Informal Agency Adjudication

Committee on Adjudication

Proposed Recommendation for Committee | October 20, 2016

Federal administrative adjudication can be divided into three different categories: (1) adjudication that is regulated by the detailed procedural provisions of the Administrative Procedure Act (APA) and usually presided over by an administrative law judge; (2) adjudication that consists of legally required evidentiary hearings that are not regulated by the APA and presided over by adjudicators who are often called administrative judges, though they are known by many other titles; and (3) adjudication that is not subject to a legally required (i.e., required by statute, Executive Order, or regulation) evidentiary hearing. This recommendation concerns best practices for the second type of adjudication. In these adjudications, although there is no statutory mandate to hold an “on the record” hearing, a statute, regulation, or other source of law

1 See Administrative Procedure Act, 5 U.S.C. §§ 554-559 (2012). In a few kinds of cases, the “presiding employees” in APA hearings are not administrative law judges (ALJs). Congress may provide for a presiding employee who is not an ALJ. See id. § 556(b).

2 Of course, this type of adjudication is subject to § 555 (requiring various procedural protections in all adjudication) and § 558 (relating to licensing), as well as the APA’s judicial review provisions, but it is not subject to §§ 554, 556-557.

3 These three types of adjudication are referred to as Type A, B, and C respectively in this recommendation’s underlying report. See generally Michael Asimow, Adjudication Outside the Administrative Procedure Act (September 16, 2016) [hereinafter Asimow], available at https://www.acus.gov/research-projects/informal-agency-adjudication.

4 Traditionally, the first type of adjudication has been referred to as “formal adjudication” and the second and third types of adjudication have been treated in an undifferentiated way as “informal adjudication.” This recommendation does not use that terminology for several reasons. First, the fact that the second type of adjudication involves a legally required hearing sharply distinguishes it from the third type of adjudication and makes it feasible to prescribe best practices. Second, the term “informal adjudication” can be a misnomer when applied to the second type of adjudication; in fact, it is often as “formal” or even more “formal” than adjudication governed by the APA. Finally, the third type of adjudication—which can properly be referred to as “informal adjudication”—is an enormous category, consisting of many millions of adjudicatory decisions each year. This type of adjudication is highly diverse and does not easily lend itself to an overarching set of best practices.
does require the agency to conduct an evidentiary hearing. Because the APA’s adjudication provisions in 5 U.S.C. §§ 554, 556-577 are not applicable to these adjudications, the procedures that an agency is required to follow are set forth elsewhere, most commonly in its own procedural regulations.

The legally required evidentiary hearings that “reside” outside of the APA are extremely diverse. They involve types of matters spanning many substantive areas, including immigration, veterans’ benefits, environmental appeals, government contracts, and intellectual property adjudication. Some involve disputes between the federal government and private parties; others involve disputes between two private parties. Some involve trial-type proceedings that are at least as formal as adjudication governed by the APA. Others are quite informal and can be purely in writing. Some proceedings are highly adversarial; others are inquisitorial. Some programs have heavy caseloads and rushed proceedings. Others have lighter caseloads and allow for leisurely and thorough examination. Some have huge backlogs and long delays; others seem relatively current. The structures for internal appeal also vary.

The purpose of this recommendation is to set forth the best practices that agencies should incorporate in regulations governing the procedures to be followed in these varied adjudications. The procedures suggested below are highlighted as best practices because they achieve a favorable balance of the criteria of accuracy (meaning that the procedure is likely to produce a correct and consistent outcome), efficiency (meaning that the procedure should minimize cost and delay), and acceptability to private parties (meaning that the procedure should meet appropriate standards of procedural fairness).

The world of legally required evidentiary hearings outside of the APA is enormously varied, and some of the best practices set forth in this recommendation may not be applicable or

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6 See generally Asimow, supra note 3 (describing the vast variety of evidentiary hearings that exist outside of the APA). See also Federal Administrative Adjudication, available at https://www.acus.gov/research-projects/federal-administrative-adjudication (providing a database that maps the contours of administrative adjudication across the federal government).
desirable for every such adjudicatory program. Because of this diversity, the recommendation
does not attempt to prescribe the exact language that the agency should employ in its procedural
regulations. Rather, this recommendation provides agencies a menu of options to choose from,
and should be particularly useful to agencies that are either fashioning procedural regulations for
new adjudicatory programs or seeking to revise their existing procedural regulations.

RECOMMENDATION

Integrity of the Decisionmaking Process

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

2. **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 staff who are advising the decisionmaker.
   Communications between persons outside the agency and agency decisionmakers or staff
   who advise decisionmakers should occur only on the record. If oral, written, or
   electronic ex parte communications occur, they should be placed immediately on the
   record.

