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## An Introduction to the 2010 Model State Administrative Procedure Act

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## SYMPOSIUM

### MODERNIZING AGENCY PRACTICE: THE 2010 MODEL STATE ADMINISTRATIVE PROCEDURE ACT

#### AN INTRODUCTION TO THE 2010 MODEL STATE ADMINISTRATIVE PROCEDURE ACT

John Gedid\*

After nearly seven years of research and drafting, the National Conference of Commissioners on Uniform State Laws, now known as the Uniform Law Commission (ULC), in July 2010, completed and approved the 2010 Revised Model State Administrative Procedure Act (MSAPA).<sup>1</sup> The 2010 MSAPA has been an important guide to the states in drafting and designing their administrative procedures since 1946, the date of the first MSAPA.<sup>2</sup> This is the third revision of the MSAPA; revisions to the original 1946 act occurred in 1961<sup>3</sup> and 1981.<sup>4</sup>

This Symposium at Widener University's Harrisburg campus in October of 2010 provides an initial overview of, and identifies changes in, the 2010 MSAPA. In order to understand the effect of the 2010 MSAPA changes and their importance, the introduction will include a brief review of the evolution of the act since its first

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<sup>1</sup> REVISED MODEL STATE ADMIN. PROCEDURE ACT, About ULC at iii (2010), [hereinafter 2010 MSAPA] *available at* [http://www.law.upenn.edu/bll/archives/ulc/msapa/2010\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/msapa/2010_final.htm).

<sup>2</sup> MODEL STATE ADMIN. PROCEDURE ACT (1946) (revised 1961, 1981, & 2010).

<sup>3</sup> *See* MODEL STATE ADMIN. PROCEDURE ACT §§ 1-19 (1961) (revised 1981 & 2010), 15 U.L.A. 184 (2000) [hereinafter 1961 MSAPA], *available at* <http://www.japc.state.fl.us/publications/USAPA/MSAPA1961.pdf>

<sup>4</sup> *See* MODEL STATE ADMIN. PROCEDURE ACT 1, Commissioners' prefatory note (1981) (revised 2010), 15 U.L.A. 1 (2000) [hereinafter 1981 MSAPA], *available at* <http://www.nmcpr.state.nm.us/acr/presentations/1981MSAPA.htm>.

version in 1946 following the promulgation of the federal Administrative Procedure Act<sup>5</sup> (APA).

### I. THE 2010 MSAPA: WHY REVISE NOW?

There were many reasons for the present revision of the MSAPA. It has been nearly thirty years since the MSAPA was last revised in 1981. Events and developments have occurred in those years that were not remotely foreseen in the 1980s. One of the most important was the creation and explosive growth of the Internet and the development of personal computing. The growth of the electronic media offers the opportunity for greater transparency and communication between agencies and citizens in an efficient manner. In the same thirty years, states have experimented with numerous new statutory devices, which is an expected corollary of the use of the model act form. There has been ongoing state adaptation and experimentation with the earlier model acts, especially the 1961 MSAPA,<sup>6</sup> and that state activity has borne fruit. The new approach to guidance documents in the 2010 MSAPA has arisen in part from various state experiments in this area.<sup>7</sup> As pointed out in the Prefatory Note to the 2010 MSAPA, other events that contribute to the need for revision are recent studies of the federal APA (which has features similar to the MSAPAs), the creation of central panels of administrative law judges in nearly half the states, and studies by the Administrative and Regulatory Law Section of the American Bar Association.<sup>8</sup> One other reason for revision is a rich academic literature on the

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<sup>5</sup> Administrative Procedure Act, 5 U.S.C. §§ 500-596 (2006).

<sup>6</sup> See 2010 MSAPA 1 n.5, Prefatory Note (noting that the following states had adopted the 1961 MSAPA: "Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming." (citing U.L.A. 357 (1980 Master Edition))

<sup>7</sup> See, e.g., VA. CODE ANN. § 2.2-4001 (2010) ("Guidance document"); VA. CODE ANN. § 2.2-4008; see also N.Y. A.P.A. LAW § 102(14) (2010) ("Guidance document"); N.Y. A.P.A. LAW § 202-E.

<sup>8</sup> 2010 MSAPA 2, Prefatory Note (2010).

model act and the revisions and changes that have been made in the past forty years in many of the states. Although often overlooked, such changes within each state invariably provoke comment, analysis, and discussion about those changes.<sup>9</sup> This academic commentary is a rich source of insight and information about the strengths and weaknesses of state APA innovations; these insights were used in the 2010 MSAPA drafting. Finally—and not least—appellate case law in forty years has identified problems of ambiguity, omission, and contradiction in state APAs.

