Memo to MSAPA drafting committee
From Professor Greg Ogden, Reporter
April 1, 2008

Revised list of provisions that may require discussion by the drafting committee, or may require drafting of new language for the drafting committee. (4.1.2008)

Article 2. Public Access to Agency Law and Policy

1. **Section 201(k),(l), (m) [electronic distribution]:** Are these provisions duplicative in providing for electronic distribution, internet posting, and regular mail distribution of rulemaking materials to members of the public? Will agencies have to maintain mailing lists, either written or electronic?

Alternate language:

Section 201(k):) An agency shall make its rules, guidance documents, and orders in contested cases available through electronic distribution unless exempt from disclosure under law other than this act. An agency may make these materials available through regular mail for which the agency may charge a reasonable fee.

2. **Section 202 (6) [agency maintenance of index and compilation of adopted rules]** Is it necessary for small agencies to have to comply with these provisions which may be burdensome for them when the official state publisher has that same responsibility? Can small agencies satisfy this requirement by keeping a copy of the agency regulations on the shelf at the agency office which is purchased from the state publisher? Do the provisions of section 202(6) [agency maintenance of rules compilation and index] duplicate the provisions of section 201(h) [publisher compilation of rules and index], or create the possibility of conflict if there are two official compilations of an agency rules, and there are discrepancies between the two compilations? Also, does the agency version control, or the publisher version? Is it advisable to bracket that language?

Alternate approach:

Section 202(6): Recommend bracketing this subsection because it substantially duplicates the requirements of Section 201(h) and in many states with small agencies, the publisher performs these responsibilities for the administrative bulletin and the administrative code already so that the primary agency role is to file information with the publisher. In some states, agencies do not separately maintain an index and compilation of their own regulations; rather they provide that information to the publisher who then publishes a compilation and index.

[check with Ken and John about this approach]

3. **Section 203(d):** Judicial review of agency decision to decline to issue a declaratory order. There are two alternatives currently. Alternative A (agency decision is not subject to judicial review), and Alternative B (agency decision is subject to judicial review for abuse of discretion)

Recommendation: Choose Alternative B as it is consistent with the existing statement of reasons requirement for declining to issue a declaratory order and it provides for a limited scope of judicial review (abuse of discretion).

Article 3. Rulemaking; Adoption and Effectiveness of Rules

1. Section 301(d): Written and electronic docket. There are two alternatives currently. Alternative A (agency must furnish a written docket), and Alternative B (upon request, agency shall provide a written docket).

Recommendation: Choose alternative B as it is consistent with the widespread adoption and use of electronic technology to provide information to the public. Also, authorize the agency to charge a reasonable fee for providing a written docket.

1. **Section 303 [negotiated rulemaking]:** Does this section do nothing more than authorize agencies to do things that they already have the power to do under their organic statutes?

Recommendation: Retain Section 303 because agency organic statutes rarely address agency procedures to be used in rulemaking and without this authority an agency may conclude that it does not have statutory authority to engage in negotiated rulemaking.

2. **Section 308 [variance between proposed rule and adopted rule]:** Should this section specifically provide that if an adopted rule varies substantially from the proposed rule, and the logical outgrowth test is not met, that the agency is required to reopen the comment period, and permit additional comments that address the new terms of the rule before the rule can be adopted? The benefit of this may be to avoid litigation, and related costs. Should we also specify a separate publication requirement after the reopened comment period, or a requirement that you only have to publish again the portions of the rule that substantially deviate from the proposed rule?

Recommendation: Add subsection (4) to Section 308, to specify that The agency may reopen the comment period to cure a variance violation or the agency may withdraw the rule, or terminate the rulemaking proceeding and commence a new rulemaking proceeding to cure the variance problem.

(4) An agency may reopen the comment period under Section 306(a) before adopting a rule that substantially differs from the proposed rule.

3. **Section 309 (a) [emergency rulemaking]:** Is it sufficient notice to publish the rule without requiring additional personal notice, or should notice be limited to persons who have requested notice? Should the "shall" personally notify requirement be changed to "may" personally notify?

Recommendation: modify last sentence to state that the agency "shall personally notify persons that may be affected by the adoption, amendment, or repeal who have requested notice." Delete the "known to the agency" language.

4. **Section 309(b) [expedited rulemaking]:** Should the "subject to section 304" language be changed to carve out the requirements of Section 304 (when persons can present comments on the proposed rule) that do not apply to expedited rulemaking?

Recommendation: modify the second sentence to read "subject to Sections 202(5) and 304(b)" or delete the subject to sections 202 and 304 entirely in that sentence.

