PRELIMINARY REPORT*

FOR DISCUSSION ONLY

MODEL STATE ADMINISTRATIVE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-FOURTEENTH YEAR
PITTSBURGH, PENNSYLVANIA
JULY 22 - 29, 2005

MODEL STATE ADMINISTRATIVE PROCEDURES ACT

** The Drafting Committee is presenting this report in order to advise the Conference of its progress to date and to obtain comments regarding certain issues that it is considering. This report has not been reviewed by the Committee on Style and will not be read line by line.*

MODEL STATE ADMINISTRATIVE PROCEDURES ACT

Introduction

This report is a summary for consideration of the National Conference of Commissioners on Uniform State Laws (Conference) at its annual meeting in Pittsburgh, Pennsylvania in July, 2005. The purpose of this report is to apprise the Conference of the progress of the Drafting Committee for Revisions to the Model State Administrative Procedures Act (Committee) and to seek guidance and advice on several issues.

The 1946 Model State Administrative Procedure Act

The Model State Administrative Procedure Act (Act) of the National Conference of Commissioners on Uniform State Laws has furnished guidance to the states since 1946, the date that the first version of the Act was promulgated and published. The Federal Administrative Procedure Act was passed in 1946, and the Conference approved its final draft of the 1946 Act shortly thereafter. The Federal Administrative Procedure Act exerted a substantial influence on the 1946 Act.[1]

The 1946 Act incorporated basic principles with only enough elaboration of detail to support essential features[2] of an administrative procedure act. This is the major characteristic of a model, as distinguished from a uniform, act. The drafters explained that this model act approach was required since the details of administrative procedure must vary from state to state because of different general histories, different histories of legislative enactment and different state constitutions. Furthermore, the drafters explained, the Act could only articulate general principles because 1) agencies–even within a single state--perform widely diverse tasks, so that no single detailed procedure is adequate for all their needs; and 2) the legislatures of different states have taken dissimilar approaches to virtually identical problems.[3] By about 1960, twelve

[1] Both the Federal Administrative Procedure Act and the 1946 Model State Administrative Procedure Act were drafted in the same period of time, with many of the same persons working on both acts. The United States Attorney General's report, as well as federal legislation proposed during the same period of time, was frequently consulted in the drafting of the 1946 Model State Administrative Procedure Act. The chair of the Conference committee that drafted the 1946 Model State Administrative Procedure Act stated that the drafters frequently consulted the Federal Administrative Procedure in drafting the 1946 Model State Administrative Procedure Act. Arthur Earl Bonfield, The Federal Administrative Procedure and State Administrative Law, 72 Va. L. Rev. 297 (1987) at 300.

[2] 1946 Model State Administrative Procedure Act preface at 200.

[3] Id. at 200.

states had adopted the 1946 Act.[4]

The 1961 Model State Administrative Procedure Act

After several studies conducted in the nineteen fifties, the Conference decided to revise the 1946 Act. The basis given for that decision was that a maturing of thought on administrative procedure had occurred since 1946. The drafters of the 1961 Act explained that their goals were fairness to the parties involved and creation of procedure that is effective from the standpoint of government.[5] The resulting 1961 Act followed the model, not the uniform, act approach. It was drafted in a skeletal[6] fashion, and expressly sought to articulate only major principles.[7] Some of those major principles were: requiring agency rulemaking to adopt procedural rules; rulemaking procedure that provided for notice, public input and publication; judicial review of rules; guarantees of fundamental fairness in adjudications; and provision for judicial review of agency adjudication. Over one half of the states adopted the 1961 Act or large parts of it.[8]

The 1981 Model State Administrative Procedure Act

In the nineteen seventies, the Conference decided to revise the Act again. The preface to the 1981 Act explained that the approach of the drafters had changed from the 1946 and 1961 Acts. According to the drafters, the 1981 Act was entirely new, and contained much more detail than earlier versions of the Act. The drafters explained that substantially more elaboration of detail was justifiable in light of changed circumstances and greater experience with administrative procedure since 1961.[9] The 1981 Act, when completed, contained considerably

---

[4] Those states, as identified in the preface to the 1961 Model State Administrative Procedure Act were: North Dakota, Wisconsin, North Carolina, Ohio, Virginia, California, Illinois, Pennsylvania, Missouri, Indiana, Michigan and Massachusetts.

[5] Preface to 1961 Model State Administrative Procedure Act.

[6] The term skeletal administrative procedure act is taken from an article that expounds the benefits of the Federal Administrative Procedure as a "skeletal" act that has survived as a useful procedural tool because of its focus on only major principles. See William D. Araiza, In Praise of a Skeletal administrative procedure act, 56 Admin. L. Rev. 979 (2004).

[7] Preface, 1961 Model State Administrative Procedure Act.

