The ABA Ad Law Section's E Rulemaking Survey*

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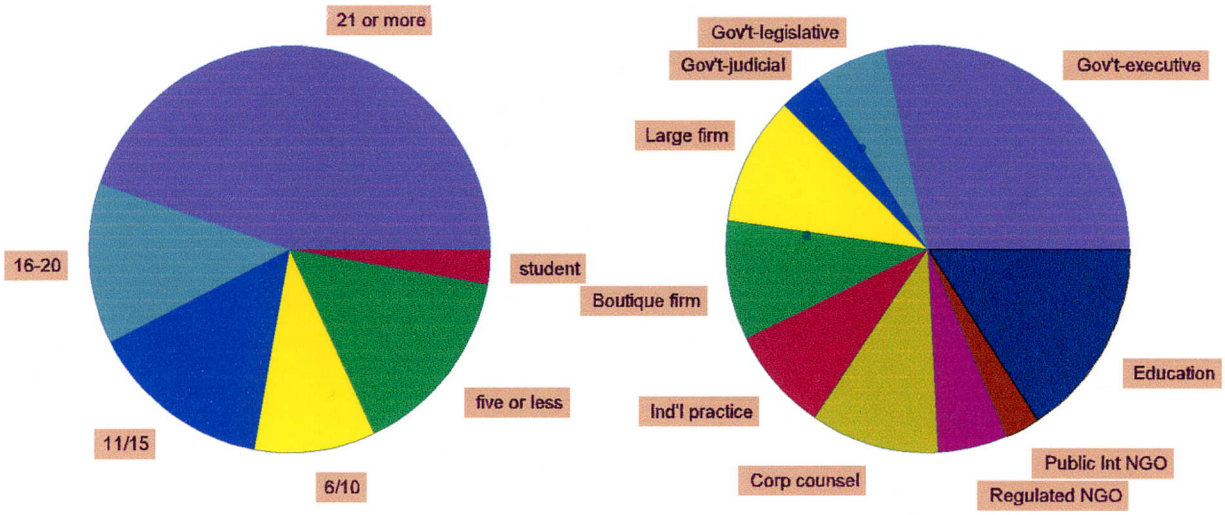
The following pages summarize the results of a survey taken last spring among members of the ABA's Section on Administrative Law and Regulatory Practice. There has evidently been much change since then, and the survey did not purport to cover all areas of possible concern – for example, whether and in what ways the creation and administration of a government-wide standard might, desirably or undesirably, enhance White House controls over rulemaking processes. Nonetheless, the reports should be interesting to Section members, and suggest some lines worthy of further consideration as the government continues to develop its E-Rulemaking initiative.

Three hundred twenty section members responded to the Survey, which was posted on the Section website, and used a proprietary, web-based survey software known as Survey Gold. As figure one shows, respondents were about equally divided between attorneys in private practice, and government attorneys or academicians; almost half had been in practice for more than 20 years. Members reported a wide range of practice areas; had financial regulation (and other possibilities) been listed, one may be confident even greater diversity would appear.

