COMMENTS ON OCTOBER 2005 MEETING DRAFT, REVISED MODEL STATE APA

There are two areas on which I would like to comment: ex parte communications and whether the rules of evidence should apply in disputed adjudications. I wish to emphasize that my comments are mine alone and do not in any way represent the views of my employer, the U.S. Nuclear Regulatory Commission or of any other organization or entity with which I am associated.

Ex parte communications

With regard to ex parte communications, I have some comments specifically about the exception permitted in Section 405(b), and some more general comments. First, I applaud the committee's addition of the disclosure and response requirements in Section (c) as an improvement on the earlier draft's permitting the communications in Section (b) without such disclosure and response opportunity. This protection is vital if the exception allowed in Section (b) is to remain, and indeed, I would expand Section (c) to allow for an opportunity for cross-examination of the technical assistant or advisor when requested and found to be appropriate to allow for a meaningful response – again, *if* the exception in (b) is to remain. I suggest, however, that there are still problems with the exception itself, and that it should be removed or greatly restricted.

As an member of the administrative judiciary for over 20 years, first with the State of Tennessee's central panel of ALJs and now with the Atomic Safety and Licensing Board Panel of the NRC, and as one who has some scientific background including an undergraduate biology (second) major, I am acutely aware that the idea of any person providing truly objective advice on technical matters is more illusory than might be apparent on the surface. Recent and current scientific controversies such as those surrounding issues relating to the use of genetic knowledge, the teaching of evolution versus "intelligent design," global warming and its impacts, nuclear power and safety, just to name a few, demonstrate that there may be strong differences of opinion on scientific and technical issues. Less obvious and/or controversial issues are not free of such differences of opinion. Indeed, I expect that with most technical issues, there exists the possibility of varying opinions on issues both broad and narrow, obvious and nuanced, and that it is the rule rather than the exception that there would be at least some differences of opinion on technical matters that are likely to be involved in any administrative adjudication.

At the same time, it is quite possible that many if not most persons who might serve to advise a presiding officer might view him or herself as being capable of being objective. But just as it has been said with regard to judging, that "[w]e may try to see things as objectively as we please[; n]onetheless, we can never see them with any eyes except our own," Cardozo, *The Nature of the Judicial Process*, I think that confidence in any advisor's true ability to be completely objective is likely to be misplaced, no matter how sincere and strong the advisor's effort to be so. I would not expect any such advisors to be deceptive or harbor any mischief or less than good faith motives in viewing and professing themselves to be objective. It is simply that the reality is that we all tend to see our own views as being correct, reasonable, and even objective assessments of whatever subject they cover. We all have our blind spots, however, and it is probably the rare exception to be truly aware of the potential for such blind spots and to give advice explaining "the technical basis of, or technical terms in, ... evidence in [a] record" in a manner that truly does not augment the evidence in the hearing record in some form or fashion – similar in nature to the evidence provided through expert testimony. Indeed, expert

witnesses generally testify not only on their own opinions but also on such things as “the technical basis of, or technical terms in, ... evidence” already introduced into a record.

This is not to say that, for example, providing simple definitions of technical terms would never be possible to do in an objective manner, where the terms are simple and subject to short, dictionary-type definitions. If this is the case, however, there would seem to be less necessity for a technical advisor, and it would also seem that the presiding officer would or should have asked a witness using a technical term to provide a definition at the time it is used, so that the presiding officer could understand it at the time and be able to follow the testimony in which it is used.

It would also seem that those situations in which a technical advisor might be perceived to be needed would likely to be those involving somewhat complex issues that the presiding officer does not understand very well. This in itself would not only raise questions about the presiding officer’s ability to follow the testimony when provided. It would also open the door for potential very significant problems regarding the unknown (to the presiding officer) ways in which the advice might be unintentionally (on the part of the advisor) one-sided. The obvious cure for these problems is to have any such “advice,” or information, provided openly, before all parties, and subject to some level of cross-examination to bring out, among other things, aspects that might not otherwise be obvious in what is said (including other points of view, inconsistencies, etc.), a well as questioning by the presiding officer to clarify any points that are not clear. I hasten to add that this need not be occasion for great delay, or for much if any delay over and above that involved in the disclosure and response procedure described in the current section 405(c).

