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Administrative Procedure for the Twenty-First Century: An Introduction to the 2010 Model State Administrative Procedure Act

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ARTICLE

ADMINISTRATIVE PROCEDURE FOR THE TWENTY-FIRST CENTURY: AN INTRODUCTION TO THE 2010 MODEL STATE ADMINISTRATIVE PROCEDURE ACT

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I. FOREWORD

The National Conference of Commissioners on Uniform State Laws (ULC) approved the Revised Model State Administrative Procedure Act (2010 MSAPA) in 2010. The model state administrative procedure acts have been one of the most successful endeavors of the ULC.¹ They have played a major role in encouraging states to incorporate concepts of fairness into state agency procedure statutes and to make express provisions for judicial review of administrative action.² Those states that adopted the model acts accomplished these fairness goals while bringing efficiency and accuracy into the state administrative process.³

This Article describes the evolution of earlier state administrative procedure acts (APAs) into the 2010 MSAPA. By providing an overview of the Act's new features, this Article will offer guidance that is useful for analysts and legislators seeking to implement similar models designed to improve state APAs. This overview examines how the development of

1. See Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 231–32 (1986) (noting the unprecedented unanimous support for the Act when presented to the Senate in March of 1946).

2. See Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 307 (1986) (quoting the 1961 MSAPA Prefatory Note and concurring that “there are certain basic principles of common sense, justice, and fairness that can and should prevail universally” in the administrative process”); Reuel E. Schiller, *The Era of Deference: Courts Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 430–39 (2007) (analyzing the impact of the Roosevelt administration and the makeup of the courts during the 1930s and 1940s on doctrines governing judicial review).

3. The exact number of states that have adopted the model acts is difficult to specify because the Act is designed to be malleable enough to allow states to adopt it in full, or use the Act as a resource for drafting state-made administrative law provisions. See MODEL ST. ADMIN. PROC. ACT, *Prefatory Note* (2010), 15 U.L.A. 2 (West Supp. 2012) (indicating the states Arizona, New Hampshire, and Washington have adopted many of the 1981 Act's provisions while other states have drawn from the Act in drafting their own administrative procedure provisions).

the administrative procedure acts as model acts⁴ made the ultimate goal of fairness achievable, as evidenced in the various revisions of the MSAPA. It includes a description of the progression of political and other restraints on agencies, and the evolutionary relationship between the 1961 MSAPA and the 2010 MSAPA. Additionally, this Article discusses the drafters' attempt to adopt administrative procedures to take advantage of developments in the digital realm.

II. BACKSTORY: THE MID-TWENTIETH CENTURY ORIGIN OF APAS

Administrative law is new and administrative procedure did not emerge as a distinct category of law until the mid-twentieth century.⁵ After a long process of development at the federal and state levels, the ULC adopted the first MSAPA in 1946, the same year that the United States Congress adopted the Federal Administrative Procedure Act (FAPA). The first step in the process took place in 1933 when the American Bar Association (ABA) established a Special Committee on Administrative Law.⁶ The Special Committee concluded that the then-current exercise of judicial powers was creating serious fairness problems.⁷ In a 1938 ABA report, Harvard Law School Dean, Roscoe Pound, attacked agency adjudication procedure, arguing that:

Since an administrative agency acted as rule maker, prosecutor, judge, and jury, proceedings before the agency were nothing more than a meaningless formality whose purpose "from end to end is . . . to give effect to a complaint." Often agencies skipped the hearing process altogether or made decisions based on evidence that was not on the record. Even when they made decisions on the record, [they were] filled with opinions, hearsay, and even "gossip."⁸

4. Note the significance of the drafters' choice to create a model act as opposed to a uniform act. Because the drafters sought a flexible solution that could apply despite the irreconcilable differences in state administrations, the Act was drafted as a model act, creating a solution superior to the rigid application inherent in uniform acts. See WALTER P. ARMSTRONG JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 67–68 (1991) (designating the characteristics of a model act).

5. See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1362 (2010) (describing the early days of the American Industrial Age).

6. Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219 (1986).

7. See *id.* (noting the first formal report and proposed legislation was "aimed at coping with 'the evils notoriously prevalent' among administrative tribunals").

8. Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 423 (2007) (internal citations omitted) (quoting SPECIAL COMMITTEE ON ADMINISTRATIVE LAW, 1938 ANNUAL REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW, at 347).

Following suit, many state bar associations also formally adopted positions attacking administrative adjudication procedure.⁹

Commentators, as well as state and federal bar officials, also attacked administrative rulemaking procedure. These opponents argued that agency actions were fundamentally unfair because agencies did not publish, give notice of, or make available, the rules adopted by the agencies.¹⁰ Specifically, the attacks included a separation-of-powers element; commentators argued that the agencies issued numerous regulations that had the force of law, some with criminal penalties, without public notice or public access to the regulations either before or after passage.¹¹ Commentators argued this lack of rulemaking procedure constituted a serious incursion against the executive and legislative branches.¹²

The arguments both pro and con were harsh and contentious. Some commentators argued that the strong disagreements between proponents and opponents of administrative reform were merely “a search for administrative truth and efficiency.”¹³ Others argued “the fight over the APA was a pitched political battle for the life of the New Deal” and that the “central purpose of the proponents of administrative reform was to constrain liberal New Deal agencies.”¹⁴

The debate was intense because it was not merely about administrative procedure, but rather involved impassioned disagreement regarding substantive law and widely divergent political positions.¹⁵ The attempt to

9. See Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 222 (1986) (describing the ABA president-elect's attacks on the procedure as “liberals” seeking “totalitarian powers”).

10. See Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204–08 (1934) (illustrating the potential negative effects that the administrative procedures would have due to the lack of notice and availability of the rules).

11. See *id.* at 202–03 (giving examples of past regulations that have imposed criminal sanctions for violations, such as the National Industrial Recovery Act of 1933 and the Securities Exchange Act of 1934).

12. See *id.* at 202–04 (denouncing administrative procedure practices as chaotic and comparing practices of the legislature and judiciary with those of administrative procedure existing at the time).

13. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996).

14. *Id.* Much of the material on the battle over administrative procedure is based upon Professor Shepherd's comprehensive article, which focused on the political battles concerning the interrelatedness of New Deal politics and administrative procedure reform. See generally *id.* (providing a detailed analysis of the developmental history of MSAPAs).

15. See James M. Landis, *Crucial Issues in Administrative Law—The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1078 (1940) (describing how the conflict over administrative procedure played out in the ABA's opposition to the National Lawyers Guild).

create and control administrative procedure was an attempt to control the New Deal.¹⁶ The attacks on administrative procedure were in fact efforts that sought “radically to alter *substance*.”¹⁷

The New Deal indirectly sparked the creation and rapid growth of administrative procedure because of perceived abuses by newly created agencies.¹⁸ In an attempt to remedy quickly the economic problems of the Great Depression, federal and state legislatures delegated extensive discretion to agencies, empowering them with immense rule-making powers and adjudicatory authority without provisions for standards or published procedures.¹⁹ Critics asserted that this unchecked discretion did “violence to society’s concept of justice.”²⁰ Despite the recognized importance of administrative law, it remained unsettled. As late as 1963, one observer noted that:

[I]t is self-evident that knowledge concerning [administrative law] is indispensable to the maintenance of the rule of law. In view of the tremendous significance of administrative law, the paucity of information regarding it, particularly at the state level, is appalling. Even the term “administrative law” has not been provided any precise definition . . .²¹

Furthermore, the relative novelty of administrative procedure contributed to the use of procedural attacks to accomplish substantive goals.²² This reaction explains the business and bar associations’ strident attacks on agencies in the mid-twentieth century. The principal reason for the creation of APAs was to control agencies.

A major breakthrough in the battle over administrative procedure occurred in 1939, when President Roosevelt ordered the attorney general to appoint a committee to investigate the “need for procedural reform” of

16. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996) (“[T]he more than a decade of political combat that preceded the adoption of the [Administrative Procedure Act] was one of the major political struggles in the war between supporters and opponents of the New Deal.”).

17. James M. Landis, *Crucial Issues in Administrative Law—The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1078 (1940) (emphasis added).

18. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1558–59 (1996) (describing the policy-shaping power of the agencies brought about by the New Deal).

19. *Id.* at 1562.

20. See William J. Pierce, *The Act As Viewed by an Academician*, 16 ADMIN. L. REV. 50, 50 (1963) (recognizing the concern of unchecked exercise of governmental powers).

