

Hi. This is Chris Micheli with the Sacramento governmental relations firm of Aprea & Micheli and an Adjunct Professor at McGeorge School of Law in its Capital Lawyering Program.

Today's podcast is about "Making Effective Regulatory Agency Presentations." The first thing is this that effective comments in the rulemaking process are based on a thorough understanding of the underlying statutes and the factual materials that a state agency, department, board or commission relies on in proposing a regulatory change.

There are 200-plus rulemaking bodies in the State of California, and they can add regulations, they can amend existing regulations, or they can repeal existing regulations. It's very critical that you understand what exactly the proposed regulation is intended to do, and understand the standards by which the regulation will be viewed both procedurally by the Office of Administrative Law and their six standards of review, but also understanding the policy that the rulemaking body is undertaking.

As with other forms of advocacy, particularly legislative advocacy, in regulatory advocacy, it's also important that an advocate make an effective presentation to the state agency during the rulemaking process. Now, of course, that can occur in written comments submitted in the 45 day comment period, and/or it can include verbal or oral comments made at a public hearing.

Now, in addition to making effective regulatory agency presentations which obviously includes: being honest, staying on point within any specified time limits, ensure that your presentation engages the rulemaking audience, but keep in mind that those presentations are just one component of successful regulatory agency advocacy.

It's important that regulatory advocates also be aware of potential avenues to impact proposed regulations. For example, the Governor can certainly influence the work of state agencies, but so can the Legislature and even the courts. Even though rulemaking is an executive branch activity, the other two branches of government and the private sector can influence that rulemaking activity.

How you may ask? Let's take a brief look. How does the Governor influence state agencies? He or she can exert considerable influence via his or her authority over a state budget, power to reorganize the executive branch. The fact that these are line authority agencies and departments, meaning the line of authority goes up to the Governor's office, personal persuasion of the Governor and his or her staff, and utilizing publicity either positive or negative.

Particularly if the agency is within a line authority of the Governor, then he or she appoints the cabinet, the agency secretary, and undersecretary, certainly the department directors and chief deputy and the deputy directors. Obviously, the Governor can issue directives to the agency or the department.

Even with some of the independent agencies, the fact that the Governor has appointed all or some of the governing board members, he or she is expected to be able to influence some of these appointees.

How could the Legislature influence state agencies and departments? When conferring the power or the authority to regulate, of course, the Legislature does so by statute and those statutory grants of authority can be a broad scope of authority or a limited scope of authority.

Another key function of the legislature is its role of oversight both standalone oversight as well as the oversight that comes with a budget process. Through the annual budget process, the Legislature can certainly exert influence over state agencies by either supplementing, or diminishing, or outright removing funding for a particular department or agency.

They can also do so by adopting what we call budget control language. In BCL, budget control language, that specifically directs state agency activities.

Back to the oversight function, the Legislature can obviously hold hearings during the year to review an agency's actions in adopting proposed regulations and even in implementing, interpreting and enforcing the law.

Also, the Legislature has the ability to utilize a couple of control agencies that are under their purview to investigate and look into an agency's actions -- how it's regulating, how it's implementing the laws, how it's interpreting and enforcing the laws. For example, the state auditor can be requested to audit a state agency.

Similarly, the Legislative Analyst Office, who is also appointed by a Legislature, can look into and analyze the budget and other functions being undertaken by a rulemaking agency. The Legislature can petition OAL to review existing regulations, but probably through the annual budget process is where they can be most effective.

There are some informal, behind-the-scenes, activities that can occur as well wherein policy committees, chairs, legislative leadership or perhaps even a large contingent of legislators might seek to influence a rulemaking agency or departments.

Now, how about outside interest groups, how can they influence state agencies in the rulemaking process? The main route for them to take is the opportunities afforded by the APA, the Administrative Procedure Act, and that is the way of participating in the actual rulemaking activities of a state agency, be it written comments or oral comments provided at a public hearing.

Now, most interest groups often go well beyond just participating in the regulatory or formal rulemaking process. Sometimes they resort to the legislative arena to influence rulemaking activities.

They might do so by instigating legislative oversight hearings, perhaps getting legislators to weigh in with specific administrative agencies and through the annual budget process, particularly the hearings conducted by the budget subcommittees that have oversight authority with the relevant agencies and departments.

Now, naturally, interest groups can also weigh in with the Governor's office as a means of pressuring state agencies to act or not act.

In the end, if interested parties are unhappy with a given regulatory action, then they can also initiate litigation and go to court to challenge the agency's rulemaking activities and they might even resort to media or grassroots activity. Of course, media attention, such as press coverage, regarding proposed state agency rulemaking can benefit your lobbying efforts as well.

Now, regulatory agencies can also suggest that agencies and departments undertake specific rulemaking, in which case they might want to go and try to influence the agency secretary or the department director.

In addition, interested parties. There are two additional ways for interested parties to challenge an agency's rulemaking. First, they can petition an agency and request either the adoption of a new regulation, the amendment or repeal of an existing regulation and by state law, those agencies so petitioned have 30 days to respond. Now, they don't have to undertake or accept that petition, but they must respond to it.

In addition, any interested person may obtain a judicial declaration as to the validity of any regulation or seek an order of repeal by bringing a judicial action for declaratory relief in Superior Court in the State of California.

Even after an agency or department has completed the rulemaking process, there are these additional opportunities to be involved, including with the OAL in its final review. Of course, there's also potentially appeal to the governor's office, and last but not least, a challenge to the rulemaking in court.

I hope you've enjoyed this podcast. We'll talk again soon.