Contested Issues in Contested Cases: Adjudication Under the Model State Administrative Procedure Act of 2010

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Research Paper No. 1785951

Stanford Public Law and
Legal Theory
Working Paper Series

Stanford Law School
Crown Quadrangle
Stanford, California 94305

CONTESTED ISSUES IN CONTESTED CASES: ADJUDICATION UNDER THE MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 2010

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Abstract: The adoption by the National Conference of Commissioners on Uniform State Laws of the Model State Administrative Procedure Act of 2010 is a landmark event in the evolution of state administrative law. This paper discusses the background of the 2010 Act and praises several features of its adjudication provisions, particularly its solution to the "gateway" problem of defining which state agency adjudications fall under the Act. However, it criticizes a provision of the Act which would prevent agency heads from consulting staff members in difficult and complex cases involving the public interest. This provision is confusingly drafted and radically departs from existing practice. It may well jeopardize adoption of the Act in many states.

The adoption by the National Conference of Commissioners on Uniform State Laws of the Model State Administrative Procedure Act of 2010 (hereinafter "2010 MSAPA") is a landmark event in the evolution of state administrative law.

I was the liaison from the ABA's Section on Administrative Law and Regulatory Practice (hereinafter "Administrative Law Section") to the drafting committee and so was involved for several years in the formative stage of the shaping of the 2010 MSAPA. I want to begin this paper by paying tribute to the dedicated members of the drafting committee under the leadership of Fran Pavetti; the committee labored for six long years to produce the 2010 MSAPA. I also

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want to give all credit to the two extremely capable and long-suffering reporters who worked on the project, John Gedid and Gregory Ogden, and to my successors as ABA liaison, Jim Rossi and Ron Levin. Two other active members of the Administrative Law Section (Judges Edward Schoenbaum and Ann Marshall Young) served as capable advisers to the drafting committee and invested many hours in the project.

In this paper, I'd like to discuss the reasons why a new Model Act was needed (Part I) and two different subjects relating to administrative adjudication under the 2010 MSAPA—the gateway provision (Part II) and the provision relating to staff advice to decisionmakers (Part III). I approve of the gateway provision but strongly disagree with the provision relating to staff advice.

I. THE NEED FOR A REVISED MODEL ACT

Administrative law is a highly state-specific subject. Each state has an Administrative Procedure Act (APA) which provides for fair procedure by government agencies in the areas of adjudication and rulemaking and insures accountability of government agencies through judicial review.

Unlike the areas of commercial law or business organization (which involve transactions that cross state lines), there is no reason why states need to have identical APAs. Consequently, the various Model State APAs that have been adopted over the years are not uniform acts, like the Uniform Commercial Code or the Uniform Partnership Act, which are supposed to be adopted without change in as many states as possible. Instead, like the Model Penal Code, the Model State APAs inform states of the best statutory practices in the areas of administrative adjudication, rulemaking, and judicial review. States are free to pick and choose whatever provisions of Model Acts they want to adopt.

Inevitably, notions of best statutory practices evolve, as the result of experience and academic commentary, and so it makes sense for states to revisit and update older versions of their APAs to take account of this evolution. The function of the Model State APAs is to facilitate that process by crystallizing new concepts of best practices for the convenience of state law-makers who don't have to reinvent the wheel. Obviously the state's administrative law culture, the political power of governmental bodies vis a vis regulated industries, the existence and strength of "good government" lobbies and law revision commissions, case law that identifies problems with existing law, and numerous other factors determine whether a state's legislature and executive branch might be interested in tackling administrative law reform, and, if so, which features of the Model Act would prove attractive or unattractive.

The venerable motto "if it ain't broke, don't fix it" has been used on countless occasions as an argument against administrative law reform. The fact that an old APA has become outdated hardly qualifies as a crisis. Very few people have ever been elected to the state legislature on a good government platform or on a promise to revamp administrative procedure laws. For that reason, it is faintly surprising when states actually take up and enact new administrative procedure laws.

One of the great success stories in the law reform arena is the 1961 Model State APA (or 1961 MSAPA).[1] This Act (which supplanted the 1946 MSAPA) was adopted in about half the states,[2] a signal achievement considering the inertia that must be overcome to adopt a new state APA. But somehow the 1961 Act crashed through the inertia barrier and won enactment across

[1] 15 Unif. L. Annot. 184 (2000).
[2] About 29 states plus the District of Columbia adopted part or all of the 1961 Act. See *id.*, 174; *id.* 16 (2008 Supplement). New Hampshire and Washington switched to the 1981 Act, reducing the count to 27. The Supplement reports that Mississippi, formerly on the list of adopters of the 1961 Act, repealed it in 2005, bringing the count down to 26 plus the District of Columbia.

the country. The 1961 Act was quite modest—only 19 brief sections—and pretty simple to understand. It dealt with the big picture, not with small details, but it did the job and has worked well for many states over many decades.

Only 20 years after the successful launch of the '61 Act, the Commissioners adopted a new version. The 1981 MSAPA[3] consisted of about 94 sections and was vastly more complex and sophisticated than the 1961 version. The 1981 Act is primarily associated with the names of its reporters, Arthur Earl Bonfield and the late L. Harold Levinson, two academics who ambitiously and aggressively attempted to modernize state administrative law. The 1981 MSAPA was a state of the art product. It was loaded with good ideas, many of which were drawn upon by reformers in various states. Yet the 1981 Act failed to win broad acceptance. No states adopted all of the provisions of the 1981 Act and only a few of them adopted parts of the Act.[4]

What went wrong? In part, the 1961 Act seemed to be working well; it was fairly recent; it wasn't broke (except perhaps in the eyes of academic reformers), so why bother to fix it? More significantly, the 1981 Act was overambitious. Its provisions were often very complex.[5] It

[3] See 15 Unif. L. Annot. 1 (2000).
[4] Only Arizona, New Hampshire, and Washington adopted substantial portions of the 1981 Act. *Ibid.* Other states borrowed some of its provisions. These include Florida, Iowa, Kansas, California, Mississippi, and Montana. Prefatory note to the 2010 MSAPA.
[5] For example, the provision on scope of judicial review was extremely detailed, probably well beyond the ability of most courts to apply it. 1981 MSAPA §5-116(c). The provision on standing seems to copy all of the notoriously vague provisions of federal standing law. 1981 MSAPA §5-106. This body of federal law has produced an immense outpouring of confusing and result-oriented case law. In my view, a state would make a terrible mistake by codifying it.

required a lot of effort to master.[6] Sometimes it seemed to micromanage, instead of sticking to the big picture.[7] And some of its ideas were far ahead of their time. For example:

