



## **Administrative Conference Recommendation 2016-4**

### **Evidentiary Hearings Not Required by the Administrative Procedure Act**

**Adopted December 13, 2016**

Federal administrative adjudication can be divided into three categories:

(a) Adjudication that is regulated by the procedural provisions of the Administrative Procedure Act (APA) and usually presided over by an administrative law judge (referred to as Type A in the report that underlies this recommendation and throughout the preamble)<sup>1</sup>;

(b) Adjudication that consists of legally required evidentiary hearings that are not regulated by the APA's adjudication provisions in 5 U.S.C. §§ 554 and 556–557 and that is presided over by adjudicators who are often called administrative judges, though they are known by many other titles (referred to as Type B in the report that underlies this recommendation and throughout the preamble)<sup>2</sup>; and

(c) Adjudication that is not subject to a legally required (i.e., required by statute, executive order, or regulation) evidentiary hearing (referred to as Type C in the report that underlies this recommendation and throughout the preamble).<sup>3</sup>

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<sup>1</sup> 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. Congress may provide for a presiding employee who is not an ALJ. See *id.* § 556(b).

<sup>2</sup> This type of adjudication is subject to 5 U.S.C. § 555 (requiring various procedural protections in all adjudication) and 5 U.S.C. § 558 (relating to licensing), as well as the APA's judicial review provisions.

<sup>3</sup> See generally Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act (Nov. 10, 2016) [hereinafter Asimow], available at <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.



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This recommendation concerns best practices for the second category of adjudication, that is, Type B adjudication.<sup>4</sup> In these adjudications, although there is no statutory mandate to hold an “on the record” hearing,<sup>5</sup> a statute, regulation, or other source of law does require the agency to conduct an evidentiary hearing. Because the APA’s adjudication provisions in 5 U.S.C. §§ 554 and 556–557 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.

Type B adjudications are extremely diverse.<sup>6</sup> They involve types of matters spanning many substantive areas, including immigration, veterans’ benefits, environmental issues, government contracts, and intellectual property. 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 Type A adjudication. Others are quite informal and can be decided based only on written submissions. Some proceedings are highly adversarial; others are inquisitorial.<sup>7</sup> Caseloads vary. 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 best practices that agencies should incorporate into regulations governing hearing procedures in Type B 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 produces a correct and consistent

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<sup>4</sup> Traditionally, Type A adjudication has been referred to as “formal adjudication” and Type B and Type C adjudication have been treated in an undifferentiated way as “informal adjudication.” This recommendation does not use that terminology for several reasons. First, the nature of Type B adjudication as involving a legally required hearing sharply distinguishes it from Type C adjudication and makes it feasible to prescribe best practices. Second, the term “informal adjudication” can be a misnomer when applied to Type B adjudication; in fact, Type B adjudication is often as “formal” or even more “formal” than Type A adjudication. Finally, Type C adjudication—which can properly be referred to as “informal adjudication”—is an enormous category, consisting of many millions of adjudications each year. This type of adjudication is highly diverse and does not easily lend itself to an overarching set of best practices.

<sup>5</sup> *See id.* at 7–9 (discussing the boundary between Type A and Type B adjudication).

<sup>6</sup> *See generally id.* (describing the vast variety of evidentiary hearings that are not required by the APA). *See also* Federal Administrative Adjudication, available at <https://www.acus.gov/research-projects/federal-administrative-adjudication> (providing an extensive database that maps the contours of administrative adjudication across the federal government).

<sup>7</sup> *See* Asimow, *supra* note 3 at 11–12, 84–88 (providing examples of inquisitorial adjudications).



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outcome), efficiency (meaning that the procedure minimizes cost and delay), and acceptability to the parties (meaning that the procedure meets appropriate standards of procedural fairness).

Some of the best practices set forth in this recommendation may not be applicable or desirable for every Type B adjudicatory program. Accordingly, the recommendation does not attempt to prescribe the exact language that the agency should employ in its procedural regulations.<sup>8</sup> This recommendation 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. That is, decisionmakers should be limited 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 or assisting the decisionmaker. Communications between persons outside the agency and agency decisionmakers or staff who advise or assist decisionmakers should occur only on the record. If oral, written, or electronic ex parte communications occur, they should be placed immediately on the record.

