

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

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January 19, 2010

Drafting Committee to Revise
The Model State Administrative Procedure Act
Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, Illinois 60602

Re: Comments on Revised Model State Administrative Procedure Act

Dear Members of the Drafting Committee:

On behalf of the California Commission on Access to Justice, I am writing to provide input on the October 2009 draft of the revised Model State Administrative Procedure Act.

We commend the Drafting Committee for the scope and breadth of the revised act. We believe that your recommendations will do much to promote systematic fairness in administrative law procedures in the years ahead. Yet, we also know much more can be accomplished, and we welcome this opportunity to provide input as you go through the arduous process of revising the Model State APA.

Access to justice is a fundamental right that ensures the long-term preservation of our constitutional and common law values and fosters respect for the rule of law by all segments of society. Achieving true access includes the provision of legal services to low income and vulnerable populations in the state. Fifty million Americans are financially eligible for services from lawyers funded by the federal Legal Services Corporation, or "one in six Americans."¹ But, throughout the county, there are only 6,500 civil legal aid lawyers, which is less than .65% of all lawyers.² Looked at another way, there is only one legal aid attorney for every 7,700 eligible clients.

During the past twelve years, the California Commission on Access to Justice successfully partnered with the Judicial Council, under the visionary leadership of Chief Justice Ronald M. George, working with the State Bar, the legal services community, concerned policy makers, self-help centers, law libraries, law schools and a myriad of other legal, judicial, and public entities in a unified effort to achieve equal justice. Providing a continuum of fully accessible services in all forums throughout the state and establishing an innovative and responsive delivery system are part of the important core principles that inform our mission.

The Commission's Administrative Law Committee has been exploring the administrative law delivery system throughout the State, and several of our suggestions are an

¹ Earl Johnson, Jr., Justice for America's Poor in the Year 2020: Some Possibilities Based on Experience Here and Abroad, 58 DePaul L. Rev. 393, 395-6 (2009).

² Id. at 396.

outgrowth of recent access to justice innovations implemented in California and other state courts. California has moved closer to ensuring the right to counsel in basic needs civil cases with adoption of the Shriver Civil Counsel Act, AB 590 last fall. Effective in July of 2011, the Shriver Act authorizes pilot projects that supply legal representation on a test basis in domestic violence, civil harassment restraining orders, and child custody actions by a parent seeking sole legal or physical custody of a child -- particularly where the opposing side is represented. Other substantive areas, such as housing-related matters, conservatorships, and elder abuse are potential pilot project areas; which substantive areas will be part of the pilot projects is to be determined by the Judicial Council following a competitive grant-making process.

Because of the centrality of the self-represented litigant (SRL) issue to our recommendations, we have included several suggestions for your consideration such as the appointment of counsel in administrative law proceedings, and providing language assistance and SRL assistance. The experience of the SRL in state court is analogous to the experience of the SRL in contested administrative adjudicative proceedings. Therefore, we believe the legislative findings of the Shriver Civil Counsel Act set forth in sections 1(a) and 1(c) support our comments as the legislature has declared an “increasingly dire need for legal services” for the poor, especially children, the elderly, the disabled and those who are non-English speaking and has recognized that:

“...[w]hile court self-help services are important, those services are insufficient alone to meet all needs. Experience has shown that those services are much less effective when, among other factors, unrepresented parties lack income, education, and other skills needed to navigate a complex and unfamiliar court process, and particularly when unrepresented parties are required to appear in court or face opposing counsel.”

The Commission believes that the right to counsel should extend to administrative law adjudications affecting basic human needs where the opposing party is represented or the applicant does not possess the intelligence, knowledge, language skills, or have the appropriate language assistance.

SPECIFIC COMMENTS ON REVISIONS

Section 310 – Guidance Documents, Pages 32-33.

Our Commission supports your recommendation regarding agency guidance documents. Subsection 310(b) provides that if an agency proposes to rely on a guidance document to the detriment of a person in any adjudicative proceeding, the agency must “afford the person a fair opportunity to contest the legality or wisdom of the position taken in the document.” This subsection also prohibits an agency from using a guidance document to foreclose consideration of issues raised in the guidance document.

Our concern is that a self-represented party may not realize and understand the right to challenge a guidance document in the adjudicative hearing. We recommend that the words “notice and” be inserted before “a fair opportunity.”

