

---

---

COMMENTS  
of  
**WASHINGTON LEGAL FOUNDATION**  
to the  
**U.S. CONSUMER PRODUCT SAFETY COMMISSION**  
Concerning  
**RULES OF PRACTICE FOR ADJUDICATIVE  
PROCEEDINGS**  
(DOCKET NO. CPSC-2016-0006)

Mark S. Chenoweth  
Gregory B. Herbers  
WASHINGTON LEGAL FOUNDATION  
2009 Massachusetts Ave., NW  
Washington, DC 20036

June 13, 2016

---

---

**Washington Legal Foundation  
2009 Massachusetts Avenue, NW  
Washington, DC 20036  
(202) 588-0302**

June 13, 2016

FILED ELECTRONICALLY AT:

<http://www.regulations.gov>

Attn: Office of the Secretariat  
U.S. Consumer Product Safety Commission  
4330 East West Highway, Room 820  
Bethesda, MD 20814

**Re: Comments on Rules of Practice for Adjudicative Proceedings**

Dear Commission:

Washington Legal Foundation (WLF) thanks the U.S. Consumer Product Safety Commission (“CPSC” or “the Commission”) for the opportunity to comment on its Proposed Rule to amend its Rules of Practice for Adjudicative Proceedings (“Rules of Practice”). These comments will address the Notice of Proposed Rulemaking published in the Federal Register on April 13, 2016 at 81 Fed. Reg. 21775-21795. Although agreeing that the Commission should update its Rules of Practice to reflect the ways in which technology has changed administrative proceedings in the last three decades, WLF writes these comments to suggest that the Commission delay the rulemaking process until after it finishes conducting its forthcoming appeal in *In re Zen Magnets, LLC*, CPSC Docket 12–2. At such a time, the Commission could re-propose a Notice of Proposed Rulemaking with a better understanding of the needs of all parties to an appeal.

The Commission first adopted its current Rules of Practice, which govern, among other things, the procedural and evidentiary rules for the Commission's adjudicative proceedings, in 1980 and has not substantively amended them since. As a result, the current Rules of Practice do not reflect the considerable changes that modern technology has brought to the litigation process. Electronic filing, pre-discovery procedures, ESI, and other litigation innovations have created an easier and more efficient method to conduct administrative proceedings. There have also been quite substantial changes to the standards of admissibility for expert testimony in the federal courts during that interval. Hence, it makes sense for the Commission to amend its Rules of Practice to incorporate those changes into its own adjudicative proceedings. WLF was actively involved in recent efforts to update the e-discovery aspects of the Federal Rules of Civil Procedure, and we support the Commission's stated goals to align its rules with other federal standards, increase the efficiency of adjudicative proceedings, and update the Commission's Rules of Practice to conform to current administrative practices.

In particular, WLF believes that the Commission's proposed efforts to conform to modernized Federal Rules of Evidence make good sense. Changes to the Federal Rules of Evidence in the past two decades have greatly reduced the amount of junk science admitted in federal court proceedings. Following federal court practices in this respect should likewise ensure that Commission adjudicative proceedings are only informed by reliable expert testimony. The Commission states that it is making this change "to maximize efficiency by working within an evidentiary framework with which most practitioners are familiar and allowing the parties and Presiding Officer to be guided by case law interpreting the Federal Rules." 81 Fed. Reg. at 21783. WLF has long participated in cases where the admissibility of expert testimony is in

dispute, and we believe the CPSC's adjudicative proceedings will be strengthened by encouraging the parties and the Presiding Officer to reference the major expert testimony precedents of the U.S. Supreme Court, including the so-called *Daubert* trilogy.

However, we are concerned that the Commission may be providing the Presiding Officer too much leeway in saying that "the Federal Rules of Evidence may be relaxed by the Presiding Officer if the ends of justice will be better served by so doing." 81 Fed. Reg. at 21792. The particular hearsay example given is not particularly troubling, but to the extent that this general language would empower the Presiding Officer to admit expert testimony that cannot survive *Daubert*-type scrutiny in federal court, it should be changed. Clarifying that the Presiding Officer does not have latitude to admit unreliable expert testimony would be appropriate here.

