

ADMINISTRATIVE LAW PRINCIPLES AND PRACTICE

Second Edition

John H. Reese
Richard H. Seamon

American Casebook Series®

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ADMINISTRATIVE LAW

PRINCIPLES AND PRACTICE

Second Edition

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Preface to the Second Edition

This second edition of the course book, as was the first edition, is based on adult learning theory as developed by educational research scholars. Because students prefer to learn differently, multiple methods of presentation should be used in classes and they should be learner friendly. This book is unique in the following ways:

- It models and supports the use of a variety of textual, graphic, problem, and group exercises as teaching-learning tools.
- The text is clear and concise; case notes explain and clarify opinions; graphics, flow charts, diagrams and checklists throughout the book present a different perspective for aid in grasping topics.

The Teachers Manual contains a variety of graphic, problem, group and individual exercise guides to facilitate the professor's choices from among a variety of teaching-learning methods. The Manual contains an assortment of materials, for the reason that the book is designed to complement a variety of methods of presentation, as selected by each professor. Thus, variations in learning preferences among our students can be accommodated. The accompanying Teaching Materials Packet also contains a variety of visual masters for handouts, overhead transparencies, presentation graphics and document camera copy.

The book's primary goal is to provide basic analysis and application skills in administrative law that are readily transferrable to professional practice. As the organizing principle of the book, significant federal APA topics and their statutory texts are presented in sequence throughout, for the APA is basic to professional practice. Key features include:

- the presentation and explanation of statutory and regulatory material central to administrative law issues
- an analysis model applied consistently to specific problems
- reminders throughout the book that agencies and their problems vary greatly, requiring a context-specific approach to each problem analysis
- parallel provisions of the APAs of 17 states, representing 70% of the nation's population (much administrative law practice occurs at state and local levels)
- comprehensive references to the Attorney General's Manual on the APA and the Recommendations of the Administrative Conference of the United States

The best evidence of the success of this academic-professional modeling for analysis approach to the study of basic administrative law proba-

PREFACE TO THE SECOND EDITION

bly is student comment. A large majority of our former students who have spoken with us about the first edition, report that, indeed, the design is learner-friendly, and that it succeeded in helping them learn how to structure and analyze real-world administrative law problems

JOHN H. REESE
RICHARD H. SEAMON

Both authors have published on legal education. See Reese and Reese, "Teaching Methods and Casebooks," 38 *Brandeis L.J.* 169 (2000); Seamon and Spitz, "Joint Teaching with a Colleague, For Just a Week or Two," 52 *J. Legal Education* 258 (2002).

Preface to the First Edition

There are numerous administrative law course books on the market. The existing course books have not, however, exhausted the design possibilities for teaching materials to use in presenting this difficult course. Hence, based on more than 25 years of experience teaching administrative and constitutional law and 14 years service as editor of the *Administrative Law Review*, I have designed this book to be different. Let me explain.

First, some of the existing books simply are too exhaustive. They are more than a teacher and a class can handle in a typical course. Obviously, the teacher is free to select from the materials in such books. However, in my experience that technique is not effective in this particular field. Because they deal primarily with parts of a process, administrative law topics are not separated for selection as readily as are the topics of some other courses. Furthermore, eliminating material breaks the learning flow.

Second, none of the books directly, and without apology, approach the subject from combined academic-professional perspectives. Yet, we know that because administrative law is pervasive it cannot be avoided by the professional. If the recommendations of the Committee on Long-Range Planning, created in 1990 by the Judicial Conference of the United States, are acted on favorably, administrative law will become even more pervasive. The Committee Report recommends new limits on access to federal courts for appeals involving disability benefits, routine pension, health and welfare claims, and many job discrimination claims.

Administrative law problems are legislation and fact specific. They are highly contextual and vary from agency to agency. This follows from the fact that agencies of government are not generically equivalent at federal, state or local levels of government. That introduces a complication which makes synthesis of administrative law principles difficult, and also misleading, for the synthesized principle is more illusory than real. Thus, student learning is enhanced if it is based on recognition of the variability among agencies of apparently similar legal questions (the "same" issue). Such variability arises from differences in the agency organic legislation, the corresponding agency rules, and court decisions construing them in agency-specific contexts.

Students should be taught to think in terms of academic-professional models for analysis that are designed for application in the varying contexts in which such apparently similar legal questions (the "same" issue) arise. Such models demonstrate how to think about different types of administrative law questions, and how to do so flexibly, with awareness of differences among the agencies. They also teach what legal materials to utilize in that thinking process and in what order. If it is done successful-

ly, students should acquire knowledge and understanding of an array of basic academic-professional models for analysis. Concurrently, the students also may be expected to acquire a fundamental academic understanding of administrative government and the various types of administrative law problems that may arise, for they are fundamental to the modeling. So far as I know, none of the books teach models for academic-professional analysis and application.

If so equipped, the new professional need not panic when a novel administrative law question comes across the desk. The modeling approach should serve to guide the student (professional) through an orderly process of learning about the agency. That process should produce an understanding of the agency legislation, the agency rules, the relevance of the APA, and case decisions—all in context. At that point, the problem begins to take shape and to be perceived broadly as a question of notice, public information, rule making, adjudication, standing, scope of judicial review, or whatever. Then, other—more specific—models for analysis should aid the student (professional) to proceed into the now-identified problem context and to analyze it more precisely. The goal, simply stated, is to develop an orderly approach to, and a method of thinking about, any basic administrative law question that may arise, at whatever level of government it may occur.

