Memoranda with comments for agenda items for Fall 2009 drafting committee meeting (October 16 to 18, 2009)

Comments by committee members and others on Articles 4, 4A, 5, 6 and relevant Sections of Article 1.

ARTICLE 4

1. Section 402(b), (c) Presiding officers; are the separation of functions provisions too rigid and should the language be revised?

A. Mike Asimow.

I think the second sentence of §402(b) provision is too rigid concerning advisers. Let's assume the general counsel of the agency is supervising the prosecution. All staff members work under the supervision of the general counsel. None of them could serve as an adviser in the case, even though staff advice is desperately needed. I also think §402(c) is confusingly worded and should be rewritten.

B. Ann Young

On 402(b), I think it is important to retain the second sentence. There is too much likelihood of influence if someone subject to the authority, etc., of someone who has served as advocate, etc., serves as a presiding officer or assists a presiding officer. I won't address here advising a presiding officer, because this brings up the whole ex parte issue, which I will address below.

2. Section 403(e) Electronic hearings

A. Mike Asimow

Contested case procedure—electronic hearings—§403(e). I think the first sentence is too strong. I wouldn't require compelling circumstances to hold an electronic hearing. I'd also permit them when there are no credibility issues, such as a dispute over the interpretation of regulations. The last sentence is defective—it refers only to telephone hearings whereas the earlier sentence refers to other methods of electronic communication.

B. Ed Felter comments

Section 403 (e) - Michael is right. Technology has advanced to the point where electronic, video-conference hearings are feasible without denying due process. Telephone hearings may be the least desirable mode.

C. Ann Young

On 403(e), I think Mike and Ed are right that electronic, even including telephone, hearings can sometimes be done effectively, and sometimes parties one would think might not like them even prefer them because it is easier on them, for example if they have health issues. You might change "compelling" to "significant."

3. Section 403(h) Lay representation; should it be allowed?

A. Mike Asimow

Lay representation—§403(h). This section bans lay representation. I think this is a blunder as it will outlaw practices that are now common in the state and federal adjudicatory hearings, especially in mass justice situations. This just isn't viewed as the unlicensed practice of law. The statute will be viewed (and I think rightly) as a lawyer protection law. Do you really want to tell poor women who have welfare disputes involving the termination of benefits, an action that will put them and their children on the streets, that they can't have the help of welfare rights advocates at their hearings? If they can't afford a lawyer (and none of them can), and there are no pro bono lawyers available (and there usually aren't), then they must represent themselves, no matter how incompetent they are to do so or how technical the issue? I don't think you want to say that. I'd have no objection if the statute contained a provision allowing agencies to register lay advocates, provide training for them, discipline them for misconduct etc, but I don't think you can ban lay representation in the present development of administrative law.

B. Ed Felter comments

403 (h) --I fully agree with Michael that banning lay representation would be folly. Not only is it common in many jurisdictions to allow lay representation in certain categories of cases, courts consider it more helpful to allow than letting the pro se fumble around. Indeed, the Colorado Supreme Court determined that even though the representation of employers in unemployment insurance cases could be deemed the practice of law, non-lawyers were allowed to represent them. *See Unauthorized Practice of Law Committee of the Supreme Court v. Employers' Unity, Inc.,* 716 P.2d 460 (Colo. 1986). In banning non lawyer representation, courts have intimated the they will steer clear of considerations that protect the economic self-interest of lawyers. In *Employers' Unity,* the court hinted that if the parties would be better off with non-lawyer representatives and the matters didn't involve complicated legal matters traditionally reserved for licensed attorneys, non lawyer representation is permissible. Many public assistance statutory schemes allow representation by "friends, relatives, or other representative." *See* Section 26-2-127 (1) (a) (IV), Colorado Revised Statutes (hereinafter "C.R.S.). In these economic tough times, no state legislature is going to create a new licensing mechanism for non lawyer representatives and supreme courts only have jurisdiction to enjoin them only if they are engaging in the "unauthorized practice of law."

C. Ann Young

On lay representation, the draft I am reading doesn't address that, only attorney representation. So I am not sure what is being addressed. But on the subject of lay representation, you might consider some sort of advice or query to a party represented by a non-lawyer to assure that he/she understands the ramifications of that. Also, if a corporation or organization wants to appear through a lay person, even president, there is law in some states that would require explicit authorization of the governing body of the org/corp., etc., of such representation, and you might want to add something like that.

4. Section 403(j): Should this subsection be redrafted to read: (j) The agency must make and retain for the amount of time required under the state's retention of records act, a verbatim transcription of the hearing by electronic recording or stenographic transcript?

Comment: the reason for the suggested change is to clarify that a written transcript is not required. Those agencies which do high volume hearings involving repetitious routine issues normally only record hearings electronically and seldom either produce or need a written transcript unless an appeal is taken. Costs are substantially reduced by allowing the agency to record the hearing by electronic means from which a written transcript can be produced if needed.