Figure 1

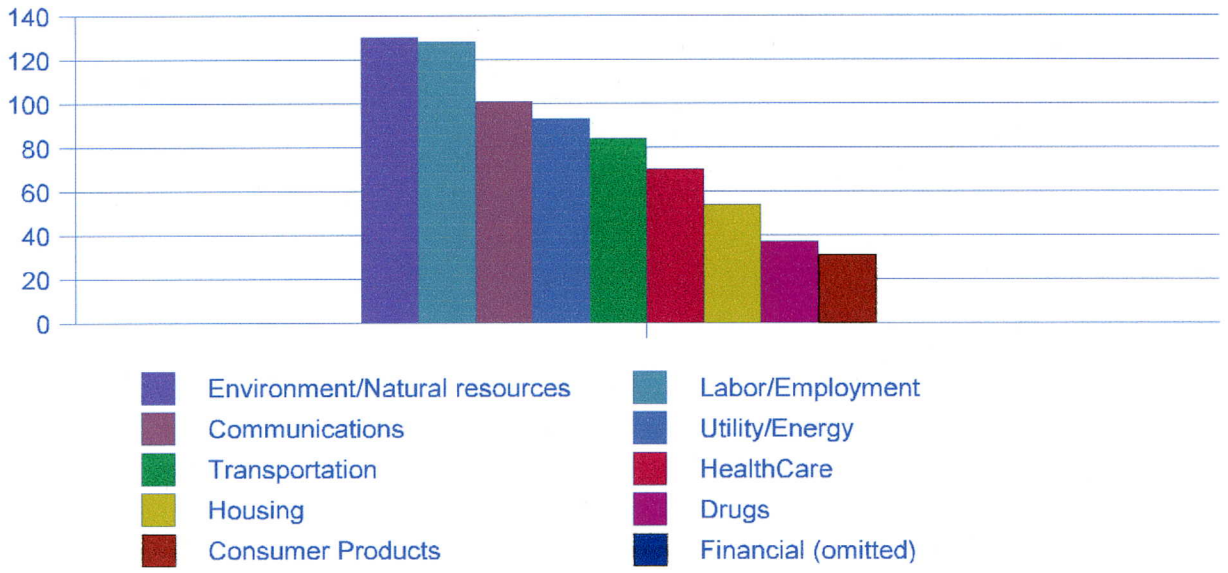


Years in practice

Type of practice

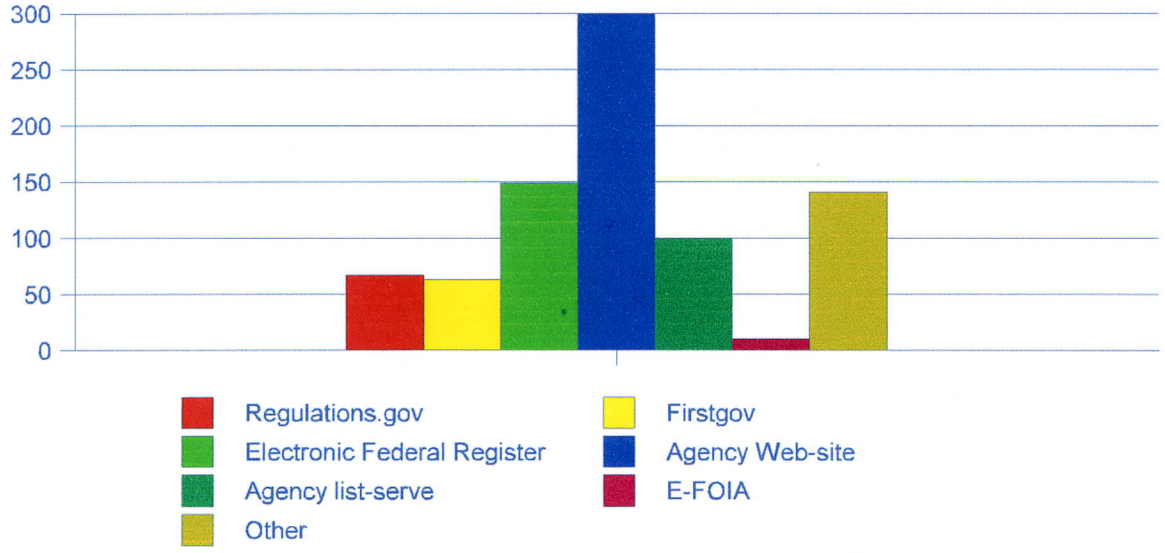
* These results, along with Professor Strauss' observations on them, will appear in the Spring 2004 issue of the *Administrative and Regulatory Law News*, published by the ABA's Section on Administrative Law and Regulatory Practice.

Figure 2



Use of electronic resources, unsurprisingly, is widespread. Asked to estimate the frequency with which they used the Internet for research, more than a third (117) reported doing so 9 or more times a day; less than half that number (41), twice or fewer. More than three quarters asserted that they used government electronic resources, when available, predominantly (31%) or often (47%). Figure 3 shows the relative frequency of their visits to various types of information resources available from the government:

