

Agenda for November (11.9.2007) committee meeting:

I. Agenda items not discussed at April 2007 meeting plus issues discussed at the 2007 annual conference and later presentations of the MSAPA draft Act

1. Article 4 Adjudication

A. [Sections 401 to 420] please carefully read the text of the draft to identify any drafting or substantive issues that need to be discussed at the meeting.

B [Sections 401 to 420] should the MSAPA include in article 4 provisions governing prehearing conferences, settlement conferences, and provisions providing for time and place of hearings (hearing venue)? [See California Government Code Sections 11508 (time and place of hearing); 11511.5 (prehearing conferences); 11511.7 (settlement conferences)].

C. [Section 401] should the MSAPA use the external law approach to determine hearing rights? See Key issues below (section II of agenda key issues from annual meeting).

D. [Section 402(c), (d)] should the MSAPA contain a separation of functions requirements? If so, does the language in the draft properly articulate the internal separation of functions requirements? Do we need additional language? See Key issues below (section II of agenda key issues from annual meeting).

E. [Section 402(e)] Should the MSAPA include language recognizing that presiding officers have the responsibility to disclose information to lawyers and their clients in adjudicative proceedings to provide information related to disqualification motions? Should the MSAPA provide for language similar to Section 12(A) of the Uniform Arbitration Act (See Section 12, 2000 Uniform Arbitration Act, and Exhibit 1 to this agenda)? See Key issues below (section II of agenda key issues from annual meeting).

F. [Section 402(g)] should the MSAPA include language specifying the decision maker for motions to disqualify a presiding officer, and which decision maker, the presiding officer or the appointing authority or the chief ALJ? See Key issues below (section II of agenda key issues from annual meeting).

G. [Section 402(j),] should the MSAPA include language recognizing 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? See Key issues below (section II of agenda key issues from annual meeting).

H. [Section 403] should the MSAPA expressly provide a burden of proof provision (typically, preponderance of evidence) and identify which party has the burden of proof, the agency in an enforcement action, and the applicant for a license in an application proceeding?

I. [Section 403.] should the MSAPA expressly provide for a pleading that begins the contested case proceeding, and should it differentiate between agency enforcement actions, and applications for licenses or benefits? [See California Government Code Sections 11503 (filing of an accusation initiates certain agency enforcement actions); 11504 (statement of issues initiates adjudicative hearing for applications or other similar proceedings); 11505 (service of accusation), 11506 (notice of defense (equivalent to answer and demurrer)).

J. [Section 403(d) (1).] should the MSAPA include standards for ALJ evidence rulings that are based on the applicable rules of evidence in the jurisdiction in which the hearing takes place? Should the MSAPA include the legal residuum rule as part of the evidentiary standards, or should it follow the federal standard (reliability of evidence) for sufficiency of evidence to support fact findings under the substantial evidence standard? See Key issues below (section II of agenda key issues from annual meeting). Can the language of section 403(d) (1) be improved by redrafting, looking at Section 10 of the 1961 MSAPA as a possible model for drafting language?

K. [Section 403(g).] should the MSAPA provisions on electronic hearings be based on a consent standard (no party objects) or based on the requirements of law? See Key issues below (section II of agenda key issues from annual meeting).

L. [Section 403(k).] should the MSAPA have a pro se litigant provision? See proposed subsection (k) providing for a right to represent oneself, and also recognizing that pro se litigants may need more explanation of agency procedures to effectively participate in the contested case proceedings. The proposed language permits that explanation to the extent consistent with fair hearing requirements.

M. [Section 403(o)] should the MSAPA have a provision mandating training for new presiding officers, especially non lawyer presiding officers, in contested case procedures, and in the rules of evidence applicable to contested case proceedings?

N. [Section 409(b)] should the MSAPA ex parte communications provisions include the “law clerk” and “ministerial matters” exceptions language? See Key issues below (section II of agenda key issues from annual meeting).

O. [Section 409(c)] should the MSAPA ex parte communications subsection exception for technical and scientific issues include the not a contested issue requirements (subsection (c) (C)) and include the requirement that those communications be made a part of the hearing record (subsection (d)? See Key issues below (section II of agenda key issues from annual meeting).

P. [Section 409] should the MSAPA ex parte communications provisions include a subsection that applies the communication ban to the agency head when acting as a decision maker but not as the presiding officer (e.g. recommended decision by presiding officer but final decision by agency head)?

Q. NEW [Section 410, added on page 53, before preexisting Section 410 (now Section 411). Should the MSAPA have provisions containing an ALJ Code of Ethics?

