AD LAW NEWS EXPRESS

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ABA SECTON OF ADMINISTRATIVE LAW & REGULATORY PRACTICE

Meet the Admin Law Section in San Francisco!

ABA2010
SAN FRANCISCO Annual Meeting
August 5-10
YOUR EXPERIENCE. YOUR COMMUNITY.

The Section of Administrative Law and Regulatory Practice is gearing up for this year's Annual Meeting in San Francisco, CA on August 5-8. During this three day event, the Section is sponsoring several world-class CLE programs at the Moscone West Convention Center in downtown San Francisco. Also on the agenda is two half-day Council Meetings, several Section Committee meetings including a Publications Committee Meeting, the Homeland Security Coordinating Committee Meeting and Coordinating Committee for Veterans Benefits and Services.

An exciting line up of six outstanding CLE programs are not to be missed. The sessions include "Federal Preemption- Recent Trends and Developments"; "Antitrust and Administrative Law: The Pros and Cons of Antitrust Enforcement by the FTC"; "Agency Leaders: Delays in the Appointment Process and the Constitutionality of the Public Company Oversight Board in the Securities and Exchange Commission"; "Priorities & Perspectives on the Civil Division"; "Citizens United: A Unique Journey through Campaign Finance, Separating the Law from the Rhetoric"; and "Are *Chevron, Vermont Yankee,* and *State Farm* in Need of New Thinking?".

The highlight of this years' meeting is the once-in-a-lifetime opportunity to join your colleagues for an exclusive tour of the Robert Mondavi Winery in Oakville, CA. Guests will transfer by motor coach to the vineyard for a private tour, reception, and hors d'oeuvres, followed by a three course gourmet meal. Special guest Judge William Fletcher of the Ninth Circuit Court of Appeals will address participants along with a special welcome from Marguerite Mondavi. This event is available to Section members at the greatly reduced price of $175. Please register early for this event as it will sell out quickly.

San Francisco stands as one of America's most exciting cities with endless tourists destinations that you can enjoy during the Annual Meeting. For your convenience the ABA has arranged for exclusive group rates for some of San Francisco's top tourist attractions including the Golden Gate Bridge, Alcatraz Penitentiary, Wine Country, San Francisco's famous Victorian Homes and many more. Please visit https://www.cappa-graham.com/ABAtours2010.html to view complete list of tour opportunities in San Francisco.

To view complete information on the Annual Meeting and register for Section of Administrative Law and Regulatory Practice events, click the link below. We look forward to seeing you in San Francisco. If you have any questions regarding the Annual Meeting please contact Meghan Keivel at 202-662-1582 or keivelm@staff.abanet.org .

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Inside this issue:

Section Member Lends Expertise to Independent Review

By: Meghan Keivel

Section of Administrative Law and Regulatory Practice member and Widener Law School Dean Linda Ammons was appointed on January 13, 2010 by Delaware Governor Jack Markell to conduct an independent review of the arrest of Dr. Earl Bradley, a Delaware pediatrician accused of sexually assaulting over 100 children. Ammons' study unearthed critical shortcomings in the administrative process in Delaware which allowed for abuse to take place on such a large scale as well as included a list of sixty-eight recommendations for improvement.

Dean Ammons presented her list of recommendations to Governor Markell on May 11, 2010, pressing for strict enforcement of laws to better protect children from sexual predators and outlining flaws in the administrative and statutory procedures used to manage claims against Dr. Bradley. Ammons conducted a rigorous study on a pro bono basis of over 70 people involved in the case in order to determine the holes in the administrative process that allowed for the abuse of children in Bradley's care to go unnoticed since as early as 1994.

Ammons' findings include:

- A November 1996 complaint by a nurse at Bradley's hospital to hospital officials regarding his inappropriate conduct toward patients was not reported to authorities.
- Bradley's sister alerted authorities at the Delaware Medical society of her brother's misconduct in a fax transmission that was in part cut off in transmission. A section of her letter that did reach the Delaware Medical Society included key details which warranted a formal referral to the Board of Medical Practice who licenses doctors in Delaware. This referral however was not carried out and this inaction according to Ammons was inconsistent with what the law requires.
- Entities who should have reported the abuse to the Board of Medical Practice, reported confusion regarding who they believed was ultimately responsible for reporting the abuse to the Board. The Board only began logging complaints after allegations against Bradley were publicized in 2009, despite a law requiring complaints to be logged years before. Additionally Ammons concludes the Department of Justice should have been in communication with the board regarding Bradley's allegations in 2005.

