November 6th, 2024

Network of Adjudicatory Agencies Continuing Legal Education Conference

for Washington State Adjudicative Agency Staff

"Improving the Practice"

Written Materials

Co-Hosts

Marguerite Friedlander, Administrator, Administrative Law Office, Department of Licensing

Marguerite Friedlander joined the Administrative Law Office (formerly the Hearings and Interviews Unit) within the Department of Licensing in September of 2018. She leads the adjudicatory unit of 23 Hearings Examiners and 17 legal operations staff. Marguerite co-authored an expansive Code of Conduct for the Hearings Examiners, was awarded grant monies for the study of legal case management solutions and continues updating the office's procedural rules. She sets and oversees implementation of strategic goals for the legal office, including strengthening public trust in the administrative judiciary, promoting efficiencies and LEAN principles wherever possible, and enhancing accountability and quality of service.

Prior to joining the agency in September 2018, Marguerite served as an administrative law judge for over 10 years with the Washington Utilities and Transportation Commission, adjudicating electric and natural gas rate cases, consumer complaints, and utility merger petitions. Marguerite is originally from Michigan, where she received her B.A. in Philosophy and Political Science. She also graduated from Gonzaga University School of Law and is licensed to practice law in both Washington and Michigan.

Dominga Soliz, Executive Director, Washington State Environmental and Land Use Hearings Office

Dominga Soliz was appointed executive director of ELUHO by Governor Jay Inslee in November 2021. Before joining ELUHO, Ms. Soliz worked for the Washington State Office of Risk Management representing the state's self-insurance liability program in tort and civil rights lawsuits against the State. Her caseload included higher education, natural resources, corrections, and employment. Before that, she was the hearings administrator for the Washington State Department of Corrections, overseeing the program that conducted probation violation and sentence revocation hearings. She also worked as a risk mitigation manager for that department, acting as the client agency in claims and lawsuits. Ms. Soliz began state service as a policy and planning specialist for the Washington State Recreation and Conservation Office, where she worked with stakeholders to set rules and priorities for habitat conservation and recreation grant programs and served as coordinator for the Habitat and Recreation Lands Coordinating Group. Ms. Soliz is a second-generation graduate of the University of California Davis, King Hall School of Law and a graduate of The Evergreen State College.

Presenters

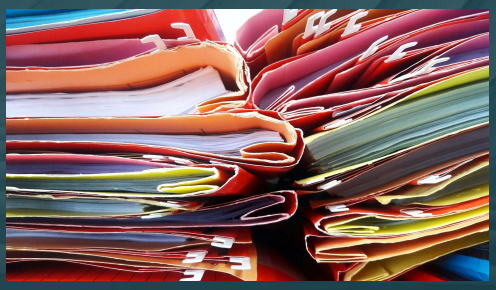
Jennifer Steele, Public Records Counsel, Office of the Attorney General

Jennifer Steele is Public Records Counsel for the Attorney General's Office. As Public Records Counsel, Jennifer advises the AGO public records unit and represents the AGO in public records litigation involving the AGO. She provides expertise to AAGs regarding public records client advice and litigation. She is a resource to the office, monitors public records litigation and significant advice, and provides trainings. Jennifer has served in the AGO since 2006, consistently worked in the public records arena. Jennifer previously worked in the Consumer Protection and Licensing and Administrative Law divisions. Prior to joining the AGO Jennifer was a clerk at the Washington State Supreme Court. Jennifer attended Syracuse University where she was on the Women's Varsity Rowing Team. She received her J.D. from Seattle University where, upon learning there was no rowing team, she became an editor for the Seattle Journal for Social Justice.

Public Records Act

Review and Best Practices for administrative law judges

Jennifer Steele, Public Records Counsel
Attorney General's Office



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Roadmap

- Public Records Act - RCW 42.56
- Employee obligations
- Exemptions
- Records Retention - RCW 40.14

Disclaimer

This presentation is educational only and is not legal advice or a legal opinion. The PRA changes over time. Later court decisions, or changes in statutes, can impact your duties and an agency's obligations.

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Public Records Act - RCW 42.56

Consistent with the PRA's 'strongly worded mandate for broad disclosure of public records,' we construe the statute's disclosure requirements liberally and its exemptions narrowly.

Washington Supreme Court

- Open Government – Sunshine – Transparency
- The records government agencies prepare, own, use, or retain are public records
  - The records you work with are state/agency records
- Public records are presumed to be open to disclosure
- Transparency allows us to show the public the good work we do

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Public Records Act - RCW 42.56

- Records or information in records can be withheld only if law allows. Exemptions are "narrowly construed"
- Non-exempt public records must be disclosed
- Location does not matter.
  - Public records can be located in/on agency files/accounts/servers or non-agency files/accounts/servers
- Public records must be retained pursuant to records retention laws (RCW 40.14)

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Public Records defined

- Definitions of "public records" and "writing" are broad
- A public record is

writing	+	related to the conduct of government or proprietary function	+	prepared, owned, used, or retained by agency

Regardless of physical form or characteristics

- Location does not matter. Form does not matter.

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Public Records are State Property

- RCW 40.14.020: "All public records shall be and remain the property of the state of Washington… and shall be preserved, stored, transferred, destroyed or disposed of, and otherwise managed, only in accordance with the provisions of this chapter."

They are not your records, even if you created them, and even if they are on/in your personal devices/accounts/files.

You are required to manage and dispose them only in accordance with state law.

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What to do, what to do… with public records

- **Manage, maintain, organize** your records
- Follow retention schedules
- Review public records requests
- Search for records
- Gather the records
- Review records for exemptions to disclosure
- *Timely* provide your records
- Track time spent responding to public records requests

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Search for Records

– follow the glitter trail

> The adequacy of the search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant records.

Duty: To search for records in locations where it is reasonably anticipated there may be records

Plan searches:

- Who is searching for records?
- What records will be searched centrally?
- Where do I need to search?
  - All devices, platforms, areas, applications where there might be records
- Follow the glitter trail
- *Communicate*

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Personal Devices – Personal Accounts

- If you use or have used a personal device or personal account for work, you may have public records on your device or in your account
- Work communications/records on your personal device or in your personal account are **public records**
- You may be required to:
  - Search personal devices and personal accounts
  - transfer records to the agency
  - sign an affidavit, or
  - take other required steps to produce and preserve the public records
- **CAUTION IS ADVISED: know your duties and responsibilities**

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Exemptions

- To withhold a record, or part of a record, an agency must cite to an exemption and give a brief explanation
- Exemptions must be authorized in law ---
  - in PRA or *other* laws
- Exemptions are *narrowly* construed
- An agency withholds only the exempt information and releases the rest
- No silent withholding
- An agency bears the burden of proving the exemption applies

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PRA Exemptions ~ Other Exemptions

- What law allows the redaction/withholding of the record or information in the record?
  - PRA
  - Agency specific statute
  - Federal statute
  - Federal Code
- Law must exempt information in record or record from disclosure

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Deliberative Process and Drafts

RCW 42.56.280

For exemption to apply, agency must show:

- Record contains predecisional opinions or recommendations as part of deliberative process, *and*
- Disclosure would be harmful to deliberative process, *and*
- Disclosure would inhibit recommendations, observations, and opinions, *and*
- Records covered reflect policy recommendations and opinions, not raw factual data decision based on

Exemption expires after final decision/action

- Only protects records while action is "pending"

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Privacy

- for the love of Pete, pick up the phone!

- There is no general "privacy" exemption in the PRA
- If privacy is an express element of another exemption, privacy is invaded only if disclosure about the person would be:
  - "Highly offensive to the reasonable person"

    and
  - "Not of legitimate concern to the public"

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Failure to follow PRA

- $ $ $
- Loss of public trust
- A court can impose civil penalties
- No proof of damages or harm required
- A court considers a variety of factors in determining a penalty amount
- A court will award the prevailing requester's attorneys fees and costs

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Records Retention

- RCW 40.14
- Records retention schedules – Secretary of State – Washington State Archives.
- Records Retention Schedules determine how long a record must be retained and when the record can be destroyed
- Once a record has met retention it may be deleted/destroyed

Office of the Secretary of State
Washington State Archives

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How long do I keep it?

- Look first to agency specific retention schedule – then to state general schedule
- Examples:
  - Hearing Notes
  - Draft orders/decisions
  - Final orders/decisions

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Remember

- Public records of government agencies are *presumed open*
- Records or information in records can only be withheld by exemption
- Exemptions must be *narrowly construed*
- Non-exempt public records must be disclosed
- Location does not matter
- Public records must be retained pursuant to records retention laws
- If you have questions please ask!

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Professor Saane H. Knudsen, University of Washington School of Law

Professor Sanne H. Knudsen received a B.S. in Environmental Engineering from Northwestern University, an M.S. in Environmental Engineering from the University of Michigan, and a J.D. from the University of Michigan, where she graduated Order of the Coif and was a member of the Michigan Law Review. She is a former law clerk for the Honorable Ronald M. Gould on the U.S. Court of Appeals for the Ninth Circuit. In 2018 Professor was invited to become a member of the American College of Environmental Lawyers, where she has since served on the Board of Regents.

After practicing law at private law firms in Chicago and Minneapolis, Professor Knudsen joined the University of Washington School of Law in 2011. She teaches Natural Resources Law, Environmental Law, Administrative Law, and Civil Procedure. She has won numerous teaching awards for 1L instruction.

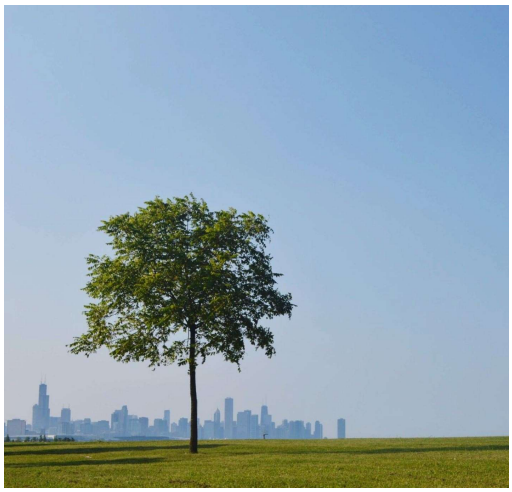
Professor Knudsen's scholarship focuses on both environmental and administrative law. She has written on how tort liability frameworks can be used to reduce or redress long-term and multiple-stressor environmental harms. She has also written on the necessity for regulating for cumulative risk in chemicals exposure. Her work in these areas has been selected through peer-review for republication as some of the top articles written in the field.

Professor also writes in the area of administrative law, where her co-authored work on the history of Seminole Rock/ Auer deference was cited by the United States Supreme Court in *Kisor v. Wilkie*.

Professor Knudsen has most recently been writing a series of articles examining the relationship between administrative law and environmental law. In *The Exoskeleton of Environmental Law,* published in 2023 in the Utah Law review, she argues that environmental law embodies a unique set of prescriptive choices centered on a commitment to self-restraint for the purposes of self-preservation. In a companion article entitled *Sidestepping Substance,* forthcoming in the Administrative Law Review*,* she examines how administrative law is operationalized to undermine the success of environmental law. In a shorter essay entitled *Reclaiming Control,* published by the Environmental Law Institute, Knudsen suggests that Congress would be wise to recalibrate the balance of power between administrative and environmental law through an APA-type legislation specific to the challenges of environmental law. In the wake of Loper Bright, she has written for the Ohio State Law Journal on *Predicting (and Protecting) the Future of Environmental Law After* Loper Bright.

Loper Bright and The Changed Landscape of Agency Deference

Sanne Knudsen
Stimson Bullitt Endowed Professor of Environmental Law, University of Washington School of Law
Network of Adjudicatory Agencies CLE
November 6, 2024



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Last Term: Three Key U.S. Supreme Court Cases

- Jarkesy v. SEC
- Corner Post v. Board of Federal Reserve
- Loper Bright Enterprises v. Raimondo

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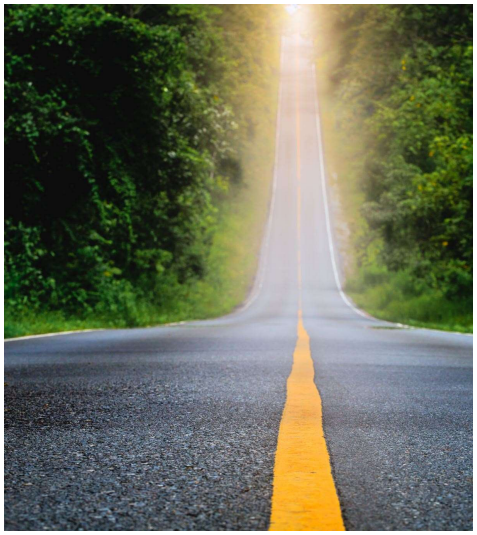

Roadmap for *Loper Bright* Discussion

- Pre-*Loper* Landscape
- Major Lines of Argument Raised in Briefing
- Examination of *Loper*
- What's Next

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Chevron's Familiar Formulation

Step One: Is the statutory provision at issue ambiguous? (Has Congress spoken to the precise legal question at issue?)

Step Two: If the statute is ambiguous, is the agency's interpretation reasonable?

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Chevron's Famous Footnote

Footnote 9:

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."

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Chevron's Foundational Presumption

Congress delegated policy-making in the gray space of a statute to expert agencies.

"[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."
Chevron v. NRDC (1984)

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Chevron Deference in Practice

"[W]here a statute leaves a gap or is ambiguous, we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute."

-- *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 276–277 (2016) (quotation cleaned up).

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Pre-*Loper*: *Chevron*'s Many Critics

Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 997–1000 (2017).	• "The Article thus seeks to establish—contrary to the suggestion in Chevron and recent cases—that there was no rule of statutory construction requiring judicial deference to executive interpretation []in the early American Republic."
Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1227 (2016)	• "When they defer to agency interpretations of the law, it must be asked whether they are engaging in systematic bias in favor of the government and against Americans, thus denying them the due process of law."
Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010)	• Arguing for a more limited Chevron. • See also Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1 (2017).
But see Cass R. Sunstein, *Beyond* Marbury: *The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580 (2006)	• Defending the "law interpretative authority of the executive branch" on both "democratic and technocratic grounds"

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Pre-*Loper*: *Chevron*'s Many Critics

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Pre-*Loper*: Administrative Law Trends

Kisor v. Wilkie (2019)	West VA v. EPA (2022)	Sackett v. EPA (2023)	Biden v. Nebraska (2023)
• Court could have, but didn't, overrule Auer deference. Still, the Court cabined it. • Auer deference reshaped to resemble Chevron deference. • Called for courts to defer only when they find "genuine ambiguity" • Signaled skepticism of reflexive deference	• Court announced major questions doctrine. • Court uses doctrine to circumvent Chevron • Signaled Court less inclined to engage in power sharing with agencies.	• No mention of Chevron (even though EPA asked for deference). • Relied on tools of statutory construction and substantive canons to reach "clarity" • See also Epic Sys. Corp. 138 S.Ct. 1612 (2018); SAS Inst v. Iancu, 138 S.Ct. 1348 (2018); American Hospital Ass', v. Becerra (2022); Becerra v. Empire Health (2022) (Court ignores Chevron).	• No mention of Chevron. • Court employs tools of statutory construction and applies major question doctrine's requirement of clarity to reject the Biden Student Debt Forgiveness Program • Barrett concurring and noting MQD "should not be taken for more than it is."

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Loper Bright Enterprises v. Raimondo No. 22-451

Question Presented 2:

"Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."

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Loper Bright Enterprises

- Magnuson-Stevens Act
- The Act allows NMFS, through fishery management plans, to require fishing vessels to carry "one or more observers . . . for the purpose of collecting data necessary for the conservation and management of the fishery." §1853(b)(8).
- The Act also allows NMFS to prescribe other "necessary and appropriate" measures for the management of the fishery. §1853(b)(14).
- NMFS required domestic fishing vessels in the Atlantic Region to pay the salaries of those federal observers.

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Loper Bright Enterprises

- The Act expressly authorizes NMFS to require these payments in the Pacific Region.
- NMFS is also authorized to require payments from certain foreign vessels.
- The Act is silent on whether these payments can be required from domestic fishing vessels in the Atlantic region.