- The Act required agencies to adopt rules to "embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers" and "to supersede principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases." These rules were to be adopted "as soon as "feasible and to the extent practicable."[8] A fine idea in theory, required rulemaking fails in practice. Nobody really wants all those rules,[9] and it is impossible to say when it is either feasible or practicable to adopt them. Yet courts were called upon to enforce the requirement and could invalidate a wide range of agency action if the court thought it was feasible and practicable to adopt rules instead of dealing with problem through adjudication or informal action.
- The Act's gateway provision (discussed further in Part II) applied the Act to every instance of adjudication, meaning every interchange between state government and private parties that resulted in an order.[10] Although the Act also provided that agencies could utilize a newly invented "summary adjudicative procedure" for all

[6] For example, the Act creates four different categories of administrative hearings—formal administrative hearings, conference adjudicative hearings, emergency adjudicative proceedings, and summary adjudicative proceedings. 1981 Act, Art. IV, Chapters II, IV, and V. Making all this work on a practical level seems a daunting task.
[7] See, e.g., § 4-209 on intervention in adjudicatory proceedings.
[8] 1981 MSAPA §2-104(3) and (4).
[9] The 1981 MSAPA provision on required rulemaking was adapted from Florida law. It caused a huge outpouring of new regulations which, in turn, sparked a sharp reaction from business and from the governor. See Jim Rossi, "The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?" 49 Admin. L. Rev. 345 (1997).
[10] See text at notes [11-13]

of the countless occasions in which states took legally binding informal action against individuals, this was a scary prospect.

Nearly thirty years have passed since the 1981 Act was approved. As the new millennium dawned, it became apparent to those in the administrative law community that the 1961 Act had become outdated and the 1981 Act had failed to garner broad support. A new model act was needed that incorporated the best statutory practices learned over two generations of experience and that took account of technological change, such as the introduction of electronic communication and the internet. Yet the new act should preserve the modesty of the 1961 Act. That was the spirit in which the 2010 MSAPA was drafted. With the exception of the provision on staff advice (discussed in Part III), the provisions of the Act are easy to understand and explain and are evolutionary rather than revolutionary. Yet there are numerous provisions of far-reaching importance, such as a nifty solution for the guidance document problem.[11] The 2010 Act contains about 66 provisions; this is considerably less than the 94 in the 1981 Act, even though the 2010 Act contains 7 provisions relating to ALJ central panels, a subject not covered in the 1981 Act. However, the 2010 Act contains considerably more sections than the 19 in the 1961 Act.

Just to get to my bottom line immediately: all states should carefully consider whether to adopt part or all of the 2010 MSAPA. This suggestion applies to states that adopted the now-outdated 1961 MSAPA,[12] those few that adopted parts of the 1981 MSAPA, and the many states whose APAs are idiosyncratic, especially including Florida,[13] Pennsylvania,[14] and California.[15]

[11] See 2010 MSAPA §311. See Ronald M. Levin, -- Widener --.
[12] See Steven P. Croley, "State Administrative Law Reform: Recent Experience in Michigan," 8 Widener J. of Pub. L. 347 (1999).
[13] See Jim Rossi, "'Statutory Nondelegation': Learning from Florida's Recent Experience in Administrative Procedure Reform," 8 Widener J. of Pub. L. 301 (1999); Rossi, Rulemaking Counter-Revolution, supra note xx.

Administrative law is vital to the functioning of modern government; state APAs must strike the right balance between accuracy, efficiency, and fairness. Administrative procedure reform is overdue everywhere and the 2010 MSAPA arrives at just the right moment to galvanize government reformers in the states into updating their administrative procedure laws.

II THE GATEWAY TO ADJUDICATION PROVISIONS

The most difficult problem in drafting the adjudication provisions of an APA is what I call the "gateway:" The gateway defines which instances of adjudication by state agencies are covered by the adjudication provisions of the act. The problem is that every state engages in countless "adjudications," meaning legally binding action against individuals. The great majority of these interactions are of trivial importance (for example, the assignment of a campsite in a state park or a decision that a driver must wear corrective lenses). Precisely which of these interactions should trigger the rather formal trial-type procedures called for by the APA?

A. Internal and external models

There are two basic approaches to the gateway problem which might be called the external and the internal models. The external model relies on statutes (or constitutional provisions) *outside* of the APA; the APA adjudication sections apply only if an external source requires them to apply.

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[14] I am on record as being quite critical of Pennsylvania's APA and related administrative procedure laws. This scheme is opaque, clumsy, and out of date. See Michael Asimow, "Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania," 8 Widener J. of Pub. L. 229, 266-72, 283-85, 295-98 (1999).

[15] The adjudicatory provisions of California's APA are modern, dating from 1995, and work reasonably well. However, its rulemaking and judicial review provisions are seriously dysfunctional. See Asimow, Speed Bumps, note xx supra, 8 Widener J. of Pub. L. at 272-77, 285-95.

The federal APA is an example of the external approach. Its adjudication provisions apply "in every case of adjudication *required by statute* to be determined *on the record* after opportunity for an agency hearing…"[16]

This external approach was also used by the 1961 Act: "'[C]ontested case'" means a proceeding, including but not restricted to ratemaking … and licensing, in which the legal rights, duties, or privileges of a party are *required by law* to be determined by an agency after an opportunity for hearing…"[17] The adjudication sections of the 1961 Act apply only to "a contested case."[18]

In contrast, under the internal model, the APA itself establishes the gateway. The 1981 MSAPA adopts the internal model. It provides: "An agency shall conduct an adjudicative proceeding as the process for formulating and issuing an order."[19] An "Order means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons."[20] In other words, the 1981 Act applied its adjudication sections to *every* state agency action that determined the legal status of specific persons, regardless of whether any other statute so required. [21]

B. The gateway problem in California and Florida.

My views on this issue are formed by my experience as consultant to the California Law Revision Commission for its APA reform project. After a lengthy process of drafting and compromise, the Commission recommended to the Legislature the adoption of a new set of

[16] 5 U.S.C. §554(a).
[17] 1961 MSAPA § 1(2), 15 Unif. Laws. Ann. 184 (2000).
[18] 1961 MSAPA §9, *id.* at 271.
[19] 1981 MSAPA §4-101(a), *id.* at 69.
[20] 1981 MSAPA §1-102(5), *id.* at 11.
[21] There were a few exceptions, essentially involving non-final actions such as the decision to issue a complaint, to initiate an investigation, or not to conduct an adjudicative proceeding. 1981 MSAPA §4-101(a)(1), (2), (3).

adjudication provisions, updating the outmoded provisions of an APA adopted in 1945.[22] This legislation passed and became effective in 1995.[23] The Commission found the gateway problem difficult to solve.

