



Committee on Rulemaking

Minutes

October 6, 2011

Members Attending

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| Robert Rivkin (Chair) | Neil Eisner | Cynthia Farina (by phone) |
| George Madison | Randy May | Elizabeth McFadden (by phone) |
| Nina Mendelson (by phone) | Esa Sferra-Bonistalli | Robert Shapiro |
| Carol Ann Siciliano | Lon Smith | |

ACUS Staff Attending

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| Jonathan R. Siegel | Emily S. Bremer |
| Director of Research & Policy | Staff Counsel |

Invited Guests Attending

Cary Coglianese
Consultant

The meeting commenced at 2:07 p.m. in the conference room of the Administrative Conference. Following introductions, the Committee approved the minutes of its August 24 meeting by unanimous voice vote. The Committee also agreed, also on unanimous voice vote, to permit members of the public in attendance to comment during the course of the meeting.

Mr. Rivkin summarized the status of the Committee's proceedings. He reported that Professor Pierce, who was unable to attend, communicated that he has no objections to the revised draft recommendation. Mr. Siegel discussed the staff's revisions to the draft recommendation. The bulk of the changes were to the preamble, where the staff took the Committee's suggestion to incorporate material from Professor Coglianese's report to provide context for the recommendations. The revisions to the recommendations themselves reflected the Committee's discussion at its last meeting.

Ms. Siciliano was happy to see new language in paragraph 3(b). She suggested, however, that it be broken out into a separate paragraph. Agencies should be encouraged to give clear notice of the rules governing social media discussions regardless of whether they use a facilitator. She further suggested it would be helpful if the Conference gave more detailed guidance as to the content of the notice. Identifying some of the potential legal issues an agency might need to address would be helpful to agencies and, down the road, to courts.

Mr. May asked Ms. Siciliano to clarify what legal issues she was referring to. Ms. Siciliano explained that, for example, an agency may want to use a blog to facilitate dialogue



among the public in anticipation of a rulemaking. Such a dialogue can improve the comments the agency ultimately receives and enable commenters to identify areas of common ground. This approach may raise a variety of legal issues, including whether and in what circumstances the dialogue will constitute comments and/or become part of the administrative record. The agency may want to follow the dialogue and write a memo to file to include some parts of the discussion in the record. Mr. May suggested paragraph 3(a) may provide the solution and asked whether Ms. Siciliano thought it would be sufficient. She replied that an agency may not have the budget to hire a facilitator, and she would like agencies to be able to look at the information and consider it without the whole blog becoming part of the record. Mr. Siegel noted that, legally, anyone could file a summary of the dialogue as a comment; they would not have to be a facilitator.

Professor Farina explained that Regulation Room is currently doing what Ms. Siciliano described. They prepare and post a draft summary of the dialogue, email everyone who participated in the discussion, and provide an opportunity for comment on the summary before it is finalized and filed with the agency. Mr. Eisner agreed with Ms. Siciliano's comments, except regarding whether an agency may use information without putting it in the record. He was also not sure why only a facilitator, and not others, would be allowed to file a summary. He noted, however, that facilitators may be able to get better responses by following up with commenters and asking them to provide data or other information to support their comments.

Ms. Sferra-Bonistalli agreed, but suggested some of these issues may be better left to another project focused specifically on agency use of social media. Professor Coglianese's report does not examine those issues. She further suggested that the ambiguity Ms. Siciliano identified in the paragraph 3(b) was intended to give agencies the necessary flexibility to work out the content of the notice themselves. Giving policy and legal advice regarding the contents of such a notice could easily be its own project. Mr. Eisner agreed that the Committee should do another project on blogs and other social media because the issues raised there are beyond the scope of this recommendation.

Mr. Shapiro expressed concern that the recommendation was unintentionally limited because it talks about the filing of summaries in the docket only by a facilitator. Mr. Rivkin suggested the language in the beginning of paragraph three gives sufficient flexibility. Mr. Madison liked the apparent flexibility to use a facilitator to file a summary, but was nervous about expanding the recommendation beyond facilitators. He observed that if too many summaries were filed, it would destroy their value.

Ms. Siciliano agreed with Ms. Sferra-Bonistalli, Mr. Eisner, and Mr. Madison, supporting the idea of a subsequent recommendation focused on agency use of social media. She wondered whether paragraph three should be removed entirely and tabled until that project could be undertaken. Professor Coglianese agreed his report does not address legal issues that might arise when an agency uses social media. Mr. Rivkin suggested the Committee could always go into



more detail in a new recommendation without tabling the issue entirely. If paragraph three is phrased generally and at a high level, it would not implicate the concerns expressed.