5. Section 403(k): Should the current language of subsection (k) be revised to make this requirement more detailed? Comment: I worry that the current language of subsection (k) may be insufficient to prevent agencies from relying on very conclusory and incomplete findings of facts and law as many did before the 1961 MSAPA.

6. Section 404(1): please revise Section 404 (1) to read, (1) Except as otherwise provided by law, the burden of proof is on the party seeking to change the status quo. or revise to read (1) Except as otherwise provided by law, (a) in an action to obtain a license or benefit the burden of proof is on the applicant and (b) in an action to enjoin activity or to impose a penalty, the burden of proof is on the agency. (This is the default rule on burden of proof under Schaffer v. Weast, 546 U.S. 49 (2005) and many similar state cases. The current proposed MSAPA language won't work with the statutes under which I conduct hearings because the party opposing the agency always initiates the hearing. Both denial of applications and enforcement orders become final if not appealed. As alternative language, we could use the language used in the federal APA at 5 USC § 556 (d), "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." (I find my suggested language clearer but the federal APA language has the advantage of having been construed by federal courts many times over the years.)

7. Section 404(2) applicability of evidence rules

A. Mike Asimow

Evidence—§404(2). Do you mean to make mandatory such civil evidentiary rules as the best evidence rule, the ban on opinion testimony, leading questions, or the *Daubert* test, or the many

other rules in the state's evidence code? The reference in the first sentence to "statutory grounds" appears to make all of them mandatory in administrative hearings. And the third sentence seems to confirm that understanding. Instead, the statute should clearly say that any evidence (including but not limited to hearsay) can be admitted, regardless of the statutory evidence rules (except for the rules of privilege) unless it is immaterial or repetitious.

B. Ed Felter comments

404 (2) --I disagree with Michael on the time-honored admin. law thought that any evidence that the hearing officer deems should be admitted can be admitted. The Colorado APA provides that the rules of evidence, to the extent practicable, shall conform to those in civil nonjury trials. Section 24-4-105 (7), C.R.S. This is further amplified in *Industrial Claim Appeals Office v. Flower Stop,* 782 P.2d 13 (Colo. App. 1989), which was superseded by a subsequent change in the Colorado Workers' Compensation Act, Section 8-43-210, C.R.S., which made the Colorado Rules of Evidence (based on the Federal Rules) applicable, lock, stock and barrel to workers' compensation cases. When a new lawyer appearing before me says, "I understand the rules of evidence are **relaxed** in administrative hearings," I reply that "you can't get much more relaxed than the Colorado Rules of Evidence. I hope these thoughts help.

C. Ann Young

On the evidence issue, I think the current language is confusing and probably not helpful, particularly for a non-lawyer presiding officer who might not understand the issue of relevance or materiality. I agree with Ed to an extent, and think the best approach is to say that "the rules of evidence should be relied on in ruling on any objections to proposed evidence, except that, if evidence is not admissible under such rules, it may be admitted if it is of a type commonly relied upon by reasonably prudent individuals in the conduct of their affairs." We had this rule (I may have paraphrased it a bit but this is it as best I recall it) in Tennessee when I was a central panel ALJ there and this worked well. It is clearer but at the same time has the "safety valve" of the "type commonly relied upon…." I would not start the section by saying what should be excluded and thereby potentially excluding too much, because this could lead not only to reversal but to remand, if too much is later found to have been excluded.

8. Section 404(2) and (3) Should hearsay evidence be allowed over a valid objection to admissibility in all cases?

9. Section 404(2) "but evidence may not be excluded solely because it is hearsay." Discuss -- authorities on this issue are collected at 36 A.L.R. 3d 12. (In Texas and some other states, hearsay is inadmissible in an administrative hearing if a timely objection is made unless it comes in under a recognized exception to the hearsay rule. I am used to this rule and can't think of any cases where I have found it particularly onerous to apply.)

10. Section 404(2) Also, should any liberalization for admission of hearsay evidence apply at all when the case is before an administrative law judge? Also, should all civil evidence rules be applicable to contested case hearings, or should the rules of evidence be relaxed?

11. Section 404(8) Official Notice

A. Mike Asimow

Official notice—§402(8): This shouldn't be limited to scientific or technical matters but should include economic or other facts within specialized knowledge of the agency.

12. Section 404(8): Should the last sentence of subsection 404(8) be revised to read "opportunity to contest any officially noticed facts before the decision <u>becomes final</u> [~~is announced~~]." (From time to time, I take official notice of what Kenneth Culp Davis calls "legislative facts" and have stated in a footnote to the proposed decision that if either party wishes to challenge the facts of which I have taken notice, I will entertain a motion to reopen and receive evidence on the issue. This speeds up the process, but as currently drafted, the language that I have proposed be revised would prohibit me from issuing the proposed order until I have first extended the opportunity to the parties to be heard on that issue. I see no advantage to the way the language is now drafted since they can present evidence either way and the way the language is now drafted would cause delay.)