In addition to Ammons' findings, she includes sixty-eight recommendations to the Board of Medical Practice, the executive branch, Department of Justice, the Delaware General Assembly, hospitals and the Delaware Medical Society geared toward increased accountability among hospitals and entities in handling child sexual assault cases. Please visit http://law.widener.edu/~/media/Files/BradleyReport/FINAL%20REPORT.ashx to view Dean Ammons' complete review of the Bradley case.

The Section of Administrative Law and Regulatory Practice congratulates Dean Ammons for her service and salutes her dedication to improving administrative and statutory processes and defending the rights of the children impacted by this case.

2010 Section Awards Deadline Extension

The deadline for the Section's 2010 National Awards has been extended to **July 8, 2010**.

The **Mary C. Lawton Outstanding Government Service Award** recognizes outstanding contributions to the development, implementation or improvement of administrative law and regulatory practice. Eligible candidates are government lawyers active in the administrative law and regulatory practice and exceptional political appointees. All nominations must be submitted by **July 8, 2010.** Click Here to view complete information on the Mary C. Lawton Award.

Gellhorn-Sargentich Law Student Essay Competition is open to all currently enrolled law students attending ABA accredited law schools. The essay theme is presidential control of agency rulemaking The winner of the Gellhorn-Sargentich Award will receive a $500 cash prize and round-trip airfare and accommodations to attend the Section's Fall Conference in October 2010 in Washington DC. Submissions must be received by **July 8, 2010**. Click here for complete information.

Annual Award for Scholarship recognizes the best work of administrative law scholarship for the prior year (2009). If you wish to nominate a book or article for this award contact Russell Weaver at 502-852-6559 or russ.weaver@louisville.edu. Click here to access complete guidelines for the Annual Award for Scholarship.

Upcoming Events

Aug 5-9, 2010
ABA Annual Meeting, Administrative Law Section Programs

Co-Chairs: Anne Joseph O'Connell & Tracy Genesen

San Francisco Marriott Marquis and Moscone Convention Center, San Francisco, CA

REGISTER NOW

Aug 7-8, 2010
Council Meeting and Publications Committee Meeting, San Francisco Marriott Marquis, San Francisco, CA

REGISTER NOW

Aug 7, 2010
Section Dinner and Tour of Mondavi Winery, San Francisco, CA

REGISTER NOW

UPDATE!
Nov. 4-5, 2010
Administrative Law Conference, Capital Hilton, Washington, DC

Co-Chairs: Linda Ford and Elizabeth Getman

UPDATE! OCT 30, 2010
Council Meeting, Publications Committee, Washington, DC

February 2011
Lobbying Institute
Washington, DC

March 2-3, 2011
6th Annual Homeland Security Law Institute, Washington, DC

May 2011
2011 Spring Conference, Charlottesville, VA

June 2011
7th Annual Administrative Law and Regulatory Practice Institute, Washington, DC

August 4-9, 2011
2011 Annual Meeting, Toronto, Canada

New ABA Executive Director

The Section of Administrative Law and Regulatory Practice welcomes new ABA Executive Director Jack Rives. Jack joins the ABA from the U.S. Air Force where he served as judge advocate general. The Section looks forward to working with Mr. Rives as we work together to ensure a strong future for the Section and the ABA. Welcome Jack!

Spring Conference Provides Unique Venue for Section's Unique Strengths

Section members rule the rapids of the Youghiogheny River while at the 2010 Spring Conference

Photo provided by Jeff Litwak

By Jamie Conrad

Nemacolin Woodlands Resort is the idiosyncratic creation of a lumber magnate who has infused his tastes and hobbies into an upscale retreat in the mountains of Western Pennsylvania -- think of the Greenbrier combined with bits of Versailles and Neverland Ranch. Held at this eclectic location on May 14-16, the Spring Meeting was another example of the Section's equally distinctive combination of timely and engaging intellectual discussion, important Council business, epicurian dining and diverse recreational pursuits.

