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## STAND OUT FROM THE CROWD: MAKING YOUR VOICE

### HEARD IN AN ERA OF “NOTICE AND SPAM”

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#### Introduction

E-commenting, or commenting on administrative rules and notices on-line, has transformed the federal notice-and-comment practice. With a click of a button, citizens can easily share their thoughts on a proposed rule or notice.<sup>2</sup> While the goal of increasing the opportunity for public participation is a worthy one, expanded public commenting has turned the notice-and-comment

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<sup>2</sup> Although agencies still accept publications through mail submissions, many agencies state that their preference is for comments to be submitted electronically. *See e.g.*, FCC, <https://www.fcc.gov/encyclopedia/rulemaking-process-fcc#q8>; Dep’t of Transp., <http://www.transportation.gov/regulations/rulemaking-process>.

process into a “rulemaking arms race.”<sup>3</sup> Agencies are now inundated with voluminous comments as public interest groups encourage members to submit boilerplate comments.<sup>4</sup>

Given these challenges, how can interested parties make their e-comments stand out from the crowd? How can the writer help the reader distinguish a thoughtful, substantive comment from “spam”?<sup>5</sup> A few resources are available to assist professionals and the public in writing administrative comments.<sup>6</sup> Agency websites also have suggestions for effective e-commenting.<sup>7</sup> This information, however, is general and limited.<sup>8</sup> Examples, illustrations, and explanations are not included, leaving the inexperienced commenter or layperson with little guidance on how to draft a persuasive comment.

This article starts with the premise that administrative comments are persuasive documents. The writer’s goal is to convince the administrative agency that the proposed rule is adequate as drafted or needs revisions or modifications. In order make her voice heard, the writer needs to make the reader think she is right, trust she is right, and feel she is right. Borrowing from the literature on persuasive legal writing, the article describes the elements of logos, ethos, and pathos,

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<sup>3</sup> Fred Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, REGULATIONWRITERS (Feb. 22, 2016), <http://www.regulationwriters.com/library/ModestProposal31AdminFall2005.pdf>.

<sup>4</sup> For example, the recent EPA proposal to change the definition of waters of the United States generated over one million comments. Nina Hart, *Social Media: Changing the Landscape of Rulemaking*, NATURAL RES. ENV’T (Feb. 22, 2016), [http://www.americanbar.org/publications/natural\\_resources\\_environment/2015-16/summer/social\\_media\\_changing\\_landscape\\_rulemaking.html](http://www.americanbar.org/publications/natural_resources_environment/2015-16/summer/social_media_changing_landscape_rulemaking.html); Eric Lipton, *Critics Hear E.P.A.’s Voice in ‘Public Comments’*, N.Y. TIMES (May 18, 2015), [http://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html?\\_r=0](http://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html?_r=0).

<sup>5</sup> E-commenting has been criticized and called “notice and spam.”

<sup>6</sup> See ELIZABETH MULLIN, *THE ART OF COMMENTING: HOW TO INFLUENCE ENVIRONMENTAL DECISIONMAKING WITH EFFECTIVE COMMENTS* (2d ed. 2013); see also *Tips for Submitting Effective Comments*, REGULATIONS.GOV, [http://www.regulations.gov/docs/Tips\\_For\\_Submitting\\_Effective\\_Comments.pdf](http://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf) (last visited Feb. 22, 2016).

<sup>7</sup> See *Comment on Proposed Regulations and Submit Petitions*, FDA, <http://www.fda.gov/RegulatoryInformation/Dockets/Comments/default.htm> (providing suggestions for making sure comments have “the greatest possible impact.”)(last visited Feb. 22, 2016); *Rulemaking Process*, DOT, <http://www.transportation.gov/regulations/rulemaking-process> (including a section on how to prepare “effective comments”)(last visited Feb. 22, 2016).

