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## LITIGATION ADVERSARIES AND PUBLIC INTEREST PARTNERS: PRACTICE PRINCIPLES FOR NEW REGULATORY LAWYERS

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**Synopsis:** Regulatory litigation covers a diverse terrain: from mergers of utility monopolies to benefits for the disabled; from market manipulation by banks to Medicaid fraud by physicians. It occurs at hundreds of administrative agencies, federal and state.<sup>1</sup> Lawyers' roles in regulatory litigation are similarly diverse. They frame and organize regulatory proceedings, conduct discovery, shape and draft expert testimony, cross-examine expert witnesses, write briefs, draft opinions, contest or defend agency commission decisions on judicial review, and bring or oppose enforcement actions. Bounded by substantive and procedural law, these activities take place before objective tribunals tasked with producing decisions that serve the public interest and hold up in court.

Every administrative proceeding must solve a legal equation: Facts plus law plus judgment equals a decision sustainable in court. To solve this equation in the adjudicatory context, administrative agencies typically organize regulatory litigation as a contest among adversaries. The adversarial system has its upsides. It can induce parties to trim their subjective sails and tack toward objectivity. But it cannot, by itself, produce public interest outcomes. Opposing positions do not comprise the universe of all possible positions; nor is the midpoint between two wrong answers necessarily the right answer. A hearing is not a boxing match where the judge's job is to pick a winner. A hearing is an effort to illuminate—to

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1. This article focuses on complex regulatory litigation involving issues affecting a public interest often broader than the private interests asserted by individual parties—as distinct from adjudicatory proceedings addressing more individualized claims, such as hearings on social security or Medicare benefits. In the latter category, individuals often represent themselves.

help the decision-makers master the issues so they can make a public interest decision.

This notion that a litigated hearing should be less about the parties and more about the issues is the animating principle behind a course I teach at Georgetown University Law Center, entitled “Regulatory Litigation: Roles, Skills and Strategies.” Case studies and exercises expose the students to the skills required at each stage of any litigated case: framing the issues, conducting discovery, preparing and defending expert testimony, organizing the hearings, cross-examining expert witnesses, negotiating settlements, filing briefs with the agency, advising decision-makers during deliberations, drafting orders, and challenging or defending agency decisions in court. But we also address mindset and attitude. Through research projects carried out for administrative law judges and other attorneys at the Federal Energy Regulatory Commission and state public utility commissions, students study this question, “How do effective lawyers, both inside and outside the agency, shape and use the litigation process so that the public interest prevails over the parties’ narrow private interests?” The students learn that effectiveness depends not only on skill but also on purpose and perspective. Effective regulatory litigators ask not “How do I win this case?” but “How can I help the agency make the best decision?”<sup>2</sup>

It is this last question that motivates this article. Having worked at all stages of the litigation process—as a litigator, expert witness, decisional advisor, opinion-writer, and appellate lawyer—I have observed litigation excellence from diverse perspectives. That experience, supplemented by contributions from my students and their semester-long project sponsors, has led to this article: a set of principles that, if applied by practitioners and decision-makers, will help lawyers advocate effectively and help agencies advance their statutory missions. I have organized these principles according to the nine typical stages of litigation:

1. Framing the Proceeding
2. Discovery
3. Pre-Filed Expert Testimony
4. Organizing Hearings
5. Cross-Examination
6. Settlements
7. Briefing
8. Deliberations and Opinion-Writing
9. Judicial Review

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2. Disagreeing with this formulation, an experienced litigator offered this thoughtful response: “At best this is unclear, but more likely inaccurate. Effective advocates swim with the tide and pursue their client’s objectives in ways that further the agency’s objectives.” He suggested this replacement: “Effective regulatory lawyers, whether representing private interests or public interest groups, ask not ‘How do I score the most points,’ but ‘How do I shape my client’s case to advance the agency’s mission?’” I prefer my formulation because it expressly puts the agency’s mission ahead of the client’s. A litigator with that mentality is more likely to win the agency’s trust. And if the client’s goals are not themselves furthered by advancing the agency’s mission, don’t take the client. I leave readers to consider these different approaches and come up with their own.

*Caveats:* This article does not substitute for mastering administrative law—either the general statutory and constitutional principles or a specific agency’s rules of practice and procedure. Its focus is litigation practice, not casebook analysis.<sup>3</sup> Further, achieving litigation excellence takes years. No single article, no single proceeding, can substitute for continuous practice and observation of others. My hope is that the thoughts presented here will help new litigators to (a) learn the sequence of steps that lead to mastery; (b) distinguish high-quality from low-quality performance; and (c) fashion a plan for professional growth. For veteran attorneys, I hope this article will provide reminders of why they are good at what they do, as well as principles they can pass on to their mentees. Finally, while this article owes much to my students, their interviewees, and the many practitioners with whom I’ve worked—alongside and against—the sole responsibility for error is mine.

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3. Examples of casebooks readers would do well to consult are: ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* (2d ed., West 2001); RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* (4th ed., Aspen 2002); WILLIAM F. FOX, *UNDERSTANDING ADMINISTRATIVE LAW* (6th ed., LexisNexis 2012); and DANIEL HALL, *ADMINISTRATIVE LAW: BUREAUCRACY IN A DEMOCRACY* (3d ed., Prentice Hall 2006).

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## I. FRAMING THE PROCEEDING

Framing a proceeding is how an agency establishes a proceeding’s purpose. For many regulatory statutes, the lodestar is the “public interest”—the phrase typically used to describe the agency’s mission. By itself, however, this broad phrase gives insufficient guidance; its boundaries must be confined by the statute’s substantive purpose.<sup>4</sup> When an agency frames a proceeding, it identifies the questions the parties must address, and that the agency must resolve, to achieve that proceeding’s statutory purpose. Framing means stating the ultimate questions the proceeding must answer, along with the subordinate inquiries necessary to answer those ultimate questions.

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4. See, e.g., *Nat’l Ass’n for the Advancement of Colored People v. Fed. Power Comm’n*, 425 U.S. 662 (1976), where the Court held that under the Federal Power Act, the phrase “public interest” does not authorize the Federal Power Commission (FPC) to remedy racial discrimination by the utilities it regulates:

[T]he use of the words “public interest” in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation. [T]he principal purpose of [the Federal Power Act and Natural Gas Act] was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices. While there are undoubtedly other subsidiary purposes contained in these Acts, the parties point to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation. The use of the words “public interest” in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates.

*Id.* at 669-70. Compare *Gulf States Utils. Co. v. Fed. Power Comm’n*, 411 U.S. 747 (1973). Gulf States sought the FPC’s approval to issue \$30 million in debt. Section 204 of the Federal Power Act authorized the FPC to approve utility financing “only if it finds that such issue . . . is for some lawful object, . . . and compatible with the public interest . . .” *Id.* at 749 n.1. Municipal wholesale customers protested, arguing that Gulf States would use the proceeds to finance anti-competitive activities, such as denying them access to transmission service in violation of antitrust laws—with outcomes that would be contrary to the “public interest.” They sought a hearing to prove these allegations and seek conditions. The FPC denied the hearing and approved the financing, holding that antitrust concerns were not within the “public interest” considerations assigned to the FPC by the Act. The Supreme Court reversed:

Under the express language of § 204 the public interest is stressed as a governing factor. There is nothing that indicates that the meaning of that term is to be restricted to financial considerations, with every other aspect of the public interest ignored. Further, there is the section’s requirement that the object of the issue be lawful. The Commission is directed to inquire into and to evaluate the purpose of the issue and the use to which its proceeds will be put. Without a more definite indication of contrary legislative purpose, we shall not read out of § 204 the requirement that the Commission consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws.

*Id.* at 759.

In attempting to influence the agency's framing, parties reveal differences—among themselves and with the agency. The parties are advancing their private interests while the agency is obligated to advance the public interest. Framing, then, is the first stage in a contest for the agency's attention: the stage where a party seeks to have the agency adopt that party's definition of the public interest, thereby increasing the chance that the proceeding's outcome will match the party's goals.

The active regulator resists these efforts. Rather than allowing the parties' interests to control the agency's framing, she uses the agency's frame to align the parties' issues with the agency's goals. Instead of the agency answering the questions the parties want answered, the active agency establishes the questions the parties must answer. The effective litigator will avoid making the framing stage a zero-sum game, trying to persuade the agency to define the proceeding in terms of what that party wants. The effective litigator, rather, will absorb the agency's statutory mandate and its related decisions, then offer a list of issues whose resolution will help the agency continue carrying out its mandate.

While the framing process can play out as a struggle between private interests and the public interest (e.g., an acquirer's private interest in controlling more assets versus the public interest in non-concentrated markets; a buyer's interest in low prices versus a public interest in sufficient supplies), it also can reflect the natural tensions between conflicting elements of the public interest—health, safety, economic survival, environmental responsibility, industrial development, affordability, short term debt repayment, long term infrastructure development, rate stability, and economic efficiency. Regulators must seek the best resolution of these conflicting components at reasonable cost.

These competing efforts to frame a proceeding take the form of party submissions and agency issuances, including: agency declarations that predate the proceeding; the application complaint that initiates the proceeding (if the proceeding is initiated by a party); the agency complaint or notice of investigation that initiates the proceeding (if the proceeding is initiated by the agency); and intervention documents filed by parties opposed to or allied with the initiating entity. The sequence of these initiating documents can, but does not necessarily, determine their influence. Even where the proceeding is initiated by a private entity, the agency can issue a hearing order that, while granting the private entity an opportunity to seek the relief it requests, reframes the proceeding by revising, broadening, or narrowing the questions the proceeding will address.

#### A. *Framing by Parties*

A private party initiates a proceeding by filing an application seeking some statutory benefit, or a complaint seeking a change in some regulated entity's behavior or responsibilities. Responding parties then file motions to intervene, stating their interests, perhaps supporting or critiquing the initiator's submission, and sometimes raising additional or different questions for the agency to consider. Here are three approaches to effective framing:

##### 1. Help the tribunal pursue its statutory purposes

At the root of much regulatory conflict—among parties, and between parties and the agency—is technological change and market share positioning, factors

often not anticipated by statutory drafters. Effective framers help the agency adapt to these circumstances, by offering new interpretations, and new rules and procedures necessary to effect these interpretations, so that legislative intent remains meaningful.<sup>5</sup>

Effective framers, therefore, root their arguments in the statutory language and purpose and then apply those foundations to current facts. They create paths for the agency based on law and logic, focusing on the greater good (as bounded by the agency's substantive authority) rather than any one party's self-interest. They describe their goals not only as consistent with, but as essential to, fulfilling the agency's purpose. Their pleadings focus not on "This is what I want" but on "This is how the agency can lawfully achieve its purpose."

Effective framing begins by addressing the agency's discretion; specifically, the discretion to grant what the party is seeking. Any request to an agency involves four procedural possibilities: (1) the agency has no discretion to grant the party's request; (2) the agency has discretion to hear or not hear the request; (3) the agency must hear the issue but has discretion whether to grant the party's request; or (4) the agency must grant the request. These variations exist because: (1) some requests are simply outside the agency's authority;<sup>6</sup> (2) the agency's statute contains no deadline or obligation to act on a request;<sup>7</sup> and (3) some statutes, especially state utility statutes, require the agency to act on a request

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5. An agency is even allowed to change its interpretation of a statute, if it explains the change (and if its new interpretation is reasonable). Consider section 706(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 153, which requires the FCC and state commissions to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . ." In one of its many broadband decisions, the FCC had asserted that section 706(a) authorized it to regulate providers of broadband service. *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 636 (D.C. Cir. 2014). The court reversed the FCC, in part because the FCC had departed without sufficient explanation from its own prior holding that section 706(a) "does not constitute an independent grant of authority." *Id.* But the court made clear that an agency's statutory interpretation need not remain fixed:

[T]he Commission need not remain *forever* bound by [its prior] restrictive reading of section 706(a). "An initial agency interpretation is not instantly carved in stone." [*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984)]. The [Administrative Procedure Act's] requirement of reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation. . . . [S]o long as an agency "adequately explains the reasons for a reversal of policy," its new interpretation of a statute cannot be rejected simply because it is new. [*Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)].

*Id.* (emphasis in original).

6. As exemplified by the *NAACP* case described in note 4 above.

7. Under the Federal Power Act and National Gas Act, a party filing a complaint or a petition for rulemaking has no statutory right to have the matter heard. The party's only recourse, should the agency disregard the filing, is to seek from the court a writ of mandamus, rarely granted. *See, e.g.,* *Cnty. of Santa Fe v. Pub. Serv. Co. of New Mexico*, 311 F.3d 1031 (10th Cir. 2002) (reversing lower court's denial of mandamus sought by landowners against county; county had a "non-discretionary" duty to stop utility's unlawful construction of power line); *N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997) (granting writ of mandamus precluding DOE from excusing its failure to accept nuclear waste timely; the "remedy of mandamus is a drastic one, to be invoked only in extraordinary situations[;] . . . only if (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff") (internal citations omitted)).

within a fixed period, while dictating the result if the agency misses the deadline.<sup>8</sup> Where the agency has discretion to hear or not hear the request, the party must explain why addressing its issue in the current proceeding serves the public interest, by, for example, avoiding multiple proceedings, clarifying policies, achieving the agency's purposes more efficiently or producing other benefits. Conversely, the party must explain why not considering the issue will cause detriment by, for example, causing delay and uncertainty that conflict with the agency's goals.

