



Committee on Rulemaking

Minutes

March 25, 2013

Members Attending

Tobias Dorsey
*Liaison—Sentencing
Commission*

Neil R. Eisner
Senior Fellow

Cynthia R. Farina
Public Member—Cornell

Randy May
*Public Member—Free State
Foundation*

Elizabeth McFadden,
*Government Member—
Department of Education*

Nina Mendelson
*Public Member—University
of Michigan*

Richard Pierce
*Public Member—George
Washington University*

Robert S. Rivkin (Chair)
*Gov't Member—Department of
Transportation*

Esa L. Sferra-Bonistalli
*Gov't Member—Coast
Guard*

Robert A. Shapiro
*Gov't Member—Department
of Labor*

Carol Ann Siciliano
*Gov't Member—Environmental
Protection Agency*

Lon Smith
*Gov't Member—Internal
Revenue Service*

ACUS Staff Attending

Paul Verkuil
Chairman

Matt Wiener
Executive Director

Gretchen Jacobs
Research Director

Emily Bremer
Staff Counsel

Samantha Aster
Intern

Invited Guests Attending

Michael Herz
*Consultant—Benjamin N.
Cardozo School of Law*

The meeting commenced at 2 pm in the conference room of the Administrative Conference.

Meeting Opening

Committee Chair Robert Rivkin opened the meeting and everyone introduced themselves. Chairman Paul Verkuil welcomed everyone and explained that Professor Michael



Herz's report gives the committee room to explore the issues implicated by the use of social media in rulemaking. He then explained that the project would be targeted for the December 2013 Plenary. Mr. Rivkin explained that he would have to leave the meeting early, at which time Lon Smith would take over as Committee Chair for the remainder of the meeting.

Mr. Rivkin asked the committee whether they approved the minutes from the November 14, 2012 meeting. The committee approved the minutes. Chairman Rivkin then asked the committee whether any committee members objected to allowing public attendees to contribute comments during the meeting. None objected.

Discussion of the Draft Report

Professor Herz presented his report to the committee, explaining that it was still a work in progress. Although the draft report highlights issues that might be ripe for recommendations, it does not yet suggest anything concrete. He outlined the sources of data in the report: a literature review of what has already been written on e-rulemaking; a review of information available online; and a series of interviews conducted by Professor Herz. He explained that the report examines how agencies are using social media, why agencies have largely declined to use social media in rulemaking, and what obstacles might stand in the way of agencies using social media in rulemaking.

Mr. Rivkin expressed his concern that the committee members may not have enough expertise in social media. Other committee members shared this concern. Professor Herz explained that few people other than Cynthia Farina have expertise on the use of social media in rulemaking because there has been so little experimentation in that area. Neil Eisner said that he was surprised Professor Herz had encountered such little enthusiasm from agency employees, since many of them have asked Mr. Eisner how they can learn more about Professor Farina's Regulation Room project. Professor Herz explained that most of the enthusiasm for social media has appeared in nonrulemaking contexts, but he also conceded that it might depend on who you talk to.

Professor Farina suggested that it was important to disaggregate both the types and potential uses of available social media tools. Mr. Rivkin agreed and suggested that it might make sense to first determine the potential benefits and best uses of social media and then examine the potential limitations. Robert Shapiro suggested that, even if an agency offered social media, the public might not make use of its potential benefits. Mr. Smith explained that he is not aware of any requests from the public for his agency to use social media in rulemaking. He expressed some doubt that it is needed.

Gretchen Jacobs asked if the agencies' reluctance to use social media was generational. Professor Herz explained that might have something to do with it, but that the reluctance also results from the increased work that new technologies often require, as well as ineffective communication between agency officials and those with the requisite technological expertise. Richard Pierce suggested that social media might be best used outside of the rulemaking process itself, which is heavily regulated.