21. William J. Pierce, *The Act As Viewed by an Academician*, 16 ADMIN. L. REV. 50, 50 (1963).

22. See James M. Landis, *Crucial Issues in Administrative Law—The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1078 (1940) (maintaining that some of the proponents who amended the National Labor Relations Act did so not because of procedural reasons, but rather, because of other substantive goals).

agency practice.²³ This committee, entitled the Attorney General's Committee on Administrative Procedure (AG Committee), issued its final report in 1941.²⁴ The majority (seven of eleven members) made recommendations for procedural reform that included provisions for dissemination of administrative information and public access to information, fair procedure in informal and formal adjudication, and creation of rulemaking procedure.²⁵ The members comprising the minority agreed with the majority, but urged that, in addition to the majority proposals, provisions were necessary on separation of functions, judicial review, and more detailed agency procedure that was consistent with current notions of fundamental fairness.²⁶

After World War II ended, many perceived that government administrative action had effectively accomplished tasks of enormous scope and complexity during the war.²⁷ In 1945, the Attorney General proposed a federal administrative procedure act to the United States House and Senate. Both houses were receptive, and enacted the Federal Administrative Procedure Act in 1946.²⁸

A. *State Administrative Procedure Act Developments*

During the same period, extensive action regarding administrative procedure occurred at the state level. In 1937, the American Bar Association Section on Judicial Administration created the Special Committee on Administrative Procedure that produced a 1938 report on state administrative procedure.²⁹ In 1939, the Committee produced a draft administrative procedure act.³⁰ The draft act was referred to the ULC, which began intensive research and drafting over several years.³¹ Although the ULC had prepared and approved a model administrative

23. ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, at 1 (1941).

24. *Id.* at Letter of Submittal.

25. *See id.* at 25–26, 35, 61, 101–02, 114–15 (detailing each of the provisions the majority sought in order to reform administrative procedure).

26. *Id.* at 203.

27. *See* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 229–30 (1986) (explaining the impact of World War II in subsidizing the Committee's goals of creating a generally applicable statute while still balancing the need for individual agency action).

28. *Id.* at 230–32.

29. *See* Bernard Schwartz, *The Model State Administrative Procedure Act*, 7 RUTGERS L. REV. 431, 437 (1953) (crediting this committee's report as giving "major impetus to constructive thinking about State administrative action" (quoting E. Blythe Stason, *The Model Administrative Procedure Act*, 33 IOWA L. REV. 196, 198 (1948))).

30. *Id.*

31. *Id.*; *see also* 1 FRANK E. COOPER, *STATE ADMINISTRATIVE LAW* 9 (1965) (noting the extensive and thorough evaluation of the draft act by the ULC).

procedure act by 1941, when the AG Committee filed a second report that year, the Conference began an exhaustive review of its existing draft act that took into account the new federal report, as well as the “Benjamin Report” from New York.³² After numerous revisions and extensive research, the ULC adopted the Model State Administrative Procedure Act of 1946.³³ Immediately, several states heavily relied on the provisions of the 1946 MSAPA to serve as a guidepost in designing their own state laws.³⁴

B. *The Significance of Drafting a Model Act*

Prior to the adoption of the federal and state APAs, there was considerable discussion on how to draft procedure acts for agencies.³⁵ Although many analysts argued for comprehensive procedural codes, a substantial number of commentators emphasized that it was impossible to fashion a uniform, comprehensive code to govern the activities of all agencies.³⁶ This group argued that only a general set of basic fairness principles would enable APA drafters to offer guidance to all entities seeking to create codes of administrative procedure: “What is needed is

32. 4 ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK—REPORT TO HONORABLE HERBERT H. LEHMAN 1 (1942); *see also* 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 10 (1965) (explaining the significance of the Benjamin Report’s critique of state administrative practice and procedure).

33. MODEL ST. ADMIN. PROC. ACT, *Historical Notes* (1961), 15 U.L.A. 174 (2000).

34. *See* Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 297 (1986) (pointing out that the states relied on the general concepts of the Model State Administrative Procedure Act when creating their own laws).

35. *See* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 225 (1986) (focusing on the extensive research). Indeed, there was no shortage of reports regarding the matter:

Altogether, before the Committee concluded its activity, some forty separate agencies and distinct entities within departments were studied; twenty-seven descriptive and evaluative “monographs” were prepared for publication; the fruits of the staff’s researches were made available to the agencies involved and were discussed by them with the full committee; and, after public notice as well as individual invitations to [one hundred thousand] persons whose presence on various lists indicated some measure of interest, public hearings were held to receive oral or written opinions about administrative procedure.

Id.; *see also* MODEL ST. ADMIN. PROC. ACT, *Prefatory Note* (1961), 15 U.L.A. 175–76 (2000) (summarizing the numerous steps, revisions, and reports considered before adoption of the 1946 MSAPA).

36. *See* ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, at 2, 28 (1941) (discussing the criticisms faced by the Committee and its plans for addressing potential problems of rigid application across agencies); *see also* 4 ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK—REPORT TO HONORABLE HERBERT H. LEHMAN 35–36 (1942) (delineating numerous reasons a uniform code would be impractical).

not a detailed code but a set of principles and a statement of legislative policy. The prescribed pattern need not be, and should not be, a rigid mold. There should be ample room for necessary changes and full allowance for differing needs of different agencies.”³⁷ This description by the AG Committee could serve as a definition for a model act; the ULC followed it in drafting the 1946 MSAPA.³⁸

After the ULC enacted the 1946 MSAPA as a model act, the drafters of the 1961 MSAPA followed the same drafting technique.³⁹ This was a critically important choice. It occurred despite the fact that the ULC initially sought to promulgate a uniform state administrative procedure act: “Originally the National Conference had thought of its measure as a ‘uniform act’ rather than a ‘model act’ However, . . . it became apparent that there were wide and . . . irreconcilable diversities in statutory practices in effect in various states of the Union.”⁴⁰

Something very similar to this position became part of the Constitution of the ULC, which provides factors for distinguishing between uniform and model act approaches.⁴¹ The criteria for designation as a uniform act are present where there is substantial expectation of enactment by many states and where uniformity among the states is desirable.⁴² Where there

37. ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, at 215 (1941). James Landis, another noted commentator and early pioneer in administrative law explained:

The scene of administrative law is . . . a large one. Moreover it is a variegated one Just as the architect follows different conceptions when creating a railroad station and building a hangar, the administrative agencies we have created have had both their organization and procedure shaped largely by the tasks with which they were confronted.

James M. Landis, *Crucial Issues in Administrative Law—The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1080 (1941).

38. See MODEL ST. ADMIN. PROC. ACT, *Prefatory Note* (1961), 15 U.L.A. 175 (2000) (noting the decision to withdraw a prior draft of the act for further consideration after receiving the AG Committee’s report).

39. *Id.* *Prefatory Note* (1961), 15 U.L.A. 178 (2000) (explaining the drafters’ purpose in dealing only with major principles and avoiding esoteric details).

40. E. Blythe Stason, *The Model State Administrative Procedural Act*, 33 IOWA L. REV. 196, 199–200 (1948); accord HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 83 (1943) (asserting that a uniform act would not be practical for the purposes of the ULC and indicating that the Act should therefore be styled as a model act).

41. ULC NEW PROJECT CRITERIA, STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS § 2 (July 13, 2010), available at <http://www.uniformlaws.org/Narrative.aspx?title=Criteria%20for%20New%20Projects> (outlining specific procedures and criteria to follow when “determining whether an act should be designated as a uniform act or a model act”).

42. *Id.* at § 2(e)(1) (“An act is designated as a uniform act if . . . there is a substantial reason to anticipate enactment in a large number of states; and . . . uniformity of the provisions of the proposed enactment among the states is a principal objective.”); see also James J. Brudney, *Mediation*

are great differences in the statutory history among the states, it becomes unlikely that all states will adopt a uniform act. This creates a problem because there are other situations where legislative guidance may be useful, even though the majority of states may not adopt the legislative draft as a whole. The solution was the model act. The criteria for designation as a model act are present when:

- (A) uniformity is a desirable objective, although not a principal objective;
- (B) the act may promote uniformity and minimize diversity, even though a significant number of states do not enact the act in its entirety; or
- (C) the purposes of the act can be substantially achieved even though it is not adopted in its entirety by every state.⁴³

Designation as a model act significantly affects drafting. In 1946, the ULC Executive Committee adopted a report on model act characteristics.⁴⁴ The report stated:

[A model act either] provides on a matter of interstate interest, a comprehensive well-worked-out model whose provisions can be lifted in whole or in part by a state, or . . . provides uniformity of underlying principle on a point of importance . . . or provides a model for handling an emergent need to keep emergent legislation sane and harmonious.⁴⁵

Unlike uniform acts that are drafted with the goal of verbatim adoption, model acts merely serve as guidelines.⁴⁶ Model acts are beneficial because their flexibility allows states to adopt specific sections from a model act, modify or adapt the text to be consistent with existing state statutory schemes and legislative history, or, if appropriate for its situation and satisfactory to its legislature, a state can adopt an entire model act.⁴⁷ All of the adoptions, however, should be informed by the underlying principles of the model act. The underlying principles of the 1946 and subsequent

and Some Lessons from the Uniform State Law Experience, 13 OHIO ST. J. DISP. RESOL. 795, 799 (1998) (commenting on the ULC's standards for when a model act is appropriate).