<sup>8</sup> For example, the FDA would like comments that “clearly indicate if you are for or against the proposed rule or part of it and why.” FDA, *supra* note 7.

generally, and identifies the use of these persuasive elements in recent administrative comments. By implementing persuasive writing techniques, the commenter not only advocates for her client or cause, but assists the agency in evaluating the strengths and weaknesses in a proposed rule.

### A. The E-Commenting Revolution

Rulemaking through the Administrative Procedure Act<sup>9</sup> is “[o]ne of the most significant powers exercised by federal agencies in the United States . . . .”<sup>10</sup> An agency solicits public comment after a proposed rule is published in the *Federal Register*.<sup>11</sup> This is called notice-and-comment or informal rulemaking. An agency may modify the rule based on public feedback and then publishes the final rule in the *Federal Register*.<sup>12</sup> In the final rule, the agency needs to describe and respond to the comments it received.<sup>13</sup>

The paper-based mechanism for rulemaking has evolved with technological advances.<sup>14</sup> Today, because so much of the process occurs on-line, rulemaking is now often called e-rulemaking.<sup>15</sup> The e-rulemaking initiative, of which e-commenting is a part, is perhaps “the most far-reaching

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<sup>9</sup> 5 U.S.C. § 553 (2012).

<sup>10</sup> Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 MICH. J. ENVTL. & ADMIN. L. 1, 3 (2012).

<sup>11</sup> § 553(b).

<sup>12</sup> *Id.*

<sup>13</sup> § 553(c).

<sup>14</sup> While not the topic of this article, legal scholars have recently begun to analyze how digital legal documents alter how we communicate. Mary Beth Beazley, *Performance-Focused Technology: Writing (and Reading) Appellate Briefs in the Digital Age*, 15 J. APP. PRAC. & PROCESS 47, 62 (2014); see also Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC 1, 2 (2015) (analyzing whether technologies have and will continue to change the fundamental nature of legal analysis and communication).

<sup>15</sup> “e-Rulemaking is defined as using web technologies before or during the APA’s informal rulemaking process, i.e., notice-and-comment rulemaking under 5 U.S.C. § 553. This includes many types of activities, such as: posting notices of proposed and final rulemakings; sharing supporting materials; accepting public comments; managing the rulemaking record in electronic dockets; and hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings.” Bridget C.E. Dooling, Recent Development, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 895 (2011).

and important governmental transformation ever effected.”<sup>16</sup> E-rulemaking is the result of the E-Government Act of 2002,<sup>17</sup> which promotes the use of information technologies throughout the government in an effort to increase opportunities for public participation, improve government decision making, and enhance the ability of government agencies to achieve their programmatic and policy goals.<sup>18</sup> As it relates to the rulemaking process, the E-Government Act directs regulatory agencies to accept electronically submitted comments and to establish comprehensive electronic dockets.<sup>19</sup> The goal, in part, is to make individual participation more useful and relevant to government agencies.<sup>20</sup>

This new method of rulemaking has its share of advocates and naysayers. The use of electronic media in the rulemaking process has been lauded for promoting democratic legitimacy, improving policy decisions, and lowering administrative costs.<sup>21</sup> A recent report estimated the federal government's cost savings at \$30 million over five years when compared to paper-based docketing.<sup>22</sup> But critics argue that electronic rulemaking will transform the notice-and-comment process into “notice and spam.”<sup>23</sup> More irrelevant comments will lead to a decrease in the overall quality of comments and will stymie the review process. In short, e-rulemaking will “frustrate the goals of citizen participation.”<sup>24</sup>

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<sup>16</sup> Beth Simone Noveck, Article, *The Electronic Revolution in Rulemaking*, 53 *Emory L.J.* 433, 434 (2004).

<sup>17</sup> This act is codified in scattered sections of title 44 of the United States Code.

<sup>18</sup> Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 *ADMIN. L. REV.* 353, 366 (2004).

<sup>19</sup> *Id.*

<sup>20</sup> Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 *DUKE L.J.* 893, 912 (2006).

<sup>21</sup> Coglianese, *supra* note 10, at 10.

<sup>22</sup> Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 *ADMIN. L. REV.* 893, 900 (2011).