13. Section 405(b), (c); Should these subsections be redrafted to combine subsections (b) and (c)? (I don't see any necessity for having separate hearing notice provisions depending on whether the case is filed by the agency or an outside party. Neither the 1961 or 1981 Model Act have such separate notice subsections.) **When redrafting, do not require the phone number of the presiding officer to be provided.** (This is an invitation to ex parte communications -- many ALJs, myself included, and are not provided with call screening. And, unfortunately, the first thing many callers do is blurt out the facts of their case ex parte as soon as the judge answers the phone.)

14. Section 406(b)(1): Should this subsection be redrafted to provide: (1) <u>a complete electronic</u> recording <u>or written transcript of any evidentiary hearing(s)</u> [~~of the proceeding~~]? (As currently drafted subsection (1) assumes a proceeding to be recorded in every case -- most cases are actually dismissed by the parties after a settlement or because one or the other decides not to pursue the case -- but there should still be an agency record preserved of whatever material is filed in every case although frequently there won't be a hearing.)

15. Section 408(d) Ex Parte Communications; Should the agency head exception in subsection (d) be revised?

A. Mike Asimow

Ex parte contacts and separation of functions—§408. As the Drafting Committee knows, I have persistently urged that the new Act should follow the model of 1981 MSAPA §4-213(b) and almost all states: agency heads or other final decision makers should be allowed to receive ex parte assistance from agency staff, provided that the advising staff members are not adversaries (prosecutors, advocates, etc.) in the particular case and do not augment evidence in the hearing record. I appreciate the compromises inherent in the current draft of §408(d) (2): ex parte staff advice is permitted on legal issues; ministerial matters; "an explanation of the technical or scientific basis of, or technical or scientific terms in" the record; and "an explanation of the precedent, policies, or procedure of the agency." In fact, staff can provide any other communication "that does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses." I know that this compromise was painful for several members of the Committee. And as a result the section is less objectionable to me than previous versions.

Nevertheless, like many compromises, the section is unwieldy and contains more detail than is appropriate in a bare-bones model state APA. Moreover, the distinctions won't hold up. Suppose the issue in a water pollution permit case is the technology that must be employed by the applicant to prevent kills of aquatic life. There are several available technologies for doing this with differences in their effectiveness and costs. The evidence is highly technical and quite difficult for a non-expert to evaluate. There are thousands of pages of testimony and exhibits and conflicting testimony or reports by eight expert witnesses. Because this issue involves difficult technical and scientific matters, present §408 allows the staff to give ex parte advice to the final decision makers to help the latter understand the technical problems.

Yet in the end, the issue turns on the appraisal of conflicting expert testimony. Applicant's witness B says that technology X is the best way to go. The staff believes that technology X is ineffective in protecting wildlife and witness B is not only incompetent but is for sale to say anything he's paid to say. The staff can explain the technical issues to the decision makers, but when asked, "what about B's testimony" they have to say "we can't discuss that with you." This just won't work. And, in my view, the fine distinctions inherent in §408 will give rise to much litigation and pretty massive confusion by ordinary non-lawyers who have to try to understand and live with it. And they may conclude that it is too risky for the staff to give advice and therefore the agency will ban ex parte staff advice. The decision makers must figure out the best solution blind. That would be a great disservice to the public interest.

As Russ Frisby pointed out, the terms "technical or scientific" are too narrow as they would seem to exclude advice about economic issues.

B. Ann Young

First, on your question whether to require disclosure of staff advice, I strongly recommend that, for reasons I have previously shared.

Mike Asimow

16. Section 408(d)(1)(A): This paragraph provides that an agency head may not discuss a contested case off the record with a staff member unless the latter "has not served as an investigator, prosecutor, or advocate at any stage of the contested case, and has not communicated with any such person about the case." The language after the comma is unprecedented and should, in my opinion, be dropped. I of course agree that the agency head should not have ex parte conversations with an adversary, but a *non-adversary* staff expert should not become unavailable to the agency head for consultation merely because he has also discussed the case with an adversary. To retain this language would jeopardize the compromise that the committee has been laboring to fashion, because it would apply even if the conversation relates to a topic that § 408 would otherwise permit the agency head to discuss off the record with non-adversary staff (such as an explanation of technical or scientific terms in the evidence, or the precedents or procedures of the agency). In effect, it would mean that, in any subject area in which independent staff expertise might be needed, the agency needs to employ two experts—one who can speak with the agency head and one who can speak with adversaries. I think many people who might otherwise be open to compromise on § 408 will find this unacceptable.

17. Section 408 (d) (1) (B) ex parte communications

A. Mike Asimow

I also think that §408(d) (1) (B) is too rigid. It disqualifies staff advisers if they have "made or received communications about the case that the agency head is prohibited from making or receiving." But let's focus on small agencies in small states that have big responsibilities (such as issuing water pollution permits). A is a staff member who is tapped as an adviser to the agency heads in a critical water pollution case because A has the necessary expertise and nobody else on the staff does. *Before* being tapped an adviser, A had communications about the case with the applicant for the permit or with staff members who are prosecuting the case. Then A is selected as an adviser. Under §408(d) (1) (B), A cannot serve even though he might be the only available staff person who could handle the advisory task. I think you should change this so that A has to disclose the ex parte communication he made or received but is not disqualified from serving.