At first, I favored the internal approach taken by the 1981 Model Act approach.[24] The federal APA approach is unsatisfactory because it is often unclear how to interpret a statute that calls for a "hearing," but does not use the code words "on-the-record." This uncertainty has produced confusing and unsatisfactory case law.[25] The federal approach also encounters the due process enigma: when, if ever, should hearings required by *due process* but not a statute fall under the APA?[26] In the end, I decided, the *default* rule should be that the APA applies to all adjudication. However, the APA should provide for an informal or summary hearing model for

[22] See Michael Asimow, "The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act," 32 Tulsa L. J. 297 (1996) (summarizing the new statute).
[23] CA Gov't C. §§11400 to 11523.
[24] See Michael Asimow, "Toward a New California Administrative Procedure Act: Adjudication Fundamentals," 39 UCLA L. Rev. 1067, 1081-94 (1992). The 1981 Model Act was quite influential in my thinking and numerous provisions of the California legislation were based on 1981 Model Act provisions.
[25] The dominant view is that courts defer to the agency's interpretation of its own statute if that statute is "ambiguous." If the agency determines that a "hearing" required by statute is not "on the record," and this view is "reasonable," the APA is inapplicable to the hearing. See Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, x (1st Cir. 2006); Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477, 1480-82 (D.C. Cir. 1989). This approach is based on the *Chevron* doctrine, according to which courts must defer to agency interpretations of ambiguous statutes. Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc. 467 US 837 (1984). Several writers have criticized this application of *Chevron* to an agency's interpretation of its hearing statute, since that interpretation controls whether the APA applies to its hearings. See William S. Jordan III, "*Chevron* and Hearing Rights: An Unintended Combination," 61 Admin. L. Rev. 249 (2009); Cooley R. Haworth, Jr., "Restoring the Applicability of the APA's Adjudicatory Procedures," 56 Admin. L. Rev. 1043 (2004). I agree with Jordan and Haworth on this point. In addition to the *Chevron*-based approach, there are two lines of case-law. One set of cases holds that the APA applies only if a statute unmistakably so provides, either by using the "on the record" phrase or otherwise. See City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983) ("hearing" in nuclear licensing case does not mean "hearing on the record"). Another line of cases applies the APA adjudication provisions, especially to economically or environmentally significant cases, unless Congress has unmistakable provided that it does not apply. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978); Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977) However, *Seacoast* was disapproved b y *Dominion Energy, supra*, ,leaving *Marathon* as the only rather weak support for the doctrine that the APA applies to statutorily required hearings unless Congress provides that it does not.
[26] See note 53.

relatively trivial adjudications. If the legislature wants to depart from the default, it should say so.

However, my view (dubbed the “big bang approach”) encountered strong opposition from the members of the Law Revision Commission and from the California Attorney General. Essentially, the internal model was subjected to death by ridicule. The Commission members asked--would the internal model require application of the APA to the decision by a state college to select cheerleaders? Imposition of a library fine? A state forest ranger's decision in allocating campsites? A decision denying a state prisoner access to a particular magazine? A decision not to hire someone for a low-level state job or buy a computer from vendor A rather than B?

My answer was --well yes, but hearings in relatively trivial state/private encounters could be provided through an informal summary hearing procedure.[27] But what if the summary hearing procedure statute left out a category of relatively trivial cases? Would some of the categories be mushy?[28] What if the agency neglected to adopt a rule providing for summary procedure for a particular category?[29] And what if even the truncated summary procedure provides too much procedure for some trivial encounter?[30] The Commission thought it would be

[27]See 1981 Model Act ' 4-502 to 4-506. Summary procedure applies to "any matter having only trivial potential impact upon the affected parties" which presumably takes in the campsite case and arguably covers the cheerleader. It applies to "a reprimand, warning, disciplinary report, or other purely verbal sanction without continuing impact against a prisoner..." Id. ' 4-502(3)(ii) and (viii). It includes monetary sanctions up to $100 (which covers the library fine) and denial of an application for admission to an educational institution or for employment (which covers the job hypo), and the acquisition of property or procurement of goods or services by contract (which covers the computer). Id. ' 4-502(3).

[28]Consider the case of the cheerleader. The decision to select someone else could be life-affecting. It seems faintly patronizing for the university or a reviewing court to say that the impact was trivial.

[29]' 4-502(3) requires that an agency rule provide for summary procedure.

[30]Summary procedure requires that a presiding officer (that is, anyone exercising authority over the matter) allow each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter. The presiding officer must furnish a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of agency discretion, and notice of any available administrative review. These explanations can be oral unless a monetary sanction is involved. The agency must review the order resulting

laughed out of town if it proposed a statute to require any sort of procedure in such trivial matters. The Commission opted for an external approach to the gateway problem (dubbed “little bang”).

I now believe the Commission's decision was right. The “big bang” approach suggested by the 1981 MSAPA is overambitious. It would be a mistake to attempt to prescribe procedures—any procedures—for the infinite range of relatively trivial interactions between government and the public. This is an instance in which the best would be the enemy of the good.[31]

A Florida case[32] illustrates the point well. The Florida APA pioneered the internal approach to the gateway problem. The adjudication provisions apply "in all proceedings in which the substantial interests of a party are determined by an agency..."[33] The court held that the denial of admission to the University of Florida College of Law did not "rise to the level of a 'substantial interest.'"[34] Of course, to the disappointed applicant, the denial of admission to this state professional school is a very substantial interest indeed. However, the court stated:

> If such hopes and aspirations were deemed substantial interests, all unsuccessful applicants for admission to a state university would be entitled to a formal hearing upon the denial of their applications. While this scenario is not the basis for our denial of

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from a summary hearing if any party requests a review. A reviewing officer must give each party an opportunity to explain the party's view of the matter. ' 4-503 to 4-506.

[31] The Pennsylvania APA has an internal approach to the gateway problem. To keep it under control, the courts have interpreted it so that only “rights,” not “privileges,” trigger hearings. The right-privilege distinction has long since been discarded in federal law and it is an unsatisfactory way to administer the gateway. See Asimow, Speed Bumps, supra note xx at 267.

[32] Metsch v. University of Florida, 550 So.2d 1149 (Dist. Ct. App. 1989).

[33] Fla. Stats. ' 120.57(1).

[34] In an alternative ground, the court held that the applicant fell within an exception for "any proceeding in which the substantial interests of a student are determined by the State University System." 550 So.2d at 1151.

Metsch's claim, we cannot ignore the repercussions that would flow from granting the relief which he seeks.[35]

Clearly the Florida court was apprehensive that many of the thousands of disappointed applicants to various Florida institutions of higher learning would demand a time- and resource-consuming hearing. The court understandably drew back from this abyss. Granted, Florida law did not contain a summary hearing procedure, but even a summary procedure—*any procedure*—might not be worth the bother in cases of disappointed applicants for the limited number of slots in educational institutions. And the same is true of many of the adjudicatory decisions that would be swept under the APA under an internal approach.

In our litigation-oriented society, a few people who resent being denied admission to the university or being turned down for a job or a contract are quite prepared to litigate the question of whether the procedure they received met the APA requirements. And the near certainty of this sort of pointless litigation (as well as the expense that would be inflicted on state government in adapting to a new regime of summary procedure) was enough to persuade the California Law Revision Commission to jettison the internal model drawn from the 1981 MSAPA. The "little bang" California approach[36] was followed in the drafting of the gateway provision of the 2010 MSAPA.

