MSAPA drafting committee agenda for February 12 to 14, 2010 meeting

ARTICLE ONE

1. **Section 102 (1)** Definition of Adjudication (Felter document)

Proposed revised definition:

(1) "Adjudication" means ~~the process~~ *a type of proceeding* for determining facts and/or applying law pursuant to which an agency formulates and issues an order *and includes a contested case conducted by an agency ~~or~~, administrative law judge, administrative judge, hearing officer, or hearings examiner.*[1] ~~which an agency formulates and issues an order~~.

Reporter Recommendation: no change recommended. The purpose of the definition of adjudication in the current version of the act is to differentiate between adjudication and rulemaking. Not all adjudications are contested cases, so we need both the current definition here and the definition of contested case in Section 102(7). For this reason, we should not add the " includes a contested case" language in this definition. Also, "the type of proceeding" language as opposed to "the process" seems to be merely a matter of style, so I will defer to our style representative on that matter. The "conducted by an agency etc" language duplicates the provisions of Section 402(a), and is not needed here. The ALJ, AJ, HO or HE suggestions may be good ones, as this reflects the variety of titles given to administrative adjudicators. However, we currently have a definition of presiding officer, Section 102(25), that is needed for purposes of article 4. It makes no sense to spell out the various titles as proposed here, unless we change or drop the presiding officer definition, which I would not support.

2. **Section 102** proposed definition of Administrative Law Judge (Felter document)

( ) *"Administrative Law Judge," "Administrative Judge," Hearing Officer," and "Hearings Examiner" means ~~a~~ an ~~a~~ decisionally independent individual appointed under Section*

[1] There are several designations for administrative law adjudicators. The MSAPA should reflect these.

____ and includes the chief ~~administrative law~~ judge, chief hearing officer or chief hearings examiner appointed under Section ____.

Reporter recommendation: A definition of administrative law judge is a good idea because the term is used in both Articles 4 (Section 402(a)) and Article 6. Since administrative law judges work for both central panels and other agencies with adjudicative responsibilities, we will need to add a phrase to section 402(a) to include non central panel ALJ's. We do not need to include the "decisionnally independent" language because that topic is covered already in Articles 4 and 6. If we want to include a definition in Article One, it could read as follows:

Proposed Definition language

Section 102 (2) "Administrative Law Judge" means an agency employee who is appointed under Section 402(a), or under Section 603(a) and Section 604(2), and includes the term "Administrative Judge", "Hearing Officer", and "Hearing Examiner" as well as the Chief Administrative Law Judge appointed under Section 602(a).

Proposed language to add to Section 402(a)

Section 402(a): A presiding officer must be the individual who is the agency head, a member of a multi-member body of individuals that is the agency head, an administrative law judge or other individual designated by the agency head, unless prohibited by law other than this [act], or an administrative law judge assigned in accordance with Section 602. (*added language is underlined*)

3. **Section 102(7)** Contested case definition proposed changes (Mann and Felter)

(7~~6~~) "Contested case" means an adjudication in which ~~*an opportunity for*~~ an evidentiary hearing is required by ~~*federal constitution or a federal statute or the constitution or a state of this state*~~ *law before an agency may issue an order*.

Reporter Recommendation: no change recommended. The law (due process of law) requires an opportunity for an evidentiary hearing so the first proposed deletion is not consistent with existing law. Hearings are only provided when persons who are affected and have a right to a hearing request a hearing. The second deletion is a bad idea because the definition of law is much broader, and the language chosen was done so carefully with lots of discussion by the committee and by commissioners at several annual meetings.

3A. **Section 102(7)** Contested Case (Beal proposal)

Beal commentary: I would add to the definition of contested case (102(6)) *"or rule"* If an agency wants to provide a contested case even if the person or entity is otherwise not entitled to one, it should be clear that they can do so. You could even go another step by saying *"by agency rule or order."* Some agencies here in Texas do it on a case by case basis.

Reporter Recommendation: no change recommended. The primary purpose of this definition is to establish the source of law for hearing rights, and adding by rule would muddy the waters.

4. **Section 102 (12)** Final order definition proposed changes (Mann and Felter)

(12~~1~~) "Final Order" means the order issued by ~~*the agency head sitting as*~~ *a* presiding officer *with final decisional authority* in a contested case.

Reporter recommendation: No change recommended. While this proposed definition may appear to be simpler, it would be inconsistent with Sections 413, 414, and 415 that differentiate between the agency head and other presiding officers with decisional responsibility.

5. **Section 102 (13)** Guidance document definition proposed changes (Mann and Felter)

(13~~2~~) "Guidance document" or "interpretative rule"[2] means a ~~record~~ rule of general applicability developed by an agency that lacks the force of law but states the agency's current approach to, or interpretation of, law, or general statements of policy that describes how and when the agency will exercise discretionary functions. The term does not include records described in subsections (27)(A),(B), (C), and (D).

2 "Guidance document" is primarily used at the federal level. "Interpretative Rule," *i.e.,* a rule that does not have the force of law is more widely recognized at the state level.

Reporter recommendation: No change recommended. We can include the information in a comment about the state term for guidance documents. We also should NOT change the term record (carefully chosen) for the word rule, as the term record was carefully chosen to refer to written or electronic documents, and using the term rule would add unnecessary ambiguity in this definition.

6. **Section 102(16)** Initial order definition proposed changes (Mann and Felter)

(16~~4~~) "Initial ~~Order~~Decision" means an order that is issued by a presiding officer ~~*with final decisional authority*~~ *in a contested case* if the order is subject to discretionary review by the agency ~~subject to further agency review and is issued by a presiding officer with final decision authority.~~

Reporter Recommendation: No change recommended. Replacing the term order with the term decision (when the two terms are synonyms) adds nothing substantively, and is unneeded because the definition of the term "order" in Section 102(22) includes the term decision. The term order was carefully chosen, in part, to differentiate agency adjudication from rulemaking and its use is consistent with 1981 MSAPA Section 1-102(5). If the committee wants to consider this comment, and act on it, the committee could recommend using the term final order or decision from 1961 MSAPA Section 12, but that is not necessary.

