

Commonwealth of Virginia		
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Administrative Law Advisory Committee		

Capital Room I, Virginia State Capitol
 July 10, 2009 12:00 p.m.
 Summary

Members Present:

Chris Nolen
 Mike Quinan
 Roger Chaffe
 Katya Herndon
 Phyllis Errico
 Eric Page
 Jane Chaffin
 Angela Bowser
 Alex Skirpan
 Cindy Berndt
 Elizabeth Palen

I. Presentation by **Lane Kneidler** on the Model State Administrative Act.

- a. *See attached documents.* See referenced website www.nccusl.org.
- b. Discussed the review procedure and discussed membership of NCCUSL.
 - i. Expects at least one more meeting and several conference calls.
 - ii. Encouraged the members to participate in the process.
- c. Suggested members of ALAC follow the progress of the proposed rules, specifically, Articles 2, 3, and 7.
- d. Because this is a model act, parts may be taken out, rewritten or removed
- e. Discussed section 310 "Guidance Documents":
 - i. Described the effect of guidance documents, described active parties, such as the American Bar Association (ABA). In the rulemaking area, this is probably the most controversial topic.
 - ii. Discussed proposed solutions to the issue of when an agency fails to issuing a regulation after the public posting and comment periods:
 1. We recommended two years, ABA wanted longer, citing the Environmental protection Agency (EPA).
 2. State agencies do not need so much time, usually not dealing with such technical data.

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- f. Discussed Section 408; ex-parte contacts.
 - i. Some have taken position that agency heads making decisions should be allowed to talk to experts or whomever off the record.
 - ii. Opposing view says that if you cannot do this as a judge, then you shouldn't be able to do this as an agency head acting in a judicial role.
- g. **Chris Nolan:** Given the model act as a whole, what are the biggest changes that you see, in a general sense, e.g., promoting more public involvement, streamlining case decisions etc.?
 - i. **Lane Kneedler:** The 1961 Act was fairly sparse, while the 1981 act was excruciatingly detailed. Our effort here is to strike a middle ground.
 - ii. We also are trying to involve the public, give an opportunity to participate, and of course, the existence of the internet. Not a lot of changes overall in policy, but there are some new things, such as guidance documents and ex-parte communications.

The Committee broke up into their respective workgroups.

Summary from Incorporation by Reference/ Exemptions

The workgroup discussed its charge and while preparing for the upcoming legislative session may not necessarily be required, as part of the duties of the chair of this workgroup may be to decide which topics to address.

- Discussion of JLARC's survey to other states.
- Discussed possibility of getting law professors involved in our group.
 - A list of all professors practicing administrative law was created.
 - although it took some effort to identify them, we were able to contact them personally and were able to have a conference call where the idea of working with the Virginia Bar Association was mentioned; a very willing group
- The group recapped some of the last meeting:
 - Discussed researching the new regulations from the Department of Environmental Quality(DEQ)
 - Discussed some statistics of regulations being exempted;
 - Of 74 total regulatory actions, only 10 went through the full process
 - 12 were fast tracked, 20-30 were either full processed or fast tracked. The rest were exempt.
 - Approximately 60% of regulatory actions were exempt statewide. This compares with the JLARC study which found the exemption rate at about 65%.
 - Also discussed was the wide use of the emergency exemption.
 - We looked at the interplay of the Governor's oversight and Section 2.2-4011(D).
 - **Elizabeth Palen:** A good charge may be to come up with a definition of "emergency." We could present this to JLARC.
 - Discussed overuse of emergency regulation exemption by legislators.

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- Discussed the possibility of educating lobbyist through a CLE. We will find out what the Attorney General's (AG) office wants.
- Discussed looking at what other states are doing.
- We expect to hear from Martin Kent regarding the federal stimulus package, will determine where the AG stands on emergency regulations dealing with the stimulus monies.
- The workgroup discussed Incorporation by reference issues.
 - Issues discussed included updating the content of links;
 - Adopting out of state guidelines, may run into delegation of powers problems.
 - If you link to a regulation, and the regulations change, although technically you are locked into the effective date of incorporation, the content of the link will still be different.
 - Discussed the issue of incorporating by reference, and the item incorporated has some changes done.
 - **Elizabeth Palen:** There should be some public participation when they are changed. If the change is immaterial, there is an exemption to a full public process and would result in a shorter process.
 - Also discussed copyright issues for items incorporated but non publishable online.
 - **Mike Quinan:** Have we had a copyright lawyer look at this issue? There may be an exemption; we should look into what happens when copyrighted material is incorporated into regulation.
 - The workgroup discussed the benefits and downsides of updating regulations as a matter of course when they are incorporated.
 - Accountability comes with Executive Review, with some exceptions.
 - Costs:
 - Some documents only available by link, may be burdensome to print a 3500 page document.
 - Discussed requiring the agency to print and file one copy.
 - The group will look into securing for the committee their own electronic database of material incorporated by reference.

Summary from the Hearing Officer Handbook workgroup:

- We first discussed the questionnaire we will be sending to current hearing officers to solicit ideas for updating the deskbook.
- A draft had been circulated and was discussed. Several excellent editing suggestions were made, and these will be incorporated into the final survey.
- **Eric Page** will distribute the questionnaire by July 1 and will ask for responses within 2 weeks. Assuming that we will need a further due date, we agreed that July 31 would be our hard deadline.

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- **Eric Page** will distribute the survey results by August 17, and we will schedule a work session sometime around the end of the month to discuss incorporating survey results into the updated deskbook and other changes to the deskbook.
- We also agreed that subcommittee members will provide me with specific comments and suggested changes to the deskbook no later than September 1, so I can put these together into one document in time for our next full committee meeting.
- This date may have to slip a bit, depending on our August work session. The goal is to have a completed document by the September committee meeting, so that we can review and finalize it by the late October committee meeting.

We then discussed the deskbook itself.

- **Chris Nolen** suggested that we include a "best practices"/practice pointers section.
- **Alex Skirpan** suggested that we look at the judges' deskbook, which he uses often, and that we beef up the "Evidence" and "Experts" sections.
- **Katya Herndon** suggested that we make references to the websites of agencies that have their own rules of practice and procedure, such as the SCC and ABC.
- The subcommittee noted several areas that must be examined and corrected.

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