

DRAFTING COMMITTEE AGENDA
FOR NOVEMBER 2008 MEETING
(November 14 to 16, 2008)

Each section in Articles 4, 5, and 6 will be read at the meeting. Certain sections are flagged in the Agenda for particular scrutiny and discussion

ARTICLE ONE DEFINITIONS THAT APPLY TO ARTICLES 4, 5, AND 6

Definitions from Section 102 that apply to articles 4, 5 and 6 of the MSAPA

Section 102(1) “Adjudication”, (2) “Agency”, (3) “Agency Action”, (4) “Agency head”, (5) “Agency Record”, (6) contested case, (9) Emergency adjudication, (10) Evidentiary hearing, (11) Final order, (14) Initial order, (16) law, (17), license, (18) licensing, (19) notify, (20) order, (21) party, (22) person, (23) Presiding officer, (24) Proceeding, (25) recommended order,

ARTICLE FOUR

I. [Sections 401 to 419]. Please read carefully the text of the draft of sections 401 to 419 to identify any drafting or substantive issues that need to be discussed at the meeting.

1. [Section 401] Should section 401 specify the contested case hearing requirements in a logical and more efficient place and in more detail rather than referring to the definitions sections in Section 102?

2. [Section 402] Does Section 402 adequately state the separation of functions requirements for presiding officers and agency heads? Does this section adequately state disqualification of presiding officers?

3. [Section 403]

A. Section 403(d) evidence rules provisions;

i. focus on admissibility of evidence standard, Alternative A [legal residuum rule] and Alternative B [substantial reliability] rules for persuasiveness. **See Research memo first topic**

ii. Should section 403(d) be reorganized into a separate section that addresses evidence rules only?

B. Section 403(e) Should section 403(e) authorize the use of mediation and other alternative dispute resolution techniques in adjudication? **See Research memo second topic**

Draft language

II. **A generic model section** could include the following language:

The presiding officer may, with the consent of all parties, refer the parties in a contested case proceeding to mediation or other dispute resolution procedure. [Section 403(e)]

III. If the committee wanted to include a **prehearing conference provision** and integrate that with an adr section, we could use the following language:

The presiding officer may, with the consent of all parties, refer the parties in a contested case proceeding to mediation or other dispute resolution procedure. The presiding officer in a contested case may conduct a prehearing conference on motion of a party, or by order of the presiding officer. The prehearing conference can be used for purposes of mediation or other dispute resolution procedure, settlement discussions, or preparation of the matter for an adjudicative hearing. [Section 403(e)].

4. [Former Section 405 and 406] informal hearings and informal hearing procedures. Should the MSAPA include provisions authorizing informal hearings and informal hearing procedures?

See Research memo third topic

5. [Section 407] Does Section 407 adequately address ex parte communications requirements? In particular does this section properly resolve the staff advice issues, and the agency head responsibilities related to ex parte contacts?

See Research memo fourth topic

6. [Section 411] Does Section 411 adequately state requirements for discovery in administrative adjudication?

See Research memo fifth topic

7. [Section 414] Does Section 414 adequately address administrative procedure requirements for licensing cases?

See Research memo sixth topic

ARTICLE FIVE

1. [Section 501] Does Section 501 adequately state the law governing the right to judicial review?
2. [Section 502]. Should section 503 use the term “ripe” or should it merely state the requirements for review of rules ?

See Research memo seventh topic

3. [Section 506] Does Section 506 adequately state the law governing standing?

See Research memo eighth topic

4. [Section 509]

i. Should the MSAPA adopt alternative I or alternative 2, for the language of the scope of review provisions in section 509?

ii. Should there be a codified deference standard that incorporates the Chevron doctrine?

Proposed language based on the Chevron doctrine

"The court shall decide all relevant questions of law ...except that in reviewing any agency law interpretation the court may defer to a contemporaneous agency legal interpretation to the extent that the interpretation is (A) authoritative (B) significantly reflects relevant agency technical, political or other resources, (C) was formulated through a careful process, including providing those especially affected with an appropriate opportunity to participate in its formulation, and (D) does not require the special weight of a judicial pronouncement."

See Research memo ninth topic

ARTICLE SIX

Do the provisions of article 6 adequately address the topic of central panel hearing agencies and related issues?

See Research memo tenth topic

Secondary agenda covering articles 1, 2, 3, and 7 and topics raised at the 2008 ULC conference in big Sky, Montana.

ARTICLE ONE

I. SECTION 102(7).

1. **Section 102(7).** Should the definition of contested case include hearings required by agency rule? Should the definition exclude judicial decision? See the comment which provides that judicial decisions means constitutional decisions by appellate courts, and also the comment that

agencies can extend hearing provisions under article 4 to include hearing rights conferred by agency regulation and use the article 4 procedures by adopting rules that so provide.

[annual meeting comment]

Reporter Recommendation: Do NOT change the definition of contested case to include hearings provided by agency rule. Retain the judicial decision portion of the definition.