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Loper Bright Enterprises

- The district court resolved issue at Step One in favor of NMFS: Congress clearly provided the authority to require payments.
- The D.C. Circuit resolved the issue at Step Two in favor of NMFS: the statute is ambiguous but the agency interpretation is reasonable.
- Judge Justin R. Walker dissented

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The Loper Bright Petitioners

1. Lower courts see ambiguity everywhere and have abdicated their core judicial responsibility as a result.
2. Statutory silence needs to be more heavily scrutinized.
3. There is something special about the direct imposition of costs on regulated entities to fund the federal inspection regime where Congress has not provided sufficient funding to do so.

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The Government Respondents

1. *Chevron* is a bedrock principle that has been a stable background rule against which Congress has been legislating for 40 years.
2. *Chevron* gives appropriate weight to the expertise, often of a scientific or technical nature, of federal agencies
3. *Chevron* promotes national uniformity and greater political accountability for regulatory policy.

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The Many Amici

50+

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Major Lines of Argument

- Chevron's impact on the stability and uniformity of law;
- The constitutionality of transferring power from Article III to Article II;
- Chevron's inconsistency with the APA;
- The inconsistent and incoherent application of Chevron in the lower courts; and
- Due Process concerns with placing a systematic thumb on the scale for government litigants;
- Appropriations Clause concerns associated with the agencies asserting power to fund a federal inspection regime; and
- The overregulation and vast agency power that accumulates from too much deference.

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Major Lines of Argument

Chevron's impact on the stability and uniformity of law.

The overregulation and vast agency power that accumulates from too much deference.

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Major Lines of Argument

Chevron's impact on the stability and uniformity of law.

Top-side
- Chevron promotes instability
- "Whipsawing" and "Flip-flopping"
- Regulatory uncertainty bad for business

Bottom-side
- Chevron promotes stability
- Without Chevron, courts decide policy
- Deference encourages uniformity

Neither side
- Professors Christopher Walker (Michigan) and Ken Barnett (Georgia)
- Chevron dampens decisions driven by ideology and promotes uniformity

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Major Lines of Argument

Top-side

- E.g., West Virginia and 26 Other States: "The economy labors under a potentially unjustified pro-regulatory default."
- E.g., Eight National Business Organizations: "Chevron has in practice led to an unwarranted expansion of bureaucratic power beyond anything authorized by Congress."

Bottom-side

- E.g., Erwin Chemerinsky (for group of U.S Senators): "This case is the product of a decades-long effort by pro-corporate interests to eviscerate the federal government's regulatory apparatus, to the detriment of the American people."

The overregulation and vast agency power that accumulates from too much deference.

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Loper Bright Enterprises (and Relentless) Nos. 22-451 and 22-1219 (June 28, 2024)

What did the Supreme Court do?

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Loper Bright

- **Short Answer:** Chevron is dead. Don't cite it.
- **Reasoning:**
  1. It is the province of the courts to say what the law is.
  2. Chevron said the law required courts to defer to agency interpretations where there was statutory silence or ambiguity, but . . .
  3. Chevron was based on the faulty presumption that Congress intended courts to defer.
  4. That presumption is faulty because Chevron failed to heed the text of the APA – which requires courts to decide all relevant issues of law.
  5. Plus, Chevron is unworkable and didn't work.

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Loper Bright–What's Next?

- **Courts must use "independent judgment" to determine "best reading"**
  - Skidmore?
  - Look for contemporaneous interpretations, consistently held over time.
  - Any conclusion about Congressional intent to delegate authority to agencies to fill in gaps on broad terms or statutory silence must be made on statute-by-statute basis.
  - Expertise is not a reason to blindly defer, but it can inform the court.
- **Respect is just that. Days of binding deference are over.**

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Big Picture – What's Next?

- **Beware the deregulatory impulse.**
  - *Loper Bright* – room to sideline expertise
  - *Corner Post* – room to revisit settled law
  - *West Virginia* – room to cabin broadly delegated authority
  - *Kisor v. Wilkie* – room to question agency interpretations of their own regs
- **Anticipate the original textualism approach.**
  - *Loper Bright* – emphasis on contemporaneous interpretations: "every statute's meaning is fixed at the time of enactment."

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Lower Courts – What's Next?

- Already cited in over 200 cases (as of early October).
- At least one court (D. N.M.) has identified the potential cross-over to Kisor/ Auer deference, concluding that Kisor deference is weaker now.
- At least one court (5th Circuit) has emphasized that Skidmore adds little since courts decide what is persuasive and since Skidmore factors ultimately lack the power to control.
- At least one court (3rd Circuit) has found evidence of Congressional intent to delegate policy-making by pointing to general grants of authority "to prescribe regulations to carry out the provisions" of the statute (FIFRA).

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Let’s Discuss!

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Leah Harris, Assistant Attorney General, Licensing and Administrative Law Division, Office of the Attorney General

Leah Harris is an assistant attorney general in the Licensing and Administrative Law Division of the Washington State Attorney General's Office. She received her B.A. in history from Northwestern University and her J.D. from Seattle University School of Law. From 2002 through 2005, she worked for Science Applications International Corporation in Chicago providing Superfund enforcement support to the U.S. EPA. Before joining the AGO in April 2010, she worked at the Washington Appellate Project representing indigent parents in appeals of child dependency determinations and terminations of parental rights. In addition to serving as her division's appellate advisor, Leah currently represents the Employment Security Department in unemployment insurance tax matters, advises the Department of Licensing's public records unit, and handles advice and litigation for various other state agency clients as needed.

Jacob Dishion, Assistant Attorney General, Licensing and Administrative Law Division, Office of the Attorney General

Jacob Dishion has been an assistant attorney general in the Licensing and Administrative Law Division of the Washington State Attorney General's Office since 2016. Jacob's practice includes coordinating Department of Licensing litigation for AGO offices statewide, defending agency decisions on judicial review in Washington courts, and advising agency clients. He is the lead advisor for the Employment Security Department's Long-Term Services and Supports Trust Program, and advises the Department of Licensing on driver's license matters. In his work as an AAG, Jacob has defended hundreds of agency decisions on judicial review. Before joining the AGO, Jacob clerked for two judges at the Washington State Court of Appeals, Division I, after graduating from the University of Washington School of Law.

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Agenda:

1. Order Requirements (RCW 34.05.461) vs. Judicial Review Provisions (RCW 34.05.570(3))
2. Drafting Factual Findings
3. Making Legal Conclusions: Applying the Law to the Facts
4. Miscellaneous

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ORDER REQUIREMENTS: RCW 34.05.461(3)-(5)

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CONTENTS OF THE ORDER: RCW 34.05.461(3)

(3) Initial and final orders shall include:

- A statement of **findings and conclusions, and the reasons and basis therefor**, on **all the material issues of fact, law, or discretion** presented on the record (WAC 10-08-210(3), (4))
- The remedy or sanction
- Findings based substantially on **credibility of evidence or demeanor of witnesses shall be so identified**.
- Findings that essentially repeats or paraphrases the relevant provision of law "shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings."
- A statement of the **available procedures and time limits for seeking reconsideration or other administrative relief**. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order. (WAC 10-08-210(6))

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CONTENTS OF THE ORDER RCW 34.05.461(4)

(4) Findings of fact shall be:

- Based exclusively on the evidence of record and on matters officially noticed in the proceeding.
- Based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.
- Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. **The basis for this determination shall appear in the order**.

(5) Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.

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JUDICIAL REVIEW RCW 34.05.570(3)

- **RCW 34.05.570(3)**: The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
  - (a) The order or statute violates the constitution.
  - (b) The order is outside the agency's authority or jurisdiction.
  - (c) There has been an unlawful process/procedure.
  - **(d) The agency misapplied the law.**
  - **(e) The order is not supported by substantial evidence.**
  - **(f) The agency has not decided all the issues.**
  - (g) A motion for disqualification was improperly denied.
  - (h) The order is inconsistent with an agency rule.
  - **(i) The order is arbitrary and capricious.**

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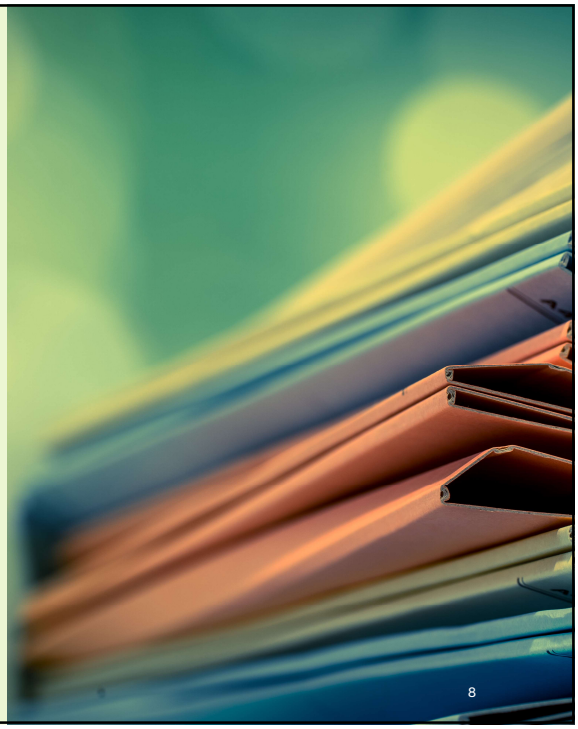
DRAFTING FACTUAL FINDINGS



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HOW COURTS REVIEW FINDINGS: THE SUBSTANTIAL EVIDENCE STANDARD

1. The substantial evidence standard is highly deferential to the finder of fact.
2. An agency finding will be upheld if supported by evidence that is substantial when viewed in light of the whole record before the court.
3. "Substantial evidence" is a "sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order."
4. Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations.
5. Appellate courts may not substitute their judgment for that of the agency as to the facts

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STEP 1: WHAT ARE NECESSARY FACTS?

What are the legal requirements?

- What does the law require?
- What facts must be shown to meet the legal standard or requirement?
- Who has the burden of proof?

Evaluate the evidence

- What was the testimony?
- What do the exhibits reveal?
- What does the absence of testimony or exhibits reveal, if anything?

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DRAFTING THE FINDINGS: DO'S AND DON'TS

Do

1. Tell the whole, relevant story
2. Resolve conflicting testimony – make the factual finding(s)
3. Make clear credibility determinations and explain bases for them
4. Include all factual findings relevant to the legal conclusions
5. Cite evidence relied on
6. Be methodical
7. Proofread!

Don't

1. Leave narrative gaps that make it difficult to understand what happened
2. Recite conflicting testimony without resolving the conflict!
3. Forget to make findings necessary to a legal conclusion (e.g., "I find Witness A is an expert" without making the findings supporting that legal conclusion)
4. Sweat the placement of findings and conclusions

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EXAMPLE: RESOLVING CONFLICTING TESTIMONY (AND FINDING WHAT ACTUALLY HAPPENED)

Common Issue:

Finding 1: Witness A testified that…

Finding 2: Witness B testified that…

Finding 3: Witness C testified that…

Do this instead:

Finding 1: The witnesses' testimony conflicted on material points. I find Witness A to be more credible, because…

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EXAMPLE 1: RESOLVE CONFLICTING TESTIMONY

- **Summary of the Evidence**: Witness A testified that the light was red... Witness B testified that the light was green...
- **Findings of Fact**
- Finding 1: I find the testimony of Witness A to be more credible than the testimony of Witness B, because... Therefore, I find by a preponderance of the evidence that on the day in question, the light was red.

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EXAMPLE 2: RESOLVE CONFLICTING TESTIMONY

Alternative way to resolve conflicting testimony or evidence:

OR: Finding 1: The witnesses' testimony conflicted on material points... I find Witness A to be more credible. Therefore, I find by a preponderance of the evidence that the light was red.

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MAKING CREDIBILITY DETERMINATIONS

RCW 34.05.461(3): "Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified."

- Where testimony or evidence conflicts on material points, make explicit credibility determination
- Explain *why* you find evidence more credible than others
- This is *especially* true if you reject uncontested evidence – Court may not accept rejection of uncontested evidence without explicit explanation as to why (might conclude findings not supported by the record)
- On appeal, courts do not "reweigh evidence or reassess witness credibility"

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EXAMPLE: Identifying evidence supporting finding

- Cite testimony/exhibits
  - Not statutory requirement, but helpful to appellate advocates and courts
  - Refer to exhibit numbers, party's testimony
  - If a chart or graph was useful, cite it, or even include it in the order
  - Helps to highlight the substantial evidence for appeal and identifies what evidence the factfinder gave more weight

16

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KEY TAKEAWAYS:

- Organized
- Make findings on all facts necessary to resolve legal issues.
- Avoid narrative gaps necessary to understanding the decision.
- Resolve credibility determinations
- Resolves conflicts in the evidence

17

17

MAKING LEGAL CONCLUSIONS: APPLYING THE LAW TO THE FACTS

18

DRAFTING CONCLUSIONS OF LAW: DO'S AND DON'TS

DO'S

- Identify and apply the standard of proof
- Analyze the law by applying it to the facts
- Resolve all the legal issues – required by statute and raised by the parties
- Be methodical
- Proofread!

DONT'S

- Make conclusory conclusions
- Merely recite the legal standard or test as a conclusion
- Bury findings in legal conclusions (*but see Tapper v. ESD*, 122 Wn.2d 406)

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STRONG CONCLUSIONS REQUIRE STRONG FINDINGS

Standard of Review: "We review legal conclusions de novo to determine whether the review judge correctly applied the law, including whether the factual findings support the legal conclusions."

Example: ***"We conclude that substantial evidence supports the challenged findings of fact, but the findings do not support [the] conclusions..."***

Karanjah v. DSHS, 199 Wn. App. 903, 916, 401 P.3d 381 (2017)

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APPLICATION OF LAW TO FACTS: CONCLUSIONS SHOULD NOT BE CONCLUSORY

Avoid stating only that the legal standard applies or reciting the test:

- **Example: conclusory conclusion:** "No convincing evidence to the contrary having been presented, and the record supporting our findings, the Department concludes that the application should be granted..."
- Court: "The [agency] merely stated in a conclusory fashion that the proposal would result in significant impacts and that these impacts could not reasonably be mitigated." *Cougar Mountain Assocs. v. King Cnty.*, 111 Wn.2d 742, 743 (1988)
  - Avoid stating only that the legal standard applied

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APPLICATION OF LAW TO FACTS: EXAMPLE

Do: Analyze the law by applying it to the facts

- E.g., "The proposal would result in the following significant impacts.... The evidence shows that the impacts could not be mitigated because.... Therefore, the statutory requirements are/are not

Perfection is not required, but deference goes only so far

- Absence of a finding – Court will presume that if a factfinder omits a particular finding of fact on a disputed issue, the party with the burden of proof failed to meet its burden. *State v. Rose*, 175 Wn.2d 10 (2012).
- But make it easier for advocates and courts by making all the necessary findings – even if the finding is "I find the [party with burden to prove this fact] failed to meet their burden." Explain why giving their evidence/testimony no weight

22

22

LEGAL ANALYSIS: STANDARD OF PROOF

If there is a debate over what standard applies, resolve what it is.

If you decide that it is a lower standard than a party is advocating, consider stating that the evidence would meet the higher standard as well, if it would, to avoid a remand.

23

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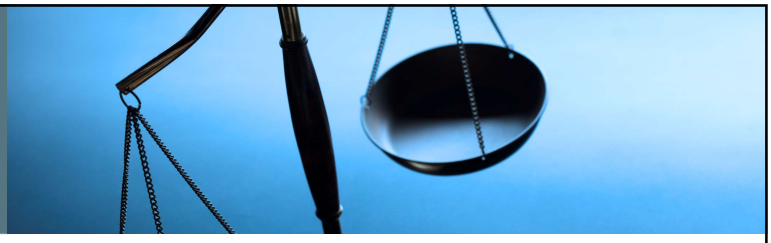
ADDRESSING ALL THE ISSUES:



RCW 34.05.570(3)(f):

Agency order can be set aside if "the agency has not decided all issues requiring resolution by the agency"

- APA does not explain how to apply this standard, but courts have interpreted it to require that an agency decide an issue before a reviewing court can reach the merits of a party's legal position on appeal
- Each issue raised in the proceeding must be addressed
  - Issues required to be determined by statute
  - Issues raised by parties
- Reviewing court cannot "substitute its judgment" for the agency if no judgment made in the first place
- Failure to do so can result in remand for further

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ADDRESSING THE ISSUES RCW 34.05.570(3)(f)

Why

- "Where an issue is not decided but remains relevant to the challenged action, the appropriate remedy is to remand for the agency to exercise its judgment and make a decision." *Puget Soundkeeper All. v. Pollution Control Hrgs. Bd.*, 30 Wn. App. 2d 360 (2024)

Example

- Ruling: "The Board summarily ruled that LIHI failed to carry its burden to show inconsistency between the provision of Lakewood's Plan and the requirements of the Pierce County CPP...But where, as here, the Board presents no basis for its decision, we cannot review its analysis."
- Remedy: Because we cannot review the Board's analysis on issue number 11 under the summary order presented, we remand for more thorough findings and articulation of the basis for the ruling.