C. Gateway provision in the 2010 MSAPA

Under the 2010 Act, the definitions of "contested case" and "evidentiary hearing" determine whether the APA adjudication provisions apply to a particular dispute. "'Contested

[35] Id. at 1150-51.

[36] "This chapter [the adjudication provisions of the APA] applies to a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision." CA Gov't C. § 11410.10.

case'" means an adjudication[37] in which an opportunity for an evidentiary hearing is required by the federal constitution, a federal statute, or the constitution or a statute of this state."[38] "'Evidentiary hearing' means a hearing for the receipt of evidence on issues on which a decision of the presiding officer may be made in a contested case."[39] And "This [article] [meaning Article 4 of the Act, specifying adjudication procedure] applies to an adjudication made by an agency in a contested case."[40] Thus the 2010 Act is firmly committed to an external model. Either a federal or state statute outside the APA, or a federal or state constitutional provision, must call for an "evidentiary hearing" in order to trigger the APA provisions.

I think this is the right call. If the legislature requires an evidentiary hearing, the best assumption is that it intended the agency to observe the APA adjudication provisions and provide the various protections for the private party that are spelled out in the APA. Thus APA applicability is the default. If the legislature did not want that result—that is, it wanted the agency to provide a hearing but not one governed by the APA—it must say so.

D. Problems in applying the gateway provision of the 2010 Act

1. What is an evidentiary hearing? The external approach to the gateway problem taken by the 2010 Act will not be problem-free. It avoids reliance on code words (like the "on the record" language in the federal act), but it still requires agencies and courts to figure out whether a given statute calls for an "evidentiary hearing," meaning "a hearing for the receipt of evidence."

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[37] "'Adjudication' means the process for determining facts or applying law pursuant to which an agency formulates and issues an order." 2010 MSAPA § 102(1). "'Order' means an agency decision that determines or declares the rights, duties, immunities, or other interests of a specific person."

[38] 2010 MSAPA § 102(7).

[39] 2010 MSAPA § 102(11). There is an unfortunate bit of circularity in these definitions, since an evidentiary hearing is one that occurs in a "contested case," while a "contested case" is one in which an external source calls for an "evidentiary hearing."

[40] 2010 MSAPA § 401.

This language should be construed to cover the sort of relatively structured proceeding that is captured by the phrase "trial-type hearing," as distinguished from a "conference" at which the private party can voice complaints or a "public hearing" in which members of the public are invited to show up and let off steam. It could cover a "hearing" in which all the submissions of "evidence" are written rather than oral. The essential elements of an "evidentiary hearing" are that parties to an adjudicatory dispute have the right to present testimony and rebut evidence offered by their opponents. A second essential element is that an "evidentiary hearing" should be presided over by an officer who has not been involved in the dispute.

A California case illustrates how difficult this classification problem can be.[41] By statute, a teacher has a "right of appeal" from a decision by a local Board of Education's decision mandating a grade change. Most observers would probably understand the "right of appeal" as the opportunity for a conference with the principal who changed the grade, but not as calling for a trial-type evidentiary hearing. However, the court held that the "right of appeal" entails a right to an evidentiary hearing, which is a critical determination under California's judicial review statute.[42] Presumably this case would be followed for the purposes of determining whether a statutory "right to appeal" triggers the adjudicatory provisions of the California APA.

2. Application of due process. Another problem that will certainly arise under the 2010 MSAPA's gateway provision is whether the adjudication provisions of the Act will be triggered by the constitutional requirement that an agency provide "some kind of hearing" under federal or

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[41] Eureka Teachers Ass'n v. Board of Education, 244 Cal. Rptr. 240, 244 (Court of Appeal, 1988).

[42] CA Code of Civil Proc. § 1094.5(a). This provision (California's so-called administrative mandate law) is triggered whenever a state or local decision is "made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested" in an agency.

state due process.[43] In *Wong Yang Sung*, the Supreme Court held in the first APA case that came before it that a hearing in a deportation case that was required *by due process,* but not by statute, triggered the adjudicatory provisions of the APA.[44] *Wong Yang Sung* was swiftly overturned by statute[45] and the federal courts have subjected the rule to a process of benign neglect ever since.[46]

The reasons why *Wong Yang Sung* has never been taken seriously are fairly obvious. Under federal law when a court determines that individualized government action has deprived a person of liberty or property, it is often necessary to apply the utilitarian, case-specific balancing test of *Mathews v. Eldridge*[47] to custom-tailor the necessary elements of a hearing and its timing. In many cases, the procedure that is required is far less formal than that called for by the federal APA. The procedure might involve little more than a quick consultation between a private party and a decisionmaker, as required by *Goss v. Lopez* in the case of a student subject to a brief disciplinary suspension from school.[48] It would be absurd if such a case triggered the full formal hearing provisions of the APA.

Therefore, states will have to decide when a proceeding required by due process adds up to an "evidentiary hearing" for purposes of triggering the adjudicatory provisions of the APA. The sort of informal consultation required by *Goss* should not be treated as an "evidentiary hearing." Similarly, the sort of pre-termination probable cause proceeding required in cases of

[43] Goss v. Lopez, 419 U.S. 565, 579 (1975).
[44] Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).
[45] See Marcello v. Bonds, 349 U.S. 302 (1955).
[46] See, e.g., Clardy v. Levi, 545 F.2d 1241 (9th cir. 1976) (APA inapplicable to hearing required by due process in a prison disciplinary case). See generally Robert E. Zahler, "The Requirement of Formal Adjudication Under Section 5 of the Administrative Procedure Act, 12 Harv. J. on Legisl.194, 218-41 (1975)
[47] 424 U.S. 319, 347-49 (1976).
[48] See note xx

employee discharge should not be treated as "evidentiary hearings."[49] APA formal trial-type procedure is unsuited for cases in which due process calls only for a consultative or conference type of procedure.[50] Unfortunately, the 2010 Act does not contain any provision for informal or summary hearings, only for full-bore formal hearings, so it cannot be easily adapted to conduct such a proceeding when it is required by due process.

Despite this problem, the drafters of the 2010 Act thought it was useful to have a framework in place for the situations in which federal or state due process calls for a trial-type hearing, as it often does. The Act provides a template of necessary procedures, thus avoiding the need for a multi-factor balancing analysis under *Matthews v. Eldridge.*

For example, assume a state statute that permits the discharge of a tenured employee for good cause, the revocation of a business license, or the termination of some kind of welfare benefit. However, this statute fails to provide for any hearing or other procedure that the state agency must follow in implementing the law. Due process will apply in these situations and will call for a trial-type hearing. Suppose the question is whether the presiding officer can be advised by an attorney who has been involved in the dispute. Due process law on separation of functions is notoriously unclear, requires a context-specific balancing analysis, and gives an agency little guidance on what procedures it must follow.[51] But the APA specifically provides that advice to a presiding officer from a staff member who has played an adversarial role in the case is improper.[52] An agency (or a reviewing court) need look no further.

