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# 2003 ADMINISTRATIVE LAW CONFERENCE

# 2003 Administrative Law Conference



**NOVEMBER 6 & 7, 2003**

The New Washington Convention Center  
Washington, D.C.

*The most comprehensive, timely, and informative  
conference addressing developments in  
administrative law and regulatory practice.*

## **CONFERENCE SPONSORS**

Cadwalader, Wickersham & Taft LLP  
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## Dear Fellow Administrative Law Section Members and Friends:

The Ad Law Section's annual Administrative Law Conference, held in Washington each autumn, has evolved into the nation's most comprehensive and informative conference addressing developments in administrative and regulatory law. When you look at this year's program, I am sure you will readily agree that this year's conference program chair Randy May continues that tradition.

Quite simply, we have assembled a group of distinguished speakers and timely educational programs to examine and discuss a broad swath of government activities and regulation. Whether you are a newly-minted lawyer or an experienced practitioner, a public servant, or in academia, you will find much to inform and enjoy.

Our featured speakers include top officials who play key roles in shaping government regulatory policy, such as John Graham, Administrator of OMB's Office of Information and Regulatory Affairs; FCC Commissioner Kathleen Abernathy, and FTC Commissioner Orson Swindle. As you will see from the program, there are many other top government officials participating as well.

We have planned a number of social and networking events to enhance the conference experience, including the Annual Awards Luncheon, a festive Thursday evening reception at the historic Tayloe House at the Howard T. Markey National Courts Building, and a reception and gala dinner Friday evening at the historic DAR Memorial Continental Hall.

Sign up early for all the Fall Conference has to offer so you don't miss anything. We welcome your participation and look forward to seeing you there.

A handwritten signature in cursive script that reads "Bill Funk". The signature is written in a dark color, possibly black or dark blue ink, and is positioned above the printed name and title.

Bill Funk  
Section Chair

# Program at a Glance

Visit [www.abanet.org/adminlaw](http://www.abanet.org/adminlaw) for program and schedule updates.

## Thursday, November 6th

- 9:00am – 9:30am** Opening Plenary: Dr. John Graham, OIRA Administrator, OMB
- 9:45am – 10:45am** Pro Bono Representation for Veterans Claims
- 9:45am – 11:45am** Federal Preemption of State Laws – Repercussions for the Banking Industry
- 10:00am – Noon** What Every Antitrust Lawyer Should Know About ADR
- 10:45am – 12:15pm** A New Frontier for Regulatory Policy: Cost-Benefit Analysis and National Security
- 10:45am – 12:15pm** Veterans Affairs – The Treating Physician Rule
- 12:30pm – 2:00pm** Awards Luncheon  
Special Address by The Honorable Kathleen Q. Abernathy, FCC Commissioner
- 2:15pm – 4:00pm** Congress and Rulemaking: Reactions and Interactions Affecting Agency Policymaking
- 2:15pm – 3:30pm** Blackout! The Aftermath for Energy Regulators
- 2:15pm – 3:45pm** Government ADR and Confidentiality: To Honor and Uphold?
- 3:30pm – 5:15pm** Scientific Peer Review
- 3:45pm – 5:15pm** Administrative Procedure and Interstate Compacts
- 3:45pm – 5:15pm** 6th Annual Update for Labor Law Attorneys
- 3:45pm – 5:15pm** Money & Medicine: The Impact of Cost on FDA Regulation of Pharmaceuticals
- 5:45pm – 7:45pm** Section Reception – United States Court of Federal Claims



## Friday, November 7th

- 8:00am – 9:00am** Administrative & Regulatory Law News Editors' Meeting
- 8:00am – 9:00am** Homeland Security Committee Meeting
- 9:00am – Noon** Annual Developments in Administrative Law with Opening Address by The Honorable Orson Swindle, FTC Commissioner
- Noon – 1:30pm** Lunch on your own
- 1:45pm – 4:00pm** Significant Administrative Law Issues in Homeland and National Security
- 2:30pm – 4:30pm** Understanding the E.U. Regulatory Process
- 6:30pm – 9:30pm** Gala Reception and Dinner – DAR Memorial Continental Hall with remarks by His Excellency Guenter Burghardt, European Union Ambassador to the United States

## Saturday, November 8

*Saturday events held at the St. Regis Hotel*

- 8:00am – 9:00am** Continental Breakfast
- 8:00am – 9:00am** Section Membership Committee Meeting
- 9:00am – Noon** Section Council Meeting
- 12:15pm – 2:00pm** Section Publications Committee Meeting

Visit [www.abanet.org/adminlaw](http://www.abanet.org/adminlaw) for program updates.