Subsection 310(e) allows an agency to rely on a guidance document and cite it as precedent, provided that the guidance document is published on the agency website. Subsection 310(f) states that a guidance document may be considered by the presiding officer or decision maker in an agency adjudication, but it is not binding on the officer or decision maker “in the exercise of discretion.” The use of the term “precedent” in subsection (e) conflicts with the limitation in subsection (f) that a guidance document is not-binding on the presiding officer or decision maker, unless subsection (f) means that a guidance document is not binding on a decision maker or presiding officer in the exercise of discretion.

Section 401, Adjudication in a Contested Case, Page 44.

This article limits its application to adjudication by an agency in a contested case. A contested case is defined in section 102(6), page 5, as “an adjudication in which an opportunity for an evidentiary hearing is required by federal constitution or a federal statute or the constitution or a statute of this state.” We suggest that the drafters include “agency regulation” so that evidentiary hearings required by agency regulation are governed by Article 4 of the Act.

Section 402, Presiding Officers, Pages 45-46

We commend the inclusion of a procedure for disqualification of a presiding officer for bias, prejudice, financial interest, ex parte communications, and “any other factor that provides reasonable doubt about the impartiality of the presiding officer.” We also support the requirement that the presiding officer disclose any known facts related to grounds for disqualification that would be material to the impartiality of the presiding officer conducting the contested case proceeding. We do not believe, however, that subsection 402(f) sets forth the proper procedure for resolution of the disqualification issue. Subsection 402(f) requires the disqualification issue to be resolved by the presiding officer whose disqualification is being sought, and the decision to grant or deny the request for disqualification is not subject to interlocutory judicial review. We urge the committee to revise this procedure. We recommend the act require that the agency head or designee resolve the disqualification issue.

Section 403, Contested Hearing Procedure, Pages 47- 49.

Several cases³ and commentators⁴ suggest that the state court innovations regarding access to justice be applied to administrative law proceedings, including the right to

³ Judges have a constitutional duty to provide parties with a meaningful opportunity to be heard. Boddie v. Connecticut, 401 US 371, 379 (1971); see also Higbee v. Sullivan, 975 F.2d 558, 561 (9th Cir. 1992) (“[W]e have long recognized that the administrative law judge is not a mere umpire [in the administrative law] proceeding but has an independent duty to fully develop the record, especially where the claimant is not represented.”) (internal quotations and citations omitted); United States v. Schweiker, 645 F. 2d 812, 813 (9th Cir. 1981) (“[W]hen a claimant is not represented by counsel, the administrative law judge has an important duty to scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts, and he must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited.”) (internal quotations and citations omitted); and Thompson v. Sullivan, 933 F.2d 581, 583 (7th Cir 1991) (if claimant is unrepresented and suffers mental impairment, ALJ duty to develop record is even greater).

⁴ Richard Zorza, Self-Represented Litigants and the Access to Justice Revolution in the State Courts: Cross-Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative Law System, 29 J. Nat'l Association of Administrative Law Judiciary 63 (Spring 2009) (hereinafter Self-Represented Litigants); Paris. R. Baldacci, A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant, 27 Nat'l Ass'n L. Jud. 447 (2007); Richard Zorza, The Disconnect between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appeal Pro Se: Causes, Solutions, Recommendations and Implications, 17 Geo. J. Legal Ethics 423 (2004).

counsel; limited scope legal representation; an active role for the ALJ to develop the record and identify controlling law in SRL cases. They also recommend the development of self-help assistance programs, lawyer referral services, and partnerships with legal service and other legal providers, law schools, law libraries and pro bono volunteer attorney programs. Legislative support for any of these activities would advance access to justice.

Subsections 403(b), (c), and (d).

We support subsections 403(b), 403(c) and 403(d). These require an agency to “make available” a copy of the agency procedures governing the case, and compel the presiding officer to give all parties the opportunity to file “pleadings, motions, and objections . . . proposed findings of fact and conclusions of law, and recommended interim, or final, orders, as well as the opportunity to respond, present evidence and argument, conduct cross-examination and submit rebuttal evidence.” Agencies with heavy attorney representation, such as the Public Utilities Commission, will surely see all their procedures given their due by the many attorneys who litigate discovery and evidentiary matters before their presiding officers.

But for the litigant in the high volume agency that adjudicates denials of benefits, such as welfare or unemployment benefits, legal representation is financially impossible, and, absent public funding for basic needs civil litigation, reality dictates self-representation. Access to justice is not met by making the agency procedures available to the self-represented party and providing him or her with an opportunity to submit legal documents, present direct and rebuttal evidence, and cross-examine.

