Informal Agency Adjudication

Committee on Adjudication

Proposed Recommendation for Committee | September 22, 2016

1 [Preamble.]

RECOMMENDATION

1. Procedural Flexibility. Congress should continue to allow agencies broad discretion in creating rules of practice and procedure for their informal adjudicatory systems.

2. Exclusive Record. Procedural regulations should require a decision to be based on an exclusive record, limiting the decisionmaker to considering factual information presented in testimony or documents received by the decisionmaker before, at, or after the hearing to which all parties had access, and to matters officially noticed.

3. Bias. Procedural regulations should prohibit decisionmaker bias in adjudicatory proceedings by clearly stating in procedural regulations and manuals that bias includes three types of disqualifying mindsets:
   a. Financial or other personal interest in the decision;
   b. Personal animus against the private party or group to which that party belongs; or
   c. Prejudgment of the adjudicative facts at issue in the proceeding.

   Procedural regulations and manuals should explain when and how parties should raise claims of bias.

4. Ex Parte Communications. Procedural regulations should prohibit ex parte communications relevant to the merits of the case between persons outside the agency
and agency decisionmakers or decisional advisers, such as law clerks. Communications
between persons outside the agency and agency decisionmakers or decisional advisers
should occur only on the record. If oral or written ex parte communications occur, they
should be placed immediately on the record.

5. *Separation of Functions.* In agencies that have combined functions of investigation,
prosecution, and adjudication, procedural regulations should require internal separation
of decisional and adversarial functions. The regulations should prohibit staff members
who took an active part in investigating, prosecuting, or advocating in a case from
serving as a decisionmaker or decisional adviser in that same case. Adversary personnel
should also be prohibited from furnishing ex parte advice to a decisionmaker or
decisional adviser.

6. *Decisional Advisers.* Agencies should consider allowing ex parte advice to
decisionmakers by decisional advisers who did not take an active part in investigating,
prosecuting, or advocating in the same case, provided that such advice does not violate
the exclusive record principle by introducing new factual materials. Procedural
regulations should describe which decisionmakers can receive such advice and which
advisers can furnish it.

**Pre-Hearing Practices**

7. *Notice.* Procedural regulations should require notice to parties so that they may prepare
for hearings. Notices should be in plain language and tailored to the specific
circumstances of the particular adjudicatory system, which could include information
about:

a. The agency’s position with respect to issues of fact, law, and discretion;
b. How a party can request a hearing;
c. Discovery options;
d. Representation, including self-representation and non-lawyer representation, if
   permitted, and any legal assistance options provided by the agency;
e. The procedural choices open to the party (e.g., choice between written and oral hearings and alternative dispute resolution (ADR) opportunities);

f. Deadlines for filing pleadings and documents;

g. Subpoenaing documents and witnesses;

h. Whether the agency offers an opportunity for reconsideration of the initial decision at a higher agency level; and

i. Availability of judicial review.

8. **Self-Representation and Lay Representation.** Agencies should make hearings as accessible as possible to parties who are self-represented or represented by non-lawyers. Agencies should provide self-represented parties with plain language forms or require the decisionmaker or agency staff to assist them. Agencies should permit non-lawyer representation in appropriate circumstances. In doing so, agencies should have the discretion to license non-lawyer representatives, require them to be insured, and make them subject to ethical codes.

9. **Alternative Dispute Resolution.** Agencies should encourage and facilitate ADR. Procedural regulations should establish a system whereby neutral mediators can be selected by agreement of the parties and ensure confidentiality of communications occurring during the ADR process.

10. **Pretrial Conferences.** Procedural regulations should allow the decisionmaker discretion to require parties to participate in a pretrial conference if the decisionmaker believes that such a conference would simplify the hearing or promote settlement. The decisionmaker should require that (a) parties exchange witness lists and expert reports before the pretrial conference and (b) both sides be represented at the pretrial conference by persons with authority to agree to a settlement.

11. **Discovery.** Procedural regulations should permit discovery in large disputes and lengthier hearings by allowing parties, at a minimum, to inspect the unprivileged materials in the government’s case file. Agencies should empower their decisionmakers to order discovery through depositions, interrogatories, and other methods of discovery used in civil trials, upon a showing that discovery is needed.
12. *Subpoena Power.* Congress should grant subpoena power to all agencies that conduct informal adjudication. Agencies with subpoena power should craft procedural regulations explaining subpoena practice in detail.

