

*[Public Comment of Professor Jack Beer mann, Boston University School of Law]*

I went through the Model Adjudication Rules and I have some comments/suggestions. I am not highly experienced in administrative adjudications so these are mainly stylistic although some may go to more significant procedural matters. Some are simply observations or questions. I recognize that this is late in the process so I recognize that it may not be possible or advisable to do much revision at this point.

MAR 100 (A). In the definition of “adjudication,” I assume the idea is to not apply these rules to all proceedings that result in the formulation of an agency order, i.e. informal adjudication.

In Comment 6, I assume that limited participants might be allowed to offer either written or oral submissions or both. I would thus change the last phrase after “offer” to “written or oral submissions or both” or I would strike “written and oral”.

MAR 101 (A) and (B): given MAR 100’s use of the word “adjudication,” I suggest changing “adjudicatory proceedings” in both of these subsections to “adjudications” for consistency.

MAR 111, comment 1, I would move the word “only” in line 2 to after the word “rules” in line 3.

Comment 5, I found the phrasing unclear especially the phrase “refusing to allow the support or opposition to a defense” and “prohibiting the introduction of designated matters into evidence.” For the first one, it seems that it should be broader, because a party might not be defending but instead might be a proponent. For the second one, I suggest deleting “matters into” if I am correct that the intent is to allow the prohibition of the introduction of evidence. I don’t understand what “matters into” adds to that thought.

MAR 112: B(2)(b). Because I think that issuance of the decision is part of the adjudication, I would delete everything after the word adjudication in the second to last line just for economy of language.

Comment 2. I wondered why the Cinderella standard for disqualification wasn’t incorporated into either the rule or the comment. Perhaps it was considered and rejected.

MAR 120: I didn’t understand why both (A) and (B) are included. They seem redundant and somewhat inconsistent. Further, Comment 1’s suggestion that adjudicators may consult with adjudicatory employees such as law clerks is not consistent with the language of the rule.

MAR 121: It seems that Comment 3 is actually the last sentence of comment 2. Perhaps it was automatically numbered in error.

MAR 130(B): I would delete the words “as a party” as redundant.

MAR 140(A) and (C): Is the intent really to allow non-lawyers to represent parties as a routine matter, or only if the agency has a rule allowing appearances by non-lawyers? That’s how it reads to me, although I may misunderstand it.

MAR 150(B)(b): I’m surprised that the default is single sided. Is that really general practice? More generally with regard to 150(B), might it be wise to include here or elsewhere in the rule a provision anticipating electronic filing, more than just mentioning it in the comment?

Comment 3—I suggest considering replaced “twenty pages” with “a specified number of pages.”

MAR 151(A)(2) Should the lack of a uniform rule for initiating an adjudication be mentioned in the rule itself, maybe by stating “(b) A document or documents initiating an adjudication must be served in accordance with agency rules or established practices. If no such rules or practices exist, such documents must be served in accordance with subsection (a) above.” Then current “(b)” would be redesignated as (c).

There is a space missing after (iii).

MAR 170(A)(2), second line, consider changing “the hearing” to “a hearing.” An oral motion might be made during a hearing on a preliminary matter, not only at the main hearing.

MAR 220(C): Line 4, I suggest changing the first “the” to “any.”

Comment 5, I suggest changing “may” in the first line to “do.” It seems clearer to me.

MAR 240(D)(1): I would change “time periods” in the last line to “times”.

MAR 300 (A): The beginning of the second sentence seems to belong with the first sentence, not with the end of the second sentence. I suggest turning the period after “hearing” in line 2 to a comma, and making the “W” in “With” lower case, then adding a period after the word “factors” in line 4 and capitalizing the word “the” after “factors.”

MAR 310: line 4, I suggest changing the word “should” to “must” unless the intent is to make this discretionary. In most of the rules, the word “must” is used in similar contexts.

MAR 320: line 3, I would delete “Any evidence may be received but” and then capitalizing “The”. The deleted phrase is redundant with the first line and also seems inconsistent with the remainder of the sentence in which it appears.

MAR 322(A): Line 3, I would change the word “under” to “of”. In line 5, I would switch the order of the words “proffered” and “evidence”.

(B): line 2—I don’t understand the meaning of the word “discourse” in this context. Would “exploration” be better?

MAR 323: I like the phrasing of the quoted language (in Comment 1) from the CFR provision better than the proposed rule, only because the timing seems odd. I would expect that an agency should inform the parties that it intends to take official notice of something before it makes its decision, perhaps in a proposed decision, and that objection would normally occur before the issuance of the decision. In comment 2, I would delete the word “proper” in line 2.

MAR 324: I don’t understand the point or meaning of the last sentence of this rule.

MAR 326 (B): This seems to be packed with contradictory statements. Is there an absolute right to cross-examination, or does the adjudicator have discretion to limit it to the “extent necessary for full and true disclosure of the facts”? The sentence about cross examination being limited to the scope of direct is contrary to the last sentence which allows the adjudicator the discretion to permit inquiry into additional matters as if on direct.

Here’s a suggested re-write: “(B) Subject to the adjudicator’s discretion to limit cross-examination to that necessary to ensure the full and true disclosure of the facts, parties have a right to cross-examine

any witness whose testimony is introduced by an adverse party or by the Adjudicator. Cross-examination is limited to the scope of the direct examination except that the Adjudicator has discretion to permit inquiry into additional matters as if on direct examination. The Adjudicator also has discretion to limit a party's cross-examination to witnesses whose testimony is adverse to that party."

MAR 340A: Why not adopt APA s. 557(c)'s provision? It's binding, correct?

MAR 400: I suggest changing all references to "appeal" to "review," which is what the section title calls it. In 400(B)(2) I would say "designate the decision (or part thereof) of which review is sought; and"

In (E) change the word "appeal" in line 4 to "review"

In (F), delete "of the Appeal" in the last line.

In (G), change the word "appeal" to "review"

In (H), in line 1, delete the word "an" and change "appeal" to "review". In line two, change "appeal" to "matter".

MAR 410(B)(1): Is it really the intent to impose the "substantial evidence" standard of review on appeals to the agency? This seems inconsistent with the general practice of agencies having all the powers as if it made the initial decision. Is this due to ACUS recommendation 68-6?

MAR 421(A), line 2, move "only" to after the word "brief". In line 3, I feel uncomfortable with the phrase "states that it is". The intent is that it actually be with the consent of the parties. How about "or if the brief is filed with the consent of all parties and contains a statement to that effect."?

MAR 440, I suggest changing the first few words to "If no petition for review is filed".