## II. THE DRAFTERS' "MODEL" APPROACH TO THE 2010 MSAPA

By way of introduction, it should be noted that the object of the 2010 MSAPA is intentionally to follow the model act style of the 1946 and 1961 MSAPAs by setting forth only major principles of fairness and leaving details up to the states. In spite of this goal, the 2010 MSAPA is longer than either of those two earlier acts; however, it is substantially shorter than the 1981 MSAPA. The 2010 MSAPA covers several major new topics such as central panels of administrative law judges<sup>10</sup> and legislative review.<sup>11</sup> There is good reason for this increased length. In the thirty-odd years since the last revision, there have been numerous changes in many areas that were wholly unforeseen. Examples are the growth of electronic communication and the Internet. Further, experience in the states with myriad variations on the earlier MSAPAs disclosed unanticipated problems with some provisions of the prior MSAPAs. And wholly new state experiments with administrative

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<sup>9</sup> See, e.g., Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L.J. 297 (1996); Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. REV. 833 (1975); Patricia Dore, *Rulemaking Innovations Under the New Administrative Procedure Act*, 3 FLA. ST. U. L. REV. 97 (1975); Dave Frohnmayer, *National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and New Utah Administrative Procedure Act*, 3 B.Y.U. J. PUB. L. 1 (1989); Karen M. Karre, *Louisiana's "New" Administrative Procedure Act*, 35 LA. L. REV. 629 (1975).

<sup>10</sup> See §§ 601-06.

<sup>11</sup> See §§ 701-03.

procedure that worked well furnished models for improvement incorporated into the 2010 MSAPA. Even though lengthier than the 1961 MSAPA, the 2010 MSAPA strives to model general principles and standards of fairness in administrative procedure; detailed implementation is left up to the states. As pointed out by Professor Asimow in his Symposium article here,<sup>12</sup> with very few exceptions the changes and additions in the 2010 MSAPA are evolutionary and easy to understand, not revolutionary. This attribute should make the 2010 MSAPA more attractive and useful to state legislatures. Finally, as noted in the Prefatory note, the 2010 MSAPA was drafted to supplement the 1961 MSAPA,<sup>13</sup> which is the version of the MSAPA in use in over half of the states.<sup>14</sup>

### III. GENERAL CHANGES AND ADDITIONS IN THE 2010 MSAPA

#### *A. Adjudication*

A definition of "adjudication" has been added: it is a process for determining evidence or applying law that results in an order.<sup>15</sup> "Contested case" has been redefined to include the requirement of a formal hearing where a federal or state constitution or statute mandates an evidentiary hearing.<sup>16</sup> An "evidentiary hearing" is a proceeding for the receipt of evidence to resolve issues in a contested case.<sup>17</sup> These definitions must be read in conjunction with Article IV, which provides the procedure for all contested cases.<sup>18</sup>

These sections of the 2010 MSAPA work a major change from the 1961 MSAPA. The 1961 MSAPA defined "contested

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<sup>12</sup> See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Revised Model State Administrative Procedure Act*, 20 WIDENER L. J. 707, 712 (2011).

<sup>13</sup> 2010 MSAPA 3, Prefatory Note.

<sup>14</sup> See *supra* note 6.

<sup>15</sup> § 102(1).

<sup>16</sup> § 102(7).

<sup>17</sup> § 102(11).

<sup>18</sup> §§ 401-19 ("This [article] applies to an adjudication made by an agency in a contested case.")

case" as one where legal rights, duties, and obligations were required to be changed after hearing "by law."<sup>19</sup> The 2010 MSAPA has added the requirement of a contested case hearing where required by state or federal *constitution*.<sup>20</sup>

A second major change in the adjudication article of the 2010 MSAPA severely limits staff *ex parte* advice to the agency head when sitting as the presiding officer in a contested case, a practice that has been followed since the advent of the 1946 MSAPA.<sup>21</sup> This was one of the most contentious issues that the drafters faced, and it represents a compromise. Two different sections of the American Bar Association actually took opposing positions on the issue of staff advice to agency heads in adjudication of contested cases.<sup>22</sup> The resulting compromise is a severely circumscribed opportunity for agency head *ex parte* communication with staff under section 408.<sup>23</sup> As a result, the American Bar Association Liaison to the Drafting Committee of the 2010 MSAPA, Professor Michael Asimow, strongly recommends the 2010 MSAPA to the states, but does not recommend adoption of section 408 with regard to staff advice to the agency head. His article, published *infra* as part of this Symposium, explains the operation of section 408; he argues that, as drafted, it is unworkable and will severely impede agency operations, explains why staff advice to agency heads sitting as adjudicators is crucial, and gives the reasons for his refusal to recommend it for adoption by the states.<sup>24</sup>

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<sup>19</sup> 1981 MSAPA § 1(2).