7. **Section 102(18)** Law definition proposed changes (Mann and Felter)

(18~~6~~) "Law" means the federal or state constitution, a federal or state statute, a federal or state judicial decision, *an order of a court* , an executive order that rests on statutory or constitutional authorization, or a rule ~~or order~~ of an agency.

Reporter Recommendation: No change recommended. The term order of a court, which they propose to add, duplicates the term judicial decision, which is already in the definition. The term judicial decision would include not only reported appellate decisions, but also court orders reversing agency decisions or orders granting writs of administrative mandamus. This could be explained in the comment. The deletion of the term order of an agency is not a good idea because many agencies have the authority to issue and follow precedential decisions. These would be considered agency orders that have precedential value like court decisions.

8. **Section 102(22)** Order definition proposed changes (Mann and Felter)

(22~~20~~) "Order" or "Decision" means an agency decision that determines or declares the rights, duties, privileges, immunities, or other interests of a specific person and *includes an initial decision and final order*.

Reporter Recommendation: No change recommended. Adding the term "or decision" adds nothing as the term is already part of the definition. The "includes an initial decision and final order" language is unnecessary because those terms are defined separately, and they are the subject of extensive provisions in Section 413, 414, and 415.

9. **Section 102** would be (24) "Person Aggrieved" proposed new definition (Mann and Felter)

(24) *"Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in their person, property or employment by an administrative decision.*

Reporter Recommendation: No change recommended. This term is used only in Article five, so any definition should be located there not in the article one definitions. Furthermore, The committee spent a lot of time at a drafting committee meeting discussing whether there should be a specific definition of aggrieved or adversely affected persons in Section 505. The committee decided to drop any definition other than the general language "person aggrieved or adversely affected" language in Section 505(a)(2). If the committee wanted to revisit this issue, the definition stated in the Mann and Felter proposal could be included in Section 505.

10. **Section 102(25)** Presiding officer definition proposed changes (Mann and Felter)

"Presiding officer" means an individual who presides over the evidentiary hearing in a contested case *conducted by the agency head, individuals other than the agency head, administrative law judge, administrative judge, hearing officer, hearings examiner or an administrative law judge assigned in accordance with Article 4A.*

Reporter recommendation: no change recommended. The proposed definition incorporates most of Section 402(a), and includes other terms for agency official than an administrative law judge. A better way to address the issue raised here is to follow the recommendations made by the reporter in agenda item number 2. That

would add a definition of administrative law judge to Section 102, and to add some language to Section 402(a). The Mann proposal would also delete Section 402(a), and leave the critical language in the definition. The Felter proposal would retain both. The conference style here would indicate that the definition sections be just that, definitions, and that substantive provisions should be in sections addressing the substance of the issue. Here, that would mean reading Section 402(a) in light of the definition of presiding officer in Section 102(25). The appointment power should be retained in Section 402(a), and not duplicated here.

11. **Section 102(28)** Recommended order definition proposed changes (Mann and Felter)

~~"Recommended order" means an order by a presiding officer other than the agency head when that presiding officer does not have final decisional authority and the order is subject to review to by the agency head~~.

Reporter recommendation: no change recommended. The proposal here is to delete the definition of recommended order. Later on, they propose eliminating the recommended order language in section 413, and 415, and replacing that with initial and final orders. In my understanding, no states currently have delegated all of the final decisional authority to ALJ's either in specific agencies, or in central panels. Most states have a mixture of decisional authority regimes, with in some cases the ALJ is delegated final decision authority, and in other cases, only recommended [or proposed] decisional authority. A good example of the latter in my home state of California is the Medical Board of California. ALJ's from our central panel hear the cases of doctor discipline and render a proposed decision, which is then submitted to the medical board itself for a final decision. I do not support this recommendation in light of current state practice.

12. **Section 102** Substantial Evidence proposed new definition (Mann and Felter)

"Substantial evidence" means relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Reporter Recommendation: No change recommended. The definition of substantial evidence offered here belongs in article 5, if at all, since it is a term used exclusively in Article 5. The committee has spent a lot of time discussing how

detailed Section 508 should be, and concluded that section 508 should be bare bones given the existing status of judicial review law in most states. The proposed definition is consistent with the substantial evidence test currently applied in many states, except that it leaves out the whole record requirement language.

ARTICLE FOUR

1. **Section 401** (Ron Levin ABA Advisor proposal with which the reporter agrees) [underlined language added]

This [article] applies to an adjudication made by an agency in a contested case. An adjudication that is not made in a contested case is not subject to this Article but is subject to other provisions of this Act where they apply.

Reporter recommendation: adopt this suggested change. Sections that would apply to non contested case adjudications would include Section s 310(d)(,(f), and Article five.

2. **Section 402(a)** Proposed changes (Mann and Felter)

[Mann proposes eliminating Section 402(a); Felter makes revisions which are underlined below]

(a) A presiding officer must be the individual who is the agency head, a member of a multi-member body of individuals that is the agency head, an individual designated by the agency head, unless prohibited by law other than this [act], or an administrative law judge, administrative judge, hearing officer or hearings examiner assigned in accordance with ~~*Section*~~ -- Article 4A.

Reporter recommendation: adding a definition of administrative law judge to section 102[see agenda item 2], would eliminate the need to spell out the other titles for administrative adjudicators in Section 402(a). The Felter and Mann proposals also renumber Article 6 as Article 4A, and new Article 4A [as proposed] duplicates many of the provisions currently in Article four. The committee will have to decide whether or not to renumber article 6 as article 4, and whether or not it is worthwhile to provide parallel provisions [with some differences] for central

panels, rather than the current approach which is to include all adjudication procedures in Article 4, and then have a much shorter Article 6 [or 4A].

3. **Section 402(e) and (f)** Disqualification of presiding officer (Mann and Felter proposal)

(e) Any party may petition for the disqualification of a presiding officer promptly after notice that the person will preside or, if later, promptly upon discovering facts establishing a ground for disqualification. The petition must state with particularity the ground upon which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of practice or ethics that requires disqualification. The petition shall be supported by an affidavit of the movant or the petition may be verified, setting forth basic or evidentiary facts as to why a fair and impartial hearing cannot be accorded. The presiding officer shall accept the basic facts alleged in the affidavit as true on their face.[3] The petition may be denied if the party fails to exercise due diligence in requesting disqualification after discovering a ground for disqualification. [underlined language added by Judge Felter].

