Agenda for Fall 2009 MSAPA Drafting Committee Meeting (October 16 to 18, 2009)

ARTICLE 1 and 4

1. Section 102(10) Evidentiary Hearing definition and Section 401 Legislative note: Should the differences between the definition of "evidentiary hearing" in 401 legislative note and the 102(10) definition be retained, or made consistent with each other?

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

3. Section 402 (c): Should this section be redrafted to clarify the separation of functions reference, as this term is not previously used? Is there a clearer way to state the substance of subsection (c)?

4. Section 402(d): Should a "reasonable doubt standard" apply to disqualifications or should an objective standard of a reasonable person apply?

5. Section 403(e): Should telephone hearings be allowed in all types of hearings across the board regardless of the complexity involved and magnitude of what is at stake for the parties? Should the compelling circumstances language be retained in subsection (e)?

6. Section 403(h): Based on the language, under what circumstances would the law prohibit a party being represented by a lawyer? Should lay representation be allowed?

7. 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?

8. 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.

9. Section 404(1): Should the current language of Section 404(1) be revised to clarify burden of proof as follows: "(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."

10. Section 404(2) and (3) Should hearsay evidence be allowed over a valid objection to admissibility in all cases? 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(5) Is the basis for allowance of written documentation in evidence inconsistent with the hearsay standards in (2) and (3)?

12. Section 404(7) Is this provision in conflict with state freedom of information laws with respect to material to be claimed confidential? Should the standard be higher such as privileged information under the law or protected by the law…ie: trade secrets?

13. Section 404(8) Should official Notice information be strictly limited to matter covered by Judicial Notice in the jurisdiction and should it be extended to scientific and technical matters within the specialized knowledge of the Agency? Should scientific and technical evidence require the usual expert witness where it is subject to cross-examination? Also, should official notice be limited to scientific or technical matters or should it include economic or other facts within specialized knowledge of the agency?

14. 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.)

15. Section 404(9) If the experience, technical competence and specialized knowledge of the presiding officer are used, must the parties be afforded the opportunity to be apprised of it and the opportunity to contest it? Can the claimed knowledge of the presiding officer which is not part of the hearing record prevail over the expert testimony presented by a party as part of the hearing record? Does such action by the presiding officer seriously impair impartiality?

16. Section 405(b) (c), 406 (c). 407(b) a determination should be made on the use of the words "action" and "proceeding" so that the words are consistently used. How can the use of those terms be made consistent?

17. Section 405(b), (c); Should these subsections be redrafted to combine subsections (b) and (c)?

18. 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~~]?

19. Section 408(d)(1)(A): Should the last clause (after the comma) of subsection (d)(1)(A)be deleted?

20. Section 408(d)(1)(b): should the staff advisor limitation be revised to require disclosure of ex parte communications, but not to disqualify the staff advisor form advisingthe agency head?

21. Section 408(g): It should be clarified whether a multi member body is the decision maker in that particular case.

22. Section 409: A petition for intervention for intervention is required to be timely. However a standard must be set to govern what constitutes timeliness.

23. Section 410: In addition to the authority granted to the presiding officer to issue subpoenas, authority is granted to "any other officer to whom the power is delegated". In most states, the power to issue subpoenas may not be delegated.

23. Section 411: Discovery
In (a)," person" should be "individual"
In (b), Parties must also have the continuing duty to furnish exculpatory material.
In (c), the word "undue" should be inserted in line 15 before the word "annoyance"

24. Section 411: Discovery: Are the discovery provisions too elaborate for administrative hearings?

25. Section 411: Should the law require that an agency must adopt a rule allowing discovery before the provisions of this section are applicable to that agency's hearings?

26. Section 412 Default
In (b), the time for petitioning to vacate the default order should start to run from the date that the defaulted party is notified of the default order.

27. Section 413 Questions raised about recommended, initial and provisional order should be resolved. Should the term initial order be used, or should some other term such as provisional or proposed order be used instead?

28. Section 413(d) provides that parties may submit proposed findings of fact and conclusions of law. However, Sec. 403(c) provides that it is up to the presiding officer whether parties may submit these. Are these two section inconsistent, and if so, what language would make the two sections more consistent?

29. Section 414 (c), the time for submitting a petition for review should start to run, when the party is notified of the initial order.

30. Section 414 (d), should it state that the agency head's decision must be based soley on evidence in the hearing record? In (d) again, with reference to "policy reasons" that can support a difference in the exercise of discretion by the agency head, must these be

pre-existing policies, how are they to be formulated, are they required to be in writing and are they to be available to the parties at the time of the hearing?

31. Section 416(a), time should run from the time the parties are notified.

32. Section 416(c) Should subsection (c) be redrafted?

ARTICLE 4A

1. Section 401A questions

A. Should some limitation be placed on these non- evidentiary hearing requirements so that a suspension from school and the denial of camping space by the park ranger are not on the same footing?

B. Should this section be deleted because of the difficulties with the informal hearing concept?

C. Should the informal adjudication provisions that were deleted from article 4 be added to article 4 to address the problems with limiting hearing rights in article 4A?

2. Section 402A questions or comments

A. In (b), the time for initiating action for judicial review should start to run when party is notified.

B. Also, should the licensing provisions that were deleted from Article 4 be added again to differentiate between licensing renewals in which the licensee has the right to a contested case hearing?