Speakers at Friday's CLE panels addressed a wide range of current topics: the constitutionality of the Public Company Accounting Oversight Board (an issue now before the Supreme Court); whether and how one can create genuine public participation in health-related decisionmaking; and the gap between theory and practice in the Nuclear Regulatory Commission's revised processes for permitting new nuclear reactors.

Section Chair William Luneburg thanks guests for attending the Spring Conference

Photo provided by Meghan Keivel

Two panels addressed opportunities for Section members collectively or individually. The first explored the concept of "Global Administrative Law" and how the Section could become involved in studying and fleshing it out. The second provided first-hand guidance on how to be retained by international or foreign bodies for short-term engagements abroad as a consultant or teacher.

Fallingwater, the iconic Frank Lloyd Wright creation located only a few miles from the resort, was a dominant motif: a sizable contingent of conferees toured the home Saturday afternoon, and participants in that evening's dinner were treated to a fascinating account of the political agendas motivating both Wright and his clients the Kaufman family, as well as the personal dynamics between them. Also befitting the setting, a more adventurous contingent of Section members spent Saturday afternoon mastering the rapids of the Lower Youghiogheny River (see photo). Note the helmets -- ad law is clearly not for the faint of heart!

Standing On The Shoulders Of Giants: Learning From Ad. Law's Legacy of Leaders

By Jim O'Reilly
Section Fellow and Former Chair

The Administrative Law & Regulatory Practice Section of the American Bar Association has developed the careers of masters of the regulatory "game" for decades. "AdLaw" is a mature field today, with well recognized canons and hierarchies, but it evolved as a system through many bumps and bruises along the way. Present at the creation, and invaluable in the formative years, AdLaw Section leaders truly shaped the system as it is today.

I was one of the rookies in the early 1970s when reform of the 1946 APA structure, adoption of open meetings legislation, updating of the Freedom of Information Act, and development of a system for judicial deference to agency interpretations were all in the fermenting stages. I was in awe of the crusty "present at the creation" spirited debates Clark Byse enjoyed, and the mastery of telecomm law by Dick Wiley and of all rulemaking issues by Bill Allen.

The administrative law growth in the era of the 1960s and early 1970s had been dominated by Section Chairs who were intellectually gifted and diplomatically skilled Washington lawyers like Ben Fisher, Roger Nelson, and Marion Edwyn Harrison. Outside of the Beltway, Dick Keatinge of Pasadena, Harold Russell of Atlanta and Frank Wozencraft of Houston were major players. The academic stars of Chicago in Ad. Law were Section Chairs Vic Rosenblum of Northwestern in the 1960s and Nino Scalia of the University of Chicago in the '70s; each went on to other pursuits. Jerre Williams went from Section Chair to the Fifth Circuit, leading the way to better judicial acceptance of the administrative agency process in his cogent opinions.

Ad. Law was a wonderful place to be as a young lawyer; one learned fast not to get in the way of transferring process improvements from one agency to another. ACUS under Bob Anthony generated exceptionally insightful reports. New modes of signaling regulatory desires in telecomm came from the FCC under Dick Wiley. FDA prospered with its old statute tuned up by the leading minds of Peter Hutt and Dick Merrill. The SEC grew its tool kit with Roberta Karmel. Judicial review norms were shaped by Ted Olson's genius for details in building the record for review. Tommy Susman reinvented himself and built a legacy in FOIA practice. And so many other innovators among our ABA Ad. Law colleagues made this field an intellectual's feast and frolic.

Deregulation pro and con? We've debated both sides. Models for deference? That's Ad. Law's work. Cost-benefit modeling? See our friend Sunstein. Preemption constructs? Wrote that book. Negotiated rules? Harter's our go-to guy. Interim final rule, Chevron doctrine, E-regs? Been there, debated that. Page through the past volumes of Administrative Law Review, or search indices for "reform & administrative law", and we of Ad. Law were there before the crowd followed, if they did. We didn't always agree with one another, but our debates were the intellectual yeast that made the regulatory system grow, one innovator at a time. From power broker law firm leaders, to professors, to agency leaders, the Ad. Law Section mixed many of the nation's best thinkers into a potent cocktail of "thought leaders". Young minds were welcomed, and sometimes awed by the repartee.