Mr. May said he would like to keep paragraph three, but would like to see less directive language regarding the filing of a summary in the rulemaking docket. Mr. Eisner suggested the Committee could make a more general recommendation that agencies should consider using social media, while suggesting a facilitator could be used to make the discussion more useful. He thought the Committee should keep the recommendation that agencies issue notice of how they will use the social media discussion. Mr. May and Ms. Siciliano expressed their view that the recommendation should just stay away from summaries.

Mr. Smith asked for clarification regarding the purpose of an agency blog. Is it supposed to help sharpen the public's views, thereby improving the comments filed? Or is the discussion used to help the agency sharpen its views? Is it necessary for the recommendation to explain the role of the facilitator? Mr. Eisner replied that the value of a facilitator is not to provide a summary of the discussion, but rather a summary of the consensus reached through the discussion.

Mr. Madison asked whether the Conference plans to study social media in a subsequent project. He expressed concern that paragraph three assumes the use of social media is legal and good policy. He asked whether paragraph three was really necessary. Ms. Sferra-Bonistalli observed that Professor Coglianese's report supports the recommendation that agencies consider using facilitators. She suggested the recommendation should not go further.

Mr. Rivkin proposed that the Committee first address whether to keep paragraph three. The Committee voted 6-5 to retain it.

Mr. May suggested paragraph three be revised to recommend agencies consider using social media to raise the visibility of rulemakings. Ms. Siciliano and Mr. Madison agreed. Professor Mendelson noted that, at its last meeting, the Committee discussed and decided to include subpart (b), regarding notice. Mr. Rivkin agreed. The Committee decided to modify paragraph three, as suggested by Mr. May, while retaining subpart (b) as the second sentence of the paragraph.

Mr. Eisner asked whether paragraph two needed to go beyond linking, noting that "integration" is more complex. Mr. Siegel clarified that the eRulemaking PMO allows agencies to provide links to canned searches on regulations.gov, and paragraph two was intended to encourage agencies to use that feature. Mr. Rivkin suggested deleting "and integrating underlying data." Mr. Siegel expressed concern that the change would too strictly limit the recommendation. Professor Coglianese agreed, explaining that agencies can make much greater use of available data to make information available on their websites. Mr. Eisner explained such uses require software that is very expensive. Ms. Sferra-Bonistalli thought the recommendation



should be phrased to permit flexibility. She suggested language to accomplish that purpose. The Committee agreed with her suggestions.

Mr. Rivkin turned the Committee's attention to access issues. Professor Farina suggested the recommendation be revised to replace "the disabled" with "persons with disabilities." Ms. McFadden suggested "individuals with disabilities." Professor Farina agreed. So did the Committee.

Mr. Eisner suggested paragraph six should be more closely confined to a discrete goal, urging the Committee to keep in mind that some agencies elicit public comments throughout their web sites. He further noted that it may be difficult for regulations.gov to post all agencies' comment policies. Ms. Sferra-Bonistalli agreed and suggested limiting paragraph six to the posting of comment policies on agency websites. She questioned the need for the policies to be posted in multiple locations. Professor Farina was of the view that posting the policy in multiple locations was a good idea because visitors to the website might not always follow the pathways the agency intended when designing its site.

Ms. Sferra-Bonistalli suggested a simplified phrasing of paragraph six that was accepted by the Committee. The Committee then discussed whether the paragraph should be limited to rulemaking or should address comment policies more broadly. A motion was made and seconded to remove "rulemaking" from six. The motion carried. The Committee also agreed to move paragraph six up to follow paragraph three.

After a short break, the Committee reconvened to consider the draft preamble. Mr. Rivkin asked for comments on significant issues. Mr. Shapiro expressed the view that the recommendation ought to acknowledge the problem of access for those who do not have Internet access at all. Mr. Rivkin suggested the Committee may not be able to adequately address that issue when the topic is e-rulemaking. Mr. Shapiro suggested the preamble might be the place to raise the issue. Mr. Rivkin suggested Mr. Shapiro come up with a sentence for the preamble. Professor Mendelson and Mr. Eisner offered other, minor changes to the preamble, which the Committee approved.

Mr. Rivkin called a vote on the draft recommendation, as amended by discussion. The draft recommendation was approved on a unanimous voice vote. Mr. Siegel then suggested the Committee authorize Mr. Rivkin, as chair of the Committee, to review and approve any further changes to the recommendation that are consistent with the Committee's intent. This was also approved on a unanimous voice vote. The meeting adjourned at 3:55 pm.