R [Section 411(c)] should the MSAPA contain a conditional or permissive intervention standard?

2. Article 5. Judicial Review

A. [Sections 501 to 509] please carefully read the text of the draft to identify any drafting or substantive issues that need to be discussed at the meeting.

B. [Section 501]. Should the MSAPA include a provision allowing judicial review of agency failure to act? See proposed language in section 501(a).

C. [Section 506] Should the MSAPA include provisions governing standing and does the current language codify existing law in ways that would allow this provision to be easily adopted in states with existing standing law that varies significantly? See Key issues below (section II of agenda key issues from annual meeting).

D. [Section 507(d)] Should the MSAPA include a petition for rulemaking requirement as a precondition (exhaustion of administrative remedies) for judicial review of rules when the issue raised on judicial review was not raised or considered by the agency in the rulemaking proceeding? See Key issues below (section II of agenda key issues from annual meeting).

E. [Section 509] should the MSAPA adopt alternative 1, or alternative 2, for the language of the scope of review provisions in section 509? See Key issues below (section II of agenda key issues from annual meeting).

II. Key issues from annual meeting statement of key issues

KEY ISSUES IN THE PROPOSED MSAPA REVISION

A. § 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?

B. § 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?

C. § 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?

D. § 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?

E. § 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?

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

Section 402, subsections (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?

G. § 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?

H. § 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?

I. § 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?

J. § 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?

K. § 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?

L. § 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)?

M. § 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 “aggrieve” which requires that parties show injury in fact?”

N. § 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?

O. § 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?

P. § 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?

Q. § 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?

III. Drafting changes in response to comments from the annual meeting and other presentations:

Article 1

1. Section 102(5) [definition of agency record] Add "informal and emergency" before the word "cases" in the last clause of the definition.

(Annual meeting comment).

2. Section 102(6) [definition of contested case] Delete “or by the common law.” or replace with the term “judicial decision”? (Discussion at annual meeting and ABA meeting). Should the MSAPA adopt the external law approach? See Key issues below (section II of agenda key issues from annual meeting).

3. Section 102(9) [definition of emergency adjudication] Delete “immediate” before danger. (Annual meeting comment; redundant to use immediate twice in same definition).

4. Section 102(11) [definition of guidance documents] should “once issued, binds the agency, and” be added after “that”
(Annual meeting comment).

5. Section 102(12) [definition of index] add “or collection” after list. Redraft text to broaden definition.
(Annual meeting comment).

6. Section 102(21) [definition of person] Add “statutory trust” to list of entities that are persons for purposes of the definitions.
(Annual meeting comment).

7. Section 102(26) [definition of rule] Add new exception for “forms”
Subsection (H).
(Annual meeting comment)

Article 2

1. Section 201(d) [Internet website] should the bracketed language [or other appropriate technology] be included in all places where the term internet website is used?
(Annual meeting comment). Should the publisher publish guidance documents or the agency? See Key issues below (section II of agenda key issues from annual meeting).

2. Section 201(g) (3) [administrative bulletin] put brackets around the term administrative bulletin.
(Annual meeting comment)

3. Section 202 [required agency rulemaking and recordkeeping] Should this section be retained with the requirements of adopting rules as stated in subsections (1), (2), (3), and (4).
(Annual meeting discussion and written comments).

4. Section 202 [required agency rulemaking and recordkeeping] Should the subsections for Section 202 be revised to use (a), (b), etc, consistent with the style manual?

5. Section 202(4) [public hearing rules] redraft duplicative lead in (each agency), and provide style symmetry.
(Annual meeting comment)

6. Section 202(5) [filing adopted rules] substitute “the agency’s for the word “all”.
(Annual meeting comment)

7. Section 202(6) [maintain index] bracket Article, and add comma after current.
(Annual meeting comment)

8. Section 202(7) [maintain custody] substitute “the agency’s for the word “all”.
(Annual meeting comment)

9. Section 203(c), (d) [declaratory orders] Delete in writing in subsection (c). Add “in writing” [or any record] is subsection (d). (Annual meeting comment).

Should agency decision to not issue declaratory orders be judicially reviewable? See Key issues below (section II of agenda key issues from annual meeting). Availability of judicial review off decisions to not issue a declaratory order may impact the agency’s ability and willingness to issue declaratory orders because of limited resources (staff time and money). [comments at SCARLA presentation]

Article 3

1. Section 301(d) [written rulemaking docket] Should the MSAPA require agencies to furnish ha written rulemaking docket? See Key issues below (section II of agenda key issues from annual meeting). See also section 301(d) survey results.