Judicial review of agency action deliberately is placed last in this book for both academic and professional reasons. My bias is that students should learn that the first order of business is to advocate effectively within the agency. Functionally, judicial review comes later and is quite limited in scope. Thus, it should be presented in its proper perspective and not be allowed to dominate the course landscape. Accordingly, students (professionals) should not be allowed to drift into an assumption that administrative law is really about finding a way to get the problem out of the agency and into the courts. As we know, judicial doctrines such as waiver, exhaustion of administrative remedies, primary jurisdiction, final action, ripeness, standing, etc., are formidable threshold obstacles to the success of that strategy. Furthermore, substantial evidence review of fact findings, reasonableness review of applications of law, the presumption of administrative regularity, separation of powers deference, etc., also serve to make success in the courts unlikely in many cases. Finally, the resources to pursue judicial review may not be available or the resolve to do so may be lacking.

Perhaps because law students are constantly exposed to appellate court opinions, they seem to resist modifying their thinking about the roles and the powers of courts in the administrative law context. Or, the failure to adjust simply may arise out of confusion. A course book should account for this resistance or confusion and should assist the teacher in reshaping student (professional) assumptions about the roles actually played by courts in this field.

Several of the existing books are quite sophisticated and are manageable only by teachers who are very knowledgeable about administrative law and who have had long experience in teaching the subject. However, there are teachers who are not as deeply involved in administrative law and I sense that they are looking for a book that is more “learner-friendly,” to both them and their students. They seek a book that will enable them to succeed as competent teachers of administrative law, but which will allow them to do so without an inordinate commitment of their time to the preparation and teaching of only one of the several courses that make up their teaching loads. In short, not all teachers of administrative law do so with frequent regularity, and they may not be interested in pursuing administrative law as a specialty. Even so, they bear the responsibility of presenting competently this important course in their law schools.

This book is designed for use in a basic law school course. Accordingly, it consists of 826 pages to permit a reasonable pace of study during the semester. Based on validated adult learning theory (Brookfield, Cross, Davis), the book is designed to be learner-friendly. A reasonable student reading assignment of approximately 20 pages per class hour and a straightforward organization and writing style permit students to acquire a basic understanding of the assignment prior to the class meeting. Thus, the teacher should be able to devote more time to building on and enriching that understanding rather than to spending time explaining the assignment in order to build a base for further learning. Student use and evaluation of the text materials confirm this proposition. I leave it to the teacher to decide whether, and to what extent, to supplement or emphasize beyond what the book contains.

One of my primary concerns is thematic continuity in the development of each topic to facilitate the learning flow. I attempt to ensure this continuity/flow by establishing a textual framework for studying a particular topic. The illustrative constitutional, statutory, case material and notes are inserted at appropriate points in that framework. Designed to be learner-friendly, the text facilitates understanding of how the agency legislation, the agency rules, the relevant constitution, case law precedents, etc., influence the analysis and decision in the class discussion cases presented. The teaching-learning goals are clarity and efficiency.

The book’s academic-professional theme will appeal to those who share my belief that as teachers of professionals, we must recognize that our graduates quickly find themselves involved in professional administrative law problems. Many of them will have client responsibility and will be well-paid for competent performance in the field. Therefore, as students, they should learn from the basic administrative law course the fundamental analytical tools that will enhance their performance as competent professionals. If we recognize the professional reality, we also must assume basic responsibility for inculcating directly the professional knowledge essential to that competence. Our students will not learn it elsewhere, and the MacCrate Report confirms that law firms are growing

increasingly impatient with non-billable or non-productive time spent in on-the-job training. The same may be said of corporate and government employers.

The book is designed to be a teaching-learning tool and not a desk book. Although it is not simplistic, neither is it encyclopedic. The encyclopedic approach, laudable as it may be in a desk book, creates serious risks to student grasp of the fundamentals of administrative law by interfering with the learning flow. Based on my years of struggling with the basic law school course in this field of infinite variability, I have concluded that less is more!

I also give attention to state and local administrative law, although federal materials are central to the text and are used to develop the various models for analysis. It seems to me that law schools cannot afford to ignore state and local administrative law for the reason that state and local issues constitute most of the administrative law problems faced by most of America's law graduates. Frank C. Newman, a former member of the California Supreme Court and former dean of the University of California Law School, Berkeley, who also is a past Chairman of the ABA's Section of Administrative Law and Regulatory Practice, stated some years ago that the bulk of the administrative law practiced in the United States occurs at state and local levels. His statement retains its accuracy.

For me, the difficulty of including state and local materials lies in the methodology. With fifty separate jurisdictions and the variations among them, it is not particularly useful simply to include some state cases in an administrative law course. Further, because of variations among the states, it is not necessarily fruitful to attempt to present the administrative law of a particular state on a specific point. Of course, it is appropriate if the goal is to teach the law of one state, or if all students may be expected to practice as professionals in that state.

Therefore, students should learn that the extrapolated federal models for administrative law analysis also apply at state and local levels. The raw materials used in the analyses essentially are the same as at the federal level. Topical state court interpretations of state constitutions, agency legislation, etc., are secondary to learning how to analyze a state or local administrative law problem. I use the APAs of ten of the most populous states to parallel consideration of the elements of the federal APA as they are introduced throughout the book. The design format invites insertion of corresponding portions of a particular state APA throughout the course, if the teacher desires to include it and, perhaps, other state and local material as well. I intend only to facilitate the inclusion and do not suggest it needs to be or should be done.

The best evidence of the success of the academic-professional modeling for analysis approach to the study of basic administrative law probably is student comment. I developed this approach over a period of years. Accordingly, many of my former students are now professionals who have

had significant administrative law problem experience. A large majority of those who have spoken with me report that, indeed, the approach succeeded and that they did learn how to structure and analyze the administrative law problems that arise.

JOHN H. REESE

Denver, Colorado
January, 1995

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