It may seem odd to today's law students that property professors talk in centuries, criminal law builds on decades, but administrative law is still cooking. If one enters the field and stays active for three decades as I have, lessons of the relatively recent past can help to illuminate solutions to today's problems. Failing to learn from the past condemns one to repeat it, and Ad. Law has been the chronicler as well as the promoter of change.

This practice area was not always a mellow pastime. As an Army veteran and with my former work as a policeman, I thought I was fearless, until the day Kenneth Culp Davis and Walter Gellhorn moved at an ACUS meeting to strike my report on amending the Freedom of Information Act; scared pygmies like me dreaded the wrath of giants like them (but the recommendation survived, and so did I, and Executive Order 12600 emerged from the cloud of intellectual dust). I started writing ABA papers on FOIA when there were 300 cases; my treatise recently passed 5,400 decisions in its coverage. Our committee effort to have ABA AdLaw express its support for cigarette regulation by CPSC was crushed in a cloud of smoke and stomped by the Gucci loafers of lobbyists. Rookies entering the NFL can relate. But the improvement of government processes requires many hands, and one must endure a few sharp elbows along the way.

The message to young law grads of today: invest time in the Ad. Law Section's committee work. Push against the inert, learn from the lively, mix with the best minds in your field. Become a champion of change that helps real people, fosters real improvement, makes fiscal sense, moves the world in a better direction. The world is run by those who show up. Ad. Law Section membership is your ticket; grow with us!

A Salute to the Section of Administrative Law Fellows and Senior Fellows

Senior Fellows
The Honorable Stephen Breyer
Professor Clark Byse
Milton M. Carrow
The Honorable Richard D. Cudahy
Kenneth Culp Davis*
The Honorable William Rehnquist*
Professor Victor Rosenblum*
The Honorable Antonin Scalia
The Honorable Patricia M. Wald

The Honorable Stephen F. Williams

Fellows
Charles D. Ablard
William H. Allen
Robert A. Anthony
Michael Asimow
Janet E. Belkin
Warren Belmar
George Berman
Jodi Bernstein
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The Honorable Susan Braden
Marshall Jordan Breger
The Honorable Arthur L. Burnett, Sr.
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Betty Jo Christian
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Cynthia Farina
Ben C. Fisher
Herbert E. Forrest
Bernard Frank
William F. Funk
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C. Boyden Gray
Edward J. Grenier
Philip J. Harter
Judy Kaleta
Sally Katzen
Cornelius B. Kennedy
Eleanor Kinney
Ronald M. Levin
Jeffrey S. Lubbers
Randolph J. May
John T. Miller, Jr.
William R. Morrow
William E. Murane
Barbara K. Olson*
Theodore B. Olson
James T. O'Reilly
Victor W. Palmer
Martin F. Richman
William W. Ross
Anna Shavers
Honorable Loren A. Smith
Charles Effinger Smoot*
Peter Strauss
Thomas M. Susman
Daniel Troy
Paul R. Verkuil
John Vittone
Joe D. Whitley
Richard W. Wiley
David Woodward
John Hardin Young
Lynne Zusman

*Deceased

Proceedings of the 6th Annual Rulemaking Institute

OIRA Administrator Cass Sunstein addresses the 6th Annual Rulemaking Institute

Photo by Meghan Keivel

By Scott Rafferty
Edits by Michael Herz

The Sixth Annual Administrative Law and Regulatory Practice Institute, held on June 1, 2010, drew approximately 250 attendees to hear leading attorneys and regulatory experts discuss the latest developments in rulemaking and appellate advocacy. Speaking for section chair William V. Luneberg, chair-elect **Jonathan Rusch** welcomed participants and introduced Cardozo School of Law Professor **Michael Herz**, the section vice-chair, who led and organized the program.