2. Section 302(b) (3) [rulemaking record] should we include a legislative note on the subject of this subsection?

3. Section 308 [variance between proposed rule and adopted rule] Should the MSAPA adopt the variance standard set forth in section 308? See Key issues below (section II of agenda key issues from annual meeting).

4. Section 309(a), (b) [emergency rules; expedited rulemaking]. Should we separate these into two separate sections?
(Annual meeting comment).

5. Section 309(a) [emergency rules] should we require the agency to give notice to persons who have requested notice of the emergency rule as a substitute or an alternative to notice to those who may be affected by the emergency rule? [Last sentence of (a)].

6. Section 310(c) [guidance documents] should subsection (c) be deleted given the ease with which agencies can change guidance documents? Or should the text of subsection (c) be added to or included in the definition of guidance documents (Section 102(11))?

(Annual meeting comments).

7. Section 310(d) [guidance documents] delete “or not” before the word “whether” and delete the comma after the word “document”. Should we use “may” or “must” for enforcement to have consistency between subsection (c), and (d)?

(Annual meeting comment).

Article 4

1. Section 403(i) [Contested Case Procedure] add the words “video conference” after the word “television” to maintain style symmetry with subsection (g).

(Annual meeting comment).

2. Section 404(c) (3) [Notice] add the words “and regulatory” after the word “statutory” To include applicable regulations

(Annual meeting comment).

3. Section 404(c) (6) [Notice] add the words “or participate in” after the word “attend ” to cover telephone hearings by consent.

(annual meeting comment).

4. Section 409(b) [ex parte communications] Should attorney general staff members providing legal advice to presiding officer at same time be allowed to advise investigators and prosecutors in the same proceeding? (Nichols, NC)

(annual meeting comment)

5. Section 409(d) [ex parte communications] replace the word “verbal” with the word “oral”.

(annual meeting comment).

6. Section 409(h) [ex parte communications] add the words “including dismissal of the application or other adverse ruling on the merits as a sanction” after the words “may be granted.”

(annual meeting comment).

7. Section 411 [Intervention]. Should existing parties have the right to be heard on petitions for intervention? See proposed new subsection 411(e).

(annual meeting comment).

8. Section 416 [licenses] Does this section apply to drivers license proceedings? If no, should it apply?

(annual meeting comment).

9. Section 416(a) [licenses] Should subsection (a) be shortened to delete “an explanation of” so that the clause reads the agency shall include the reasons for denial?

(annual meeting comment).

10. Section 419(a) [Reconsideration] Should the reconsideration process (rehearing process) include an opportunity for reconsideration after a recommended decision and then again after a final decision, or should there be just one such opportunity after a final decision (order), with some opportunity to comment on the recommended decision before it becomes a final decision or order?
(annual meeting comment).

Article 5

1. Section 501(c) [right to judicial review] Should this section use the term “irreparable harm” consistent with Sections 502 and 507(e)?
(annual meeting comment).

2. Section 502 [review of agency action other than order] should this section use the term “irreparable harm” consistent with Sections 501 and 507(e)?
(annual meeting comment).

3. Section 507(e) [exhaustion of administrative remedies] should this subsection use the term “irreparable harm” consistent with Sections 501, and 502?
(annual meeting comment).

Article 6

1. Section 601(b) [Creation of OAH] should the term ‘non partisan’ be added as an additional modifier to the term “independent agency”? Should the subsection be redrafted to eliminate purpose language which may not belong in statutes?
(Annual meeting comment)

2. Section 603(a) [Appointment of chief ALJ]. In one state, the chief justice of the state Supreme Court appoints the chief ALJ, and this is required by separation of powers provisions in the state constitution. (Governor Appointment violates separation of powers?)

Research and include in a comment, if appropriate.

(Annual meeting comment)

3. Section 604 [powers and duties of OAH] Should the subsections for Section 604 be revised to use (a), (b), etc, consistent with the style manual?

4. Section 604(3) [powers and duties of OAH]
Should the text be redrafted to add “attempt to” before the word “ensure”
(Annual meeting comment)

5. Section 608(b) [decision making authority of ALJ’s]
Substitute the words “does not” for “shall not be construed to”
(Annual meeting comment)

6. Section 608(c) [decision making authority of ALJ's]
Substitute the words "does not" for "may not be construed to"
(Annual meeting comment)