18. Section 408 ex parte communications

Ann Young

On 408 - ex parte communications, I think the provisions should apply also to impending proceedings, as the same principles would apply to a case that you know is about to come up. On the current compromise, I have previously expressed my views and I won't repeat them here in any great detail. I would, however, urge no further compromise and that the committee actually consider strengthening the prohibitions to protect against legal and other advice and

communications that may inadvertently compromise the fairness of a proceeding and/or decision, by overlooking "the other side of the story" that won't come out if the person with "the other side" doesn't know about all the communications.

There are definitely, without question, all sorts of practical reasons why ex parte prohibitions are inconvenient, but sometimes (perhaps even usually), as with the recent supreme court decision on right to confront experts who do lab reports, etc., due process is simply not convenient, but the principle warrants proceeding in a way that protects rights. If the fairness of a proceeding or decision is ever brought into question later because of ex parte contacts, including those that were well-intended, then I would argue that the ultimate cost of that is more significant than the inconvenience of having to comply with a strict ex parte rule - even when such questions arise only infrequently.

Most of the time ex parte communications will not come out, by their very nature - they are ex parte and not known to all the parties. But if and when they do, and if they are embarrassing or worse, then the damage can be very significant, and I am not sure that this has been sufficiently considered. I think that recent issues relating to regulation of banks and other financial institutions have shown that the "going wisdom" at any given time (of the sort that might be included in staff advice, for example) may not ultimately stand the test of scrutiny, and can do harm by causing outside viewpoints to be overlooked or given short shrift. I raise this not to bring controversy into the question, but simply to point out that the ex parte prohibitions address the same kinds of concerns of overlooking opposing viewpoints, and that such potential costs of the compromises that are currently in place (or that might be added to them) should be seriously considered.

19. Section 411 Discovery; Should this section be retained in its current format, or revised?

A. Mike Asimow

Discovery—§411. I believe this section is overambitious because it provides elaborate discovery procedures to the vast universe of mass justice adjudication. Take unemployment compensation disputes. In most states these are very quick and informal affairs, lasting perhaps 15 minutes each. You just can’t require any more procedure than a right to a quick hearing before an impartial hearing officer. There is no staff to administer discovery. Elaborate discovery provisions would bring this system to a grinding halt. I suggest that this section be triggered only by a rule adopted by an agency providing for discovery. Absent such a rule, there would be no right to discovery. The comment cites California provisions for administrative discovery but these are applicable only to professional licensing situations where someone’s livelihood is at stake. These represent perhaps 5% or less of the total number of California administrative adjudications.

B. Reporter comment: Mike's comments are sound in my view. His suggestion of adding a requirement that an agency has to adopt a rule providing for discovery to invoke this section has merit. The wide variety of cases subject to the MSAPA may suggest that this section is too broad for all cases.

C. Ed Felter comment

411 --The biggest selling point for administrative law is that it has abbreviated and expedited discovery unlike the courts where trial by avalanche has replaced trial by ambush. In civil litigation, Mr. Big is capable of driving a poor schmoe into bankruptcy through never-ending discovery. Even the courts are now taking a hard look at expedited discovery procedures. In my humble opinion, the Uniform Laws Commissioners should not present an elaborate discovery model to the states. Legislatures will be hostile to the idea. Michael is right that there should be alternatives, including no discovery. In England, the only discovery involves the production of documents. In Colorado workers' comp. cases, represented parties can agree to engage in whatever discovery they choose. If they can't agree, they'll need an ALJ order and the ALJ will most likely limit the types and amount of discovery permitted. The non-represented often need protection from the consequences of discovery modalities that they don't understand. For instance, the consequences of not responding to requests for admission are more often than not a trap for the unwary.

C. Ann Young

On 411- discovery, I think the current section is not terribly elaborate, and indeed is less extensive than discovery generally is. Because discovery is an area that is subject to abuse, both in paper "dumps" on the one hand and elaborate evasive techniques on the other, it is good to have some provisions, such as you now have, and not to go too far in the direction of "simplifying" that might bring about more evasion. (There will very often, if not always, be some motivation to evade.)

You might add a phrase at the end of 411(e), saying something like: ", or expediting or simplifying discovery if doing so would not prejudice any party and would assist the parties in preparing for the hearing." If an agency just does a lot of very simple hearings, this could be done as part of the presiding officer's normal preparation for a hearing. Also, the procedures for discovery don't even come into play except upon written notice to another party within x days before a hearing. And in my experience in Tennessee, in those simple hearings, you will rarely if ever get such a notice or request - and in the rare case you do get such a thing, there may actually be a good reason for it in that individual case.

