



Informal Agency Adjudication

Committee on Adjudication

Proposed Recommendation for Committee | October 20, 2016

1 Federal administrative adjudication can be divided into three different categories: (1)
2 adjudication that is regulated by the detailed procedural provisions of the Administrative
3 Procedure Act (APA) and usually presided over by an administrative law judge;¹ (2) adjudication
4 that consists of legally required evidentiary hearings that are not regulated by the APA and
5 presided over by adjudicators who are often called administrative judges, though they are known
6 by many other titles;² and (3) adjudication that is not subject to a legally required (i.e., required
7 by statute, Executive Order, or regulation) evidentiary hearing.³ This recommendation concerns
8 best practices for the second type of adjudication.⁴ In these adjudications, although there is no
9 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.

Commented [A1]: Consideration of title change to “Evidentiary Hearings Outside of the Administrative Procedure Act.”



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10 does require the agency to conduct an evidentiary hearing. Because the APA's adjudication
11 provisions in 5 U.S.C. §§ 554, 556-577 are not applicable to these adjudications, the procedures
12 that an agency is required to follow are set forth elsewhere, most commonly in its own
13 procedural regulations.

14 The legally required evidentiary hearings that "reside" outside of the APA are extremely
15 diverse.⁵ They involve types of matters spanning many substantive areas, including
16 immigration, veterans' benefits, environmental appeals, government contracts, and intellectual
17 property adjudication. Some involve disputes between the federal government and private
18 parties; others involve disputes between two private parties. Some involve trial-type proceedings
19 that are at least as formal as adjudication governed by the APA. Others are quite informal and
20 can be purely in writing. Some proceedings are highly adversarial; others are inquisitorial.
21 Some programs have heavy caseloads and rushed proceedings. Others have lighter caseloads
22 and allow for leisurely and thorough examination. Some have huge backlogs and long delays;
23 others seem relatively current. The structures for internal appeal also vary.

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

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

⁵ 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).



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33 desirable for every such adjudicatory program. Because of this diversity, the recommendation
34 does not attempt to prescribe the exact language that the agency should employ in its procedural
35 regulations.⁶ Rather, this recommendation provides agencies a menu of options to choose from,
36 and should be particularly useful to agencies that are either fashioning procedural regulations for
37 new adjudicatory programs or seeking to revise their existing procedural regulations.

RECOMMENDATION

Integrity of the Decisionmaking Process

- 38 1. *Exclusive Record.* Procedural regulations should require a decision to be based on an
39 exclusive record, limiting decisionmakers to considering factual information presented in
40 testimony or documents they received before, at, or after the hearing to which all parties
41 had access, and to matters officially noticed.
- 42 2. *Ex Parte Communications.* Procedural regulations should prohibit ex parte
43 communications relevant to the merits of the case between persons outside the agency
44 and agency decisionmakers or staff who are advising the decisionmaker.
45 Communications between persons outside the agency and agency decisionmakers or staff
46 who advise decisionmakers should occur only on the record. If oral, written, or
47 electronic ex parte communications occur, they should be placed immediately on the
48 record.
- 49 3. *Separation of Functions.* In agencies that have combined functions of investigation,
50 prosecution, and adjudication, procedural regulations should require internal separation
51 of decisional and adversarial personnel. The regulations should prohibit staff members
52 who took an active part in investigating, prosecuting, or advocating in a case from

⁶ 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 and update 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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- 53 serving as a decisionmaker or staff advising the decisionmaker in that same case.
54 Adversary personnel should also be prohibited from furnishing ex parte advice to a
55 decisionmaker or staff who advise decisionmakers.
- 56 4. *Staff Who Advise Decisionmakers.* Procedural regulations should explain whether the
57 agency permits ex parte advice to decisionmakers by staff who did not take an active part
58 in investigating, prosecuting, mediating, or advocating in the same case. Such advice
59 should not violate the exclusive record principle by introducing new factual materials.
- 60 5. *Bias.* Procedural regulations should prohibit decisionmaker bias in adjudicatory
61 proceedings by clearly stating that an adjudicator can be disqualified if any of the
62 following types of bias is shown:
- 63 a. Financial or other personal interest in the decision;
 - 64 b. Personal animus against the private party or group to which that party belongs; or
 - 65 c. Prejudgment of the adjudicative facts at issue in the proceeding.
- 66 Procedural regulations and manuals should explain when and how parties should raise
67 claims of bias, and how agencies resolve such claims.