[8] 14 Uniform Laws Annotated at 357 (1980 Master Edition) catalogued numerous states that used the 1961 Model State Administrative Procedure Act. They are: Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

[9] Preface, 1981 Model State Administrative Procedure Act. The greater emphasis on detail in the 1981 Model State Administrative Procedure Act is apparent from the text of the preface:

In addition, the drafters of this effort have produced an act that is more detailed than the earlier Model Act.

greater detail than the 1961 Act.[10] In the twenty-odd years since promulgation of the 1981 Act, Arizona, New Hampshire, and Washington have substantially adopted most of its provisions, and several other states have drawn some of their provisions from the Act.[11]

The Present Revision

There are several reasons for revision of the 1981 Act. It has been more than twenty years since the Act was last revised. There now exists a substantial body of legislative action, judicial opinion and academic commentary that explain, interpret and critique the 1961 and 1981 Acts and the Federal Administrative Procedure Act. In the past two decades state legislatures that have been dissatisfied with agency rulemaking and adjudication have enacted statutes that modify administrative adjudicative procedure in specific areas and that require additional specific procedures to be followed in agency rulemaking. There has been considerable scholarly examination of scope and standard of judicial review of agency action in the past twenty-five years, as well as extensive judicial examination at the state and federal level about the problems and difficulties of this area. Finally, the ABA has undertaken a major study of the Federal Administrative Procedure Act and is recommending revision. That action represents an opportunity for the Conference. The various revisions of the Act have several features that are similar to the Federal Administrative Procedure Act; the ABA study, to the extent that it points out benefits and problems of those similar features in the Federal Act, can furnish a helpful comparisons for use by the Conference.

The Committee has decided to use a form of model act that we believe will be of considerable usefulness to the states. The success of the "skeletal" 1946 and 1961 Administrative Acts has persuaded the Committee to return to return to drafting in that form. The Committee will draft the revision by using a "core" form supplemented by "optional" provisions. Core provisions will consist of only essential general principles. The Committee's objectives are to produce a template consisting of core principles: 1) that a state can adopt with minimal adjustments; 2) that represents the most widely-adopted and accepted principles from the states and the best of current thinking on administrative procedure; and 3) that is an Administrative Procedure Act entire in itself and ready for use. Principles that are not so widely

---

There are several reasons for this. First, virtually all state administrative procedure acts are much more detailed than the 1961 Revised Model Act. Second, the states badly need and want guidance on this subject in more detail than the earlier act provided. Third, substantial experience under the acts of the several states suggests that much more detail than is provided in the earlier Model Act is in fact necessary and workable in light of current conditions of state government and society. Since this is a Model Act and not a Uniform Act, greater detail in this act should also be more acceptable because each state is only encouraged to adopt as much of the act as is helpful in its particular circumstances.

[10] For example, the 1961 Model State Administrative Procedure Act contained nineteen sections; the 1981 Model State Administrative Procedure Act contained more than eighty sections divided among five different articles.

[11] Some of those states are: Florida, Iowa, Kansas, California, Mississippi and Montana.

adopted, essential or acceptable, or that are more clearly supplemental in nature or more detailed, but that might nevertheless be considered by some states to be useful, will be presented separately as optional sections of the revised code. The committee believes that this approach will preserve the best parts of the 1946, 1961 and 1981 Model State Administrative Procedure Acts and will be acceptable to state legislatures.

ISSUES FOR CONFERENCE ADVICE AND GUIDANCE

In the Committee discussions, there has been continuing discussion of several issues, and the members have been unable to reach consensus. Some of these issues represent different approaches used in various revisions of the Model State Administrative Procedure Acts. Several of these issues concern matters on which there is disagreement between the administrative procedure acts of different states and between different segments of the legal profession.

KEY ISSUES

1. Should the Model State Administrative Procedure Act require interpretive and policy statements to be adopted as rules; and, if not, should there be a requirement that they be published?

2. If interpretive and policy statements are not rules, but are required to be published, should the Model State Administrative Procedure Act address the weight to be given to them on judicial review?

3. Should the Model State Administrative Procedure Act require prior agency decisions of first impression on legal issues to be adopted as rules; or, if not required to be adopted as rules, should there be a requirement that such decisions be indexed and published?

4. Should evidentiary hearings be required only when mandated by statute, constitution or other law, or should the Conference adopt the broader approach of the 1981 Model State Administrative Procedure Act that requires an evidentiary hearing in almost all instances where an order is to be issued by the agency?

5. With respect to post hearing ex parte communications between the agency decision maker and agency staff, what, if any, disclosure of the ex parte communication should be required to the parties? Also, what, if any, opportunity should be allowed for a party to respond to the disclosed communication?

OTHER ISSUES

6. Should cost-benefit analysis be required for all rules; or be limited to certain situations; and, if limited, under what criteria?

7. Should the Act provide for an administrative rules editor, with the power to edit, for the

publication, compilation, indexing, and public inspection of rules or should the Act provide for a publisher with limited power to edit?

8. Should the Act contain a legislative veto power for agency rules?

9. Should the Act provide that, before a person who was not a party in an agency rulemaking proceeding seeks judicial review of a rule produced in that proceeding, that person must first petition the agency for rulemaking on the subject for which she seeks judicial review?