MODEL STATE ADMINISTRATIVE PROCEDURE ACT
ISSUES STATEMENT

HISTORY AND APPROACH TO THE CURRENT REVISION

The 1946 Model State Administrative Procedure Act

The 1946 Model State Administrative Procedure Act (MSAPA) drew heavily upon the Federal Administrative Procedure Act (FAPA) that was enacted in the same year. That MSAPA incorporated basic principles with only enough detail to support essential features of an administrative procedure act. The differences among the states in administrative procedure and the differences among agency tasks were so great that the drafters purposely adopted this "model act," rather than a uniform act, approach.

The 1961 Model State Administrative Procedure Act

The MSAPA was revised in 1961 to take into account a "maturing" of thought on administrative procedure. The 1961 MSAPA articulated its objectives as fairness to parties and creation of procedure that was effective from the governmental standpoint. This revision also followed a model act approach that focused on major features, because, it explained, details must vary from state. A great deal of the 1961 MSAPA has been adopted by the states.

The 1981 Model State Administrative Procedure Act

The MSAPA was revised in 1981 because of the expansion in types of regulation carried out by the state agencies, such as, for example, workplace safety and environmental regulation. The 1981 MSAPA approach was "entirely new" with "more detail" than earlier acts. This approach offered guidance to the states so that they could select the parts of the MSAPA that were suitable for their particular situation, and took into account the greater experience with administrative procedure since 1961. There have been only a few adoptions of provisions from the 1981 MSAPA.

The Current Proposed Revision

It has been twenty-six years since the 1981 revision of the MSAPA. There have been many changes and significant events since that time. One is the emergence of the Internet in the mid 1980's and its explosive growth since that time. States have discovered that the Internet furnishes an excellent, efficient and low-cost method for communication with the public. In the past two decades, state legislatures have expressed dissatisfaction with agency rulemaking, and have taken action to assure continuous oversight and creation of mechanisms and procedures overrule agency action. At the present time, the American Bar Association has undertaken a major study of the Federal Administrative Procedure Act and has recommended revisions that draw upon fifty years of experience with the FAPA, which is similar in many respects to the various revisions of the MSAPA. Finally, in the past twenty-six years, there have been a large number of state and federal judicial decisions that involve the administrative procedure acts of the various states and the Federal Administrative Procedure Act, a continuous stream of scholarly articles on federal administrative law, and the emergence of a body of

academic writing on *state* administrative procedure. A number of states have revised their administrative procedures act in the time since 1981, including a number of new types of provisions. These developments have been taken into account in this revision of the MSAPA.

The drafting committee's mission is to adopt best practices in the revision process to make the administrative process more efficient, accessible, and fair.

KEY ISSUES IN THE PROPOSED MSAPA REVISION

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§ 102 (6) Contested Case definition, and § 401 When Article 4 [Adjudication] Applies: Contested Case

[Section 102(6)] The scope of hearing rights in this revised draft is contained in the Section 102(6) definition of contested case. Section 102(6) adopts a definition of hearing rights based upon law other than the APA itself. This is also known as the external law approach under which the APA provides controlling procedures for use in contested cases, but does not define when hearings are required by law in contested cases The definition includes constitutional, statutory, and common law sources of hearing rights.

1. Should this section be adopted with this scope of hearing rights, and with the external law approach?

[Section 401] This section uses the term "contested case" that was used in the 1961 MSAPA. The scope of adjudicative hearing rights under this draft is broader than hearing rights under the 1961 MSAPA, Section 1(2), but narrower than the scope of hearing rights in adjudicative proceedings under the 1981 MSAPA, Sections 4-101, 4-210, and 4-211. The scope of hearing rights in this revised draft is contained in the Section 1-102(6) definition of contested case. Section 1-102(6 adopts a definition of hearing rights based upon law other than the APA itself. This is also known as the external law approach under which the APA provides controlling procedures for use in contested cases, but does not define when hearings are required by law.