(f) A presiding officer whose disqualification is requested shall determine whether to grant the petition and state facts and reasons for the determination in a record and in writing. A presiding officer's decision to deny disqualification ~~is not~~ shall be subject to interlocutory judicial review. [underlined language proposed by both Mann and Felter].

Reporter Recommendation: The added language in Section 402(e) provides specific guidance as to how to properly present a disqualification motion or petition. While this is typically a civil procedure rule matter, this suggested change is a good one, and I recommend that we adopt Judge Felter's added language. The

[3] *See Colorado Rules of Civil Procedure, Rule 97; also see Wright v. District Court,* 731 P.2d 661 (Colo. 1987) [a requirement that the allegations in an affidavit in support of disqualification must be accepted as facially true creates a more objective standard for a reviewing tribunal and prevents the party sought to be disqualified from engaging in a swearing match with the affiant.

language spells out exactly how to properly prepare a disqualification motion, and that is useful to practicing lawyers. The added language in section 402(f) however, is another matter. Adding "in writing" is unnecessary because the definition of the term record includes written documents. The shall be subject to interlocutory review is not a good idea in my view because that would stop the administrative hearing process while an interlocutory appeal is resolved in the court system, at great cost in time and money to the agency hearing process.

4. **Section 403(b)** Contested Case Procedure (Mann proposal)

(b) . *By reference to its internet website* ~~*A*~~*a*n agency shall make available to the person to which an agency action is directed a copy of the agency procedures governing the case. [underlined language by Judge Mann].

Reporter Recommendation: The language added here makes specific what agencies would do anyway, which is to have electronic distribution of agency procedures on the agency website. This language would require internet based posting. If we think this is a good idea, we could add in electronic [or written format] after the word available rather than adding the proposed language above. We used this terminology frequently in Article Two already.

5. **Section 403(d)** contested Case Procedure (Beal proposal)

Beal comments: Under 403(d), *"The presiding officer may take testimony, including the power to question witnesses and to request the presence of a witness from a state agency who has not otherwise participated in the hearing for the purposes of evaluating the evidence."* I believe this has been an invaluable tool at SOAH to make sure the ALJ has the evidence needed to decide the case and the aid of the agency expertise that would be subject to cross examination by the parties.

Reporter recommendation: This is a good idea for the reasons stated. I recommend that we add this sentence as a new second sentence to section 403(d).

6. **Section 404(1),(2)** Evidence in contested cases (Mann and Felter proposals)

(1) Except as otherwise provided by law, when the agency initiates a contested case , the agency has the burden of proof by the preponderance of the evidence. When a party other than the agency initiates a contested case, the party has the burden of proof by the preponderance of the evidence.

Beal comments: Under 404(1): *"Unless a statute otherwise provides, the burden of proof shall be by a preponderance of the evidence."* I have no idea why but every APA never states the burden of proof and we have to have litigation in order to establish it is a preponderance. Fix it by doing this.

(2) Upon proper objection, the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, excludable on constitutional or statutory grounds, or excludable on the basis of an evidentiary privilege recognized in the courts of this state. Any other relevant evidence [including hearsay evidence] may be received if it is of a type commonly relied upon by reasonably prudent individuals in the conduct of their affairs. Except as otherwise provided in this section or provided by law other than this [act], the rules of evidence as applied in the civil courts, sitting without a jury, shall be followed.

Beal comments: Under 404(2) [**eliminate first sentence]** *"The (state) Rules of Evidence shall apply to the contested case proceeding."* Why have that first sentence which is really the basis for all the rules of evidence? Merely use them and have the reasonable person standard in the second sentence to allow the judge to let something in despite the rules of evidence.

Reporter recommendation: Adding the preponderance of evidence standard to Section 404(1) is a good idea, as supported by Mann and Felter as well as Beal,

although the language is rarely included in procedure statutes. However, the text of subsection (a) is focused on the burden of production as well as the burden of persuasion. I can add a comment explaining the difference between the two issues and the meaning of the preponderance standard, so that is clear. As to the added language in Section 404(2), while this language may be a good idea it is somewhat inconsistent with the first two sentences of existing Section 402. The first two sentences address admissibility of evidence standards for administrative hearings, and the third sentence would add the admissibility standards used in the courts. That would duplicate the requirements of the first two sentences, and create some degree of confusion.

7. **Section 405(b),(d)** Notice in a contested case (Mann and Felter proposal)

(b) In a contested case ~~action~~ initiated by a person other than an agency, within 5 days ~~*a reasonable time*~~ after filing, the agency shall give notice to all parties that an action has been commenced. [first sentence only]

(d) When a hearing or a prehearing conference is scheduled, the agency shall give parties notice that contains the information required by subsection (c) not less than 120 days after filing of the notice and at least 14 days before the hearing or prehearing conference.

Reporter Recommendation: A specific time limit in subsection (b) compels the agency to act promptly. That is a good idea, but five days may be too short. A 10 day time limit may be better, or a bracketed time limit. The 120 day time limit in subsection (d) is also a good idea because it requires the agency to schedule a hearing or a prehearing conference within 120 days of initiating the contested case. However, we also need a shorter notice period in subsection (c), such as within 10 days of filing so that the non agency party has the opportunity to hire counsel, and prepare a defense which may take more time than 14 days before the hearing. We may want to consider two types of notice, the initial notice under subsections (b)

and (c), which would include (b)(1), (2), and (4), with a later notice notifying the parties about subsection (b)(3), because the hearing may not have been scheduled at the time of the initial notice. Similarly, with subsection (c), the initial notice would include (c)(1), (2), (3), (4), (6) (7) and (8). The later notice would include subsection (5), and a new subsection similar to subsection (b)(3) notifying the parties of the date time and place of the scheduled hearing.