43. ULC NEW PROJECT CRITERIA, STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS § 2 (e)(2) (July 13, 2010), *available at* <http://www.uniformlaws.org/Narrative.aspx?title=Criteria%20for%20New%20Projects>.

44. *See* WALTER P. ARMSTRONG JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 68 (1991) (opining that the Committee's adoption of this report was one of the most significant actions taken that year).

45. *Id.* at 67–68.

46. *See* James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RESOL. 795, 799 (1998) (stressing the distinction between uniform acts and model acts).

47. *See id.* (“Model acts serve more as guideline legislation, which states may borrow from or modify to suit their individual needs and conditions.”).

MSAPAs have been, and continue to be, fairness and justice.⁴⁸

As befits a guide, not a detailed code, the 1946 MSAPA was very basic. In drafting the Act, the ULC sought to “embrace within the [A]ct only the major principles of administrative law.”⁴⁹ Composed of only thirteen sections, it was far from a complete code; it was merely intended “to serve as a verbal embodiment of the basic principles of common sense, justice, and fairness.”⁵⁰

III. FUNDAMENTAL PRINCIPLES OF THE 1946 MSAPA

A few commentators have questioned the success of model acts, primarily because not all of the states may adopt them, or because it is difficult to calculate which states have adopted a model act when a state does not adopt the act in its entirety.⁵¹ These positions overlook the genesis of the model APAs as a major part of the reform movement in administrative procedure at both the state and federal levels.⁵² Curbing agency arbitrariness and encouraging fairness were among the principal reasons for enactment of APAs.⁵³

The movement [toward administrative procedure codes] . . . is an expression of a growing concern over the problem of administrative procedure that has accompanied the tremendous expansion in the authority of the administration during the present century. “The subject of administrative procedure,” Judge Augustus N. Hand has aptly pointed out, “is relatively new and acutely contentious.” The last generation has been

48. See E. Blythe Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 200 (1948) (“[T]he conference was convinced that certain major principles of fairness should prevail wherever administrative rule-making or adjudication impinge upon private rights.”).

49. *Id.* at 199.

50. *Id.* at 200 (emphasis added).

51. James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RESOL. 795, 800–03, 810–12 (1998) (identifying the risks of using model acts and the difficulties in recognizing when model acts are successful); see also Peter A. Alces, *Is It Time for a Restatement of Contracts, Fourth?*, 11 DUQ. BUS. L. J. 195, 201 (2009) (expressing that model acts and restatements are ineffective); Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability*, 66 U. COLO. L. REV. 947, 948 (1995) (declaring that economic analysis reveals serious problems with the model statutes prepared by private legislatures).

52. See, e.g., Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability*, 66 U. COLO. L. REV. 947, 955–60 (1995) (comparing and distinguishing between uniform acts and model acts).

53. William J. Pierce, *The Act As Viewed by an Academician*, 16 ADMIN. L. REV. 50, 53 (1963) (stating the MSAPA will cause rules of law and their administration to be improved, which is the ultimate endeavor in any democratic society); E. Blythe Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 200 (1948) (recognizing the MSAPA was intended as an “embodiment of . . . common sense, justice, and fairness”).

filled with ferment concerning it. The movement toward remedial legislation in the field has been a result of that ferment.⁵⁴

The inclusion of “justice” and “fairness” in the text of the 1946 MSAPA was an expression of those underlying remedial objectives.⁵⁵ The procedures imposed on state agencies in the 1946 MSAPA were nearly all directed toward ensuring fairness.⁵⁶ The fairness characteristics of the 1946 MSAPA were clear; they could be summarized as the following:

- (1) Agencies were required to adopt and publish rules of procedure.
- (2) Agencies were required to give sufficient notice to the public prior to rule making.
- (3) Agencies were required to publish all rules, so that they were available to the public.
- (4) Agencies were required to give declaratory judgments in order for members of the public to learn in advance if a rule covered their situation without having to risk prosecution.
- (5) Agencies were required to follow general adjudicative procedures such as notice, pleading rules, and rules of evidence that were calculated to ensure fundamental fairness.
- (6) Agency heads were required to be personally familiar with the case before them (rather than “rubber stamping” decisions of hearing examiners).
- (7) Agency action was made reviewable by a court of record in order to correct error.⁵⁷

The decision to draft the APA as a model act rather than a detailed code led to inclusion of the fairness goals, but left details of how to accomplish them to each state.⁵⁸ This combination of features encouraged many states to use the model APAs.

54. Bernard Schwartz, *The Model State Administrative Procedure Act—Analysis and Critique*, 7 RUTGERS L. REV. 431, 431 (1953) (citations omitted).

55. See William J. Pierce, *The Act As Viewed by an Academician*, 16 ADMIN. L. REV. 50, 53 (1963) (stating the MSAPA, principled on fairness and justice, will inevitably improve the rules of law).

56. See generally MODEL ST. ADMIN. PROC. ACT (1946), 9C U.L.A. 174 (1957) (expressing that the procedures were framed with ideas toward fairness).

57. See Bernard Schwartz, *The Model State Administrative Procedure Act—Analysis and Critique*, 7 RUTGERS L. REV. 431, 438–39 (1953) (reporting the essential principles of the 1946 MSAPA (citing HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-THIRD ANNUAL CONFERENCE 194 (1943))).

58. *Id.* at 438 (“Each State and each agency must work out these details for itself according to the necessities of the case.”).

A. *General Features of the 1946 MSAPA*

The 1946 MSAPA contained definitions that carefully distinguished adjudication⁵⁹ from rulemaking.⁶⁰ The rulemaking sections of the 1946 MSAPA dealt only with general requirements. Those sections required agency creation of rules of practice,⁶¹ public notice prior to adopting a rule,⁶² opportunity for public input before adopting a rule,⁶³ and filing and publication of all rules with a state authority (usually the secretary of state).⁶⁴ The Act also created individual power to petition for a rule, agency power to issue declaratory rulings on the applicability of rules to particular parties and situations, and declaratory judgments by courts on applicability of rules to individuals.⁶⁵

Sections 8 and 9 of the 1946 MSAPA dealt with adjudications (defined in the 1946 MSAPA as “contested cases”). The contested case sections provided for more detailed notice,⁶⁶ an opportunity for all parties to present evidence and argument,⁶⁷ creation of a record of the proceedings,⁶⁸ and creation and publication of rules of adjudicative procedure.⁶⁹ A separate section provided several unique rules of evidence.⁷⁰ One of the most important provisions—and one that is overlooked today because it is so widely followed and accepted—was the requirement that each agency adopt rules of procedure for practice before the agency.⁷¹ This agency duty is crucially important. It implemented one

59. The 1946 MSAPA used the term “contested cases” instead of “adjudications” to refer to proceedings before an agency where rights and liabilities were determined. MODEL ST. ADMIN. PROC. ACT § 1(3) (1946), 9C U.L.A. 180 (1957).

60. *Id.* 9C U.L.A. 179 (1957).

61. *Id.* § 2(1) (1946), 9C U.L.A. 180 (1957).

62. *Id.* § 2(3) (1946), 9C U.L.A. 180 (1957).

63. *Id.*

64. *Id.* § 3 (1946), 9C U.L.A. 180 (1957).

65. *Id.* §§ 5–7 (1946), 9C U.L.A. 181 (1957).

66. *See id.* § 8 (1946), 9C U.L.A. 181–82 (1957) (demonstrating the detailed nature of the code).

In any contested case[,] all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto
....

Id. § 8 (1946), 9C U.L.A. 182 (1957).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* § 9 (1946), 9C U.L.A. 182 (1957).