20. Section 413(b) initial order or proposed order**?**

A. Jack Davies

After a few days' reflection (and after your nice reaction to my first thought), I offer this suggestion. "Initial order" seems wrong. "Initial" is defined in my dictionary as "first or before all others". But in your act it means "next to last" or "most likely to turn into the last and final order". I would prefer "provisional order" or "provisional final order" or "conditional" or "proposed" or any other synonym for "provisional". Any of those words make the distinction with "recommended orders" clearer immediately. Later comment by Jack Davies: I wish I had not included "proposed" in my list of synonyms. Provisional is much the best substitute for "initial. Too bad it was not used years ago.

B. Steve Cawood

I think that the issue of enactability may come into the debate on the terminology issue here with respect to doing away with “recommended decision”. For those agencies where the judge’s decision IS a recommended decision, the historical FACT is that the executive branch has convinced that state’s legislature to keep it that way for a reason, and that those states where that’s the case, they’ll guard the prerogative jealously; if we change the terminology, by implication, this may appear a threat to the executive branch hierarchy that could chill the Act’s acceptability. I’m just speaking to the reality of things politically. Steve

C. Ed Felter

In my opinion, "Initial Order" or "Initial Decision" is a much better word of art than "recommended decision," which suggests that the reviewer is free to make all sorts of changes in the recommendation. Colorado uses the "initial decision," which may only be modified by the reviewer (agency head) under fairly tight APA constraints, *e.g.,* findings of evidentiary fact that are contrary to the weight of the evidence (which, as a practical matter, means the reviewer must read every word of the verbatim transcript of the testimony to make this determination). If I'm not mistaken, at a past meeting, Ron Levin expressed a preference for "initial decision," as the more progressive phrase. Later comment: I'm wondering if the Committee could balance enactability with the progressive approach calling it an "initial decision," and that sets up APA strictures for overturning or modifying it. At this juncture, over 50% of the state legislatures have created independent central panels of ALJs to hear administrative law cases, a signal that state legislatures are more amenable to the progressive approach of giving the ALJs more authority and independence. Additionally, the agency heads I know like the APA strictures because the strictures insulate them against charges of disregarding due process and/or doing whatever they please despite the ALJ who heard the evidence. Just a thought.

(Ed Felter continued) Section 413 (b) I feel very strongly about calling it "initial decision," a careful word of art. "Provisional decision," "Conditional Decision," "Recommended Decision", or "Proposed Decision" tend to undermine the perceptions of, authority and legitimacy of the fact finder ALJ or hearing officer, and reinforce the ancient perception that the hearing officer is nothing more than an agency apparatchik, heading down to the sunless basement hearing room

with a $39 tape recorder under his/her arm. Again, in my humble opinion, the mission of the Uniform Laws Commissioner should be to elevate administrative law in this country and, at the same time, balance enactability considerations. The handle, "Initial Decision," has gained fairly wide acceptance in the administrative law community. What it connotes that the other handles don't is that it will become final agency action if the agency does not appropriately modify it (within APA strictures) within a prescribed period of time. Such a concept appeals to state legislatures because it obviates the necessity of the party needing final agency action sooner rather than later having to file a motion for "removis juris donkus" with the agency, and finality can be more quickly achieved.

D. Ann Young

Although "provisional final order" might, strictly speaking, more accurately describe the idea, I think "initial order" or "initial decision" have come to be such terms of art that to change the terminology would likely be confusing. And I think the concept of issuing an initial order that becomes final unless appealed, reviewed, reversed, etc. is the one that is best. The idea of a proposed or recommended order means that it does not become final unless subsequently adopted. The general practice, and the one I would recommend, is not to reduce the current general authority of ALJs and AJs, etc., to issue initial orders that become final unless…, to merely the authority to issue recommended or proposed decisions. It's more efficient to have initial decisions, in that no action is required unless a party or the agency wants the initial order to be reviewed. It might also be said to lead ALJs to take more responsibility for their decisions, give more serious thought to them, etc., than if they thought they were only recommended. Later comment: I also have had the impression that not using "initial order" would be a change from what the general practice is, and certainly what the general trend is. I think it would be likely be clear without too much explanation that "initial" connotes something other than final, and that review is permitted, just not required.

E. Lane Kneedler

Sounds like a good idea. I like "provisional order" or "provisional final order." "Conditional order" connotes something different to me -- e.g., it could be a final order "conditioned" on something or "with conditions." Lane

F. Fran Pavetti. Good idea.

21. Section 416(c) Should subsection (c) be redrafted? Comments: --I think subsection (c) needs to be redrafted. If the presiding officer is an ALJ instead of the agency head(s), the presiding officer should not receive a petition for reconsideration of the final order. It should instead be addressed to and ruled upon by the agency head(s). Also, I would consider adding a sentence at the end of subsection (c) providing that it the agency head doesn't rule on the motion within ___ days after filing, the motion is overruled by operation of law. (In Texas, this motion

is a prerequisite to appealing the agency order. The theory of this prerequisite to appeal requirement is that it saves judicial resources if the errors in the agency order are specifically pointed out to the agency and the agency given a chance to correct its own mistakes before an appeal is taken to the courts. I would advocate that the MSAPA drafting committee consider and discuss requiring the motion as a prerequisite to appeal.)