<sup>20</sup> 2010 MSAPA § 102(7).

<sup>21</sup> § 408(d)-(e).

<sup>22</sup> The National Conference of Administrative Law Judges, a part of the judicial division of the American Bar Association, took the position that there should be no exception for staff to render *ex parte* advice to an agency head; the Administrative and Regulatory Law Section of the American Bar Association took the position that there should be a broad exception for such advice. *See* § 408, cmt. at 73.

<sup>23</sup> *Id.*

<sup>24</sup> *See* Asimow, *supra* note 12, at 721-39.

*B. Rulemaking*

A "rule" is defined as a "statement of general applicability that implements . . . law or policy . . . and has the force of law,"<sup>25</sup> which is similar to the 1946 and 1961 MSAPAs. The 2010 MSAPA generally has numerous new provisions that improve public notice, access and participation in rule making, that improve agency input from the public during rulemaking, and that improve judicial review. Some new provisions in the 2010 MSAPA rulemaking article are: the term agency "record" in rulemaking is for the first time defined<sup>26</sup> and an obligation is placed on the agency to maintain that record;<sup>27</sup> negotiated rulemaking has been added and includes provision for advisory groups' advice and advice from stakeholders and interested groups;<sup>28</sup> and a special simplified procedure has been added for "direct final" rules which are expected to be noncontroversial.<sup>29</sup>

An important new provision in Article III of the 2010 MSAPA is express recognition and agency procedure for use of guidance documents.<sup>30</sup> The new guidance document procedure clarifies the relationship between agency rules and interpretive and policy statements. The 2010 MSAPA definition of a "guidance document" is a statement of general applicability that explains an agency's interpretation of statute or policy but lacks the force of law.<sup>31</sup> There is no requirement in the 2010 MSAPA for agencies to use notice-and-comment procedure for the promulgation of guidance documents. However, to deal with the problem of agencies that use guidance documents in a "binding" fashion, the 2010 MSAPA has carefully crafted limitations on agency use of guidance documents and produced a completely new set of obligations for agencies in connection with using them.<sup>32</sup> Some of those limits are that (1) an agency proposing to rely on a guidance

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<sup>25</sup> § 102(30).

<sup>26</sup> § 102(29).

<sup>27</sup> § 302.

<sup>28</sup> § 303.

<sup>29</sup> § 310.

<sup>30</sup> §§ 102(14), 311.

<sup>31</sup> § 102(14).

<sup>32</sup> See § 311 & cmt.

document must afford an affected party an opportunity to address the "legality or wisdom" of the agency position; (2) if an agency proposes to act at variance with a guidance document, it must give "a reasonable explanation for the variance;" (3) if the affected party may have relied on the guidance document, the agency must explain why its interest outweighs the party's interest; and (4) the agency must maintain an index of all guidance documents that is available to the public.<sup>33</sup> Professor Ronald Levin in his Symposium article here on rulemaking explains the numerous and important advantages of this novel approach to guidance documents.<sup>34</sup> Professor Ron Beal agrees and observes that the 2010 MSAPA provisions on guidance documents will eliminate several problems in states that have adopted a version of the 1961 MSAPA.<sup>35</sup>

### *C. Electronic Procedure*

The 2010 MSAPA also includes entirely new material on electronic and Internet procedures that attempt to draw upon developments that have occurred since the 1981 MSAPA was drafted. Most of these provisions deal with technology that did not exist at the time of the last revision of the MSAPA. One caveat on this subject: because uses of computer electronics are so diverse and variable (for example, they can be used for giving notice individually or generally to the public, or for maintaining an index to documents, or for maintaining a database available to the public, or for submitting documents or records to an agency), the 2010 MSAPA defines several electronic devices and practices in Article I<sup>36</sup> and employs those devices throughout the act.<sup>37</sup> Many

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<sup>33</sup> § 311(b)-(e).

