



Informal Agency Adjudication

Committee on Adjudication

Proposed Recommendation for Committee | September 22, 2016

1 [Preamble.]

RECOMMENDATION

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

Integrity of the Decisionmaking Process

- 4 2. *Exclusive Record.* Procedural regulations should require a decision to be based on an
5 exclusive record, limiting the decisionmaker to considering factual information presented
6 in testimony or documents received by the decisionmaker before, at, or after the hearing
7 to which all parties had access, and to matters officially noticed.
- 8 3. *Bias.* Procedural regulations should prohibit decisionmaker bias in adjudicatory
9 proceedings by clearly stating in procedural regulations and manuals that bias includes
10 three types of disqualifying mindsets:
- 11 a. Financial or other personal interest in the decision;
 - 12 b. Personal animus against the private party or group to which that party belongs; or
 - 13 c. Prejudgment of the adjudicative facts at issue in the proceeding.
- 14 Procedural regulations and manuals should explain when and how parties should raise
15 claims of bias.
- 16 4. *Ex Parte Communications.* Procedural regulations should prohibit ex parte
17 communications relevant to the merits of the case between persons outside the agency



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18 and agency decisionmakers or decisional advisers, such as law clerks. Communications
19 between persons outside the agency and agency decisionmakers or decisional advisers
20 should occur only on the record. If oral or written ex parte communications occur, they
21 should be placed immediately on the record.

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

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

Pre-Hearing Practices

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

- 39 a. The agency's position with respect to issues of fact, law, and discretion;
- 40 b. How a party can request a hearing;
- 41 c. Discovery options;
- 42 d. Representation, including self-representation and non-lawyer representation, if
43 permitted, and any legal assistance options provided by the agency;



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- 44 e. The procedural choices open to the party (e.g., choice between written and oral
45 hearings and alternative dispute resolution (ADR) opportunities);
46 f. Deadlines for filing pleadings and documents;
47 g. Subpoenaing documents and witnesses;
48 h. Whether the agency offers an opportunity for reconsideration of the initial
49 decision at a higher agency level; and
50 i. Availability of judicial review.
- 51 8. *Self-Representation and Lay Representation.* Agencies should make hearings as
52 accessible as possible to parties who are self-represented or represented by non-lawyers.
53 Agencies should provide self-represented parties with plain language forms or require the
54 decisionmaker or agency staff to assist them. Agencies should permit non-lawyer
55 representation in appropriate circumstances. In doing so, agencies should have the
56 discretion to license non-lawyer representatives, require them to be insured, and make
57 them subject to ethical codes.
- 58 9. *Alternative Dispute Resolution.* Agencies should encourage and facilitate ADR.
59 Procedural regulations should establish a system whereby neutral mediators can be
60 selected by agreement of the parties and ensure confidentiality of communications
61 occurring during the ADR process.
- 62 10. *Pretrial Conferences.* Procedural regulations should allow the decisionmaker discretion
63 to require parties to participate in a pretrial conference if the decisionmaker believes that
64 such a conference would simplify the hearing or promote settlement. The decisionmaker
65 should require that (a) parties exchange witness lists and expert reports before the pretrial
66 conference and (b) both sides be represented at the pretrial conference by persons with
67 authority to agree to a settlement.
- 68 11. *Discovery.* Procedural regulations should permit discovery in large disputes and
69 lengthier hearings by allowing parties, at a minimum, to inspect the unprivileged
70 materials in the government's case file. Agencies should empower their decisionmakers
71 to order discovery through depositions, interrogatories, and other methods of discovery
72 used in civil trials, upon a showing that discovery is needed.



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73 12. *Subpoena Power*. Congress should grant subpoena power to all agencies that conduct
74 informal adjudication. Agencies with subpoena power should craft procedural
75 regulations explaining subpoena practice in detail.

76 13. *Open Hearings*. Agencies should adopt the presumption that their hearings are open to
77 the public, while retaining the ability to close the hearings in particular cases due to
78 privacy concerns, including, but not limited to, the protection of:

- 79 a. National security;
- 80 b. Law enforcement;
- 81 c. Confidentiality of business documents; and
- 82 d. Privacy of the parties to the hearing.

Hearing Practices

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

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

89 16. *Written-Only Hearings*. Agencies should use written-only hearings in appropriate cases,
90 such as those that do not involve resolution of credibility conflicts. Particularly good
91 candidates for written-only hearings include those that involve:

- 92 a. Disputes concerning the interpretation of statutes or regulations, or
- 93 b. Legislative facts in which experts offer conflicting views.

94 17. *Oral Argument*. Agencies should permit oral argument in connection with a written-only
95 hearing if a party requests it, while retaining the discretion to dispense with oral argument
96 if it appears to be of little value in a given case. Further, agencies should allow a hybrid
97 of oral and written-only hearings. If one party (A) wants an oral hearing and the other
98 party (B) wants to submit the case on the record, A receives an oral hearing and B
99 receives a written-only hearing; however, B is permitted to cross-examine A's witnesses.



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100 18. *Rules of Evidence*. Procedural regulations should clearly prescribe the rules of evidence
101 the decisionmaker will apply (e.g., not simply leave it to the “decisionmaker’s
102 discretion”) in order to avoid confusion and time-consuming evidentiary disputes.

103 19. *Opportunity for Rebuttal*. Agencies should allow an opportunity for rebuttal, which
104 usually involves cross-examination of an adverse witness in cases presenting credibility
105 issues. Agencies should have the discretion to limit or preclude cross-examination in
106 appropriate circumstances, including cases where:

- 107 a. The case involves a dispute concerning legislative facts where the evidence
108 consists of expert testimony;
- 109 b. Credibility is not at issue;
- 110 c. The only issue is how a decisionmaker should exercise discretion;
- 111 d. National security could be jeopardized; or
- 112 e. The identity of confidential informants might be revealed.

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

Post-Hearing Practices

116 20. *Written Decisions*. Procedural regulations should both require the decisionmaker to
117 furnish a written decision and specify the contents of the written decision. Such content
118 could include:

- 119 a. Findings of fact;
- 120 b. Explanation of how the decisionmaker resolved credibility conflicts;
- 121 c. Explanation of the decisionmaker’s legal interpretations; and
- 122 d. Statement of the decisionmaker’s reasons for discretionary choices.

123 21. *Higher-Level Reconsideration*. Procedural regulations should provide for a higher-level
124 reconsideration of initial adjudicatory decisions in order to correct errors made by
125 decisionmakers and to enhance the feelings of private parties that their case has been
126 dealt with fairly and impartially. Agencies should give parties an opportunity to make



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127 arguments to the reconsidering authority. The reconsidering authority should be entitled
128 to summarily affirm the lower-level decision without being required to write a new
129 decision.

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

Procedural Regulations

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

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

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

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