ARTICLE 4A

1. Section 401A Should this section be deleted because of the difficulties with the informal hearing concept?

A. Mike Asimow

A. Important issues:

1. Informal hearings—§401A. This is an admirable attempt to provide a template for procedure in the case of informal adjudication (that is, of adjudications that are not contested cases because no evidentiary hearing is required by statute or constitution). However, I believe it will give rise to more trouble than it is worth. Hypo: I work for a state law school and give you a C in administrative law. This is (or at least might be) an order (under §102(20) the law school has determined your rights or other interests) and therefore is adjudication. You have a right to a statement of my reasons, and the right to respond before an impartial decision maker (the dean?) There are an infinite number of such situations—relatively trivial but binding decisions by state agencies. A classic example is the state park ranger giving me the last campsite and denying it to you. You can't mandate *any* procedure for this vast universe of situations. The 1981 MSAPA did attempt to do this (and provided for a "summary hearing" procedure in such cases); in my opinion, this is one of the reasons it failed to win acceptance. The Comment miscites CA Gov't C. §11445.40 which provides for informal hearings, but is limited by the basic requirement that a statute or constitution require an evidentiary hearing. There is no such limitation for §401A. In *Metsch v. Univ. of Florida*, 550 So. 2d 1149 (1989), Metsch's application for admission was rejected by the Univ. of Florida Law School and he sought a hearing. The Florida statute provided for a hearing in any case in which a "substantial interest" was affected, regardless of whether a hearing is required by any other source such as statute or constitution. The court held that admission to a state law school is not a "substantial interest" which is a highly dubious conclusion. But the subtext of the opinion is the huge burden this would create for the university. Section 401(A) isn't even limited by a "substantial interest" provision like the Florida statute.

B. Reporter comment: Mike Asimow's comments are sound in my view. You may recall that we added Article 4A, and section 401A after the November drafting committee meeting. Upon reflection, that was a mistake, and we should delete section 401A for the reasons stated by Mike Asimow.

C. Larry Craddock comments

Strike the entire subsection (a) as it now stands and redraft to read as follows: (a) Except as otherwise provided by law when an agency denies an application for a license or permit, the agency shall state the reason(s) for the denial in writing. The applicant, if aggrieved, may then appeal the decision by requesting a hearing within (30) days after written notice of the agency decision. (This is typically the way denial of a license application is handled -- agencies usually grant the vast majority of license applications on the basis of testing or an internal investigation of an application without the necessity of a hearing. However, if the license is denied, the better and probably the most common practice is to grant the applicant an opportunity for a hearing to review the basis on which the agency has denied the license. See 2 Charles H. Koch, Jr., Administrative Law and Practice (West Publishing 2d Edition 1997) at §5.14, as follows:

> *"Many administrative adjudications begin with an initial administrative determination. The party is then in a position of either 'appealing' that determination or accepting it."*

Professor Frank E. Cooper, who was the primary draftsman of the 1961 Model State Administrative Procedure Act, recommends this procedure as a "best practice." See 2 Frank E. Cooper, State Administrative Law 484-485 (Bobbs Merrill 1965) where Professor Cooper states his views on this type of statutory procedure as follows:

> *"Neither the federal statute [the Federal Administrative Procedure Act] nor the Revised Model State Act [the 1961 Model State Administrative Procedure Act, National Conference of Commissioners On Uniform State Laws] requires a hearing on all applications for licenses. . . . Provisions are normally made in the specific statute authorizing the particular licensing activity either requiring or not requiring a hearing. There is apparently no state in which a hearing is required in every application for a license; and this is not surprising, in view of the large number of licensing functions that are essentially ministerial in nature. It is easy to conjecture the chaos which would ensue if public officers were required to hold a hearing, for example, on every application for the issuance of a dog license, or an automobile license.*

> *There is always a possibility, of course, that an application may be peremptorily denied, even in a case where there exists a clear legal right to obtain the license. The Indiana statute wisely provides for this contingency by prescribing a method which deserves careful attention by the legislatures of other states. . . . The Indiana statute provides that the normal hearing requirement shall not apply for issuance of licenses or permits on application, subject to an important condition: whenever an application or permit is denied, the applicant is entitled to have a hearing before the ultimate authority of the*

agency, if he files a written application within fifteen days after receipt of notice of the refusal.

D. Ed Felter comments

401A -I agree with Michael and the commissioner who expressed strong reservations about prescribing any procedures for "informal hearings."

2. Section 401A Why not redraft this section to define the ruling on the camping permit or student suspension from school as something other than "an adjudication?" I think this would be much less confusing. Once we define ruling on the camping permit or student suspension as "an adjudication," we have to think through and possibly rework all the provisions in this Act which pertain to "an adjudication." If we were to define the ruling on the camping permit or student suspension by some other terminology, we wouldn't run the risk that we will inadvertently make the ruling on the camping permit or student suspension subject to procedures that we didn't intend.

