# Study Guide - Chapter 3

# Thinking about Londoner and Bi-Metallic, how do you determine whether an action is a rule or an adjudication?

# Licenses and Permits

## Why are licenses and permits an important part of agency regulation?

## What are the enforcement advantages of requiring a license or permit before allowing someone to undertake an activity, as opposed to allowing them to engage in the activity without agency review?

# Adjudications to Make Policy

## How can adjudications set national policy, if the adjudication is not binding precedent?

## Why make policy through adjudications rather than rulemaking?

# Federal Agency Adjudications versus Article III Trials

## Inquisitorial rather than adversarial hearings

### What does this mean?

### How is the role of the inquisitorial judge different from the Article III judge?

## The legal status of a federal ALJ's opinion

### Unless it has been delegated, who has the authority to make the final decision?

### What does 557(b) tell us about the nature of the ALJ’s decision?

### Why did the EPA switch to allowing ALJ decisions to be final decisions if the agency did not act and there were no internal appeals in 45 days?

## Expertise versus impartiality/cluelessness

### Do we choose federal judges based on expertise in the matter before them?

### How does an expert judge and an inquisitorial system change the nature of trials?

### What are the restrictions on ex parte communications for administrative hearings and how do they differ from those for Article III trial?

#### What are examples of the differences?

### Why is expertise critical to the role of agencies?

### How does expertise affect the deference courts give agencies?

### How does the inquisitorial system better support expertise than does the Article III trial system?

## How does the Louisiana Department of Administrative Law affect expertise in adjudications?

# Basic Procedure for Adjudications:Section 555

## While Section 555 only applies to formal adjudications and formal rulemaking, it is a good general review of the basics of a hearing.

## What are the 555 requirements for a hearing?

## Thinking ahead, what does Goldberg add to these?

## Notice

### What is notice?

### Why is it required?

### What has to be provided in the notice?

### What can complicate notice?

#### What about in immigration?

#### Welfare benefits?

## Who has the burden of proof?

### What is the Social Security Disability example?

### License revocation?

## When can the burden shift?

### New system - TANF

#### Benefits have limited term

#### No action necessary to terminate benefits.

### Recertification schedules

#### Shift the burden to recipient to show qualifications.

#### License renewals can do the same.

# Standard of Proof

## What is the standard of proof required in an agency proceeding, unless otherwise specified in the law?

## Are there other standards in administrative proceedings?

### The United States Supreme Court has upheld a clear and convincing standard in mental health commitments.

### Congress is free to require even higher standards of proof.

# Burden of proof

## Who has the burden of proof in an adjudication?

# Rules of Evidence in Administrative Proceedings (Formal and Informal)

## What is the purpose of the rules of evidence in Article III trials?

### What is the underlying theory of the rules?

### How does this change when there is no jury?

## Why would this be different in an inquisitorial proceeding?

## Does the APA set the standard of evidence?

### Do all agencies use the same standards?

# Hearsay

## What is hearsay?

### Why is it excluded in the rules of evidence, except for the zillion exceptions?

### Why would the hearsay rule not be as important in an agency proceeding?

## What is the Residuum Rule?

### What standard has displaced this?

### LA uses "sufficient evidence" - may not be the exactly same standard.

# Discovery

## Not provided for by the APA

### Some agencies allow discovery

### Freedom of information/Open Records Acts make access to the information less of an issue than in Art. III trials.

## Parties may also be entitled to have the agency use its subpoena power on their behalf against other third parties, if the agency can order discovery for itself.

# APA Provisions - Formal Adjudications

## Formal (APA) Adjudications under the US APA

### US - 554, et seq.

# Formal (APA) v. Informal (Non-APA) Adjudications

## What is the language in 554 that triggers a formal adjudication?

### “on the record after opportunity for an agency hearing”

## What are the subsequent provisions this triggers?

### 556, 557

## Why do we call informal adjudications non-APA adjudications?

## What makes formal adjudications prone to being very complex and time consuming?

## Practice Issues for formal adjudications

### The book spends a lot of time on examples of arguments for and against the court ordering a formal adjudication.

#### You do not need this level of detail for this course

#### As with formal rulemaking, the courts are reticent to order formal rulemaking unless the statute is clear.

#### If the statute is ambiguous, most circuits defer to the agency – Chevron deference discussed later.

#### A few do not defer, reading the law themselves.

#### In practice, if the issue has not been settled for your hearing type, you have to argue the issue to the court based on the circuit’s precedent.

# Informal (Non-APA) Adjudications

## Where do we look for the standards for informal adjudications?

# Ex parte Communications in Formal Adjudications

## No ex parte communications - 557(d)

### What is the extreme sanction for a party who violated this ban?

## What communications are allowed?

### 554(d)(1)(A-C)

## EPA Example

### Can the EPA ALJ consult with an EPA scientist to better understand a case?

#### What if it is about advice on facts in issue?

### Can the EPA ALJ consult with an agency lawyer about law?

#### What about the lawyer prosecuting the case?

### Can the ALJ consult with a party in the case, outside of the proceeding, to get additional facts?

#### How can these consultations be accomplished - what would you do in an Article III trial?

## Separation of Functions

### What is separation of functions?

#### How does this mitigate the loophole of communication with agency personnel?

#### Why do we care?

### What is the problem with requiring separation of function in small state agencies?

## Consumer Product Safety Commission Example

### Can the commissioner consult with his staff?

#### Are they considered legally the same person?

### What about the head of the prosecution staff?

#### What is the key question?

### What about consulting with the heads of companies not currently before the agency?

#### Can ex parte contacts occur before a proceeding?

### Why should the agency be cautious about ex parte contacts?

#### Why do they invite remand from the courts?

# Licensing under the APA Section 558

## Who is the movant when you are applying for the bar?

### Who has the burden of proof to establish that you meet the criteria?

## Are there opportunities for due process hearings?

### What if you flunk the bar?

### What if they decide you do not have the character and fitness to take the bar?

## Who is the movant for a license revocation?

### Who has the burden of proof?

## What does this tell you about your behavior before you are licensed?

# Competitive Licensing

## Why are there a limited number of broadcast television licenses available in a given area?

## How would this change the licensing process as compared to law licensing?

### How does the state limit the number of lawyers?

# What are the standards for disciplining license holders under 558?

# What potential conflicts in peer licensing supervision such as by the Louisiana Board of Medical Examiners, which has only physician members?