Keynote. Professor Herz introduced keynote speaker **Cass Sunstein**, Administrator of the Office of Information and Regulatory Affairs (OIRA), who spoke on "Empirically Informed Regulation." Sunstein began by Identifying three key aspects of the Obama Administration's approach to regulation. The Administration promotes transparency and open government in new ways, using disclosure as a low-cost, high-impact regulatory tool. Regulatory review emphasizes the best new evidence on how people really behave. Cost-benefit analysis has been made a pragmatic tool to assess and publicize the full range of consequences, including fairness, distributional impacts, and intergenerational transfers.

The new regulations issued by the Obama Administration during its first 15 months have total net benefits exceeding $3.1 billion. These regulations address a wide range of critical issues with large benefits - saving lives on highways, protecting consumers and investors, increasing energy efficiency, combating obesity, facilitating student loans, and creating an unprecedented "Race to the Top" to reform education.

President Obama directed OMB Director Peter Orszag to take account of the insights of behavioral economics, ensuring, for example, that regulatory actions reflect recent findings regarding factors such as procrastination, peer impacts, and salience. Default decisions tend to stick, which explains the low participation in 401(k) plans. Saving increases when it is automatic or simple. Obesity and healthy behavior can be contagious. People do respond to incentives, but information must be salient. For example, providing consumers with an orb that displays high and low energy use led to more conscientious, and therefore more effective, attempts to conserve.

Automatic enrollment overcomes inertia, so the Affordable Care Act directs large employers to enroll employees unless they opt out. Medicaid and CHIP will also use "express lane eligibility." The government is increasingly paying benefits by issuing debit cards rather than checks, which saves money and increases convenience for recipients without bank accounts. A series of initiatives, including the new Consumer Financial Product Agency, allow simplified disclosure that is clear and straightforward, meaningful as well as technically accurate.

Transparency and openness have (1) increased accountability, due to sunlight's "disinfectant" effect, (2) made information easier for citizens to find and use, and (3) enabled policy makers to benefit from "dispersed knowledge" within society, as Friedrich Hayek urged. Data.gov, now being mimicked all over the world, allows the public to download data sets, leading to private applications such as flyontime.com. Agencies have welcomed these initiatives, which have unleashed tremendous creativity.

Citizen participation is an indispensible method to ensure that regulation is evidence-based. Over the last six months, regulatory analyses and preambles have been unprecedented both in detail and clarity, which is quite a trick.

Disclosure can be a low-cost method to achieve regulatory objectives without the burdens of command-and-control requirements. Significant recent examples include the greenhouse gas reporting rule, which allows public tracking of emissions; increased disclosure of workplace fatalities, air passenger protection, human rights records; and simplification and improvement of labeling regarding nutritional values, the safety and fuel efficiency of tires, and child car seat safety. The OMB/OIRA dashboard is a picture of the rulemaking apparatus, promoting accountability within the government itself.

Finally, cost-benefit analysis has become more inclusive. Before rescinding the ban on entry by HIV+ immigrants, OMB tabulated a broad range of beneficial and adverse affects – reducing stigmatization, strengthening families, attracting highly skilled workers, and ethical, humanitarian, international, and distributional impacts that are difficult to quantify in dollar terms.

OIRA manages a review process that is truly interagency, involving multiple actors and perspectives. The originating agency frequently concludes that this review improves the rule. On questions of law, the OMB general counsel, the White House counsel, and the Department of Justice coordinate to get the law right. No court has struck down an Obama Administration rule that has been through interagency review.

Regulation must promote, and not undermine, economic recovery. Looking before we leap, we will continue to find unprecedented opportunities for improving and extending people's lives. Management of health care information alone will involve billions of dollars in net benefits.

Panel 1. **Jamie Conrad**, Counsel, Conrad Law & Policy, introduced the

Proceedings of the 6th Annual Rulemaking Institute, cont'd

panel on recent developments in rulemaking. **Michael Fitzpatrick**, Assistant Administrator of OIRA, observed that the Administration's ambitious agenda had generated many complex rules. Review times are extremely tight. OMB has already reviewed 802 "significant" rules, of which 162 were economically significant.

Open government will be a key legacy. A working group of OIRA, CIO Vivek Kundra, and Beth Noveck, head of the Open Government Initiative, meets regularly. Each agency has senior accountability officials. There are continuous efforts to populate data.gov with useful information and to enhance the OIRA dashboard. Whatever is in the public docket room, should be online.