3. Section 402A Strike the entire subsection (a) as it now stands and redraft to read as follows: (a) Except as otherwise provided by law when an agency denies an application for a license or permit, the agency shall state the reason(s) for the denial in writing. The applicant, if aggrieved, may then appeal the decision by requesting a hearing within (30) days after written notice of the agency decision. (This is typically the way denial of a license application is handled -- agencies usually grant the vast majority of license applications on the basis of testing or an internal investigation of an application without the necessity of a hearing. However, if the license is denied, the better and probably the most common practice is to grant the applicant an opportunity for a hearing to review the basis on which the agency has denied the license. See 2 Charles H. Koch, Jr., Administrative Law and Practice (West Publishing 2d Edition 1997) at §5.14, as follows:

"Many administrative adjudications begin with an initial administrative determination. The party is then in a position of either 'appealing' that determination or accepting it."

ARTICLE 5

1. Section 501(d) (2) should the agency discretion exception for judicial review be retained?

A. Mike Asimow

4. Discretion-§501(d) (2). I disagree with the exception “agency action is committed to agency discretion by law.” This is in the federal APA and has given rise to vast litigation and confusion and highly politicized decisions. It was not part of the 1981 MSAPA. It is difficult to explain to non-experts the difference between “committed to agency discretion” (unreviewable) and

"arbitrary, capricious, an abuse of discretion" in §508(a) (3) (C) (reviewable). I think non-expert state court judges will have a tough time with this.

After all, exactly why shouldn't all discretionary action be reviewable (unless the legislature precluded review under §501(d) (1))? At the ABA meeting, Ron Levin said he was concerned about judicial review of prosecutorial decisions, especially decisions not to prosecute, as in the famous federal case of *Heckler v. Chaney*. However, if a prosecutor has been paid off not to prosecute someone, or made a prosecutorial decision based on race or gender, what's wrong with judicial review? Besides, this example seems unreviewable under §501(a) ("agency action that is a failure to act is not judicially reviewable...") In the end, I predict that the exception will cause much confusion and just isn't worthwhile.

B. Ed Felter

Section 501 (d) (2) --I wholeheartedly agree with Michael. Access to the courts on **judicial** review is part of our constitutional system. In Australia, which does not have a constitution similar to ours, the Generalist Administrative Review Tribunal, an executive branch tribunal, is the end of the line on administrative law matters. "Discretion" should always be reviewable on an "abuse of discretion" standard.

2. Section 503(a) Statute of limitations for procedural challenges; Two year length

A. Mike Asimow I'd make the statute much shorter than two years on procedural challenges to regulations. These should be made quickly or be barred so as to remove uncertainty about the validity of the regulation.

B. The scope of the statute of limitations should be reexamined. For example, I question whether the first sentence should allow a rule to be challenged fifteen years after its promulgation on the ground that the agency did not have a sufficient factual basis for issuing it. The second sentence is also problematic. The committee has provisionally decided not to try to codify the doctrine of ripeness. That may be the correct decision, but the second sentence of § 503(a) could be read to mean that a rule or guidance document is reviewable even if it would, under standard analysis, be considered unripe for review.

3. Section 505(a) Standing; zone of interests test

A. Mike Asimow

Standing-zone of interest test—§505(a). I would strike out the bracketed language "if the asserted interests of the person are not inconsistent with or completely unrelated to those the agency is required to consider..." This language is inspired by one interpretation of the federal zone of interest test. The zone test arose from case law interpreting language in the federal APA (5 USC§702) that is not present in the Model Act and, in my view, doesn't belong in the Model Act. I recognize that similar language is contained in 1981 MSAPA §5-106(a) (5) (ii), but I have

always disagreed with the inclusion of that section. Why unnecessarily incorporate confusing federal case law?

In my view, anyone who is "aggrieved" as defined in §505(a) should be allowed standing, whether or not an analysis of the underlying legislation suggests that this plaintiff wasn't among the group that the statute was intended to regulate or protect, or even that the plaintiff's interest is inconsistent with what the statute was intended to protect. Countless federal cases show that this is a very time consuming and difficult issue to resolve and is a side issue that has nothing to do with the merits. The decisions tend to be highly politicized—judges who want to review something find that the zone test is met and those who don't want to review it find that the zone test isn't met.

A recent California case which I believe wrongly imported the federal zone of interest test into California law is a good example. *Waste Management of Alameda County, Inc. v. County of Alameda*, 94 Cal. Rptr. 2d 740, 748-49 (2000). A is licensed to process waste. B applies for a similar license. A complains that the conditions of B's license would be more lenient than the conditions in A's license. In the absence of the zone test, A is aggrieved and would have standing. The court said that the statute was intended to protect people from irresponsible waste disposal practices, not to protect competitors from each other, so A has no standing. I think that the question of what the statute intended on this point is difficult to ascertain and basically irrelevant. Let's get to the merits and decide the case. If the legislature wishes to preclude review in this situation, it can, of course, do so.