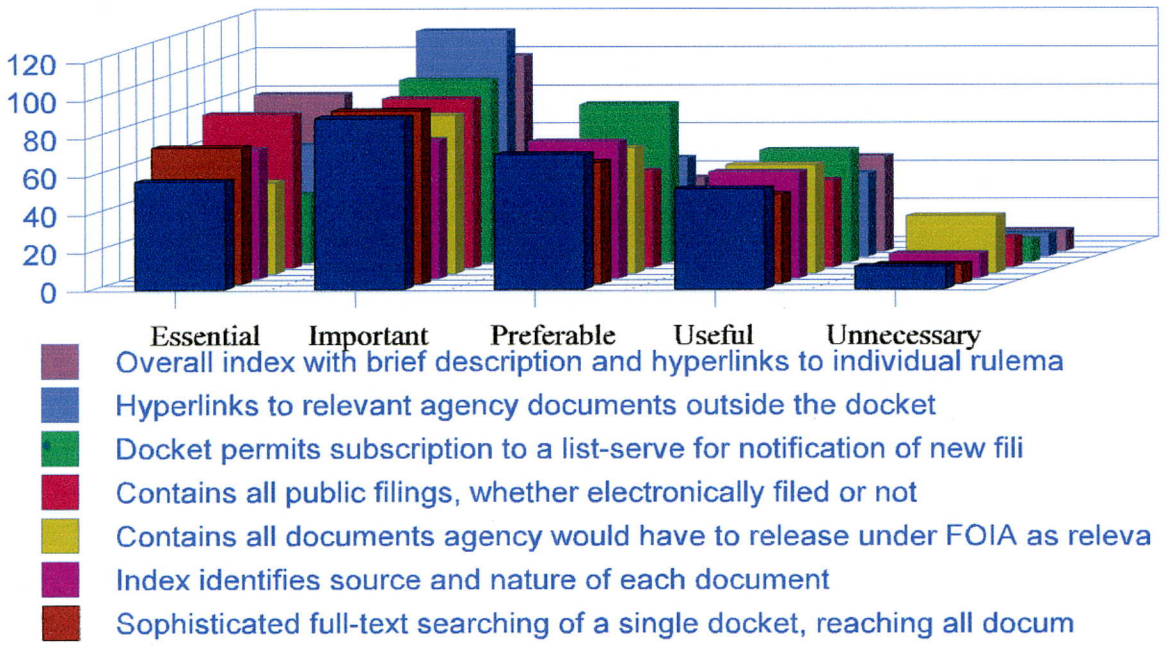
Figure 3



Rulemaking is not a central element of practice for most respondents – rulemaking is less than 10% for more than half; but almost 20% (59) reported that rulemaking constituted half or more of their work. To the same effect, 176 respondents (55%) had not filed rulemaking comments in the past three years; but 76 in (about one fourth) had filed comments in more than 3 rulemakings during the same period. Not surprisingly, perhaps, 73 respondents reported making at least some filings electronically – the bulk once or twice, but 16, 5% of respondents, in more than five rulemakings. Twenty-one respondents who had not filed electronically reported concerns about limitations (11), agency evaluation (4), excessive availability to the public (3) and reliability (3).

Perhaps the greatest transformation worked by putting rulemaking on line lies in the change in transparency. Depending, of course, on how agencies approach the matter, one can transform not only the mechanics of delivering notice of a proposal and filing a comment, but the visibility of the process as a whole. In good part at Neil Eisner's urging, the Department of Transportation has been a particular leader in making interpretive materials as well as proposals and rules on line, and as well putting in readily accessible electronic format the whole docket of pending rulemakings (as well as other departmental matters.[**] One series of questions in the survey asked respondents about what characteristics they thought an agency rulemaking docket should have. Because the resulting graphic is a bit busy, it seems relevant to present these results in both graphic and tabular form.

