

ABSTRACT

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Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element

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Abstract by Frederick G. Jauss, IV

The vast majority of the output of agencies are not regulations published under the notice and comment process, but are publication rules. They comprise the interpretive rules, statements of general policy, staff manuals, and other assorted documents. Professor Strauss' article deals with the confusion surrounding the manner in which the courts treat the agency work product that inhabits this level. The APA appears to acknowledge the existence of these rules and provides minimal guidance governing their adoption. The author argues that the courts have apparently ignored the guidance provided by the APA in the deference to be accorded these rules, since they have repeatedly required increasing levels of formalization in the creation of publication rulemaking. The more costly for an agency to generate regulations, even publication rules, the more likely the agencies will be to want to short cut the established procedures in order to make public policy. Professor Strauss posits that the APA and the force of precedent allowed publication rules under the APA is grounded in notions of sound public policy. Agencies work best when they are free to advise people based on official agency positions and definitions, rather than discretionary interpretations of local enforcement agents. The actions of the courts to discourage the use of these rules or make the their publication more costly threatens evenhanded enforcement and full public disclosure of agency rules.

Strauss argues that agencies should restrict the use of publication rules in a precedential way, eschewing their use with the force of statutes. However, this should not tempt courts to encourage agencies to accompany their advice with a disclaimer that it should not be relied upon. Doing so would have a perverse effect on the operations of the agency. Judicial review of these rules should be as limited as possible in order to preserve their value. Unfortunately, the activity of the courts, notably the D.C. Circuit, in this area has muddied the waters surrounding these rules. Following a more proper precedent in *Shidmore v. Swift*, which makes a distinction between influence and command, restore these rules to their proper place in the administrative canon.