<sup>23</sup> Noveck, *supra* note 16, at 441. “If anything, e-commenting arguably exacerbates the problem of everyone speaking and no one listening. When many comments are submitted, commenters as well as agency officials do not have the resources to consider the merits of each and formulate considered replies.” *Id.* at 479-80.

<sup>24</sup> *Id.* at 442.

Although there has been no comprehensive study evaluating on-line commenting as compared to its paper-based counterpart, there is some evidence to suggest that e-rulemaking will make organized mail campaigns easier, but will not necessarily lead to better comments.<sup>25</sup> For example, one study of federal rulemakers<sup>26</sup> has shown that e-commenting has not led to more useful comments.<sup>27</sup> Many e-comments are simply opinions with no supporting facts.<sup>28</sup> Respondents also noted an increase in the number of identical or nearly identical e-comments.<sup>29</sup> Still another study discovered a “spike” in electronic comments for certain types of rules.<sup>30</sup>

Administrative law by its very nature is committed to transparency and open government.<sup>31</sup> The administrative system operates under the assumption that all information is welcomed and will be considered. But under the APA, there is no limit to what can be filed and no requirement to economize submissions. As a result, participants have little incentive to filter or limit the information they provide an agency, resulting in what has been termed “filter failure.”<sup>32</sup> The task of

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<sup>25</sup> “While e-commenting makes the opportunity to comment more accessible, employees do not organize nor sort the blizzard of comments on regulations.gov by any meaningful search criteria. Comments are not deliberative; they do not respond to one another but are one-off communiqués between submitter and agency.” Beth S. Noveck & David R. Johnson, *A Complex(Ity) Strategy for Breaking the Logjam*, 17 N.Y.U. ENVTL. L.J. 170, 179 (2008); *See also* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 953 (2006) (describing two studies where most of the comments were “simple form letters” in one and “tremendously unsophisticated” citizen comments in the other).

<sup>26</sup> This study included a survey, which was the first of its kind, of 74 federal rulemakers from 14 agencies. *See* Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451, 458 (2010). “Federal rulemakers” were primarily attorneys but also included “policy expert[s] in the field,” “technical experts[s] in the field,” “economists,” and a political scientist. *Id.* at 450.

<sup>27</sup> *Id.* at 466.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Dooling, *supra* note 22 at 899.

<sup>31</sup> Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1326-27 (2010).

<sup>32</sup> *Id.*; *see also* Coglianese, *supra* note 25 at 959 (noting one study of 500,000 comments submitted on an especially controversial EPA rule where “less than 1 percent of these comments reportedly had anything original to say”).

processing this information is left to the agency. And in some cases, comments are outsourced for review by someone not within the agency.<sup>33</sup>

As a result, scholars have suggested reforms to the on-line platform, the APA, and the standard for judicial review of agency action.<sup>34</sup> While reforming the process is certainly worth discussing, this article focuses on writing a comment that stands out from the crowd. Much like a judge will gravitate towards a persuasive brief, a rulemaker will gravitate towards a comment that conveys a clear message, demonstrates the credibility of the writer, and considers the perspective of the reader.

## B. Administrative Comments as Persuasive Documents

Persuasive writing is “intended to influence or elicit change in the readers’ position.”<sup>35</sup> And it is common for proposed rules to undergo changes as a result of the comments received.<sup>36</sup> In the context of the rulemaking process, the D.C. Circuit has stated that “[c]onsideration of comments as a matter of grace is not enough. It must be made with a mind that is open to persuasion.”<sup>37</sup> Therefore, if the writer is seeking to alter, modify, or change a proposed rule, she should first understand that she is writing to persuade.

The Supreme Court has provided some guidance as to what a comment should include stating that “comments must be significant enough to step over a threshold requirement of

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<sup>33</sup> Noveck & Johnson, *supra* note 25 at 179-80.

<sup>34</sup> Wagner, *supra* note 31 at 1406 (“[C]orrecting the standards for judicial review should be a top priority.”).