Under the Proposed Rules, the Commission aims to, at times, vary from the Federal Rules and to "adapt the Rules of Practice ... based on the experiences of Commission staff in adjudicative proceedings," but WLF respectfully submits that the Commission lacks the institutional knowledge necessary to decide when it ought to deviate from the Federal Rules. 81 Fed. Reg. at 21777. The Commission has operated under the same Rules of Practice since 1980. Further, the Commission rarely litigates its recall complaints; since 2000 only two mandatory recalls have gone to trial and only one, the case currently before the Commission, has been appealed from an administrative law judge (ALJ) ruling. CPSC litigates so rarely that it does not even have its own ALJs.

In the coming months, the Commission will get an opportunity to learn exactly which existing procedures are deficient when it comes to conducting adjudicative proceedings. Currently before the Commission is a mandatory recall appeal from an ALJ decision. The

appeal, *In re Zen Magnets, LLC*, will afford the Commission's current staff an ideal chance to experience the modern administrative process firsthand and discover where it needs to change its Rules of Practice and what those changes should look like. Although conforming to the Federal Rules is a good starting point, the Commission should take the time to learn from the present appeal and amend its Rules of Practice with those lessons in mind. As an administrative agency, it will need to diverge from the Federal Rules occasionally to better accomplish its goals of efficiency and administrative conformity. All federal district courts and federal courts of appeals have local rules that seek to create efficiencies particular to the docket of that tribunal. The Commission's Rules of Practice should strive to do likewise.

Therefore, WLF asks the Commission to withdraw its current Proposed Rule and re-propose a new Proposed Rule after the Zen Magnets appeal has run its course. If instead the Commission makes substantial changes to the Proposed Rule based on learning from the forthcoming appeal, and finalizes the current Proposed Rule without inviting a second period of public comment, in all likelihood that action would violate the Administrative Procedure Act.

As a final point, WLF notes that constitutional separation of powers problems are inherent in any adjudicative proceeding where an appeal is made to the very Commission that voted to prosecute a case (order a mandatory recall, etc.) in the first instance. It is a fundamental tenet of the Rule of Law that the laws be enforced by someone other than the maker of those laws. When the CPSC adjudicates appeals from an ALJ over alleged violations of its own regulations, it unacceptably collapses the separate powers of government, combining the rulemaking legislative function, the prosecutorial executive function and the judicial function in a single authority. The Commission's proposed Rules of Practice discuss separating the

functions in new “§ 1025.69 Separation of functions.” That section states: “An employee or agent engaged in the performance of investigative or prosecuting functions for the Commission in a case, *other than a Commissioner*, may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision, except as witness or counsel in public proceedings.” 81 Fed. Reg. at 21795 (emphasis added). But of course Commissioners are the very people who make the key prosecutorial decision of whether or not to prosecute. By purporting to exempt Commissioners from the requirement of not violating the separation of powers, CPSC formally embraces a fundamental and egregious violation of the Rule of Law—and an unconstitutional regime. This section should be rewritten entirely to preclude Commissioners who vote on bringing a prosecution from hearing any appeal related to that same matter too. It does little good to preserve the separation of functions at the staff level when they are then compromised beyond salvage at the Commissioner level.

WLF thanks the Consumer Product Safety Commission for the opportunity to comment on this very important aspect of CPSC’s public policy mission. WLF will continue to follow the Commission’s work on its Rules of Practice closely and will look forward to commenting on a re-proposed Notice of Proposed Rulemaking in the future.

Respectfully submitted,

/s/ Mark S. Chenoweth

General Counsel

/s/ Gregory B. Herbers

Staff Attorney

Washington Legal Foundation