## 2. Teach the agency the issues

Framing helps the agency when it makes abstract statutory purpose concrete. Facts about a transaction, a market's entry barriers, or a party's difficulties in getting financing, all help the agency connect a party's needs to the agency's statutory obligations. This concreteness also helps the agency distinguish between disputes that are unique to the pending proceeding and disputes whose general features are likely to recur. An agency that understands the facts early will define the boundaries of the case appropriately, reducing the risk that facts will be missing when it comes time to draft an opinion. Consider Judge Posner's plea for help:

I don't understand [lawyers'] inability to see their cases from the judges' perspective. If they could do that they might realize that they are not giving the judges what they need—the full context of the case, both factual and legal, making no unrealistic assumptions about the extent of judicial preparation and depth of judicial understanding of novel cases. Lawyers who can imagine themselves as judges would understand the importance of visual aids, the importance of scene setting, the necessity of radical simplification, and the acute judicial need for patient explanation of the mysteries of modern technology, an ever more salient element of modern litigation.<sup>9</sup>

## 3. Ditch “plain vanilla” interventions

Some parties file intervention documents that merely identify the party, cite the agency's intervention rule, and attach the lawyer's signature block. While a “plain vanilla” intervention does enable a party to monitor a case, it misses a chance to educate the agency and the other parties. To lack final positions on a case's questions, to want to stay uncommitted until the facts are in, is understandable. But a party can still raise questions, stimulate thinking, point out gaps between the moving parties' interests and the public interest, and offer useful perspectives from that party's unique industry position. Effective interventions find a way to add value to the proceeding.

Further, plain vanilla interventions carry procedural risk. What if the agency decides the case based solely on the initiating document and interventions?<sup>10</sup> Then

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8. See, e.g., MD. PUB. UTIL. COS. CODE § 6-105(g)(6) (requiring the Commission to issue an order on a utility's merger application within 180 days (plus an extra 45 days if good cause exists); failure to issue the order timely is deemed to be approval).

9. RICHARD A. POSNER, REFLECTIONS ON JUDGING 357 (2013).

10. See, e.g., Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 776 (7th Cir. 2013), (Posner, J.) (citations omitted):

Like Illinois, Michigan objects to the Commission's refusal to conduct an evidentiary hearing. It wants an opportunity to present evidence in a trial-type proceeding involving cross examination of expert



the plain vanilla intervenor, never having stated a position or raised a question, is out of luck; it has raised no substantive issue that it can pursue on judicial review. An intervention document therefore should probe, ask hard questions, and suggest areas for the agency to pursue. Having done so, the intervenor who has been ignored at least can challenge the commission in court for failing to address those areas. Failing to do so, the party filing a plain vanilla intervention has no issue to raise.

Instead of filing a plain vanilla intervention, challenge the framing proposed by the initiator. Show that the initiator's narrower framing would prevent the agency from fulfilling its statutory mission; that without the intervenor's issues, the agency will be basing its decision on an incomplete record or omitting considerations required by statute.

### *B. Framing by Agencies*

Agencies can make policy either through rulemaking—where the agency initiates the proceeding (although a prospective party can request a rule); or through adjudication—where either a party or the agency can initiate the proceeding. Regardless of the approach, the agency's ability to lead is affected by whether and how it frames. Here are five suggestions:

#### 1. Induce parties to state issues objectively

Litigation involves advocacy, but advocacy does not always assist objectivity. Advocating a position is not the same thing as articulating an issue. Parties often conflate these two things by spinning: framing an issue in a manner that leans toward the preferred outcome. Spinning works when regulators are passive: when they merely copy the parties' statements of issues into the agency's own statement of issues. Alert agencies, in contrast, convert the parties' issues into objective inquiries. Doing so signals to the parties that the path to persuasion is not spinning but educating. Indeed, an agency alert to a party's spin will more readily detect and expose how that party's goals diverge from the agency's public interest mission. Parties who find their game-playing exposed will write more objectively the next time. The result is a forum that parties respect rather than manipulate.

#### 2. Order joint statements

Although a proceeding may begin with parties framing issues differently, the agency can order them to develop a joint statement. Doing so early reduces

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witnesses. (All direct testimony at the FERC's evidentiary hearings is presented in writing; only cross-examination is oral.) It also wants pretrial discovery, like Illinois. But unlike Illinois, it didn't raise the issue until its reply brief, which is too late.

FERC need not conduct an oral hearing if it can adequately resolve factual disputes on the basis of written submissions. Considering the highly technical character of the data and analysis required to match costs and benefits of transmission projects, the technical knowledge and experience of FERC's members and staff, and the petitioners' access to . . . [the transmission operator's—here, the Midwest Independent System Operator] studies, we would be creating gratuitous delay to insist at this late date on the Commission's resorting to litigation procedures designed long ago for run-of-the-mine legal disputes. Michigan has failed to indicate what evidence that it might present in an evidentiary hearing would contribute to the data and analysis in the record already before the Commission.

confusion and time-waste. A joint statement should not be a compromise statement, because blurring the issues does not help the tribunal. It is better to present precise differences of opinion about a proceeding's purpose. A joint statement can be a set of contrasting statements. That way, the agency can reframe the case to make clear which issues are included and excluded.<sup>11</sup>

3. State the issues as precisely as they will appear in the agency's final order

The more precision and detail in the agency's statement of issues, the more likely that parties will address those issues in the detail necessary to make the record complete. Vague categories like "effect on competition" or "effect on rates" are too loose; they leave the parties free to omit facts and analyses they find inconvenient, but that the agency needs to make a decision. Better to use precise questions like, "Will the vertical joining of production and transmission affect entry barriers in the product and geographic markets defined as XYZ; and if so, how?" and, "To what extent will the merger acquisition premium, paid by the acquirer to the target company's shareholders, affect the merged entity's finances, cost structure, and rates in each of the first five years after the merger?"

4. Be alert to evidentiary gaps

Despite agency efforts to reframe the issues, parties might not get the message. Or, they may hope that by ignoring the agency's frame they can return the case to their initial focus. They might, for example, offer pre-filed testimony (see Part IV below) that covers ground narrower than what the agency seeks to cover.

The agency must be alert to these gaps when they occur. Otherwise, the opinion-writers could face a stack of submissions and transcripts that is insufficient to decide the issues the agency wants to decide. At that late stage, the agency's choices will be unsatisfactory: reopening the hearings to supplement the record, or issuing a decision whose incompleteness makes it vulnerable on appeal or slows the agency's progress toward its goals.

Better to have too much evidence than too little. For example, when faced with an applicant or complainant whose testimony omits issues identified by the agency, the agency should take appropriate action: dismiss the case for failure to present sufficient evidence. That lesson, taught once, will obviate repetition.

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11. Consider this excerpt from the rules of conduct that Judge Steven Glazer, an administrative law judge at the Federal Energy Regulatory Commission, has created for his hearings:

No later than two (2) weeks prior to the date scheduled for hearing, the participants should submit through the FERC Online eFile website a Joint Statement of Positions on the Issues. Each issue in the Joint Statement of Positions on the Issues must also indicate the name of the supporting witnesses, the exhibit numbers relating to the testimony, the estimated money value of the issue (where applicable), and a brief statement of each witnesses' position.

Each party must submit through the FERC Online eFile website a pre-hearing brief, either independently, or jointly with other like-interested parties, no later than one (1) week prior to hearing. The pre-hearing brief should conform to the outline of the Joint Statement of Positions on the Issues and should concisely present a party's case concerning each issue by providing: (i) a narrative of the party's arguments and position, (ii) a summary of what the testimony of each witness will show, (iii) references to the record, and (iv) other relevant information.

### 5. Remember the unrepresented

The public interest has many components, including economic efficiency (both short-term and long-term), health and safety, consumer protection, environmental protection, stimulation of energy production, and quality of service. Because the cost of lawyers and experts is high, there will be interests and groups affected by a regulatory proceeding who cannot participate. In many proceedings, the public interest scope assigned to government attorneys will include some of the affected interests, but not necessarily all of them. An agency charged with promoting the public interest should identify these gaps in participation, then fill those gaps by supplementing the parties' issue list with issues these non-participating interests would have raised. The agency would not be advocating for those interests, but it would be requiring that the participating parties build a record that ensures those interests receive sufficient agency attention.

## II. DISCOVERY

Parties use discovery to gather information about each other's positions. Parties then use that information to support, refine, and revise their own arguments and positions; to undermine or narrow their opponents' positions; and to find points of agreement that allow settlements of or withdrawals from a case. The purpose of discovery thus coincides with the purpose of regulatory litigation: to find the facts needed to support agency action. And, if handled efficiently, discovery saves time. As one veteran litigator has written, "[d]iscovery is sometimes likened to a 'fishing expedition,' but like a good fisherman, a good lawyer should have an idea where the fish are."<sup>12</sup> With the facts already gathered through discovery, the hearing can focus on using the witnesses' expertise to advance the agency's goals.

### A. Objectives

Lawyers use discovery to achieve the following objectives:

1. Identify strengths and weaknesses of each party's position.
2. Fill in factual gaps, enabling mastery of each element of the transaction or event at issue. The facts can include those supporting one's own position or the other side's position.
3. "Pop balloons" in the opposing party's case (i.e., conclusory statements, loose aspirations, and adjectives and adverbs that lack substance).
4. Expose differences among witnesses for the opposing party.

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12. David S. Vogel, *Advanced Discovery Techniques* (June 2003), [http://davidvogel.com/2013/?page\\_id=34](http://davidvogel.com/2013/?page_id=34). See also JAY E. GREINIG & JEFFRY S. KINSLER, *HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE* 53, 55-56 (2d ed. 2002); ROGER S. HAYDOCK & DAVID F. HERR, *DISCOVERY PRACTICE* 13-15 (2d ed. 1988); FED. ENERGY REG. COMM'N, *OFFICE OF ADMIN. LITIG., EXPERT WITNESS BRIEFING BOOK* (2004).

5. Expose conflicts between an opposing witness' testimony (or, more generally, the opposing party's business objectives) and agency precedent.
6. Gather admissions of weaknesses, along with facts supporting one's own side.
7. Probe the practicality of witnesses' positions, such as by using hypotheticals that can demonstrate the effects of a party's position on future transactions and proceedings.
8. Probe for compromises, such as commitments for future behavior, thus removing issues from the case.

### *B. Boundaries and Types*

Agency rules typically allow discovery into anything that (a) is relevant to the subject matter of the proceeding or that (b) might reasonably be calculated to lead to the discovery of admissible evidence. Discovery procedures range from informal to formal: from initial conversations between parties by telephone or email, to written interrogatories, data requests, requests for admission, requests for inspections and depositions. The role of the decision-maker in the discovery process also varies, from actively guiding the process with rules and oversight, to leaving the parties to themselves.

### *C. Timing*

Parties accustomed to cooperating typically start discovery as soon as the moving party files its application or complaint, without waiting for the agency to establish a schedule. Non-cooperating parties will wait for the tribunal to issue a formal procedural schedule stating the opening and closing dates for discovery. As the parties make additional submissions, like pre-filed testimony (which can be direct, rebuttal, and surrebuttal; see Part III below), discovery into those submissions begins.

It is common for the asking party, on receiving answers to initial questions, to issue "supplemental" (also known as "follow-up") questions. Depositions (question and answer sessions under oath and transcribed by a court reporter) and informal conversations can be a more efficient way to gather information that otherwise would require multiple iterations in writing.

Discovery takes time, especially if the answering party is uncooperative. The wise lawyer starts early.

### *D. Minimizing Disputes: Suggestions for Lawyers*

There is tension between (a) the adversarial relations inherent in litigation and (b) the cooperative relations necessary for productive discovery. Essential are tact, humor, and heeding the golden rule. Here are four suggestions.

#### 1. Tailor discovery requests to true need

The clearer your mission in the case, the tighter will be your discovery requests. Instead of demanding "all documents," ask for documents that address

subjects ABC or involve persons XYZ. Accompany your requests with time limits: ask not for “all documents,” but “all documents created since [insert date].” A good technique is to outline your final brief, at least in terms of the topic and subtopic headings, in as much detail as possible, then tailor discovery requests to flesh out specifics under each subtopic. Some general fishing is inevitable and can be useful, but at least have an idea about the type of fish and where they might be swimming. Pinpointed questions get pinpointed answers (or resistance, which itself is useful information).

## 2. Write discovery clearly by being informed and prepared

Unclear questions produce unclear answers, followed by multiple exchanges before usefulness arrives. Imprecise answers often result when lawyers are out of their league, asking poorly worded questions about technical matters they haven't mastered. A close working relationship between expert witness and attorney reduces this problem, as does having the technical consultant draft the technical questions.

It also helps to know the difference between opinion and fact. As one interviewee explained: Whether it is hot outside is an opinion; what the temperature is, is a fact. In discovery of witnesses, asking for opinions is valid. The key is to know which, as between fact and opinion, you want to ask.