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[49] Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532 (1985).
[50] The 2010 MSAPA does not contain a conference or informal hearing model as an alternative to a formal hearing, although earlier drafts of the Act did contain such an option. See §§405, 406, "Annual Meeting Draft" of the MSAPA (July, 2006). I believe omission of an informal hearing model was unfortunate.
[51] See Nightlife Partners v. City of Beverly Hills, 133 Cal. Rptr. 2d 234 (Calif. Ct. of App. 2003) (holding that such consultations violated due process).
[52] 2010 MSAPA § 408(c)(1)(A).

E. Evidentiary hearings required by regulation

If an agency's procedural regulations call for an evidentiary hearing, the agency must follow the regulations. However, hearings required by regulation are not contested cases since regulations are neither statutory nor constitutional provisions. The omission of hearings required by regulation from the contested case category was a conscious decision by the drafters of the Act. They wanted to encourage agencies to provide for hearings when neither a statute nor due process required one. But if such regulations triggered all the formal procedures called for by the APA, agencies would be deterred from adopting regulations that provided for some kind of formal procedure. To avoid this perverse deterrent effect, hearings required by regulation are not covered by the APA, unless, of course, the regulation explicitly incorporated the APA provisions.

III STAFF ADVICE TO DECISIONMAKERS

There is one provision in the 2010 MXZPZ that I strongly oppose.[53] This provision prohibits some forms of ex parte staff advice to agency decisionmakers. This provision was the subject of intense debate by the drafting committee while I was the ABA liaison and the debate continued after Jim Rossi and Ron Levin took my place. In my view, agency decisionmakers in complex cases should be able to receive ex parte advice from agency staff members, provided that the staff member has not played an adversarial role in the case and provided that the staff member does not furnish evidentiary material that is not in the record.

A. Hypothetical situation

[53] 2010 MSAPA § 408(e)(2). My friend and colleague in the ABA, Judge Ann Marshall Young, who was an adviser to the MSAPA drafting committee, disagrees with my position on this issue. See Ann Marshall Young, "Ex Parte Communications and the Exclusive Record Provision of the 2010 MSAPA," – Admin. L. News. – (Fall, 2010, available at http://new.abanet.org/sections/adminlaw/Pages/Publications.aspx)

State Water Agency (SWA) handles a range of regulatory issues relating to water in a small state. The issue before SWA concerns Chipco's application for a water pollution permit. Chipco plans to build a factory to make a new form of computer chip. It needs a permit because the factory will discharge a chemical called XYZ into a local river. XYZ is a relatively understudied chemical and is not covered by any existing regulation. There are sharp differences within the scientific community about how safe it is.

The question for SWA is whether to permit a discharge of XYZ at the level of 10 parts per million (PPM), as Chipco has requested, or only 2 PPM, as the SWA staff has urged. There was a lengthy hearing on these issues. Numerous expert witnesses representing Chipco and representing the staff have provided written and oral testimony. The record consists of 8000 pages with hundreds of exhibits. It includes expert opinions and published studies involving computer chip and waste disposal engineering, chemistry, epidemiology, fish and human biology, and similar scientific disciplines. The new factory will create 200 jobs in a depressed area of the state; but hundreds of thousands of people use this river for drinking water and recreation. Chipco claims that unless it receives a permit allowing a discharge of 10 PPM, it will build the factory in Brazil.

The presiding officer has decided to issue a permit allowing Chipco to discharge XYZ at a level of 5 PPM. The three heads of SWA must now make the final decision in the case. They are part-timers. Each of them has another job and they meet once a month for a couple of hours to deal with all pending SWA business. None of them has any scientific background or training and two of the three were appointed by the Governor within the last three months, so they are still learning on the job.

The heads wish to consult staff member SA to assist them in evaluating the testimony in the record. SA, who has a Ph.D. in chemistry and long experience dealing with toxic waste issues, has not been involved in the Chipco case up to this point. The question is whether S can provide ex parte advice to the agency heads.

This hypothetical situation is intended to be typical of a significant number of complex and very important adjudicatory cases that state regulators must decide. These might involve a range of scientific or economic issues involving banking, accounting, public utility or insurance ratemaking, permits for the construction of new fossil-fueled power plants, consumer protection laws or similar disputes that are resolved by state agencies in case-by-case adjudication. These are cases that involve much more than the interests of the parties to the case. They involve the health, safety, and economic welfare of the entire public. In ordinary adjudications, it doesn't much matter (except to the immediate parties) whether the agency gets the result right or wrong; but in high-stakes cases like these, it is all-important that the agency's decision be the best informed and wisest that it can possibly be.

B. Separation of functions and staff advice

The problem under discussion is part of what is generally known as "separation of functions."[54] In American administrative law, agencies can engage in rulemaking, investigation, prosecution, and adjudication. Obviously, the adjudicatory function is in some conflict with the prosecutorial function. To deal with this conflict,[55] American agencies typically are subject to internal separation of functions. That means that the adjudicatory decisionmakers (both

[54] See generally Michael Asimow, "When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies," 81 Colum. L. Rev. 759 (1981).

[55] In Commonwealth countries, such as the U.K. or Australia, adjudication is normally done by tribunals that are independent of the agency that made the decision under review. This form of external separation is quite common in the states, particularly in schemes like workers' compensation and unemployment insurance, and it is occasionally employed within the federal government.

presiding officers and agency heads) do not engage in adversarial activities (such as prosecution, investigation, or advocacy) in the same case that they adjudicate. In addition, staff members who have engaged in adversarial activity in a case are not permitted to provide ex parte advice to decisionmakers.

However, staff members who have not engaged in adversarial activity in a case have always been allowed to furnish ex parte advice to decisionmakers (so long as they do not violate the exclusive record rule by advising the decisionmakers about non-record factual material).[56] Staff members routinely advise decisionmakers (usually at the agency head level, not the presiding officer level) in countless federal, state and local agencies. The advice might concern issues about interpretation of statutes or regulations, advice about the policies and precedents of the agency, or advice relating to policy, politics, and discretion. It might concern resource allocation and agency priority-setting. It could dwell on the public relations impact of taking particular action or the possible political backlash from doing so. The staff routinely provides technical assistance on understanding and interpreting the conflicting expert testimony in the record of complex cases. It assists in drafting opinions. So far as I am aware, no federal or state decision has ever found advice-giving by non-adversarial staff to violate due process or any

[56] See, e.g., 1 Richard J. Pierce, Jr., Administrative Law Treatise 726 (5th ed. 2010). Pierce writes: "The role of a typical agency's staff is much greater than the role of the staff of a trial court or of an appellate court…[When the case reaches the agency head level] staff members may also present their analysis of the case to the agency heads, who are also usually free to consult any staff members except those who have participated in investigating or prosecuting in the particular case…The decision tends to be an amalgam of the views of the agency heads and the staff.. The institutional decision often reaches a level that is higher than that attainable by the ablest of administrators or judges who are cut off from sources of expert advice…The institutional mind has insights that are as profound as those of any individual and may be much more comprehensive, for the appropriate specialists collaborate by considering the judgment of each other, each contributing his or her own particular knowledge and skills."

