

Internal Commission Organization: Who Should Do What?

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At Georgetown Law, my spring course covers the stages of regulatory litigation: applications, interventions, prefiled testimony, discovery, cross-examination, brief-writing, deliberations, opinion-writing, and appellate review. Binding these steps is this purpose: to produce an agency decision that serves the public interest and holds up in court. Effective regulatory litigators develop a mental habit of asking not "How do I win this case?" but "How do I help the agency make the best decision?"[1]

Regulatory litigators also should understand how tribunals make decisions. So I assign my students to help state commission clients solve challenges on internal organization and decisionmaking. Here's a sampling of those challenges.

Organizing Staff to Advise and Empower Commissioners

Substance: In each of the different types of proceedings (adjudication, rulemaking, licensing, enforcement), at which points in the process should the staff offer advice? Before the proceeding begins, to fashion the procedures that produce the information? At the end, to recommend solutions? Throughout, to make sure the process produces a rich record for resolution? What form should the advice take? Identifying issues and educating the commissioners? Offering options and their pros and cons? Recommending outcomes? Drafting orders ready for signing? (These alternatives vary in the mix of objectivity and subjectivity.) And in preparing these advisory materials, what specific roles should be played by each of the staff members? Who has the forest and who has the trees? Who coordinates and who advocates? Who keeps the trains on time?

Law: Agency lawyers can play diverse and multiple roles. They can be private advisors, fashioning the rules for the evidentiary hearing and in drafting the final orders. Or they can represent the agency's litigation staff, advocating for the "public interest." Or they can be hearing examiners, presiding over the parties. That hearing examiner, depending on applicable law, can act independently of the agency, issuing a recommended decision that is then "appealed" to the commission; or she can be part of the decisional team, not only presiding over the hearings but advising during deliberations and drafting the final order. In different jurisdictions these variables combine in different ways, depending on law, budget, tradition, commissioner preferences and staffing strengths. There is no ideal; what matters is efficiency, expedition, transparency—and quality.

Combining with type of role is type of advice. Lawyers advise on substance and procedure. Law declares rights and responsibilities—of applicants, intervenors and the agency itself. So agency lawyers interpret and apply the agency's enabling statutes, administrative law and constitutional principles. They deal with disputes over transparency and confidentiality, and

about who gets to say what, when. The more legal clarity, from opening bell to final decision, the higher the ratio of substantive productivity to legal friction.

Timing matters too. An administrative law judge once wondered aloud why an agency's appellate experts get involved only when the agency's actions are attacked in court. Had they been consulted during deliberations and opinion-writing, or when the initial judgments on scope and procedure were made, there would be fewer appeals. Early errors can infect later decisions.

Delegation: In a hospital, each department focuses on one body part or one body function. Ear doctors, stomach doctors, foot doctors. Someone has to care for the whole. In an administrative agency, each staff member has some responsibility for something. *But all outcomes flow through the commissioners.* A 10-year FERC Commissioner once told me he'd signed 10,000 orders—averaging 1,000 a year, 20 per week, 4 per day—many of them hundreds of pages long and of immense importance to hundreds of millions of consumers, industry workers and investors. Delegation is essential.

But how? What types of decisions can commissioners usefully delegate to staff, with what guidance and oversight? What criteria should accompany delegation, to ensure consistency with the commission's priorities? When is delegation permitted or not permitted by statute? Is it worth distinguishing between "soft" delegation (staff decision is a recommended decision only) and "hard" delegation (staff decision is deemed to be the decision of the agency)? Even with hard delegation, what types of oversight, review and "spot checks" by commissioners would still be desirable? Which of these delegations should be made public through an official Commission order, and which should be matters of internal and informal practice?

Organizing Commissioners to Work Best Together

Even with delegation, workload exceeds resources. How might Commissioners divide work among themselves, to take full advantage of each one's unique skills and experiences? In some commissions (e.g., California, Connecticut) each proceeding is assigned (either at random or based on preference or expertise) to an individual Commissioner. That Commissioner runs the proceeding, then works with staff to prepare a draft decision for the other Commissioners to consider. During the evidentiary hearing run by Commissioner X, Commissioners Y and Z can participate or not, as they wish. In other agencies, all commissioners are responsible for all proceedings, although each commissioner will tend to concentrate on issues of particular interest or expertise. The goal is to find the most efficient working relationships: to avoid gaps and overlaps; to make best use of each commissioner's abilities; and to ensure a rich, disciplined and well-informed dialogue among commissioners, staff and participants.

Within each of these models are more specific questions. What types of consultations should occur among the commissioners and when? (In some states, "sunshine acts" prohibit inter-commissioner communication.) How will staff keep the communication flowing, based on what schedule? What are the best ways to uncover inevitable disagreements among commissioners, then use those disagreements to dig more deeply into an issue? What are techniques for keeping everything "loose and creative" for some period of time, so that everyone

remains open-minded, while preserving a disciplined approach that produces clear decisions on deadline? In what ways should substantive and legal staff be part of these discussions, so that the decisionmakers do not get separated from the experts?

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Administrative agencies are odd. They use technical experts and arcane procedures to make deeply political decisions. Inside these agencies are people—people no different from the citizens these decisions affect. The quality of an agency's decisions depends on how its people organize themselves to make those decisions.

[1] For a detailed treatment of these subjects, see S. Hempling, "[Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers](#)," *Energy Law Journal* (Spring 2015).