Pre-Hearing Practices

- 68 6. *Notice.* Procedural regulations should require notice to parties so that they may prepare
69 for hearings. Notices should be in plain language and tailored to the specific
70 circumstances of the particular adjudicatory program, which should include, where
71 appropriate:
- 72 a. The agency's position with respect to issues of fact, law, and discretion;
 - 73 b. How a party can request a hearing;
 - 74 c. Statement of issues to be decided;
 - 75 d. Discovery options, if any (see paragraph 12);
 - 76 e. Information about representation, including self-representation and non-lawyer
77 representation, if permitted, and any legal assistance options;
 - 78 f. The procedural choices open to the party (e.g., choice between in-person and
79 video or telephonic hearings (see paragraph 16); written and oral hearings (see



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- 80 paragraph 17); and alternative dispute resolution (ADR) opportunities (see
81 paragraph 9));
- 82 g. Deadlines for filing pleadings and documents;
- 83 h. Procedures for subpoenaing documents and witnesses, if allowed (see paragraph
84 13);
- 85 i. Whether the agency offers an opportunity for review of the initial decision at a
86 higher agency level (see paragraph 22);
- 87 j. Availability of judicial review; and
- 88 k. Website address for and/or citation to the procedural regulations and any practice
89 manuals.
- 90 7. *Sanction*. Agencies with the requisite statutory power should authorize decisionmakers
91 to sanction non-government attorneys and parties for misconduct, including admonition
92 and monetary fines. Agencies should introduce a layer of review before a sanction can be
93 imposed.
- 94 8. *Self-Representation and Lay Representation*. Agencies should make hearings as
95 accessible as possible to parties who are self-represented⁷ or represented by non-lawyers,
96 including permitting limited representation (i.e., lawyer representation of some issues or
97 during some phases). Agencies should permit non-lawyer representation in appropriate
98 circumstances. In doing so, agencies should have the discretion to license non-lawyer
99 representatives, require them to be insured, and make them subject to ethical codes.⁸
- 100 9. *Alternative Dispute Resolution*. Agencies should encourage and facilitate ADR, and
101 ensure confidentiality of communications occurring during the ADR process.
- 102 10. *Pretrial Conferences*. Procedural regulations should allow the decisionmaker discretion
103 to require parties to participate in a pretrial conference if the decisionmaker believes that

⁷ Agencies should refer to Recommendation 2016-x, Self-Represented Parties in Administrative Hearings, __ Fed. Reg. __ (Dec. xx, 2016), *available at* link, when establishing or improving their procedures related to self-represented parties.

⁸ 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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104 such a conference would simplify the hearing or promote settlement. The decisionmaker
105 should require that (a) parties exchange witness lists and expert reports before the pretrial
106 conference and (b) both sides be represented at the pretrial conference by persons with
107 authority to agree to a settlement.

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

110 12. *Discovery*. Agencies should empower their decisionmakers to order discovery through
111 depositions, interrogatories, and other methods of discovery used in civil trials, upon a
112 showing that discovery is needed.

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

116 14. *Open Hearings*. Agencies should adopt the presumption that their hearings are open to
117 the public, while retaining the ability to close the hearings in particular cases, including,
118 but not limited to, where the public interest in the proceedings is outweighed by the need
119 to protect:

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

Hearing Practices

124 15. *Hearing Officers*. Agencies that decide a significant number of cases should use hearing
125 officers to conduct hearings and provide an initial decision, subject to higher-level review
126 (see paragraph 22).



