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Agency Litigation Webpages

Committee on Judicial Review

Draft Proposed Recommendation for Committee | July 28, 2020

1 Federal agencies participate in thousands of court cases every year. Most such cases
2 result in “agency litigation materials,” which this recommendation defines as pleadings, briefs,
3 settlements, and court decisions bearing on agencies’ regulatory or enforcement activities.

4 Public access to agency litigation materials is desirable for at least two reasons. First,
5 because agency litigation materials often clarify how the Federal Government interprets and aims
6 to enforce federal law, they can help people understand their legal obligations. Second, public
7 access to agency litigation materials promotes accountable and transparent government. Those
8 two reasons distinguish agency litigation materials from litigation filings by private parties.

9 However valuable public access to agency litigation materials might be, federal law does
10 little to mandate it. When it comes to agencies’ own litigation filings, only the Freedom of
11 Information Act (FOIA) requires disclosure, and then only when members of the public specify
12 the materials in which they are interested.¹ In the same vein, the E-Government Act of 2002
13 requires federal courts to make their written opinions, including opinions in cases involving
14 federal agencies, available on websites.² But that requirement has not yielded “a satisfactory
15 method of delivering usable and findable legal information,”³ partly because most courts’
16 websites lack functions and features that would allow users to easily identify cases about specific
17 topics or agencies. The most comprehensive sources of agency litigation materials are the Public

¹ See 5 U.S.C. § 552(a)(3).

² See 44 U.S.C. § 3502(a).

³ Ian Gallacher, *Cite Unseen: How Neutral Citation and America’s Law Schools Can Cure Our Strange Devotion to Bibliographical Orthodoxy and the Constriction of Open and Equal Access to the Law*, 70 ALB. L. REV. 491, 515 (2007).



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18 Access to Court Electronic Records (PACER) service and paid legal research services like
19 Westlaw and Lexis. Yet the cost, requirement to provide billing information, and certain
20 limitations on search functionality might keep people from using them to find agency litigation
21 materials.

22 Agency litigation webpages are a convenient way for people to examine agency litigation
23 materials. For purposes of this Recommendation, an agency litigation webpage is a webpage on
24 an agency's website that systematically catalogs and links to agency litigation materials from
25 cases in which the agency has participated and which relate to the agency's regulatory or
26 enforcement activities. The documents linked on an agency litigation webpage can include
27 pleadings, merits briefs, amicus briefs, court opinions, settlements, and judgments. When
28 agencies maintain up-to-date, search-friendly litigation webpages, people can visit them and
29 quickly find important filings in court cases concerning matters of interest. Agency litigation
30 webpages thus make it easier for people to learn about the law and to hold government
31 accountable for agencies' actions.

32 Several federal agencies already maintain agency litigation webpages.⁴ A survey of
33 websites for 25 federal agencies of all stripes — big and small, executive-branch and
34 independent, regulatory and benefit-oriented, and so forth — revealed a range of practices when
35 it comes to agency litigation webpages.⁵ The survey suggests that most federal agencies do not
36 maintain active agency litigation webpages. Among those that do, the quality of the litigation
37 webpages varies appreciably. Some contain vast troves of agency litigation materials; others
38 contain much more limited collections. Some are updated regularly; others are updated only
39 sporadically. Some are easy to locate and search; others are not. In short, there appears to be no
40 standard practice for publishing and maintaining agency litigation webpages.

41 Close inspections of agencies' litigation webpages suggest three general features that
42 make for a useful litigation webpage. First, an agency's litigation webpage must be easy to find.

⁴ See Mark Thomson, Draft Report on Agency Litigation Webpages at 15–16 (June 30, 2020) (draft report to the Admin. Conf. of the U.S.) (forthcoming).

⁵ See *id.* at 14–20 (identifying variations in agency practices).



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43 Second, it must contain a robust collection of agency litigation materials. Third, those materials
44 must be easy to search and sort. Creating a useful litigation webpage takes time, money, and
45 effort. However, the agency personnel responsible for creating some of the Federal
46 Government's most impressive agency litigation webpages report that the benefits substantially
47 outweigh the costs.

48 This Recommendation offers best practices and factors for agencies to consider in
49 making their litigation materials available on agency litigation webpages. It recognizes that
50 agencies have unique missions, litigation portfolios, and programming and financial constraints,
51 and that those considerations might reasonably affect how agencies incorporate the substance of
52 this Recommendation. To the extent agencies must expend additional resources to implement
53 this Recommendation, they should be mindful that upfront costs may yield even greater benefits
54 over time.

RECOMMENDATION

Providing Access to Agency Litigation Materials

- 57 1. Agencies should provide access on their websites to agency litigation materials, including
58 documents like pleadings, briefs, court opinions, settlements. In determining which
59 agency litigation materials to include on their websites, agencies should ensure that they
60 have implemented appropriate safeguards to protect relevant privacy and business
61 interests implicated by the disclosure of litigation materials. Among other things, each
62 agency should implement a protocol to ensure that, before a document is posted to the
63 agency's litigation webpage, the lawyers responsible for drafting and filing the document
64 have reviewed it and certified that it does not contain private or protected information.
- 65 2. Agencies that choose to post all or most of their litigation materials should consider
66 grouping together links to those materials on a single, dedicated webpage — what this
67 recommendation refers to as an agency litigation webpage. If an agency is organized such
68 that different divisions within it are responsible for different classes of litigation,
69 operational efficiency may ultimately counsel in favor of the agency's maintaining



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70 multiple litigation webpages, with each webpage grouping together links to the litigation
71 materials relevant to a different division.

72 **Making It Easy to Locate Agency Litigation Webpages**

- 73 3. Agencies should make sure that website users can locate the agencies' litigation materials
74 easily on the agencies' websites. Agencies can do this by:
- 75 a. Displaying links to agency litigation webpages in readily visible locations on the
76 homepage for the agency's website; and
 - 77 b. Maintaining a search engine and a site map or index, or both, on the agency's
78 homepage.
- 79 4. Agencies that maintain litigation webpages should ensure that, when website users enter
80 litigation-focused terms — like court, brief, settlement, or lawsuit — in the main search
81 engines on the agencies' websites, the search results prominently display a link to the
82 agencies' litigation webpages.

83 **Making It Easy to Find Relevant Materials on Agency Litigation Webpages**

- 84 5. Agency litigation webpages should group together materials from the same cases. They
85 might, for example, provide a separate docket page for each case, with a link to the
86 docket page on their litigation webpages.
- 87 6. Agencies should offer general and advanced search and filtering options within their
88 litigation webpages. The search and filtering options could, for instance, allow users to
89 sort, narrow, or filter searches according to criteria like action or case type, date, topic,
90 case number, party name, or specific words and phrases, along with any other criteria the
91 agency decides are especially useful given its litigation activities.

Commented [MT1]: To be discussed: What are the benefits and drawbacks of sub-agencies linking to their parent agencies' litigation webpages, rather than maintaining their own litigation webpages?