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<sup>8</sup> Drafters of procedural regulations implementing these best practices may want to consult the Conference-prepared 1993 Model Adjudication Rules for guidance on language, though those rules are directed to adjudication governed by the APA. See Michael Cox, *The Model Adjudication Rules (MARS)*, 11 T.M. COOLEY L. REV. 75 (1994). The Conference has initiated a new Model Adjudication Rules Working Group to revise the model rules. See Admin. Conf. of the U.S., Office of the Chairman Model Adjudication Rules Working Group, available at <https://www.acus.gov/research-projects/office-chairman-model-adjudication-rules-working-group> for more information.



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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 who took an active part in investigating, prosecuting, or advocating in a case from serving as a decisionmaker or staff advising or assisting the decisionmaker in that same case. Adversary personnel should also be prohibited from furnishing ex parte advice or factual materials to a decisionmaker or staff who advise or assist decisionmakers.
4. *Staff Who Advise or Assist Decisionmakers.* Procedural regulations should explain whether the agency permits ex parte advice or assistance to decisionmakers by staff. The staff may not have taken an active part in investigating, prosecuting, mediating, or advocating in the same case (see paragraph 3). The advice should not violate the exclusive record principle (see paragraph 1) by introducing new factual materials. The term “factual materials” does not include expert, technical, or other advice on the meaning or significance of “factual materials.”
5. *Bias.* Procedural regulations should prohibit decisionmaker bias in adjudicatory proceedings by stating that an adjudicator can be disqualified if any of the following types of bias is shown:
  - a. Improper financial or other personal interest in the decision;
  - b. Personal animus against a 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 them.

### **Pre-Hearing Practices**

6. *Notice of Hearing.* Procedural regulations should require notice to parties by appropriate means and sufficiently far in advance so that they may prepare for hearings. The notice should contain a statement of issues of fact and law to be decided. In addition, the notice



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should be in plain language and, when appropriate, contain the following basic information about the agency's adjudicatory process:

- a. Procedures for requesting a hearing;
  - b. Discovery options, if any (see paragraph 10);
  - c. Information about representation, including self-representation and non-lawyer or limited representation, if permitted (see paragraphs 13–16), and any legal assistance options;
  - d. Available procedural alternatives (e.g., in-person, video, or telephonic hearings (see paragraph 20); written and oral hearings (see paragraph 21); and alternative dispute resolution (ADR) opportunities (see paragraph 12));
  - e. Deadlines for filing pleadings and documents;
  - f. Procedures for subpoenaing documents and witnesses, if allowed (see paragraph 11);
  - g. Opportunity for review of the initial decision at a higher agency level (see paragraph 26);
  - h. Availability of judicial review; and
  - i. Website address for and/or citation to the procedural regulations and any practice manuals.
7. *Confidentiality*. Procedural regulations should provide a process by which the parties may seek to keep certain information confidential or made subject to a protective order in order to protect privacy, confidential business information, or national security.
8. *Pre-Hearing Conferences*. Procedural regulations should allow the decisionmaker discretion to require parties to participate in a pretrial conference if the decisionmaker believes the 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.



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9. *Inspection of Materials.* Procedural regulations should permit parties to inspect unprivileged materials in agency files that are not otherwise protected.
10. *Discovery.* Agencies should empower their decisionmakers to order discovery through depositions, interrogatories, and other methods of discovery used in civil trials, upon a showing of need and cost justification.
11. *Subpoena Power.* Agencies with subpoena power should explain their subpoena practice in detail. Agencies that do not have subpoena power should seek congressional approval for subpoena power, when appropriate.
12. *Alternative Dispute Resolution.* Agencies should encourage and facilitate ADR, and ensure confidentiality of communications occurring during the ADR process.

### **Hearing Practices**

13. *Lawyer Representation.* Agencies should permit lawyer representation.
14. *Non-Lawyer Representation.* Agencies should permit non-lawyer representation. Agencies should have the discretion to (a) establish criteria for appearances before the agency by non-lawyer representatives or (b) require approval on a case-by-case basis.<sup>9</sup>
15. *Limited Representation.* Agencies should permit limited representation by lawyers or non-lawyers, when appropriate (i.e., representation of a party with respect to some issues or during some phases of the adjudication).