# 2003 Administrative Law Conference

November 6 & 7, 2003

Randolph J. May, Program Chair and Section Chair-Elect

## Featured Speakers



The Honorable Kathleen Q. Abernathy  
FCC Commissioner  
*"Public Service and Scholarship in the Pursuit of Sound Regulation"*



Theodore "Ted" Kassinger  
General Counsel, U.S. Department of Commerce  
*"Understanding the E.U. Regulatory Process"*



The Honorable Orson Swindle  
FTC Commissioner  
*"A Regulator's Perspective on Protecting Consumers and Competitive Marketplaces: Developments at the FTC"*



Francine Kerner  
Chief Counsel, Transportation Security Administration  
*"Significant Administrative Law Issues in Homeland and National Security"*



His Excellency Guenter Burghardt  
European Union Ambassador to the United States  
*"Understanding the E.U. Regulatory Process"*



Dan Troy  
Chief Counsel, Food and Drug Administration  
*"Money and Medicine: The Impact of Cost on FDA Regulation of Pharmaceuticals"*



Dr. John Graham  
Administrator, OMB Office of Information and Regulatory Affairs  
*"Smarter Regulation: Progress and Unfinished Business"*



Richard E. Wiley  
Managing Partner, Wiley Rein & Fielding, Former Chair of the Federal Communications Commission  
*"Congress and Rulemaking: Reactions and Interactions Affecting Agency Policymaking"*

Thursday, November 6, 2003

9:00am – 9:30am

**Opening Plenary**

Dr. John Graham, Administrator, OMB Office of Information and Regulatory Affairs

“Smarter Regulation: Progress and Unfinished Business”

9:45am – 10:45am

**Pro Bono Representation for Veterans Claims**

This session will provide a history of the federally funded Veterans Consortium Pro Bono Program, which began in 1992. Services provided by the consortium include books, training, case screening, mentoring and monitoring. Significant features of the program include the opportunity for oral argument before the Court of Appeals for Veterans Claims and EAJA fees for a successful appeal.

*Program Chair:*

- Ron Scholz, Sr. Counsel and Executive Assistant to the Chairman of the Board of Veterans Appeals, Department of Veterans Affairs

*Presenters:*

- David Myers, The Veterans Consortium Pro Bono Program
- David Addlestone, Executive Director, National Veterans Legal Services Program

9:45am – 11:45am

**Federal Preemption of State Laws –**

**Repercussions for the Banking Industry (2 hrs. CLE)**

Federal preemption of state laws in the areas of predatory lending, privacy, securities law enforcement, and insurance and its relationship with state enforcement of laws continues to generate controversy and new rulemaking. This session will examine preemption and what it means for consumers and regulated entities in different substantive areas and how the states are responding.

*Program Chair:*

- Charlotte Bahin, Senior Vice President – Regulatory Affairs, America's Community Bankers

*Presenters:*

- Julie Williams, Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency
- Carolyn Buck, Chief Counsel, Office of Thrift Supervision
- Arthur Wilmarth, Professor, George Washington University School of Law
- Cantwell Muckenfuss, Partner, Gibson, Dunn & Crutcher
- Michael Roster, Executive Vice President and General Counsel, Golden West Financial

10:00am – Noon

**What Every Antitrust Lawyer Should Know**

**About Alternative Dispute Resolution (2 hrs. CLE)**

The session will probe the latest theories on the feasibility of using alternative dispute resolution to resolve antitrust disputes. Through actual examples of alternative dispute resolution used in antitrust matters, the panelists will demonstrate how an ADR mechanism could benefit both regulators and private parties alike.