8. **Section 408** Ex Parte Communications (Mann and Felter proposal)
[Two new subsections to be added to section 408]

(f) A prohibited ex parte communication is a communication made to the presiding officer or judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, which the presiding officer or judge reasonably believes will give a party a procedural, substantive, or tactical advantage as a result of the ex parte communication.

(~~e~~g) If a presiding officer or the final decision maker makes or receives a communication in compliance with this section, the presiding officer or the final decision maker shall sign an affidavit that the communication was made or received in compliance with this section and the affidavit shall be filed in the record of the case and served on all parties.

Beal comments: Under 408(c) and (d): *"Any communications made under these sections shall either be made at an open hearing of the agency or be reduced to writing and placed within the contested case record."* I doubt any one will agree with me but I think such communications should be in the record so ALL PARTIES can decide whether improper communications have or have not occurred, even accidentally, while "advising" the ultimate decision-maker.

Reporter Recommendation: Subsections (f) and (g) are based on ABA Model Code of Judicial Conduct Rule 209(A). Subsection (f) includes a definition of ex parte communications, and subsection (g) provides that the agency official, either a presiding officer or a final decision maker, must sign and file an affidavit of compliance with this section whenever an ex parte communication is made or received in compliance with this section. There is an inconsistency between the proposed subsection (f) definition of ex parte communications, and the existing provisions of Section 408(b),(c), (d), and (e). Subsection (b) contains a broader

definition of ex parte communications than proposed subsection (f) ["any communication concerning a pending contested case"], and the exceptions recognized in subsections (c) [permitted ex parte communications authorized by statute, or uncontested procedural issues], (d) [legal advice and ministerial matters exception], and (e) [agency head exceptions]. If we wanted to use this definition, we would need to rewrite subsection (b). We considered this idea at a previous drafting committee meeting and did not adopt it choosing to recognize specific exceptions in later subsections. Proposed subsection (g) requires the filing of an affidavit in all cases of ex parte communications, even ones that are in compliance with a recognized exception, whereas the provisions of Section 408 subsections (g) and (h) only require disclosure and an opportunity to respond when an ex parte communication is made that violates Section 408's prohibition. While the proposal may be consistent with the norms for judicial ethics in the civil court system, the administrative law world is different. No change recommended as to both man and Felter, and Beal's proposals..

9. **Section 410** Subpoenas (Mann proposal) [add new subsection (c)]

(c) Witness fees shall be paid by the party requesting the subpoena in the manner as provided by law for witness fees in a civil action.

Reporter Recommendation: This is a good idea, so I recommend that we add subsection (c) to Section 410, to specify who is responsible for payment of witness fees.

10. **Section 411(g)** Discovery (Mann and Felter proposal)

[Delete :"by other methods provided by law other than this act, and replace with underlined language below]

(ge) Upon petition and for good cause shown, the presiding officer may issue an order authorizing discovery in accordance with the rules of civil procedure as applied in this state.

Reporter recommendation: This is a good idea to specify that civil discovery rules or statutes in the state are the logical source for discovery methods other than provided by the MSAPA. I recommend that we adopt this recommendation.

11. **Section 412** Default (Mann and Felter proposal)

[Delete recommended in subsection (a), and (b), and use initial decision for initial order]

a) Unless otherwise provided by law other than this [act], if a party without good cause fails to attend or participate in a prehearing conference or hearing in a contested case, the presiding officer may issue a default order. If a default order is issued, the presiding officer may conduct any further proceedings necessary to complete the adjudication without the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party. An ~~recommended,~~ initial decision[4] or final order issued against a defaulting party may be based on the defaulting party's admissions or other evidence that may be used without notice to the defaulting party. If the burden of proof is on the defaulting party to establish that the party is entitled to the agency action sought, the presiding officer may issue an ~~recommended,~~ initial decision or final order without taking evidence.

(b) Not later than [ ] days after the date of notifying a party subject to a default order that ~~a recommended~~, initial decision, or final order has been rendered against that ~~a~~ party, that

[4] This footnote should apply wherever "initial decision" appears. The phrase "initial Decision" is used in the Federal APA. *See* U.S.C. § 557 (b), wherein it is provided, in relevant part, that one who presides at the hearing "…shall **initially** (emphasis supplied) decide the case…." Use of the designation "initial decision" eliminates confusion between it and the final decision of the agency final agency action).

party may petition the presiding officer to vacate the ~~recommended~~ initial decision, or final order. If good cause is shown for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If good cause is not shown for the party's failure to appear, the presiding officer shall deny the motion to vacate.

Reporter recommendation: The term order is defined in section 102(22) to mean an agency decision. We do not need to change the language here, unless we want to substitute decision for order across the board in the act. The recommended order deletion issue arises with section 412, 413, and 415. The federal APA includes a category for recommended decisions (5 U.S.C. section 557 (b) includes a recommended decision category, and Section 557(c) includes recommended decisions as one of the categories for federal agency decisions. A number of states use the term "proposed decision" [See California APA Government Code Section 11517(c) (1)]. Proposed decision is a synonym for recommended decision. Some agencies do delegate final decisional authority to administrative law judges, but not all agencies do so. That is typically a decision made by a specific agency based on its own governing statue or agency regulations, not by the APA. Including the term recommended decision here, is a recognition of this type of decision structure in the agencies of many states. However, 1961 MSAPA Section 12 uses the term "a final decision or order" and does not use either initial decision or recommended

decision. 1981 MSAPA Sections 4-215, and 4-216 use the terms final order and initial order but do not use the term recommended or proposed order.

12. **Section 413** Orders, Final Recommended Initial (Mann and Felter proposal)

[Delete recommended in title and in subsections (b), (c), and (d), and use initial decision for initial order; substitute initial for recommended decision, and final order for initial order. new language for subsection (b)].

(b) Except as otherwise provided by law other than this [act], if the presiding officer is not the agency head and has not been delegated final decisional authority, the presiding officer shall render ~~*a recommended*~~ *an initial* ~~order.~~ decision. If the presiding officer is not the agency head and has been delegated final decisional authority, the presiding officer shall render ~~an initial order that~~ ~~becomes~~ a final order. ~~[30] days after issuance, unless reviewed by the agency head on its own motion or on petition of a party~~.