Table 4: Wishes Respecting Agency Dockets



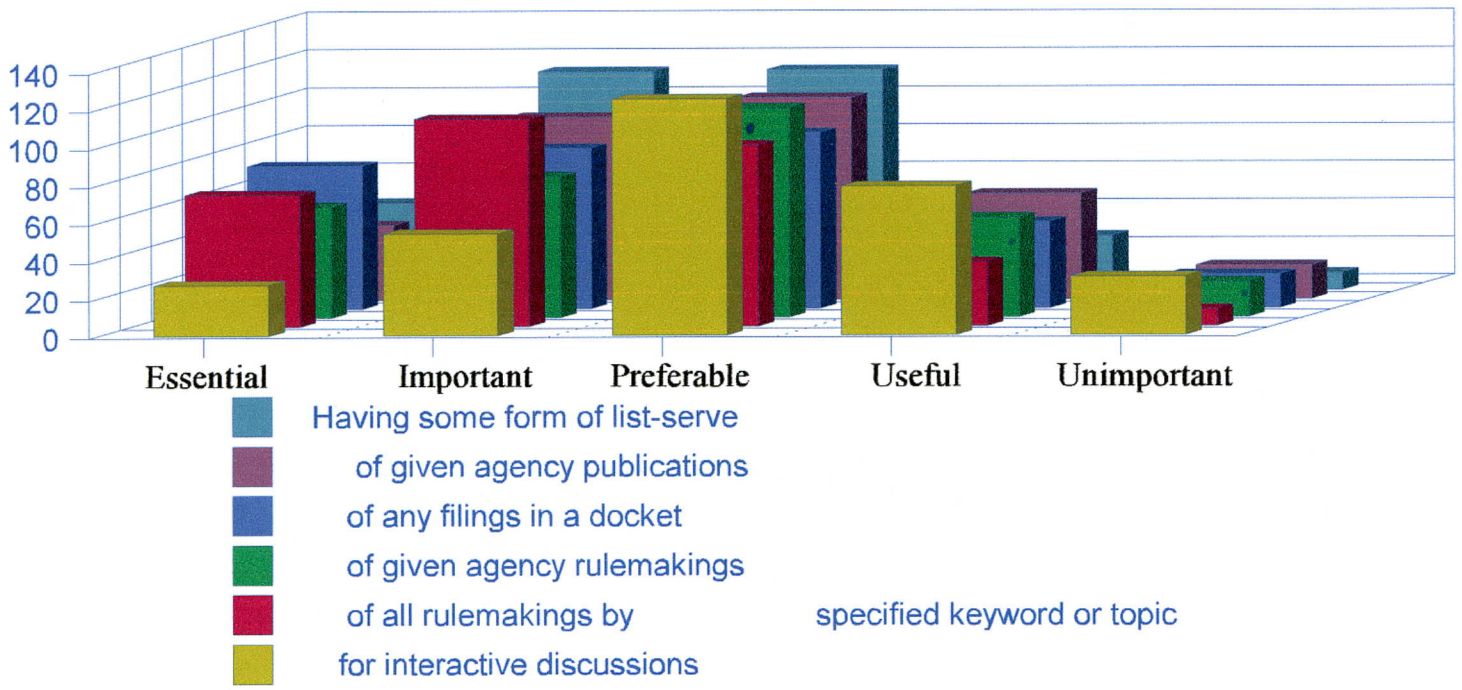
Notice the particular importance, in our estimation, of hyperlinking, both in the overall index, and between docket documents and other relevant agency documents. Least important, among these alternatives, is that the electronic docket contain all documents an agency would be obliged to

[**]See http://dms.dot.gov.

release under FOIA. Less than half the respondents reported consulting an electronic docket; forty-four of those who did consult such a docket did so for more than 5 rulemakings; 38, for 3-5, and 46, for 1-2. For the docket they referred to most frequently, about a third each consulted it 6 or more times, 3-5 times, and 1-2 times. The reasons most frequently given to look at rulemaking dockets were for general information or to explore all comments (190); 61 reported examining particular comments, 52 examining agency data or reports, and 30 help in preparing second round comments.

Wish-list for agency electronic dockets in Rulemakings

	Essential	Important	Preferable	Useful	Unneeded
Overall index with brief description and hyperlinks to individual rulemakings	**83**	***103***	39	50	11
Hyperlinks to relevant agency documents outside the docket	59	***119***	52	44	12
Docket permits subscription to a list-serve for notification of new filings	36	**96**	**83**	59	12
Contains all public filings, whether electronically filed or not	**81**	**89**	51	46	16
Contains all documents agency would have to release under FOIA as relevant to a rulemaking	48	**83**	66	57	30
Index identifies source and nature of each document	68	73	72	56	13
Sophisticated full-text searching of a single docket, reaching all documents in all common electronic text formats	72	**91**	64	47	10
Sophisticated full-text searching of a single docket, reaching all documents, including scanned	57	**90**	71	53	12



A second set of "wish-list" questions explored the pro-active potential of internet connections. If attorneys could register with an agency or central server for automated notice of various events – a so-called "list-serve" function, what kinds of notice would they like automatically to receive?

