

This is Chris Micheli with the Sacramento governmental relations firm of Aprea & Micheli. Today's topic is public comment in the rulemaking process.

There are both informal and formal opportunities for individuals to comment on proposed rulemaking. Just by way of background, the State of California has over 200 state agencies and departments that have quasi-legislative or rulemaking authority. That's found in California's Administrative Procedure Act.

Those 200-plus agencies adopt more than 500 regulations each year, so there's plenty of opportunity for members of the public and interested persons to participate.

How does the public go about participating? There are both informal and formal opportunities to do so. They can be informed, observe, and participate in these rulemaking opportunities.

The first opportunity is an interested party's process whereby those state agencies and departments send information to interested persons, either by email or by mail. Once you are made aware of those opportunities, you can sit down with the rulemaking body, the staff, appointed officials, and determine what are they interested in doing.

Is there a particular regulation that they want to do? Do they have specific language that they're looking at?

This is an opportunity for members of the public to provide informal comments. The difference between informal and formal comments is the informal comments are not part of the official rulemaking file. In other words, nothing is documented. Nothing is made public. It's an informal process.

In the regular rulemaking process, that formal opportunity comes about once the regulation is published. By law, the rulemaking body has to provide a minimum 45-day comment period. Sometimes, they offer opportunities to speak in a public hearing. Other opportunities, they do not, and it's just written comment that is provided.

However, in the public hearings, if they do not notice a public hearing, individuals can formally request that public hearing. If you think you could offer something valuable, not just in writing, but also verbally, this would be an opportunity or a reason to request that public hearing.

If a member of the public does request a public hearing, it must be provided by that state agency or department. Otherwise, you're limited to written comments. Whether you submit verbal or written comments, it's very important to keep in mind the six standards of review that the Office of Administrative Law utilizes.

Once the formal rulemaking process ends, the State Office of Administrative Law will review that rulemaking file in order to determine whether or not that state agency or department complied with all of the legal requirements found in the APA. It's important for you to keep those six standards in mind.

It's important to keep in mind in the formal rulemaking process some timelines. Once that initial notice is provided with an initial statement of reasons, a 45-day comment period will be offered. That may or may not be followed by a public hearing.

It's important that you submit your written comments to the state agency, again based upon those standards of review. Let's review the six standards. They are necessity, authority, clarity, consistency, reference, and non-duplication. What do each of those six standards mean and what's OAL looking for?

Necessity means that the need for the regulation has been demonstrated by substantial evidence. While substantial evidence is a legal term of art, the important thing to know is, has the state agency or department justified the need for adopting the particular regulation?

That justification is found in the initial statement of reasons, and then at the conclusion of the rulemaking, in their final statement of reasons.

The authority: what is the provision of law that authorizes or requires the regulation? That's relatively straightforward.

Clarity: is the regulation easily understood by those who are affected by the regulation? This is an interesting one, because it's not one that anyone can understand. It's the regulated community.

For example, if you have a highly technical regulation, for example, at the Department of Toxic Substances Control, the standard by which clarity is determined is one who has the technical or scientific expertise.

The fourth standard is consistency: is the regulation in harmony with and not in conflict with other laws?

Reference: what is the statute that is being implemented or interpreted by the rulemaking body?

Non-duplication, meaning it doesn't serve the same purpose as any other state or federal law.

Let's turn briefly to how to make an effective regulatory agency presentation. Again, keep in mind those six standards of review. You cannot lobby or provide comments to the Office of Administrative Law. They are only allowed to consider the rulemaking file.

As such, it's important that either your verbal comments at the public hearing or your written comments in your letter to the state agency or department keep those six standards in mind. We have found that the most effective comments are those that demonstrate an understanding of the underlying statute and the justification for that rulemaking.

In other words, as opposed to lobbying in the Legislature, where you're often focused on the bigger public policy issues, and often your written comments are anywhere from one

to maybe two or three pages, often rulemaking comments are much more substantive. They often provide alternative language where it is being suggested.

First, you have to understand the statute and the materials that the agency is relying upon in proposing the regulation, demonstrate an understanding of what the proposed regulation is attempting to do, and, again, keep in mind those six standards of review.

As with any other lobbying or advocacy, make sure that your presentation is concise, but thorough. Expect the unexpected. Your audience? To whom are you speaking? Any questions that may be raised? It's very important that you keep, again, your comments quick and to the point.

Remember that, whether it's a verbal presentation or a written presentation, there are multiple component parts.

With that, those are some of the opportunities where members of the public can comment on proposed rulemaking with California state departments and agencies.

Look forward to our next topic together.