Staff Advice to Decisionmakers
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Drafting Committee on Revised Model State Administrative Procedure Act

The heads of state agencies often adjudicate cases that have a large impact on the public interest. For example, their cases often concern health, safety, economic, and environmental regulation, consumer protection statutes, or public utility or insurance ratemaking. The public interest is heavily involved in these cases and it is essential that they be decided correctly. The stakes go far beyond the interests of the private parties that are litigating them and involve critical interests of all the residents of the state.

Agency heads require staff assistance when they adjudicate important cases. Agency heads are often not technically sophisticated in the problems dealt with by their agencies. They may lack any scientific or technical background or any experience in the matters they must resolve. They may be part-timers with very limited time to consider the record and decide the case. They may be overwhelmed by their caseload or by massive and complex hearing records. The agency's staff typically includes employees with a repository of expertise on the issues to be resolved. As a result, it is imperative that staff members be able to furnish advice to the agency heads so that the heads can decide the cases wisely and correctly.

This staff advice may concern critical issues of interpretation of statutes and regulations. It often concerns issues of policy, politics, and discretion. The staff provides technical assistance on understanding and interpreting the conflicting expert testimony in the record. The staff also assists in drafting opinions. In short, in important and difficult cases, there is a great deal of back-and-forth communication between agency heads and agency staff. The state APA must not stand in the way of agency heads receiving this necessary staff advice.

The draft of the Model State APA that we will be considering at our Virginia meeting contains in §405(b) a provision allowing ex parte communications to presiding officers from agency staff for the purpose of furnishing "technical assistance and advice." Incidentally, this provision should be redrafted so that it permits technical advice to agency heads as well as presiding officers. However, §405(c) requires that all such advice be part of the hearing record whether it is written or oral. Private parties then have an opportunity to respond.

This provision was placed into the draft at the urging of several members of the drafting committee who heard complaints from private lawyers about this issue. The private lawyers said that agency decisionmaking was like a black box and they had no way to know who said what to whom. They feared that biased staff members persuaded agency heads to ignore their arguments. In order to better represent their clients, they needed to know exactly what advice the agency heads received so they could attempt to counteract it with additional arguments.

I am opposed to §405(c). I feel so strongly on this issue that I intend to oppose adoption of the Model Act within NCCUSL if it is not removed. If this provision is in the final version of the Model Act, it will never be accepted by state legislatures. It will provide a lightning rod for opposition by state government agencies and would guarantee that the new MSAPA will not be taken seriously. In the unlikely event that it is enacted by any states, it will do a great deal of harm to the public interest.

Notice that the Act already contains protections against inappropriate staff advice to agency adjudicative decisionmakers. The Act prohibits advice from staff members that have been engaged in investigation and prosecution in the case in which advice is given. (§405(b)(1)) Only neutral staff members who have not been involved as adversaries in the case can give advice. That is the principle of "separation of functions." In addition, the advisers cannot insert factual material that is not in the record. (§405(b)2) That is the principle of the "exclusive record."

I have been studying administrative law for more than thirty years. Everything I know about administrative law, and everything I know about government, tells me that if staff advice to decisionmakers must be placed into the record, there will be no candid staff advice. It's just that simple. Nobody will ever place anything into the record that might jeopardize the agency's decision on judicial review by providing fodder for lawyers' arguments, or which might expose the agency heads to embarrassing treatment in the press.

As a result, agency heads will be cut off from receiving candid advise from the staff and the effect will be poorly reasoned decisions and great harm to the public interest. (Or in some cases, agency heads and staff will cheat by engaging in oral communications that are not memorialized in the required memorandum). I will make three basic arguments against §405(c).

1. Supreme Court precedent. Section 405(c) is inappropriate because it permits outside scrutiny of the decisionmaking process of adjudicators. The Supreme Court has consistently blocked efforts to expose the decisionmaking process of agency heads, including scrutiny of the communications between the agency heads and advisory staff..

The leading cases of all time about the agency adjudicatory process are the four *Morgan* cases decided back in the 1930's and 1940's. These cases concerned ratemaking for livestock agencies and, because of the underlying statute, were treated as adjudication subject to due process. The Secretary of Agriculture made the final decision and the cases concerned what sorts of advice the Secretary could receive.

The Supreme Court held that courts could not examine the decisional process of the Secretary. Just as litigants cannot inquire about the thinking process of a judge, or about the judge's consultations with a law clerk, the courts cannot do this with respect to agency heads. Section 405(c) violates this principle by requiring exposure of the decisional process of agency adjudicators.