2. Should this section be adopted with this scope of hearing rights, and with the external law approach?

§ 310. Guidance Documents and § 201(d) Publication of Guidance Documents

[Section 310] The revised draft provides detailed provisions related to agency guidance documents, including provisions for issuance of guidance documents, definitions, procedures, deference standards, publication, index maintenance, and petitions. This section is based on specific state APA statutes enacted after the 1981 MSAPA was adopted. Guidance documents are widely used by agencies to provide guidance to the public and those regulated by the agency. Many agencies rely upon guidance documents to either interpret the agencies governing statute or to explain how the agency intends to exercise discretion given to the agency by the governing statute.

1. Should the guidance document provisions be adopted, and should the section include the proposed topics and language?

[Section 201(d)] This section provides for the electronic publication of guidance documents by the rules publisher for those guidance documents filed by an agency with the publisher. Many agencies rely upon guidance documents to either interpret the agencies governing statute or to explain how the agency intends to exercise discretion given to the agency by the governing statute. Electronic publication of guidance documents makes these agency statements more accessible to the public. This helps to ensure fairness and provide guidance to parties who have to comply with the law as articulated by the agency. This section does not mandate that agencies file guidance documents with the publisher, only that the publisher publish electronically guidance document filed by the agency. However, Section 310 (e) does require agencies to publish guidance documents.

2. Should electronic publication of guidance documents be required?

§ 203(d) Judicial review of agency decisions to not issue a declaratory order.

The revised draft states two alternatives related to reviewability of agency decisions not to issue a declaratory order. Each alternative is based upon a major U.S. Supreme Court decision (See comment to subsection (d)). The first alternative treats an agency decision to not issue a declaratory order to be within the agency discretion exception as available under the federal APA. The second alternative treats an agency decision to not issue a declaratory order as reviewable only in the case of the abuse of discretion standard of review as available under the federal APA.

Which of these alternatives is better?

§ 301 (d) Written Rulemaking Docket

The revised draft states two alternatives related to furnishing a written docket. The first alternative requires an agency to furnish a written docket whether or not there is an electronic docket. The second alternative requires that the agency provide a written docket only upon request. The issue here relates to electronic resources and whether mandating the furnishing of a written docket is necessary in a predominately electronic information era.

Which of these alternatives is better?

§ 308. Variance between proposed rule and adopted rule

The revised draft states as a variance standard the logical outgrowth test that is based on existing appellate decisions (See comment). Three factors are listed to determine whether the logical outgrowth test is met. If the test is not met, then the agency can not adopt the rule as stated, but must provide an additional notice and comment period before adoption of the rule.

Should the variance standard be adopted, and does Section 308 provide the proper standards for variance?

§ 402 (c), and (d). Separation of Functions

Section 402**, s**ubsections (c), and (d), provide for internal separation of functions for agency officials with conflicting responsibilities (adjudication versus investigation, prosecution, or advocacy) in an agency that has both prosecutorial (enforcement) and adjudicative responsibilities. Separation of functions is designed to ensure due process of law for parties to agency adjudications and to protect presiding officers from command influence by agency enforcement officials.

Should this section be adopted with the internal separation of functions requirements?

§ 402 (e) Standards for Disqualification of Presiding Officers

Section 402(e) provides for standards for disqualification of presiding officers including bias, prejudice, financial interest, or other cause for disqualification of a judge. The section also adopts a disclosure standard for disqualifications based upon an objective standard of reasonableness as to the presiding officer's impartiality, including an interest and a relationship standard.

Should this subsection be adopted with the stated requirements?

§ 402 (g) Disqualification of Decision maker

Section 402(g) provides for alternative decision makers to decide motions to disqualify a presiding officer. These alternatives include the presiding officer themselves, or the appointing authority or the chief ALJ. The presiding officer is probably the most knowledgeable person about the grounds for disqualification but some grounds for disqualification, such as personal bias or prejudice, might be more fairly determined by a decision maker other than the presiding officer. The other decision maker may be more objective in evaluating the disqualification motion.

Should this subsection be adopted, and which alternative is better?

§ 402 (j) Agency head exception

Section 402(j) provides for an agency head exception to disqualification of a presiding officer when the agency head is required by law to participate in the hearing or decision of a contested case. The subsection codifies the rule of necessity (See comments).