<sup>35</sup> Julie A. Baker, *And the Winner Is: How Principles of Cognitive Science Resolve the Plain Language Debate*, 80 UMKC L. REV. 287 (2011).

<sup>36</sup> See Steven J. Balla, *Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States* 33 (George Washington Inst. of Pub. Policy and the Regulatory Studies Ctr., Working Paper, Mar. 15, 2011) (noting “that nearly every significant regulation is changed in some way as a result of the information contained in the comments”), <https://www.acus.gov/sites/default/files/documents/Consolidated-Reports-+-Memoranda.pdf>.

<sup>37</sup> *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) (alteration in original) (citation omitted) (internal quotation marks omitted).

materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results . . . .”<sup>38</sup> This statement provides guidance in terms of content, but what about style? One professor has suggested that “[i]f you are seeking substantial changes or a major turnaround in the proposal, *make your comments look and sound like a legal brief.*”<sup>39</sup> To make the comment “sound like a legal brief,” the writer should use the classic persuasive rhetorical devices of logos, ethos, and pathos.

### C. Logos, Ethos, and Pathos in Administrative Comments

The use of logos, ethos, and pathos to persuade has been in existence for some time.<sup>40</sup> Because “[p]ersuasion is at the heart of the lawyer’s craft,”<sup>41</sup> it is the foundation for many legal writing courses and the subject of many legal writing texts.<sup>42</sup> In addition, many legal scholars have comprehensively studied the use and application of these rhetorical devices in legal writing.<sup>43</sup> When writing to illicit a change in an administrative comment, the writer should write to persuade the reader through logic and reason (logos), emotion (pathos), and credibility (ethos).

#### 1. Logos: Make the Reader Think You are Right

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<sup>38</sup> Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 553 (1978) (quoting Portland Cement Ass’n. v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973)).

<sup>39</sup> Richard G. Stoll, *Effective Written Comments in Informal Rulemaking*, ADMIN. & REGULATORY L. NEWS 15, 15-16 (Summer 2007) (emphasis added).

<sup>40</sup> Greek philosopher Aristotle gets credit for describing persuasion in these terms. See Kristen K. Robbins-Tiscione, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 492 (2003).

<sup>41</sup> Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ASS’N LEGAL WRITING DIRECTORS 75 (2009).

<sup>42</sup> See JOAN M. ROCKLIN ET AL., AN ADVOCATE PERSUADES (2016); RUTH ANNE ROBBINS, ET AL., YOUR CLIENT’S STORY: PERSUASIVE LEGAL WRITING (2013).

<sup>43</sup> See Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS’N LEGAL WRITING DIRECTORS 129, 131 (2006), <http://www.alwd.org/wp-content/uploads/2013/04/pdf/jalwd-fall-2006-smith.pdf> (providing a list of works that discuss logos, ethos, and pathos in persuasive legal writing).

Logos considers the message of the argument. Although persuasive documents typically include all three modes of persuasion, an appeal to logic or reason is the strongest.<sup>44</sup> In the context of an administrative comment, the argument must be grounded in the law. In order to convince the reader that the arguments in the comment are correct, the writer must:

- Clearly identify the problem (legal, factual, procedural). Commit to a position and avoid an application of the law that requires the reader to make inferences.
- Include citations to law, statutes, and other legal (or non-legal) authorities. Do not editorialize.
- Use empirical data, statistics, or financial information. Non-legal facts of “legislative facts”<sup>45</sup> are often the best support for policy-based arguments.<sup>46</sup>
- Offer alternatives or propose solutions by suggesting specific language for use in the rule.
- Use analogies where appropriate. Analogies are useful when writing persuasively but weak or incomplete analogies can detract from a sound legal argument.<sup>47</sup>
- Use a clear writing style.<sup>48</sup>
- Think carefully about document design and include headings in longer comments.<sup>49</sup> Avoid “packed paragraphs.”<sup>50</sup>

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<sup>44</sup> See Robbins-Tiscione, *supra* note 40, at 492.

