

To Dan Sheffner, 2.1.18 from Russell Wheeler

I haven't commented on points raised in the 2/1/18 committee meeting or in Beermann's comments.

Page

- Iv second bullet—it sounds strange to animate the MARs. Perhaps “The Working Group has sought, where appropriate, to make the revised MARs more consistent . . .”
- 3 Comment 1—Avoid the passive voice: “The WG suggests that if an agency adopts this rule that it identify included and excluded adjudications by name . . .”
- 4 Comment 1—“However, sometimes circumstances arise that these rules may not anticipate.”
- 6 Comment 1 uses “power” and “authority” interchangeably. I don't think they're the same. “Power” is the ability to do something. Authority is the right or privilege to do something. I may have the authority to do X but doing it may be beyond my ability (power).
- 8 4<sup>th</sup> line from bottom—“treatment of ethics primarily for state administrative . . .”
- 10 (B)(1)—Given the loose definition of interested person, which could be persons beyond the authority of the rule, shouldn't the burden be on the Adjudicator, agency or “any employee . . .process”? “The Adjudicator, [Agency], or any employee . . .process should not accept any ex parte communication from any interested person outside the agency.” And if the WG defines “interested person” as (as suggested in the discussion) as “all persons who filed a notice of appearance or declared an interest in the adjudication”, this MAR may require further refinement to reach persons who didn't so file or declare but may still attempt an ex parte communication.
- 20 third line from bottom: the second “agency” should be “agency's”.
- 31 FRCP 16 includes discussion of ADR in the list of possible topics at pretrial conferences. Did WG consider including it here rather than in Comment 1?  
Comment 2—Instead of “It would be” why not simply “It is”?
- 41 As written, Comment 1 leaves the impression that the WG is suggesting agencies adopt a rule when a single specific situation arises, i.e., “if a party fails to admit . . . truth of the matter”. Perhaps rephrase, “If the agency anticipates that some parties may fail . . .truth of the matter, it may wish to consider . . .”
- 43 (B) Suggest inserting “in order” between “requires” and “to protect”.
- 53 Comment 1—“are going to” is ambiguous. Suggest dropping it, unless WG means that they can be present **after** testifying, in which case suggest: “all persons who will testify may not be present in the courtroom prior to their testimony.”
- 63 Comment 4—suggest “witness may” rather than “witness can”.
- 69 (B)(1)—Isn't “any of the following” unnecessary and perhaps inconsistent with “or” in (b)? I would make it simply “evidence that was not:”