statute, provided that the staff member did not violate the exclusive record rule by introducing new facts or by serving as a conduit for outsiders.[57]

The practice of allowing non-adversarial staff to furnish ex parte advice to adjudicators obviously departs from the adversarial model used in criminal cases. In a criminal case, the judge may receive advice from a law clerk but does not receive ex parte advice from persons in the prosecutor's office, even if the adviser has not been involved in the case under adjudication. However, there are many ways in which administrative agency adjudication differs from ordinary civil litigation (in particular, agencies often use adjudication to make policy as an alternative to adopting the policy through rulemaking) and in which administrative adjudication departs from the judicial model. The ability of non-adversarial staff to give ex parte advice to

[57] On the contrary, the case law has often upheld advice by non-adversarial staff members to agency decisionmakers. The Tennessee Court of Appeals upheld the provision of advice by non-adversary staff to the heads of the state public utility regulatory commission in a ratemaking case. It denied requests to discover the advice. The court said: "On this part of the controversy we are persuaded that the [Tennessee Regulatory Authority or TRA] was correct. The TRA deals with highly complicated data involving principles of finance, accounting, and corporate efficiency; it also deals with the convoluted principles of legislative utility regulation. To expect the Authority members to fulfill their duties without the help of a competent and efficient staff defies all logic. And, we are convinced, the staff may make recommendations or suggestions as to the merits of the questions before the TRA… Otherwise, all support staff—law clerks, court clerks, and other specialists—would be of little service to the person(s) that hire them. We are satisfied that any report made by the agency staff based on the record before the TRA was not subject to the CAD's motion to discover it." Consumer Advocate Div. v. Tennessee Reg. Auth., 1998 Tenn. App. Lexis 428; 1998 Westlaw 684536 (for unknown reasons this case is not reported in the Southwest Reporter). See also White v. Indiana Parole Bd., 266 F.3d 759, 766 (7th Cir. 2001) ("[N]on-record discussions between an agency's decisionmakers and members of the agency's staff are common and proper…Agencies and courts have different methods of resolving disputes; what is unthinkable for a court may be normal for an agency"); Smith v. Houston Chemical Servs, 872 S.W.2d 252, 278 (Tex. Ct. App. 1994) (statutory provision upheld against due process attack that allowed agency decisionmaker to communicate with non-adversary staff "for the purpose of using the special skills or knowledge of the agency and its staff in evaluating the evidence"); Boswell v. Iowa Bd. of Veterinary Medicine, 477 N.W.2d 366, 370 (Iowa 1991) ("the statute allows the [state veterinarian] to share his expertise as a veterinarian [with the board] as long as he is acting neither as a prosecutor nor advocate"); Nationwide Mutual Ins. Co. v. Insurance Comm'r, 509 A.2d 719 (Md. App. 1986) (rejecting due process challenge to Commissioner's ex parte consideration of charts prepared by staff specialist who played no adversary role in the case).

agency decisionmakers is one of the ways that agency adjudication differs from judicial adjudication.

The reasons for allowing such advice are obvious and are reflected by the water pollution hypo above. Agency heads are not like judges. They have often vast responsibilities, such as rulemaking, law enforcement, legislative relations, budgeting, and numerous other important tasks. They may be part-timers with limited time to devote to their agency work. Yet they are also responsible for making the final decision in adjudicated cases. There may be many such cases coming to their desks and they may be extremely complex and technical, calling for the application of expertise in matters of critical concern to the community. It is simply not realistic to expect the agency heads in their adjudicative capacity to act like trial or appellate judges who work on their own (or with the assistance only of a law clerk). Administrative judges often have neither the time nor the expertise to do so. Rapid turnover at the agency head level is quite common, so the persons responsible for making major decisions may have vertical learning curves. Agency heads desperately need help in understanding the issues, getting control of massive records, evaluating expert testimony, and grappling with frighteningly uncertain science. Agency heads also have to understand past agency practice and policy statements as well as the law as set forth in statute, regulations, and court decisions. They must seek to reach results that are consistent with earlier cases, whenever that is possible, or to explain why they have departed from earlier precedents. Only staff assistance can enable them to do all of this important work responsibly and wisely.

Thus staff members have been consulting with agency heads as long as combined function agencies have existed and as long as adjudication has been used as a policy-making tool. At least since 1946, it has been well understood that certain staff members were

disqualified from giving advice if they had served as adversaries in the case in which they are called on to give advice. Finally, it has always been well understood that staff members could not use advice giving as a way to introduce new evidence that was not in the record, for that would violate the principle that adjudicatory decisions must be based on the record. So far as I am aware, these two rules (prohibiting advice from adversaries and prohibiting the introduction of new evidence) have been scrupulously observed and non-problematic.

C. Statutory provisions on staff advice

The ability of agency heads to receive staff advice was explicitly confirmed in the 1981 MSAPA. It provides: "Any presiding officer [which in context means both the administrative judge and the agency heads] may receive aid from staff assistants if the assistants do not (i) receive ex parte communications of a type that the presiding officer would be prohibited from receiving or (ii) furnish, augment, diminish or modify the evidence in the record." [58] However, "A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding."[59]

The federal APA is also clear on this point: "An employee or agent engaged in the performance of investigative or prosecuting function for an agency in a case may not, in that or a factually related case, participate or advice in the decision…except as witness or counsel in public proceedings."[60] This provision obviously implies that staff members who have not engaged in investigative or prosecuting functions in a case are permitted to furnish advice.

[58] 1981 MSAPA § 4-213(b).
[59] *Id.* § 4-214(a).
[60] APA, 5 U.S.C. §554(d). The provision has exceptions for initial licenses and ratemaking. *Id.* 554(d)(A) and (B). There is an additional exception for "the agency, or a member or members of the body comprising the agency." *Id.* §554(d)(C). Most observers believe this exception is intended to allow the agency heads to personally engage in

However, the 1961 MSAPA is not so clear on the staff advice issue. Section 13 provides:

> Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a decision or make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member
>
> (1) may communicate with other members of the agency, and
>
> (2) may have the aid and advice of one or more personal assistants.[61]

This provision in the 1961 Act is quite obscure on several points. To my knowledge, it has never been explained or implemented by case law. It could be read to confine agency heads to receiving ex parte staff advice only from "personal assistants" but not from other staff members. But so far as I am aware, section 13 has never been enforced in this way.[62] My understanding is that agency adjudicators in states subject to the 1961 Act have freely consulted with non-adversarial agency staff members, whether or not formally designated as their personal assistants.