<sup>45</sup> “Legislative facts” include: science, empirical studies, social and psychological theory, history, and current events. Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 198 (2000).

<sup>46</sup> *Id.* at 210.

<sup>47</sup> Robbins Tiscione, *supra* note 40, at 535.

<sup>48</sup> “Clarity, therefore, is the most basic quality of good legal writing. For it is only when writing is clear that the reader can accurately comprehend the writer's message and use that information to facilitate professional decision-making.” Mark K. Osbeck, *What Is “Good Legal Writing” and Why Does It Matter?*, 4 DREXEL L. REV. 417, 428 (2012).



## 2. Ethos: Make the Reader Trust You Are Right

Ethos requires that the writer demonstrate credibility, character, and good will<sup>51</sup> in her writing. Because ethos-based arguments focus on the credibility of the writer, some scholars believe this component of persuasive argumentation is the most important.<sup>52</sup> In order for the reader to trust that the writer is correct, the writer must:

- Establish her authority to comment (describe experience, organization, or industry).
- Show that she performed a thorough review of the draft rule and other comments.
- Use good writing mechanics and produce a polished document.<sup>53</sup>
- Be appreciative, civil, and respectful.

## 3. Pathos: Make the Reader Feel You Are Right

Pathos is the sense of sympathy or justice the reader feels for the writer's position or argument.<sup>54</sup> The focus is on the reader and effective pathos-based arguments “stir an emotional

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<sup>49</sup> The message of the argument can be lost through poor document design. “Commentators have discussed how the format of the printed page and the typography of a document can affect the reader's ability to comprehend the text.” *Id.* at 435.

<sup>50</sup> The Packed Paragraph is a paragraph that is too long. Robbins-Tiscione, *supra* note 40, at 509.

<sup>51</sup> Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos As Relationship*, 9 LEGAL COMM. & RHETORIC 229, 231 (2012).

<sup>52</sup> MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 125 (3d ed. 2013).

<sup>53</sup> Be aware that the writer “may also evoke negative emotions through errors in grammar and punctuation.” Lillian B. Hardwick, *Classical Persuasion Through Grammar and Punctuation*, 3 J. ASS'N LEGAL WRITING DIRECTORS 75, 78 (2006).

<sup>54</sup> Julie A. Baker, *And the Winner Is: How Principles of Cognitive Science Resolve the Plain Language Debate*, 80 UMKC L. REV. 287, 303 (2011).

response” in the reader such as “pity, horror, jealousy, patriotism, or pride.”<sup>55</sup> It is easier for the writer to “move” the reader when the comment includes:

- Specific examples to illustrate concerns about the proposed rule
- A compelling study or article to support position
- Vivid narratives taken from personal stories or firsthand accounts

#### 4. Examples of persuasive administrative comments<sup>56</sup>

Effective and ineffective use of logos, ethos, and pathos appear in the comments responding to the Food and Drug Association’s (FDA) 2014 proposed change to the nutrition label.<sup>57</sup> The FDA received over 280,000 e-comments on the proposed nutrition label change.<sup>58</sup> The proposed label had “added sugars” appearing separately from “sugars.”<sup>59</sup> The next section examines three excerpts from e-comments responding to this proposed change.<sup>60</sup>

##### a. Logos

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<sup>55</sup> Stacy Caplow, *Putting the "I" In Writing: Drafting an Effective Personal Statement to Tell a Winning Refugee Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 249, 259 (2008).

<sup>56</sup> These comments are made by professional policymakers and professional commenters. One group of scholars is researching the differences between comments made by this professional group and comments made by lay people. Professional rulemaking participants (lobbyist, governmental decision-makers, regulatory consultants, and attorneys) tend to use premise-argument-conclusion argumentation in their comments and rely heavily on statistical, financial, and technical data as evidence. In contrast, comments made by lay-people tend to use narratives to support they position. These scholars note the benefit of comments based in personal narratives. These comments offer a different type of “evidence.” In particular, narrative-type comments offer “information about impacts, problems, enforceability, contributory causes, [and] unintended consequences” of a proposed rule. Epstein, Dmitry, et al. *The Value of Words: Narrative as Evidence in Policymaking*, 10 EVIDENCE AND POLICY 14 (May 2014).