I am aware of the argument that, unless such advice is permitted on an ex parte basis, a presiding officer will not be able to obtain frank and candid advice of the sort that might not occur in public. My response to this is, first, that the fear that candor is inhibited by being observed I have found to be mitigated in large part (if not completely) by the phenomenon of simply “getting used to” being recorded, for example, in a hearing. I base this on, among other things, having sat as an ALJ in adjudications with board and commissions in Tennessee, who conduct open deliberations in public, often quite effectively. Second, if there is cause for lack of candor originating in some level of embarrassment in talking openly, I would expect it to be either because (and this is less likely) there is some question about the propriety of what is being said, or (more likely) there is hesitance on the part of the presiding officer to admit in public that he or she does not understand something and risk being seen as asking a “stupid question.” Nothing surely need be said about the former possibility; about the latter I would suggest that any good judge (at any level, including the administrative judiciary) should develop an ability to ask questions that may seem “stupid” (which, for some, might at times require about as much courage, of a sort, as some more obvious aspects of the job may require).

All of the above applies to any advisor meeting the criteria of subsections (1) and (2) of Section 405(b). Regarding subsection (3), I am not clear whether this third criterion limits all advice under section (b) to those having a purpose of providing advice “concerning a settlement proposal advocated by the advisor or the parties,” or is intended to relate to one among several types of advice that also meets the criteria of subsections (1) and (2). I would, however, point out that generally in litigation information elicited in settlement negotiations (of a sort that could well come out, even if only inadvertently, in advice “concerning a settlement proposal”) is inadmissible, for a good reason: the parties may be willing to say things in such negotiations, in a tentative or “arguendo” way, which they would not be willing to say in litigation, because of the

effect they might have on the outcome when, for example, the burden may be on one party to prove the other did x, y, or z, etc. For this reason, to give one example, in Tennessee when we began a pilot project requiring attempts at mediation in all civil services cases, in all such cases there was both a hearing judge and a mediation judge appointed, and the two judges were not to discuss the case with each other, other than for the mediation judge to tell the hearing judge that a settlement had been reached by the parties. There are significant concerns with getting a judge decision-maker in a case too involved in any settlement activities, apart from approving a settlement, because of the sorts of concerns I describe.

With regard to settlement proposals "advocated by the advisor" rather than the parties, it is unclear to what this refers, but it causes my antenna to go up, wondering why the judge and advisor should be discussing a settlement proposal not advocated by the parties. If it is of a sort that a mediator might throw out to parties in a very tentative way, then I suggest the better practice is to have separation between the judge and anyone essentially serving (even just in part) in a mediation capacity, for the reasons I have stated. With regard to application of this to the agency head, I don't see why the parties could not propose a settlement themselves, and again find the rule unclear on any settlement proposal "advocated by the advisor."

Finally, more broadly, I suggest that the general definition in the rule for ex parte comments is too narrow. I believe the trend, at least since adoption of the ABA Model Code of Judicial Conduct of 1990 and probably before, is that the ex parte prohibitions pertain to communications from anyone, not just interested parties and persons. For example, a judge should not talk about issues in a case with, for example, a professor friend who might be an expert on a subject at issue but who is not involved in the proceeding and has no "dog in the fight." Nor should the judge discuss such issues with anyone, if they concern the merits of a case or if, in the words of the model code, any communication received might confer a tactical advantage on one party.

The plain, simple, and important idea is that a decision should be based on the record exclusively, and this should exclude any ex parte communications from anyone, whether or not an interested party or person – because, no matter how innocently intended, such communications may have an effect on the judge's thinking which, although unintended and unexpected, may affect the case in ways the parties would care about, and about which they might wish to speak and present an opposing viewpoint, through evidence and/or argument. Under your current definition, the parties would not even know about the communication from the professor friend or other person, or its effect, and would thus have no way whatsoever to address or rebut it, to attempt to demonstrate that what might seem obviously valid to the judge based on his or her trusted friend's comments, actually has another side to it.

In this regard, both the 1990 Model Code and the current proposed revision contain essentially the same language, which I commend to you for your consideration:

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

See ABA Model Code of Judicial Conduct (1990), Canon 3(B)(7). The proposed revised code adds to the provision itself what was formerly only in the comment the requirement that a judge is not to independently investigate facts in a case, and must make reasonable efforts to ensure that the rule is not violated through law clerks or other staff. *See* Preliminary Draft, ABA Model Code of Judicial Conduct, June 30, 2005, Canon 2, Rule 2.10 (found at www.abanet.org/judicialethics/Canon2.pdf).