We believe that meaningful access to justice for the self-represented party requires the presiding officer in a contested case to explain the issues presented, the relevant law and the opposing party’s position, as well as the hearing procedure that will be followed. “A system through which a litigant forfeits important rights through ignorance or powerlessness cannot be viewed as fair; nor can a system in which outcomes of cases are determined not according to their merits, but according to the status of a party’s representation.”⁵ A presiding officer can be impartial and active in developing the case.⁶

Subsection 403(e).

Subsection 403(e), in our view, imposes too stringent a requirement for evidentiary hearings conducted by means other than the taking of in-person testimony. We suggest that the word “compelling” be omitted so that when “circumstances” make the appearance of witnesses impractical, the presiding officer may allow the introduction of the witness’ testimony by written affidavit, under penalty of perjury, or by electronic means such as television, video conference, telephone or other electronic means. We appreciate that the compelling circumstances limitation prevents an agency from adopting a system of mass telephone hearings to deal with a heavy case load, and in so doing, protects the party’s right to a meaningful hearing. Yet, there may be circumstances that constitute a good reason for a telephone hearing or for allowing a

⁵ Russell Engler, And Justice For All – Including The Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks, 67 Fordham L. Rev. 1987, 1989 n. 17 (1999).

⁶ Ellen E. Sward, Values, Ideology, and Evolution of the Adversary System, 64 Indiana L. Rev. 301, 321 n. 6 (1989).

witness to give evidence by written declaration, or through electronic means, even though the good reason is not a compelling one.

The last sentence of subsection 403(e) should encompass all electronic means of recording, and should not be restricted to telephone hearings.

Subsection 403(h).

We urge the Committee to modify Subsection 403(h), which permits representation by lawyers and omits reference to non-lawyer representation. This section appears to ban lay representation, and such a ban will have a disparate impact on the ability of poor, low income and moderate income litigants to have a meaningful hearing. Most jurisdictions with statutory public assistance schemes permit representation by non-lawyers, such as a friend, relative or other representative. Subsection 403(h) eliminates this avenue of assistance, and precludes representation by law school students in clinics supervised by licensed attorneys. Law schools are an important stakeholder in the pursuit of access to justice for the poor. The modification regarding non-legal representation should also be made in the notice provisions, Subsection 405(b)(5).

Subsection 403(i).

The Commission commends the Committee for addressing the issue of the SRL and role of the presiding officer. We believe, however, that a presiding officer has a duty to explain contested case procedures to a self-represented party, and this duty is not discretionary.

Case law recognizes the administrative law judge's affirmative duty to develop the record in contested cases involving a self-represented party. Comment 4 to Rule 2.2 of the ABA Model Judicial Code, adopted February 2007, allows a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly litigated. The comment expressly states it is "not a violation" of the Code for a judge to make reasonable accommodations for pro se litigants.⁷

Therefore, we urge the Committee to revise subsection 403(i), which permits, but does not require, the presiding officer to explain contested case procedures if the party exercises "the right to self-representation in a contested case." We recommend that section 403(i) impose an affirmative duty on the presiding officer in a contested case to explain the issues presented, the relevant law and the opposing party's position, as well as the hearing procedure that will be followed.

Subsection 403(i)'s reference to the right to self-representation was drafted prior to the Shriver Right to Civil Counsel Act, and in an ideal world, publicly-funded civil counsel would be afforded to all economically-eligible litigants in contested administrative adjudications. In the real world, however, the right to private legal representation is beyond the reach of most low and moderate income litigants, even if the legal services are unbundled or limited in scope. The typical self-represented litigant not only lacks the financial means to hire counsel to prepare and argue the plethora of legal documents and motions referenced in subsection 403(c), but also lacks the knowledge, skill and experience to navigate the contested case proceeding, conduct discovery and cross-examine witnesses.⁸

⁷ Model Code of Judicial Conduct R. 2.2 cmt 4 (2007).

⁸ Paul B. Zuydhoek, Litigation Against A Pro Se Plaintiff, 15 Litig. 13, 16 (Summer 1989).

Limitations on legal aid funding and lack-luster pro bono participation make the right to civil counsel functionally non-existent for low and moderate income litigants in contested administrative adjudications. Procedural adjustments, such as a mandated active role for the presiding officer in cases involving a self-represented party, help alleviate the injustice that a lack of legal representation sows.