<sup>57</sup> *Proposed Changes to the Nutrition Facts Label*, FDA (Sept. 23, 2015), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm>.

<sup>58</sup> *Food Labeling: Revision of the Nutrition and Supplement Facts Label*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=FDA-2012-N-1210>.

<sup>59</sup> *Id.*

<sup>60</sup> The comments reprinted in the article are on file with the author and were found on [www.regulations.gov](http://www.regulations.gov). *Food Labeling: Revision of the Nutrition and Supplement Facts Label*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=FDA-2012-N-1210>.

Consider the following comment from the California Strawberry Commission.<sup>61</sup> Has the writer made the reader think he is right?

The FDA acknowledged in the preamble to the proposed nutrition labeling regulations that there is no chemical difference between sugars that are added to food and those that are naturally-occurring food components. In addition, there is no evidence that there is any difference in the physiological effects elicited by sugars that relates to whether the sugars are added or naturally-occurring and no evidence that added sugars are uniquely or directly linked to any chronic disease risk or health-related condition, or physiological endpoint, or that naturally-occurring sugars are superior to added sugars in any nutritional or health respect.

An obvious defect in this comment is the lack of citation to authority, legal or non-legal. The Commission did not identify where in the preamble of the proposed rule the FDA stated that there was no chemical difference between added sugars and naturally-occurring sugars. And without explaining why “no chemical difference” matters, the Commission moved onto the physiological effects of natural sugars and added sugars in an awkward 67-word sentence. The reader has to read this sentence several times to see that the message the Commission is trying to convey is that there is no difference between added sugars and natural sugars, chemical or otherwise. Furthermore, this submission includes a single citation: “National Berry Crop Initiative discussion.”<sup>62</sup> Is that a reliable source? A persuasive comment is not one that requires the reader to reread sentences or to question the accuracy of the statements.

In contrast, consider the following comment from the University of California San Francisco/University of California Hastings Consortium on Law, Science, and Health Policy (“the Consortium”):<sup>63</sup>

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<sup>61</sup> California Strawberry Commission, Comment on FDA Proposed Rule: Revision of the Nutrition and Supplemental Facts Label, 79 Fed. Reg. 11879 (proposed Mar. 3, 2014) (to be codified at 21 C.F.R. pt. 101), available at <http://www.regulations.gov/#!documentDetail;D=FDA-2012-N-1210-0339>.

<sup>62</sup> See *id.*

<sup>63</sup> UCSF-UC Hastings Consortium on Law, Science, and Health Policy, Comment on FDA Proposed Rule: Revision of the Nutrition and Supplemental Facts Label, 79 Fed. Reg. 11879 (proposed Mar. 3, 2014) (to be

### D.2/3. Sugars/Added Sugars

We strongly support the requirement for nutrition label disclosure of added sugars. The dramatic increase in obesity and other chronic diseases such as diabetes has been called our national “time bomb” for what it augurs not just for American public health, but also our financial health. There is significant evidence of a causative relationship between sugar and diabetes and sugar and obesity. Added sugar has been directly associated with the prevalence of many other chronic diseases, such as heart disease and fatty liver disease. Sugar’s destructive effects on teeth, and the cost and discomfort of dealing with dental caries, are also significant public health problems; indeed, dental caries constitutes the greatest exposure to general anesthesia and accounts for the greatest number of outpatient surgeries in the United States. Of the 600,000 food items in American grocery stores, 77 percent contain added sugar.

One noticeable difference is the clarity of the message: the Consortium supports changing the nutrition label. The second noticeable difference is the use of “evidence” to support the message. Although not reprinted in this article, this segment of the Consortium’s comment includes citations and links to several scientific studies.<sup>64</sup> The short sentences allow the first-time reader to understand the relationship between sugar and human health, the prevalence of sugar in our society, and the health and economic impacts sugars have on our nation. In addition, the use of headings help the reader navigate the comment and further add to its clarity.