D. Staff advice in the 2010 MSAPA

Whether the 2010 Act should follow the received wisdom of allowing non-adversarial ex parte staff advice to decisionmakers was a subject of intense controversy in the drafting

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adversary activities, then decide the case, but is not intended to allow the heads to receive ex parte advice from adversarial staff members. See Asimow, note xx , 81 Colum. L. Rev. at 766.

[61] 1961 MSAPA §13.

[62] New York altered §13 to make clear that staff advice to decisionmakers is permissible. "Any such agency member…may have the aid and advice of agency staff other than staff which has been or is engaged in the investigation or prosecuting functions in connection with the case under consideration or factually related case." New York State Administrative Procedure Act § 307(2).

committee, beginning in the committee deliberations that occurred while I was still the ABA liaison. My understanding is that some members of the drafting committee had received complaints from lawyers about staff advice to agency heads. The agency-head decisional process seemed like an impenetrable black box. The lawyers felt that they had presented a solid case to the administrative judge which was set at naught by ex parte staff communications to the agency head. Yet the lawyers were unable to find out what these communications consisted of, much less have a chance to rebut them. All this seemed like a grievous offense against the norms of the adversary system. For that reason, a majority of the members of the drafting committee decided to break with prior practice and ban ex parte staff advice.

I was unsuccessful in my attempts to change their minds. My successor as ABA liaison, Ron Levin, was more successful (and no doubt more tactful) and he persuaded the drafting committee to compromise significantly. As will be explained shortly, the provision in the final draft of the 2010 MSAPA permits ex parte staff advice in a variety of circumstances, but it still forbids staff advice that would "address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses."

When the Model Act was before the Commissioners on Uniform State Laws for their final decision, the Council of the Administrative Law Section of the ABA sent them a letter complaining about this provision and asking it be deleted,[63] but the letter was unsuccessful and no changes were made.

Here are the two subsections in the 2010 MSAPA that are in dispute:

§408: EX PARTE COMMUNICATIONS…

[63] Letter from William Luneberg, Chair of the Administrative Law Section, to Robert A. Stein, President, Uniform Law Commission (June 28. 2010). The Commissioners also received a letter from the Organization of Central Panel Directors which criticized the final draft for the opposite reason—it allowed too much ex parte staff advice.

(d) A presiding officer or a final decision maker may communicate about a pending case with an individual authorized by law to provide legal advice to the presiding officer or to the final decision maker and may communicate on ministerial matters with an individual who serves on the [administrative] [personal] staff of the presiding officer or the staff of the final decision maker if the individual providing legal advice or ministerial information has not served as investigator, prosecutor or advocate at any stage of the case, and if the communication does not augment, diminish or modify the evidence in the record.

(e) An agency head that is the presiding officer or final decisionmaker in a pending contested case may communicate about that case with an employee or representative of the agency if:

(1) the employee or representative

(A) has not served as investigator, prosecutor or advocate at any stage of that case;

(B) has not otherwise had a communication with any person about the case other than a communication a presiding officer or final decision maker is permitted to make or receive under subsection (c) or (d) or a communication permitted by paragraph (2); and

(2) the communication does not augment, diminish, or modify the evidence in the agency hearing record and is:

(A) an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record;

(B) an explanation of the precedent, policies, or procedures of the agency, or

(C) *any other communication that does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses.*[64]

It is noteworthy that this section allows a range of ex parte staff assistance to decisionmakers. None of these instances of permitted advice were in the initial drafts of the 2010 MSAPA; they all arose from a series of compromises struck by the drafting committee.

- Both presiding officers and agency heads can communicate about a pending contested case "with an individual authorized by law to provide legal advice to the presiding officer ore final decisionmaker."[65] Note that this provision would appear to allow a law clerk to communicate about any subject with decisionmakers, not just about the law.
- Both presiding officers and agency heads may communicate about "ministerial matters with an individual who serve on the [administrative] [personal] staff of the presiding officer or final decision maker."[66] I point out here that the term "ministerial matters" is not defined in the Act. It might refer to procedural issues such as scheduling of a hearing. Or it may mean a matter about which the decisionmaker has no legal discretion. Whether an item is ministerial or discretionary is often a highly disputed matter. There is a vast body of case law on the question, which frequently arises in state law writ practice, because it is possible to obtain a writ of mandamus to compel an officer to discharge a ministerial duty but not to compel the officer to exercise discretion in a particular manner.

[64] 2010 MSAPA § 408(d) and (e) (emphasis added).
[65] *Id.* §408(d).
[66] *Id.* §408(d).

- Agency heads (but not presiding officers) can receive staff assistance which is "an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record."[67] This exception was intended to allow staff assistance to help decisionmakers understand difficult scientific evidence.
- Agency heads (but not presiding officers) can receive staff assistance which is "an explanation of the precedent, policies, or procedures of the agency." [68] This exception was intended to allow staff advice that allows the agency heads to make decisions that are consistent with prior decisions or prior policy statements adopted by the agency.
- Agency heads (but not presiding officers) can receive "Any other communication…"[69] from the staff. This language would seem to render the previous two paragraphs redundant.

But all of the three just-mentioned provisions that allow advice to the agency heads (but not presiding officers) are subject to the exception that such communication "does not address the qualify or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses."[70]

I make several observations about sections 408(d) and (e). First, it is head-spinningly complex. I'm guessing that you, as a reader encountering this material for the first time, had quite a lot of difficulty understanding what sections 408(d) and (e) allow and prohibit by way of ex parte staff advice. In this respect, the provision departs sharply from the goal of producing a

[67] *Id.* §408(e)(2)(A).
[68] *Id.* §408(e)(2)(B)
[69] *Id.* § 408(e)(2)(C).
[70] *Id.* § 408(e)(2)(C). It might be possible to read this language as applying only to "any other communication." Ron Levin reads it this way. I believe that the drafters meant it to cover advice relating to the "technical or scientific basis" of the evidence or an explanation of the" precedent , policies or procedures of the agency" as well as "any other communication…"

reader-friendly, relatively simple statute suitable for consideration by non-expert state legislators, along the lines of the 1961 Act. Sections 408(e) and (e) are full of ambiguities and difficult concepts to apply in practice, some of which I've mentioned already.

In addition, the 2010 MSAPA was intended to be evolutionary, not revolutionary, involving mostly minor improvements in administrative procedure without breaking sharply with existing law. However, such is not the case with the Act's provisions relating to staff advice to decisionmakers. I feel certain that these provisions limiting ex parte staff advice will stir vehement opposition by agencies and Attorneys General in the states that consider the Act. Indeed, these provisions may be enough, by themselves, to cause the Act not to be taken seriously or rejected out of hand.