Professor David Franklin of DePaul University spoke regarding judicial review of guidance documents. For many years, scholars have proposed that courts not review such documents to determine whether they are "spurious rules" – that is actually legislative rules in disguise that are invalid because they did not go through notice-and-comment. Instead, it is argued, courts should simply treat any rule that did not go through notice-and-comment as a non-legislative rule, which would mean that the agency could not treat it as legally binding or rely on it in an enforcement matter.

Such an approach is appealing but would be a mistake. Deregulatory rules, including safe harbors, would never be subject to review, since there would be no subsequent enforcement. Electing notice-and-comment for guidance could make it difficult for agencies to make excep-tions or revision without another comment process. Public scrutiny at notice-and-comment also serves different purposes from post-enforcement judicial review. While sloppy, the status quo has play in the joints, giving courts room to tailor notice-and-comment requirements, while allowing agencies some use of guidance documents to inform the public.

Professor Herz discussed a variety of developing issues in judicial review or rulemaking. One open question concerns the impact of the portions of Massachusetts v. EPA that found the agency's reliance on non-statutory factors to be arbitrary and capricious. A strong reading of the opinion would severely constrain agency discretion, limiting the factors it can consider in making a decision. Prof. Herz also suggested that it was an "anti-politics" decision, seeking to protect the technocratic expertise of the agency.

Prof. Herz also discussed recent "logical outgrowth" cases. Although the test should be grounded in foreseeability and fair notice, the circuits have taken divergent approaches both with regard to what constitutes a logical outgrowth and with regard to whether the final rule must be grounded in the text of the proposed rule, the notice, or the entire regulatory discussion. Prof. Herz also touched on conflicts regarding whether sex offender registry rules could take immediate effect as to past offenders and suggested that the D.C. Circuit was becoming more permissive of changes in agency interpretations made without notice and comment.

Curtis Copeland, specialist at the Congressional Research Service, reported on a widespread failure to submit rules to Congress as required by the Congressional Review Act. Mr. Fitzpatrick responded that some agencies questioned the underlying data, but confirmed that OMB will make sure that GAO has a direct regulatory contact in each agency. Mr. Copeland also observed that Affordable Care Act has 40 rulemaking requirements, including some very broad grants of authority. Congress will surely seek to oversee these rulemakings, most likely though reliance on appropriations riders.

Panel 2. The second panel, moderated by **Professor Ronald Levin** of Washington University, concerned formal and hybrid rulemaking. In the 1960s and 1970s, rulemaking agencies shifted from trial-type proceedings to informal notice-and-comment proceedings. Several statutes required hybrid proceedings, but Vermont Yankee (1978) signaled a shift away from formal and hybrid rulemaking. The panel considered whether formal rulemaking should be resurrected or abandoned altogether.

Professor Jeffrey Lubbers of Washington College of Law was un-enthusiastic about formal rulemaking. In several recommendations, dating back to 1972, ACUS has proposed that, while agencies should voluntarily consider hybrid rulemaking, statutory requirements would be a mistake. The Magnuson-Moss Act required the FTC to use special procedures with built-in time lags, causing rulemakings (e.g., credit practices, used cars) to last almost a decade. Where Congress has provided exemptions, the FTC has obtained public input and completed significant rulemakings within 4-7 months.

Jim Davidson, Chair of Polsinelli/ Shughart's Public Policy Group, observed that the "substantial evidence" standard drives the process, creating a record for judicial review. Politics, not process, explains delay.

Jonathan Snare, partner at Morgan Lewis & Bockius, discussed OSHA's hybrid rulemaking. For health standards, OSHA must establish technological and economic feasibility of rules to ensure that no employee suffers substantial health impairment. Formal hearings vary from one day to six months, with 30-45 day post-hearing periods for briefing and rebuttal. The process leads to in-creased credibility for the rule.

Jeffrey Rosen, partner at Kirkland Ellis, argued that agencies often should use hybrid and formal procedures, which would improve factual accuracy and provide incentives for public participation and transparency. Even ACUS has recommended on-the-record procedures when data are technical, the problem is open-ended, or costs are significant. However, Professor Levin argued that, since the 1970s, a consensus has developed that infor-mal rulemaking provides an adequate record without demeanor evidence.