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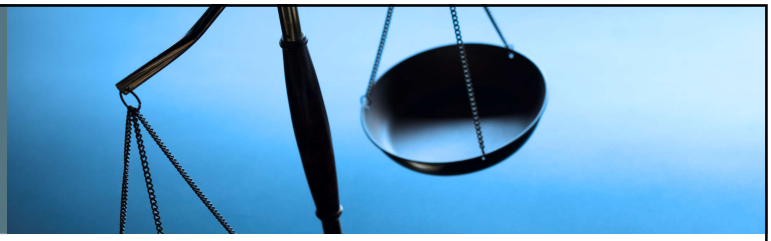
APPLYING THE LAW: SHOW YOUR WORK



RCW 34.05.570(3)(f):

Agency order can be set aside if "the agency has not decided all issues requiring resolution by the agency"

RCW 34.05.570(3)(i): Arbitrary and capriciousness: Willful and unreasoning action in disregard of facts and circumstances

- Actually apply the law to the facts
- E.g., multi-factor test
  - Apply each factor to the factual findings and determine whether each is or is not met
    - Don't conclusorily state they are or are not met
    - This also requires factual findings for each factor or element
  - Failure to do so could be deemed a failure to decide all issues (remand), or worse, arbitrary and capricious for failure to give due consideration to all facts and circumstances (reversal)

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EXAMPLE: ADDRESSING THE ISSUES IN A MULTI-FACTOR TEST RCW 34.05.570(3)(f) AND (i)

Law – WAC 192-320-036(4)(c) (Whether to waive delinquent tax rate)

- (c) In determining if an employer acted in good faith and if application of the delinquent tax rate would be inequitable, the department may consider all facts surrounding the delinquent reports, taxes, penalties and interest.
- (i) The department will consider the following factors when determining if an employer acted in good faith and if application of the delinquent tax rate will be inequitable. No single factor is conclusive. The factors include, but are not limited to:
- (A) Whether there were events beyond the employer's reasonable control;
- (B) Whether departmental error led to the delinquency;
- (C) Whether the employer made only isolated errors instead of repeated errors;
- (D) If the employer was a domestic service employer under RCW 50.04.160;
- (E) Whether the employer, upon learning of the delinquency, made a diligent effort to pay overdue taxes, penalties, and interest and file overdue reports within ninety days;
- (F) The amount of taxes, penalties and interest an employer failed to pay compared to the amount of taxes an employer reported and paid during the same time period;
- (G) The number of employees an employer failed to report compared to the number of employees an employer reported during the same time period;
- (H) The additional amount of taxes, penalties, and interest resulting from the application of delinquent tax rates compared to the amount of taxes, penalties, and interest the employer failed to pay originally.

Improper Application

- "Suffice it to say, none of these factors is met."

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RESEARCH AND PROOFREAD

Research developing areas of the law, especially if a party is pro se or proceeding is non-adversarial.

Don't just copy and paste! If using an order bank or modifying a prior order, be sure to verify that key legal citations are still valid.

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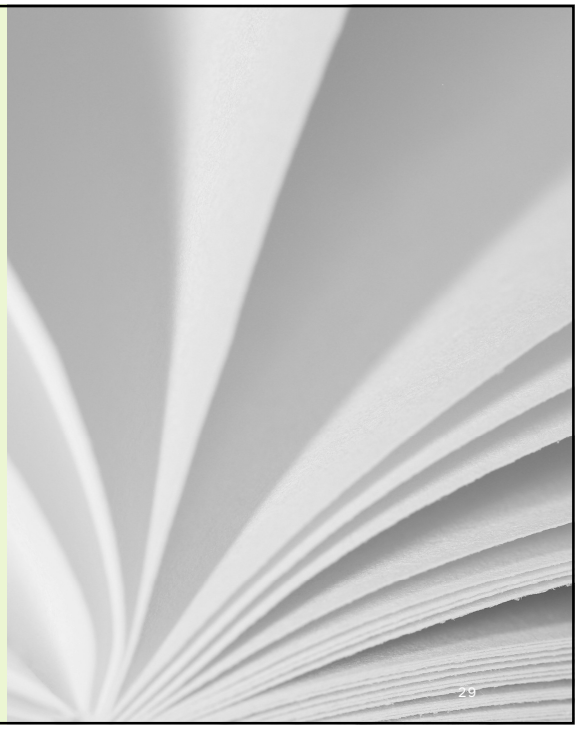
MISC.



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WHAT FACTORS MIGHT THE AGO CONSIDER WHEN DEFENDING A DECISION (OR APPEALING A SUPERIOR COURT REVERSAL)?

- Is the record sufficient? Bad records make bad law
- Are the findings thorough? Inadequate findings can make bad law
- Benefit of favorable decision vs. risk of adverse decision and attorney fees on appeal
- Reputational risk

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ISSUE EXAMPLE: JURISDICTION

- Procedural errors ≠ jurisdictional errors
- An agency order "is void only when the Department lacks personal or subject matter jurisdiction." *Marley v. Dep't of Lab. & Indus.*, 125 Wn.2d 533, 542 (1994)
- SMJ is the authority to adjudicate the *type* of controversy
- All other defects or errors go to something else
- E.g., *Colasurdo v. Dep't of Lab. & Indus.*, 25 Wn. App. 2d 154 (2023)
  - L&I allowed a worker's compensation claim more than a year after the worker's injury, despite statute requiring claims to be filed within one year
  - When employer did not appeal the improper allowance within the time limitation, allowance became final
  - Allowance was an error of law, but not "void," and thus had to be appealed within the time limitation

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QUESTIONS?

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THANK YOU

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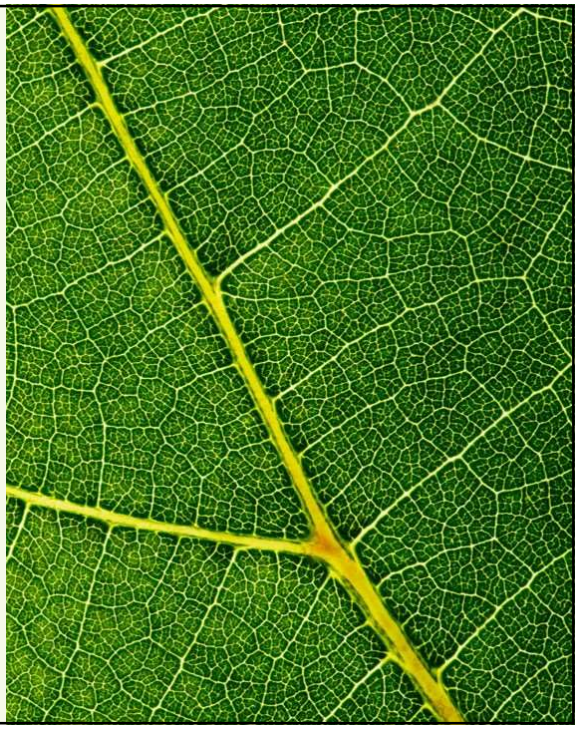

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Suzanne Becker, Assistant Attorney General, Government Compliance and Enforcement Division, Office of the Attorney General

Suzanne Becker has been with the Government Compliance and Enforcement (GCE) Division in the AGO since 2012. For her first five years with the AGO, Suzanne represented the Department of Health and medical boards and commissions in administrative adjudicative proceedings. In 2018, Suzanne transitioned to the Advice and Compliance Section of GCE, and in that role advises multiple state agencies, including the Gambling Commission, Department of Financial Institutions, and the Office of Corrections Ombuds. At the AGO, Suzanne serves as the Administrative Procedure Act (APA) topic leader for the Administrative Law Forum. Prior to joining the AGO, Suzanne first worked for the City of Vancouver and Kittitas County. Suzanne graduated with a B.S. in chemical engineering from Stanford University and a M.S. in environmental studies from Yale University. After working in the private sector for almost eight years, she obtained her law degree from Lewis and Clark Northwestern School of Law in 2008.

Administrative Procedure Act Case Law Update

Suzanne Becker, AAG

Government Compliance and Enforcement Division, Office of the Attorney General

1

Breakdown of the Numbers

- December 2022 – October 2024
  - 5 Supreme Court cases
- August 2023- October 2024
  - 14 Published Court of Appeals cases
    - 6 Division I
    - 6 Division II
    - 2 Division III

- December 2022 – July 2023
  - 10 Published Court of Appeals cases
- December 2022 – October 2024
  - 46 total Unpublished Court of Appeals cases

Any views and opinions expressed are mine alone. This presentation is not an official opinion of the Office of the Attorney General

2

Washington Supreme Court Cases

3

City of Tacoma, et al, v. Dep't of Ecology

- Facts
  - Northwest Environmental Advocates (NWEA) petitioned Ecology to initiate rulemaking to include nitrogen discharge limits in their regulations. Ecology denied NWEA's petition, and in the denial letter, Ecology made a commitment to NWEA that it "will, through the individual permitting process ... [s]et nutrient loading limits at current levels from all permitted dischargers in Puget Sound...."
- Procedural History
  - Petitioners filed a petition for judicial review and declaratory judgment arguing that the commitment in the denial letter was a rule and asking that it be invalidated as ECY did not properly adopt the "rule" under the APA.
  - Superior court held that the commitment in the denial letter was an improperly promulgated rule. ECY appealed.
  - COA affirmed the superior court. ECY appealed.
- Held
  - The Supreme Court reversed the COA. The commitment in the denial letter is not a directive of "general applicability" as it did not eliminate staff discretion or prevent a case-by-case analysis of the permit holder's operations when issuing permits.

City of Tacoma v. Dep't of Ecology, 555 P.3d 390 (Wash. 2024)

4

King County v. Friends of Sammamish Valley

- Facts
  - King County performed 2016 study of the wine, brewery and distilleries (WBD) operating in Sammamish Valley which determined that of the 54 WBD currently operating, only 4 had permits. A 2018 action report then made specific zoning code recommendations, including a number of zoning changes in rural and agricultural areas and licensing requirements for alcoholic businesses in these areas.
  - Based on the zoning recommendations, King County passed Ordinance 19030. Prior to passage, county staff completed a SEPA checklist and determined that the Ordinance was a nonproject action with a threshold determination of nonsignificance (DNS)
  - Friends of Sammamish Valley (FOSV) filed a petition for review. Based on motions for summary judgment, GMHB determined the County failed to comply with SEPA and GMA, and invalidated portions of the Ordinance.
- Procedural History
  - The county appealed. On direct review, the Court of Appeals reversed the Board's order of invalidity and remanded for entry of a finding of compliance with the GMA and SEPA. FOSV appealed.
- Held
  - Reversed COA and reinstated the GMHB order. In its Order, GMHB specifically acknowledged what was necessary to invalidate the Ordinance by 1) entered findings of fact on how the Ordinance and the SEPA checklist failed to comply with SEPA and GMA provisions, 2) remanded to the County with a schedule to come into compliance, and 3) included findings and conclusions explaining how the Ordinance substantially interferes with the goals of the GMA.
  - GMHB established sufficient facts showing that the County failed to consider potential environmental impacts in its SEPA checklist, including a failure to disclose potential impact for expanding WBDs into rural area not previously allowed, etc.
  - The COA erred in considering a later checklist that was not part of the County's original DNS. The court must consider the first checklist that was used in making the threshold determination and that was reviewed by GMHB.

King Cnty. v. Friends of Sammamish Valley, 556 P.3d 132 (Wash. 2024)

5

Benton County Water Conservancy Bd. V. Dep't of Ecology

- Facts
  - Benton County Water Conservancy Board (Board) filed an administrative division request asking ECY to confirm division of water rights of private individuals.
  - ECY denied the request on several technical deficiency grounds, and also noted that it was "unusual and outside the scope" of the Board's authority to file the documents. ECY also outlined the process for the private individuals to use
- Procedural History
  - Board sought judicial review of ECY's denial.
  - Superior court granted judicial review, and the Board moved for summary judgment. ECY argued the Board lacked standing and the factual problems with the document. Superior court determined the Board had standing, and granted summary judgement to the Board.
  - The Court of Appeals reversed the superior court and held the Board lacked standing to challenge ECY's action.
- Held
  - Affirmed the COA holding the Board lacks standing to challenge the administrative confirmation of division of water rights.
  - The Board has not demonstrated how it suffered injury-in-fact from ECY's refusal to accept certain administrative division forms pursuant to the policy. The Board suffered no prejudice and its interests would not be redressed by invalidating the policy.

Benton Cnty. Water Conservancy Bd. v. Washington State Dep't of Ecology, 546 P.3d 394 (Wash. 2024)

6

Kenmore MHP v. City of Kenmore

- Facts
  - On April 18, 2019 the City of Kenmore published an Ordinance. On June 14, 2019 MHP Challenged the Ordinance and filed a petition for review with GMHB. Due to traffic conditions, personal service on the City did not happen until June 17, 2019. June 17 was the 60th day following publication, but rule required service same day as GMHB.
  - GMHB granted city's motion for summary judgment and dismissed MHP's petition for review challenging city land-use ordinance, based on determination that property owner did not substantially comply with service requirements. Applied *Your Snoqualmie Valley* balancing test to mean each prong must be met and that a finding of prejudice is not required.
- Procedural History
  - The Superior Court reversed and remanded to GMHB. City appealed.
  - The COA reversed the Superior Court and upheld the GMHB decision. Property owner appealed
- Held
  - Property owner substantially complied with service requirements. GMHB's failure to correctly apply test for substantial compliance and failure to consider prejudice as a factor was arbitrary and capricious in violation of APA.
  - The substantial compliance test in *Your Snoqualmie Valley* is a balancing test that considers prejudice and favors decisions on the merits.

Kenmore MHP LLC v. City of Kenmore, 528 P.3d 815, 816 (Wash. 2023)

7

Nw. Pulp & Paper Ass'n v. Dep't of Ecology

- Facts
  - Department of Ecology added a new section in its national pollutant discharge elimination system (NPDES) permit writer's manual that addressed release of polychlorinated biphenyls (PCB) into state waterways.
  - NW Pulp & Paper petitioned for review and declaratory judgment under Administrative Procedure Act (APA), seeking to invalidate the manual, arguing that it was a rule requiring adoption in compliance with APA.
- Procedural History
  - Superior court dismissed petition and denied request for declaratory judgment on the basis that NW Pulp & Paper failed to show he new section was a rule under the APA. NW Pulp & Paper appealed.
  - The COA affirmed superior court. NW Pulp & Paper appealed.
- Held
  - The new section of permit writer's manual provides guidance for permit writers and does not have any independent regulatory effect. Therefore, it does "not constitute a directive of general applicability and is not a rule as defined by the APA."

Nw. Pulp & Paper Ass'n v. Dep't of Ecology, 200 Wash. 2d 666, 520 P.3d 985 (2022)

8

Am. Prop. Cas. Ins. Ass'n v. Kriedler

- Facts
  - Office of Insurance Commissioner (OIC) issued a data call to 123 insurers operating in Washington. The Association objected to the data call and demanded an administrative hearing on behalf of its Washington members
  - The Association also asked that the administrative hearing be before an OAH ALJ instead of the internal OIC ALJ. The OIC ALJ first denied the request by email, then after a motion for reconsideration, by written order.
- Procedural History
  - The Association filed a writ of mandamus with the Washington Supreme Court asking that OIC be ordered to transfer the hearing to an OAH ALJ.
- Held
  - Affirmed that statutory writ of mandamus "does not apply to state agency action reviewable under chapter 34.05 RCW. " RCW 7.16.360. Where the APA provides a remedy, mandamus is not appropriate.
  - Otherwise, "Anytime a party disagreed with an agency's "interlocutory" order, it would not need to use the exclusive means of review via the APA but could simply use mandamus to avoid that process. This is not the purpose of a writ of mandamus."
  - The APA seeks to ensure reliability and predictability in agency decisions and efficiency in the adjudicative process. Permitting a party to circumvent the process every other party must pursue directly conflicts with the goal of consistency and efficiency, and will likely encourage others to jump the queue, ultimately making this "extraordinary" writ effectively ordinary.