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<sup>9</sup> Agencies should refer to Recommendation 86-1, Nonlawyer Assistance and Representation, 51 Fed. Reg. 25,641 (June 16, 1986), available at <https://www.acus.gov/recommendation/nonlawyer-assistance-and-representation>, when establishing or improving their procedures related to non-lawyer representation.



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16. *Self-Representation*. Agencies should make hearings as accessible as possible to self-represented parties by providing plain language resources, legal information, and other assistance, as allowed by statute and regulations.<sup>10</sup>
17. *Sanctions*. Agencies with the requisite statutory power should authorize decisionmakers to sanction attorneys and parties for misconduct. Sanctions can include admonitions, monetary fines, and preclusion from appearing before the agency. Agencies should have a mechanism for administrative review of any sanctions.
18. *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 when the public interest in open 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.
19. *Adjudicators*. Agencies that decide a significant number of cases should use adjudicators—rather than agency heads, boards, or panels—to conduct hearings and provide initial decisions, subject to higher-level review (see paragraph 26).
20. *Video Conferencing and Telephone Hearings*. Agencies should consult the Administrative Conference’s recommendations<sup>11</sup> in determining whether and when to conduct hearings or parts of hearings by video conferencing or telephone.

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<sup>10</sup> Agencies should refer to Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*, 81 Fed. Reg. 94,319 (Dec. 23, 2016), available at <https://www.acus.gov/recommendation/self-represented-parties-administrative-proceedings-final-recommendation>, when establishing or improving their procedures related to self-represented parties.

<sup>11</sup> Agencies should refer to Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011), available at <https://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion>; Recommendation 2014-7, *Best Practices for Using Video*



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21. *Written-Only Hearings.* Procedural regulations should allow agencies to make use of written-only hearings in appropriate cases. Particularly good candidates for written-only hearings include those that solely involve disputes concerning:
- Interpretation of statutes or regulations; or
  - 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 material fact.
22. *Oral Argument.* Agencies generally 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.
23. *Evidentiary Rules.* Procedural regulations should prescribe the evidentiary rules the decisionmaker will apply in order to avoid confusion and time-consuming evidentiary disputes.<sup>12</sup>
24. *Opportunity for Rebuttal.* Agencies should allow an opportunity for rebuttal, which can take the form of cross-examination of an adverse witness as well as additional written or oral evidence. Agencies should have the discretion to limit or preclude cross-examination or have it be conducted in camera in appropriate cases, such as when:
- The dispute concerns a question of legislative fact where the evidence consists of expert testimony;
  - Credibility is not at issue;

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Teleconferencing for Hearings, 79 Fed. Reg. 75,119 (Dec. 17, 2014), available at <https://www.acus.gov/recommendation/best-practices-using-video-teleconferencing-hearings>; and the Conference's Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings, available at <https://www.acus.gov/report/handbook-best-practices-using-video-teleconferencing-adjudicatory-hearings>, when establishing or improving their video teleconferencing hearings.

<sup>12</sup> Agencies should refer to Recommendation 86-2, Use of Federal Rules of Evidence in Federal Agency Adjudications, 51 Fed. Reg. 25,642 (June 16, 1986), available at <https://www.acus.gov/recommendation/use-federal-rules-evidence-federal-agency-adjudications>, when considering whether or how to use the Federal Rules of Evidence.





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- 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.

### **Post-Hearing Practices**

25. *Decisions.* Procedural regulations should require the decisionmaker to provide a written or transcribable decision and specify the contents of the decision. The decision should include:

- a. Findings of fact, including an explanation of how the decisionmaker made credibility determinations; and
- b. Conclusions of law, including an explanation of the decisionmaker's interpretation of statutes and regulations.

26. *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.

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

### **Management of Procedures**

28. *Complete Statement of Important Procedures.* Agencies should set forth all important procedures and practices that affect persons outside the agency in procedural regulations



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that are published in the Federal Register and the Code of Federal Regulations and posted on the agency website.

29. *Manuals and Guides.* Agencies should provide practice manuals and guides for decisionmakers, staff, parties, and representatives in which they spell out the details of the proceeding and illustrate the 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.
30. *Review of Procedures.* Agencies should periodically re-examine and update their procedural regulations, practice manuals, and guides.
31. *Feedback.* Agencies should seek feedback from decisionmakers, staff, parties, representatives, and other participants in order to evaluate and improve their adjudicatory programs.