Luncheon Speaker. Our lunch speaker, **Chairman Paul Verkuil** of

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the Administrative Conference of the United States (ACUS), spoke of the excitement of re-establishing the agency, which operated from 1968 until 1995 and was funded again last year. He identified a number of potential research areas, including (1) agency preemption of state law, (2) regulatory negotiation, (3) the application of ethics rules to contractors and their potential involvement in inherent government functions, and (4) immigration procedures. He emphasized the opportunity for ACUS to serve as a forum to disseminate best practices among agencies and to improve management techniques. He is in the process of recruiting consultants so that projects will be in the pipeline as ACUS builds its staff and membership. The President will appoint 10 council members to direct the Conference, which will include up to 90 additional members.

Luncheon Keynote speaker ACUS Chairman Paul Verkuil

Photo by Otto Hetzel

Panel 3. **Neil Eisner**, Assistant General Counsel, Office of Regulation & Enforcement, Department of Transportation (DoT), moderated the panel on technology and rulemaking.

Professor Cynthia Farina of Cornell University reported on the progress of the Cornell e-Rulemaking Initiative. Regulationroom.org is working closely with DoT to provide an actively moderated discussion of selected pending rules. DoT treats the summary that they file on the last day of rulemaking as a public comment. The project seeks to overcome several basic obstacles that limit effective public participation in e-rulemaking: the public is ignorant about the process, unaware of relevant rulemakings, and overloaded by the volume and complexity of information. To increase public awareness, they identified stakeholders and used media and social network outreach. Their statistics for sustained participation compare favorably with similar web applications.

Neil Eisner moderates "The Technology of Rulemaking" panel

Photo by Otto Hetzel

Carl Malamud, founder of Public.Research.Org, discussed the importance, and challenge, of making all primary legal materials available to the public, in digitally signed format. Equal protection is impossible without access. After his organization put Oregon statutes on the internet, the legislature unanimously waived copyright; however, eight states still assert a copyright in their statutes. They acquired 20 million pages of Pacer documents, leading to new court rules to redact social security numbers and other private information. Cost remains a barrier; entering the search business would still cost $10-50 million.

Duncan Brown, the government's new director of e-Rulemaking, is charged with implementing relevant provisions of the E-Government Act, including the regulations.gov portal and the Federal Document Management System (FDMS) for internal agency use. Brown spoke about the accomplishments and future of e-rulemaking, emphasizing the value and efficiency of having a single government-wide portal and sharing technological resources.

Professor Stuart Shulman of the University of Massachusetts founded Texifter, LLC, which created Public Comment Analysis Toolkit. This software allows users to search, sort, and analyze large amounts of text. Shulman described the uses of the software and spoke generally about the challenges of handling large volumes of public comments.

Michael White, managing editor of the Federal Register, explained that GPOAccess, started in 1994, is being retired, as federal materials migrate to Federal Digital System (FDSys). Paper subscriptions to the Federal Register have fallen to just a few hundred. Federal Register and CFR files are now free on data.gov, with substantial metadata to support third party applications.

The National Archives and GPO are preparing "Federal Register 2.0" as a web edition that highlights citizen participation opportunities – using newspaper-like sections with broad topics, crowd sourcing (most popular lists), clean layout, and calendars. They want to digitize pre-electronic material from the beginning of the Republic. These digitized records will parse as well as natively electronic data. They use open-source code, so anyone can re-use, and eventually expect that XML, not PDF, will be the default format.

Panel 4. **Chief Judge David Sentelle** and **Judge Brett Kavanaugh** of the U.S. Court of Appeals for the District of Columbia Circuit concluded the day's proceedings with a discussion of effective appellate advocacy.

Judge Kavanaugh emphasized that presentation in court really matters as to outcome. Judges are generalists. Judge Sentelle said that briefs had to inform and explain the controversy, before advocating. Lawyers gain an advantage by doing a better job just stating the case. (Have a glossary of acronyms at beginning if absolutely necessary.) Here as elsewhere honesty and candor will help you. In general, candor develops a professional reputation. More specifically, do not misleadingly paraphrase, particularly when

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referring to a statute. Justice Scalia has influenced interpretation, which is now much more textualist. Judges always go through ellipses, so don't use them to leave out key terms. Do not improperly state what happened below. Acknowledge adverse precedents.