*Program Chair:*

- Steve Vieux, Attorney, Federal Trade Commission

*Presenters:*

- Phillip Harter, Early F. Nelson Professor of Law, Center for the Study of Dispute Resolution, University of Missouri School of Law
- Judith Kaleta, Senior Counsel for Dispute Resolution, U.S. Dept. of Transportation
- Milton Marquis, Partner, Dickstein Shapiro Morin and Oshinsky (invited)
- Richard Miles, Director of Dispute Resolution Service, FERC (invited)

10:45am – 12:15pm

**Veterans Affairs – The Treating Physician Rule (1.5 hrs. CLE)**

An expert panel will discuss the advantages and disadvantages of possible “treating physician rules” in the adjudication of claims for VA benefits. The

Social Security treating physician rule provides that the opinion of a physician who treats a patient is entitled to greater weight

than the opinion of a physician who merely examines the patient or who offers an opinion based solely on a review of medical records. The panel will consider how the Social Security rule is applied, its shortcomings and advantages, the justifications for adopting a similar rule for VA claims adjudication, and why such a rule might be unnecessary or ill-advised.

*Program Chair:*

- Ronald L. Smith, Chief Appellate Counsel, Disabled American Veterans

*Presenters:*

- The Honorable Johnathan Day, Board of Veterans Appeals
- Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program
- The Honorable Clifford J. Sturek, Social Security Administration

10:45am – 12:15pm

**A New Frontier in Regulatory Policy:**

**Cost-Benefit Analysis and National Security (1.5 hrs. CLE)**

The rhetoric and practice of cost-benefit analysis has had a major impact on almost every area of economic and industrial regulation. Lawyers and policymakers must now consider the role of cost-benefit-analysis in shaping national security policy. The application of a cost-benefit paradigm to national security policy raises pressing questions. How does cost-benefit analysis currently play a role in homeland security or foreign policy decisions? How should costs and benefits be defined in national security policy? How should government measure these costs and benefits? How should cost-benefit analysis play a role in decisions where the executive branch has considerable discretion? The panel offers perspectives from government, practice, and academia on these timely questions.

*Program Chair:*

- Mariano-Florentino Cuellar, Professor, Stanford University Law School



12:30pm – 2:00pm

### Annual Awards Luncheon

Keynote Address by The Honorable Kathleen Q. Abernathy, Commissioner, Federal Communications Commission, "Public Service and Scholarship in the Pursuit of Sound Regulation"

#### Mary C. Lawton Outstanding Government Service Award Winner

Michael Messitte, Settlement and Compliance Director, Appellate Court Branch, National Labor Relations Board

#### Award for Scholarship in Administrative Law

Thomas Merrill and Kathryn Tongue Watts  
*Agency Rules With the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002).



Messitte



Merrill



Watts\*

3:45pm - 5:15pm

### Money & Medicine: The Impact of Cost on FDA Regulation of Pharmaceuticals (1.5 hrs. CLE)

Drug costs are soaring. According to one study, prices for the 50 drugs most prescribed for the elderly rose last year more than three times the rate of inflation. These costs have inspired much legislative activity. This program will survey the extent to which pharmaceutical costs are impacting policy and regulation, from regulation of prescription drug importation across borders to the current status of Medicare RX plans on the Hill, and also probe related ethical and policy considerations.

#### Program Co-Chairs:

- Lori A. Hardaway, Ph.D., Associate, Pennie & Edmonds LLP and
- Christine M. Meis, Associate, Quarles & Brady Streich Lang LLP

#### Panelists:

- Prof. Gregg Bloche, Kennedy Institute of Ethics and Georgetown University Law Center
- James Czaban, Shareholder, Heller Ehrman
- Dan Troy, Chief Counsel, Food and Drug Administration
- Bruce Kuhlik, Vice President and General Counsel, PhRMA

2:15pm – 4:00pm

### Congress and Rulemaking: Reactions and Interactions Affecting Agency Policymaking (1.75 hrs. CLE)

#### Program Chair:

- Michael Herz, Professor, Cardozo School of Law, Yeshiva Univ.