## 3. Base objections on legal principles, not inconvenience

Disputes take the form of objections from the answering party, followed by motions to compel from the asking party. Typical objections fall into these categories:

- (a) Relevance (but remember, a discovery question need not produce relevant information; the question is valid if it seeks information likely to lead to relevant material);<sup>13</sup>
- (b) Privileges (e.g., attorney-client, work product);<sup>14</sup>
- (c) Burden (voluminous; making the opponent perform a new study, rather than produce one that exists);<sup>15</sup>
- (d) Confidential business data (which can be addressed with protective orders);<sup>16</sup> and
- (e) “Critical infrastructure” data (e.g., data relating to locations and vulnerability of pipelines, generating plants, water towers—which again can be addressed with protective orders).<sup>17</sup>

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13. *KansOk Partnership*, 69 F.E.R.C. ¶ 61,004, at p. 61,030 (1994) (finding that an intervenor seeking to acquire information pertaining to applicant's affiliates failed to establish the information's relevance).

14. *Portland Gen. Elec. Co.*, 102 F.E.R.C. ¶ 61,189 at P 2 (2003) (holding certain documents itemized in a log not subject to discovery because of the Commission's investigative privilege).

15. *Nev. Power Co.*, 100 F.E.R.C. ¶ 61,195 at P 16 (2002) (holding request to produce all documents that respondents reviewed to comply with an investigation would impose substantial costs and an undue burden on respondents).

16. *Westar Energy, Inc.*, 115 F.E.R.C. ¶ 61,034 at P 10 (2006) (denying applicants' request for confidential treatment for commercially sensitive portions of its application).

17. *Am. Elec. Power Serv. Corp.*, 145 F.E.R.C. ¶ 63,008 (2013) (providing a sample protective order instructing participants to designate materials containing critical energy infrastructure information as protected).

#### 4. Address disputes without the tribunal

It is surprising how often lawyers will file written objections to discovery questions, in response to which opposing lawyers file motions to compel rather than just pick up the phone to talk things out. The better one understands the other side's case, the more quickly one will understand why a request is relevant. Just as there are lawyers who regularly object formally just to raise the other side's cost, there are lawyers who regularly ask for "all documents" rather than pinpoint based on actual need. Inasmuch as they deserve each other, they will share the same small space in hell.<sup>18</sup>

Administrative law judges (ALJs), usually overworked and underpaid, prefer to focus on substance rather than discovery. Further, at the discovery stage, if the ALJ has not yet seen the pre-filed testimony, she might lack sufficient context to make the right decision. Opponents who fail to resolve disputes on their own risk anger and error.

#### *E. Resolving Disputes: Suggestions for Agencies*

Agency decision-makers help the process by creating clear discovery rules, enforcing them consistently, and resolving disputes quickly. Experienced ALJs recommend these two approaches to their peers:

*Prepare to be pro-active, but emphasize that your involvement is the exception.* Clear instructions about deadlines, confidentiality, and procedures for filing objections or motions to compel can discipline the parties to avoid useless power games. Occasional check-ins, informally by phone, can give parties a chance to air concerns before they become formal disputes. Hosting informal conversations among the parties early on can reduce ambiguity about a case's substantive boundaries, while also establishing a cooperative tone that reduces misunderstanding. If parties understand that what matters most to the tribunal is the underlying dispute, they will bicker less over what matters less.

*When resolving discovery disputes, concentrate on core issues.* Placing substance at the center helps keep discovery focused and efficient.

#### *F. Getting Discovery into the Evidentiary Record*

Discovery only gathers facts; one still needs to get those facts into the record. Most tribunals offer two options. One option is to negotiate a stipulation with the other parties. Some pre-hearing orders require the parties to stipulate the admissibility of uncontested evidence. Another option is to attach the discovered document (which could be either a pre-existing document or a newly created document containing the other side's written response to your question) as an exhibit to your witness' pre-filed testimony. Still another means is to introduce the discovered information through an opposing witness during cross-examination. Having studied the discovered documents, the cross-examiner may ask an opposing witness questions relating to those documents. If an answer is consistent with the document, there is no obvious need to put the document into the record. (If the witness agrees orally that her salary last year was \$29 million,

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18. Wrote one reviewer of this article: "You sure it's a small space? There are a lot of lawyers to go in there."

the record does not need the annual report stating that same number.) If the witness answers inconsistently with the discovered document, the lawyer can still introduce the discovery answer as an exhibit to impeach the witness as inconsistent. *Caution:* The lawyer should anticipate how the witness will explain away the inconsistency; better to have pursued the point through supplemental discovery than to wait for the hearing to find out the document was later revised.

Alternatively, the cross-examiner can ask the tribunal to mark a document as an exhibit, show the document to the witness (and to opposing counsel—and some ALJs require a copy for every party), and ask the witness questions about it. On completing that line of questions, the cross-examiner can ask the tribunal to admit the document into evidence. (Having the document marked for identification is different from having it admitted into evidence.) Some tribunals allow the cross-examiner to place into evidence, automatically, any or all discovery answers authenticated by a witness.

Some agencies skip all these steps by inviting the parties (or perhaps the agency's litigation staff) to move all discovery documents into the record, regardless of whether anyone actually intends to cite those documents during the hearing. This approach makes for fewer interruptions during the hearing because no one has to mark and move specific exhibits, but it makes for a much larger record. This approach does not save time if there are multiple objections to various exhibits.

*Another caution:* In a proceeding with pre-filed testimony, a lawyer cannot introduce discovery into the record while her own witness is on the witness stand; that discovery needs to be attached to the witness' pre-filed testimony. For the same reason, a lawyer cannot introduce new exhibits while conducting "friendly cross" of witnesses for allied parties; friendly cross itself is usually prohibited.

### III. PRE-FILED EXPERT TESTIMONY

Regulatory decisions are based on this equation: *Agency decision equals law plus facts plus expert judgment.* To place facts and expert judgment in the record, parties offer testimony by expert witnesses.

In public utility regulation, witnesses pre-file their testimony in written, question-and-answer form. The technical hearing then consists mostly of cross-examination. At the hearing, each witness is sworn by the ALJ. The offering lawyer then asks the witness to state his or her name, followed by this standard question: "If I asked you all the questions in your pre-filed testimony, would you give the answers stated therein?" The witness says "yes," then the attorney moves the witness' pre-filed testimony into evidence. This process takes about ninety seconds. Some tribunals allow or require the witness to present an oral summary—but the summary cannot present any new information. Assuming no objections to the pre-filed testimony (objections should have been addressed long before, because the procedural schedule should have provided for motions to strike testimony weeks earlier), the witness is turned over to opposing lawyers for cross-examination on the pre-filed testimony.

Despite all the drama around cross-examination, the core of any party's case is its pre-filed testimony. It is the main evidence on which a party relies to advance its position, the main target against which the opponents launch their attacks, and

the main source of material—the facts, insights and judgments—that supports the agency’s opinion.

*A. Effective Pre-Filed Testimony*

Pre-filed testimony is effective if it helps the agency carry out its statutory obligations. It does so by integrating the party’s goals, the expert’s technical knowledge, the facts, and the law into a solution to the statutory equation. Testimony is most successful, therefore, when drafted with this question in mind: “What facts, reasoning, and language does the agency need to write an opinion that will be sustained on appeal?” When drafted this way, passages from the pre-filed testimony can literally be copied by the lawyer into her brief, and by the opinion-writer into the agency’s decision. That is the mark of testimonial success.

Effective testimony is educational testimony. It makes the technical comprehensible, so that non-technical decision-makers can absorb the witness’ knowledge, ask intelligent questions at hearing, and use the results to support their decisions. It also educates the opposing parties and their lawyers, causing them to sharpen their positions or seek settlement.

*B. Typical Procedure*

In typical administrative proceedings involving public utilities, the initiating submission, such as an application or a complaint, is accompanied by the moving party’s direct testimony (sometimes called its “case in chief”). Once intervenors have completed discovery into those documents, they will file their responsive direct testimony (sometimes called “answering testimony”). Depending on the tribunal, there will be additional rounds of testimony—rebuttal, surrebuttal, even sur-surrebuttal. Discovery can occur in response to each of these testimonial submissions; a party uses the discovery on one round of testimony to support its next round of testimony.

*C. Witness Types and Purposes*

There can be witnesses for the applicants (or the complainant), for intervenors, respondents, and for the agency’s litigation staff. Witnesses can include both fact witnesses and expert witnesses. They can be employees of the party or people retained for the proceeding. Fact witnesses can include (a) generalist witnesses, like the chief executive officer, who gives a broad picture of the company’s objectives while also presenting a “table of contents” that describes the other witnesses’ roles in the case; and (b) witnesses with financial or operational responsibilities, such as the chief financial officer and senior vice presidents with operational responsibilities, who testify about the company’s details. Experts usually are specialists with technical expertise, such as in engineering, economics, finance, accounting, and management; or have national or global experience that can lend objective support to the party’s positions. Most expert witnesses are not employees of a party; however, company employees can be qualified as expert witnesses. Agency witnesses are often qualified as experts.



Occasionally, the tribunal will separately retain an expert to testify, on the grounds that an outside perspective will enhance the record and pull parties' witnesses toward objectivity.<sup>19</sup>

#### D. Recommendations for Agencies

##### 1. Insist that expert witnesses be experts, not position-takers

Pre-filed testimony should not merely state the party's position. An agency is not a supermarket where parties shop for private benefits. It is an expert tribunal charged with promoting the public interest. Successful testimony doesn't lobby for an outcome; it offers expertise and education, to help the agency integrate facts, insights, technical expertise, and law. Agencies can raise the quality of their records by warning parties of this distinction: truly expert testimony will be admitted and studied while position-taking testimony will be struck or ignored.<sup>20</sup>

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19. POSNER, *supra* note 9, at 293-301 (providing an argument for court-appointed witnesses along with a discussion of why adversarial lawyers dislike them). For further readings on the subject of partisan experts vs. neutral experts, see generally Carl B. Meyer, *Science of Law: The Quest for the Neutral Expert Witness: A View from the Trenches*, 12 J. NAT. RESOURCES & ENVTL. L. 35 (1997); Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Control and Proposed Responses*, 18 YALE J. ON REG. 253 (2001); David Sonenshein & Charles Fitzpatrick, *The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence*, 32 REV. LITIG. 1 (2013).

20. See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 141 F.E.R.C. ¶ 63,014 at P 1316 n.116 (2012) ("The undersigned finds the testimony in the latter stages of this proceeding increasingly became repetitive and resorted to personal attacks among the expert witnesses. Accordingly, much of the testimony is irrelevant, repetitive, and immaterial."); *BP Pipelines (Alaska) Inc.*, 146 F.E.R.C. ¶ 63,009 at P 2, 4 (2014) ("Conclusory expert witness opinions/statements lacking evidentiary support would be accorded little or no weight . . . . It is the responsibility of an expert witness in the first instance, and, ultimately, of reviewing/filing counsel, to ensure that any pre-filed narrative testimony is accompanied by appropriate supporting evidence."). Then there is this gem, from Judge Lewnes' Initial Decision in the *PacifiCorp-Utah Power & Light Co.* merger case, 43 F.E.R.C. ¶ 63,030, at p. 65,343-44 (1988) (citations omitted):

In Mr. Landon's case, a baffling circuit of annihilating refutations were developed as to both his credibility and his competence . . . . For example, Mr. Landon denied, both in written testimony and on the witness stand, that the entire [region known as the] WSCC [Western Systems Coordinating Council] was a relevant market for bulk power . . . . In fact, as brought out during cross-examination, within the past 18 months in an important and time consuming case, Mr. Landon testified in a United States District Court that, from the standpoint of five comparatively small utilities in Southern California, the WSCC was the relevant bulk power market.

On cross-examination, Mr. Landon also indicated a lack of knowledge as to [Utah Power & Light's] historic policy of not wheeling but rather engaging in brokering. This assertion was countervailed by his recent testimony in an anti-trust case where he relied upon a reconstruction of what the wheeling/brokering policy of UP&L had been over a 10-year period based on his own investigation and conversations with UP&L personnel.

In the instant proceeding, Mr. Landon prepared schedules to his pre-filed testimony covering "firm energy" and "firm capacity" sales to California. On cross-examination he acknowledged that he did not know what "firm energy" or "firm capacity" meant.

Mr. Landon testified in the instant proceeding that "entry into both the transmission and generation portions of the bulk power market is easy in the long term." In his prior testimony in the above referenced anti-trust case he had stated "transmission is very difficult to duplicate because it takes a long time and is very expensive." On cross-examination, Mr. Landon was asked (without identification of the source as his own prior testimony) whether he agreed with the statement just quoted. He disagreed with his own sworn testimony.

Mr. Landon testified that the lead time for planning, permitting and constructing new transmission is 3 to 5 years. However, on cross-examination he was unable to cite a single instance in

While expert testimony is preferable to broadly stated positions, nothing prevents witnesses from opining on the ultimate question in a case, although practitioners do differ on this point. Some believe that a witness should not opine on the ultimate question—Is the proposed rate “just and reasonable”? Was the pipeline inspection program “adequate”?—but rather, offer only the facts and analytical tools necessary to determining the outcome. Others believe that as long as a witness’ opinion is based on expertise, experience, facts, and logic, her opinion on the ultimate question is appropriate and useful. When opinions are allowed, the key is to back them with facts and logic. Conclusory statements are useless to the tribunal because they don’t qualify as substantial evidence.

