



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

July 15, 2022

The Honorable Henry Johnson
Chair
Subcommittee on Courts, Intellectual
Property & the Internet
2240 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Darrell Issa
Ranking Member
Subcommittee on Courts, Intellectual
Property & the Internet
2300 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Johnson and Ranking Member Issa:

The Office of the Chairman of the Administrative Conference of the United States (ACUS) is pleased to present this letter for the record of the Subcommittee's hearing, *The Patent Trial and Appeal Board After 10 Years, Part II: Implications of Adjudicating in an Agency Setting*, to be held on July 21, 2022. We appreciate the opportunity to provide the Subcommittee with information about ACUS resources related to the structure and operation of different programs of federal administrative adjudication.

ACUS is an independent agency in the executive branch charged by statute with making recommendations to the President, federal agencies, Congress, and the Judicial Conference to improve adjudication, rulemaking, and other administrative processes (5 U.S.C. § 594). It consists of up to 101 members drawn from federal agencies, the practicing bar, scholars in the field of administrative law or government, and others specially informed by knowledge and experience with respect to federal administrative procedure. A presidentially appointed, Senate-confirmed Chairman serves as chief executive of the agency and oversees a full-time staff within the Office of the Chairman. The Office of the Chairman supports the work of the membership and undertakes other activities to study and improve federal administrative processes.

ACUS has adopted dozens of recommendations, and the Office of the Chairman offers many additional resources, on the subject of federal administrative adjudication. This letter highlights selected ACUS materials which you may find helpful in understanding how the Patent Trial and Appeal Board (PTAB) fits into the broader practice of federal administrative adjudication. For a comprehensive list of ACUS recommendations and other resources on the subject, please visit www.acus.gov/adjudication.

Adjudication Not Subject to the Formal Hearing Provisions of the Administrative Procedure Act

ACUS has undertaken several projects to catalog, analyze, and better understand how federal agencies adjudicate matters arising under the programs they administer. Special focus has been given to programs, such as PTAB, in which adjudication is not subject to the formal-adjudication provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 554, 556–57.

In [Recommendation 2016-4](#), *Evidentiary Hearings Not Required by the Administrative Procedure Act* (81 Fed. Reg. 94,314, Dec. 23, 2016), ACUS offered agencies a comprehensive set of best practices for structuring evidentiary hearings that are not governed by the APA’s formal-adjudication provisions.

A separate sourcebook commissioned by ACUS, *Federal Administrative Adjudication Outside the Administrative Procedure Act*, comprehensively catalogs and analyzes programs of administrative adjudication that are not subject to those provisions. The sourcebook, by Professor Michael Asimow, is available online at www.acus.gov/research-projects/federal-administrative-adjudication-outside-administrative-procedure-act.

ACUS also commissioned a report that comprehensively examines the status of federal agency adjudicators other than administrative law judges (ALJs) and their selection, oversight, and removal by agencies. That report, by Professor Kent Barnett, Russell Wheeler, and others, is available online at www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal-1.

Recommendation 2016-4 and both reports draw heavily on a database, available at acus.law.stanford.edu, that ACUS and Stanford Law School developed in 2013 to map the contours of federal agency adjudicative programs. Researchers, as part of that project, compiled information about how dozens of different programs handle topics such as ex parte contacts, discovery, subpoenas, cross-examination, and appeals.

Procedural Rules

Another helpful resource, in addition to those materials cited in the previous section, is the *Model Adjudication Rules*. The *Model Adjudication Rules*, which a working group of public- and private-sector experts substantially revised in 2018, are intended for use in any “trial-type proceeding—whether conducted pursuant to the APA, other statutes, or agency regulations or practice—that offers an opportunity for fact-finding before an adjudicator, whether or not an

administrative law judge (ALJ).” The *Model Adjudication Rules*, available at www.acus.gov/research-projects/model-adjudication-rules-2018-revisions, address a wide range of topics including ex parte communications, adjudicator impartiality, prehearing procedures, hearing conduct, and administrative review.

Also worth noting is [Recommendation 2018-4](#), *Recusal Rules for Administrative Adjudicators* (84 Fed. Reg. 2139, Feb. 6, 2019), which recommends that agencies issue procedural rules governing the recusal of adjudicators to ensure both impartiality and the appearance of impartiality in agency adjudications. A subsequent report, by Professor Louis Virelli, describes approaches to recusal that agencies have adopted to preserve the integrity of their adjudications. It is available at www.acus.gov/report/administrative-recusal-rules-taxonomy-and-study-existing-recusal-standards-agency-0.

Public Access to Policies, Records, and Proceedings

ACUS recommends that federal agencies promote transparency in their adjudication programs. It has issued the following recommendations in recent years, which set forth best practices for facilitating public access to policies, decisions, records, and proceedings:

- [Recommendation 2021-6](#), *Public Access to Agency Adjudicative Proceedings* (87 Fed. Reg. 1715, Jan. 12, 2022)
- [Recommendation 2020-5](#), *Publication of Policies Governing Agency Adjudicators* (86 Fed. Reg. 6622, Jan. 22, 2021)
- [Recommendation 2018-5](#), *Public Availability of Adjudication Rules* (84 Fed. Reg. 2142, Feb. 6, 2019)
- [Recommendation 2017-1](#), *Adjudication Materials on Agency Websites* (82 Fed. Reg. 31,039, July 5, 2017)

The reports underlying these recommendations, which are available on ACUS’s website, provide more detail on how different agencies currently make information about their adjudication programs publicly available.

Administrative Review of Decision Making

Finally, ACUS has issued two recent recommendations that offer best practices for structuring administrative review of agency decision making. The first, [Recommendation 2020-3](#), *Agency Appellate Systems*, focuses on the traditional appellate model for administrative

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review. The appendices to the report underlying the recommendation provide overviews of appellate systems at twelve agencies, including the Patent and Trademark Office.

A second recommendation, [Recommendation 2021-10](#), *Quality Assurance Systems in Agency Adjudication*, identifies best practices for agencies' use of quality assurance techniques—such as peer review, feedback to adjudicators, and training initiatives—to promote fairness, accuracy, timeliness, and consistency in adjudication.

ACUS is currently undertaking a follow-up project, *Precedential Decision Making in Agency Adjudication*, that, it is anticipated, will result in recommended best practices on that topic. Information about that project is available at www.acus.gov/research-projects/precedential-decision-making-agency-adjudication.

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I welcome any questions the Subcommittee may have about these or other ACUS materials on adjudication. Please have Subcommittee staff direct any questions to Todd Rubin, Counsel for Congressional Affairs, at trubin@acus.gov.

Sincerely,

A handwritten signature in cursive script that reads "Andrew Fois".

Andrew Fois
Chairman