

Draft Agenda
NCCUSL MSAPA drafting committee meeting
(April 20 to 22, 2007)

I. Primary agenda item: drafting committee will read and review the entire draft of the MSAPA and take a fresh look at the provisions and language of the act.
(Within that broader task, there are a number of specific sections of the act in which the reporter seek guidance from the committee).

II Article 1 General Provisions

A. [Sections 101 to 103] Please carefully read the text of the draft to identify any drafting or substantive issues that need to be discussed at the meeting. Please review the definitions in Section 102.

B. Section 102 (Definitions)

[Section 102(5)] should the MSAPA provide for a definition of an agency record ?
Proposed language has been added after the existing definition of agency head in Section 102(4) [page 5, after line 1]

III. Article 2. Public Access to Agency Law and Policy

A. [Sections 201 to 204] 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 201(c)] Should the MSAPA provide that the rules publisher have the responsibility to maintain the official record of adopted rules filed by the agency with the publisher?

C. [Section 201(h)(f)] Should Section 201(f) be deleted in that the agency duties under this section duplicate the duties of publishers? [See Section 201(f) issues memo]

D. [Section 201(i) (g)] Should the MSAPA provide for an administrative rules editor, with the power to edit agency rules? [Section 201(i)(g)] includes proposed text providing the rules publisher with the power to make non substantive edits of proposed or adopted rules with notice to the adopting agency. [See administrative rules editor Section 201(i)(g)] issues memo with statutory variations from the states that have existing administrative rules editor provisions.

E.. [Section 201(j)] Should the MSAPA provide for the publisher to publish agency guidance documents filed with the publisher? [See Section 201(j) issues memo]

IV. Article 3. Rulemaking

A. [Sections 301 to 317] 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 309(b)] Should the MSAPA provide for direct final rulemaking in place of the existing fast track rules provisions as stated in Section 309(b)? [See Section 309(b) issues memo]

C. [Section 310(d)] Should the MSAPA provide for do novo review by courts of the validity of guidance documents as stated in section 310(d)? [See Section 310(d) issues memo] Should section 310(d) include a reliance (equitable estoppel) provision?

D. [Section 310(f)] Should the MSAPA provide for filing and publication of guidance documents by the rules publisher? [See section 201(j) issues memo, which addresses this issue]

V. 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. [Section 402(e), page 38, lines 19 to 20] 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, Exhibit 1 to this agenda).

C. [Section 403(d)(1), page 40, lines 9 through 17] 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? 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? [See Section 10, 1961 MSAPA, Exhibit 2, to this agenda, below]

D. [Section 403(g), page 42] Should the MSAPA provisions on electronic hearings be based on a consent standard (no party objects) or based on the requirements of law?

E. [Section 403(k), page 42] 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.

F. [Section 403(o), page 43] 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?

G. 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?

H. [Section 411(c), page 54] Should the MSAPA contain a conditional or permissive intervention standard?

VI. 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, page 66]. Should the MSAPA include a provision allowing judicial review of agency failure to act? See proposed language in section 501(a).

C. [Section 507(d), page 70] 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?

D. [Section 509, pages 71 to 74] Should the MSAPA adopt alternative 1, or alternative 2, for the language of the scope of review provisions in section 509?

VII. Article 6. Office of Administrative Hearings

A. [Sections 601 to 608] 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 601] Does Section 601 include the necessary provisions to establish an office of administrative hearings [central panel] office? Should anything be added or taken away from these provisions?

C. [Section 602] Does Section 602 include the necessary provisions to establish the duties of an office of administrative hearings [central panel] office? Should anything be added or taken away from these provisions?

D.. [Section 603] Does Section 603 include the necessary provisions to establish the appointment and duties of the chief administrative law judge? Should anything be added or taken away from these provisions?

E. [Section 604] Does Section 604 include the necessary provisions to establish the powers of the chief administrative law judge? Should anything be added or taken away from these provisions?

F. [Section 605] Does Section 605 include the necessary provisions to establish the qualifications, powers, and duties of administrative law judges in the office of

administrative hearings ? Should anything be added or taken away from these provisions?

G. [Section 606] Does Section 606 include the necessary provisions for cooperation of other state agencies with the operations of the office of administrative hearings? Should anything be added or taken away from these provisions?

H. [Section 607] Does Section 607 include the necessary provisions to establish the powers of administrative law judges presiding in an office of administrative hearings [central panel] adjudication? Should anything be added or taken away from these provisions?

I. [Section 608] Does Section 608 include the necessary provisions to establish the decision making authority of administrative law judges in an office of administrative hearings [central panel] adjudication? Should anything be added or taken away from these provisions?

VIII. Article 7. Rule Review

A. [Sections 701 to 706] 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 701 to 706] should the MSAPA include the most commonly adopted type of rules review provisions, i.e., legislative veto, or should it provide for a variety of alternatives as currently drafted?

C. [Sections 701, 702] Governor's veto or objection. As a policy matter, should the executive veto type of provisions contained in Sections 701-702, be adopted as part of the MSAPA?

D. [Sections 703, 704, 705] Legislative veto or objection. As a policy matter, should the legislative veto type of provisions contained in Sections 703-705, be adopted as part of the MSAPA?

E. [Sections 706] Attorney General Review. As a policy matter, should the attorney general review type of provisions contained in Section 706, be adopted as part of the MSAPA?

IX. Article 8. Electronic Publication

A. [Sections 801 to 802] 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 801 to 802] Should these provisions be integrated into Article 2, Public Access to Agency Law and Policy?

C. [Section 801 to 802] Should the MSAPA mandate electronic publication [Section 802] or encourage electronic publication [Section 801], or provide alternatives, either section 801 or Section 802? Do any states not have electronic publication capability in 2007? [See section 801 to 802 issues memo]

X. Article 9. Effective Date

A. [Section 901] 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 901] Should the MSAPA effective date language include agency adjudications conducted by an agency following a remand from a court or another agency after the effective date? Draft language containing this provision has been added. [See Section 901 issues memo].

C. [Section 901] Should the MSAPA effective date language include authority for agencies to adopt interim regulations to govern adjudicative proceedings under the Act? See Section 901 issues memo].

EXHIBIT ONE [Section 402(e)]

Section 12, Uniform Arbitration Act, 2000

SECTION 12. DISCLOSURE BY ARBITRATOR. (2000 Uniform Arbitration Act)

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) a financial or personal interest in the outcome of the arbitration proceeding; and

(2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon

the fact disclosed, the objection may be a ground under Section 23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b), upon timely objection by a party, the court under Section 23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Section 23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a [motion] to vacate an award on that ground under Section 23(a)(2).

EXHIBIT TWO [Section 403(d)]

Section 10, 1961 MSAPA

§ 10. [Rules of Evidence; Official Notice].

In contested cases:

(1) irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in [non jury] civil cases in the [District Courts of this State] shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

[(2) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original;]

(3) a party may conduct cross-examinations required for a full and true disclosure of the facts;

(4) notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.