B. Ed Felter comments

Section 505 (a) --I agree with Michael that importing Federal APA language should always be approached with extreme caution, especially the "zone of interest" language under consideration here. When the court decisions are polarized, I question the wisdom of the Commission attempting to resolve this matter.

C. Ann Young

Finally, on standing, I agree with Mike to simplify this as much as possible. Otherwise it can become very complicated and time-consuming indeed to address such questions, when going more directly to the merits will generally better serve the interests of all concerned.

4. Section 506 Exhaustion of administrative remedies; should there be a provision for issue exhaustion in rulemaking?

A. Mike Asimow Exhaustion of remedies—§506. Did I miss it or is there no provision on issue exhaustion? Someone (not necessarily the plaintiff) should have raised the issue before the agency before it's raised in court.

ARTICLE 6

1. Section 603(d)(1) should this section be changed to clarify that an ALJ is subject to the "administrative supervision" of the chief ALJ, if the section has to be there at all. This would avoid concerns about decisional independence for ALJ's.

A. Ann Young

Second, I do have comments on article 6. I know I will probably be in the minority on these, but I have real concerns about the supervision aspects of the article. I would hasten to say that some of my best friends are chief ALJ's, but..... I would change section 603(d) (1) to say an alj is subject to the "administrative supervision" of the chief alj, if the section has to be there at all. To leave it as is could be interpreted to allow supervision of how judges handle cases from a legal standpoint. And although some administrative matters may appropriately be supervised by the chief, even those can be used in questionable ways by a chief who is less than fully aware of all relevant law and ethical considerations, not to mention general principles of common sense.

B. Ed Felter

I agree with the recommended tweak for 603 (d) (1) --"...subject to the **administrative** supervision of the Chief ALJ." All administrative adjudication organizations should actually have clear policies that provide for the respect of the decisional independence of the adjudicator. "Administrative supervision" can include standards on the timeliness of orders, and the adoption of developmental processes to monitor and improve the quality of hearings and decisions without chilling the decisional independence of the adjudicator. I certainly agree that adoption of the 2007 ABA Model Code of Judicial Conduct should actually be referenced. Provisions for the enforcement thereof need to be broad enough to encompass "appointing authorities" or "disciplinary commissions" --the choice being with the specific jurisdiction. Some jurisdictions, for example Colorado, have no choice because the ALJs are in the constitutional state personnel system, thus, the appointing authority administers discipline subject to appeal to an impartial constitutional ALJ, outside the specific adjudication organization, under the State Personnel Board.

2. Section 604 (7), (8), (9) In section 604, I would delete subsections (8) and (9), about monitoring the quality of adjudications ... and disciplining ALJ's; and change (7) to read, "shall, in consultation with the administrative law judges in the office and pursuant to the rulemaking provisions of this act, adopt a code of conduct for administrative law judges modeled on the American Bar Association Model Code of Judicial Conduct."

A. Ann young

In section 604, I would delete subsections (8) and (9), about monitoring the quality of adjudications ... and disciplining ALJ's; and change (7) to read, "shall, in consultation with the administrative law judges in the office and pursuant to the rulemaking provisions of this act,

adopt a code of conduct for administrative law judges modeled on the American Bar Association Model Code of Judicial Conduct." That code as recently revised recommends that it apply to the administrative law judiciary, with the possibility of adaptation if this is needed in particular instances. This code has always been the gold standard for persons who function as judges, and now explicitly says it applies to the administrative law judiciary.

My concerns about supervision and discipline have to do with putting that much power in the hands of one person, who - if compromised in any way, less than optimally competent, biased, etc. etc. - can do great damage with such power, affecting not simply the ALJ's in an office, but ultimately the parties in cases and the public interest. I know of quite a few instances of abuse of such power around the country. It would be better to put in a section that would establish a commission, appropriately constituted, that would be responsible for any discipline, as well as appointment recommendations. The chief alj could bring charges, but should not decide on discipline. I realize that "appropriately constituted" is not precise, and would require some definition, but this is better than putting so much power in the hands of one person - the chief alj. And for an incompetent chief, a political hack, or someone otherwise less than ideal to be "monitoring the quality of adjudications" can also lead to all sorts of mischief as well as unfortunate - if not indeed legally questionable - situations. When writing a model code, I would humbly suggest that you must not assume that any and all persons in a position will be competent or even well-meaning, but should write them in a way that will not only best encourage quality but also best prevent abuse, and that is largely what my comments are based on.

I know I may have missed something, but even putting in the provision about removal only for cause and after notice and opportunity for hearing, is there anything that prevents the chief alj from doing the hearing as the article is currently written?

I think I have shared my article on evaluation of ALJs with you, in which I discuss not only evaluation but also management issues more broadly, including not only a legal perspective but the perspective of management research from the U. of Chicago business school and elsewhere. If anyone doesn't have it and would like a copy, please let me know and I will email it to you.