Am. Prop. Cas. Ins. Ass'n on Behalf of Washington-Licensed Members v. Kreidler, 200 Wn. 2d 654, 520 P.3d 979 (2022)

9

Published Court of Appeal Cases

September 2023-October 2024

10

Glacier NW, Inc. V. WA Dep't of L&I and Int'l Union of Operating Engineers, Local 302

- Facts/Procedural History
  - Glacier Northwest subcontracted to receive, handle and dispose of tunnel spoils or clean soil from the Alaskan Way Viaduct tunnel construction site. The disposal occurred at an off-site location. After a complaint and investigation, L&I determined Glacier failed to comply with Prevailing Wage Act (PWA) for the work at the disposal site.
  - Glacier appealed to L&I's OAH. Both Glacier and L&I moved for summary judgment. The L&I ALJ granted summary judgment in favor of Glacier, finding that after the removal of the soil WSDOT did not control over what happened to it, i.e. that the disposal work off-site was not a public work. L&I appealed the initial order to L&I's Director.
  - L&I Director reversed the initial order, granting summary judgment to L&I. The final order found that the contracts demonstrate that the disposal was directly related to the public work, and that it was essential to the tunnel project.
  - Glacier petitioned for review of the final order, and the case was transferred directly to COA.
- Held
  - Affirmed the final order. Applying principles of statutory construction, the PWA applies to the work Glacier undertook offsite to dispose of the soil pursuant to the broader SR99 project.
  - Court rejected argument that emails from L&I and WSDOT staff opining that PWA would not be appropriate to the offsite work are controlling interpretations. "[P]ersonal opinions on prevailing wages, while informed, are in no way binding on L&I or determinative of the issue". It is the L&I director who has the ultimate responsibility of administering the PWA.

Glacier Nw., Inc. v. Washington State Dep't of Lab. & Indus., 555 P.3d 896, 900 (Wash. Ct. App. 2024)

11

WA Interpreters v. Washington Pub. Emp. Rels. Comm'n

- Facts/Procedural History
  - Following a statutory amendment, L&I was required to update its language interpreter services by September 2020. L&I communicated the work scheduling option it selected to the interpreters through various listserv and messaging systems. L&I sent out multiple messages about the planned changes between December 2018 and October 2020.
  - In November 2020, WA Interpreters filed a representation petition with PERC seeking certification as the exclusive bargaining representative of language providers.
  - In 2021 L&I continued to send updates to the interpreters, and the new system went live on April 12,2021.
  - AS Interpreters filed an unfair practice claim on March 30, 2021 alleging L&I unfairly changed the manner in which interpreters schedule appointments and were paid by L&I.
  - After a hearing, the PERC Examiner entered a final order that found that the new scheduling system was part of the dynamic status quo that did not interfere with collective bargaining rights. L&I took numerous steps to roll out the system and notify the interpreters of the developments.
  - WA Interpreters filed a petition for review. Superior court affirmed the PERC final order. WA Interpreters appealed.
- Held
  - Affirmed the superior court upholding the PERC decision. L&I clearly communicated the decision to change and implement the system before WA Interpreters filed their representative petition,.
  - PERC's Final Order (1) did not erroneously interpret or apply the law, (2) was not inconsistent with agency rules, (3) was supported by substantial evidence, and (4) was not arbitrary and capricious.

WA Interpreters v. Washington Pub. Emp. Rels. Comm'n, 30 Wn. App. 2d 801, 546 P.3d 1054 (2024)

12

Stevens v. Dep't of Health, Nursing Care Quality Assurance Comm'n

- Facts
  - DOH suspended Steven's nursing license for unprofessional conduct after holding an administrative hearing
- Procedural History
  - Stevens filed a petition for judicial review, but failed to have the administrative record filed.
  - DOH filed a motion to dismiss.
  - Before the hearing on the motion to dismiss, Stevens noted the action for trial
  - Superior Court granted the motion to dismiss as the court had not received the administrative record and the case was not ready to be scheduled per court rules
- Held
  - As DOH was the party that caused the delay in producing the record and Stevens did note the case for trial before the motion to dismiss in a manner that met CR 41(b)(1), superior court erred in dismissing Stevens' petition.

Stevens v. Dep't of Health, Nursing Care Quality Assurance Comm'n, 30 Wn.App. 2d 434, 545 P.3d 380 (2024)

13

Puget Soundkeeper Alliance v. Pollution Control Hearings Bd.

- Facts/Procedural History
  - ECY issued the 2020 Industrial Stormwater General Permit under the NPDES and state discharge program. Like prior permits, ECY requires that transportation facilities must obtain coverage under the 2020 permit and the permit requirements apply to the entire facility, not limited portions.
  - Several industry parties appealed the 2020 permit raising multiple issues.
  - PCHB granted summary judgment on Issue 11, and declared issue 12 moot as a result. For Issue 11, PCHB concluded as a matter of law that the 2020 permit was unambiguous and only applied to limited portions of the covered transportation facilities.
  - Respondents Puget Soundkeeper Alliance (PSA) & ECY appealed the PCHB's order, and argued that the permit applied to the entire transportation facility. By agreement of the parties, the case was transferred to the court of appeals for direct review.
- Held

  The court reversed PCHB's final order on issues 11 and 12, finding:
  - The general NPDES permit is to be interpreted as regulation rather than a contract;
  - The plain language of permit encompassed entirety of any transportation facility conducting vehicle maintenance and other specified operations;
  - Ecology's interpretation of permit language was entitled to deference to the extent of any ambiguity; and
  - Remand was necessary to allow PCHB to grant summary judgment on legal issue 11 in favor of PSA & ECY, and reach the merits of legal issue 12

Puget Soundkeeper All. v. Pollution Control Hearings Bd., 30 Wn. App. 2d 360, 545 P.3d 333, review denied sub nom. Puget Soundkeeper All. v. Pollution Control Hearings, 554 P.3d 1222 (Wash. 2024)

14

Marie E. Romero, et al., v DSHS

- Facts/Procedural History
  - Romero and Ayele were owners of adult family homes who were credentialed as nursing assistants. Both had findings that they each neglected a vulnerable adult, DSHS placed their names on its vulnerable adult abuse registry.
  - Under DSHS rules, neither was eligible to petition for removal from the list. Therefore, after both petitioned for removal, DSHS denied their request without a hearing or any other proceedings.
  - Both timely petitioned for review, and the cases were consolidated and certified for direct review.
- Held
  - DSHS did not exceed its statutory authority,
  - Under current Washington Supreme Court precedent, DSHS's regulations did not violate procedural due process,
  - DSHS rules did not violate substantive due process or equal protection, and
  - The rules are not arbitrary and capricious. In addition, DSHS did not take arbitrary or capricious actions in Romero and Ayele's cases.

Romero v. Dep't of Soc. & Health Servs., 30 Wn. App. 2d 323, 544 P.3d 1083 (2024)

15

Sound Ford, Inc. v. Central Puget Sound Reg'l Transit Auth. d/b/a Sound Transit

- Facts
  - Sound Ford applied for reimbursement claims it believed it was eligible for under state and federal law. Sound Transit denied the claims.
  - Sound Ford administratively appealed and requested a hearing before Sound Transit's hearing examiner.
  - At the hearing, Sound Transit argued that it was entitled to deference and the hearing examiner was required to uphold its determination unless it was unsupported by substantial evidence.
  - Sound Ford argued that the appropriate standard for a fact finding hearing is for the hearing examiner to determine the facts by a preponderance of the evidence.
- Procedural History
  - In a 45 page order, the hearing examiner agreed with Sound Transit and used the substantial evidence standard, but also found that applying the preponderance of the evidence would not change his decision.
  - Sound Ford filed a petition for judicial review. The matter was transferred to the Court of Appeals on direct review by agreement of the parties.
- Held
  - The hearing examiner was the presiding officer, not the superior court or reviewing officer under the APA. The presiding officer is tasked with making factual findings established by the evidence in the record, weighing credibility of the evidence and demeanor of witnesses, and issuing conclusions of law.
  - As the presiding officer entered a substantial order that also addressed preponderance of the evidence, the court was able to "independently determine" whether the officer's use of an erroneous standard supported relief under the APA.

Sound Ford, Inc. v. Cent. Puget Sound Reg'lTransit Auth., 30 Wn. App. 2d 301,, 544 P.3d 1079 (2024) Published in part

16

Headworks Handcrafted Ales v. WA State Liquor & Cannabis Bd.

- Facts/Procedural History
  - Liquor and Cannabis Board (LCB) issued an administrative notice to Headworks due to its failure to comply with the pandemic related mask mandate issued by DOH in 2020. LCB relied in part on a rule that stated licensees or employees may not "[e]ngage in or allow behavior that provokes conduct which presents a threat to public safety."
  - Headworks requested an administrative hearing. Headworks did not contest the material facts alleged in the complaint, and both parties filed motions for summary judgment.
  - The ALJ issued an initial order that granted LCB's MSJ and affirmed the complaint. Headworks filed a petition for review of the initial order. LCB affirmed the initial order and adopted as the final order. Headworks timely appealed.
- Held
  - LCB has authority under Title 66 and WAC 314-11-015 to enforce violations of the DOH's mask mandate.
  - LCB's interpretation of the WAC not overly broad. The court also found that it was indisputable that threats to public safety come in all shapes and sizes; the phrasing of the delegation of authority from our state legislature to the LCB is inherently broad and flexible so as to encapsulate and address unforeseeable events, such as those which unfolded as a result of the COVID-19 pandemic.
  - LCB also was not arbitrary and capricious where LCB received a total of 7 public complaints, visited headworks, spoke with employees and the manager, and issued a written warning that included guidance on the mask mandate for employers.

Headworks Hand Crafted Ales, Inc. v. Washington State Liquor & Cannabis Bd., 29 Wn. App. 2d 460, 540 P.3d 863, review denied sub nom. Headworks Brewing v. Washington State Liquor & Cannabis Bd., 547 P.3d 901 (Wash. 2024)

17

Advocates For A Cleaner Tacoma, Et Al., Appellants V. Puget Sound Clean Air Agency

- Facts/Procedural History
  - Puget Sound Energy (PSE), submitted a Notice of Construction Order of Approval (NOC Order) permit application to Puget Sound Clean Air Agency (PSCAA) for a natural gas facility. PSCAA reviewing engineer, signed the notice of construction (NOC) order of approval.
  - Advocates for a Cleaner Tacoma (ACT) and the Puyallup Tribe separately appealed the NOC order to PCHB, who consolidated the two appeals.
  - One of the issues raised by both ACT and the Tribe is that the NOC Order is invalid because it was issued by PSCAA staff rather than by its board. PSE filed a partial motion to dismiss.
  - PCHB granted the partial motion to dismiss, holding that under a plain reading, air pollution control officers, in additional to an air agency board, have the authority to issue orders of approval.
  - ACT and the Tribe appealed.
- Held
  - Because the WCAA authorizes PSCAA staff members to issue orders of approval, the PCHB did not err in dismissing the Appellants' ultra vires claim on partial summary judgment.
  - In the unpublished opinion, the Court also found no error in the PCHB's conclusion that the SEIS was adequate or in the PCHB affirming the NOC Order of Approval

Advocs. for a Cleaner Tacoma v. Puget Sound Clean Air Agency, 29 Wn. App. 2d 89, 540 P.3d 821 (2023)

18

Seasons Hospice And Palliative Care Of Snohomish V Dep't of Health

- Facts/Procedural History
  - Seasons applied for a certificate of need to operate two new Medicare and Medicaid certified hospice agencies as well as offer hospice services. DOH denied the application on the basis that it relied on a higher average length of stay (ALOS) rate which meant that Seasons had not met its burden to prove that a lower ALOS was financially feasible.
  - Seasons requested a review hearing. At the review hearing, Seasons attempted to argue that its proposal was financially feasible even under a lower ALOS. The health law judge (HLJ) excluded this evidence.
  - The final order found that the ALOS used was too high to be financially feasible absent further explanation. The final order was silent on whether Season's proposed project would be financially feasibly under a lower ALOS.
  - Seasons petitioned for review, and the case was transferred to the COA on direct review.
- Held
  - The court gave DOH "substantial deference" and held that DOH's rejection of Seasons' ALOS was supported by the evidence and not arbitrary and capricious.
  - However, DOH denied Seasons an opportunity, available under the regulations, to explain how it could meet the financial feasibility requirements under a lower ALOS. DOH also failed to address in its final order whether Seasons' project was financially feasible. When an agency fails to decide an issue or supplies no reason for a decision, RCW 34.05.570(3)(f) provides authority for remand for further proceedings.
  - Remanded to allow Seasons to supplement its application with evidence and explanation as to how it could meet financial feasibility requirements under a lower ALOS.

Seasons Hospice & Palliative Care of Snohomish Cnty. v. Washington State Dep't of Health, 28 Wn. App. 2d 842, 538 P.3d 965 (2023)

19

RCCH Trios Health, LLC, Appellant V. Dep't of Health

- Facts
  - DOH released a methodology that showed the net need for percutaneous coronary interventions (PCIs) in 14 planning areas. The need in Trios's planning area was 182, which was less than the 200-procedure threshold for new certificates of need.
  - Despite the need not meeting the threshold, Trios applied for a certificate of need to perform PCIs, and attempted to introduce data from different data sources to demonstrate the net need was over the threshold.
  - DOH concluded it could not consider Trios's data sources and denied the application.
  - Trios requested a review hearing. Kadlec (the only other hospital in the planning area performing PCIs) was allowed to intervene and filed a motion for summary judgment.
  - The HLJ granted summary judgment and issued a Final Order that concluded that the sources offered by Trios did not meet the definition required by WAC. Trios filed a petition for judicial review.
- Held
  - The court affirmed the review officer's final order, finding that:
    - The data offered by Trios did not fall within the definition of PCIs in rule and therefore could not be counted in the determination of need, and
    - DOH's refusal to consider Trios's proffered data was not contrary to law because it was based on a reasonable interpretation of DOH's rules.

RCCH Trios Health, LLC v. Dep't of Health, 28 Wn. App. 2d 534, 536 P.3d 1189 (2023), review denied, 544 P.3d 27 (Wash. 2024)

20

Frank DeYoung v. City of Mount Vernon and Dep't L&I

- Facts
  - DeYoung applied for occupational disease benefits, arguing that the 2018 amendments to the Industrial Insurance Act apply retroactively to his claim for work related Post-Traumatic Stress Disorder, which manifested before the amendments became effective. L&I denied the application.
  - Board of Industrial Insurance Appeals (BIIA) affirmed L&I denial of application for benefits for work-related PTSD.
  - DeYoung petitioned for review
- Procedural History
  - Superior court affirmed BIIA order. DeYoung appealed.
- Held
  - Affirmed the BIIA order. The 2018 amendment only applies prospectively.
  - The law at time PTSD manifested, and not law in effect at time of filing, governed determination of whether DeYoung's PTSD constituted occupational disease for which he could recover benefits.

DeYoung v. City of Mount Vernon, 28 Wash. App. 2d 355, 536 P.3d 690 (2023)

21

Spokane County v. Growth Mgmt. Hearings Bd.

- Facts/Procedural History
  - Four separate administrative actions were originally brought against Spokane County (the County) between 2005 and 2014 by the various respondents (Futurewise). The cases were consolidated. After GMHB found that the County was not compliant with the GMA, the parties entered into settlement negotiations and eventually agreed to file stipulated motions to dismiss.
  - GMHB granted the first stipulated dismissal but refused to grant subsequent dismissals, after concluding that RCW 36.70A.330, which requires the GMHB to hold a compliance hearing after a finding of non-compliance, precluded the GMHB from dismissing the complaint.
  - The County appealed the GMHB's refusal to enter the stipulated order of dismissal. Superior Court certified appeal to COA
- Held
  - As a matter of first impression, GMA did not require GMHB to hold a compliance hearing after county and protesters settled their dispute regarding county's noncompliance with the GMA. Reading the statutory "shall" to require a compliance hearing even after the parties have settled their dispute raises concerns of impartiality, justiciability, and mootness.
  - Without a controversy, GMHB would be left to determine issues of compliance on its own initiative, raising concerns that GMHB was acting beyond its quasi-judicial powers.