Here, the most desired capacities were to be able to sign up of automatic notice of rulemakings triggering specified keywords or topics – knowing that you could be sure of getting email notice whenever the Department of Agriculture proposed a rule reaching Muscovy Ducks – and of new filings in a specified docket. An associated question asked people to identify the *type* of document they would like to be able to use keywords to specify for list-serve notification. Strikingly, relevant interpretive materials (213) was a close second to rulemakings (221); other options were considerably less interesting.

Table of expressed wishes respecting list-serve use.

	Extremely Important	Frequently	Occasionally	Rarely	Not at all
Having some form of list-serve	47	***116***	***117***	29	9
of given agency publications	40	**97**	***107***	56	18

of any filings in a docket	**76**	**85**	**93**	46	18
of given agency rulemakings	59	75	***111***	53	19
of all rulemakings by specified keyword or topic	70	***110***	**96**	34	9
for interactive discussions	27	54	**125**	79	31

People were asked more general questions, not readily tabulated, but a reviewer can report his sense that ease and predictability of navigation – user friendliness – are important values; also, the breadth and thoroughness of search capacities available. The variation of search engines used from agency to agency – sometimes, from subagency to subagency – may be the most frequently criticized aspect of the current provision of e-government.

Where might one go from here? A January 8 conference held at American University under the auspice of Neal Kerwin heard federal officials and others discuss the emerging shape of e-rulemaking. The present practice, the first phase of a three-stage plan, takes matters no further than providing a single site, www.regulations.gov, where one can find posted all open notices of rulemaking by federal agencies. (It is much more successful in this regard than agency web-sites; a 2003 GAO study found that, for a three-month period in early 2003, only 20 of the 63 proposed rules for which EPA published an NPRM in the Federal Register could be found on EPA's site; but all were findable on regulations.gov.) The second phase, planned for implementation early in 2005, is to provide a government-wide docket for all rulemakings, assuring uniform (and powerful) search capabilities and broad availability of materials, such as others' comments, that until now have been discoverable only with considerable effort and, often, out of time.

This phase is still in development, and it is unclear how far it will reach – how assiduously, for example, agencies will be encouraged to post not only their proposals but supporting studies; how rapidly comments will be posted (electronic comments can appear immediately, but those filed in hard copy will have to be scanned in); to what extent and in what respects list-serve capacities will be developed. Section members have an obvious interest in promoting the maximum development of these capacities.

Beyond this, it will be interesting and important to see if and how the development of these capacities transforms rulemaking. An obvious and perhaps welcome transformation will be the growth of the "reply comment," as others' comments become instantly and cheaply available, and readily searched and analyzed for matters of possible interest. Rulemaking can be far more deliberative if it becomes more readily iterative. Past enhanced deliberation, however, may lie more questionable political effects. When commenting can be as easy and cheap as a keystroke, one must perhaps expect that the possibilities of comment will not only be open to a broader range of the populace, but also open to exploitation. Even legitimate grassroots campaigns can serve to push rulemaking towards a more political, plebiscitary character; and it is not hard to imagine manipulative campaigns exploiting the tools of spam to proliferate comments dramatically. Further politicization of rulemaking seems at least equally threatened from within. A centralized docket

would offer much in the way of convenience – knowing one organization, search engine, etc. But it will also dramatize and enhance OMB's and OIRA's already central role. Together with information specialists at EPA, they are the ones creating this new apparatus; and to have all information travel through their gateway only adds to the possibilities of their influence. Indeed, one might suppose that this would occur with or without a single, central docket. As agencies become more transparent, they become more transparent to the President as well as to the public; the docket is equally available to him, and politics will give him the incentive to attend to it. Several times during the Washington conference, presenters voiced the idea that rulemaking had become the most important means by which government now generates law – more important than legislation, or than judicial development of law. If increasingly we come to see that this is the President's political law, not the "expert" product of an agency intermediary between President, Congress and courts, deliberating with the relevant public and answering to all three, the President will have become our chief lawmaker (Justice Black's pithy denial in *Youngstown Sheet & Tube v. Sawyer* to the contrary notwithstanding). Such a development would raise sharp questions about the nature of our government, worthy of the most serious attention.