## 2. Make experts affordable to the under-resourced

When parties have differential access to experts, and when experts differ in their quality, the record is left lopsided. Some regulatory agencies have statutory authority to award funds to under-resourced parties with proven histories of offering high-quality expert testimony. The funds can come from taxpayer-funded agency budgets, or fees imposed on regulated entities (which, in the case of regulated companies, can be recovered from customers).<sup>21</sup>

### *E. Recommendations for Litigating Lawyers*

#### 1. Create solid working relationship between witness and lawyer

Although the nominal author of expert testimony is the expert witness, the lawyer leads the preparation. Leading does not necessarily mean doing the drafting (although some lawyers do draft some of their witnesses’ testimony). Leading means ensuring that the expert witness offers the facts and judgment that, when fitted to the law, produces a line of reasoning that the agency can adopt when drafting its decision. Recall the recommendation, in Part II.D.1 above, to prepare an outline of the brief during the discovery stage. That outline, fleshed out after discovery, can guide the organization of the draft testimony.

Well before drafting testimony, the lawyer works with the witness to develop the discovery questions that will gather the facts necessary to support and defend the witness’s testimony. The lawyer then works as editor-strategist, ensuring that the witness’s judgments are sound, are based on record facts, and are written clearly. This role includes anticipating all vulnerabilities likely to emerge on cross-examination (experience in cross-examination is essential for a lawyer who works with expert witnesses). It is important not to underestimate the editorial role. Not all expert witnesses are clear writers, or are able to explain their technical processes in lay terms. Some believe in their rightness so strongly they fail to write objectively and educationally (i.e., “It’s so obvious, why do we need to

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which a major transmission line was built within 3 years. Indeed he admitted that he had no specific knowledge as to how long it has taken Applicants, or any other WSCC utility, to build transmission lines because he had not made such inquiries. Once again, such unsupported and unresearched opinions lack any probative value. In fact, the record is replete with evidence of the substantial barriers to entry to the electric transmission market.

21. See, e.g., CAL. PUB. UTIL. CODE §§ 1801-1812 (providing for “compensation for reasonable advocate’s fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the commission”).

explain everything?") The tribunal normally consists of individuals having less technical knowledge than the technical witness. The testimony must speak at their level; or better, raise that level to the plane necessary to resolve the case. Effective testimony is educational testimony.

A witness' credibility declines with inaccuracy. Errors in calculation or citation, even minor ones, chew up time on the witness stand and distract from the main points. And accuracy is the first thing to slip when preparation is rushed. The lawyer must manage the months, weeks, and days before testimony is due to ensure that the multiple drafts, reviews, internal debate, and then final polishing occur smoothly.

### 2. Keep the expert on topic, but stay flexible

Working from the statutory equation and the existing internal outline, the lawyer can guide the testimony-drafting process by preparing an outline specific to the witness' role. That outline should contain the questions the witness needs to answer. The expert's first draft, then, can be written answers to these skeleton questions. The lawyer then may insert subsidiary questions, the answers to which will provide the technical bases and reader education necessary to support the answers. This approach effectively meshes the lawyer's expertise in organizing a case with the witness' expertise on the technical issues. It keeps both professionals on topic.

At the same time, early in the drafting process the witness should feel free to color outside the lines; to avoid missing insights the lawyer might not have grasped. As long as the lines are there, they can be heeded or changed, but if there are no lines, the testimony can lose its shape and effectiveness and risk being seen as mere position-taking.

### 3. Bridge the distance between expert and layperson

An expert has the "curse of knowledge": a difficulty remembering what it was like to be ignorant.<sup>22</sup> What is "obvious" to the witness is unlikely to be obvious to the tribunal. To overcome the curse, lawyers help the witness turn lay readers into comprehending readers. This does not mean eliminating technical language or dumbing down the presentation. The agency's opinion-writers need to use the language of the trade and write with the expertise required for the decision. So the lawyer's role, when working with the witness, is to spot every step that may be clear to the witness but not clear to the lay reader. Together they must develop a question-and-answer sequence that leaves no reader lost. Testimony that only opines and prescribes, but fails to explain and educate, will not succeed. This effort requires precision work, sweat, sympathy for the reader, and a good eye.

Testimony written for an expert agency tends to speak in the agency's expert language. But there is another audience: the courts that will review the agency decision if it is appealed—by you or by your opponent. Courts are lay readers. Be sure the testimony has the explanations that a reviewing court will need to understand.

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22. For a discussion of the "curse of knowledge," see generally CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* (2007).

#### 4. Bridge the distance between expert and law

It is not enough for the expert to have an opinion. That opinion must fit into the equation established by statute. Statutes prescribe the standards, criteria and analyses that agencies must follow. The lawyer must ensure that the testimony fits with these requirements. Effective lawyers have a vision of their desired agency opinion. That vision should guide the organization of the expert testimony. One way to discipline the testimony-drafting process is to draft an introduction that answers these questions: “What is your understanding of the commission’s obligation in this proceeding?” and “How will you organize your testimony to assist the commission in carrying out that obligation?”

#### 5. Coordinate multiple presentations throughout the proceeding

When a party has multiple witnesses, they are not individual soloists singing different songs; they are part of a full chorus, singing together and in harmony. The lawyer is conductor: he has a plan for the entire case; he has assigned each witness a unique role; he has placed in each witness’ testimony the “stitching,” in the form of cross-references and hand-offs that demonstrate mutual reliance among the witnesses; and he has prepared all the witnesses by giving them a common understanding of the statute and the agency’s obligations. He must avoid overlaps, gaps, and inconsistencies among the submissions. This coordination effort starts with case planning and testimony drafting, but continues throughout the proceeding—through discovery, cross-examination and brief-writing.

Sometimes it is desirable to have an “overview witness”: someone who describes the context for the case and the party’s full position, presents a table of contents to the various witnesses, and explains how each witness relates to the whole. But overview testimony is only as good as the coherence of the underlying case.

### IV. ORGANIZING HEARINGS

In adversarial litigation, agencies typically organize technical hearings around parties. Each party presents its witnesses, one at a time, for cross-examination. For each witness, each adversarial party’s lawyer takes a turn cross-examining. Hours later, the tribunal might ask questions. (Surprisingly and disappointingly often, the tribunal asks no questions.) Occasionally the ALJ or a panel member will interrupt the lawyers’ questions with her own question.

This traditional approach elevates parties over issues, scatters discussion of a particular issue over disparate parts of the transcript, and makes the tribunal passive. Indeed, when the parties choose not to cross-examine a witness, it often happens that the tribunal asks no questions either. The witness returns home unexamined. But lawyer strategy should not preclude tribunal curiosity. Lawyers’ reasons to waive cross—such as not wanting to give the witness a chance to educate or persuade the tribunal—have nothing to do with the tribunal’s duties to learn from experts and probe their thinking.

An alternative approach is to organize hearings around issues rather than parties. The hearing days are divided into issue segments. For each issue segment, all parties’ witnesses who address that issue appear on a panel simultaneously. The tribunal, or a staff lawyer, begins the questioning by asking the questions that

are necessary to help the tribunal understand the case and arrive at an opinion. When the tribunal's questioning is complete, the parties' lawyers get their chance. At that point, most of the necessary questions have been asked. This approach raises the value-per-minute ratio for at least three reasons: (1) the witnesses are debating their positions with each other; (2) a full discussion of a particular issue occurs in one place in the transcript; and (3) the majority of questions reflect the commission's needs rather than the parties' strategic goals.<sup>23</sup>

## V. CROSS-EXAMINATION

As explained in Part III (pre-filed testimony), a party's pre-filed testimony is the core of its case. The party then uses cross-examination to supplement that case—to gather concessions for the brief so the agency can cite those concessions in its opinion. Cross-examination must be carried out methodically and unemotionally. Lawyers who view cross as a chance to bring shock and awe to the proceedings, to stun the witness into conceding his case, rarely succeed.

In regulatory hearings, most witnesses are experts, often more expert than the examining lawyers—both in their subjects and in the process of cross-examination. These circumstances require deep preparation by the lawyer. According to my colleague John Coyle,<sup>24</sup> cross-examination is the “least extemporaneous part of a trial—you’ve got to minimize improvisation to maintain control.”

### A. Goals and Objectives

If pre-filed testimony is the foundation of a party's case, the cross-examiner's job is to weaken that foundation. Having probed for vulnerabilities during discovery, lawyers use cross-examination to place that discovered information into the record (unless the tribunal has placed all discovery into the record automatically, as discussed in Part II above). This relationship between the discovery and cross-examination bears repeating. Discovery gathers information; cross-examination places that information into the record. Lawyers who fail to do discovery comprehensively, then hope to gather necessary information during cross, take unnecessary risk—that the witness won't have the information, or will use the question to strengthen her own case. The purpose of cross is to place in

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23. The Hawaii Commission used this approach in a series of proceedings organized to address renewable portfolio standards, third-party administrator for energy efficiency programs, competitive bidding requirements, distributed generation, feed-in-tariffs, decoupling, renewable energy surcharges, and other issues relating to the need to reduce the state's dependence on fossil fuels. According to Carlito Caliboso, Chairman of the Commission during that period (2003-2011), this hearing format was “helpful and effective,” as it caused the many expert witnesses retained by diverse parties to address common questions productively. Differences got exposed earlier and with more clarity. Because that exposure occurred not through adversarial cross-examination but through Commission-led questioning, it was easier to test solutions and discover commonalities. Correspondence with author, October 2014. The author participated in these proceedings as the Commission's moderator. Judge Richard Posner of the Seventh Circuit makes a similar recommendation. POSNER, *supra* note 9, at 311 (In a subchapter on juries' difficulty dealing with complex issues, he suggests having opposing witnesses testify in pairs, back-to-back. This variation on the aforementioned “panel” approach hosts opposing views on an issue in real time).

24. Coyle, a partner with the Washington, D.C. firm of Duncan and Allen, is a 30-year veteran of litigated utility proceedings.

the record what the lawyer already knows; it is not a time to discover what the lawyer should already know.

For each opposing witness, the cross-examiner can pursue one or more of the following six objectives:

*Narrow the testimony.* Broad testimonial statements can be narrowed by presenting to the witness hypotheticals that cause her to put boundaries on broad conclusions, by having the witness admit to an absence of facts that are necessary to support her conclusions, or by showing logical gaps in her reasoning.

*Render the testimony “insubstantial.”* To support an administrative decision, evidence must be “substantial.” Cross-examination can make pre-filed testimony “insubstantial” by causing the witness to acknowledge flaws in logic, gaps in evidence, and contradictions (within their testimony, between their testimony and common sense, or between their testimony and industry practice).

*Render the testimony irrelevant.* This type of cross aims to show that the pre-filed testimony, even if true, makes no difference to the case. Witnesses often testify about their client’s positive intentions. But intention does not mean commitment. Cross-examination can demonstrate the absence of commitment. Intention without commitment, or commitment without consequence for non-achievement, cannot be a basis for a positive public interest finding. *Caution:* There are agency opinions that disagree with this latter point; opinions that cite mere intentions and aspirations as positive evidence to support a public interest finding.

*Remove the veneer of objectivity.* Witnesses who repeatedly testify for only one side can have difficulty establishing their objectivity. The job of the cross-examiner is to expose the subjectivity, to erode the tribunal’s trust in the witness.

*Expose the witness or his client as hostile to the agency’s mission.* Where a regulated entity emphasizes its private interest in reducing or avoiding regulation over the public interest that underlies a regulation, there can be conflicts and contradictions, even the absence of common sense, for the cross-examiner to expose. Imagine someone who believes that speed limits are unnecessary because he can be trusted to drive safely. If you can get a witness to admit to the equivalent, you’ve reduced his credibility before the agency. (Cross is rarely that successful because witnesses are rarely that incautious.)

*Have the witness contribute to your case.* In rare occasions, careful cross can cause an opposing witness to agree with some of the steps of your side’s reasoning. (Don’t try to have the witness agree with your ultimate proposition). A witness for a merger applicant is not going to agree that the merger is adverse to the public interest. But she might agree that the acquisition premium is higher than average, and that some acquirers have been weakened as a result of paying high premiums.

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An effective cross-examiner is a teacher to the tribunal. An effective teacher is organized and clear. She presents logical patterns that the students can grasp; she speaks with crystal clarity. Next are some thoughts on how to meet those standards; first by preparing and then by conducting cross.<sup>25</sup>

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25. For additional readings on cross-examination, see generally JAMES H. MCCOMAS, DYNAMIC CROSS-EXAMINATION 9-11 (2011); THE ART OF CROSS-EXAMINATION: ESSAYS FROM THE BENCH AND BAR (Charles B.