Reporter recommendation: The subsection (b) is based upon there being two types of decisions initial and final. If this is correct, the suggestion for subsection (b) does make sense. However, my recommendation is the same as above. See reporter recommendation for agenda item 21 (section 412 default).

13. **Section 414(a),(b) (c)**, Agency Review of Initial Order (Mann and Felter proposal)

[substitute decision for order in title and in all subsections of section 414; add underlined language below in (a); add language in subsection (c); revise language in subsection (f); add new subsections (h), and (i).

(a) An agency head may review an initial order on its own motion, except as otherwise provided by law, other than this [act] [underlined language added]

(b) A party may petition an agency head to review an initial order. Upon petition by a party, the agency head may review an initial order, except as otherwise provided by law other than this [act].

(c) A petition for review of an initial order must be filed with the agency head, or with any person designated for this purpose by agency rule not later than [15] days after the initial order is issued, or from the date that the parties are notified of the order, whichever is later. If the agency head decides to review an initial order on its own motion, the agency head shall give notice in a record of its intention to review the order within [15] days after it is issued, or the parties are notified of the order, whichever is later. If neither a petition for review is filed nor does the agency head elect to review the initial order within the proscribed time limit, the initial order becomes a final order, and there is a waiver of the right to judicial review under Article 5.

[Mann proposal]

…..…

(f) An agency head ~~may~~ *shall* render a final order disposing of the proceeding within 120 days after the initial ~~order~~ decision is issued or may remand the matter for further proceedings with instructions to the presiding officer who rendered the initial ~~order~~decision. The remand proceedings must be completed within 45 day of receipt of the remand order. Thereafter, the agency head is prohibited from issuing a second remand order to the presiding officer who

rendered the initial ~~order~~decision~~.~~ Upon remanding a matter, the agency head may order such temporary relief as is authorized and appropriate. …..

(h) In the absence of a petition to review, or an agency review, the initial decision of the presiding officer shall become final agency action, subject to judicial review.[5]

(i) Failure of a party to file a petition to review shall result in a waiver of the right to judicial review.[6]

[underlined language added]

Reporter Recommendation: The subsection (a) proposed added language is the same as in subsection (b). We could consolidate the two subsections into one and include this exception. The subsection (c) proposed language [Mann proposal] and the subsection (h), and (i) [Felter proposal] are similar. Both address finality. It may be very helpful to provide for a finality provision in this section. However, we should not include the waiver language because that is addressed in article five [Section 506, exhaustion of administrative remedies]. If we like the finality part of this, we can add subsection (h) language from this proposal to Section 414. We should not include subsection (i) or the portion of subsection (c) that discusses waiver, as those subsections address judicial review topics which should be in article five. Waiver is not the right word here, either as exhaustion of

[5] *This added provision brings finality and ripeness for judicial review in the absence of action by parties or the agency. See, for example, § 24-4-105 (14) (b) (III), Colorado Revised Statutes (2009).*
[6] *Again, this provision brings finality sooner rather than later, without abridging due process. See § 24-4-105 (14) (c), Colorado Revised Statutes (2009).*

administrative remedies is the conventional term used. The other proposed changes to subsection (f) including time limits for decision making and a prohibition on a second remand are interesting. Having time limits (120 days and 45 days) are action forcing for agencies, and may be a good idea. However, prohibiting a second remand raises other issues, such as who is the presiding officer, and do they work for a central panel agency or within the agency that is deciding the case.

14. **Section 414(e), and 415(e)**. Beal proposal

Beal comments: I left until the end the most controversial recommendation to [414(e) and] 415 (e). I am totally sold on our system here in Texas. I would have it read as follows:

"When reviewing a recommended order, the agency head shall not change a basic, underlying fact within the order unless it constitutes a non-material, technical error. The agency head may only modify an ultimate finding of fact or conclusion of law on the basis that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies or prior administrative decisions. If the administrative law judge relied on a prior administrative decision which the agency head concludes at this time that it was an incorrect decision that should be changed, the agency head may modify the order consistent with the new interpretation or application of the law. Each and every modification by the agency head of an ultimate finding of fact or conclusion of law of the recommended order shall be justified in writing within the final order setting forth the specific reason, factual or policy, and the legal basis for the change.

Beal Comments: I believe that ad law in Texas has fundamentally changed for the better by having the ALJ being the final authority on basic, underlying facts. At least suggest to them they put this in as an alternative for states who want to truly

have an independent but interdependent SOAH/Referring Agency decision or order. (the best of both worlds in my opinion).

Reporter recommendation: no change recommended. The existing approach is consistent with the Universal Camera federal standard. This proposal would be make ALJ fact determinations almost unreviewable by the agency head rather than giving deference to the ALJ fact findings based on demeanor evidence and credibility determinations.

15. **Section 415**, Agency Review of Recommended Order (Mann and Felter proposal)

[Delete the entire section]

Reporter Recommendation: There is no supporting reason for deleting this entire section. If states have eliminated recommended or proposed decisions, that is news to me. At the very least there should be some explanation as to why this is being proposed. In the absence of that explanation, I do not support this recommended change.

New Article 4A (Mann and Felter proposals)

Their Proposal is to renumber Article 6 as Article 4A, and to expand the provisions listed in new article 4A. New Sections 401A to 405A substantially track the provisions of current article 6, with some exceptions. New sections 406A to 419A substantially track to current provisions in article 4, with some exceptions. The proposal would be to have two parallel sets of apa adjudication procedures, one for

central panel agencies (in article 4A), and one for other non central panel agencies (in Article 4). Because this proposal is lengthy, I am going to pull out the text from the Mann and Felter documents, and create a separate document (with new article 4A) for the committee to consider. See Mann and Felter attachment. The issue here is whether or not we should have two largely parallel articles that address the same issues, as the current proposal recommends, or whether the existing Articles 4 and 6, are sufficient. The 1918 MSAPA had extensive provisions on adjudication, but only one section (chapter III, Section 4-301) on the office of administrative hearings.