71. *Id.* § 2(1) (1946), 9C U.L.A. 180 (1957).

of the principal goals of MSAPAs: codification of agency procedure and creation of a set of basic procedural safeguards.⁷² Although the model code drafters recognized that they could not produce a single, universally binding procedural code for all agencies, they created the next best thing: A requirement for each agency to produce its own code of practice and procedure consistent with the fairness standards of the MSAPA.⁷³ Proceeding in this fashion would enable the agencies to draft procedural rules that were consistent with the differing structures and tasks assigned to various agencies.⁷⁴ At the same time, because of the general fairness requirements imposed by the 1946 MSAPA, the Act forced agencies to incorporate minimum procedural standards so that agency rules would apply fairly to litigants.⁷⁵ The genius of this device was that it promoted the administrative law goals of accuracy and efficiency, while at the same time serving the goal of fairness to participants.

Several sections of the 1946 MSAPA imposed additional mandatory duties on agency officials in contested cases. For example, under section 10, in a case involving a decision adverse to the non-agency party, the decision should “not be made until a proposal for decision, including findings of fact and conclusions of law, [had] been served upon the parties, and an opportunity [had] been afforded to each party adversely affected to file exceptions and present argument.”⁷⁶ Section 11 required that when an adverse order was entered against a litigant, the order was required to be in writing and include factual findings and legal conclusions.⁷⁷ Additionally, the litigant was entitled to receive notice of the decision.⁷⁸ Section 12 stated the procedure for judicial review of agency action after a final decision had been made.⁷⁹

Most sections were drafted in terms that were too general to constitute rules of agency procedure or to be described as a codification.⁸⁰ Instead,

72. See Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 584–85 (1951) (identifying the most frequently named goals of the MSAPA).

73. See MODEL ST. ADMIN. PROC. ACT, *Prefatory Note* (1946), 9C U.L.A. 177 (1957) (“The major principles embraced in the Act as adopted by the Conference are . . . [r]equirements that each agency shall adopt essential procedural rules and, so far as practicable, that all rule-making, both procedural and substantive, shall be accompanied by notice of hearing to interested persons . . .”).

74. See *id.* (“[M]any of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state.”).

75. See *id.* (enumerating the six major fairness principles upon which the 1946 MSAPA was founded).

76. *Id.* § 10 (1946), 9C U.L.A. 182–83 (1957).

77. *Id.* § 11 (1946), 9C U.L.A. 183 (1957).

78. *Id.*

79. *Id.* § 12 (1946), 9C U.L.A. 183–84 (1957).

80. Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581,

they stressed broad fairness themes or standards such as notice and opportunity to be heard,⁸¹ creation and exclusivity of a record,⁸² and a right to judicial review of agency action.⁸³

IV. GENERAL FEATURES OF THE 1961 MSAPA

Several events and trends led to the revision of the 1946 MSAPA in 1961. Administrative law was a relatively new area. Because the area was so young, study of the subject continued after the enactment of the first state APAs in 1946. One commentator called the legal profession's study of administrative procedure after 1946 "research and development on a grand scale."⁸⁴ This research sought to deal with problems arising under the new administrative procedure acts.⁸⁵ In 1953, President Eisenhower called a conference to study delays in federal agency action.⁸⁶ The ABA also commissioned studies of administrative procedure in the 1950s,⁸⁷ and the ULC began a series of studies that culminated in the adoption of a revised MSAPA in 1961.⁸⁸ During this same period, twelve states adopted all or part of the 1946 MSAPA.⁸⁹

By the late 1950s, state experience with the new Act and the continued research and analysis created a "substantial maturing" of ideas about

585 (1951) ("The Administrative Procedure Act is anything but a codification either of administrative procedure . . . or of those types of [rulemaking] . . . to which the Act applies.").

81. See MODEL ST. ADMIN. PROC. ACT §§ 2(1), (3) (1946), 9C U.L.A. 180 (1957) (stating that rulemaking provisions require: notice of the rules of procedure for that agency action; notice of each intended or proposed rule that the agency considers adopting; and an opportunity to submit information and argument); *id.* §§ 8, 9(4), 10 (1946), 9C U.L.A. 181–83 (1957) (holding that adjudication provisions require the following: agency creation of rules for "notice" and "hearing"; notice of the charges and issues at the earliest feasible moment; notice of findings and conclusions of the hearing officer which are transmitted to the agency head for final decision; notice and opportunity to respond to officially noticed facts).

82. *Id.* § 9(2) (1946), 9C U.L.A. 182 (1957).

83. *Id.* § 12 (1946), 9C U.L.A. 183–84 (1957).

84. Edwin Blythe Stason, *Research in Administrative Law*, 16 ADMIN. L. REV. 99, 102 (1963) (commenting on the thirty-plus years of research in the area of administrative procedure).

85. Cf. 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 11–12 (1965) (noting the continued research and development of the MSAPA after its enactment in 1946).

86. See *id.* at 11 (citing the participation of fifty-six agencies at the conference and the formulation of twenty-two recommendations for improving federal administrative law).

87. See *id.* at 12 (pointing to the ABA's establishment of a special committee to analyze federal administrative practices while considering the recent report of the Hoover Commission).

88. See *id.* (recognizing the research by other agencies that prompted the ULC to conclude revision of the 1946 MSAPA was necessary).

89. MODEL ST. ADMIN. PROC. ACT, *Prefatory Note*, at 177–78 (1961), 15 U.L.A. 177–78 (2000) (demonstrating that North Dakota, Wisconsin, North Carolina, Ohio, Virginia, California, Illinois, Pennsylvania, Missouri, Indiana, Michigan, and Massachusetts all adopted the 1946 MSAPA in whole or in part by 1955).

administrative procedure.⁹⁰ Once again, a major focus of the studies was fairness to the participants as well as effectiveness and efficiency.⁹¹ As a result, in 1958 the ULC began updating the 1946 MSAPA, which led to the adoption of a revised model act in 1961. Like the 1946 MSAPA, the 1961 MSAPA presented only general principles, and left minor matters and specific procedures to the states.⁹² The 1961 Act contained six major principles:

- (1) Requirement that each agency shall adopt essential procedural rules, and, except in emergencies, that all rule-making, both procedural and substantive, be accompanied by notice to interested persons, and opportunity to submit views or information;
- (2) Assurance of proper publicity for all administrative rules;
- (3) Provision for advance determination of the validity of administrative rules, and for “declaratory rulings,” affording advance determination of the applicability of administrative rules to particular cases;
- (4) Assurance of fundamental fairness in administrative adjudicative hearings, particularly in regard to such matters as notice, rules of evidence, the taking of official notice, the exclusion of factual material not properly presented and made a part of the record, and proper separation of functions;
- (5) Assurance of personal familiarity with the evidence on the part of the responsible deciding officers and agency heads in quasi-judicial cases;
- (6) Provision for proper proceedings for and scope of judicial review of administrative orders, thus assuring correction of administrative errors.⁹³

The ULC stated that it intended these principles for states to use as “essential safeguards of fairness in the administrative process.”⁹⁴ The 1961 MSAPA made several additions and changes to the 1946 MSAPA, including the addition of definitions, as well as changes to rulemaking and adjudicative procedure provisions.

A. *Definitions*

The 1961 MSAPA added definitions for licenses, parties, and persons,⁹⁵ and changed the definition for the amount and types of notice regarding

90. See *id.* *Prefatory Note* (1961), 15 U.L.A. 178 (2000) (“All of the foregoing activities have resulted in a very substantial maturing of ideas with respect to administrative procedures which must be fair to the parties and at the same time effective from the standpoint of government.”).

91. See *id.* *Prefatory Note* (1961), 15 U.L.A. 178–79 (2000) (listing the fundamental principles of the MSAPA).

92. *Id.* *Prefatory Note* (1961), 15 U.L.A. 178 (2000).

93. *Id.* *Prefatory Note* (1961), 15 U.L.A. 178–79 (2000).

94. *Id.* *Prefatory Note* (1961), 15 U.L.A. 179 (2000).