#### Panelists:

- Howard Waltzman, Counsel, House Committee on Energy & Commerce
- Richard E. Wiley, Managing Partner, Wiley, Rein & Fielding, and former FCC Chairman

2:15pm – 3:30pm

### Blackout! The Aftermath for Energy Regulators (1.25 hrs. CLE)

#### Program Chair:

- Sheila Slocum Hollis, Managing Partner – Washington office, Duane Morris

2:15pm – 3:45pm

### Government ADR and Confidentiality: To Honor and Uphold? (1.5 hrs. CLE)

Experts from the public and private sectors describe the progress made in developing formal written Confidentiality Guidance under the auspices of the ABA's Section of Administrative Law and the Federal Sector's Interagency

Working Group Committee on Confidentiality. This program will bring full circle an initiative sparked four years ago by a discussion at the Section's Administrative Law Conference on the subject of: "Is Government ADR Really Confidential?" This year's program will focus on guidance documents that have recently been developed collaboratively recommending good practices for avoiding (or dealing with) confidentiality challenges facing public and private sector neutrals, parties, and program administrators in federal ADR.

#### Program Chair:

- Charles Pou, Mediator/Dispute Resolution Consultant

3:30pm – 5:15pm

### Scientific Peer Review: Better Regulation of More Red Tape (1.75 hrs. CLE)

#### Program Co-Chairs:

- Sidney Shapiro, Professor, University of Kansas School of Law, and
- Fred Anderson, Partner, Cadwalader, Wickersham & Taft LLP

3:45pm – 5:15pm

### Administrative Procedure and Interstate Compacts (1.5 hrs. CLE)

Interstate compacts are an effective tool for structuring interstate relationships, regulating private activity that transcends state lines and furnishing government services on a regional basis. They offer an alternative to federal involvement and are particularly apt for matters traditionally addressed by states, such as law enforcement and public health, safety and welfare. Some 190 interstate agreements are currently in place. Interstate compact agencies generally are not considered federal agencies within the scope of the federal Administrative Procedure Act (APA), are not generally subject to state APAs, and in some states are expressly excluded from the scope of the state's APA. Some recent compacts have incorporated APA-like provisions, but the practice is hardly uniform. The panel will discuss compact law and rulemaking guidelines recently developed for application to the new Interstate Compact on Adult Offender Supervision, and a project to draft an "Interstate Compact APA."

#### Program Chairs:

- Kent Bishop, Rules Analyst, Utah Governor's Office of Planning & Budget, and
- William S. Morrow, Jr., General Counsel, Washington Metro Area Transit Commission

#### Panelists:

- Mike Buenger, State Court Administrator, Missouri Office of State Courts (representing National Center for State Courts)
- Ron Levin, Henry Hitchcock Professor of Law, Washington University School of Law
- Rick Masters, Special Counsel, The Council of State Governments
- William S. Morrow, Jr., General Counsel, Washington Metropolitan Area Transit Commission

3:45pm – 5:15pm

### 6th Annual Update for Labor Law Attorneys (1.5 hrs. CLE)

Panelists will highlight significant regulatory developments affecting labor and employment practices and will discuss the anticipated focus and direction of the Department of Labor, EEOC, and other agencies.

#### Program Chair:

- Nancy Shallow, Principal, William E. Mercer, Inc.

5:45pm – 7:45pm

### Meet and Greet Reception

United States Court of Federal Claims  
Howard T. Markey National Courts Building  
717 Madison Place, N.W., Washington, D.C.

\* Photo courtesy of Steve Petteway, Collection of the Supreme Court of the United States



# Meeting Information

## Hotel Information

The St. Regis Hotel  
923 16th Street, NW (16th and K Streets NW)  
Washington, DC 20006

Conference rate: \$199 per night, plus tax, single or double room.  
Government rate: \$150 per night, plus tax, single or double room.

Reservations: Call the St. Regis at 202-638-2626 and mention the American Bar Association when calling.

For a list of hotels near the new Washington Convention Center please call the Section office at 202-665-1582.

## Airline Information

Washington, D.C. is accessible via Reagan National Airport, Baltimore/Washington International Airport, and Dulles International Airport. To obtain discounts through the ABA Meeting Discounted Airfares Program, please refer to the special ABA discount codes below when using these airlines:

American Airlines (800/433-1790) Discount Code: 15794  
Delta Air Lines (800/241-6760) Discount Code: 189408A  
U.S. Airways (800/874-7687) Discount Code: 36632473

## Registration/Program Entry

Entry into each of the conference sessions will require a ticket. Tickets may be purchased in advance using the enclosed registration form, or may be purchased on-site at the conference registration desk. Room monitors will collect tickets at the door of each session. Please have your ticket ready. We appreciate your cooperation.