5. **Section 310(c) [guidance documents binding on agency]: (now part of (a))** Should subsection (c) be deleted because it will create problems for agencies? Or should this subsection be modified to provide a reasonable reliance standard instead? What about situations in which the agency guidance document is incorrect on the law, or in a three party situation, one of whom wants to be able to rely on a guidance document? Should this subsection be changed to provide that agency can not bind interested members of the public or non agency parties to an agency proceeding, by using guidance documents?

6. **Section 310(d) [no deference to guidance documents] (now part of (b)):** Is this subsection needed? If guidance documents are not law, but rather are the agency's opinion of the law, why does the court have to consider the guidance document? Can it just look at the applicable law, whether statutory or in an adopted regulation to decide the issue before the court? Should this subsection be deleted on separation of powers grounds, and let the existing judicial review case law in each state provide the applicable standards for reviewing guidance documents?

7. **Section 310(f) [indexing of guidance documents (now part of (d)]:** What purpose is served by the last sentence of subsection (d)? Is this designed to provide incentives for agencies to index their guidance documents? Is this needed? Should this subsection be changed to give the agencies the authority to adopt regulations governing fee provisions?

8. **Section 310 [guidance documents generally]:** Should this section be changed to merely require publication of the guidance documents and making them available to the public without addressing the other issues?

Recommendation: Substitute Ron Levin's alternative draft of section 310, which addresses most of the issues raised in the transcript comments herein.

Levin draft section 310 set forth here:

SECTION 310. GUIDANCE DOCUMENTS.

(a) An agency may issue a guidance document without following the procedures set forth in Sections 304 through 308. Guidance documents do not have the force of law and do not constitute an exercise of an agency's delegated authority, if any, to establish the rights or duties of any person.

(b) An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding must afford that person a fair opportunity to contest the legality or wisdom of positions taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.

(c) A guidance document may contain binding instructions to agency staff members, provided that the agency's procedures also afford to affected persons, in compliance with subsection (b), an adequate opportunity to contest positions taken in the document at an appropriate stage in the administrative process.

(d) When an agency proposes to act at variance with a position expressed in a guidance document, it shall provide a reasonable explanation for the departure.

(e) Each agency shall publish all currently operative guidance documents and may file the guidance document with the [publisher].

(f) Each agency shall maintain an index of all of its currently operative guidance documents, file the index with the [publisher] on or before January 1 of each year, make the index readily available for public inspection, and make available for public inspection the full text of all guidance documents to the extent inspection is permitted by law. Upon request, an agency shall make copies of guidance indexes or guidance documents available without charge; at cost; or, where authorized by law, on payment of a reasonable fee. If any agency does not index a guidance document, the agency may not rely on that guidance document or cite it as precedent against any party to a proceeding, unless that party has actual and timely notice of the guidance document.

(g) Any person may petition under section 317 to request an agency (1) to adopt a rule in place of an existing guidance document or (2) to revise or repeal an existing guidance document, or (3) both.

[ARTICLE] 4 ADJUDICATION IN A CONTESTED CASE

1. **Section 403[contested case procedures]:** Should this section contain a provision that gives the presiding officer discretion to refer the parties to mediation?

Recommendation: add the following sentence to Section 403(e). "The presiding officer may, with the consent of all parties, refer the parties in a contested case proceeding to mediation or other dispute resolution procedure authorized by law other than this act."

2. **Section 403(d)(1),(2):** Should these subsection contain specific language that an aggrieved party whose evidence has been excluded has the right to make an offer of proof in the record, including having documents marked for the record, and the right to present an oral summary of the testimony from a witness whose testimony is being excluded? Should the subsections provide for motions in limine, or a pretrial conference at which evidentiary issues can be decided before the contested case hearing commences? Should subsection (d) (1) use must or may with evidence exclusion? Is "may" the better term for exclusion on grounds of relevance, materiality, or repetitious evidence, and "must" the better term for exclusion on constitutional, statutory, or privilege grounds? Should subsection (d) (1) adopt the legal residuum rule, or the federal reliability of evidence standard?

First Recommendation: add the following sentence to subsection (d)(2): "A party may make an offer of proof when evidence is objected to, or prior to the presiding officer's decision to exclude evidence."

Second Recommendation: Some states have pretrial conference procedures for contested case hearings. These conferences can add preparation of contested case proceedings for the hearing on the merits. A simple provision recognizing a pretrial conference option would read: "At the request of a party or by order of the presiding officer, the presiding officer may conduct a prehearing conference." I recommend adding this specific language to section 403(e).

[Hearsay Evidence] On the other issues raised in these comments, the bracketed terms as to hearsay reflect differences in state law. As to the persuasiveness of hearsay evidence to support fact findings, there is a split in state law. Some states follow the legal residuum rule, but other states follow the reliability of evidence standard.