ARTICLE FIVE

1. **Section 501** Right to judicial review; final agency action reviewable

[Felter proposal] [add underlined language]

(d) Final agency action is reviewable except to the extent that:

(1) a statute [of this state] other than this [act] precludes judicial review;

(2) agency action is committed to agency discretion by law;

(3) failure to file a petition to review of the final agency action or final order of the agency within 15 days of service of the final order, shall result in a waiver of the right to judicial review of the final order.

Reporter Recommendation: No change recommended. The drafting committee has discussed this topic extensively. The proposed (d)(1) language has been moved to subsection (b) in the existing draft. The committee decided to delete the proposed (d) (2) language at a prior drafting committee meeting. The proposed (d)(3) language addresses a topic that is covered in Section 506, exhaustion of administrative remedies.

2. **Section 503 (d)** added language (Mann and Felter proposal)

(d) A party may not petition for judicial review while seeking reconsideration under Sections 416, 417A and 418A of a final order. During the time a petition for reconsideration is pending before an agency, the time for seeking judicial review in subsection (b) is tolled.

Reporter recommendation: The added language incorporates new proposed sections from proposed Article 4A, which provide for reconsideration by the ALJ, and by the agency head respectively. This language should only be added, if the committee adopts the proposed new Article 4A.

3. **Section 508 (a)(3)(b),(d)** Scope of Review (Mann and Felter proposal)

[underlined language added]

(B) the agency committed an error of procedure; a showing of non compliance with the requirements found in Sections 408, 414 (e)or (g), 411A, and 416A(e) or (g) by a person seeking judicial review shall be prima facie [conclusive] evidence of a prejudicial error;

(D) an agency determination of fact is not supported by substantial [the preponderance of the] [de novo review of the] evidence in the record as a whole;

Reporter recommendation: The added language in subsection (b) particularizes specific types of procedural error, and includes a prima facie standard for those errors. Both the 1961 MSAPA Section 15(g) (3), and 1981 MSAPA Section 5-116 (c)(5) provide for a generalized procedural error standard of review, and so does federal APA 5 U.S.C. Section 706(2)(d). It is not a good idea without further justification to single out certain types of procedural error, and give them specific

mention. There are a whole range of procedural errors in Articles 3 and 4 that could be the subject of this type of review. Further, the prima facie evidence language does not add much, as a violation of one of the procedural requirements of the MSAPA, would be procedural error, in any case. No change recommended. The added language in subsection (d) does raise a couple of issues. First, the preponderance of the evidence standard is a burden of proof standard for administrative hearings (and civil trials)not a judicial review standard, so it probably does not belong here. The do novo standard of review is recognized in the federal APA, 5 U.S.C. Section 706(2) (f), and in California judicial review law, but it is otherwise not widely used in judicial review in state administrative law. The two most widely used tests are the clearly erroneous test, used in the 1961 MSAPA Section 15 (g)(5) , and the substantial evidence test, used in the 1981 MSAPA Section 5-116(c)(7). Based on this material, we should not include the de novo review standard.

ARTICLE SIX

1. **Section 604(6)** Chief administrative law judge; powers; duties (Beal proposal)

Beal Comments Under 604(6): *"Such procedural rules related to the pre-hearing and hearing process shall govern and any rule of the agency on behalf of which the hearing is conducted shall not apply unless expressly incorporated by reference."*

(6) shall adopt rules pursuant to this [act] to implement this [article]; "Such procedural rules related to the pre-hearing and hearing process shall govern and any rule of the agency on behalf of which the hearing is conducted shall not apply unless expressly incorporated by reference."

Reporter recommendation: This is a good idea for the reasons stated.

Mooney materials: Matt Mooney, an ALJ in Kentucky, did an extensive analysis of Article 4, as well as the related definitions sections of Article One. The Mooney proposals for changes includes a lot of style comments, but also some suggestions for new sections and rewriting for clarity, active voice, and other things. Speaking generally, I believe that his comments are well taken and offer significant improvements in drafting language compared to the existing language. Mooney included three documents in his submission to me. Given the number of sections addressed in his memo, and the limited time that the drafting committee has in its February meeting, I will focus on the recommendations for Article one sections that he recommends be redrafted , and new sections added and also include his suggestions and notes document, which provides the rest of his suggestions for Article 4, but neither the concordance nor the preliminary memo.

ARTICLE ONE (Mooney suggested drafting revisions)

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the [state] Administrative Procedure Act.

SECTION 102. DEFINITIONS. In this [act]:

SECTION 102(1) "Adjudication" means the process of determining facts or applying law to facts in order ~~pursuant~~ to ~~which an agency~~ formulate~~s~~ and issue~~s~~ an order.

DRAFTING NOTES: The suggested revisions define adjudication in terms of both determining facts and applying law to facts, which is at once a more complete and

concise definition. The awkward phrase "pursuant to which" is replaced by the phrase "in order to" to keep the closing phrase in the active voice.

SECTION 102(2) "Agency" means a state ~~board,~~ authority, board, bureau, cabinet, commission, ~~institution,~~ department, division, institution, office, officer, or other state entity ~~that is~~ authorized or required by law to make rules or to adjudicate. The term does not include the Governor, the Legislature, ~~and~~ or the Judiciary.

DRAFTING NOTES: The suggested revisions simply add additional names used for agencies to the list and put the list in alphabetical order. Under the law of Kentucky, a list like this must either be exhaustive or contain the required caveat, "including but not limited to" if it is to cover anything that is not listed. The use f "that" as a pronoun here is unnecessary and the meaningless phrase "that is" has been deleted. The disjunctive is substituted in the last sentence to follow the sense of the sentence.

SECTION 102(4) "Agency head" means the individual ~~in whom,~~ or one or more members of ~~the body~~ a group of individuals ~~in which, the ultimate legal authority of an agency is vested~~ authorized [by law] to issue a final rule or order.

DRAFTING NOTES: The suggested revisions delete the awkward construction "in whom, or one" and replaces it with a straightforward compound subject, using "group" instead of "body" for reasons explained in the comments to Section 402(a). The vague phrase "the ultimate legal authority of an agency is vested" is deleted and the proposed revision of the last sentence uses the defined terms "issue" and "final order" to define "agency head" and to put the sentence in the active voice.