The above states what has come to represent basic fairness with regard to ex parte communications in litigation. There is no practical or legal reason it should not be applied equally to administrative adjudication in the states, some of which already follow this requirement in essence. We in the U.S. hold ourselves out to the world as a model of fairness in our legal system. We advocate transparency for other countries. There is no reason in my view that we should provide litigants in administrative adjudication any less fairness, or that we should do anything different than that proposed in the model code, and I strongly suggest you change the definition and basic principles regarding ex parte communications so that it follows the provisions of the model code.

Disputed Case Procedure and Rules of Evidence

As an administrative adjudicator who has conducted proceedings both under the rules of evidence, with an exception that I believe was based on the 1981 Model State APA, and not under the rules, I believe that the better model is to follow the rules unless, in essence, it is not reasonably feasible for a party to present evidence that would be admissible under the rules, and the evidence is of a sort that reasonably prudent persons would consider reliable under the circumstances. The rules of evidence have been developed over time (the rules following case law that had developed prior to their adoption in the various jurisdictions) as the best way to assure fair adjudication, and moreover provide standards to follow, in contrast to a more open-ended approach of not following the rules, the result of which can in probably too many instances be either to "let it all in for what it's worth," or to let in what just more or less "seems ok" to the presiding officer who happens to be hearing the case, and exclude the rest. With exceptions when warranted under a defined standard such as I summarize above, for what might be viewed as comparable to "reliable hearsay," it is easier for all concerned – parties and judges – to have a set of standards to which to look for guidance, but to which exceptions may be granted where reasonable. Where parties are unrepresented by counsel, such an exception may be applied it is not reasonably feasible for them to present evidence that would be admissible under the rules

I appreciate your attention to my comments and will be glad to meet with you to discuss these

issues when you are here in the DC area later this week. For your information, I attach below a short biographical sketch.

Ann Marshall Young

Ann Marshall Young has been an administrative judge with the Atomic Safety and Licensing Board Panel (ASLBP) of the U.S. Nuclear Regulatory Commission since July 2000. Prior to her appointment to the ASLBP, she was an administrative law judge for seventeen years with the Tennessee Department of State, Administrative Procedures Division, Tennessee's central panel of administrative law judges, where she conducted hearings for a variety of state agencies in areas including employment, health, environmental, and human rights law. She has also served as an adjunct lecturer in law in the legal writing program at Vanderbilt University School of Law in Nashville, Tennessee, from which she graduated in 1979; as an assistant general counsel for the Tennessee Department of Health and Environment; as a legal aid attorney; and as staff attorney for the Institute for Children's Resources (a non-profit advocacy organization in Nashville). Before beginning her career in law, she received an A.B. degree (in philosophy of religion) from Oberlin College (1968), completed a second undergraduate major in biology (1971), and earned a master's degree in educational policy studies while teaching in an inner-city Nashville public school (1973-'76).

Judge Young writes and speaks from time to time on ethics and other subjects related to administrative adjudication, including judicial evaluation, logic and legal writing, the history of administrative adjudication and judicial independence, and innovative techniques for handling expert testimony in complex adjudication; and received the National Association of Administrative Law Judges (NAALJ) 1996 Fellowship Award for her article, "Evaluation of Administrative Law Judges: Premises, Means, and Ends -- A Proposal for Rethinking Traditional Models in Light of Due Process Concerns and Modern Management Theory and Research," which appeared in the Spring 1997 Issue of the NAALJ Journal. Judge Young currently serves on the Council of the Administrative Law and Regulatory Practice Section of the American Bar Association (ABA), as co-chair of the section's Adjudication Committee, and as a member of the ABA National Conference of the Administrative Law Judiciary (NCALJ) Special Committee on the Model Code of Judicial Conduct, and the Science and Technology, Individual Rights, and Government and Public Sector sections of the ABA. Prior activities include being president of NAALJ, ABA Judges' Journal Editorial Board member, NCALJ Judicial Independence Committee Chair, National Association of Women Judges Administrative Judiciary Committee Co-Chair, NCALJ Executive Committee member, and planner and chair of national conferences on equal justice in administrative adjudication, and psychology of judging and hidden biases. She has participated in international administrative law conferences sponsored by the Canadian Council of Administrative Tribunals, and in 1998 was part of a group of U.S. women judges who traveled to China to visit courts at all levels and meet and interact with women judges in Beijing, Shanghai and several smaller cities, towns and provinces, which also served as the basis for articles on her experiences there. She is currently working on a novel that includes situations relating to health care of the aged and administrative adjudication.

The statements and opinions of Judge Young are hers alone and do not necessarily represent the views of the U.S. Nuclear Regulatory Commission or any other institutions or organizations with which she is or has been associated.

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