



## Agency Appellate Systems

### Committee on Adjudication

#### Proposed Recommendation | December 16, 2020

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

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

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<sup>1</sup> 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 (2018)), 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 practice 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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15 agency head. The appellate decision may be the agency’s final action or may be subject to  
16 further appeal within the agency (usually to the agency head).

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

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

33         Most importantly, this Recommendation begins by suggesting that agencies identify, and  
34 publicly disclose, the purpose(s) or objective(s) of their appellate systems. Appellate systems  
35 may have different purposes, and any given appellate system may have multiple purposes.  
36 Purposes or objectives can include the correction of errors, inter-decisional consistency of  
37 decisions, policymaking, political accountability, management of the hearing-level adjudicative

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<sup>3</sup> 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 (Nov. 10, 2020) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-agency-appellate-systems>.



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

43 This Recommendation proceeds from the recognition that agency appellate systems vary  
44 enormously—as to their purposes or objectives, governing substantive law, size, and resources—  
45 and that what may be a best practice for one system may not always be the best practice for  
46 another. In offering the best practices that follow, moreover, the Administrative Conference  
47 recognizes that an agency’s procedural choices may sometimes be constrained by statute. The  
48 Recommendation is drafted accordingly.

### RECOMMENDATION

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

- 49 1. Agencies should identify and publish in procedural regulations what objective or  
50 objectives their appellate systems serve, and they should design their processes and draft  
51 their procedural regulations accordingly. In particular, agencies should set their scope and  
52 standard of review to be consistent with the objectives of their appellate system.

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

- 53 2. Agencies should promulgate and publish procedural regulations governing agency  
54 appellate review in the *Federal Register* and codify them in the Code of Federal  
55 Regulations. These regulations should cover all significant procedural matters pertaining  
56 to agency appellate review, including but not limited to the following:
- 57 a. the objectives of the agency’s appellate review system;
  - 58 b. the timing and procedures for initiating review, including any available  
59 interlocutory review;



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- 60 c. the standards for granting review, if review is discretionary;
- 61 d. the standards for permitting participation by interested persons and amici;
- 62 e. the standard of review;
- 63 f. the allowable and required submissions by litigants and their required form and
- 64 contents;
- 65 g. the procedures and criteria for designating decisions as precedential and the legal
- 66 effect of such designations;
- 67 h. the record on review and the opportunity, if any, to submit new evidence;
- 68 i. the availability of oral argument or other form of oral presentation;
- 69 j. the standards of and procedures for reconsideration and reopening, if available;
- 70 k. any administrative or issue exhaustion requirements that must be satisfied before
- 71 seeking agency appellate or judicial review;
- 72 l. openness of proceedings to the public and availability of video or audio streaming
- 73 or recording; and
- 74 m. in the case of multi-member appellate boards, councils, and similar entities, the
- 75 authority to assign decision-making authority to fewer than all members (e.g.,
- 76 panels).
- 77 3. Agencies should include in the procedural regulations governing their appellate
- 78 programs: (a) a brief statement or explanation of each program’s review authority,
- 79 structure, and decision-making components; and (b) for each provision based on a
- 80 statutory source, an accompanying citation to that source.
- 81 4. When revising existing or adopting new appellate rules, agencies should consider the
- 82 appellate rules (Rules 400–450) in the Administrative Conference’s *Model Rules of*
- 83 *Agency Adjudication* (rev. 2018) in deciding what their rules should provide.
- 84 5. When materially revising existing or adopting new appellate rules, agencies should use
- 85 notice-and-comment procedures or other mechanisms for soliciting public input,
- 86 notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the costs
- 87 clearly outweigh the benefits of doing so.



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

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

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

- 96 8. Whenever possible, agencies should consider maintaining electronic case management  
97 systems (eCMS) that ensure that hearing records are easily accessible to appellate  
98 adjudicators. Such an eCMS may include the capability for electronic filing.
- 99 9. Although the randomized assignment of cases to appellate adjudicators is typically an  
100 appropriate docketing method for an agency appellate system, agencies should consider  
101 the potential benefits of sorting and grouping appeals on the appellate docket, such as  
102 reduced case processing times and more efficient use of adjudicators', staff attorneys',  
103 and law clerks' skills and time. Criteria for sorting and grouping cases may include size  
104 of a case's record, complexity of a case's issues, subject matter of a case, and similarity  
105 of a case's legal issues to those of other pending cases.
- 106 10. Consistent with the objectives of the agency's appellate system and in light of the costs of  
107 time and resources, agencies should consider adopting an appellate model of judicial  
108 review in which the standard of review is not de novo with respect to findings of fact and  
109 application of law to facts. For similar reasons, many agencies should consider limiting  
110 the introduction of new evidence on appeal that is not already in the administrative record  
111 from the hearing-level adjudication.