SECTION 102(6) "Contested case" means ~~an~~ the entire agency adjudication procedure, ~~adjudication in which~~ including an opportunity for an evidentiary hearing, ~~is~~ as required by the federal or state constitutions, ~~or a federal or state~~ statutes, regulations, or ~~a federal or state~~ judicial decisions.

DRAFTING NOTES: The suggested revisions are intended to give "contested case" a broad reach and scope to set it at the top of the references to adjudicative procedures. The first revision inserts a broad definitional scope for the "contested case." The word

"including" is inserted in place of "adjudication in which" to set off the following descriptive phrase. The word "regulation" is inserted because in Kentucky some regulations create a right to hearing where such right is not stated in the enabling statute but is necessarily implied. Moreover, in Kentucky, even when the enabling statute does grant a right to hearing, often regulations set out the details of how and when such a hearing must be requested. The listing of the legal bases for hearings has been shortened by putting the adjectival phrase "federal or state" before the listing and eliminating its repetition thereafter.

POLICY NOTES: The Act should adopt a hierarchy of terms to clarify the distinctions between the various components of an overall "contested case." Thus, the Act should consistently use "contested case" as the broadest descriptor for an agency adjudication. Below this the Act should use "proceedings" to denote all the component "proceedings" that may make up a "contested case." The Act should use "hearing" or "adjudicative hearing" to describe one particular type of "proceeding" within a "contested case." Within this hierarchy a presiding officer would "preside" over a "contested case," and "conduct" the component "proceedings," including any "hearing" or "adjudicative hearing."

SECTION 102(10) "Evidentiary hearing" means an ~~hearing~~ adjudicative proceeding conducted for the purpose of admitting ~~receipt of~~ evidence in the hearing record regarding ~~on~~ issues ~~on which~~ that a ~~decision of the~~ presiding officer may ~~be made~~ decide in a contested case.

DRAFTING NOTES: The word "hearing" is deleted from the first phrase to avoid defining an "evidentiary hearing" as a "hearing." This is not useful. The phrase "hearing for the receipt of evidence" is replaced with "adjudicative proceeding conducted for the purpose of admitting evidence" to comport with the hierarch of terms discussed in the Policy Notes to §102(6). The phrase "in the hearing record" is inserted to make the purpose of the hearing clear. The awkward phrase "on issues on which a decision of the presiding hearing officer may be made" is replaced with the phrase "regarding issues a presiding officer may decide" to simplify the language and put the phrase in the active voice.

SECTION 102(10A) "File" or "filing" means the oral or written designation of material for inclusion in the hearing record by the presiding officer or the marking of the [time and] date by which material is included in the hearing record by the keeper of the hearing record.

POLICY NOTES: For some reason, the Act does not define "file" or "filing" for the purpose of Article 4, although the verb "file" or "filed" is used in §403(c), 414(c), 414(d),

416(a), (b) and (c), and the gerund "filing" is used in §405(b), 416(a) and (b). The benefit of defining how to "file" something or what constitutes a "filing" is that it creates a uniform procedure that marks documents with a date certain. This allows all parties to reliably and easily calculate time limits from that date. At present, the Act calculates time periods from the "effective date" (§407(g) - emergency order), from "after the notice" (§408(f) - to respond to ex parte communication), "upon written notice" (§411(b) - discovery), from "after a recommended, initial or final order is rendered" (§412(b) - motion to vacate), "after issuance" (§413(a) - initial order to final order), "after the initial order is issued" (§414(c) - motion for review or agency notice of intent to review), "after notice of a final order is given" (§416(c) – motion for reconsideration), "after the filing denying" a petition for reconsideration (§416(c) – motion for reconsideration), and "after the parties are notified of the final order" (§417 - stay). The Act should uniformly use an easily identifiable date from which to calculate effect, time periods, and limitations: using the date a document is "filed" would do this. Thus, the various vague examples above could all be redrafted to use the filing date as defined in this proposed section.

SECTION 102(11) "Final order" means the order issued by ~~the~~ an agency head ~~sitting as the~~ presiding ~~officer~~ in a contested case, or by an agency head upon review of a recommended order, that resolves all or part of a contested case [or remands the case for further proceedings]. The phrase shall include an initial order that has become a final order by operation of law under Section 413.

DRAFTING NOTES: The definite article is replaced with the indefinite article to make clear the definition includes orders issued by any agency head. The phrase "sitting as the presiding officer in a contested case" is replaced with "presiding in a contested case" to shorten the sentence without changing the meaning and to eliminate "sitting" and retain "presiding" for reasons explained above in the Policy Notes to §102(6). The phrase following the disjunctive is meant to bring final orders that result after review of a recommended order into the definition. The final sentence is inserted to make sure that final orders that came from initial orders fall within the definition, as they must, even though they are not issued by an agency head presiding over the case.

POLICY NOTES: The definition of "final order" must be broad enough to encompass the various ways states treat these orders. In complex cases, there can be a separate final order for some parties in a case but not others. These are styled "final orders" by agencies, because as to that party they are final. Also, although it may not be common, some agencies will allow an interlocutory-type review of certain rulings from a presiding officer to the agency head. Since these reviews are by their nature reviews of orders on parts or distinct issues of a case, the best policy is to include them in the definition of final order. See §414(d) (mentioning final order of remand). Ordinarily these are dispositive motions ruled on by the presiding officer and then reviewed by the agency head. They too are styled "final orders" sometimes, which can be useful for all parties if it allows

appeal of a dispositive legal issue before having to go through an entire hearing.

SECTION 102(12A) "Hearing record" means the hearing record in an adjudication governed by Section 406, and the agency record in emergency adjudication governed by Section 407.

DRAFTING NOTES: The Act uses "agency record," "hearing record" and "record" as loose synonyms when they are not. The phrase "agency record" is defined in §201, and "hearing record" is defined in §406. All instances of "record" in Article 4 should be changed to "hearing record" so it is clear that the "record" in §406 and the record of emergency adjudications in §407 is what is meant. The phrase "hearing record" appears for the first time in these proposed revisions in §406(g).