95. Compare *id.* §§ 1(4)–(6) (1961), 15 U.L.A. 185 (2000) (including a total of seven definitions), with *id.* § 1 (1946) (containing only definitions for agency, rule, and contested case).

newly promulgated rules, which were required to be made available to the public.⁹⁶ It also provided for a penalty against the agency if it did not comply.⁹⁷

B. *1961 MSAPA Rulemaking Provisions*

Although retaining the basic structure of the 1946 Act for rulemaking, the 1961 MSAPA added the following features: A specific description of how to give notice of proposed rulemaking;⁹⁸ mandates that all interested persons must be given an opportunity to present their views;⁹⁹ an attempt to assure consideration by the agency of all comments;¹⁰⁰ and a penalty against the agency for failure to comply with the mandates of the section.¹⁰¹ The 1961 MSAPA increased the requirements for identifying and taking action to make rules in an emergency.¹⁰² Also, section 5 added an indexing and monthly publication requirement to ensure public access to information.¹⁰³

C. *1961 MSAPA Contested Case (Adjudication) Provisions*

The 1961 MSAPA substantially added to the notice requirements in a contested case, defined what the record was required to include, and made express the requirement of exclusivity of the record.¹⁰⁴ The problem of ex parte contacts with judicial officers was widespread prior to the adoption of administrative procedure acts.¹⁰⁵ The comment following section 9 references the concern regarding the required contents of the record and communications between involved parties:

Of special significance is the provision that includes in the record “all staff memoranda submitted to the hearing officer or members of the agency in connection with their consideration of the case.” In some circumstances it may prove desirable to go even further and prescribe that such staff memoranda shall be submitted for the record in time to permit adverse

96. *Id.* §§ 2, 5 (1961), 15 U.L.A. 209, 259–60 (2000) (requiring public availability of information and publication of rules “at least once every [two] years”).

97. *Id.* § 2(b) (1961), 15 U.L.A. 209 (2000) (prohibiting application of the rules to parties where no notice was given).

98. *Id.* § 3(a)(1) (1961), 15 U.L.A. 212–13 (2000).

99. *Id.* § 3(a)(2) (1961), 15 U.L.A. 213 (2000).

100. *Id.*

101. *Id.* § 3(c) (1961), 15 U.L.A. 213 (2000).

102. *Id.* § 3(b) (1961), 15 U.L.A. 213 (2000).

103. *Id.* § 5 (1961), 15 U.L.A. 259–60 (2000).

104. *Id.* § 9 (1961), 15 U.L.A. 271–72 (2000).

105. *See id.* § 13 (1961), 15 U.L.A. 426 (2000) (proscribing ex parte communications and referencing the related counterparts of the federal APA).

parties to offer evidence in reply. This careful specification of the content of the record is in accordance with the recommendations of the Hoover Commission Task Force report.¹⁰⁶

Section 10 of the 1961 MSAPA made two major changes in the requirements for admission and consideration of evidence. The first was to require the exclusion of irrelevant, immaterial, and repetitious evidence.¹⁰⁷ The second was to equate the rules of evidence in administrative hearings to the rules of evidence in a non-jury trial.¹⁰⁸ Section 11, which provided for examination of the evidence by the agency head, remained essentially identical to section 10 of the 1946 MSAPA.¹⁰⁹

The nature of the trial examiner's decision, covered in section 11 of the 1946 MSAPA, was changed in section 12 of the revised Act to impose more specific requirements based on the experience of several states.¹¹⁰ The 1961 MSAPA retained the requirement for separate conclusions of law and findings of fact, but added the requirement that in addition to the stated findings, the underlying reasons supporting the findings must be included as well.¹¹¹ Based on these changes, it is plain that the 1961 MSAPA carefully continued the goal of the earlier model state Act to operate fairly to litigants while achieving goals of efficiency and fairness.

V. GENERAL FEATURES OF THE 1981 MSAPA

By the late 1970s the ULC concluded there was a strong need for a complete revision of the MSAPA.¹¹² The Commission based its conclusion on several factors, including: (1) the rapid growth of state administrative agencies and procedure; (2) social changes over the past decade; (3) judicial development; (4) changes in the law of due process adopted by the United States Supreme Court; and (5) state

106. *Id.* § 9 (1961), 15 U.L.A. cmt. at 272 (2000).

107. *Compare id.* § 10(1) (1961), 15 U.L.A. 329 (2000) (“[I]rrelevant, immaterial, or unduly repetitious evidence *shall* be excluded.”) (emphasis added), *with id.* § 9 (1946), 9C U.L.A. 182 (1957) (“[Agencies] *may* exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.”) (emphasis added).

108. *Id.* § 10(1) (1961), 15 U.L.A. 329 (2000) (“The rule of evidence as applied in [non-jury] civil cases in the [District Courts of this State] shall be followed.”).

109. *Compare id.* § 11 (1961), 15 U.L.A. 366 (2000) (“Examination of Evidence by Agency”), *with id.* § 10 (1946), 9C U.L.A. 182–83 (1957) (“Examination of Evidence by Agency”).

110. *Compare id.* § 12 (1961), 15 U.L.A. cmt. at 371 (2000) (summarizing the reasons behind the amendments in this section), *with id.* § 11 (1946), 9C U.L.A. 183 (1957) (containing less compulsory language than the corresponding 1961 provision).

111. *Id.* § 11 (1961), 15 U.L.A. 366 (2000) (“The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision . . .”).

112. *Id. Prefatory Note* (1981), 15 U.L.A. 2 (2000).

experimentation with new and different procedural provisions.¹¹³

Although the drafters titled the 1981 MSAPA a revised model act, it was entirely new, and its form was completely different from the previous MSAPAs.¹¹⁴ The preface explained the need to consider new areas not relevant during the 1961 revisions “in light of changed circumstances and experiences.”¹¹⁵ The 1981 MSAPA consisted of five articles and ninety-four sections, as compared with only nineteen sections in the 1961 MSAPA.¹¹⁶ Although the length of the 1981 MSAPA makes it impossible to summarize every addition and change in this brief introductory article, an examination of one area—adjudication—illustrates the extent and nature of changes and added detail in the 1981 MSAPA.

Section 1-102(5) defined the term “order” as “agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons.”¹¹⁷ Section 4-101(a) explained “[a]n agency *shall* conduct an adjudicative proceeding as the process for formulating and issuing an order.”¹¹⁸ The comment to section 4-101 explained that this section provided the link between the definition of order in section 1-102(5) and contested case proceedings conducted under Article IV of the 1981 MSAPA.¹¹⁹ Taken together, these sections meant that, whenever agency action affected the rights, duties, obligations, or privileges of any individual, it was mandatory for an agency to conduct an adjudicative proceeding.¹²⁰

113. See *id.* Prefatory Note (1981), 15 U.L.A. 4–5 (2000) (recognizing that rapid state growth and social changes over the previous twenty years required a revision of the MSAPA).

114. See *id.* Prefatory Note (1981), 15 U.L.A. 5–6 (2000) (recognizing the 1961 MSAPA as the starting point for the 1981 revisions, but referring to the 1981 MSAPA as entirely new).

115. *Id.* (calling the 1981 MSAPA entirely new, but identifying the 1961 version as the starting point).

116. Compare *id.* (1981), 15 U.L.A. 7–9 (2000) (itemizing the five articles and ninety-four substantive sections included in the 1981 MSAPA), with *id.* (1961), 15 U.L.A. 184 (2000) (listing the nineteen sections included in the 1961 MSAPA).

117. *Id.* § 1-102(5) (1981), 15 U.L.A. 11 (2000).

118. *Id.* § 4-101(a) (1981), 15 U.L.A. 69 (2000) (emphasis added).

119. *Id.* § 4-101 (1981), 15 U.L.A. cmt. at 69 (2000).

120. The 1981 MSAPA provided several exceptions to the adjudicative proceeding requirement in section 4-102(b)(1)–(6):

(b) An agency shall commence an adjudicative proceeding upon the application of any person, unless:

- (1) the agency lacks jurisdiction of the subject matter;
- (2) resolution of the matter requires the agency to exercise discretion within the scope of [s]ection 4-101(a);
- (3) a statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding before issuing an order to resolve the matter and, in the exercise of that discretion, the agency has determined not to conduct an adjudicative proceeding;

The 1981 MSAPA contained provisions for four different types of adjudicative hearings, including formal adjudicative hearings, conference adjudicative hearings,¹²¹ summary adjudicative proceedings,¹²² and, when necessary, emergency adjudicative proceedings.¹²³

Section 4-102 provided that an adjudicative hearing shall be held upon the application of any person, subject to several exceptions.¹²⁴ The reporter's comment to this section explained that section 4-102 *required* an adjudicative hearing on the application of any person whose rights, duties, obligations, or privileges have been affected by agency action falling within the definition for production of an order.¹²⁵ Section 4-201 provided that all adjudicative proceedings must be conducted in accordance with Article IV, Chapter II (Formal Adjudicative Hearing), unless a statute provided otherwise.¹²⁶ Taken together, these provisions gave an individual the right to a hearing whenever agency action affected "rights, duties, privileges, immunities, or other legal interests," and section 4-201 made the formal adjudicative proceeding the default type of hearing.¹²⁷

Additionally, section 4-201 provided four other types of adjudicative procedure that an agency could employ instead of a formal adjudicative hearing in certain situations.¹²⁸ The Act left the choice of whether to adopt these less formal proceedings up to the agency, which could make this choice by rule.¹²⁹

(4) resolution of the matter does not require the agency to issue an order that determines the applicant's legal rights, duties, privileges, immunities, or other legal interests;

(5) the matter was not timely submitted to the agency; or

(6) the matter was not submitted in a form substantially complying with any applicable provision of law.

