DRAFTING COMMITTEE AGENDA
FOR APRIL 20, 2009 TELEPHONE CONFERENCE CALL

We will review the rest of Article 4 seriatim, section by section, and relevant definitions, and we will continue in the same fashion through Articles 4A, 5 and 6, all of which are to be read at the session with the Committee of the Whole at the Annual Meeting.

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1. SECTION 411(c) DISCOVERY: what is deliberative process privilege?

[Style Committee question]

Reporter comment: This term is used in freedom of information act [FOIA] litigation to refer to documents covered by exemption 5 [5 U.S.C. Section 552(b)(5)] including "inter-agency or intra -agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Another term for this would be executive privilege.

2. SECTION 413(e) Orders, Final, Recommended, Initial Agency deference to ALJ fact findings based on demeanor evidence.

When we reach Article VI in our discussions, the drafting committee needs to take a strong position on the respect the agency should give ALJ fact determinations based on witness demeanor. Most academics and many appellate courts which have written on this issue find the better view to be that an agency should give the benefit-of-the-doubt to any ALJ fact determinations based on witness demeanor.

Most academics who have written on this issue support the proposition that an agency should give the benefit-of-the-doubt to the ALJ's fact determinations based on witness demeanor. The law in most central panel jurisdictions (and in most other jurisdictions) is that deference is due to the ALJ demeanor fact determinations. I would hope the NCCUSL drafting committee would recognize that in the language of the final draft of the MSAPA.

[Comments from ABA Advisor Larry Craddock]

3. Section 414, Agency Review of Initial Order, Section 415, Agency Review of Recommended Order : As a matter of policy, I'd recommend limiting the role of agency heads in reviewing rulings of presiding officers to circumstances in which as a matter of law or regulation such review is authorized. In most circumstances agency heads don't actually review orders, but delegate the responsibility to unidentified agency officials who get to second-guess the decision of the hearing officer without exposure to the witnesses and only a limited review of the evidence. This is simply bad practice and undermines the rule of law. In addition, because of the role of agency heads in the overall management of agencies, their ability to act as fair and impartial adjudicators is often suspect. In the alternative, at a minimum I'd recommend revising § 415(a) to clarify that review of proposed orders by agency heads is optional rather than mandatory, but when such review occurs, it must be conducted in the manner prescribed by § 415. The current language stating that, "An agency head shall review a recommended order pursuant to this section" seems to imply that review of proposed orders is mandatory.

[Comments from Commissioner Pepe]

4. Section 418(b) Availability of Orders; Index; do we need subsection (b), because it restates requirements of the public records act in most states?

[Style committee Question]

Reporter Recommendation: this subsection should be retained because it addresses the requirements for indexing of decisions which is not provided for by public records acts of states that address only disclosure of document or records, and exemptions from disclosure.

ARTICLE 4A

1. Section 401A Adjudication Other Than Contested Case : Important adjudications often occur in circumstances in which aggrieved persons are not afforded an opportunity for hearings pursuant to contested case procedures. Significant examples include various types of insurance and health benefit plan filings; notices of adjustments being made in the rates charged for taxes, fees, or rate or price limitations; approvals of corporate and similar documents being officially filed with state agencies; and other circumstances in states for a variety of reasons determine that notice and comment procedures are sufficient to protect procedural due process rights. In addition to providing parties to such proceedings notice, a statement of reasons for the agency action, and an opportunity to respond

to proposed agency actions before an impartial decision maker, we should identify other provisions of Article 4 that may be applicable. For example, it appears to me that § 402 (relating to presiding officers); portions of § 403 providing for public access to proceedings and the right to be represented by an attorney; § 404 (relating to evidence); portions of § 405 regarding the minimum requirements for notice; and § 408 (relating to *ex parte* communications) should apply to these "informal" adjudications.

[Comments from Commissioner Pepe]

ARTICLE FIVE

1**. Section 501 Right to Judicial Review; Final Agency Action Reviewable;** Is there another way to restate the agency discretion exception in subsection (d) (2)?

[Style Committee question]

Reporter comment: This language is based on the Federal APA, Section 701(a) (2). There are no comparable provisions in the 1961 MSAPA or in the 1981 MSAPA.

2. Section 501(a) Right to Judicial Review; Final Agency Action Reviewable;: Final agency action should include actions both which confer a benefit and which deny a benefit to a person. In addition, the last sentence stating that, "Final agency action includes a final order in a contested case and a final rule" may be problematic because following *ejusdem generis* statutory construction principles it may be deemed to exclude dissimilar types of actions, such as so-called informal adjudications subject to § 401A.

