



## **Administrative Conference Recommendation 2020-3**

### **Agency Appellate Systems**

**Adopted December 16, 2020**

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

Appellate review of hearing-level decisions can be structured in numerous ways. Two structures are most common. In the first, litigants appeal directly to the agency head, which may be a multi-member board or commission. In the second, litigants appeal to an appellate adjudicator or group of adjudicators—often styled as a board or council—sitting below the

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<sup>1</sup> Admin. Conf. of the U.S., 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), 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 practices are as applicable to APA adjudications as non-APA adjudications. Some such practices, in fact, are modeled on the APA’s formal hearing provisions.



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agency head. The appellate decision may be the agency’s final action or may be subject to further appeal within the agency (usually to the agency head).

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

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

Most importantly, this Recommendation begins by suggesting that agencies identify, and publicly disclose, the purpose(s) or objective(s) of their appellate systems. Appellate systems may have different purposes, and any given appellate system may have multiple purposes. Purposes or objectives can include the correction of errors, inter-decisional consistency of

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<sup>3</sup> 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); 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). 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* (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-report-agency-appellate-systems>.



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decisions, policymaking, political accountability, management of the hearing-level adjudicative system, organizational effectiveness and systemic awareness, and the reduction of litigation in federal courts. The identification of purpose is important both because it dictates (or should dictate) how an agency administers its appellate system—including what cases it hears and under what standards of review it decides them—and provides a standard against which an agency’s performance can be evaluated.

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

### **RECOMMENDATION**

#### **Objectives of Appellate Review**

1. Agencies should identify the objective(s) of appellate review; disclose those objectives in procedural regulations; and design rules and processes, especially for scope and standard of review, to serve them.

#### **Procedures for Appellate Review**

2. Agencies should promulgate and publish procedural regulations governing agency appellate review in the *Federal Register* and codify them in the *Code of Federal Regulations*. These regulations should cover all significant procedural matters pertaining to agency appellate review, including but not limited to the following:
  - a. The objectives of the agency’s appellate review system;



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- b. The timing and procedures for initiating review, including any available interlocutory review;
  - c. The standards for granting review, if review is discretionary;
  - d. The standards for permitting participation by interested persons and amici;
  - e. The standard of review;
  - f. The allowable and required submissions by litigants and their required form and contents;
  - g. The procedures and criteria for designating decisions as precedential and the legal effect of such designations;
  - h. The record on review and the opportunity, if any, to submit new evidence;
  - i. The availability of oral argument or other form of oral presentation;
  - j. The standards of and procedures for reconsideration and reopening, if available;
  - k. Any administrative or issue exhaustion requirements that must be satisfied before seeking agency appellate or judicial review, including whether agency appellate review is a mandatory prerequisite to judicial review;
  - l. Openness of proceedings to the public and availability of video or audio streaming or recording;
  - m. In the case of multi-member appellate boards, councils, and similar entities, the authority to assign decision-making authority to fewer than all members (e.g., panels); and
  - n. Whether seeking agency appellate review automatically stays the effectiveness of the appealed agency action until the appeal is resolved (which may be necessary for appellate review to be mandatory, see 5 U.S.C. § 704), and, if not, how a party seeking agency appellate review may request such a stay and the standards for deciding whether to grant it.
3. Agencies should include in the procedural regulations governing their appellate programs: (a) a brief statement or explanation of each program's review authority, structure, and decision-making components; and (b) for each provision based on a statutory source, an accompanying citation to that source.



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4. When revising existing or adopting new appellate rules, agencies should consider the appellate rules (Rules 400–450) in the Administrative Conference’s *Model Rules of Agency Adjudication* (rev. 2018).
5. When materially revising existing or adopting new appellate rules, agencies should use notice-and-comment procedures or other mechanisms for soliciting public input, notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the costs clearly outweigh the benefits of doing so.