In the 4th *Morgan* case, *United States v. Morgan*, 313 U.S. 409 (1941), the Supreme Court said:

> Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies.
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> But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." [citing the first *Morgan* case, 298 U.S. 468, 480.] Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." [citing the 2d *Morgan* case, 304 U.S. 1, 18] Just as a judge cannot be subjected to such a scrutiny... so the integrity of the administrative process must be equally respected... *It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other* [citing the 3d *Morgan* case, 307 U.S. 183, 191]. (emphasis added)

The admonition in the 4th *Morgan* case against judicial examination of the decisional processes of an agency head has been echoed in countless cases and always followed. It was applied in the more recent case of *Grant v. Shalala*, 989 F.2d 1332 (3d Cir. 1993), which involved judicial scrutiny of the decisionmaking process of an ALJ. The Court said:

> Availability of the type of discovery and trial that the plaintiffs sought in this case would undermine this vital independence [of federal ALJs]. ... It has long been recognized that attempts to probe the thought and decision making processes of judges and administrators are generally improper. In [*Morgan IV*] the Supreme Court observed that questioning a judge or administrator about the process by which a decision had been reached would undermine the judicial or administrative process. ...
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> In this case, the plaintiffs, through discovery, have already delved deeply into ALJ Rowell's decision making processes, work habits, and private

> communications. For example, they deposed an opinion-writer who assisted ALJ Rowell in writing opinions for five years, and they plainly intended to rely heavily on her evidence. During her deposition, under questioning by plaintiffs' counsel, she gave evidence concerning, among other things, ALJ Rowell's instructions concerning opinions that she was assigned to draft, his use of "stock" language in opinions, differences between his work procedures and views and those of other ALJs, the length of his opinions and the number of revisions he made, her evaluation of aspects of his work, his consultation of law books, his familiarity with and views about particular rules of law, whether she thought his opinions were principled or result-oriented, how often she disagreed with his decisions, whether she believed that his decisions discriminated against certain groups, how he viewed his role as a Social Security ALJ, whether he ever uttered racial or ethnic epithets, complaints about him from typists and secretaries, how he evaluated certain types of evidence, the number of hours he worked, his views regarding particular physicians in the area, his views regarding alcoholism and obesity, and many other matters. ...
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> Such efforts to probe the mind of an ALJ, if allowed, would pose a substantial threat to the administrative process. Every ALJ would work under the threat of being subjected to such treatment if his or her pattern of decisions displeased any administrative litigant or group with the resources to put together a suit charging bias. Every ALJ would know that his or her staff members could be deposed and questioned in detail about the ALJ's decision making and thought processes, that co-workers could be subpoenaed and questioned about social conversations, that the ALJ's notes and papers could be ordered produced in discovery, and that any evidence gathered by these means could be used, in essence, to put the ALJ on trial in district court to determine if he or she should be barred from performing the core functions of his or her office. This would seriously interfere with the ability of many ALJs to decide the cases that come before them based solely on the evidence and the law.

2. Decisional processes of judges. In my opinion, this drafting committee cannot interfere with the decisional processes of agency heads without being prepared to require the same thing of all judges: their consultations with law clerks must also be placed on the record so litigants can determine exactly what was said to and by the judge in chambers, including all the advice that law clerks give the judge about legal issues, policy, discretion, even the political impact of a decision. Such disclosure would surely be a big help to counsel for the losing party in seeking reconsideration or making arguments at the next appellate level. Since the committee obviously isn't in favor of requiring disclosure of law clerk communications to judges, it should not require disclosure of communications to agency heads.

When I made this argument at the last meeting of the drafting committee, several members said that judges are different from agency heads because judges are neutral

while agency heads have responsibility for carrying out a program and are therefore biased. But I disagree. They are not different.

All decisionmakers are biased. Every judge has a policy bias—liberal, conservative, extreme liberal, extreme conservative. But we allow all of these judges to decide individual cases because we are confident that they can set aside their bias and decide the particular case on the facts in the record and arguments of counsel. It's no different from agency heads. They have (and should have) a bias in favor of enforcing the statute for which they're responsible, but that doesn't mean that they can't decide individual cases fairly. They are sworn to do that and, in practice, they do so. Agency heads are entitled to, and need, as much freedom from outside scrutiny of their decisionmaking process as are judges.

3. The attorney-client privilege. I believe that the members of this Committee are in favor of the attorney-client privilege. But why? Wouldn't justice be served if you could find out all the things your opponent said to his attorney or the attorney said to the opponent? Imagine all the relevant evidence that's cloaked behind the privilege. We would be much better able to determine the truth at a trial if we could get at all these communications.

But we know that if these conversations weren't privileged, they wouldn't occur. Clients would never dare to speak candidly to lawyers if everything they said would have to be disclosed in a deposition. For the same reasons, attorneys couldn't give candid advice to their clients. So we sacrifice the truth-finding function of trials by pursuing a greater good—encouraging full disclosure by clients to lawyers and candid advice by lawyers to clients. To achieve that greater good, we protect attorney-client communications from any form of disclosure.

It's the same with advice by staff members to agency heads. It won't and can't occur in the open. Disclosure will prevent staff members from giving candid advice—really leveling with the agency heads—just as it would discourage clients and lawyers from leveling with each other.

Conclusion: I could go on and on, for example, by discussing the impact of open-meeting sunshine laws on the quality of discussion at public meetings of agency heads. Sunshine laws have effectively prevented candid discussions at public meetings because agency heads and staff don't ever want to let the public know about their disagreements, their decisionmaking processes, or their ignorance. But I hope I've said enough to articulate my strong conviction that it would be a serious mistake to require disclosure of staff advice to agency decisionmakers as required by draft §405(c).

Thank you for your attention to my arguments.

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