Spokane Cnty. v. Growth Mgmt. Hearings Bd., 28 Wash. App. 2d 86, 534 P.3d 1203 (2023)

22

Peterson, V. Dep't of Soc. & Health Servs.

- Facts
  - Peterson was a RN and worked in hospice care. Peterson evaluated a patient in the patient's home to determine hospice care eligibility. As part of the intake process Peterson asked to see all the patient's medications to document them and ensure there was at least a five-day supply.The patient's daughter asserted that Peterson opened a bottle of the patient's prescription pain medication and put some of the pills into her laptop bag. The daughter reported Peterson.
  - Adult Protective Services (APS) made an initial finding that Peterson financially exploited a vulnerable adult. Peterson timely requested an administrative hearing.
  - The hearing was largely a "credibility battle" between the daughter and Peterson. Both testified and also participated in a visual demonstration of how the parties were positioned during the alleged incident. Peterson also demonstrated her method of handling pill bottles to conduct a count.
  - The ALJ issued an initial order that found Peterson did not financially exploit the patient and reversed the initial APS finding.
- Procedural History
  - DSHS petitioned for review with the Board of Appeals. The reviewing officer reversed the initial order and affirmed the APS finding in the Final Order.
  - Peterson timely petitioned for judicial review. The petition was transferred to the Court of Appeals, Div. II.
- Held
  - Reviewing officer failed to give "due regard" to the ALJ's observation of witnesses. Under the plain language of RCW 34.05.464(4) and WAC 388-02-0600(1), the reviewing officer must give the requisite or appropriate attention or respect to the ALJ's ability to observe witnesses, as should be illustrated by their action or conduct.
  - The Court adopted the reasoning of Division Three in *Crosswhite* and *Quilang* and agreed that, to effectuate meaningful appellate review, an administrative reviewing judge must explain their disagreement when they reverse an ALJ's finding of fact.

Peterson v. Dep't of Soc. & Health Servs. , Adult Protective Servs., 28 Wn. App. 2d 16, 534 P.3d 869 (2023)

23

Burbank Irrigation District #4 v. Dep't of Ecology

- Facts
  - Burbank Irrigation District #4 applied to the Franklin County Water Conservancy Board (Board) to amend one of its water rights certificates to facilitate sale to Pasco. The Board granted the application conditioned on ECY approval.
  - Prior to issuing the amendment, ECY must be satisfied that the additional well taps the same body of public groundwater as the original well, the additional well will not enlarge the right conveyed by the original permit or certificate, and other existing rights will not be impaired. ECY denied the application. Burbank appealed to PCHB.
  - PCHB granted ECY's motion on summary judgment, concluding that the amendment and transfer would result in enlarging the water rights conveyed by the certificate.
- Procedural History
  - Burbank then appealed the decision to the superior court, which reversed PCHB's order on summary judgment and granted summary judgment for Burbank, overturning the decisions of Ecology and the PCHB and reinstating the Board's decision.
- Held
  - There are genuine issues of material fact concerning the scope and characteristics of rights conveyed by the certificate. Both the PCHB and the superior court erred in deciding this disputed factual issue on summary judgment. Remanded to PCHB for additional proceedings.
  - Additionally, in its appellate capacity, the superior court erred in deciding factual and legal issues beyond those determined by the PCHB and entering judgment in favor of Burbank.

Burbank Irrigation Dist. #4 v. Washington Dep't of Ecology, 27 Wn. App. 2d 760, 534 P.3d 833 (2023)

24

Remainder 2023 Court of Appeals Published Cases

- *City of Olympia v. W. Washington Growth Mgmt. Hearings Bd.*, 27 Wn. App. 2d 77, 531 P.3d 816 (2023)
- *Greenfield v. Dep't of Lab. & Indus.*, 27 Wn. App. 2d 28, 531 P.3d 290 (2023), review denied, 540 P.3d 774 (Wash. 2024)
- *Dep't of Lab. & Indus. v. A Place for Rover Inc.*, 26 Wn. App. 2d 746, 530 P.3d 272, review denied, 536 P.3d 185 (Wash. 2023)
- *Zimmerly v. Columbia River Gorge Comm'n*, 26 Wn. App. 2d 265, 527 P.3d 84, review denied, 534 P.3d 793 (Wash. 2023)
- *Alstom Power, Inc. v. Dep't of Revenue*, 26 Wn. App. 2d 36, 526 P.3d 855 (2023)
- *Envolve Pharmacy Sols., Inc. v. Dep't of Revenue*, 25 Wn. App. 2d 699, 524 P.3d 1066, review granted sub nom. Envolve Pharmacy Sols., Inc. v. State of Washington, Dep't of Revenue, 532 P.3d 152 (Wash. 2023)
- *Prime Therapeutics LLC v. Washington State Off. of Ins. Comm'r*, 25 Wn. App. 2d 674, 524 P.3d 720 (2023)
- *Ladyhelm Farm, LLC v. Washington State Liquor & Cannabis Bd.*, 25 Wn. App. 2d 658, 524 P.3d 700 (2023)
- *Whitehall v. Washington State Emp. Sec. Dep't*, 25 Wn. App. 2d 412, 523 P.3d 835 (2023)
- *Quilang v. Dep't of Soc. & Health Servs.*, 25 Wn. App. 2d 164, 527 P.3d 73 (2022)

25

Questions?

26

Commissioner Jonathan Lack, King County Superior Court

Jonathon Lack presently serves as a Ex-Parte Commissioner for the King County Superior Court (WA). Prior to joining the court in 2019, he served as six years as a Commissioner for the Thurston County Superior Court and for five years as a Family, Children's, and Probate Master for the Superior Court, and as a Magistrate for the District Court, in Anchorage, Alaska. Jonathon holds a BA in Political Science from The George Washington University, and his JD from the University of Richmond, School of Law. He completed the Senior Executives in State and Local Government program at the Harvard Kennedy School where he was a David Bohnett Fellow and has his DEI Certificate from the University of Washington, Foster School of Business. Jonathon is a former Chair of the Board of Directors of the Alaska Humanities Forum and the Anchorage Youth Court and former member of the Board of Directors of the Pride Foundation and the International Association of LGBTQ Judges. In 2023 he received the President's Award from the Washington Q-Law Bar Association. Jonathon teaches as adjunct faculty at the Tacoma Community College and an affiliate instructor at the University of Washington School of Law. He is a member of the Alaska, Virginia, and Washington State Bar Associations.

Procedural Due Process: Equity in Hearings

Network of Adjudicatory Agencies

November 6, 2024

Commissioner Jonathon Lack
King County Superior Court (He/Him)

1

Learning objectives

- As a result of this session, you will be able to:
  - Understand the concept of procedural due process
  - Distinguish between procedural due process and equity
  - Identify ways to create perceptual equity
  - Identify ways to assure equitable outcomes

2

What is Procedural Due Process?

- Procedural due process is a legal principle that ensures the government follows fair procedures before depriving a person of live, liberty, or property.
  - Notice
  - Opportunity to be heard
  - Neutral Decision-maker

3

What is Procedural Due Process?

- It assumes that each party has the same opportunity to pursue their claim/action
  - Not just in each case
  - Each case should have the same process (*kinda*)

4

When does due process begin?

- Before the claim of action arises
  - If we create systems *after* the claim arises, it creates the potential for *implicit and explicit bias* to affect an outcome
  - This is not always possible
    - we cannot contemplate every possible contingency
    - Adjustments must be assessed in the context of procedural due process

5

Is your pre-hearing process fair?

- What prehearing issues might affect procedural due process before a hearing?
  - Language
  - Interpreters
  - Forms
  - Location of Hearing
    - Parking?
    - Bus?
      - What time do busses arrive
      - What time does the hearing start
  - …..and more….

6

How do you start the hearing?

- Introduction
- Make sure everyone is ready to proceed
- Explain the hearing process
- Get a list of witnesses?
- Explain objection process
- Time allocations

7

Is your hearing process fair?

- What issues might arise during a hearing?
  - Language
  - Interpreter
  - Hearing assistance devices
  - Right to Counsel
  - Layout of hearing room
  - Computer access
  - Remote Hearings

8

What is the difference?
Procedural Due Process vs. Equity

- Just because the system is the same for everyone does not mean its equitable

9

Perception of Equity

- Equal time
- Hearing officer questions
  - How do you pose the question
- Affirming you have read both sets of pleadings
- Give the moving party the last word?
  - *Or give the losing party the last word……*
- **Perception of Equity reduces appeals and complaints**

10

Takeaways – Learning Points

- Think about the process in advance
- Contemplate needs of customers
- Is there a Due Process Committee?
  - How do staff, attorneys, or hearing officers raise issues?
  - Review processes regularly
  - Set goals for improving systems

11

Thank you!

- Jonathon Lack
- jlack@kingcounty.gov

12

Neil Wise, Administrative Appeals Judge, Washington State Environmental and Land Use Hearings Office

Neil graduated from Oregon State University with a Bachelor's in Wildlife Science and then was employed by the Oregon Department of Fish & Wildlife for nine years before entering law school at University of Oregon. After law school, Neil spent some time in the Republic of Palau, drafting environmental statutes and regulations, and then worked 26 years for the Washington Attorney General's office, representing the Washington Departments of Fish & Wildlife and Natural Resources and the Forest Practices Board. In 2018, Neil was appointed to a Pollution Control Hearings Board/Shorelines Hearings Board member position in the Environmental and Land Use Hearings Office (ELUHO). Neil retired in 2023, but returned to ELUHO as an Administrative Appeals Judge in June of 2024.

Neil has been married since 1976. Neil and his wife enjoy hiking, horseback riding, traveling, and reading fantasy/science fiction and spy thriller novels.

ALJ BEST PRACTICES PANEL

NAA CLE Conference

November 6, 2024

Neil Wise, ELUHO AAJ

1. Introduction

At the Environmental and Land Use Hearings Office (ELUHO), each case is assigned a Presiding Officer by the Chair of the Shorelines Hearings Board (SHB) and Pollution Control Hearings Board (PCHB). The Presiding Officer handles prehearing scheduling and other procedural matters, conducts the hearing, and develops a decision memorandum for dispositive and final orders. After a Board discussion and decision, the Presiding Officer drafts an opinion. Board members are the substantive decision makers. If the Presiding Officer is an Administrative Appeals Judge (AAJ), they may recommend an outcome but have no vote in the decision. AAJs do not independently issue Initial or Final orders. AAJs also conduct mediations, and provide procedural guidance.

2. Hearing preparation (tasks for the AAJ)
    - Technical issues
        - AAJ needs to be familiar with the Zoom, audio visual, and other equipment used for conferences and hearings.
        - This includes testing, practice, and consulting on technical issues.
        - Make sure all parties can access the hearing (technical and disability issues).
    - AAJ must read the prehearing briefs.
    - Study witness/exhibit lists.
    - Be familiar with the Legal Issues that govern the case.
    - Review and decide motions *in limine* (due two weeks prior to the hearing).
    - Identify threshold issues.
    - Develop a hearing script.
    - Identify emergency procedures:
        - Medical
        - Facility (i.e. fire, earthquake)
3. Presiding officer
    - AAJ should review the applicable procedural rules (know your role and authority).
    - AAJ needs to take control of the proceeding----be firm yet fair.
    - Exercising authority: strict at first, then relax if appropriate.

- At ELUHO, the AAJ may ask questions of the witnesses, and provide additional evidence if necessary.

4. Hearing testimony
    - AAJ needs to make sure testimony is in proper format for Zoom recording and/or court reporter (i.e. all testimony audible and understandable, no gestures).
    - Use a witness checklist to keep track of testimony (direct, cross examination, re-direct).
    - At ELUHO, expert witnesses must have their resume as an exhibit.
    - Can use pre-filed testimony in highly technical and complex matters. Written testimony substitutes for lengthy direct testimony. Cross examination, etc. is still allowed.
    - Witnesses can appear in person or remotely. Address any technical issues with remote testimony.
    - If the parties are sharing a witness, the AAJ will determine the timing and format of the questioning.
5. Exhibits
    - Use an exhibit checklist with columns for admitted, not admitted, and withdrawn exhibits.
    - Ask parties to coordinate on exhibits to avoid duplication and last minute disputes.
    - Parties should agree on exhibit authentication prior to the hearing. The AAJ will decide what evidence is appropriate for admission into the record.
    - ELUHO normally requires testimony on each exhibit prior to admission. At a minimum, foundation issues must be addressed.
    - Make sure exhibits are legible for the record.
    - Ask the parties to use excerpts of voluminous exhibits.
6. Making the Record
    - Useful to create an evidence rules cheat sheet.
    - Objections
        - Stop the witness testimony, listen to the objection and the arguments, and decide how to proceed.
        - Guidance factors:
            - Err on the side of inclusion to create a robust record.
            - Evidence admitted can be given the weight it deserves.
        - Administrative hearsay rules are not as strict as civil courts.
        - Rebuttal evidence process
            - Rebuttal evidence is allowed at the AAJ's discretion.
            - Evidence should address some unforeseeable circumstance.
            - Party requesting the evidence makes a verbal motion, detailing the content and duration of the testimony.
            - After considering the motion, AAJ makes a ruling on admission, content, and duration.

- Cross examination is allowed on rebuttal testimony.

7. Working together
    - Foster a team spirit amongst the participants.
    - Everyone should be working together to create a record that will be helpful to the Board.

Dan Gerard, Senior Administrative Law Judge, Washington State Office of Administrative Hearings

Dan Gerard is a child of the West, raised as a nomad in Nevada, California, and Arizona. He is a graduate of the University of Nevada, Reno with a dual History/Political Science degree and a graduate of St. Mary's Law School in San Antonio. He has been conducting unemployment hearings since 2011; holding over 10,000 hearings between Texas and Washington. He is currently a Senior Administrative Law Judge in the Regulatory and Education Division, supervising Administrative Law Judges (ALJs) on the Unemployment Insurance, Regulatory and Modified Adjusted Gross Income (MAGI) caseloads, while maintaining a moderate, active caseload, involving high profile and complex matters. When not working, he is at the beck and call of his five-year-old husky/lab mix, Tucker and likes to get safely lost in the mountains.

Rolling with the Punches – The Benefits of Procedural Agility

Dan Gerard
Senior Administrative Law Judge
Washington State Office of
Administrative Hearings

1

Thinking outside the box

2

Direct Impacts of the COVID-19 Pandemic on Existing OAH Procedures

- Resulting Unemployment Insurance (UI) Backlog
- Inability to Conduct In-Person Hearings

3

Pre-Pandemic Status Quo

- UI
  - Average Daily Case Intake ~115-130
  - Inventory, February 2020 – 3,282
- Hearing Options
  - Telephone
  - In-Person

4

Pandemic Disruption

- UI
  - Average Daily Case Intake ~390-481
  - Inventory, March 2022 – 46,129
- Hearing Option
  - Telephone
  - ~~In-Person~~

5

Need for Change

6

Considerations

Unemployment Insurance

- Viable Options
- Legal Sufficiency
- Accessible to the Participants
- Stakeholder Buy-in

Hearing Methods

- Technological Capability
- Usability for Participants and ALJs
- Contracts
- Stakeholder Buy-in

7

Solutions

Brief Adjudicative Proceedings (BAPs)

- Due process
- Ability to Opt Out
- Automatic Appeal Rights
- Emergency Rules
- Logistics

Video Hearings

- WebEx, then Teams
- New Templates
- Technological Tutorials
- Conflicts with Existing Regulations

8

Outcomes

BAPs

- 24 hearings per week to 65
- Inventory, September 2024– 2,613
- Insignificant number of petitions for review

Video Hearings

- Seamless transition
- Most popular method of conducting a hearing

9

Thank you

10

Matthew Randazzo, Board Member, Washington State Board of Tax Appeals

Matthew Randazzo was appointed to the Board of Tax Appeals in March 2023. He is a graduate of the University of North Carolina at Asheville, where he received a B.A. in English Literature. He also earned his J.D. from Emory University School of Law and is licensed to practice law in Washington State. Mr. Randazzo's previous experience includes serving as a Criminal Deputy Prosecutor and an Assistant Attorney General.