## CLE Accreditation

Accreditation for the programs has been requested from all states with mandatory continuing legal education. Please be aware that each state has its own rules and procedures as well as its own definition and categories for "CLE." Check with your state for confirmation of program approval. **NEW REQUIREMENTS FOR NEW YORK & DELAWARE ATTORNEYS:** Please be aware that the new rules state that you must sign in and out of each session that you attend. You must record your state license number for each state you are currently licensed in. The sign-in and out forms will be available in each meeting room.

## Transportation

Attendees are responsible for their own transportation between conference and event sites. The New Washington Convention Center is conveniently connected to the Mt. Vernon Square metro on the green line.

### Future Meetings of the ABA Section of Administrative Law and Regulatory Practice

#### Midyear Meeting • February 2004

Hyatt Regency San Antonio  
San Antonio, Texas

#### Spring Meeting • May 2004

Kiawah Island Resort  
Kiawah, South Carolina

#### Annual Meeting • August 2004

Westin Peachtree Plaza  
Atlanta, Georgia

# 2003 ADMINISTRATIVE LAW CONFERENCE REGISTRATION FORM

**Advance Registration Deadline – October 30, 2003**

## 2 WAYS TO REGISTER

**Mail: ABA, 2003 Administrative Law Conference, 740 15<sup>th</sup> Street, NW, Washington DC 20005**

**Fax: (202) 662-1529**

Name: \_\_\_\_\_  
(AS YOU WISH IT TO APPEAR ON YOUR BADGE)

Spouse / Guest (if attending): \_\_\_\_\_

Affiliation: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_

(PLEASE INCLUDE YOUR E-MAIL ADDRESS TO RECEIVE UPDATES/CHANGES ON PROGRAMS)

**Please note: You must purchase a ticket for the session in order to be admitted and/or receive hard copy of the handouts.**

PROGRAMS	MEMBER	NON-MEMBER
#1 Money & Medicine: The Impact of Cost on FDA Regulation of Pharmaceuticals	\$25	\$35
#2 Federal Preemption of State Laws – Repercussions for the Banking Industry	\$25	\$35
#3 Pro Bono Representation for Veterans Claims	FREE	FREE
#4 Cost-Benefit Analysis of National Security	\$25	\$35
#5 Veterans Affairs – The Treating Physician Rule	\$25	\$35
#6 Congress and Rulemaking	\$25	\$35
#7 Blackout! The Aftermath for Energy Regulators	\$25	\$35
#8 Alternative Dispute Resolution and Confidentiality	\$25	\$35
#9 Scientific Peer Review	\$25	\$35
#10 Administrative Procedure and Interstate Compacts	\$25	\$35
#11 6 <sup>th</sup> Annual Update for Labor Law Attorneys	\$25	\$35
#12 Annual Developments in Administrative Law with Opening Address by The Honorable Orson Swindle, FTC Commissioner	\$35	\$45
#13 Significant Administrative Law Issues in Homeland and National Security	\$35	\$45
#14 Understanding the EU Regulatory Process	\$35	\$45
#15 Opening Plenary: John Graham No charge, please check here if attending <input type="checkbox"/>		
Section Council Meeting (November 8 <sup>th</sup> ) No charge, please check here if attending <input type="checkbox"/>		
<b>PASSPORT</b>		
Includes entry to all programs and special events over the two-day conference.	\$195	\$225
<b>SPECIAL EVENTS</b>		
Section Awards Luncheon – Nov. 6 <sup>th</sup>	\$25	\$35
Section Reception – Nov. 6 <sup>th</sup>	\$25	\$35
Section Dinner – Nov. 7 <sup>th</sup>	\$65	\$75
TOTAL:	_____	_____

## METHOD OF PAYMENT

Check (made payable to "American Bar Association")  VISA  MasterCard  American Express

Card Number: \_\_\_\_\_ Exp. Date: \_\_\_\_\_ Signature: \_\_\_\_\_

**QUESTIONS? Call (202) 662-1582 • [www.abanet.org/adminlaw](http://www.abanet.org/adminlaw)**