Id. § 4-102(b)(1)–(6) (1981), 15 U.L.A. 70–71 (2000).

121. *Id.* § 4-401 (1981), 15 U.L.A. 107 (2000).

122. *Id.* § 4-502 (1981), 15 U.L.A. 111 (2000).

123. *Id.* § 4-501 (1981), 15 U.L.A. 110 (2000); *see also id.* § 4-201 (1981), 15 U.L.A. cmt. at 77 (2000) (contrasting the types of adjudication in the 1981 MSAPA against the only type of hearing found in the 1961 MSAPA, the contested case hearing).

124. *See id.* § 4-102(b) (1981), 15 U.L.A. 70–71 (2000) (granting authority to conduct an adjudicative proceeding with enumerated exceptions).

125. *Id.* § 4-102 (1981), 15 U.L.A. cmt. at 71 (2000) (emphasis added) (clarifying "when an agency may, and when an agency shall commence adjudicative proceedings").

126. *Id.* § 4-201 (1981), 15 U.L.A. cmt. at 76 (2000).

127. *See id.* § 1-102(5) (1981), 15 U.L.A. 11 (entitling individuals to an adjudicative hearing when an order is issued involving that individual's rights or duties).

128. *See id.* (stating situations when the conference adjudicative hearing, the emergency adjudicative proceeding, or the declaratory proceeding would apply).

129. *Id.* § 4-201 (1981), 15 U.L.A. cmt. at 77 (2000) (explaining that the options are intended to allow states to adopt those well-suited to its purposes while still seeking to minimize variations in procedure across agencies).

The conference adjudicative hearing involved fewer procedural requirements under specified circumstances, such as the absence of a question of fact, or when an agency was imposing small fines or minor penalties.¹³⁰ A summary adjudicative proceeding was one where the stakes were even smaller, such as one that merely involved a reprimand to a student or licensee.¹³¹ Finally, the emergency adjudicative proceeding was one that involved an “immediate danger to the public health, safety, or welfare.”¹³²

The default type of hearing under the 1981 MSAPA was the formal adjudicative hearing.¹³³ The requirements for that type of hearing were numerous and set forth with particularity in twenty-one sections of Article IV, Chapter Two.¹³⁴ For cases that did not involve minor matters, and if an agency took no other action (i.e., to create conference and summary types of hearings by rule), the agency was required to hold a formal adjudicative hearing in every case affecting individual rights, duties, obligations or privileges.¹³⁵ This requirement constituted a heavy and expensive burden for an agency and served as a strong incentive for an agency to create the informal hearing procedures.

These were vast changes from the 1946 and 1961 MSAPAs. The degree of detail approached that of a uniform act or a comprehensive procedural code rather than a model act. Instead of general provisions for the state to build upon, the 1981 MSAPA contained numerous, detailed provisions.¹³⁶ Although the 1981 MSAPA clearly sought to achieve justice and fairness, its method differed from the general provisions of the 1946 and 1961 MSAPAs. Because it was completely new, it can be argued that it was not an evolutionary development of earlier MSAPAs.¹³⁷

Although creative and useful, some of these 1981 provisions created

130. *Id.* § 4-401(1)–(2) (1981), 15 U.L.A. 107 (2000).

131. *See, e.g., id.* § 4-502(3)(ii)(1981), 15 U.L.A. 111 (2000) (allowing use of summary adjudicative proceedings where the sanction or warning does not have “continuing impact”).

132. *Id.* § 4-501(a) (1981), 15 U.L.A. 110 (2000).

133. *Id.* § 4-201 (1981), 15 U.L.A. 76 (2000).

134. *Id.* §§ 4-201 to 4-221 (1981), 15 U.L.A. 76–104 (2000).

135. *See id.* § 4-201 (1981), 15 U.L.A. cmt. at 76 (2000) (commenting on the stipulations of the 1981 MSAPA in regards to formal adjudicative hearings); *id.* § 4-102(b)(4) (1981), 15 U.L.A. 70–71 (2000) (“An agency shall commence an adjudicative proceeding upon the application of any person, unless . . . resolution of the matter does not require the agency to issue an order that determines the applicant’s legal rights, duties, privileges, and immunities, or other legal interests.”).

136. *See* Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 709–10 (2011) (positing that the 1981 revisions were overly ambitious and ahead of their time).

137. *See* MODEL ST. ADMIN. PROC. ACT, *Prefatory Note* (2010), 15 U.L.A. 2 (West Supp. 2012) (calling the 1981 MSAPA entirely new).

problems of enactability because of legislative resistance to the new provisions.¹³⁸ One major problem arose in connection with the “gateway” provision, which describes the statutory terms or methods for identifying situations in which a litigant has a right to a hearing.¹³⁹ The gateway language of the 1981 MSAPA used an internal definition, which meant the language of the Act itself defined the requirements for a hearing.¹⁴⁰ This was a significant change from the 1946 and 1961 MSAPAs. The earlier APAs adopted an external definition, which provided that hearings were mandatory when a statute other than the APA contained a hearing requirement.¹⁴¹ A second problem of the 1981 MSAPA was the creation of a presumption that an adjudicative hearing must be held in every case affecting a litigant’s rights, duties, or obligations.¹⁴² That provision could be interpreted broadly, and, in conjunction with the other provisions of the 1981 MSAPA, meant that an agency hearing would be mandatory in even the most benign or

138. See *id.* Prefatory Note (2010), 15 U.L.A. 2–3 (West Supp. 2012) (citing an example of enactment difficulties, “Under the 1981 Act, evidentiary hearings were required for an extremely wide range of disputes between citizens and the government”).

139. See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 713–14 (2011) (explaining the concept of the “gateway” provision and discussing the two approaches, the internal model and the external model, to the problem). The gateway provision is the section of the act or code that determines what cases agencies must consider under the provisions of the act. In an act applying an external model, such as the 1961 MSAPA, the act will contain a provision defining the type of case that the act requires to be heard. *Id.* Contrasting the external model is the internal model used in the 1981 MSAPA, which mandates that an agency hold an adjudicative proceeding before issuing an order, and defines an order as any agency action that determines the rights or privileges of any person. MODEL ST. ADMIN. PROC. ACT § 1-102(5) (1981), 15 U.L.A. 11 (2000) (defining order); *id.* § 4-101 (1981), 15 U.L.A. 69 (2000) (stating when adjudicative proceedings are required); Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 713–14 (2011). The result of the 1981 MSAPA’s internal model is that adjudicative proceedings are required in virtually every action by every state agency if the legal status of a person is affected in any way. *Id.*

140. See MODEL ST. ADMIN. PROC. ACT § 4-201–221 (1981), 15 U.L.A. 76–104 (2000) (containing the 1981 MSAPA requirements for Formal Adjudicative Hearings); see also Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 713–14 (2011) (explaining the internal approach to the gateway problem in the 1981 MSAPA, “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”).

141. See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 713–14 (2011) (differentiating between internal and external model approaches to the gateway problem).

142. MODEL ST. ADMIN. PROC. ACT § 4-102 (1981), 15 U.L.A. cmt. at 72 (2000); see also Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 713–14 (2011) (“[T]he 1981 MSAPA’s gateway provision . . . applied the act to every instance of adjudication . . .”).

insignificant situations. These changes reflected fundamental differences from the earlier versions of the MSAPA.

Some of these fundamental changes created problems for legislators and agency personnel.¹⁴³ For example, when the California legislature was engaged in revising the state's administrative procedure act, a legislative commission examined and rejected the gateway provision of the 1981 MSAPA's adjudication provisions.¹⁴⁴ The commissioners reportedly rejected the gateway provision because of what they perceived to be a broad requirement for an adjudicative hearing in every imaginable situation.¹⁴⁵ Commission discussions considered the extreme results that the 1981 MSAPA gateway provision would produce: a required hearing for a decision by a high school about choice of cheerleaders, a library fine for an overdue book, or a forest ranger's decision on approval of an overnight campsite application.¹⁴⁶ The commission members concluded that they could not adopt this approach because it required hearings for trivial matters.¹⁴⁷

The 1981 MSAPA adjudication provisions also increased the number of situations in which notice and an opportunity to be heard were extended to individuals.¹⁴⁸ However, it would appear that, even though the 1981 MSAPA adjudication provisions seemed to guarantee procedures that would operate fairly to virtually all individuals affected by agency action, the states were either not ready for those changes or were satisfied with their already existing administrative hearing procedures.¹⁴⁹ In the thirty years following the adoption of the 1981 MSAPA, New Hampshire, Arizona, and Washington adopted many of its provisions, and several

143. E.g., Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L. REV. 297, 301-03 (1996) (exemplifying California as an illustration of frustrations created by the detailed provisions in the 1981 MSAPA).