BEST PRACTICES

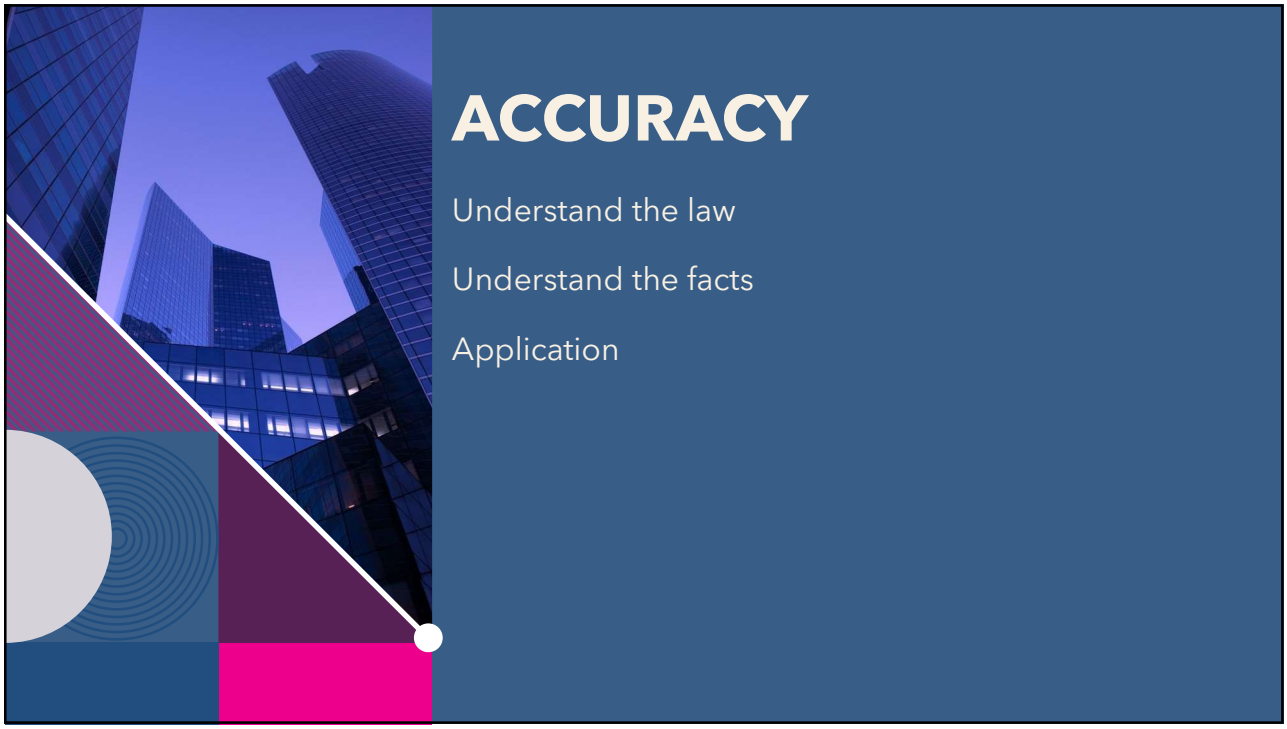
1


FOR WHAT?
Writing Decisions
Conducting Hearings
Conducting Settlement Conferences
Working Collaboratively
Education
2

2


GOALS OF DECISION WRITING
ACCURACY
COMPREHENSIBLE
CONCISENESS
EDUCATIONAL

3


ACCURACY
Understand the law
Understand the facts
Application

4

COMPREHENSIBLE

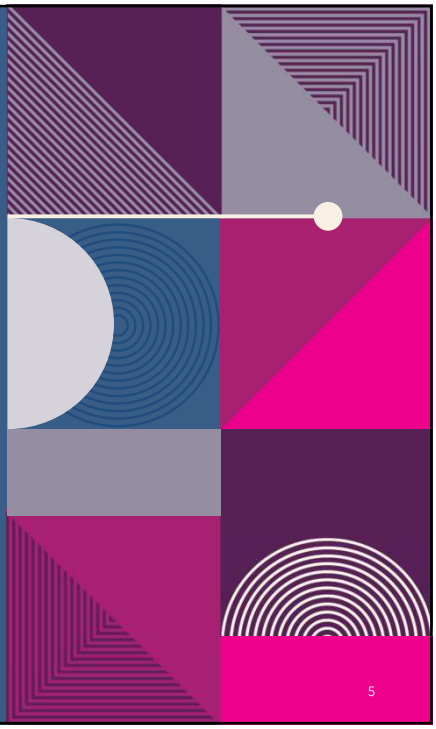
Know your audience

Define terms

Explain terms

IRAC / CRAC / CREAC

Chain writing



5

5

CONCISENESS

Identify material facts

Write in plain language

Edit out superfluous portions

6

6

EDUCATIONAL

Acknowledge important argument arguments and facts
Cite to authority
Explain findings

7

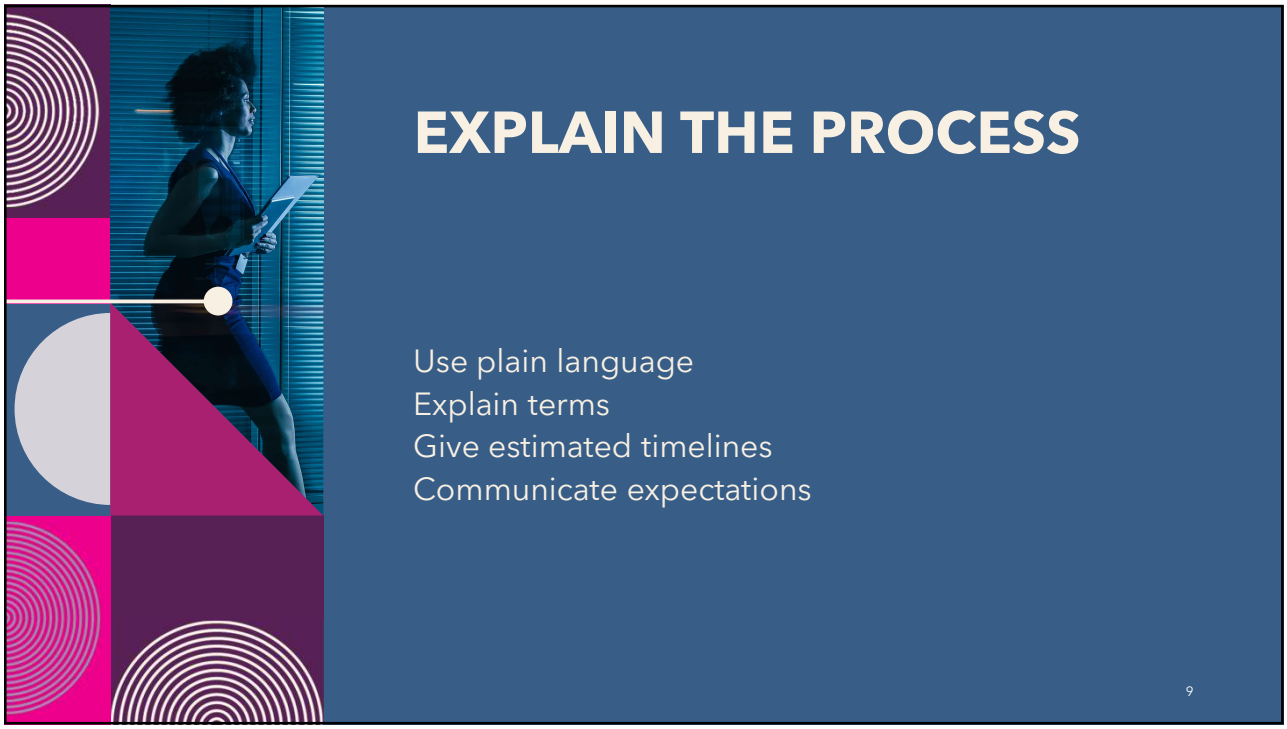
7

CONDUCTING HEARINGS

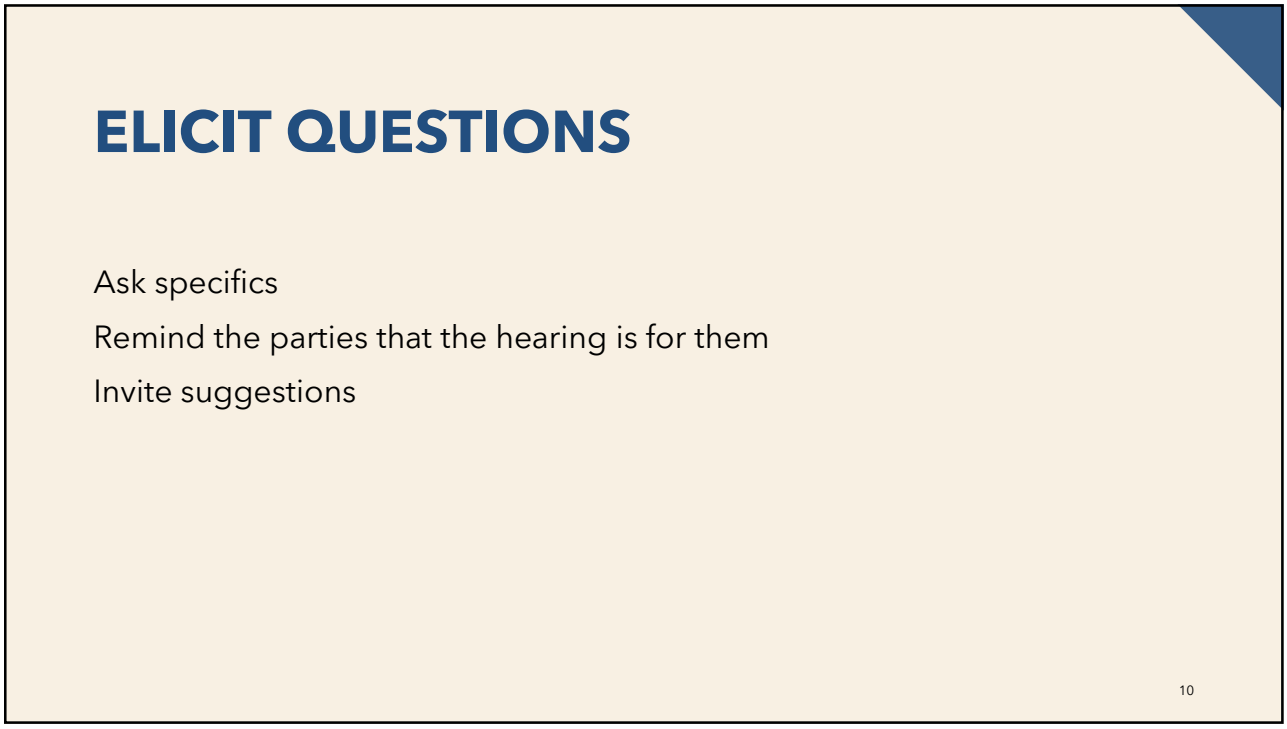
Explain the process
Elicit questions
Confirm their understanding
Confirm your understanding
Control the proceedings

8

8


EXPLAIN THE PROCESS
Use plain language
Explain terms
Give estimated timelines
Communicate expectations
9

9


ELICIT QUESTIONS
Ask specifics
Remind the parties that the hearing is for them
Invite suggestions
10

10

CONFIRM THEIR UNDERSTANDING

Listen to what they say
Listen to how they say it
Ask if they have suggestions

11

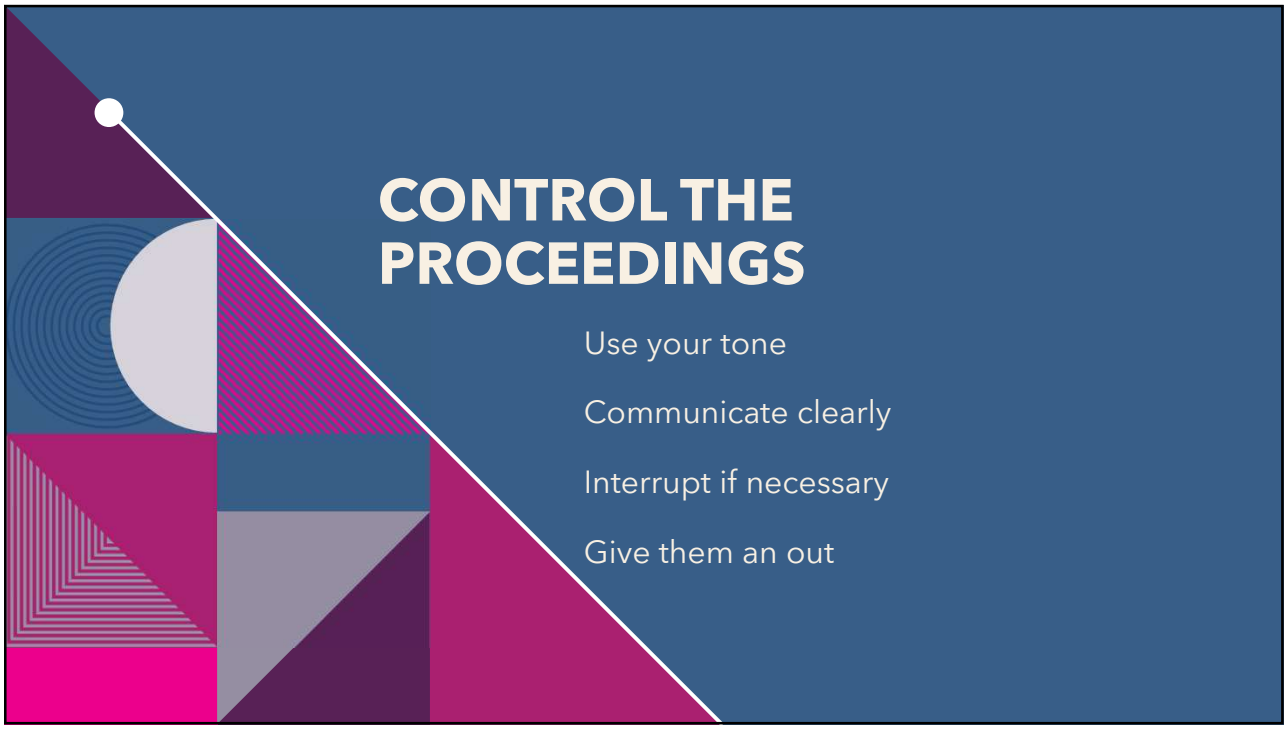
11

CONFIRM YOUR UNDERSTANDING

Ask your questions
Ask specific questions
Don't stop until you understand or confirm you won't

12

12


CONTROL THE PROCEEDINGS
Use your tone
Communicate clearly
Interrupt if necessary
Give them an out

13

Drew Simshaw, Assistant Professor and Clute-Holleran Scholar in Corporate Law, Gonzaga University School of Law

Drew Simshaw is an Assistant Professor and the Clute-Holleran Scholar in Corporate Law at Gonzaga University School of Law, where he researches the intersection between legal technology, legal ethics, and access to justice and teaches Professional Responsibility, Criminal Law, Legal Research and Writing, and International Privacy Law. His recent publications include Access to A.I. Justice: Avoiding an Inequitable Two-Tiered System of Legal Services, 24 YALE J.L. & TECH 150 (2022) and Toward National Regulation of Legal Technology: A Path Forward for Access to Justice, 92 FORDHAM L. REV. 1 (2023). Professor Simshaw is a member of the Washington Practice of Law Board, the Washington Disciplinary Round Table, and the Washington State Bar Association Legal Technology Task Force. Before joining the Gonzaga Law faculty, Professor Simshaw taught at the Georgetown University Law Center as a Visiting Associate Professor of Law, Legal Practice. As a supervising attorney with the Institute for Public Representation in Washington, D.C., he specialized in communications and technology law and represented public interest organizations in rulemakings and adjudications before federal agencies and in litigation before federal appellate courts. In 2017, he received the H. Latham Breunig Humanitarian Award from Telecommunications for the Deaf and Hard of Hearing, Inc., in recognition of his pro bono advocacy on behalf of people with disabilities. Professor Simshaw previously taught as a fellow in Georgetown Law's Communications and Technology Law Clinic and at Elon University School of Law. He is a proud AmeriCorps alum.