### B. *Preparing to Cross-Examine Opposing Witnesses*

1. Organize the questions according to the propositions that satisfy the legal question

*Prepare by sketching out a skeleton brief.* Since the purpose of cross is to collect material for the brief, the lawyer should have sketched out the brief—at least its table of contents—with as many details in the hierarchy as possible. (That is why lawyers do discovery—to get the details.) The major sections and subsections of that sketch then become the sections and subsections of the cross-examination. Make each item in this draft table of contents a declarative sentence, rather than merely a topic name. Each statement is either a proposition that contributes toward satisfying the legal equation whose solution is your success; or it is an “anti-proposition” that weakens the other side’s case, such as by challenging the credibility or expertise of an opposing witness. Each is a reminder of why you are asking the questions you are asking. The discipline of the declarative sentence prevents you from getting off-track or pursuing a line that is not succeeding.

*Draft questions that fill out the skeletal brief.* Having drafted declarative sentences representing the key propositions, draft questions whose answers will support those propositions. Just as a heading in a brief forces the brief-writer to align each paragraph with the point of the section, each declarative sentence heading in the draft cross causes the cross-examiner to organize her questions systematically to support that sentence.

To write a question sequence logically, I draft a paragraph that I would hope to put in my brief—a paragraph based on the witness’ response to my cross. Then, I take each sentence in that paragraph, put it on its own line, and replace the periods with question marks. If the paragraph was written well, these questions will have a logical sequence. A logical sequence helps make the answers inevitable. You want to establish a rhythm, where the witness answers cooperatively, almost as if in a trance (this is fantasy but it’s the ideal worth aiming for). He’s more likely to cooperate if there is an inevitability to the logic. That is why it helps to draft the questions as sentences in a unified paragraph. To help create momentum, start each series by establishing the context, using questions that the witness will agree with readily.

Some lawyers like to randomize the order of questions to, as they say, “keep the witness off-balance.” I disagree with this approach. Random questions can make the witness confused, inarticulate, and uncooperative. There is the added risk that the bench will lose focus and become inattentive. (But see comments under “Advanced Techniques,” Part V.C.7 below).

2. Map out the opponents’ strategy

It is fun to fantasize about successful cross: asking a long series of yes/no questions, getting the witness into a trance, pulling a succession of plums from the Christmas pie. It’s not likely to work that way. Better to think the opposite: “For each question, what would be the inconvenient answer? Then what?” Be ready

to drop lines of questions, to quit a line when you're still ahead, even concede on small points to succeed on big points.

### 3. Word the questions with precision

Writing cross questions is precision work, like writing a poem. Every word counts. The more precise and tight the question, the more precise and tight the answer. That is how the lawyer controls the witness. Here are suggestions for basic question-writing:

(a) Start each line of questions with a succinct reference to the pre-filed testimony. Doing so reduces the probability of objections based on relevance, because you can respond: "I'm asking about his testimony. How is that not relevant?" And succinct means "Page 2 line 5." Not "Mr. X, please turn to page 2, and go to line 5."

(b) Make each question a declarative sentence with a question mark at the end.

(c) Design the question to produce one word answers, like: "yes," "no," or "correct."

(d) Limit questions to fifteen words or less, the shorter the better. If necessary, break up the question into sub-questions. Or, if a long question is necessary, make the first part of the question a declarative sentence that states the context, then make the actual question fifteen words or less. (Be careful with that one-sentence opening; make it 100% factual, or opposing counsel will object: "He's testifying?")

(e) Avoid throat-clearing word-wasters like "Isn't it true that . . . ?" or "Is it your testimony that . . . ?" Curtness shows control.

(f) Avoid rhetorical negatives, like "Didn't you . . . ?" (The reason is that a "no" answer becomes ambiguous: Does the "no" cancel out the negative, meaning "Yes, I did"? But you can and should use a negative if you mean a negative, as in "You never inspected the O-rings, correct?") So, write the questions as affirmative statements, followed by a comma and the term "correct"? As in "You never took high school algebra, correct?"

(g) And if you have to ask a question with a negative, do not depend on a yes/no answer because it risks ambiguity. End the question with "correct?" to avoid ambiguity.

The wrong way:

"So you didn't run the computer model twice?"



“No.”

[That “no” could mean he didn’t run the model twice; or, applying a double negative it could mean “No, you’re wrong, I did run the model twice.”]

The right way:

“You didn’t run the model twice, correct?”

“Correct.”

(h) Do not ask questions that invite an essay answer. (That’s what discovery is for). Do so only when you are certain of what the witness will say and of your ability to make the answer work for you.

(i) Numbering the questions in your script helps you keep track of where you are. This step also helps during breaks, if you have to trim the questions due to time limits.

(j) Visibility: Use 13-point font because it’s easier to see. Using outline form, make some questions subparts of others because it helps you keep the substance and purposes organized, and allows you to write notes in the margins.

(k) Have your expert review the wording to consider how an opposing expert might avoid or undermine the question by quarreling with its imprecision.

#### 4. Avoid common question-writing errors

Good cross-writing is like good writing generally. Eliminate all the bad habits first. If anything is left, polish. Here are the most frequent bad habits:

(a) Treating cross like a deposition by asking open-ended questions. Open-ended questions produce long, self-serving answers.

(b) Failing to organize questions under topic sentences. As discussed above, using topic sentences helps organize and discipline your questions and assess whether you are getting answers that support your topic sentence.

(c) Asking a question that includes a characterization (i.e., an opinionated interpretation) of a witness’ testimony. The witness will argue with you about your question rather than answer it. (Or the opposing lawyer will object to the characterization, as a way to warn the witness.) It is better to quote the witness verbatim than to paraphrase or characterize. Then, you can offer an interpretation of that passage and ask if he agrees with your

interpretation. This gets you a “yes” or “no” answer rather than an argument.

(d) Arguing with a witness rather than asking a question. If you don’t like a sentence in the pre-filed testimony, ask questions that force him to narrow his point or admit to holes or softness. Witness statements are often overbroad. Consider a merger case, where the target company’s CEO testifies “This merger is in the best interest of the consumers.” You don’t ask, “How could you possibly know it’s in the best interest of consumers—do you have a crystal ball?” That’s arguing. Instead, ask: “Did you issue an RFP requiring bidders to describe what they would give to consumers, then select the company that offered the most?”

(e) Making statements before asking the question. The witness will argue with your statement rather than answer the question, or the opposing lawyer will object to the statement as testimony (therefore throwing you off your stride, while also warning the witness about the statement).

(f) Including in the questions adjectives, adverbs, and other subjective terms. These terms often ask the witness to admit to some weakness. Witnesses don’t admit to weaknesses; instead, they use up time by avoiding the question. Or the witness argues with your premise (or the opposing lawyer objects to the premise) rather than answering your question. Eventually the tribunal says you’re wasting time and orders you to “move on.”

(g) Asking the witness to concede. Questions like “Wouldn’t you agree with me that . . . ?” don’t work. Witnesses don’t want to agree with you; they want to disagree with you. Skip the introductory phrase and just ask the question.

(h) Using negatives in the question, as in “Didn’t you say that...?” For some reason, negatives act like alarms, causing the witness to hold back, argue, or resist.

(i) Using imprecise verbs: A witness doesn’t “suggest” or “indicate.” A witness “states” or “testifies.”

(j) Using throat-clearing, time-consuming sentence openings, like “Isn’t it true that...?” or “Is it your testimony that ...?” These are clichés, evidence of insecurity. Just ask with the minimum number of words. Succinctness and rhythm are essential.

(k) Using compound questions (i.e., multiple questions phrased in independent clauses separated by “and”). One question at a time. No stream-of-consciousness questions. Don’t think out loud; plan it.

(l) Putting the page reference in the middle of the question or stating the page reference but then asking the question before the witness finds the page. Put the page/line reference first, make sure the witness gets there, and then ask. Otherwise, the witness will be flipping through the pages while you're asking the question, won't hear the question, and will have to ask you to repeat it. You lose your momentum and waste time.

(m) Overusing "and" as the first word in a sequence of questions. Doing so warns the witness that you're trying to build momentum. The witness will catch on and cease to cooperate. Build the momentum more subtly with concise questions and few pauses between them.

### *C. Crossing Opposing Witnesses*

#### 1. First or last?

In regulatory proceedings, it is common for the applicant or complainant to be opposed by multiple parties. That means there are multiple lawyers hoping to get their teeth into the opposing witness. Some lawyers prefer to be first questioner, so as to score points before the witness gets his footing. But there is an opposing theory. The risk of going first is that one accomplishes what is necessary, only to have subsequent questioners go over the same ground (because that's how they prepared their questions, and they lacked the flexibility or time to revise or delete them). This repetition of prior areas allows the witness to modify or blur her prior answers. That risk favors going last, so you can clean up the imprecisions left by prior questioners. Even better, though, is to accomplish the near-impossible: coordinate with allied lawyers by allocating issue areas. That way no one overlaps anyone else.

And an obvious point: know the tribunal's hearing procedures (which can vary among ALJs within any agency) well before hearing. Some ALJs will not allow a lawyer to cover substantive ground addressed by a preceding lawyer.

#### 2. Manage time conscientiously

Assume your time is limited, even if the tribunal doesn't impose time limits. There is no legal right to have all the time you want, and after a certain amount of time, the bench can tune out. Operate at a pace that gets the most done in the shortest time.

Ask your most important questions as early as possible, before the witness has found his footing. At the first restroom break, the witness' lawyer will explain to the witness how you've established control and how the witness should break that control. Coming back from the break, the witness will take longer to answer the questions, will give longer answers that avoid your questions, will ask you to clarify questions, and will use other lawyer-supplied techniques to make your cross less productive. Eventually, the presiding judge loses patience—with you, not with the witness—and will tell you to "move on." Try to score most of your points in the first quarter.

### 3. Listen to the answers

It sounds obvious, but inexperienced lawyers can be so focused on their script they forget to hear the answers. Witnesses do not always respond in complete, precise sentences. Nervous questioners miss the imprecisions; they hear what they want to hear, not what was said. Then when they get the transcript, they find that a key answer was garbled. (I once heard a witness answer a question as follows: “If I understand your question, I think the answer is yes.” The questioner did not follow up. My boss<sup>26</sup> leaned over and said “Try putting that in your brief.”) So, listen carefully to the answer. If it was imprecise, then rephrase the answer in your own words and get affirmation.

### 4. Be comfortable with silence

When you ask a question the witness finds difficult, the witnesses’ silence can be awkward. But only for the witness, not for you. Don’t help, don’t talk to your co-counsel, and don’t move. Just wait. Need convincing? Listen to Vin Scully calling the ninth inning of Sandy Koufax’s 1965 perfect game. See what Scully does after the last pitch.<sup>27</sup>

### 5. Be comfortable being emphatic and blunt

Courtesy and civility do not require softness. Firm voice, short questions, direct expressions of dissatisfaction when the witness evades, all even-keeled, work well. Don’t raise voice or pitch. Short tough punches, not wild swings.

Expect to create discomfort, and then live with the discomfort you create. The discomfort is the witness’ problem, but make sure the discomfort emanates from the directness of your questions and your insistence on answers, not from facial grimace or raised voice.

Some people believe the lawyer should put the witness at ease, to gain his cooperation. That has not been my experience.<sup>28</sup> Being cross-examined is no one’s idea of ease. Trying to trick a witness into feeling at ease, into cooperating, might work for one or two questions, but he’ll catch on to your game and have any minor admissions fixed on redirect. Expert witnesses are expert for a reason. They understand that every question puts their careers at stake. No one is going to be at ease. A witness cooperates only when the cross-examiner gives him no choice but to cooperate, or lie under oath. You get cooperation when you induce it, not when you invite it.

### 6. Manage your paper

Control your movements, your speech, your emotion, and, above all, your paper. Organize your paperwork like you would choreograph a dance. Physical control of the paperwork helps establish control of the witness—and wins points with the judge for respecting the forum. Have your exhibits (and the required

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26. George Spiegel, of blessed memory.

27. *Vin Scully Calls Koufax Perfect Game*, YOUTUBE, <https://www.youtube.com/watch?v=VJdli-ONL-8>.

28. But it has been for one anonymous reviewer of this article, whose comments included this: “If you have common ground with a witness, and start there, taking time to establish mutual interest and a rapport, the witness may come with you to fertile ground, especially if the witness in other contexts would be happy to go there. Not all witnesses are experts, and not all experts are good witnesses.”

number of copies) organized in separate files, have your questions in a three-ring binder that can easily be reorganized, and have an assistant prepared to pass out exhibits. Rehearse all of this so that the performance is smooth. No page-flipping, file-shuffling, or pencil-dropping during the cross. It's a performance. Fumblers give the witness time to get his footing and throw you off yours. Don't pause to find your place. Keep your place, and keep the questions coming.

#### 7. Advanced techniques

It is true, as John Coyle said, that minimizing improvisation maintains control. But sometimes improvising can tighten control. In other words, prepare a script, but also prepare to improvise. Improvising is a product of preparation; it is not a substitute for preparation. Improvising can intimidate a witness; if he sees that you're departing from your script, he begins to worry that you know more than he does. Here are two suggestions:

(a) Instead of starting at the logical beginning point, ask a question out of the blue, or as a follow-up to something the witness said off-handedly.