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- 112 11. Taking agency resources into account, agencies should emphasize concision, readability,  
113 and plain language in their appellate decisions and explore the use of decision templates,  
114 summary dispositions, and other quality-improving measures.
- 115 12. Agencies should establish clear criteria and processes for identifying and selecting  
116 appellate decisions as precedential, especially for appellate systems with objectives of  
117 policymaking or inter-decisional consistency.
- 118 13. Agencies should assess the value of oral argument and amicus participation in their  
119 appellate system based on the agencies' identified objectives for appellate review and  
120 should establish clear rules governing both. Criteria which may favor oral argument and  
121 amicus participation include issues of high public interest, issues of concern beyond the  
122 parties to the case, specialized or technical matters, and a novel or substantial question of  
123 law, policy, or discretion.

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

- 124 14. Agency appellate systems should promptly transmit their precedential decisions to all  
125 appellate program adjudicators and, directly or through hearing-level programs, to  
126 hearing-level adjudicators (as appropriate). Appellate programs should include in their  
127 transmittals, when feasible, brief summaries of the decision.
- 128 15. Agencies should notify their adjudicators of significant federal-court decisions reviewing  
129 the agencies' decisions and, when providing notice, explain the significance of those  
130 decisions to the program. As appropriate, agencies should notify adjudicators if the  
131 agency will not acquiesce in a particular decision of the federal courts of appeals.
- 132 16. Agencies in which decision making relies extensively on their own precedential decisions  
133 should consider preparing or having prepared indexes and digests—with annotations and  
134 comments, as appropriate—to identify those decisions and their significance.
- 135 17. As appropriate, agency appellate systems should communicate with agency rule-writers  
136 and other agency policymakers—and, as appropriate, institutionalize communication  
137 mechanisms—to address whether recurring issues in their decisions should be addressed  
138 by rule rather than precedential case-by-case adjudication.



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139 18. The Office of the Chairman of the Administrative Conference should provide for, as  
140 authorized by statute, the “interchange among administrative agencies of information  
141 potentially useful in improving” (5 U.S.C. § 594(2)) agency appellate systems. The  
142 subjects of interchange might include electronic case management systems, procedural  
143 innovations, quality-assurance reviews, and common management problems.

### **Public Disclosure and Transparency**

144 19. Agencies should disclose on their websites any rules (sometimes styled as “orders”), and  
145 statutes authorizing such rules, by which an agency head has delegated review authority  
146 to appellate adjudicators.

147 20. Regardless of whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs  
148 their appellate review system, agencies should consider announcing, livestreaming, and  
149 maintaining video recordings on their websites of appellate proceedings (including oral  
150 argument) that present significant legal and policy issues likely to be of interest to  
151 regulated parties and other members of the public. Brief explanations of the issues to be  
152 addressed by oral argument may usefully be included in website notices of oral argument.

153 21. Agencies should include on their websites brief and accessibly written explanations as to  
154 how their internal decision-making processes work and, as appropriate, include links to  
155 explanatory documents appropriate for public disclosure. Specific subjects agencies  
156 should consider addressing include: the process of assigning cases to adjudicators (when  
157 fewer than all of the programs’ adjudicators participate in a case), the role of staff, and  
158 the order in which cases are decided.

159 22. When posting decisions on their websites, agencies should distinguish between  
160 precedential and non-precedential decisions. Agencies should also include a brief  
161 explanation of the difference.

162 23. When posting decisions on their websites, agencies should consider including, as much as  
163 practicable, brief summaries of precedential decisions and, for precedential decisions at  
164 least, citations to court decisions reviewing them.



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- 165        24. Agencies should include on their websites any digests and indexes of decisions they  
166                maintain. It may be appropriate to remove material exempt from disclosure under the  
167                Freedom of Information Act or other laws.
- 168        25. Agencies should affirmatively solicit feedback concerning the functioning of their  
169                appellate systems and provide a means for doing so on their websites.