congressional liaisons, and other  
93 appropriate officials any needed statutory amendments that the program may identify.
- 94 5. The Office of the Chairman of the Administrative Conference should provide for, as  
95 authorized by statute, the “interchange among administrative agencies of information  
96 potentially useful in improving” (5 U.S.C. § 594(2)) agency appellate systems. The  
97 subjects of interchange might include electronic case management systems, procedural  
98 innovations, quality-assurance reviews, and common management problems.

### **F. Public Disclosure and Transparency**

- 99 1. Agencies should disclose on their websites any rules (sometimes styled as “orders”) by  
100 which an agency head has delegated review authority to appellate adjudicators.
- 101 2. Whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs their appellate  
102 review system, agencies should consider announcing, livestreaming, and maintaining  
103 video recordings on their websites of appellate proceedings (including oral argument)  
104 that present significant legal and policy issues likely to be of interest to regulated parties



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- 105 and other members of the public. Brief explanations of the issues to be addressed by oral  
106 argument might usefully be included in website notices of oral argument.
- 107 3. Agencies should include on their websites brief and accessibly written explanations as to  
108 how their internal decision-making processes work and, as appropriate, include links to  
109 explanatory documents appropriate for public disclosure. Specific subjects agencies  
110 should consider addressing include: the assignment of cases to adjudicators (when fewer  
111 than all the programs adjudicators participate in a case), the role of staff, and the order in  
112 which cases are decided.
- 113 4. When posting decisions on their website, agencies should clearly distinguish between  
114 precedential and non-precedential decisions. Agencies should also include a brief  
115 explanation of the difference.
- 116 5. When posting decisions on their website, agencies should consider, as practicable,  
117 including brief summaries of precedential decisions and, for precedential decisions at  
118 least, citations to court decisions reviewing them.
- 119 6. Agencies should include on their website any digests and indexes of decisions they  
120 maintain. It may be appropriate to remove any material exempt from disclosure under the  
121 Freedom of Information Act or other laws.