144. See *id.* at 297 (citing California's rejection of the 1981 MSAPA extensive hearing requirements in favor of protection under existing California laws).

145. See *id.* at 308 (emphasizing California's frustration with the broad requirements of the 1981 MSAPA).

146. See *id.* at 308-09 (reciting a Commission member's criticism that "the 1981 Model Act approach [would] really require application of the APA to: the decision by a state high school to select cheerleaders; imposition of a library fine; a state forest ranger's decision in allocating campsites; every decision affecting a state prisoner that the prisoner dislikes," and other similarly benign decisions).

147. See *id.* (explaining the rationale behind the California Law Revision Commission's decision to reject the 1981 MSAPA and adopt the federal approach).

148. MODEL ST. ADMIN. PROC. ACT § 4-204 (1981), 15 U.L.A. cmt. at 82-83 (2000).

149. See *id.* Prefatory Note (2010), 15 U.L.A. 2 (West Supp. 2012) (indicating that no states adopted the 1981 MSAPA in full, only three states adopted a substantial portion of the act, and very few others borrowed from the Act in drafting their own provisions).

other states drew ideas from the Act,¹⁵⁰ but there has not been widespread adoption of the 1981 MSAPA.¹⁵¹

Although many states declined to adopt the 1981 MSAPA, it was a groundbreaking code that included many innovative and useful ideas. One excellent concept was the provision for more than one type of hearing, depending on the seriousness of the complaint and type of loss suffered by the complainant.¹⁵² That type of provision is one that courts have judicially recognized as fair and consistent with due process.¹⁵³ It is also fair to the government in terms of efficient use of resources and yields accurate results when employed in the proper circumstances.¹⁵⁴ For example, in the case of a student or employee reprimand, the hearing might simply consist of a brief statement of the agency's view on the matter including what the violation was and what evidence supports it, together with an opportunity for the claimant to reply with his or her position and statement of evidence.¹⁵⁵ Thus, the 1981 MSAPA approach was to hold a hearing in a vastly increased number of situations but to tailor those hearings to the type of case and issues involved. If there was a small fine or slight reprimand, then an abbreviated hearing or even a "paper" hearing might be held. In many ways, the 1981 MSAPA was ahead of its time; state legislators were simply not ready for the sweeping, some might say revolutionary, changes included in it.¹⁵⁶

VI. MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 2010

By the time the drafters considered another revision to the MSAPA, it had been nearly thirty years since the ULC promulgated the 1981 MSAPA. During those years, the unforeseen creation and explosive growth of the

150. *Id.*

151. See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Administrative Procedure Act*, 20 WIDENER L.J. 707, 709–10 (2011) (citing MODEL ST. ADMIN. PROC. ACT, *Prefatory Note* (2010), 15 U.L.A. 2 (West Supp. 2012)) (hypothesizing on the failure of the 1981 MSAPA to gain widespread acceptance).

152. MODEL ST. ADMIN. PROC. ACT § 4-201 (1981), 15 U.L.A. cmt. at 77 (2000) (pointing out the four types of adjudicative proceedings contained in the revised Act).

153. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 533 (1984) ("[U]nder the Due Process Clause[,] an individual must be given an opportunity for a hearing *before* he is deprived of any significant property interest . . .").

154. See *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (holding that the value of notice and hearings is important to ensure due process rights of students are not violated).

155. MODEL ST. ADMIN. PROC. ACT § 4-502 (1981), 15 U.L.A. 111 (2000).

156. See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 710–11 (2011) (suggesting the 1981 MSAPA was ahead of its time).

Internet and the development of personal computing occurred.¹⁵⁷ The growth of electronic media now offers the opportunity for greater transparency and inexpensive communication between agencies and citizens, thus contributing to fairness and efficiency. States experimented with entirely new statutory devices and adaptations of the earlier model acts, especially the 1961 MSAPA.¹⁵⁸ Some of that state experience has been incorporated into the 2010 MSAPA. For example, the new approach to guidance documents in the 2010 MSAPA arose in part from state experiments in this area.¹⁵⁹ Other events that contributed to the need for revision included recent studies of the federal APA (which has features similar to the state MSAPAs),¹⁶⁰ the creation of central panels of administrative law judges in nearly half the states,¹⁶¹ studies by the Administrative Law and Regulatory Practice Section of the American Bar Association,¹⁶² and rich academic literature on the model acts and the revisions of the past forty years in many of the states.¹⁶³ Finally, appellate case law over the past thirty years has identified problems of ambiguity, omission, and contradiction in state APAs.¹⁶⁴

157. See *id.* (noting the advancement of technology and the need for new provisions in the years following the promulgation of the 1981 MSAPA).

158. See, e.g., *id.* at 716 (referring to Florida's disregard of the 1981 internal gateway provision model in favor of the external model used in the 1961 MSAPA and later in the 2010 MSAPA).

159. See VA. CODE ANN. § 2.2-4001 (2008) (defining "guidance document" under Virginia law); *id.* § 2.2-4008 (requiring agencies to publish any guidance documents relied upon by the agency); see also N.Y. A.P.A. LAW § 102(14) (Consol. Supp. 2012) (defining "guidance document" under New York law); *id.* § 202-e (codifying the requirements for publication and maintenance of guidance documents).

160. MODEL ST. ADMIN. PROC. ACT, *Prefatory Note* (2010), 15 U.L.A. 2-3 (West Supp. 2012).

161. *Id.* *Prefatory Note* (2010), 15 U.L.A. 3 (West Supp. 2012).

162. *Id.*

163. See Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L. REV. 297, 297 (1997) (addressing the 1995 addition of California's new Administrative Procedure Act); Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. REV. 833, 835 (1974) (discussing the signing of the North Carolina Administrative Procedure Act in 1974); Patricia Dore, *Rulemaking Innovations Under the New Administrative Procedure Act*, 3 FLA. ST. U. L. REV. 97, 97 (1995) (articulating the impact in Florida of the state Administrative Procedure Act); David B. Frohnmayer, *National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and the New Utah Administrative Procedure Act*, 3 BYU J. PUB. L. 1, 1 (1989) (noting Utah's reliance on the 1981 MSAPA in drafting its own state Administrative Procedure Act); Karen M. Karre, *Louisiana's "New" Administrative Procedure Act*, 35 LA. L. REV. 629, 630 (1975) (opining on the intent of the Louisiana Administrative Procedure Act).

164. See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 711 (2011) (identifying situations where courts invalidated administrative actions due to procedural problems).

A. *Drafters' Approach to the 2010 MSAPA*

The drafters of the 2010 MSAPA intentionally sought to follow the model-act style of the 1946 and 1961 MSAPAs by setting forth only broad principles of fairness and leaving details up to the states.¹⁶⁵ The 2010 MSAPA is shorter than the 1981 MSAPA despite the addition of many new topics and areas.¹⁶⁶ The drafters based many of these additions on successful state experiments with administrative procedure.¹⁶⁷

The 2010 MSAPA expressly states that one of its objectives is to model general principles and standards of fairness in administrative procedure, leaving detailed implementation up to individual states.¹⁶⁸ Further, with very few exceptions, the changes and additions in the 2010 MSAPA are evolutionary, building upon practices that states have used, primarily originating with the 1946 and 1961 MSAPAs.¹⁶⁹ Changes regarding entirely new principles are invariably the result of unforeseen changed circumstances that did not exist when the earlier MSAPAs were drafted. These attributes should make state legislators more willing to consider the improvements incorporated into the 2010 MSAPA. The drafters explicitly stated that they attempted to draft the 2010 MSAPA to supplement the 1961 MSAPA, not to replace its principles.¹⁷⁰ Although the drafters also drew upon some useful provisions from the 1981 MSAPA, those changes are not structurally or fundamentally different from the 1946 and 1961 MSAPAs. Thus, the changes and additions in the 2010 MSAPA are evolutionary, not revolutionary.¹⁷¹ As a result, the 2010 MSAPA should

165. MODEL ST. ADMIN. PROC. ACT, *Prefatory Note* (2010), 15 U.L.A. 4 (West Supp. 2012).

166. See *id.* *Prefatory Note* (2010), 15 U.L.A. 3 (West Supp. 2012) (“The 2010 Act is lengthier than the 1961 Act, but shorter and less detailed than the 1981 Act.”); see also *id.* § 303 (2010), 15 U.L.A. 26 (West Supp. 2012) (adding negotiated rulemaking); *id.* § 311 (2010), 15 U.L.A. 33–34 (West Supp. 2012) (adding guidance documents); *id.* § 603 (2010), 15 U.L.A. 73 (West Supp. 2012) (adding ALJ central panels); *id.* § 702 (2010), 15 U.L.A. 76 (West Supp. 2012) (adding legislative review).