POLICY NOTES: Reading the expansive definition of "agency record" in §102(5), it would appear the Committee intended the phrase "agency record" to serve for all references to what is commonly referred to as the "hearing record" in contested case under Article 4 as well as the record in other Articles of the Act. This is unwise given the very different scope and subject matter of the various Articles of the Act. The definition of "agency record" is too broad for use in Article 4 and would only create confusion. Moreover, it is not clear why the Committee would want to use "agency record" instead of "hearing record" when there is a whole section defining "hearing record."

SECTION 102(15A) "Issue" means the act of signing and dating an order by the agency head, presiding officer, or an individual authorized by law, or if the order is undated, then when the order is filed in the hearing record.

DRAFTING NOTES: Article 4 uses various terms such as "render," "issue," "dispose," "sign," and "file" to mean the act of ruling on a motion or issue, or making an order effective, or perhaps the process of making a ruling. The term "issue" is defined in §413(f) to mean the act of "an agency head, presiding officer, or an individual authorized by law" signing an "order." However, that definition applies to final, recommended or initial "order[s]" issued under §413, and not other sections of Article 4.

"issue"

Several sections other than §413 use a form of the verb "issue" with a form of the object "order" to convey the same meaning as in §413. *See* §404(7) (protective orders); 407(b), (c), (d), (f) and (g) (emergency order); §410(a) (subpoenas); §411(c), (d), and (e)

(protective, compelling, authorizing discovery); §412(a) (default order and recommended, initial, or final order); §414(c) (initial order); §416(c) (order on motion to reconsider); §606(a) (recommended or initial orders). The widespread use of "issue" to mean the same as in §413 indicates that term should be in this definitional section for the entire Act or at least Article 4.

"render"

At other places Article 4 uses the verb "render" to mean the same thing as "issue": §413(a) and (b), §415(b), and §606 all use the verb "render" with the object "order" to mean the decision maker's act of making or conveying an order to affected persons. §415(c) uses the past tense "rendered" to mean the same thing. §412 uses the past participle "rendered" in a passive construction to refer to the same thing.

"dispose"

§414(b) and (d) use a form of the verb "dispose" regarding a petition (motion) for reconsideration to mean "rule" or "decide" while (c) requires the "order" on a motion for reconsideration to be "issued."

§415(c) uses the adverbial "disposing" referring to a final order. This use of "disposing" appears intended to mean "ruling on" or perhaps "resolving."

§416(b) uses "dispose" to mean "rule on" a "petition" (motion) for reconsideration and fixes the time for judicial review at "disposition" whenever that may be. As used here, "dispose" could mean "issue," or "file," or "make."

POLICY NOTES: Article 4 should use "issue" where possible to mean the act of ruling on a motion or issue, or making an order effective. "Issuance" should be used when referring to the process of "issuing" or the point in time an order is "issued."

SECTION 102(23) "Presiding officer" means an individual authorized to conduct and govern ~~who presides over~~ the ~~evidentiary hearing~~ all the proceedings in a contested case and issue a recommended, initial or final order.

DRAFTING NOTES: These revisions replace the phrase "who presides over the

evidentiary hearing in a contested case" with the phrase “authorized to conduct and govern all the proceedings in a contested case.” The purpose of these revisions is to convey the characteristic act and function of a "presiding officer." They are intended to make clear that a "presiding officer" is the person authorized to govern, conduct, put on, hold, or run all the "proceedings" within an entire “contested case.” The phrase “and issue a recommended, initial, or final order” is intended to make clear that the presiding officer presides until the end of the proceedings.

POLICY NOTES: The Act does not always use terms that clearly differentiate between the kinds of actions performed by presiding officers. The Act uses the word "conduct" in §§102(24), 403(e) and (f), 404(7), 412(b) and 415(b) with the noun "hearing." §407(a) uses "conduct" with the noun "(emergency) adjudication." §412(a) uses "conduct" with the noun "proceedings." In all these cases, the Act uses "conduct" to convey the idea of putting on, holding, or running a proceeding within a contested case. §409(e) uses "hold" to mean the same thing. §403 (l) uses "conducts" with the noun "contested case" to mean something like "governs." The Act should clarify its terms to reflect the hierarchy discussed in the Policy Notes to §102(6).

SECTION 102(30A) Unless otherwise provided by law, "serve" shall mean actual delivery of a document to the person intended or the act of depositing a document with the United States postal service for delivery to the person, properly addressed, postage prepaid. If a document is deposited with the United States postal service certified mail, return receipt requested, then service shall be complete upon the date the return receipt was signed or postmarked, or upon the date the United States postal service returns the unsigned return receipt to the sender.

POLICY NOTES: The word “serve” is used in the current draft of the Article in Sections §405(c)(7), 410(b), and 413(c) to mean the delivery of a notice, or order, similar to the definition offered above. This proposed definition comports with the policy discussion concerning the proposed definition of "file" or "filing" in proposed §201(10A) and is offered to allow the Act to place a date certain upon certain acts keyed to delivery of orders, notices, etc. where the filing date may not be appropriate. The conditional introductory phrase is used because agencies may wish to specify only certain methods of service for use in their adjudications or may wish to incorporate the service provisions of the rules of civil procedure.

[ARTICLE] 4

~~X.~~I. ADJUDICATION IN A CONTESTED CASE

SECTION 401. WHEN ARTICLE APPLIES; CONTESTED CASES.

This [article] applies to ~~an~~ agency adjudications ~~made by an agency~~ in ~~a~~ all contested cases.

DRAFTING NOTES: This Section is clearly intended to apply to *all* agency adjudications, not just "a" contested case or "an" adjudication. This should be made clear in the text. Thus the singular indefinite articles have been deleted, the nouns made plural and the adjective "all" inserted before "contested cases." Similar changes are proposed below without specifically being discussed in subsequent drafting notes. The phrase “adjudications made by an agency” is wordy and can be replaced by the more succinct and syntactically equivalent “agency adjudications.”