Drew Simshaw
Assistant Professor
Clute-Holleran Scholar in Corporate Law
Gonzaga University School of Law
@dsimshaw

LEGAL AI RISKS, REWARDS, AND REGULATORY REFORMS

1

About me:

- Practiced public interest communications and technology law before FCC and federal appellate courts
- Previously taught: Georgetown Law, Elon Law
- Joined Gonzaga in 2019
- Teach: professional responsibility, criminal law, privacy law, legal research and writing
- Research: intersections of legal technology, legal ethics, access to justice, and legal education
- Practice of Law Board, Disciplinary Advisory Round Table. WSBA Legal Technology Task Force

2

My scholarship on these topics:

Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law, 70 HASTINGS L.J. 173 (2018), available at https://ssrn.com/abstract=3308168.

Access to AI Justice: Avoiding an Inequitable Two-Tiered System of Legal Services, 24 YALE J.L. & TECH 150 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4090984.

Toward National Regulation of Legal Technology: A Path Forward for Access to Justice , 92 FORDHAM L. REV. 1 (2023), available at https://ssrn.com/abstract=4565341.

Technology Competence as a Compass for Helping to Close the Justice Gap, 20 U. ST. THOMAS L.J. 129 (2024) (symposium contribution), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4926333.

Re-Regulating for Globalized Legal AI (work in progress)

3

"legal tech" – software and other technology used throughout legal problem-solving processes

4

"legal tech" – software and other technology used throughout legal problem-solving processes

"legal AI" – legal technology utilizing combinations of algorithms, natural language processing, and machine learning

5

"legal tech" – software and other technology used throughout legal problem-solving processes

"legal AI" – legal technology utilizing combinations of algorithms, natural language processing, and machine learning

"legal analytics" – machine-assisted, data-driven decision-making in legal problem-solving processes

6

"legal tech" – software and other technology used throughout legal problem-solving processes

"legal AI" – legal technology utilizing combinations of algorithms, natural language processing, and machine learning

"legal analytics" – machine-assisted, data-driven decision-making in legal problem-solving processes

"judicial analytics" – machine-assisted pattern recognition concerning judicial decision making

7

Wall Street Journal, Asa Fitch, "Would You Trust a Lawyer Bot with Your Legal Needs?" Aug. 10, 2020, https://www.wsj.com/articles/would-you-trust-a-lawyer-bot-with-your-legal-needs-11597068042.

Bloomberg Law, Justin Wise, "Lawyer's AI Blunder Shows Perils of ChatGPT in 'Early Days,'" May 31, 2023, https://news.bloomberglaw.com/business-and-practice/lawyers-ai-blunder-shows-perils-of-chatgpt-in-early-days

8

CBS News, Megan Cerullo, "Texas judge bans filings solely created by AI after ChatGPT made up cases," https://www.cbsnews.com/news/texas-judge-bans-chatgpt-court-filing/.

"U.S. District Judge Brantley Starr of the Northern District of Texas is specifically requiring that attorneys file a certificate to indicate either that no portion of any document they file was generated by an AI tool like ChatGPT, or that a human being has checked any AI-generated text."

9

The Guardian, Betsy Reed, "Colombian judge says he used ChatGPT in ruling," https://www.theguardian.com/technology/2023/feb/03/colombia-judge-chatgpt-ruling.

10

Artificial Intelligence

"The ability of machines to execute tasks and solve problems in ways normally attributed to humans."

(Yann LeCun)

11

Types of tools

(1) Rule based – decision trees, designed from top down (if, then)

(2) Deep learning – learn without new programming

12

Soft AI in Legal Problemsolving

- Advanced legal research
- Automation of tasks
- Legal analytics
- Firm "legal bots"
- Self-help

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"[T]echnology has been integrated into the very act of practicing law. The core activity of lawyering — that of thinking like a lawyer — is expressed through the technology lawyers use. At its core, technology is not merely a tool of the trade, but it is wrapped up intrinsically in the very thought processes lawyers employ. . . . Modern technology is now entrenched in the core tasks of being a lawyer, and its function, purpose, and future potential cannot be ignored."

Agnieszka McPeak, Disruptive Technology and the Ethical Lawyer, 50 U. Tol. L. Rev. 457, 471-72 (2019).

14

The "cyborg" legal problem-solving landscape

Stakeholders:

- Consumers
- Licensed lawyers
- Other licensed legal professionals
- Non-lawyers and other third parties (including technology and AI vendors)

15

Legal Research

- Context: Data-driven law isn't new; lawyers have been automating parts of legal research for years.
- Some data-driven legal research tools:
  - Natural language searches
  - Auto-suggestion results
  - "Smart" recommendations based on research activity
  - Legal analytics (e.g. about decisionmakers, outcomes)
  - Drop-and-drag memo and brief analyzers
  - "Harvey" for BigLaw (see https://www.abajournal.com/news/article/meet-harvey-biglaw-firms-artificial-intelligence-platform-based-on-chatgpt)

16

AI-Driven Contract Review

The Problem

- Contract review is an incredibly time consuming task

The Solution

- Tools streamline contract review
- Instantly scan contracts
- Highlights key information
- Machine learning capabilities enable tools to get 'smarter' with each reviewed contract
  - Learns the preferences of the user

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Legal writing assistance

- Even though "robots" are not (yet) widely and regularly drafting entire briefs without human guidance, emerging tools are assisting with different stages of the legal writing process

- For example, services provide data-driven review of drafts of legal writing by analyzing cited authority, checking the accuracy of quotations and citations, and providing suggestions based on a review of similar cases

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Legal Writing Process

Editing

- Software that "checks" and suggests
- MS Word tools but for lawyers
- Grammar, legalese, style, citation
  - Westlaw Edge Drafting Assistant
  - Lexis for MS Office
  - WordRake
  - BriefCatch
  - Grammarly
  - Clerk (by Judicata)

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Judicial analytics (writing strategy)

- Emerging services can help lawyers craft legal arguments according to patterns exhibited by individual decision makers
- These tools can analyze decisionmakers' frequently used authorities, as well as specific language they use when granting or denying certain motions

20

Examples of Judicial Analytics

Broad data analytics (outcome-oriented) - data-driven insights about case timing, resolutions, damages, remedies, and findings, to produce strategic insights about the litigation behavior of judges and others, using "big data" from underlying litigation information

vs.

Language analytics (reasoning-oriented) - language-based analytical insights, zeroing in on the exact language a court or judge finds most persuasive, the specific reason a judge has excluded or admitted an expert's testimony, how an expert has stood up to judicial scrutiny, what litigation risks a client may be facing, etc.

21

Examples of Judicial Analytics Predicting Appellate Court Decisions

Statistical models relying on general case characteristics (not specific law or facts) correctly predicted 75% of SCOTUS case outcomes (affirm or reverse) during the 2002 term. (In a separate study, legal experts predicted only 59.1% of the same cases correctly.)

The six statistical variables were: "(1) circuit of origin; (2) issue area of the case; (3) type of petitioner (e.g., the United States, an employer, etc.); (4) type of respondent; (5) ideological direction (liberal or conservative) of the lower court ruling; and (6) whether the petitioner argued that a law or practice is unconstitutional."

See Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking, 104 COLUMBIA L. REV. 1150 (May 2004), https://bit.ly/2tjRcgY.

22

Examples of Judicial Analytics Predicting Appellate Court Decisions

Looking back at SCOTUS cases from 1816 to 2015, a machine-learning, statistical-model algorithm predicted case outcomes and votes for each justice by looking back at all prior years' outcomes for associations between case features and outcomes. The model was updated after each year's predictions. Over the full 200 years, the algorithm correctly predicted 70.2% of the decisions and 71.9% of the justices' individual votes.

See Daniel Martin Katz, Michael J. Bommarito II & Josh Blackman, A General Approach for Predicting the Behavior of the Supreme Court of the United States, 12 PLOS ONE e0174698 (Apr. 12, 2017), https://bit.ly/2sxg8RO.

23

Examples of Judicial Analytics

Broad data analytics (outcome-oriented) - data-driven insights about case timing, resolutions, damages, remedies, and findings, to produce strategic insights about the litigation behavior of judges and others, using "big data" from underlying litigation information

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A Comparative Perspective – China

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A Comparative Perspective – China

THE | DIPLOMAT
READ THE DIPLOMAT, KNOW THE ASIA-PACIFIC

Why Are Chinese Courts Turning to AI?

A drive to standardize judgments for "similar cases" has courts experimenting with big data and AI.

By **Meng Yu** and **Guodong Du**
January 19, 2019

https://thediplomat.com/2019/01/why-are-chinese-courts-turning-to-ai/

26

A Comparative Perspective – China

Ray Worthy Campbell, Artificial Intelligence in the Courtroom: The delivery of Justice in the Age of Machine Learning, 18 COLO. TECH. L. J. 323, 334 (2020).

"AI can . . . be used to make sure that the resolution of a dispute by a particular court is in line with the results reached by other courts on similar facts and similar legal issues. . . . China has pioneered this, with its Same Type Case Reference System program comparing similar factual and legal situations so as to give guidance not just to the trial court but those who review the trial court's actions."

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A Comparative Perspective – France

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A Comparative Perspective – France

ABAJOURNAL

France bans publishing of judicial analytics and prompts criminal penalty

BY JASON TASHEA

JUNE 7, 2019, 12:51 PM CDT

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A Comparative Perspective – France

RÉPUBLIQUE FRANÇAISE
Liberté
Égalité
Fraternité

Légifrance
Le service public de la diffusion du droit

LAW n° 2019-222 of March 23, 2019 on programming 2018-2022 and justice reform (1)

NOR : JUST1806695L
ELI : https://www.legifrance.gouv.fr/eli/loi/2019/3/23/JUST1806695L/jo/article_33
Alias : https://www.legifrance.gouv.fr/eli/loi/2019/3/23/2019-222/jo/article_33
JORF n°0071 du 24 mars 2019
Texte n° 2

Article 33

I.-In 4° of Article L. 153-1 of the Commercial Code, the words: "publication" are replaced by the word: "advertising".
II.- The preliminary title of the code of administrative justice is thus modified:
1° The second and third paragraphs of article L. 10 are replaced by three paragraphs thus worded:
"Subject to the specific provisions which govern access to decisions of justice and their publicity, judgments are made available to the public free of charge in electronic form.
“By way of derogation from the first paragraph, the surnames and first names of the natural persons mentioned in the judgment, when they are parties or third parties, are blacked out before they are made available to the public. When its disclosure is likely to undermine the security or respect for the privacy of these persons or those around them, any element allowing the identification of the parties, third parties, judges and members of the registry is also concealed.
“The identity data of magistrates and members of the registry may not be reused for the purpose or effect of evaluating, analyzing, comparing or predicting their real or supposed professional practices. Violation of this prohibition is punishable by the penalties provided for in Articles 226-18, 226-24 and 226-31 of the Criminal Code, without prejudice to the measures and penalties provided for by Law No. 78-17 of January 6, 1978 relating to data processing, to files and freedoms. » ;
2° After the same article L. 10, an article L. 10-1 is inserted as follows:

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A Comparative Perspective – France

RÉPUBLIQUE FRANÇAISE
Liberté
Égalité
Fraternité

Légifrance
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LAW n° 2019-222 of March 23, 2019 on programming 2018-2022 and justice reform (1)

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A Comparative Perspective – France

- Banned publication of personally identifiable information of judges or clerks that could "be [used] for the purpose or effect of evaluating, analyzing, comparing or predicting their real or supposed professional practices."
- Punishable by up to five years in prison
- Effect: analytics companies allowed to produce statistics around trends in the law, but not specific to individual courts or judges*

*See https://www.artificiallawyer.com/2019/06/04/france-bans-judge-analytics-5-years-in-prison-for-rule-breakers/

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A Comparative Perspective – France

ABOVE THE LAW

ARTIFICIAL INTELLIGENCE

France Resists Judicial AI Revolution

France bans predicative analysis of caselaw. Does this protect or impede universal justice?

By IAN CONNETT

Jun 10, 2019 at 3:03 PM

"Although there's no general consensus as to why the French ban on AI was included in the bill, many reasons have been proposed, ranging from the need for judicial anonymity, to the fear that predictive analytics might expose glaring dichotomies between objective judicial norms and reality."

https://abovethelaw.com/legal-innovation-center/2019/06/10/france-resists-judicial-ai-revolution/#:~:text=Earlier%20this%20month%2C%20France%20passed,of%20judicial%20decision%2Dmaking%20data.&text=French%20AI%20Ban

33

A Comparative Perspective – France – Theories of Motivation

GregoryBufithis

Understanding the French ban on judicial analytics

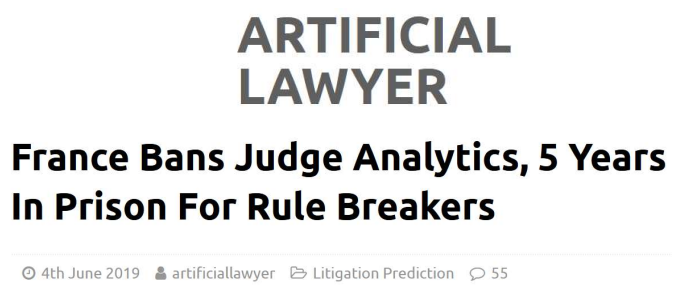
Posted on 2019-06-09 by Gregory Bufithis in Technology

- "[In France, t]here is this general need for anonymity (or fear) among judges that their decisions may reveal a too large deviation from the expected standards of civil law. That their 'human subjectivity' will be revealed."

https://www.gregorybufithis.com/2019/06/09/understanding-the-french-ban-on-judicial-analytics/

34

A Comparative Perspective – France – Theories of Motivation


ARTIFICIAL LAWYER

France Bans Judge Analytics, 5 Years In Prison For Rule Breakers

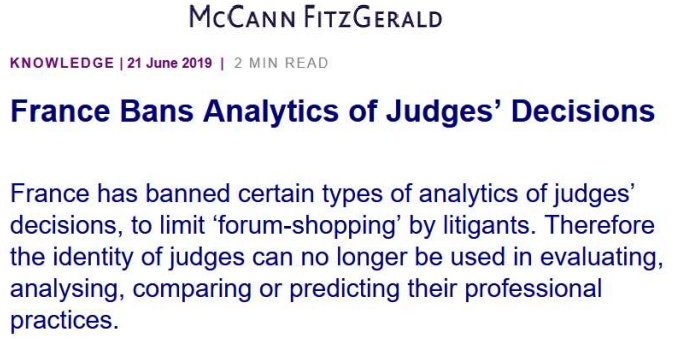
4th June 2019 artificiallawyer Litigation Prediction 55

- Anonymous French legal expert: "In the past few years there has been a growing debate in France about whether the names of judges should be removed from the decisions when those decisions are published online. The proponents of this view obtained this [new law] as a compromise from the Government, i.e. that judges' names shouldn't be redacted . . . but that they cannot be used for statistical purposes."

https://www.artificiallawyer.com/2019/06/04/france-bans-judge-analytics-5-years-in-prison-for-rule-breakers/

35

A Comparative Perspective – France – Theories of Motivation


McCann FitzGerald

KNOWLEDGE | 21 June 2019 | 2 MIN READ

France Bans Analytics of Judges' Decisions

France has banned certain types of analytics of judges' decisions, to limit 'forum-shopping' by litigants. Therefore the identity of judges can no longer be used in evaluating, analysing, comparing or predicting their professional practices.

- "The Council noted the concerns that the use of such analytics of decisions on a judge-by-judge basis could facilitate strategies to choose courts and judges, which would likely alter the functioning of justice"

https://www.mccannfitzgerald.com/knowledge/technology-and-innovation/france-bans-analytics-of-judges-decisions

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A Comparative Perspective – France

GregoryBufithis

Understanding the French ban on judicial analytics

Posted on 2019-06-09 by Gregory Bufithis in Technology

- "[M]any have said 'prove to me I arrived at my answer via statistical modeling, and not plain old fashioned research and informed opinion?'"
- "Several U.S. judges, reacting to the ban, Tweeted they would love to see a statistical analysis of their decisions in order to better monitor their performance."

https://www.gregorybufithis.com/2019/06/09/understanding-the-french-ban-on-judicial-analytics/

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Effects of Legal Analytics on Writing for Courts

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Effects of Legal Analytics on Writing for Courts

Non-exhaustive list of potential ethical issues concerning the process and substance of legal writing:

- Whether lawyers have an obligation to use legal analytics as part of diligent representation;
- Competent use of data-driven tools;
- Confidentiality and client communication in a data-driven landscape
- The risk of bias resulting from biased data, algorithm design, and data interpretation;

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Legal Analytics and Bias

- Machines "learn" through modeling behavior, which is based on data, and data scientists, coders, and designers of algorithms don't always understand what the data is modeling (and therefore what it is teaching the machine)
- For example, in hiring decisions, training AI to filter candidates based on the attributes of previously hired candidates can magnify the race, gender, and other disparities that currently exist in many professions
    - Amazon, for example, abandoned a system for connecting resumes to potential jobs because it disfavored women, in part because the system relied on hiring decisions reflected in data from the previous ten years, when men were more frequently hired
- The challenge – all data is based on the past
- How will similar biases impact clients (and potential clients) from communities that have been historically marginalized by or excluded from the legal system?