The State Basic Access Act, adopted by the California Commission on Access to Justice in March of 2008, illustrates a model for providing appropriate public legal services, defined as full legal representation, limited legal representation, and non-lawyer representation, to financially eligible parties. Public legal services are provided (1) to the applicant if a basic human need is at stake and that person has a reasonable possibility of achieving a successful outcome; or, (2) to a defendant or respondent if a basic human need is at stake, unless the respondent or defendant lacks a non-frivolous defense. “Basic human needs” are defined as shelter, sustenance, safety, health, and child custody.⁹ The Act also identifies factors to be considered in determining when representation by an attorney is needed for fair and equal access to justice and when self-representation will suffice. These include the complexity of the substantive law, the complexity of the forum’s procedures and process, the individual’s education, legal sophistication and English language ability, and the presence of counsel on the opposing side of the dispute.”¹⁰

Subsection 403 (I)

We commend the Committee for subsection 403(I), which reminds administrative agencies that they may provide for greater rights than those provided for in Article 4.

Section 408, Ex Parte Communication, Pages 56-59.

We commend the Committee for including these provisions prohibiting ex parte communications except for matters of procedure. Providing notice to the opposing party as a remedy for an improper contact allows the aggrieved party to take action, if it is deemed necessary.

Section 411, Discovery, Pages 61-62.

The Commission understands the Committee’s desire to provide discovery, which is limited in administrative law proceedings. Some agency leeway is necessary, because in some cases, elaborate discovery proceedings might impede the efficient and prompt determination of benefits. If an agency provides for formal discovery, then compliance with this rule is warranted.

Sections 603 and 604.

Section 603 makes administrative law judges subject to canons for administrative law judges. Subsection 604(7) gives exclusive authority to the chief administrative law judge to adopt a code of conduct for administrative law judges. Serious consideration should be given to incorporating in the code of conduct a provision similar to comment 4 to Rule 2.2 of the ABA’s model judicial code, allowing the ALJ to provide reasonable accommodations for the SRL. This can be achieved in a way that does not harm impartiality but maximizes access to justice for those who are self-represented.

⁹ State Basic Access Act, section 205; California Commission on Access to Justice (January, 2008) http://www.brennancenter.org/content/resource/state_basic_access_act/.

¹⁰ *Id.*

Proposed Section dealing with Language Assistance, Interpreters.

Our Commission has worked actively to heighten awareness of the need for interpreters in California. For many years, our Commission has been involved with efforts to expand language assistance in civil and family law cases, including publication in 2005 of a report entitled "*Language Barriers to Justice in California*." We wholeheartedly endorse the series of recommendations in your draft report. However, we urge you to note that administrative agencies should continue to seek adequate state funding for interpreters. Three Commission recommendations in its 2007 *Action Plan for Justice*, page 72, that address this issue can be adapted to administrative law proceedings:

- Guarantee qualified interpreter services in administrative proceedings.
- Develop policies and procedures to improve language access including training and resources for [agency] staff and presiding officers; expanding multi-lingual self-help centers; and pursuing research to determine the actual unmet need and to develop appropriate solutions.
- Reevaluate the system for recruitment, training, compensation and certification of agency interpreters.

One suggestion we would like to make with regard to cases involving the need for interpreters is to mark the electronic records as well as the physical files with an indication that a party requires an interpreter and the language required. With such a system, it will be clear in advance that one or both parties needs an interpreter and the interpreter can be scheduled. Advance scheduling enables agency supervisors to pool resources and schedule interpreters accordingly.

Proposed Section Encouraging Dissemination of Public Information on Available Resources

The Commission strongly suggests adding sections encouraging administrative agencies to take appropriate steps to educate the public about what relevant services are available to them. In addition, sections should address the need to educate the administrative law bench about available resources related to the subject matter of the proceeding, such as, in the case of welfare and unemployment benefits, no- and low-cost counseling; and in other matters, parenting classes, support groups and classes for survivors of domestic violence and their children, and domestic violence shelters. Our experience demonstrates that community organizations such as legal aid agencies and other services can be of great assistance in identifying such resources and preparing or reviewing materials for use in providing such information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ronald B. Robie". The signature is fluid and cursive, with the first name "Ronald" and last name "Robie" clearly distinguishable.

Hon. Ronald B. Robie, Associate Justice, 3rd District,
California Court of Appeal
Chair, California Commission on Access to Justice