<sup>34</sup> Ronald Levin, *Rulemaking Under the 2010 Revised Model State Administrative Procedure Act*, 20 WIDENER L.J. 855 (2011)

<sup>35</sup> Ron Beal, *Rulemaking: Procedure as It Relates to Substance Under the 2010 Revised Model State Administrative Procedure Act*, 20 WIDENER L.J. 741 (2011).

<sup>36</sup> See § 102(8) ("Electronic"); § 102(9) ("Electronic record"); § 102(15) ("Index"); § 102(17) ("Internet website").

<sup>37</sup> E.g., § 201 (public access to agency law and policy); § 316 (filing of rule); § 403(e)-(f) (providing for hearings open to the public and permitting various electronic devices for conducting such hearings).



of these 2010 MSAPA provisions have been influenced by state and federal agencies that are already employing them.

#### *D. Central Panel Article*

The 2010 MSAPA includes a new optional article that establishes a central administrative law judge panel.<sup>38</sup> Article VI is based upon the Model Act Creating a State Central Hearing Agency<sup>39</sup> adopted by the House of Delegates of the American Bar Association in 1997.<sup>40</sup>

#### *E. Judicial Review*

One area where there is little change in the 2010 MSAPA is judicial review. The judicial scope of review provisions are relatively unchanged from the 1946 and 1961 MSAPAs.<sup>41</sup> The reporter explains that the drafters' refusal to change the scope provisions occurred because the drafting committee believed that scope is "notoriously difficult to capture in verbal formulas, and its application varies depending on context."<sup>42</sup> Although space limitations prohibit any extended discussion, this drafting committee choice is unfortunate. The fact of the matter is that in the years since the first APA was promulgated, courts have generated more precise and useful explanations and verbal formulas for judicial review of agency action. Reviewing and including some of those more evolved scope provisions in this article of the 2010 MSAPA would provide substantial assistance to state appellate courts reviewing agency decisions. This is particularly true for courts that do not adjudicate large numbers of appeals from agency decisions. The author, who served on the drafting committee that produced the 2010 MSAPA for the entire, nearly seven-year drafting period, suspects that a contributing factor to the refusal to revisit more specific scope of review

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<sup>38</sup> §§ 601-07.

<sup>39</sup> AM. BAR. ASSOC., MODEL ACT CREATING A STATE CENT. HEARING AGENCY (OFFICE OF ADMIN. HEARINGS) (1997), *available at* <http://www.law.fsu.edu/library/admin/alj.html>.

<sup>40</sup> § 601 cmt.

<sup>41</sup> *See* § 508.

<sup>42</sup> § 508 cmt.

provisions is the fact that at the time the drafting committee began consideration of the scope provisions, the drafting process had been going on for nearly six years; the drafting committee was anxious to finish up and was being encouraged to do so by the ULC leadership. Professor Bernard Bell in his article in this Symposium points out another 2010 MSAPA problem area: the *Chevron* problem in the states.<sup>43</sup> In his comprehensive article, he criticizes the 2010 MSAPA for missing the opportunity to provide guidance on the deference that state courts should give to agency interpretations of law and policy.<sup>44</sup> Professor Bell makes a persuasive argument that, based on differences in state agency expertise and the democratic pedigree of many state court judges, judicial review of state agency interpretation of policy and law is different in kind from federal agencies; therefore *Chevron* deference is not suitable in the states.

#### IV. CONCLUSION

The 2010 MSAPA represents nearly seven years of intense research and drafting by experts in administrative procedure. The committee solicited and received substantial input from several organizations that work and have interest and expertise in agency procedure. Those organizations included the American Bar Association, the National Association of Secretaries of State, and the National Conference of Administrative Law Judiciary. Many of the participants in this Symposium participated in some or all of the drafting process as reporter, drafting committee member, or representative to the drafting committee from the American Bar Association. The 2010 Revised Model State Administrative Procedure Act makes many improvements to state administrative procedure. In this Symposium, participants explained those improvements and they explained the contentious problem areas that are the result of compromise as well. The result is a roadmap for states that wish to improve their administrative procedure, one

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<sup>43</sup> See generally Bernard Bell, *The Model APA and the Scope of Judicial Review: Importing Chevron Into State Administrative Law*, 20 WIDENER L.J. 801 (2011).

<sup>44</sup> See *id.* at 821.

that identifies clear stretches of highway that are highly desirable for adoption, as well as those few areas where improvement may not be universally conceded.