[may or must exclude evidence] On the may or must questions, may is properly reserved for those circumstances in which the presiding officer has discretion to admit or exclude evidence, whereas must can be applied in situations in which there is no discretion, such as based on evidentiary privileges. If that is the right distinction, we should use may for evidence that is not material not relevant or unduly repetitious, and use must with the remaining categories, such as constitutional, statutory or evidentiary privilege grounds.

3. **Section 409(b)[ex parte communications]:** Should subsection (b) include within the exception, staff communications on substantive matters if the staff are paralegals, colleagues (other ALJ's working for the central panel) for purposes of pre-decisional peer review, and interaction, and the ALJ who presided and rendered the recommended decision, when the agency head is the final decision maker, and that decision maker has questions in the time period between the recommended decision, and the final decision of the agency? Should the term law clerk be used for the subsection (b) exception, or is that too general a term? Should this exception be limited to personal staff of the presiding officer instead of a law clerk?

Recommendation: substitute the term "personal staff" for the term "law clerk "since most presiding officers in state agencies do not have law clerks.

Alternate Recommendation: substitute the phrase "a lawyer whose duty is to advise the presiding officer on the law'" for the term "law clerk"

4. **Section 413 [discovery]:** Should this section include provisions on discovery of electronic records? Should subsection (b) (2) (C) include language requiring supplementation of witness lists?

Recommendation: add the following language to subsection (b)

(3) Parties to contested case proceedings have a duty to supplement responses provided under subsection (b) to include information thereafter acquired to the extent that information will be relied upon in the contested case hearing.

5. **Section 417(b) [orders: final and recommended]:** Should subsection (b) include other alternatives to the subsection (b) recommended decision becoming the final decision of the agency unless reviewed by the agency within 30 days provision? Some state agencies may be required by constitutional or statutory provisions to make the final decision, and they may not be able to delegate that authority to a presiding officer as provided in subsection (b). One alternative is to bracket that language, another is to add language such as "unless otherwise provided by law other than this act" and another is to provide several options for administrative law judge presiding officer decisions, including final decisional authority when that is authorized by an agency's governing statute. Should the proposed decision term be added to Section 417, in recognition of the use of that term in many states rather then the term recommended decision? Could we bracket both recommended and proposed? Should this section include a provision giving

the parties time to react to a proposed or recommended decision before the decision becomes final?

Recommendation: Revise Section 417(b) to read as follows:

(b) If the presiding officer is not the agency head, the presiding officer shall render a recommended decision [proposed decision], when the presiding officer has not been delegated final decisional authority. When the presiding officer has been delegated final decisional authority, the presiding officer shall render a decision which shall become a final order in [30] days, unless reviewed by the agency head on its own motion or on petition of a party.

6. **Section 417(d)** Should this section, or other sections, include a requirement that every administrative decision should include a notice on the decision itself specifying how much time the parties have to appeal the decision of the agency?

Recommendation: add the following language to the third sentence of subsection (d):

", and a statement of the time limits for seeking judicial review of the agency order.

6. **Section 421 [availability of orders: index]:** Should subsection (d) offer an alternative to redaction, such as preparing a public version of a precedent decision using generic language, such as taxpayer A, so that the public has access to a broader range of agency decisions?

Recommendation: revise subsection (d) to allow a bracketed generic version alternative to redaction. The revised subsection would read:

(d) If, in the judgment of the presiding officer, it is possible to redact [or to prepare a generic version of] a final order or decision that is exempt,

privileged or otherwise made confidential or protected from disclosure by law so that it complies with the requirements of law, the redacted [or the generic version of the] document may be indexed and published.

[ARTICLE] 5 JUDICIAL REVIEW

2. **Section 509(a)(3) [scope of review]:** Should the committee retain the two alternatives, or should it select one or the other alternatives as the committee's recommendation?

Recommendation: Choose Alternative 1, the shorter and more generic statement of scope of review rather than Alternative 2, a more lengthy and detailed statement of scope of review. Alternative 1 may enhance enactability in that most states have well established existing standards of judicial review, and alternative 1 would fit better with that existing body of law.

[ARTICLE] 6 OFFICE OF ADMINISTRATIVE HEARINGS

1. **Section 601 [Creation of Office of Administrative Hearings]:** Should subsection (d) be deleted or revised to indicate that the purpose of the subsection is to give decisional independence to administrative law judges, or to provide a transitional provision? The purpose of the subsection may be unclear.

Recommendation: Change the language of subsection (d) to read "the administrative law judges to which this [article] applies are employees of this office."

2. **Section 604 [powers and duties of chief ALJ]:** Should subsection (2) include or delete the word "randomly"? Random assignment of ALJ's is difficult in small agencies because of the need to balance expertise and existing case loads of ALJ's in making assignment of new matters.

Recommendation: Delete "randomly" in Section 604(2)