#### b. Ethos

Consider ethos when reading the beginning of the Consortium’s comment. Will you trust what the Consortium has to say about the proposed rule?

Since its establishment in 2008, the Consortium has developed, supported, and engaged in collaborative educational and professional opportunities for students and faculty at the University of California San Francisco and the University of California Hastings College of the Law. The mission of the Consortium is to support interdisciplinary collaboration on a wide variety of subjects at the intersections of law, science, and health policy. The Consortium concentrates on three broad areas:

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codified at 21 C.F.R. pt. 101), available at <http://www.regulations.gov/#!documentDetail;D=FDA-2012-N-1210-0366>.

<sup>64</sup> See *id.*

education, research, and clinical training and service. We submit these comments as part of our clinical service mission, to share the expertise on our campuses in the pursuit of improved individual and public health.

The Consortium recognizes the magnitude and complexity of the task delegated to FDA and commends FDA for its efforts to update these regulations with consideration of 21st century public health problems related to the American diet, including the crucial problem of the impact of added sugars on obesity and other chronic diseases. Nevertheless, the proposed rule can be strengthened to better accommodate the realities of food consumption by our citizens.<sup>65</sup>

The Consortium has instilled a sense of trust or ethos in the reader by stating its expertise on this issue, by thanking the agency for its efforts, and by making suggestions to “strengthen,” rather than redo the work that has already been completed. A persuasive comment is one where the writer has stated her qualifications, has demonstrated familiarity with the proposed rule by noting what the agency and others have stated, and has included citation to data or scientific reports.

### c. Pathos

The final example comes from a comment by the Governor of Massachusetts at the time, Deval Patrick.<sup>66</sup> Governor Patrick is concerned with how this rule will impact an important Massachusetts industry: the cranberry industry. After a dose of ethos, where the Governor “applauds” the FDA’s “effort[s] to help Americans make healthier decisions about the foods they consume,” Governor Patrick writes:

Massachusetts is the ancestral home of the cranberry. It is our Commonwealth’s leading agricultural crop, our state fruit and a part of our heritage. Additionally, cranberries deliver many health benefits. However, unlike apples, oranges and other fruits, cranberries have very low natural sugars. They are tart and must be sweetened to be made palatable.

I am concerned, therefore, that the “added sugars” declaration on cranberry products could lead consumers to wrongly believe that these cranberry products lack

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<sup>65</sup> *Id.*

<sup>66</sup> Hon. Deval L. Patrick, Comment on FDA Proposed Rule: Revision of the Nutrition and Supplemental Facts Label, 79 Fed. Reg. 11879 (proposed Mar. 3, 2014) (to be codified at 21 C.F.R. pt. 101), *available at* <http://www.regulations.gov/#!documentDetail;D=FDA-2012-N-1210-0492>.

nutritional value, are not healthy and should not be consumed. This is not the case, and this misperception could prove quite damaging to our cranberry industry.

The Governor's message is personal and story-like. Similar to Dr. Seuss' *Lorax*, the Governor uses "I" and "our" to speak for the people of Massachusetts and to express his heartfelt concern. Focusing on harm that might befall the cranberry industry because of the label change is an effective way for the Governor to invoke the reader's sympathy for the citizens of Massachusetts.

### **Conclusion**

A lawyer's job is to persuade. In the context of administrative rulemaking, the lawyer's job is to persuade an administrative agency that a proposed rule is adequate or inadequate as written. Because a comment is a persuasive piece of writing, the most effective comments will be those that carefully consider and apply classic persuasive rhetorical devices. The need for a persuasive comment is even more important today, given that on-line commenting allows for many more spam-like comments. Fortunately, changing how one writes is much easier than changing the process. Make your comment stand out from the crowd: use logos, ethos, and pathos.