(b) In the middle of a line of yes/no questions, stop suddenly and ask something open-ended, like, "Why is that?" You do this only if you know the witness will give a poor answer and that you'll be able to use the answer against the witness. This is likely to work only when the questioner knows more than the witness, such as when the witness is a generalist, like a CEO, rather than when the witness is an expert, like a CFO or a technical consultant.

*Caution:* These techniques work only for the experienced lawyer and only when she has reason to be confident. Use them sparingly and only in a context where you already have shown discipline and control.

#### 8. Notes on "friendly" cross, redirect, and recross

*Friendly cross:* This is cross of witnesses for allied parties. It is usually prohibited by tribunals because it either repeats points already made, or risks introducing new testimony that should have been offered in writing as pre-filed testimony (the latter is called "sandbagging").

*Redirect after cross:* The witness' lawyer can ask questions after the witness has been cross-examined. These questions must stay within the boundaries of the cross. Otherwise it risks becoming forbidden "additional direct"—another form of "sandbagging."

*Recross:* This is cross of the testimony offered on redirect. It must stay within the boundaries of the redirect. Not every agency allows it. Be prepared to argue for it by identifying elements of the redirect that brought out new information of questionable veracity.

#### D. Preparing and Protecting Your Own Witnesses

*Map out the opposing examiner's approach.* What does your opponent want the agency decision to say? What words will she want to come out of your

witness' mouth to support that desired agency decision? What questions will she ask to elicit those words? How will the witness respond?

*Decide what to concede and what not to concede.* It is not a problem to concede small points. In fact, an opposing questioner who hears "yes" when expecting "no" can lose his footing.

*Practice with the witness.* It's one thing to write detailed testimony; it's another thing to articulate principles orally. A major league expert might be a minor league speaker. Every witness hopes that the ALJ will say "Would you please help me understand XYZ." The more articulate the witness, the more likely that scenario.

*Keep a cheat sheet of objections.* Alertness during the hearing is essential, but preparation helps one know what to be alert for. Irrelevance, asked-and-answered, confusing questions, mischaracterizations of prior testimony, and questions whose premise is not in the record ("When did you stop beating your spouse?") are the typical ones.

*Remain stone-faced.* Do not let your expression or your posture change during your own witness' cross. Don't nod emphatically with good answers, don't wince with bad answers, and don't shift in your seat. Pick a spot, like your witness' testimony on your desk, and keep looking at it. This is not as easy as it seems.

#### *E. Tribunal Behavior During Cross*

Some commissioners and ALJs sit quietly throughout hearings, saying and asking little, expecting the truth to emerge from adversary cross. This is a misunderstanding of the tribunal's role.

[T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.<sup>29</sup>

Adversarial lawyers try to score the narrow points—the ones that cross-examination can realistically yield. Those efforts to poke holes are not necessarily designed to have the tribunal master the case. The ALJ or panel member should bring a broader perspective to the questioning. Some presiding officials begin the hearings with their own questions. Only when they have covered all the ground they need, do they allow the adversarial lawyers their chance to poke holes. At that point, cross-examination moves more quickly because the lawyers have learned what matters to the tribunal. This is not to say that adversarial lawyers immersed in the case won't add value; only that their purpose is to gather what they need to win their case, not what the tribunal needs to make a public interest decision.

#### *F. Get Experience*

Experience comes from observing and doing. Cross-examination is difficult to perform and difficult to learn, in part because for regulatory lawyers, opportunities are infrequent. While advance preparation is most important, also

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29. *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965).

important is knowing how to maintain or regain footing after an unexpected reply; and also learning how to vary from the script—by deleting questions that become unnecessary (or too risky given prior answers), and by coming up with follow-up questions on the spot. A helpful task is to prepare multiple possible follow-ups (e.g., if he says A, then ask B; if he says C, then ask D). Even if these alternative scripts never get used, the process of preparing them sharpens the lawyer. Finding opportunities to observe, critiquing others' performance, preparing questions for a colleague and practicing in the office are all important steps.

## VI. SETTLEMENTS

Parties to regulatory litigation hope to achieve their ideal outcome, but they also plan for settlement. By studying opponents' positions and strategies as the case evolves, as well as the judge's reactions and initial rulings, they assess risks and develop realistic expectations. When both parties make these efforts, settlements of at least some issues are possible.

### A. *Terminology and Types*

The term "settlement" is a misnomer because parties cannot "settle" an administrative case, in the sense of determining the outcome. Only an agency decision can dispose of an agency case. What parties call "settlement" is actually a proposal to the agency, co-signed by some or all parties. The agency has no obligation to accept the proposal; filing such a document does not limit the agency's authority and duty to issue decisions that promote the goals of the statute.<sup>30</sup> The agency can issue a decision accepting, rejecting or modifying the settlement. That decision, like any agency decision, must comply with the agency's substantive statute and any administrative law statutes—and is subject to judicial review. So a "settlement" is only an interim step toward finality.

A proposed settlement can be unanimous, contested or partial. A unanimous settlement is signed by all the parties. A contested settlement is signed by some and opposed by others. A partial settlement settles some issues but not others. In the latter two situations, the non-settling parties or issues proceed to hearing. It is also possible to have a settlement signed by fewer than all of the parties, with no one opposed; the non-signing parties remain silent or withdraw from the case.

### B. *Procedural Contexts*

Settlements occur most frequently in adjudicatory proceedings involving a dispute among a limited number of parties. Examples are rate cases, licensing applications, tariff proposals or amendments, complaint proceedings, and merger applications.<sup>31</sup> In rulemaking proceedings, the agency aims to make general

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30. Different regulatory statutes may create exceptions to this principle. Under the Federal Power Act, for example, if a utility proposes a settlement rate that satisfies the statutory requirement that rates be just and reasonable and cause no undue preference or advantage, the Federal Energy Regulatory Commission is obligated to accept that rate, even if the agency would prefer a different rate. But still, it is the Commission order accepting the rate (after a finding of lawfulness), not the parties' settlement, that causes the rate to go into effect.

31. Enforcement proceedings, where agency staff has accused a regulated entity of violating agency orders, regulations, or underlying statute, are also susceptible to settlement. The parties to the settlement are

policy. Settlements are still possible but less likely due to the large number of parties and the diversity of their interests. Many state regulatory agencies, however, have produced settlements in the rulemaking context by using so-called “collaboratives,” which are series of large meetings organized by agency staff.

When parties are settlement-oriented (meaning they have no fundamental differences, just differences over degrees), and especially when they have a history of settlements, they might begin settlement talks once the expert testimony has been filed, even after the application or complaint has been filed, and continue those discussions right up to and even during the hearing.

### C. *Appropriateness*

Practitioners and scholars differ over the appropriateness of settlements in the regulatory context. One school of thought views settlements as unambiguously positive: they save resources, stimulate creativity and encourage amicability. An opposing view holds that when agencies accept settlements, they become passive, leaving important public decisions to private parties. It is not possible to conclude in the abstract that settlement outcomes are better than litigation outcomes. The question is always whether the final result best serves the public interest. What follows are some considerations that agency participants can use to assess whether the settlement process achieves that goal.

#### 1. Settlement positives

*Reduce workload.* Some agencies favor settlements because they reduce the agency’s workload. If no one contests the outcome, they reason, the agency need not create a full record or draft a full-fledged decision. This reasoning works, in my view, if the settlement affects only the parties to the case—like two drivers in an auto accident. But in economic regulation, the reality usually is different. There are likely interests affected by the outcome who are not represented, either because they lack resources, don’t know about the case, or have not yet been born. Agencies that accept settlements merely because they are settlements are not honoring their public interest obligation.

*Encourage creativity.* Settlement processes involve informal exchange. Informal exchange enhances understanding of each entity’s technical problems and private goals. Both effects spiral upwards. As technical fluency grows, commissions defer to the parties’ solutions, encouraging more informal exchange, more technical understanding, and more commission deference. Mutual exposure to parties’ private goals spurs settlement solutions that align private interest with public interest—if the commission has established public interest parameters first. These views were described by Stephen Littlechild, an eminent former electricity regulator from the United Kingdom, and his colleague Joseph Doucet, as follows:

[S]ettlements . . . allow more innovative and creative solutions tha[n] the regulatory commissions [are] able to prescribe by litigation. Thus, settlements are not so much, or not only, a way of reducing the transaction costs of achieving the same outcome

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usually the regulated entity and the enforcement division of the agency; the agency’s decision-makers at the top still must approve the settlement.



as litigation. Rather, they are a means of achieving a different outcome than litigation, and one that is preferred by the parties involved.<sup>32</sup>

[N]egotiation allows the parties themselves to make the trade-offs, instead of leaving it to the regulator to split the difference. . . . [I]ndustry was changing rapidly and the regulators were unable or unwilling to adapt their policies to the changing conditions fast enough. As a result, parties were facing possible litigated results that would reflect out-of-date, poorly suited policies, which would have left all parties dissatisfied and worse off. . . . Through settlements, parties could get reasonable results without putting the regulator in a position of having to reconsider major policies (which it would most likely have wanted to do through a lengthy, generic rulemaking).<sup>33</sup>

## 2. Settlement negatives

*Induce regulatory passivity.* A settlement culture means commissioners and their staff have less mental engagement and less issue education; so they inevitably exercise less leadership. A habit of “Let’s see what the parties say,” leads to “Let’s see what the parties want,” which leads to “Who are we to stand in the way?” There is risk of atrophy, as muscles less-used become muscles less-able. This spiral points downward: as the commission becomes less engaged and less alert, it becomes less respected and less relied upon, leading to more settlements and more atrophy. Consider these comments collected by Littlechild and Doucet:

[T]he commission becomes irrelevant to the process of regulation. . . . The parties become the decision makers—the commission has only to put its stamp of approval or disapproval on a fait accompli. That . . . the commissioners were willing participants in this state of affairs does not repair it—the commission is not the aggrieved party, the public is.<sup>34</sup>

[O]ne of the casualties of the explosion of settlements is the necessary and appropriate evolution and adaptation of regulatory policy to changing industry circumstances. In the early rounds of a rate case, parties may raise some important issues of regulatory policy, but then through the settlement the issues never get resolved (settlements generally state that the details should not be interpreted as suggesting any particular policy is right or wrong, there is no precedent, etc.).<sup>35</sup>

*Make policy without involving affected interests.* Here are some more comments collected by Littlechild and Doucet: “Some have opposed [settlements] for their lack of transparency, with no public explanation or justification of the terms involved . . . They are also concerned that the public interest might not be adequately protected, especially the interests of vulnerable consumers, particularly if non-unanimous settlements are allowed.”<sup>36</sup> And: “Where cases are initiated by

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32. Stephen Littlechild, *The Bird in Hand: Stipulated Settlements in the Florida Electricity Sector* 17 UTILS. POLICY (2009) [hereinafter Littlechild], <https://ideas.repec.org/p/cam/camdae/0713.html>.

33. Joseph Doucet & Stephen Littlechild, *Negotiated Settlements: The Development of Legal and Economic Thinking*, 14 UTILITIES POLICY 266, 271, 272 n.34 (2006) [hereinafter *Negotiated Settlements*] (citing comments from a critic of settlements).

34. Littlechild, *supra* note 32, at 30 n.52 (quoting a referee’s comments).

35. *Negotiated Settlements*, *supra* note 33, at 272 n.34 (citing comments from a critic of settlements).

36. Littlechild, *supra* note 32, at 276 (citing critics of settlements).

one type of customer, settlement could simply shift the burden of paying for cost increases to a less articulate or well-organized group.”<sup>37</sup>

*Increase expenses for less resource-constrained parties.* Settlements may save time for commissions but not necessarily for parties. When unguided settlement processes combine with resource differentials, large parties can grind down the small, making “settlement” a euphemism for “Take it or leave it.” Large parties can attend more meetings, produce more studies, bring more staff, and pay more lawyers to talk longer and louder. Litigation, when made disciplined and efficient by strong judges, can make resource differences less relevant. And saving the decision-maker’s time is not an end in itself; success should be measured by decisional quality, not speed.<sup>38</sup>

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Settlements are double-edged swords: they have positive value if they solve public interest challenges, negative value if they edge the commission out of its statutory role or allow the commission to avoid its role. Settlements make sense when they help the commission carry out its public interest obligations. Favorable conditions include: (1) the settlement subject demands technical proficiency, where the parties’ proficiency exceeds the commission’s; and (2) the parties’ private interests are aligned with the long-term public interest.

#### D. Options for Regulators

*Require settlement discussions?* There are several points of view. One sentiment is to make parties talk settlement early, before they dig in to their positions and alienate each other through discovery disputes. A different view is that forcing parties to talk settlement, when they know from experience that settlement is hopeless, wastes time, uses up settlement judge resources unnecessarily, and costs clients money. The latter view sees the parties as adults; they don’t need someone else to order talks. Further, early in the proceeding the parties might not know enough about each other’s positions to see opportunities for compromise. It may be only after pre-filed testimony and discovery that each side’s experts understand the dispute well enough to propose solutions.