3. **Separation of Functions.** In agencies that have combined functions of investigation,
   prosecution, and adjudication, procedural regulations should require internal separation
   of decisional and adversarial personnel. The regulations should prohibit staff members
   who took an active part in investigating, prosecuting, or advocating in a case from

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serving as a decisionmaker or staff advising the decisionmaker in that same case. 

Adversary personnel should also be prohibited from furnishing ex parte advice to a decisionmaker or staff who advise decisionmakers.

4. **Staff Who Advise Decisionmakers.** Procedural regulations should explain whether the agency permits ex parte advice to decisionmakers by staff who did not take an active part in investigating, prosecuting, mediating, or advocating in the same case. Such advice should not violate the exclusive record principle by introducing new factual materials.

5. **Bias.** Procedural regulations should prohibit decisionmaker bias in adjudicatory proceedings by clearly stating that an adjudicator can be disqualified if any of the following types of bias is shown:
   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, and how agencies resolve such claims.

**Pre-Hearing Practices**

6. **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 program, which should include, where appropriate:
   a. The agency’s position with respect to issues of fact, law, and discretion;
   b. How a party can request a hearing;
   c. Statement of issues to be decided;
   d. Discovery options, if any (see paragraph 12);
   e. Information about representation, including self-representation and non-lawyer representation, if permitted, and any legal assistance options;
   f. The procedural choices open to the party (e.g., choice between in-person and video or telephonic hearings (see paragraph 16); written and oral hearings (see
paragraph 17); and alternative dispute resolution (ADR) opportunities (see paragraph 9));

g. Deadlines for filing pleadings and documents;

h. Procedures for subpoenaing documents and witnesses, if allowed (see paragraph 13);

i. Whether the agency offers an opportunity for review of the initial decision at a higher agency level (see paragraph 22);

j. Availability of judicial review; and

k. Website address for and/or citation to the procedural regulations and any practice manuals.

7. **Sanction.** Agencies with the requisite statutory power should authorize decisionmakers to sanction non-government attorneys and parties for misconduct, including admonition and monetary fines. Agencies should introduce a layer of review before a sanction can be imposed.

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, including permitting limited representation (i.e., lawyer representation of some issues or during some phases). 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.8

9. **Alternative Dispute Resolution.** Agencies should encourage and facilitate ADR, 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

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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. Inspection of Materials. Procedural regulations should permit parties to inspect unprivileged materials that are not otherwise protected.

12. Discovery. 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.

13. Subpoena Power. Agencies with subpoena power should craft procedural regulations explaining subpoena practice in detail. Agencies that do not have subpoena power should seek congressional approval for subpoena power, where appropriate.

14. 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, including, but not limited to, where the public interest in the proceedings is outweighed by the need to protect:

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

Hearing Practices

15. Hearing Officers. Agencies that decide a significant number of cases should use hearing officers to conduct hearings and provide an initial decision, subject to higher-level review (see paragraph 22).
16. **Video Teleconferencing and Telephone Hearings.** Agencies should be able to require—while providing parties an opportunity to object—that hearings, or parts of hearings, be conducted by video teleconferencing or telephone.\(^9\)

17. **Written-Only Hearings.** Procedural regulations should allow agencies to make use of 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 solely involve disputes concerning:

   a. Interpretation of statutes or regulations; or
   b. Legislative facts as to which experts offer conflicting views.

Agencies should also consider the adoption of procedures for summary judgment in cases in which there are no disputed issues of fact.

18. **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, or parts of a case.

19. **Rules of Evidence.** Procedural regulations should prescribe the evidentiary rules the decisionmaker will apply in order to avoid confusion and time-consuming evidentiary disputes.

20. **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 dispute concerns a question of legislative fact where the evidence consists of expert testimony;

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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

21. Decisions. Procedural regulations should both require the decisionmaker to furnish a decision and specify the contents of the decision. Such content should include:

a. Findings of fact, including an explanation of how the decisionmaker resolved credibility conflicts;

b. Conclusions of law, including an explanation of the decisionmaker’s interpretation of statutes and regulations; and

c. Explanation of the decisionmaker’s reasons for discretionary choices.

22. Higher-Level Review. Apart from any opportunity for reconsideration by the initial decisionmaker, procedural regulations should provide for a higher-level review of initial adjudicatory decisions. Agencies should give parties an opportunity to file exceptions and make arguments to the reviewing authority. The reviewing authority should be entitled to summarily affirm the initial decision without being required to write a new decision.

23. Precedential Decisions. Procedural regulations should allow and encourage agencies to designate decisions as precedential in order to improve decisional consistency. Such decisions should be published on the agency’s website to meet the requirements of 5 U.S.C. § 552.
Management of Procedures

24. 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 and posted on the agency website.

25. Manuals and Guides. Agencies should provide practice manuals and guides for decisionmakers, staff, and private parties spelling out the details of the proceeding and illustrating principles that are set forth in regulations. These manuals and guides should be written in simple, non-technical language and contain examples, model forms, and checklists, and they should be posted on the agency website.

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

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