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Carol Ann Siciliano suggested that there may be a greater benefit to using social media during the pre-rulemaking period (before a Notice of Proposed Rulemaking (NPRM) is issued) and the retrospective review process. The committee generally agreed that these two areas warrant greater study. Professor Herz agreed and further noted that social media could increase transparency during these two stages of the rulemaking process. Mr. Eisner suggested that using social media during these stages might encourage more collaboration and participation from stakeholders who have been largely silent in traditional rulemaking.

Tobias Dorsey noted that he has yet to see any identifiable successes or failures in agency use of social media. Professor Herz explained that the government mainly uses social media to provide services and information to the general public. Mr. Smith expressed concern that social media might not be useful in rulemakings that primarily involve legal and statutory interpretation questions. Professor Herz agreed that social media would not be useful for all kinds of rulemakings. Whether and how to use social media may depend on the type of information the agency is looking to get from commenters.

Discussion of Next Steps

Chairman Verkuil asked what information and resources the committee thought it would need to complete the project. Ms. Jacobs suggested inviting people with relevant technical expertise to participate in the committee's process. Chairman Verkuil agreed and suggested looking into groups that generate comments for public meetings, such as America Speaks. He also suggested bringing in the Chief Information Officer to discuss relevant what the Administration is doing. Ms. Siciliano suggested the Conference might do a pilot project, using social media to solicit feedback on this project. Chairman Verkuil suggested that inviting the right experts to attend the next committee meeting might be a good start.

Mr. Dorsey suggested that the committee might ask agencies about any experiences they have had using social media in rulemaking to date. Professor Farina explained that the American Bar Association's Administrative Law Section is holding its annual Regulatory Practice Institute at the beginning April, and it might be fruitful to circulate a questionnaire on social media to the agency officials in attendance. She also explained that there would be a panel on the use of technology in rulemaking that might provide a good forum to discuss the Social Media Project. Mr. Shapiro suggested asking attending agency employees how their agencies have used social media. Emily Bremer suggested distributing a leaflet or survey at the event.

Mr. Shapiro suggested that it might be useful to ask agency stakeholders and public comments how social media might improve the rulemaking process for them. Mr. Eisner and Professor Farina explained that agencies that have used social media in rulemaking have had some successes, including by generating more effective comments and encouraging participation from previously silent stakeholders. Mr. Dorsey thought that it was important to address how agencies can use social media to engage the public, improve the quality of comments, and generate dialogue among commenters. Chairman Verkuil asked how many comments are generally submitted on rules. Professor Herz explained that most rules do not attract many comments, although it is possible for an agency to get tens or even hundreds of thousands of comments. Large volume dockets are, however, relatively rare.



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Mr. Smith asked the committee what it wanted Professor Herz to focus on for the next draft of the report. Professor Farina suggested that the revised report should recognize the importance of identifying the agency's goals in a particular rulemaking. Agencies may also want to consider using a third-party facilitator, at least in the beginning, to help commenters and agencies learn how to engage in a productive social media discussion. Professor Herz outlined three recommendations he would likely put forward at the next meeting: (1) setting up a blog, in which agency officials participate, during in both the pre- and post-NPRM periods; (2) using third-party facilitators to provide real-time, online sessions on how to submit good comments; and (3) creating a Wiki where people can collaborate on the text of a comment.

Mr. Dorsey suggested that it might be more fruitful to focus the project on what agencies would like to get out of rulemaking that they are not currently getting, and then address how social media can address those issues. Ms. Siciliano reiterated her suggestion to focus on the pre-NPRM and retrospective review stages to avoid getting caught up in the legal constraints that apply once an NPRM has been issued. The committee generally agreed. Ms. Siciliano further suggested that the recommendations should be about how agencies can more actively engage the public during in pre-NPRM inquiries and retrospective review, including by recommending best practices for the use of social media. Ms. Bremer opined that focusing on improving the rulemaking process would give any recommendation a longer shelf life than it would have if focused first on social media. The committee generally agreed.

Meeting Closing

Professor Herz explained that he will work to fill in the blanks in the report and will come up with some concrete proposals for the next committee meeting. The committee expressed its gratitude to Professor Herz for writing a draft report that is both helpful and easy to read. The meeting was adjourned at approximately 4:45pm.