2. **Section 102.** Should the following terms, “administrative bulletin,” “administrative code”, and “rulemaking docket” be defined in Section 102?.

[annual meeting comment]

Reporter Recommendation: Do NOT define these terms in the definitions section. The first two terms are generic to reflect the different titles used in different states. A better approach would be a short legislative note for each of the first two terms. The third term is defined in the language of Section 301.

3. **Section 102.** §§ 102(12), 102(26), 314(b). In the process of revision, the language stating that a guidance document is not within the definition of “rule” has been dropped. Surely the committee did not intend that. Hopefully that can be fixed. Also, would it be possible to say more explicitly that the exclusions in § 314(b) apply to guidance documents as well as rules? A careful reading would confirm this, but it’s hard to grasp.

[aba advisor]

Reporter Recommendation: Include exceptions to the rule definitions in Section 102(27)

ARTICLE TWO

II. **SECTION 201**

1. **Section 201.** Should this section include a national disaster (attack or threatened attack upon the continental US) provision providing for the suspension of filing and publication requirements when impracticable or when this would not provide appropriate notice. The federal register act, 44 U.S.C. Section 1505(c) contains provisions like these.

[ACR meeting comment]

Reporter Recommendation: do not add such a provision. While this may be a good idea, it is not essential and state officials already have authority to address emergency situations, such as hurricanes, and earthquakes.

III. **SECTION 202**

1. **Section 202.** Should this section include or delete the rule adoption requirements of subsections (1), (2), and (3)? Alternatively, should the term “publish” be substituted for the adopt as a rule language in subsections (1), (2), and (3).

[annual meeting comments]

Reporter Recommendation: This provision is based on 1961 MSAPA Section 2(a), and should be retained.

IV. **SECTION 203**

1. **Section 203.** Should this section, or a new section authorize agencies to issue informal opinions, or advisory opinions, as an alternative to declaratory orders. Informal [advisory] opinions would not be binding unlike declaratory orders?

[annual meeting comments]

Reporter Recommendation: do not add such a provision. Agencies exercise this type of authority already, and there is no need for a codified procedure for something this informal.

ARTICLE THREE

V. **SECTION 305**

1. **Section 305.** Should the term “de minimis” be substituted for “no” in subsection (b) on the grounds that no is an impossible standard to satisfy ?

[commissioner comment]

Reporter recommendation: Good idea Substitute the term “minimal” for “no”

VI. **SECTION 309**

1. **Section 309(a).** What is the better standard for invoking emergency rulemaking?

[annual meeting and ACR comments]

Alternatives include:

A) (The current draft language) “imminent peril to public health, safety, and welfare”

(based on 1961 MSAPA Section 3(b))

B) “unnecessary, impracticable, or contrary to the public interest”

(1981 MSAPA Section 3-108(a); FAPA Section 553(b)(3)(B)).

C) “public necessity”

D) “public health, safety and, welfare”

Reporter recommendation: Retain existing language based on 1961 MSAPA Section 3(b)

2. **Section 309(a).** Should there be specific language for imminent loss of federal funding, or should that be in a comment, as an example? Also should we add imminent loss of state funding, or due to federal or state enactments, or in election cases? [annual meeting and ACR comments]

Reporter recommendation: put these specific items in a comment as the general definition should be broad enough to cover all of the specific circumstances.

3. **Section 309.** Should there be a separate category for temporary rules, for which the test would be less strict, such as public welfare? [ACR meeting comment]

Reporter Recommendation: Do not include this provision

4. **Section 309(a) emergency rulemaking;** Should the 180 day effective date provisions (with one renewal for 180 days) be eliminated since the lapse provision may be too inflexible. [ABA Advisor comment]

Reporter recommendation: The 180 day effective date provisions may be too short for agencies addressing emergencies. Either eliminate the deadline entirely, or lengthen it to one year with a similar renewal period.

5. **Section 309(a) emergency rulemaking;** Should section 309(a) specify the consequences of an emergency rule lapsing such as the previous permanent rule goes into effect upon lapse of the emergency rule?

[ACR comment]

Reporter Recommendation: This is a good idea if we retain the lapse provisions [180 days plus one extension of 180 days]

6. **Section 309(a) emergency rulemaking and (b) direct final rulemaking.**

Should the two parts of this section be separate sections because they address very different topics? [2008 annual conference comment]

Reporter recommendation: redraft to provide separate sections for these two subjects

ARTICLE SEVEN

VII. **SECTION 703**

1. Should section 703 include language that the rules review committee can disapprove with suggested amendments as an alternative to 703(a)(2) and 703(c)?

Reporter recommendation: redraft this section to include disapproval with suggested amendments .

[annual meeting comment]

2. Should section 703(d) include a provision providing a for a suspension of the rule until the end of the legislative session, or a total of 90 days as an alternative provisions to the adjournment of the next regular session of the legislature.

[committee member comment]

Reporter recommendation: redraft this section to include this alternative for states with biennial legislative sessions.