Conference Chairman Michael Herz introducing Chief Judge Sentell and Judge Kavanaugh

Photo by Otto Hetzel

Lead with your best issues or counterarguments. Don't waste time and space on issues that do not win. Minimize number of times that you refer to "the Act," remembering that they have three other cases on the day. Statutes are supposed to be an addendum, make sure that code citations in the brief correspond to the addendum.

Particularly in reviewing agency action, precision with regard to the standard of review is essential. (Both judges recommended their colleague Harry Edwards's book, written with Linda Elliot, Federal Courts Standards of Review (Thomson West 2007).) Petitioners must fit the argument into the proper framework. Respondents should not get bogged down in substance if the standard of review determines the case. Many cases are resolved on step one of Chevron: whether the statute speaks directly to issue being interpreted. Arbitrary and capricious is an uphill climb, but not impossible. Look for case law beyond your agency. Agencies should consult with litigating counsel before they issue final rule. If the agency response ignores salient points made by several commentators, the court may very likely send the rule back, even under arbitrary and capricious.

The Court of Appeals will of course follow whatever the Supreme Court has decided. Even dicta are almost a holy. They are also bound by holdings of prior panels within the circuit, but may not be as wedded to dicta. Decisions of other circuits are persuasive, but you need to make clear why their ruling applies and identify any circuit splits.

Summary of argument is the first chance to put forth your key arguments, uninterrupted, so do not waste it. This is the first thing Judge Kavanaugh reads, and then he reviews it right before he goes on the bench, so it frames his thoughts before he hears the case.

The judges complained that they often do not know exactly what the petitioner is asking us to do -- vacate, remand on specific issue, reopen comment period? Briefs can also leave the court mystified about how the rule works on the ground. Agency counsel always needs to have a good answer to: "What happens if you lose?"

Footnotes interrupt judges' train of thought, even if just for references. Extensive reviews of circuit conflicts may justify a footnote. Keep substantive footnotes to a minimum, such as any ripple effect of the desired holding.

Petitioners should not let the court overlook a well-reasoned dissent within the agency. Dissenting commissioners have the same expertise, even though they are not entitled to formal deference.

Plan two different oral arguments, depending on whether the panel is hot or passive. Always answer the question the judge is asking. If you are not certain you under-stand, seek clarification. When confronted with a hypothetical, do not simply say "that's not this case"; because hypothetical questions help judges understand how far precedent could take the court. Listen for "yes or no" questions. You have an opportunity to address what is troubling the judge, which opponent will use if you do not.

Argument in the alternative is a lost skill in brief-writing, and even more so in oral argument. "We think the Supreme Court means A, but we still win if it means B." This does not give away case or sound extreme. Be wary of conceding on the fly. Avoid extreme hypotheticals. Don't use extended analogies. This wastes time and invites hypotheticals.

Chief Judge David Sentelle shares words of wisdom at the 2010 Administrative Law and Regulatory Practice Institute.

Photo by Otto Hetzel

Preparation is important for oral "argument. You want moots if you can get them. If your office is too small, you have to prepare yourself and engage in role-playing.

When pressed, advocates should acknowledge that they understand difficulties suggested by a judge's question, but then offer three responses as "lifelines." This keeps judges off your back and shows advance preparation. Another lifeline is returning to the theme or mantra of argument. There may be more than one way to win, but wind your answer back to your strongest argument. If one judge doesn't understand, try to make eye contact with other judges.

You must know the record. If you don't, never guess. Be ready to be asked, "Where was this point raised before the agency?" Appellate counsel may have different formulation and approach, but need to know where everything is in the record. Every advocate can and should be utterly prepared.

The judges concluded with some final advice: Don't exaggerate. Don't say "clearly." And don't interrupt judges.

Section of Administrative Law & Regulatory Practice

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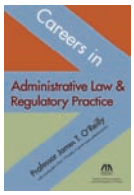

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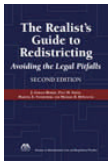

Homeland Security Legal and Policy Issues

Editors: Joe D. Whitley and Lynne K. Zusman

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