C. Assuming the Model Act is going to have an article on adjudications that are not contested cases, should we move § 203 (declaratory orders) into it? Arguably it would fit there better than in Article 2, which is mostly about public access to information.

D. Should subsection (a) be redrafted 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.

ARTICLE 5

1. Section 501(d)(1): Bracketed language in this paragraph would seem to mean that an agency action is reviewable even insofar as federal law prohibits review (an issue that might arise if the agency is administering a federal program). Even as an optional provision, that seems questionable.

2. Section 501(d)(2)

A. Should the agency discretion exception for judicial review be retained or deleted ?

B. In (d) (2), the committed to agency discretion should be non-reviewable ONLY if the agency has not abused its discretion.

3. Section 502(b):

A. As worded, the paragraph says that a defendant cannot get judicial review of a rule in an enforcement proceeding if he could have obtained it by appealing from it directly. This needs revision. Normally he should be able to choose either route, although in limited cases the direct review route should be exclusive (such as where a statute so requires).

B. I strongly oppose Section 502 (b) which allows collateral attacks on agency orders. It is contra to both existing law and tradition in my state.

C. In Section 502(b)(b), the judicial enforcement referred to should be "of an order of an agency".

4. Section 503(a):

A. Statute of limitations for procedural challenges; Is the two year time period too long?

B. The scope of the statute of limitations should be reexamined.

5. Section 503(a),(b) In (a) If the rule were adopted without compliance with the applicable notice procedures, the rule should be reviewable at any time except if the challenger had actual notice through other means whereupon the 2 year limitation should apply. In (b), if the mailing is not received by a party, that contingency should be addressed in the Act. Possibly, the mailing should be by certified mail, return receipt requested

6. Section 505(a)

A. Standing; should the zone of interest test be retained or revised?

B. The definition of aggrieved persons in subsection (a) is based on an ABA recommendation for land use and zoning proceedings (See comment to the section). Is this the proper definition, or should Section 505 use the subsection (b)(2) language

without providing a more specific definition? This section was also drafted to incorporate existing state law governing standing in states that adopt Section 505. Should this section include the federal zone of interests test, or should the term "aggrieved" be the primary test for standing? There is a substantial body of existing state law on standing , so that the simpler definition (B)(2) may fit better into the existing law.

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

8. Section 506(b) (I would require the petition for reconsideration as a prerequisite for seeking judicial review in the interest of conserving judicial resources by avoiding unnecessary appeals and giving the agency an opportunity to correct its own mistakes.)

9. Section 507: The language providing for the principle of closed-record review, and for exceptions to that principle, needs work. For example, it seems to say that a petitioner may request the court to consider evidence outside the record, but a respondent or intervener may not. Also, the exception for "new evidence or changed circumstances" seems broad enough that it could potentially swallow the general (closed-record) rule. More generally, the law in this area is complex and the committee has not yet worked through the many issues raised by the Ogden research memo on this topic.

10. Section 508(a)(3)(A): As currently drafted this paragraph seem to imply that an agency action on the ground that the agency misinterpreted the federal Constitution or a federal statute. Surely that implication is not intended.

11. Section 508(a)(3)(D): This provision requires that a finding of fact must be supported by "substantial evidence." Such a requirement becomes problematic or at least confusing when, as is common in rulemaking, the action rests on predictions about the future, or matters about which there is great scientific uncertainty, or other "legislative fact" premises that are inherently unprovable. This problem is well discussed in Citizens for Free Enterprise v. Department of Revenue, 649 P.2d 1054, 1061-65 (Colo.1982). Potential solutions would be (i) to limit the "substantial evidence" clause to contested cases, and then rely on the arbitrary-capricious clause (paragraph C)) to define the standard of review for fact findings in other cases; or (ii) simply to live with the awkward wording and rely on the comments to explain that the meaning of "substantial evidence" depends on context. (Federal law generally relies on the former solution; but when a rulemaking statute specifically provides for substantial evidence review, it usually adopts the latter solution via judicial interpretation.)

12. Section 508(a) (3)(E) Reword as follows: (E) to such extent, if any, as the facts are subject to trial de novo by the reviewing court, the action was unwarranted by the facts.

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.

2. Section 604(2): The provision says that the chief ALJ "shall randomly assign administrative law judges in any case referred to the office, taking into account administrative law judge expertise." It is unclear how the assignment can be random and still take account of a qualifying factor.

3. Section 604(2): There is an internal conflict between random assignment of judges and assignment on the basis of their expertise. In redrafting, I would allow assignment on the basis of expertise when required by the complexity of a particular case or type of case. In the states where the central panels have field offices, I would also allow assignments on the basis of the geographical proximity of ALJ staff to the location where the controversy arose and most witnesses reside.

4. 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."

5. Section 605(b) Reword as follows: (b) [~~Subject to Section 402 (g) an~~] An agency may not reject a particular administrative law judge <u>but when appropriate may request that a judge be recused pursuant to the procedures in Section 402 (d)-(g).</u>

6. Entire Article 6 the drafting committee has not discussed in detail the provisions of Article 6 after they were extensively revised following the November 2008 drafting committee meeting, and the January 2009 style committee meeting.