To illustrate the difficulty of applying the staff advice provisions, let's return to my example about water pollution. Assume that W, a purported expert, testifies on behalf of Chipco that XYZ is as harmless as mother's milk. During the deliberations at the agency-head level, SWA head AH asks staff assistant SA about W's testimony. SA can explain what XYZ is and what mother's milk is (including the chemical formulas for both), but cannot express any opinion about the "quality or sufficiency of" the evidence or about W's "credibility." SA would like to say that W's methodology was ridiculous, but he is forbidden from saying so off-the-record. Perhaps the reader will share my puzzlement about how SA can furnish an "explanation of the technical or scientific basis of…the evidence in the agency hearing record," which is permitted,[71] but refrain from "address[ing] the quality and sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses," which is prohibited.[72]

As the result of all this ambiguity and of distinctions that are very difficult to draw in

[71] *Id.* §408(e)(2)(A).
[72] *Id.* §408(e)(2)(C).

practice, there may be several negative outcomes. First, agencies may decide to forego staff assistance altogether because of the risk that a prohibited ex parte communication might occur. That would be extremely unfortunate because, by hypothesis, the problem arises in cases that are highly complex yet are of great public importance. Second, the section is an open invitation to litigation. Depending on state law, parties unhappy with agency decisions may be able to engage in discovery about exactly what was said, by whom and to whom.[73] Then they can challenge the staff advice on judicial review. The section can only promote procedural litigation and commensurately increase delays and agency costs.

F. Putting staff advice on the record

It may seem that there is an obvious compromise between the positions of either freely allowing or strictly prohibiting staff advice to decisionmakers—allow the advice but put it on the record so that parties who disagree with it can offer a rebuttal. At one point during consideration of the 2010 Model Act, the drafting committee would have allowed staff advice but required that both oral and written advice be placed on the record.

However, I do not think this compromise will work because the goal of allowing staff advice is to get candid advice. If advice is to be placed on the record and thus made public, the staff adviser will never give candid advice, at least not in writing. Candid advice could embarrass the staff member or the agency head who receives it. It can expose either of them to adverse criticism in the media. Staff comments could be of great value to the party who challenges the agency action in court, particularly comments that are critical of the action that the agency finally decides to take. No staff member would willingly furnish fodder for lawyers'

[73] In the famous *PATCO* case, involving outsider ex parte contacts with a federal agency, there was extensive discovery about who said what to whom. The court ordered that the agency conduct a special hearing before an ALJ at which the agency heads who received the communications had to testify about them. Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth., 685 F.2d 547 (D.C. Cir. 1982)

arguments against the agency.

I have worked in the area of administrative law for a long time and of this I am certain: if you want an adviser to give candid advice, it has to be off-the-record. On the record advice will be worthless. In this era of transparency, my position may seem outmoded, but it is not. Consider:

- Sunshine acts require agency members to meet in public. Everyone who has ever studied sunshine acts concludes that the public meetings are a joke.[74] Nobody ever says anything of importance with the public and the press listening. It is impossible for the agency members to have a candid debate or discussion. Matters are settled by the staff or by conferences between members in the bathroom. The entire purpose of having a multi-member headed agency is frustrated.
- The Freedom of Information Act (FOIA) contains an exception for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than agency in litigation with the agency."[75] In other words, FOIA embodies a privilege for pre-decisional advice because we realize that the only way executive officials can get candid advice is if the advice can remain secret.[76]
- The attorney-client privilege allows secrecy of communications between lawyer and client. Just think how much the truth-seeking function of trials could be improved if this information could be presented. But we protect it from

[74] See e.g. Richard J. Pierce, Jr. 1 Administrative Law Treatise 390-93 (5th ed. 2010).
[75] 5 U.S.C. §552(b)(5).
[76] See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 (1975).

disclosure because that is the only way that clients and lawyers will level with each other.

- There is no discovery of what law clerks say to judges or of what judges on multi-judge courts say to each other. The reasons are obvious.[77]

Justice Frankfurter's opinion in the *Fourth Morgan case* made the definitive argument against forcing disclosure of communications between judges (including agency heads acting as adjudicative decisionmakers) and staff assistants. The four *Morgan* cases decided back in the 1930's and 1940's 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.

In the Fourth *Morgan* case,[78] 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.

[77] I offer a personal anecdote to the same effect. Years ago, I was asked to comment on the work of an academic who was up for tenure at another institution. My response included some critical comments about the candidate's work. Shortly afterward, I heard from the candidate who was greatly annoyed by my comments. From then on, I have refused to participate in peer review of the work of a tenure candidate at another institution unless my identity is not disclosed to the candidate (generally this is done through redaction of the names and institutions of peer reviewers from letters in the file that is available to the candidate). In my view, the peer review process in institutions that fail to protect the identity of reviewers is a sham.

[78] United States v. Morgan, 313 U.S. 409 (1941),

> 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.
>
> 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."[79] 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."[80] 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.[81]

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*,[82] which involved judicial scrutiny of the decisionmaking process of an ALJ. The Court said:

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[79] Here Frankfurter cited the first Morgan case which allows the Secretary of Agriculture to receive staff assistance in making an adjudicatory rate making decision. Morgan v. United States, 298 U.S. 468, 480 (1936).
[80] Here Frankfurter cited the second Morgan case which questioned, among other things, advice from staff members who had been adversaries in the case. Morgan v. United States, 304 U.S. 1, 18 (1938)
[81] United States v. Morgan, 313 U.S. 409, 421-22 (1941) (*Morgan IV*). For the final sentence, Frankfurter cited the Third Morgan case, 307 U.S. 183, 191 (1939).
[82] 989 F.2d 1332, 1344-45 (3d Cir. 1993)

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. ...

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. ...
>
> 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.

The opinions in *Morgan IV* and *Grant v. Shalala* are eloquent arguments for the proposition that administrative judges (whether ALJ or agency head) are entitled to receive candid, confidential assistance from staff. Requiring disclosure of such communications would be extremely destructive to the decisionmaking process.

G. Fixing the problem

I hope that many states will adopt the 2010 MSAPA but will delete the provisions limited ex parte staff advice. As suggested in the letter by the ABA Administrative Law

Section to the Uniform Law Commissioners,[83] a state legislature can easily do so by deleting the disputed language from section 408(e)(2).[84]

IV CONCLUSION

The 2010 Revised Model State APA had a long gestation period. The pregnancy and birth were difficult. A large number of people devoted a great deal of time, effort, and emotional energy to getting this model act drafted and adopted. I regret that I must strongly oppose two subsections of the Act on staff advice, as described in Part III, and I must urge states considering the Act to strike these out and substitute a provision that allows staff advice from non-adversarial staff members. With that exception, however, I am very supportive of the Act and hope it will be considered in every state and adopted by many.

[83] Letter, p. 5, fn. 6. The letter is referenced in note [62] supra.

[84] It is necessary only to delete subsections (A), (B), and (C) in §408(e)(2), ending that subsection after the words "the evidence in the agency hearing record." This deletion would also require a corresponding amendment of §408(e)(1)(B). Probably (B) should be reworded so it reads: "(B) has not received an ex parte communication of a type which the agency head would be prohibited from receiving." The latter language is taken from §4-213 of the 1981 Act.