*Appoint settlement judges?* In some jurisdictions, the judge assigned to hear the litigation also has the discretion to encourage settlement and assist the settlement process. Other jurisdictions separate the roles.<sup>39</sup> The parties then can talk candidly with a neutral person who is not the ultimate decision-maker. Judges who take on the settlement role can choose to be neutral, simply getting parties to talk; or they can be evaluative, giving their views on strengths and weaknesses of parties’ positions. But judges who take the latter approach must master the details. Otherwise, they are vulnerable to being lobbied by the parties, whose arguments will not be constrained by evidentiary rules or testimonial oaths.

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37. *Negotiated Settlements*, supra note 33, at 268 (citing comments of T.D. Morgan, *Toward a Revised Strategy for Ratemaking*, 1978 U. ILL. L.F. 21 (1978)).

38. Again, a reviewer’s different perspective: “This is impossible to verify and likely not true in many contexts. Often it takes fewer resources to settle on favorable terms, and many more resources to litigate.”

39. See, e.g., 18 C.F.R. § 385.603(c) (addressing procedure for appointing a settlement judge in proceedings of the Federal Energy Regulatory Commission).

*Require settlements to be supported by testimony?* Since a settlement proposal has no more legal weight than any other proposal, it must be supported by substantial evidence—by testimony explaining why and how it satisfies the statute. Witnesses will be less likely to exaggerate their initial positions if they know they will have to support settlement positions. Consider a return-on-equity witness who testifies that unless the commission authorizes a return-on-equity of 14.0%, the company will be “crippled.” If the company later settles at 12.0% and shows no signs of crippling, his credibility diminishes. By requiring the same witness who testifies on direct to testify in favor of the settlement, a commission can reduce the initial exaggerations—in turn making settlement more likely.

#### *E. Options for Lawyers*

*Distinguish litigation mode from deal-making mode.* Settlements don’t just happen; they require parties inclined to negotiate and people who know how to negotiate. Lawyers who like to dominate the litigation process are less useful in the settlement process. In settlements, the most useful personnel are those who know how to find common ground. They may be the technical people, the business people, the client decision-makers, or lawyers skilled at deal-making. The best role for the adversarial lawyer at this stage is to get the right people to the table, while keeping the advocates in the background.<sup>40</sup>

*Align settlements with the commission’s policies.* The commission will approve only those settlements that are consistent with the agency’s public interest mandate. The lawyer for a party supporting the settlement should ensure that the terms are aligned with commission precedent, or with evolving commission policy. It is better to start with commission policy (existing or evolving) as a constraint, and negotiate terms within that constraint, than to settle on whatever terms are convenient and then try, post hoc, to characterize the terms as consistent with precedent.

## VII. BRIEFING

As explained in Part III (relating to pre-filed testimony), every administrative proceeding has a legal equation: Facts plus law plus judgment equals decision. The purpose of briefing is to fill out and solve that equation for the decision-maker. The brief is the summation of all the steps that precede it: framing, discovery, expert testimony, and cross-examination. The brief combines law and record: the law consisting of the agency’s statute, the Constitution, court cases under the statute and similar statutes, the agency’s cases, and other agencies’ cases; and the record—consisting of the application or complaint, the pre-filed testimony and exhibits, the discovery materials that are placed in the record, and the hearing transcript.

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40. For sources in negotiating skills, *see generally* CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (5th ed. 2005); CHARLES B. CRAVER, SKILLS & VALUES: LEGAL NEGOTIATING (LexisNexis 2009). *See also* USING ADR TO RESOLVE ENERGY DISPUTES: THE BETTER WAY, REPORT OF THE ENERGY ADR FORUM (2006), available at <http://www.raabassociates.org/Articles/EnergyADRForumReport-Oct2006.pdf>; and materials published by the U.S. Institute for Environmental Conflict Resolution, available at <http://www.ecr.gov/pdf/EnergyADRForumReporOct2006.pdf>. The Federal Energy Regulatory Commission has an entire division devoted to alternative dispute resolution. *See, e.g., Alternative Dispute Resolution*, FED. ENERGY REGULATORY COMM’N, <http://www.ferc.gov/legal/adr.asp>.

A successful brief-writer imagines herself as the opinion-writer. A successful brief organizes the law, evidence, expertise and analysis so the opinion-writer can draft an opinion that will carry out the agency's policies and be sustained on appeal. Here are thoughts on mindset and craft.

A. *Mindset: Win the Tribunal's Trust*

*Focus on the agency's policy goals.* For the agency, the long-term success of its policies is more important than any single case. Since the order you seek can set precedent, the agency needs a legal and policy foundation it can apply to future cases. So, connect your specific case to the agency's long-term priorities (or show how it is a reasonable exception to those priorities). And precedent changes; courts allow agencies to change their minds on policies. Acknowledging precedent is always essential, but focusing on the future is at least as important.

*Educate rather than argue.* Lawyers are taught to argue; briefs usually have a major heading called "Argument." This common view of briefs—that their purpose is to argue, to advocate, to persuade—casts the brief-writer as a salesman trying to win over a customer. The better approach is to educate before you advocate—to present, to explain, to assist. Teach the agency the facts and the law, empower the decision-maker reader to make a good decision. Be known by the agency as the brief-writer whom the opinion-writers trust.

*Display objectivity.* Assume that the decision-maker will see the case as a close call, each side having some merit. It is better to address your side's vulnerabilities rather than hide them or dismiss them. By adopting the close-call mindset, the brief-writer will avoid the habits that lose trust: exaggerating events; omitting inconvenient facts; cherry-picking cases and case excerpts; mischaracterizing witness statements; citing facts not in the record; and using sarcasm, platitudes, and clichés. Persuade with facts and logic, not adjectives and adverbs.

*Distinguish agency duty from agency discretion.* When urging agency action, take care to distinguish "must" from "should." Agencies have duties and discretion. When it's a duty, the word is "must." Those are situations where logic, facts, and case law compel only one answer. When it's discretion, the word is "should." When an agency applies broad standards like "in the public interest" or "just and reasonable," there are many lawful outcomes, with the agency having discretion to choose. To have the discretion exercised in your direction, give reasons why deciding for your client will achieve the agency's goals.

*Keep an eye on all audiences.* A brief has many readers: the agency's official decision-makers, their advisors and opinion-writers, opposing parties, the agency's statutory constituents, the financial community, anyone else with a stake in the outcomes; and, of course, the appellate court (which will address only those arguments made before the agency). Imagine any one of these elements reading the brief, and ask: "Will they understand it?" and "Will they trust it?"

*Don't "sandbag."* You must make all your arguments in the opening brief. Reply briefs are for replies, and only for replies.<sup>41</sup>

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41. *Transcon. Gas Pipe Line Corp.*, 28 F.E.R.C. ¶ 63,086, at p. 65,182 (1984) (defining "sandbagging" as "the surfacing of a position for the first time in a reply brief" and advising that where a party wishes to address an issue raised during the hearing through an evidentiary submission, that issue must be addressed in an initial

### B. *Craft: Prepare, Organize, and Focus*

*Prepare for brief-writing early in the proceeding.* Recall the discussion on framing. Framing requires having, at the beginning of the case, a vision for the agency's opinion. A party's final input to that opinion is the brief. It makes sense, therefore, to create a skeletal outline of the brief when framing the case. Doing so at this early stage enables the lawyer to organize legal research, discovery, pre-filed testimony, and cross-examination to produce the facts and law that go into the brief and thence into the agency's opinion. This outline of the brief helps keep the lawyer on track; it allows her to adjust course as facts develop.

*Organize the facts and law to achieve coherence.* In regulatory proceedings, the facts are strewn across multiple sources—the application or complaint, pre-filed testimony of multiple witnesses, exhibits, and cross-examination of different witnesses on different days. Arranging these disparate facts into a coherent narrative that fits the legal equation is the best contribution a brief-writer can make to the agency's opinion-writer. This is why creating an outline early in the case, and revising it as facts develop, is necessary. The outline not only displays the vision for the final opinion, it also operates as a file cabinet to organize and store the facts and insights as they come in. As the briefing deadline nears, sentences can always be polished, but reworking an entire structure under pressure is difficult and risky.

*Tell a story.* A good brief has a beginning, middle, and end. The beginning introduces the subject, the issues, and the facts. It sets the stage. The middle develops your thesis (the plot) which should be broad enough to cover the major issues in the case, although it need not capture every issue if the case is large and multifaceted. The middle explains your positions: why they are rooted in statutory objectives, the agency's policies and precedents, and the record. The middle also addresses your opponents' positions, accurately articulating their arguments, but then carefully explaining where they go awry. Be sure to characterize your opponents' arguments with precision. Misstating their arguments can cause the decision-maker to disregard your response in the belief that you did not fully grasp your opponent's point. The conclusion is important. It is another opportunity to reinforce your thesis, emphasizing the most important parts of your argument.<sup>42</sup>

*Focus on the dispute.* This point is obvious but often overlooked. Some brief-writers tend to devote excess space to the obvious, because it's easier. While the non-disputed elements in a case do need attention in the brief (so that the opinion-writer can use those elements in her opinion), they should occupy only minor space. The purpose of the brief is to help the decision-maker make a decision; therefore, devote the major space and time to the disputed matters. The need to focus on disputes is especially true in a reply brief. Many writers tend to use the reply brief to restate the points from their opening brief. Use the reply brief to show that your opponent's best case is not a sufficient case.

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brief); *Trans Alaska Pipeline System*, 55 F.E.R.C. ¶ 63,036, at p. 65,207 (1991) (disallowing "sandbagging" and limiting parties' arguments to those raised in initial briefs); *Idaho Power Co.*, 117 F.E.R.C. ¶ 63,050 at P 29 (2006) (explaining that sandbagging is an impermissible practice in part because it limits discovery and response time).

42. This excellent paragraph was contributed by a reviewer.

*Separate affirmative from negative.* Structure the brief to separate your affirmative position from your arguments against your opponent's position, rather than interrupting your affirmative case to argue with your opponent. Further, when contesting your opponent's position, focus not on why you disagree with it, but why the agency cannot or should not adopt it. Try to identify the weaknesses: errors of logic; points that purport to be fact-based but are not; adverbs and adjectives instead of facts and logic; non-committal aspiration-talk; illusory promises (i.e., promises to comply with existing obligations, rules, or statutes); positions that conflict with statutes or precedent; private interests clothed in public interest terms; departures from precedent without explanation; and policy choices that, if followed in future cases, would undermine the agency's goals.

If your opponent's story has flaws, let those flaws do the work. Exposing them is sufficient; you need not use pejorative language that detracts from your objectivity. The more clearly you expose the flaws, the less you need to say about them. One exception: sometimes an opponent, recognizing his position lacks foundation, tries to cover up the problem with wordiness. In this situation, paraphrase his point, using concise but accurate phrasing, to distill his argument to its illogical essence.

It is also best to anticipate all opposing arguments. Some lawyers use the approach of "Let's not bring that point up unless the other side does." This is weakness. Better to anticipate arguments and expose them, because even if the other side doesn't raise them, some judge or law clerk will. Better to acknowledge one's vulnerabilities then show how they are less important than the strengths. As stated above: assume the judge thinks the case is a close one.

*Make the table of contents an educational tool.* The table of contents is the first step in educating the tribunal and winning its trust. On reading it, the opinion-writer should not only understand the dispute, but also wonder: "Why is there even a dispute?" To achieve this result, each element of the table of contents must be organized logically and phrased objectively. It must be structured according to legal equation: law plus facts plus judgment equals decision. The test is whether the opinion-writer could use your table of contents when drafting her decision.

Each item in the table of contents should be a short declarative sentence stating a legal principle or a fact, one for every significant structural point in your argument. "Applicants bear the burden of demonstrating that the merger has positive benefit" is legal. "Applicants decline to make any commitments" is factual. No item should be conclusory. "Applicants' claims are without merit" is conclusory and useless.

*Caution:* Drafting a table of contents is as difficult as writing cross-examination questions. Treat it like writing a poem, where every word and word placement has a purpose. Revise it as you write the brief, because immersion in the law and record produces insights into how to describe the case.

*Be succinct.* Most forums have page limits or word limits. The brief-writer can react to these limits by cutting arguments or by condensing language. The latter is better. Arrange the writing schedule so that a full day or two remains to condense. Even the most experienced writers find that with one more draft, they

can replace ten words with six. Doing so over forty paragraphs can free up pages for arguments that might otherwise get short shrift.<sup>43</sup>

### VIII. DELIBERATIONS AND OPINION-WRITING

With the hearing complete, the record closed, and the briefs submitted, the tribunal must deliberate and write an order. A regulatory order seeks to achieve the relevant statute's objectives by applying law to facts, citing (or explaining away) precedent, and promoting policies. An effective order serves multiple functions. It (a) resolves the specific dispute, (b) explains how that resolution advances (or, if necessary, modifies) agency policy, (c) guides future industry behavior, and (d) reduces future disputes. Effective orders display the commission as not merely an adjudicatory body resolving individual disputes, but also as a policymaker carrying out legislative intent. Orders with those characteristics serve the purpose of all regulation: to improve the regulated industry's performance.<sup>44</sup>

#### A. *Pre-Hearing Outlines*

Using the application or complaint, the pre-filed testimony, and the parties' previously filed issue list, the decision-maker can create her own list of issues and propositions. Doing so early in the proceeding helps create a mental filing system in which the decision-maker can place facts, insights and questions as the case proceeds. This internal document helps to structure the deliberations and order-writing process. It allows time for improvisatory thinking as well, because the outline reduces the work of organizing the mass of material that accumulates during the hearing.