13. *Open Hearings.* Agencies should adopt the presumption that their hearings are open to the public, while retaining the ability to close the hearings in particular cases due to privacy concerns, including, but not limited to, the protection of:
   a. National security;
   b. Law enforcement;
   c. Confidentiality of business documents; and
   d. Privacy of the parties to the hearing.

**Hearing Practices**

14. *Hearing Officers.* Agencies that decide a significant number of cases should use hearing officers to conduct hearings and provide an initial decision. Agency heads should provide upper-level reconsideration of such initial decisions.

15. *Video Teleconferencing and Telephone Hearings.* Agencies should provide the option for hearings to be conducted by video teleconferencing or telephone, provided the key criteria of consistency, efficiency, and participant satisfaction are met.

16. *Written-Only Hearings.* Agencies should use written-only hearings in appropriate cases, such as those that do not involve resolution of credibility conflicts. Particularly good candidates for written-only hearings include those that involve:
   a. Disputes concerning the interpretation of statutes or regulations, or
   b. Legislative facts in which experts offer conflicting views.

17. *Oral Argument.* Agencies should permit oral argument in connection with a written-only hearing if a party requests it, while retaining the discretion to dispense with oral argument if it appears to be of little value in a given case. Further, agencies should allow a hybrid of oral and written-only hearings. If one party (A) wants an oral hearing and the other party (B) wants to submit the case on the record, A receives an oral hearing and B receives a written-only hearing; however, B is permitted to cross-examine A’s witnesses.
18. **Rules of Evidence.** Procedural regulations should clearly prescribe the rules of evidence the decisionmaker will apply (e.g., not simply leave it to the “decisionmaker’s discretion”) in order to avoid confusion and time-consuming evidentiary disputes.

19. **Opportunity for Rebuttal.** Agencies should allow an opportunity for rebuttal, which usually involves cross-examination of an adverse witness in cases presenting credibility issues. Agencies should have the discretion to limit or preclude cross-examination in appropriate circumstances, including cases where:
   a. The case involves a dispute concerning legislative facts where the evidence consists of expert testimony;
   b. Credibility is not at issue;
   c. The only issue is how a decisionmaker should exercise discretion;
   d. National security could be jeopardized; or
   e. The identity of confidential informants might be revealed.

Rebuttal in these contexts could take the form of additional written evidence and oral argument. In such instances, the decisionmaker should give appropriate consideration to the lack of opportunity to cross-examine.

**Post-Hearing Practices**

20. **Written Decisions.** Procedural regulations should both require the decisionmaker to furnish a written decision and specify the contents of the written decision. Such content could include:
   a. Findings of fact;
   b. Explanation of how the decisionmaker resolved credibility conflicts;
   c. Explanation of the decisionmaker’s legal interpretations; and
   d. Statement of the decisionmaker’s reasons for discretionary choices.

21. **Higher-Level Reconsideration.** Procedural regulations should provide for a higher-level reconsideration of initial adjudicatory decisions in order to correct errors made by decisionmakers and to enhance the feelings of private parties that their case has been dealt with fairly and impartially. Agencies should give parties an opportunity to make
arguments to the reconsidering authority. The reconsidering authority should be entitled to summarily affirm the lower-level decision without being required to write a new decision.

22. Precedential Decisions. Agencies should include provisions that allow and encourage the reconsidering body to designate its decisions as precedential in order to improve the consistency of lower-level decisions.

**Procedural Regulations**

23. Complete Statement of Important Procedures. Agencies should set forth all important procedures and practices that affect persons outside the agency in procedural regulations that are published in the Federal Register and the Code of Federal Regulations.

24. Manuals and Guides. Agencies should provide practice manuals and guides for decisionmakers, staff, and private parties spelling out smaller details of the proceeding and illustrating principles that are set forth in regulations. These manuals and guides should be made as user friendly as possible by being written in simple, non-technical language and containing examples, model forms, and checklists.

25. Review of Procedures. Agencies should periodically re-examine and update their procedural regulations, practice manuals, and guides.

26. Feedback. Agencies should seek feedback from decisionmakers, staff, parties, representatives, and other participants in order to evaluate and improve their adjudicatory systems.