[Comments from Commissioner Pepe]

3. Section 501(d)(2) Right to Judicial Review; Final Agency Action Reviewable;: While I appreciate that the statement that final agency action is reviewable except to the extent that "agency action is committed to agency discretion" is derived from 5 USC § 701(a)(2), it nonetheless makes very little sense and should be deleted. To the extent a matters are not committed to agency discretion by law, agencies cannot issue rules and orders. I'm concerned that the language can be used as a catch-all justification for denying the reviewability of orders in a broad variety of circumstances.

[Comments from Commissioner Pepe]

4. Section 501 Right to Judicial Review; Final Agency Action Reviewable; Do we need to include subsection (e), which is based upon the last sentence of Section 703 of the federal APA?

[Style Committee question]

Reporter comment: This language is based on the Federal APA, Section 703. There is no comparable provision in the 1961 MSAPA. Sections 5-201 to 5-205 of the 1981 MSAPA address the same subject as subsection (e) in much greater detail.

5. **Section 502 Relation to Other Judicial Review Law and Rules**: do we need to refer to both the rules of civil procedure, and the rules of appellate procedure?

[Style Committee question]

Reporter recommendation: No, we can pick one of the two, or bracket the two types of modifiers. In federal practice, there are separate rules for trial procedure [the FRCP] and appellate procedure [FRAP] but that may not be true for administrative law related judicial review in the states

6. SECTION 502(b) Relation to Other Judicial Review Law and Rules: This section should be revised to state that, "Except when prior and adequate judicial review is made exclusively available under this [article] or under law other than this [act], final agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." The comment states that the subsection is based on 5 USC § 703, but the language differs significantly from the last sentence of § 703 which states that, "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." By deleting the qualifying language contained in 5 USC § 703, the subsection may much more severely limit the reviewability of agency actions in enforcement proceedings than is provided by the APA.

[Comments from Commissioner Pepe]

7. Section 503(a): Time for Seeking Judicial Review of Agency Action; Limitations : This subsection requires the commencement of procedural challenges to agency rules to two years after the effective date of rules. An exception should be provided in circumstances in which procedural defects render agency action *void ab initio,* such as when the failure to provide notice of the

adoption of rules deprives the public of actual or constructive notice of the adoption of the rules and thereby making prior judicial review impossible.

[Comments from Commissioner Pepe]

8. Section 503(b): Time for Seeking Judicial Review of Agency Action; Limitations: This subsection requires the commencement of challenges to final agency actions other than rules to 30 days after the date of the mailing of notice to parties to an order. I'd recommend a broader rule that allows actions to be initiated within 30 days after notice of agency action or as otherwise provided by law. A more liberal rule of this type will address situations in which (1) mail notice is misdirected or not received; (2) informal adjudications occur in which aggrieved persons may not be permitted to participate; (3) agency action is deemed final as a matter of law, but notice is not mailed to parties (as occurs with deemed approvals); and (4) other circumstances in which appeals *nunc pro tunc* are appropriate.

[Comments from Commissioner Pepe]

9. SECTION 506(2) Standing Should the definition for the term "aggrieved" from Section 101 of the ABA Model Land use code be added to the language of Section 506?

[Language provided by Ron Levin]

Reporter Recommendation: Yes, the definition of aggrieved clarifies the meaning of an important term in section 506. The ABA definition is recently adopted, and is consistent with standing law used in federal administrative law.

10. SECTION 507 AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTION

[Comments from Commissioner Pepe]

§ 507: I'd recommend retaining the language of the 1961 and 1981 Acts that provides exceptions to closed record review. The research memo suggests that the provisions of the 1961 and 1981 Acts are closer to prevailing state practices than closed record review as provided by the federal APA. In addition, closed record review makes no sense whatsoever as applied to persons aggrieved by § 401A adjudications who either lacked the ability to participate at all in the proceedings,

or who were provided only a limited opportunity to present evidence to the decision maker. Furthermore, as applied to rulemaking proceedings, because § 302(a)(3) requires the record only to include "factual material, studies, and reports relied on or consulted by agency personnel in formulating the proposed or final rule," closed record review allows agencies to choose to be willfully blind to information contrary to their proposed course of action.

11. **SECTION 508(a)(3)(A) SCOPE OF REVIEW;** acted in excess of the agency authority under the law language. Should we retain that language?

[Style committee question]

Reporter recommendation: This language should be retained. This is a standard ground for review of administrative agency action, that the agency exceeded its statutory authority.

REVIEW OF ARTICLE SIX