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- 127 16. *Video Teleconferencing and Telephone Hearings*. Agencies should be able to require—
128 while providing parties an opportunity to object—that hearings, or parts of hearings, be
129 conducted by video teleconferencing or telephone.⁹
- 130 17. *Written-Only Hearings*. Procedural regulations should allow agencies to make use of
131 written-only hearings in appropriate cases, such as those that do not involve resolution of
132 credibility conflicts. Particularly good candidates for written-only hearings include those
133 that solely involve disputes concerning:
- 134 a. Interpretation of statutes or regulations; or
 - 135 b. Legislative facts as to which experts offer conflicting views.
- 136 Agencies should also consider the adoption of procedures for summary judgment in cases
137 in which there are no disputed issues of fact.
- 138 18. *Oral Argument*. Agencies should permit oral argument in connection with a written-only
139 hearing if a party requests it, while retaining the discretion to dispense with oral argument
140 if it appears to be of little value in a given case, or parts of a case.
- 141 19. *Rules of Evidence*. Procedural regulations should prescribe the evidentiary rules the
142 decisionmaker will apply in order to avoid confusion and time-consuming evidentiary
143 disputes.
- 144 20. *Opportunity for Rebuttal*. Agencies should allow an opportunity for rebuttal, which
145 usually involves cross-examination of an adverse witness in cases presenting credibility
146 issues. Agencies should have the discretion to limit or preclude cross-examination in
147 appropriate circumstances, including cases where:
- 148 a. The dispute concerns a question of legislative fact where the evidence consists of
149 expert testimony;

⁹ 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 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 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.



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- 150 b. Credibility is not at issue;
- 151 c. The only issue is how a decisionmaker should exercise discretion;
- 152 d. National security could be jeopardized; or
- 153 e. The identity of confidential informants might be revealed.
- 154 Rebuttal in these contexts could take the form of additional written evidence and oral
- 155 argument. In such instances, the decisionmaker should give appropriate consideration to
- 156 the lack of opportunity to cross-examine.

Post-Hearing Practices

- 157 21. *Decisions.* Procedural regulations should both require the decisionmaker to furnish a
- 158 decision and specify the contents of the decision. Such content should include:
- 159 a. Findings of fact, including an explanation of how the decisionmaker resolved
- 160 credibility conflicts;
- 161 b. Conclusions of law, including an explanation of the decisionmaker's
- 162 interpretation of statutes and regulations; and
- 163 c. Explanation of the decisionmaker's reasons for discretionary choices.
- 164 22. *Higher-Level Review.* Apart from any opportunity for reconsideration by the initial
- 165 decisionmaker, procedural regulations should provide for a higher-level review of initial
- 166 adjudicatory decisions. Agencies should give parties an opportunity to file exceptions
- 167 and make arguments to the reviewing authority. The reviewing authority should be
- 168 entitled to summarily affirm the initial decision without being required to write a new
- 169 decision.
- 170 23. *Precedential Decisions.* Procedural regulations should allow and encourage agencies to
- 171 designate decisions as precedential in order to improve decisional consistency. Such
- 172 decisions should be published on the agency's website to meet the requirements of 5
- 173 U.S.C. § 552.



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Management of Procedures

- 174 24. *Complete Statement of Important Procedures.* Agencies should set forth all important
175 procedures and practices that affect persons outside the agency in procedural regulations
176 that are published in the Federal Register and the Code of Federal Regulations and posted
177 on the agency website.
- 178 25. *Manuals and Guides.* Agencies should provide practice manuals and guides for
179 decisionmakers, staff, and private parties spelling out the details of the proceeding and
180 illustrating principles that are set forth in regulations. These manuals and guides should
181 be written in simple, non-technical language and contain examples, model forms, and
182 checklists, and they should be posted on the agency website.
- 183 26. *Review of Procedures.* Agencies should periodically re-examine and update their
184 procedural regulations, practice manuals, and guides.
- 185 27. *Feedback.* Agencies should seek feedback from decisionmakers, staff, parties,
186 representatives, and other participants in order to evaluate and improve their adjudicatory
187 programs.