Should this subsection be adopted with the agency head exception?

§ 403 (d) Evidence rules: Legal Residuum standard

Subsection 403(d) (1) codifies standards for admissibility and persuasiveness of evidence in contested case proceedings. One of the alternatives adopts the legal residuum rule for persuasiveness of hearsay evidence. The other alternative adopts the federal reliability of evidence approach for persuasiveness.

Which alternative should be adopted?

§ 403 (g) Electronic Hearings

Subsection 403 (g) codifies an electronic hearing alternative in which if all parties consent, if allowed by law, and if there is an adequate opportunity for each party to speak, hear, and be heard, then the presiding officer may conduct the hearing by electronic means.

Should this subsection be adopted?

§ 409. Ex Parte Communications.

The presiding officer may not receive communications from any person on an issue in the case unless all parties participate. There are two exceptions to this rule. Under Section 409(b), the presiding officer may communicate with a law clerk or with a person authorized by law to give legal advice to the agency, or may communicate on ministerial matters with a personal staff member of the presiding officer who has not participated in the proceeding in an adversary role. Under Section 409(c), if the presiding officer is the agency head, he or she may communicate with agency staff for an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence, if the term is not a central, contested issue in the case and if the agency staff member meets the criteria in 409(c) (A), (B), and (C). Also, the staff advice must be made part of the record, and parties given an opportunity to respond. Various remedies are given under subsection (e) if a violation of Section 409 occurs.

Should this section be adopted with the exceptions set forth in subsections (b), and (c)?

§ 506. Standing.

This section adopts a general description of standing. The "person aggrieved or otherwise affected" language has become a term of art around which courts have built a considerable body of case law. The approach of this section leaves the courts free to continue development of this concept.

1. Is the term "otherwise affected" too broad, and does it eliminate the injury in fact test for party standing?

2. Should the standard be limited to "aggrievement" which requires that parties show injury in fact?"

§ 507. Exhaustion of Administrative Remedies.

The new material in this section is in subsections (c), (d), and (e). Subsections (c), and (d) are new and pertain to rulemaking only. They permit a person who did not participate in a rulemaking proceeding to appeal the rule without exhausting administrative remedies. However, before doing so, the party that is challenging the rule must petition the agency to initiate rulemaking in order to resolve or cure the issues that the petitioner is challenging, and disclose that petition and the agency action on it to the court. Subsection (e) codifies recognize exceptions to the exhaustion requirement.

Should this section be adopted and should the rulemaking provisions in subsections (c), and (d) be adopted with the issue exhaustion requirement?

§ 509. Scope of Review.

The drafting committee is divided on the approach to take to the subject of scope of review, and has put two alternative versions of scope before the annual meeting for guidance. Alternative 1 is general and would leave considerable discretion to the courts. Alternative 2 is a detailed approach that some commentators and a few states have adopted. The second and third paragraphs of the note following the text of the section give some of the major arguments for each alternative. Alternative 2 is the longest version of scope of review that research has disclosed. There are versions available that are longer than alternative 1, but considerably shorter than alternative 2.

Which of these alternatives should be adopted?

§ 601(c). Selection of ALJ's

Subsection 601(c) provides for two alternatives for selection and appointment of administrative law judges to the state office of administrative hearings. The first alternative is selection and appointment through the state civil service system. The second alternative is selection and appointment by the chief administrative law judge?

Which of these alternatives should be adopted?

§ 604(10), and § 605(a) (10), discipline and supervision of ALJ's by the chief ALJ.

Sections 604(10), discipline of ALJ's by Chief ALJ, and 605(a)(10) supervision of ALJ's by Chief ALJ provide for supervisions and discipline of ALJ's by the head of the office of administrative hearings, the chief ALJ. These provisions are controversial because some ALJ's believe that supervision and discipline by a chief ALJ can lead to compromises on an ALJ's decisional independence, or the risk of command influence on an ALJ's impartiality. Others believe that performance based supervision and discipline can be carried out without jeopardizing decisional independence.

Should these subsections be adopted?