40

Legal Analytics and Bias

- Risk of magnifying, amplifying, and reinforcing bias through analytics
- Amy B. Cyphert, A Human Being Wrote This Law Review Article: GPT-3 and the Practice of Law, 55 U.C. Davis L. Rev. 101 (2021)
  - Some chatbots have been found to produce biased or even overtly racist outputs due to being "trained" by datasets containing "scraped" language from popular websites such as Reddit.
- Opportunity to more clearly detect bias through analytics

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Effects of Legal Analytics on Writing for Courts

Other issues:

- Effect on quality of writing (both form and substance/advocacy)
- Effect on quantity of writing (both number of filings and length)
- Access to analytics services - see Access to AI Justice: Avoiding an Inequitable Two-Tiered System of Legal Services, 24 YALE J.L. & TECH 150 (2022)
- Effect on evolution of precedent

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Effects of Legal Analytics on Writing by Courts

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Effects of Legal Analytics on Writing by Courts

- Will judges use similar analytics tools?
- Will judges review what analytics reveal about them?
- How will judges respond to calls to adapt their writing to be more machine readable to enable more use of analytics?

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Effects of Legal Analytics on Writing by Courts

- Will judges use similar analytics tools?
- Will judges review what analytics reveal about them?
- How will judges respond to calls to adapt their writing to be more machine readable to enable more use of analytics?

"Trying to feed judicial opinions into budding AI-based legal reasoning systems and derive the meaning of those human judicial renderings is a daunting task. Some urge that the courts should write opinions with the aim of ensuring the writing is readily machine-readable and potentially amendable (sic) to computability."

Lance B. Eliot, AI In The Law Impeded Due To Machine Readability Of Judicial Decisions, Stanford Center for Legal Informatics (Dec. 2021), https://ssrn.com/abstract=3990474

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Effects of Legal Analytics on Writing by Courts

- Will judges use similar analytics tools?
- Will judges review what analytics reveal about them?
- How will judges respond to calls to adapt their writing to be more machine readable to enable more use of analytics?

(Within the context of machine-readability) "By changing the way . . . decisions are written, there is an opportunity to dramatically improve the level of clarity and predictability within the judicial process. In short, it would increase the ability of those governed by the decisions to understand and make predictions about new cases, as well as speed up research and lower legal costs"

Jameson Dempsey & Gabriel Teninbaum, May It Please the Bot?, MI Computational Law Report (Aug. 2020)

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AI-Driven Legal Self Help

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Josh Browder (Then)

- Born in 1997
- Created AI-based Chat Bot called DoNotPay to appeal parking tickets
- 375,000 appeals in 2017 (about 60+% win rate)
- DoNotPay claimed to have saved $9 million through 2018
- Youngest-ever person on Forbes under 30 rising star list in the law category
  - Joshua Browder doesn't have a law degree
  - He is a coder

Josh Browder (Now)

- Has expanded to assisting with self-help in small claims court
- Raised millions of dollars to expand services into new markets
- Has begun integrating ChatGPT
- Offered to pay $1 million to any lawyer willing to let its AI argue a case before the U.S. Supreme Court
- Facing numerous lawsuits

Source: *Forbes, VentureBeat, The New Yorker, Gizmodo*

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Opportunities and Challenges

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Will robots replace lawyers?

- How will AI continue to cut hours worked by lawyers and paralegals?
- McKinsey Global Institute estimated about one quarter of attorney work can be automated
- Attorneys will continue to do higher level work, leading a team that includes a machine
- "[A]utomation has a measurable impact on the demand for lawyers' time, but one that is less significant than popular accounts suggest."

  Dana Remus & Frank Levy, Can Robots Be Lawyers?: Computers, Lawyers, and the Practice of Law, 30 Geo. J. Legal Ethics 501 (2017)

50

Shed "I went to law school to avoid math" mentality

- Selling selves short
- Lawyers are smart, analytical, logical
- Data-driven law not new
- Empowering

51

Elevate creative thinking

- Can AI increase creativity?
- Ed Walters (Georgetown, Fastcase): Tech can help humanize law practice; give "robotic tasks" to robots and reclaim human aspects of lawyering

52

Link to Mindfulness & Well-being

- Katrina Lee (Ohio State): A Call for Law Schools to Link the Curricular Trends of Legal Tech and Mindfulness, 48 Toledo L. Rev. 55 (2017), http://ssrn.com/abstract=2937721
  - Creativity
  - Empathy
  - Openness
  - Compassion

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Impact on the justice gap

54

The widening justice gap

Information gap

Cost of legal services

Cuts to legal aid

"A2J Paradox" (poor & under/unemployed lawyers)*

Geographic challenges

* See Rebecca Kunkel, Rationing Justice in the 21st Century: Technocracy and Technology in the Access to Justice Movement, 18 U. Md. L.J. Race, Religion, Gender & Class 366, 37 (2018) (citing Jules Lobel & Matthew Chapman, Bridging the Gap Between Unmet Legal Needs and an Oversupply of Lawyers: Creating Neighborhood Law Offices - The Philadelphia Experiment, 22 Va. J. Soc. Pol'y & L. 71, 72 (2015)).

55

Access to justice implications

- The threat of a two-tiered system
  - Superior humans vs. inferior machines
  - Superior "cyborg lawyers" vs. inferior humans and inferior machines
  - The status quo: those who can afford legal services and those who can't
- The need to properly "calibrate" AI (balance tech reliance and restraint)
  - Consumer considerations
  - Issue considerations
  - Process considerations

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The "cyborg" legal problem-solving landscape

Challenges to "calibrating" for A2J:

- Expectations
- Transparency (i.e. the "black box" problem)
- Bias
- Data-driven conservatism
- Data protection issues

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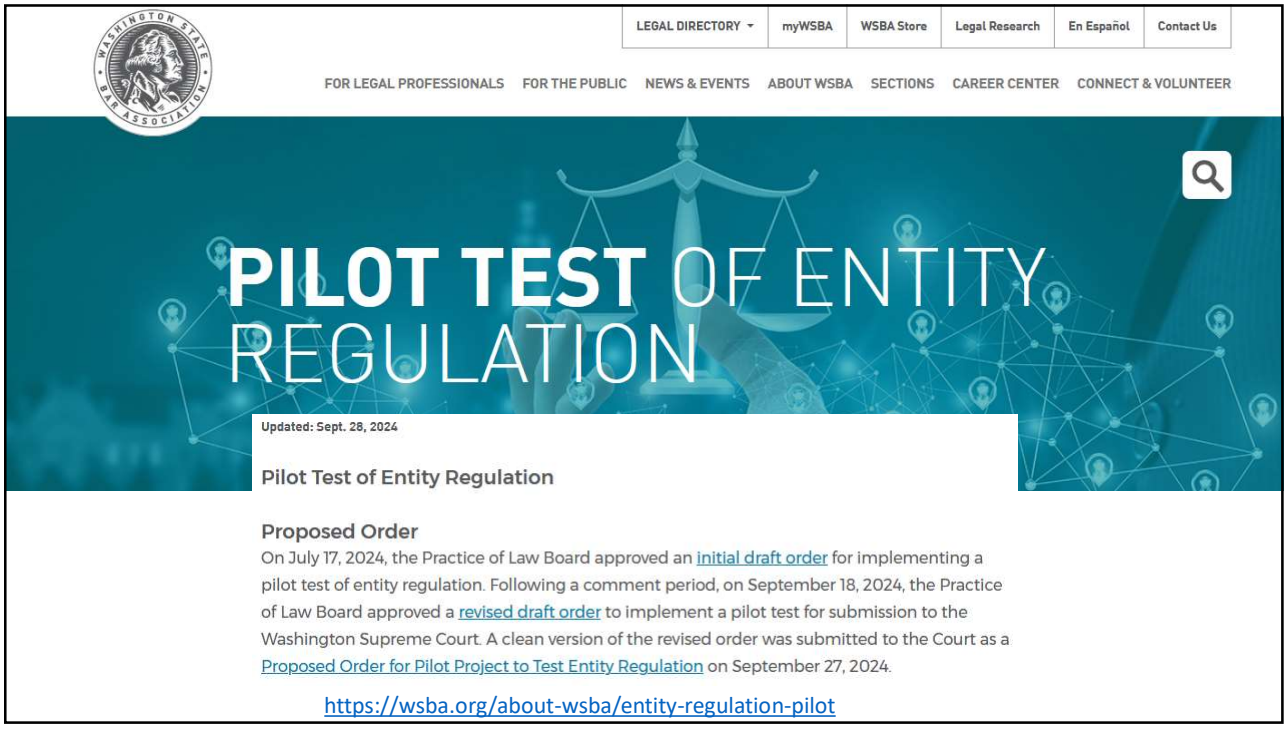
Emerging regulatory reforms

58

Legal regulatory "sandboxes"/"laboratories"

https://www.wsba.org/docs/default-source/legal-community/committees/practice-of-law-board/polb_legal-regulatory-lab_2.0_02-2022.pdf?sfvrsn=b67110f1_5

59



https://wsba.org/about-wsba/entity-regulation-pilot

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Questions?

Prof. Drew Simshaw
Clute-Holleran Scholar in Corporate Law

Gonzaga University School of law
simshaw@gonzaga.edu
Twitter: @dsimshaw

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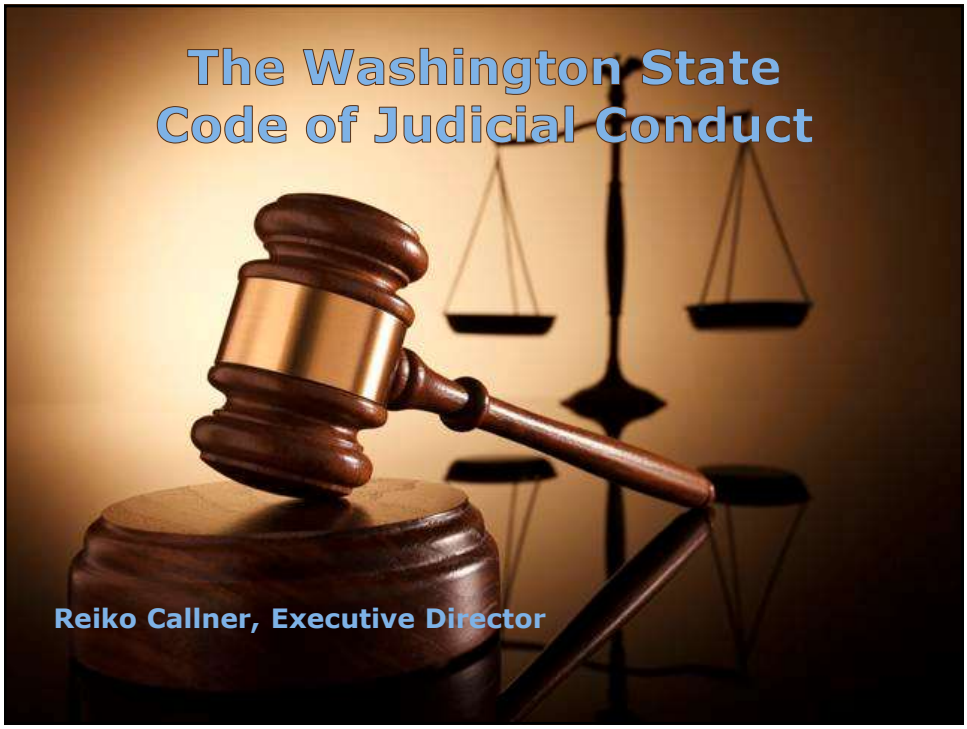
Ms. J. Reiko Callner, Executive Director, Washington State Commission on Judicial Conduct

Ms. Callner has served as the Executive Director of the Washington State Commission on Judicial Conduct since 2005. She previously served the agency as its senior investigator, beginning in 1997. Ms. Callner is an emeritus board member of the national Association of Judicial Disciplinary Counsel, and is past Chair of the Washington State Human Rights Commission. Ms. Callner worked as a prosecutor for ten years and has represented Child Protective Services. She has taught for the American Judicature Society, the Washington State Criminal Justice Training Commission, the Administrative Office of the Courts, the National Center for State Courts, and has made presentations to a wide variety of public agencies and private organizations. She has assisted the US State Department and non-governmental organizations in improving judicial ethics and independence in over 35 foreign countries.

Ms. Callner has an undergraduate degree from Oberlin College and a J.D. from the University of Washington. She was a law clerk for retired Washington State Supreme Court Justice Robert Utter, and is a licensed Zumba instructor.



1

Fundamentals of Justice

- Trustworthy
- Neutral
- Fair - integrity
- Equal treatment
- Consistent
- Due process
- Transparent
- Accessible
- Competent

2

Code of Judicial Conduct

Canon 1: A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

Canon 2: A JUDGE SHOULD PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

Canon 3: A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

Canon 4: A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

3

Each Canon Contains Rules Which are Enforceable by Discipline

- Example: Rule 1.3:

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests* of the judge or others, or allow others to do so.

4

Comments Accompany the Rules

- The Comments provide guidance on the purpose, meaning, and proper application of the rules.
- They also identify aspirational goals for judges.

5

Comment example:

6

Procedural Fairness

- Understanding
- Respect
- Neutrality
- Voice

7

New(ish) Comments to Canon 2,

Rules 2.2 and 2.6

8

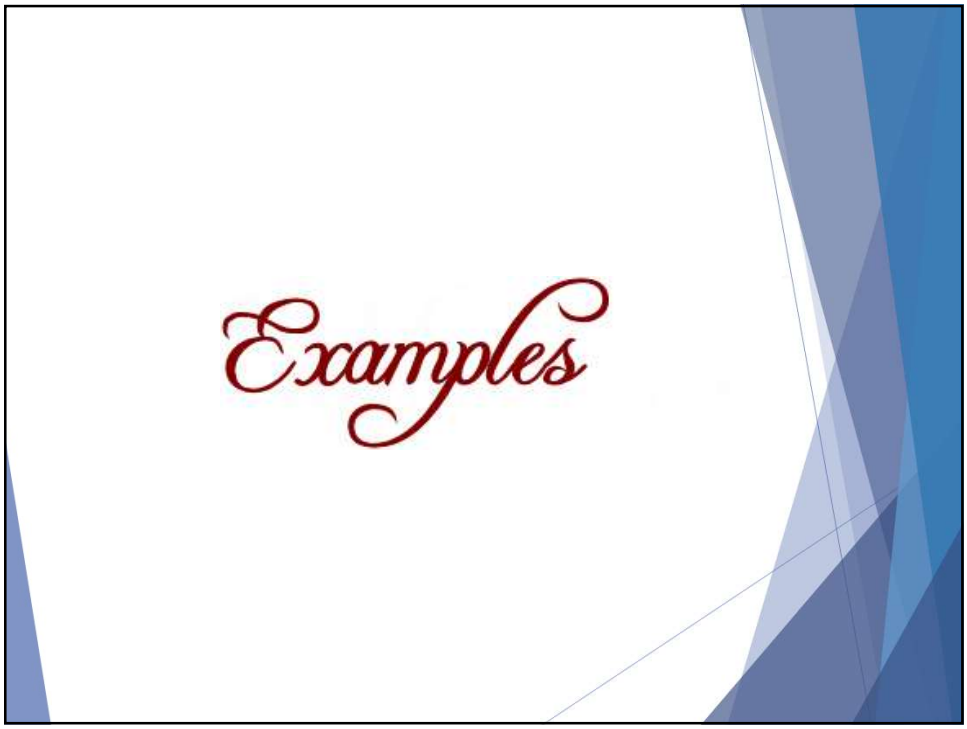
Why is this a Code violation?

9

Google

You **WILL** be Googled

10



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Washington State Commission on Judicial Conduct

www.cjc.state.wa.us

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