#### B. *Pre-Briefing Activities*

It is useful to re-read the record and the legal sources, even after having just sat through the hearing. Pieces of evidence presented by a party in a context and sequence favorable to that party look different after the remaining context is made

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43. And do not test the tribunal's patience by skirting the page limits. Imagine forwarding this opinion to your client:

We expect counsel to respond to our orders by complying rather than seeking ways to evade them. In this case counsel tried to evade both the appellate rules and our order. . . . Fed.R.App.P 32(a) requires typed briefs to be double-spaced and to observe specified margins. Briefs also must have type 11 points or larger, ruling out elite type. Westinghouse disregarded all these rules. It filed a brief with approximately 1½ spacing, with type smaller than 11 points, and with margins smaller than those allowed. The effect was to stuff a 70-page brief into 50 pages. One has the sense that the lawyers wrote what they wanted and told the word processing department to jiggle the formatting controls until the brief had been reduced to 50 pages. Our clerk's office did not catch the maneuver. The judges did, and when we required Westinghouse to file a brief complying with the rules counsel responded by moving gobs of text into single-spaced footnotes, thereby leaving essentially the same number of words in the brief . . . . The lawyers, caught with their hands in the cookie jar, have apologized and promised not to play the same trick on us again.

*Westinghouse Elec. Corp. v. Nat'l Labor Relations Bd.*, 809 F.2d 419, 425 (7th Cir. 1987). The court fined the lawyers \$1,000, prohibiting them from passing the fine on to their clients (the court figuring that lawyers who "jigger the formatting controls" might also pad their bills).

44. For sources on opinion-writing, *see generally* RUGGERO J. ALDISERT, *OPINION WRITING* (3d ed. 2012); GUY J. AVERY, *DECISION WRITING: A HANDBOOK FOR ADMINISTRATIVE LAW JUDGES* (1996).

plain. Statutes whose meaning seemed to lean one way in the abstract can read differently when applied to real facts.

It is also useful to start deliberating and sketching the opinion before the briefs arrive. Doing so prepares one to catch the distortions and biases that the briefs try to cause. It is better to read the briefs with a critical mind informed by one's own review, than to rely too heavily on briefs that might cherry-pick the facts and law to suit the filing party. Contemplating the case before the briefs arrive also enables one to consider more readily the broad policies implicated by the case, because the parties' briefs will tend to focus on their narrower concerns.

### *C. Opinion Logic Organized Per Policy Logic*

Some opinion-writers organize their opinions according to how the parties structure their briefs. These opinions devote many—often the majority—of their pages to summarizing each party's positions, as if the parties' private goals are the drivers of regulatory decisions. But independent opinion-writing means opinion-writing independent of the parties' goals. A commission's job is not merely to adjudicate disputes, but also to implement policy; and sometimes, to make policy. An effective opinion organizes the material according to the logic of the policy.

Why are so many regulatory opinions organized according to the parties' positions? The agency has a legitimate desire to show the parties that they have been heard. And the agency must show reviewing courts that all arguments were considered. The agency also has a political interest in avoiding attacks for being isolated or aloof. But these considerations do not mean that the parties' positions must, or should, occupy center stage. Placing the parties' positions upfront, giving them the most attention, contributes to a mistaken view that the agency is a supermarket where parties shop for results, rather than a policymaker that places the public interest first.

A better approach, then, is to make the main part of the order about the policy considerations that flow from the statute, and how those policy considerations apply to the facts of the case. The agency can summarize the parties' positions in an appendix. Doing so displays visually the proper emphasis of public interest over private interest. Better to address parties' arguments in the context of broad policy considerations, rather than discuss policies in the context of addressing parties' arguments.

### *D. Rewarding Objectivity*

The previous subsection urged opinion-writers to allocate the opinion's "prime real estate" to the agency's policy objectives rather than to the parties' private goals. A related technique is to reward objectivity. The more an opinion relies on expert testimony that displays objectivity, the more likely future witnesses will display objectivity. Making objective, technical expertise—engineering, accounting, economics, and finance—the foundation of each opinion will induce future parties to align their positions with the public interest.

### *E. Precedent: Acknowledge Before Adjusting*

Regulatory agencies make policies that affect billions of dollars. Predictability encourages investment and lowers capital costs. Arbitrariness



deters investment and raises capital costs. So precedent deserves respect. But an agency is not a lower court, bound by the precedents of its superiors. An agency is a policymaker, carrying out legislative goals broadly defined. Policies need to change as contexts change.

Regulatory statutes use broad language because legislatures want agencies to use their expertise and to solve problems not anticipated by the legislators. The legislative intent is that statutory applications will change over time. It is surprising, therefore, when commissions decline to update their interpretations because, “We’ve never done that before” or “Someone might take us to court.” These attitudes undermine the purpose of administrative agencies, which is to make and modify policies as—and before—needs arise.

The key is to acknowledge the precedent, explain the factual changes or analytical shifts that justify changing the precedent, and take into account any discomforts and costs caused by the change. That way, those who rely on predictability will know that the agency takes change seriously and will not make change arbitrarily. Further, there is a difference between making a one-time exception to precedent because of unique facts versus changing the precedent because of a broader change in context or policy. Both are possibilities, both are permissible, but each must be explained differently.

There is, then, a linkage between modifying previous statutory interpretations and building a record. The more distant the new statutory interpretation is from the old, the more important it is to build a record that displays the problem the agency is newly trying to solve.

#### *F. Narrow or Broad?*

Not every order needs to resolve every issue. A regulatory opinion can dispose only of the unique matters at issue, or it can also set policy for the future. Further, not every record in every proceeding has every fact and insight necessary to make policy on every issue raised. The agency has choices: from writing the opinion tightly so as to leave little room for additional litigation, to deferring some issues for future proceedings, to opening a separate proceeding to explore some questions more deeply.

#### *G. The Value of Unanimity and Diversity*

If regulatory solutions were obvious to all and acceptable to all, there would be fewer disputes. The reality is messier. Decision-makers within an agency diverge on values. It is worth remaining flexible to find the compromises that produce unanimity, because unanimous orders gain legitimacy for the agency and reduce the chance of appellate or legislative reversal. At the same time, some cases present such difficult choices that the public, the courts and the legislature can benefit from a full-throated expression of policy differences by an agency respected for its forthrightness. Such situations are more useful if the agency speaks with one voice. A long series of non-unanimous decisions, in contrast, reflects policy uncertainty, which causes transactional and contractual uncertainty, thereby undermining the agency’s mission to improve industry performance.

### *H. Drafting for Diverse Audiences*

Depending on the case, the readership can include not only the parties and their lawyers, but other judges and staff within the agency, appellate judges (who are generalists unfamiliar with the subject and the jargon), the trade press, the mainstream press, public interest organizations, the financial community, other practitioners in the field, scholars, and even other agencies interested in possible policy overlaps among agencies. While it is not possible to make every order a lesson in regulatory fundamentals, keeping audience diversity in mind reminds the opinion-writer that writing only for the parties' lawyers will limit the opinion's usefulness and influence. Focusing on audience diversity will cause the writer to aim for comprehensibility, reduce jargon, explain technical concepts, present all sides and considerations, explain reasons for accepting and rejecting arguments, and place the decision in a policy context that allows readers to apply its reasoning to future transactions.

### *I. Substantive and Procedural Constraints*

Experienced deliberators need no reminders, but newcomers do, of traditional constraints on substance and procedure imposed by administrative law.

*Substantive constraints:* The decision must be based on substantial evidence, must not be arbitrary or capricious, must explain its reasoning, must be consistent with the agency's statute, must be consistent with agency precedent (unless changes are explained), and may not rely on materials outside the record. Decision-makers must have no bias and must not have prejudged. (Concerning this last sentence: A hunch is not a bias. An active mind is not a blank mind. It is fine, even desirable, for a decision-maker to express skepticism or leanings during a proceeding, as long as she gives the legal or factual reasons. Doing so alerts parties to their weaknesses and thus helps them build a fuller record.)

*Procedural constraints:* The main ones are separation of functions, the prohibitions on ex parte contacts, and "Sunshine Act" limitations on private meetings among decision-makers.

## IX. JUDICIAL REVIEW

For regulatory litigants, judicial review is the last stop. For agency opinion-writers, judicial review is the ultimate in accountability. Judicial review tests the lawfulness of agency action: whether the agency acted within its authority, considered all substantial evidence rationally, based its decision on that evidence without abusing its discretion or acting arbitrarily or capriciously, and followed procedures mandated by administrative law rooted in the Constitution and in statutes.

### *A. Building a Robust Record*

As with each other stage in regulatory litigation, preparing for judicial review begins at the beginning. As early as the discovery stage, and as noted elsewhere in this article, alert attorneys sketch a skeletal version of an agency opinion, one that tracks the statutory criteria. Then they build a record, through discovery, pre-filed testimony, and cross-examination, to put flesh on the skeleton.

While this advice applies to attorneys outside and inside the agency, different roles produce different approaches. Individual parties will focus on creating records that support their side, while the agency must think more objectively. It must consider a range of outcomes, then ensure that the record contains facts and insights necessary to accept, reject or revise any outcome on that range. Otherwise the agency, if it wants a policy result the parties did not consider, will risk judicial reversal because the facts and insights to support the desired result will not be on the record. Conversely, if the record is incomplete, the agency will have difficulty articulating a reasonable basis for rejecting a party's position. Early in the proceeding, therefore, the effective tribunal will have studied the initiating complaint and the relevant statute, identified all the issues that its final order might need to address, and then instructed the parties to present evidence on those issues.

### B. *Earning Deference*

Deference must be earned. Appellate courts defer to agency decisions that are consistent with the substantive law and that emerge from lawful procedures. On matters delegated by statute to the agency's judgment, the agency need not persuade the court that it reached the right answer; the agency's answer need only be based on a reasonable interpretation of the statute and be supported by substantial evidence (which does not mean all the evidence).<sup>45</sup> Further, *Chevron* and *City of Arlington* tell us that the appellate court need not agree with the agency's statutory interpretation; it need only find that the statute was ambiguous and that the agency's interpretation was reasonable.<sup>46</sup> *Caution: Chevron* applies only to federal courts. State courts will vary in their deference to agency interpretations of their statutes.<sup>47</sup> These legal principles should give the agency the confidence to lead policymaking into new areas. But deference is not like a golfer's handicap—an extra margin that compensates for subpar performance. Deference must be earned by demonstrating technical expertise, respect for the record, and adherence to the statutory language and purpose.

### C. *Avoiding Standard Mistakes*

There is a set of traditional errors for agencies and parties to avoid during judicial review. The agency may not offer in its brief or on oral argument rationales for its decision that did not appear in its opinion (a practice known as post-hoc rationalization).<sup>48</sup> Courts will disregard the argument. The solution is to include all pertinent rationales in the opinion.

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45. It is necessary to know your forum's case law on deference. In some contexts, such as contract interpretation, judicial review might be *de novo*.

46. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984); *City of Arlington v. Fed. Comm'n's Comm'n*, 133 S. Ct. 1863, 1871 (2013).

47. See, e.g., Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977 (2008) (comparing deference standards among various states).

48. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself[.]") (citing *Secs. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

A party to an appeal may argue to the court only those points that were raised before the agency (because the agency will not have considered them—and it is the agency’s order that is on review). Nor may a party make arguments for the first time in the reply brief (a practice called “sandbagging”; the opposing party will have no chance to respond).<sup>49</sup> The solution, again, is to think of and raise all arguments before the agency—a habit made more likely if the party has created a skeletal outline early in the proceeding.

#### X. CONCLUSION

Regulatory litigation is not a set of subjects and skill sets. It is a professional discipline, one whose purpose is to serve a statutory purpose: to promote the public interest by improving the performance of the industries we regulate. Mastering that discipline requires one to be disciplined. “An individual is disciplined to the extent that she has acquired the habits that allow her to make steady and essentially unending progress in the mastery of a skill, craft, or body of knowledge.”<sup>50</sup> The path to mastery involves identifying the skills one needs for proficiency, recognizing the proficiency in others, and pursuing a career path that allows one to achieve that proficiency in diverse settings. Only that way can one view each proceeding from diverse perspectives—itsself a condition of mastery.

But mastering skills is not enough. A superb cross-examiner will fail if so focused on controlling a witness she loses sight of the agency decision her client seeks. Mastery, therefore, requires knowing how to construct the complete picture, from framing to judicial review, and to communicate that picture to the litigation team, the opponents, and the tribunal.

An accomplished litigator, like a great jazz musician, is both rigorous and improvisatory—both substantively (she knows the precedents but can adapt them to the facts) and strategically (she aims for the optimal outcome but is alert to satisfactory settlements). Above all, she gains and maintains trust, because honoring the forum and the law are more important than winning any single case.

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49. *Chenery Corp.*, 332 U.S. at 196 (holding that reviewing courts should not look beyond the record that was before the agency at the time the agency made its decision).

50. HOWARD GARDNER, *FIVE MINDS FOR THE FUTURE* 40 (2006).