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Discovery in Administrative Rulemaking: The Colorado Experiment

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DISCOVERY IN ADMINISTRATIVE RULEMAKING: THE COLORADO EXPERIMENT

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Administrative Practice, A Perspective

Administrative practice in Colorado, as elsewhere in the United States, is rooted in three significant and intertwined products of Twentieth Century law -- the doctrine of reasonable police power over the exercise of private property rights, the expansion of the commerce clause for regulatory purposes, and the growth of the administrative agency as law-maker, law-enforcer, and law-interpreter. Because of its genesis -- reaction by the public to the impact of the entrepreneurial system upon the human, social and physical environment -- administrative practice often has a peculiarly political cast. The Legislature and the Courts function essentially as overseers to an heterogeneous group of appointed policy makers; a combination of lay men and women, professional planners, technicians, engineers, scientists, managers and government lawyers who, in the context of broadly stated goals and a varying sense of mission, have sought and obtained the power to influence, alter or determine the fate of private and governmental decision-making.

Counsel's task in this milieu, whether government or private counsel, is to understand the intersts of the client, to determine if and how these interests can be forwarded, to counsel accommodation and/or behavior modification where appropriate, and generally to pursue a resolution favorable to the client, diligently and ethically.

The context in which the practitioner of administrative law works is, like any other, the law, the facts, and the forum. The law determines what arguments should be made; the facts determine what argument can be made; the forum determines what argument will be made. The goal is to argue persuasively for the exercise of decision-making power in the client's favor. Normally, persuasive argument is that which appeals to the policy of the law, the equities of the client's presentation and the decision makers'

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sense of rightness and importance. Preparation and presentation -- with enthusiasm and conviction -- is the heart of persuasive argument. The effective use of expert witnesses can be indispensable.

The practice of administrative law is both challenging and frustrating because of the large measure of discretion given to administrative agencies and the general absence of evidentiary rules. The building of the record to protect a decision in the client's favor is extremely important, but the protection of the record against whatever another party might wish to adduce is very difficult. The introduction of every conceivable assertion, document, diagram, letter, photograph, memorandum or statement is generally allowed.

Hence, constitutional and statutory procedural protections found in the APA and in individual agency Acts have assumed great importance. Of primary importance, however, is the manner in which the agency views the substance of the presentation. The task, therefore, is to educate the decision-maker about the legal parameters of the case or proposed rule, through motions, briefs and oral argument, and the substantive issues, through written and oral presentation by witnesses. Tools for accomplishing this task are present in the State Administrative Procedure Act.

Since special statutory procedures control over general statutory procedures, such as the State Administrative Procedure Act, agency enabling Acts should always be consulted. Some agencies have adopted rules of practice before the agency, including discovery procedures, which are in addition to the State Administrative Procedure Act and these should be closely read....

The Policy Behind Discovery And Compulsory Process In Rulemaking

Discovery and compulsory process for witness testimony and document production are significant aids to the presentation of a fair and well-considered rulemaking proceeding, particularly from the standpoint of those who may be regulated by the agency or by persons interested in having the agency enforce its laws, because: 1) rulemaking may often involve complex social, economic, scientific and technical issues, 2) rules are most often proposed by the same staff and agency which interprets and enforces the rules, 3) the agency's interpretation, particularly contemporaneous construction regarding its rules and enabling Act, is entitled to deference, 4) rules are entitled to presumptive validity and the burden is on the challenging party to establish invalidity beyond a reasonable doubt, 5) judicial review is highly deferential to the agency, 6) rulemaking involves the formulation of policy upon a hearing record which is not subject to evidentiary review to the extent of an adjudicatory record, 7) it is presumed that those regulated are aware of the regulations which govern

their actions, 8) violation of rules may result in severe civil or criminal sanctions or both, and 9) rules can be extremely costly or prohibitive for the regulated sector to implement. With rules having such a potentially serious effect, careful attention must be paid to formulation of the rule itself.

The most important factor to consider in this regard is that rule-making agencies in Colorado are normally composed of citizens who may need, depending on the circumstances, a great deal of education in the subject matter and the ramifications of the proposal they are considering. Pre-hearing discovery can significantly narrow the need for oral testimony. The rulemaking agency can choose to accept depositions and other written material in lieu of oral presentations in order to shorten the proceedings. As in the court context, perceived issues and concerns about the proposed rule may disappear or be ameliorated as a result of discovery. Interested persons begin to see how best to prepare and make their presentation to the rulemaking agency. In sum, the rulemaking proceeding begins to assume known outlines before the free-for-all, which has characterized many of these proceedings in the past, commences.

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