### **Case Selection for Appellate Review**

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

### **Appellate Decision-making Processes and Decisions**

8. Whenever possible, agencies should consider maintaining electronic case management systems that ensure that hearing records are easily accessible to appellate adjudicators. Such systems may include the capability for electronic filing.
9. Although the randomized assignment of cases to appellate adjudicators is typically an appropriate docketing method for an agency appellate system, agencies should consider the potential benefits of sorting and grouping appeals on the appellate docket, such as reduced case processing times and more efficient use of adjudicators’, staff attorneys’, and law clerks’ skills and time. Criteria for sorting and grouping cases may include the size of a case’s record, complexity of a case’s issues, subject matter of a case, and similarity of a case’s legal issues to those of other pending cases.



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10. Consistent with the objectives of the agency's appellate system and in light of the costs of time and resources, agencies should consider adopting an appellate model of judicial review in which the standard of review is not de novo with respect to findings of fact and application of law to facts. For similar reasons, many agencies should consider limiting the introduction of new evidence on appeal that is not already in the administrative record from the hearing-level adjudication.
11. Taking agency resources into account, agencies should emphasize concision, readability, and plain language in their appellate decisions and explore the use of decision templates, summary dispositions, and other quality-improving measures.
12. Agencies should establish clear criteria and processes for identifying and selecting appellate decisions as precedential, especially for appellate systems with objectives of policymaking or inter-decisional consistency.
13. Agencies should assess the value of oral argument and amicus participation in their appellate system based on the agencies' identified objectives for appellate review and should establish rules governing both. Criteria that may favor oral argument and amicus participation include issues of high public interest; issues of concern beyond the parties to the case; specialized or technical matters; and a novel or substantial question of law, policy, or discretion.

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

14. Agency appellate systems should promptly transmit their precedential decisions to all appellate program adjudicators and, directly or through hearing-level programs, to hearing-level adjudicators (as appropriate). Appellate programs should include in their transmittals, when feasible, brief summaries of the decision.
15. Agencies should notify their adjudicators of significant federal court decisions reviewing the agencies' decisions and, when providing notice, explain the significance of those decisions to the program. As appropriate, agencies should notify adjudicators if the agency will not acquiesce in a particular decision of the federal courts of appeals.



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16. Agencies in which decision making relies extensively on their own precedential decisions should consider preparing or having prepared indexes and digests—with annotations and comments, as appropriate—to identify those decisions and their significance.
17. As appropriate, agency appellate systems should communicate with agency rule-writers and other agency policymakers—and institutionalize communication mechanisms—to address whether recurring issues in their decisions should be addressed by rule rather than precedential case-by-case adjudication.
18. The Office of the Chairman of the Administrative Conference should provide for, as authorized by 5 U.S.C. § 594(2), the “interchange among administrative agencies of information potentially useful in improving” agency appellate systems. The subjects of interchange might include electronic case management systems, procedural innovations, quality-assurance reviews, and common management problems.

### **Public Disclosure and Transparency**

19. Agencies should disclose on their websites any rules (sometimes styled as “orders”), and statutes authorizing such rules, by which an agency head has delegated review authority to appellate adjudicators.
20. Regardless of whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs their appellate review system, agencies should consider announcing, livestreaming, and maintaining video recordings on their websites of appellate proceedings (including oral argument) that present significant legal and policy issues likely to be of interest to regulated parties and other members of the public. Brief explanations of the issues to be addressed by oral argument may usefully be included in website notices of oral argument.
21. Agencies should include on their websites brief and accessibly written explanations as to how their internal decision-making processes work and, as appropriate, include links to explanatory documents appropriate for public disclosure. Specific subjects that agencies should consider addressing include: the process of assigning cases to adjudicators (when fewer than all of the programs’ adjudicators participate in a case), the role of staff, and the order in which cases are decided.



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22. When posting decisions on their websites, agencies should distinguish between precedential and non-precedential decisions. Agencies should also include a brief explanation of the difference.
23. When posting decisions on their websites, agencies should consider including, as much as practicable, brief summaries of precedential decisions and, for precedential decisions at least, citations to court decisions reviewing them.
24. Agencies should include on their websites any digests and indexes of decisions they maintain. It may be appropriate to remove material exempt from disclosure under the Freedom of Information Act or other laws.
25. Agencies should affirmatively solicit feedback concerning the functioning of their appellate systems and provide a means for doing so on their websites.