167. One example is the administrative law judge central panel provision, which over one-half of the states have adopted. Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 J. NAT’L. ASS’N ADMIN. L. JUDGES 321, 343 (2002).

168. See MODEL ST. ADMIN. PROC. ACT, *Prefatory Note*, at 3 (2010), 15 U.L.A. 3 (West Supp. 2012).

169. See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 712 (2011) (distinguishing evolutionary changes from revolutionary changes).

170. MODEL ST. ADMIN. PROC. ACT, *Prefatory Note* (2010), 15 U.L.A. 3–4 (West Supp. 2012) (“The 2010 Act is designed especially for adoption by states that currently have the 1961 Act, but would like to replace that act with a more modern up to date administrative procedure act.”).

171. See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 711–12 (2011) (identifying the 1961 MSAPA as outdated and the 1981 MSAPA as not broadly supported, and indicating the revisions of the 2010 MSAPA were “evolutionary rather than revolutionary”).

be more attractive to legislatures and agencies because many of its provisions are similar to, or build upon, the 1961 MSAPA upon which many states have already modeled their administrative procedures.

B. *General Features of the 2010 MSAPA*

This section of the Article serves as a general introduction and overview and includes only the major features of the 2010 MSAPA. This will facilitate comparison with existing administrative procedure acts in the states where legislatures may wish to improve their state administrative procedure.

C. *Definitions*

Section 102 of the 2010 MSAPA contains thirty-three definitions.¹⁷² Many of the 2010 definitions are necessary to deal with matters relating to electronic media that did not exist at the time of the earlier acts. Such terms include electronic,¹⁷³ electronic record,¹⁷⁴ index,¹⁷⁵ internet website,¹⁷⁶ record,¹⁷⁷ and writing.¹⁷⁸ This section also includes terms modified from earlier APAs, such as “sign,” which now recognizes electronic signatures.¹⁷⁹ Other definitions communicate modern procedures that have been adopted based on successful practices in states using some variant of the 1961 MSAPA.¹⁸⁰ The definition of the term “guidance document” fits this category.¹⁸¹

Additional definitions were included to address ambiguous terms in prior MSAPAs and to define adequately all relevant terms used in the respective acts.¹⁸² Some of these areas required clarification in a definition. For example, the 2010 MSAPA clarified the term “agency record” to define exactly what constitutes a record in connection with

172. MODEL ST. ADMIN. PROC. ACT § 102(1)–(33) (2010), 15 U.L.A. 8–10 (West Supp. 2012).

173. *Id.* § 102(8) (2010), 15 U.L.A. 8 (West Supp. 2012).

174. *Id.* § 102(9) (2010), 15 U.L.A. 8 (West Supp. 2012).

175. *Id.* § 102(15) (2010), 15 U.L.A. 8 (West Supp. 2012).

176. *Id.* § 102(17) (2010), 15 U.L.A. 9 (West Supp. 2012).

177. *Id.* § 102(29) (2010), 15 U.L.A. 9 (West Supp. 2012).

178. *Id.* § 102(33) (2010), 15 U.L.A. 10 (West Supp. 2012).

179. *Id.* § 102(32) (2010), 15 U.L.A. 10 (West Supp. 2012).

180. *See, e.g., id.* § 311 (2010), 15 U.L.A. cmt. at 34 (West Supp. 2012) (noting the adoption of detailed provisions on guidance documents in four states).

181. *Id.* § 102(14) (2010), 15 U.L.A. 8 (West Supp. 2012).

182. *Compare id.* § 102 (2010), 15 U.L.A. 7–10 (West Supp. 2012) (containing thirty-three terms in the definitions section), *with id.* § 1 (1946), 9C U.L.A. 179–80 (1957) (containing three terms under the definitions section).

rulemaking, contested cases, emergency hearings, and judicial review.¹⁸³ Other definitions were adopted from the 1981 MSAPA, which, as described above, contained several excellent new general features that the drafting committee and ULC believed should not be lost.¹⁸⁴ Examples include definitions of the terms agency,¹⁸⁵ agency action,¹⁸⁶ and agency head.¹⁸⁷ A few definitions embody new changes that will improve the transparency, accuracy, and efficiency of administrative practice. Examples are the changed definitions of law¹⁸⁸ and contested case.¹⁸⁹

One of the tenets of drafting procedural standards is consistency—the same words should carry the same meaning when used in all contexts.¹⁹⁰ Definitions are “of the highest value to determine legislative intent.”¹⁹¹ “Where a definition clause is clear[,] it should ordinarily control the meaning of words used in the remainder of the act because of its authoritative nature.”¹⁹² The thorough set of definitions in the 2010 MSAPA will produce clarity, consistency, and transparency in its interpretation.

D. *Adjudication*

Under what circumstances is a claimant entitled to a trial-type hearing preserved by an official record? The gateway provision provides an answer.¹⁹³ This provision is critically important because it defines when a licensee, beneficiary, or other claimant receives an evidentiary hearing, and,

183. See *id.* § 102(6) (2010), 15 U.L.A. 8 (West Supp. 2012) (defining rulemaking, contested cases, emergency hearings, and judicial review).

184. See, e.g., *id.* § 102 (2010), 15 U.L.A. cmt. at 10–11 (West Supp. 2012) (identifying definitions based on the 1981 MSAPA).

185. *Id.* § 102 (2010), 15 U.L.A. cmt. at 10 (West Supp. 2012).

186. *Id.*

187. *Id.* § 102 (2010), 15 U.L.A. cmt. at 10–11 (West Supp. 2012).

188. *Id.* § 102 (2010), 15 U.L.A. cmt. at 13 (West Supp. 2012).

189. *Id.* § 102 (2010), 15 U.L.A. cmt. at 11 (West Supp. 2012).

190. See NORMAN J. SINGER & J.D. SHAMBIE SINGER, 1A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 27.2, at 612 (7th ed. 2009) (reasoning that ignoring a definition is refusing to give legal effect to a statute); Jack Stark, *Learning from Samuel Johnson about Drafting Statutes*, 23 STATUTE L. REV. 227, 229 (2002) (opining that liberal use of definitions indicates the importance of statutory drafting).

191. NORMAN J. SINGER & J.D. SHAMBIE SINGER, 1A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 27.2, at 612 (7th ed. 2009).

192. *Id.* at 610.

193. The term was created by Professors Michael Asimow and Ronald Levin. MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 69 (3d ed. 2009); accord Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 713 (2011) (attributing the term “gateway provision” to Professors Michael Asimow and Ronald M. Levin).

in many situations, when judicial review of agency action will be available.¹⁹⁴ The 2010 MSAPA retains the label “contested cases”¹⁹⁵ from the 1961 MSAPA to describe the type of dispute for which an on-the-record hearing must be held.¹⁹⁶ However, the 2010 MSAPA includes hearings required by a state or federal statute and adds hearings mandated by the federal Constitution or a state constitution.¹⁹⁷

The 2010 MSAPA adds a definition of an evidentiary hearing, defining it as “a hearing for the receipt of evidence on issues on which a decision of the presiding officer may be made in a contested case.”¹⁹⁸ The 2010 MSAPA includes a definition of adjudication as the “process for determining facts or applying law pursuant to which an agency formulates and issues an order.”¹⁹⁹ An order is “an agency decision that determines or declares the rights, duties, privileges, immunities, or other interests of a specific person.”²⁰⁰ Article 4, titled “Adjudication in Contested Cases,” provides that these definitions operate in conjunction with all provisions therein.²⁰¹ Article 4 procedure is a trial-type administrative hearing on the record in most situations except for emergency hearings;²⁰² thus, the default hearing provision in the 2010 MSAPA is an on-the-record, trial-type hearing.²⁰³

Despite the careful construction, several areas of the revised adjudication provisions will require judicial construction. Under the provisions of the 2010 MSAPA, a pre-termination formal hearing is mandated when statutory or constitutional provisions require it; when that occurs, all of the procedural and other provisions of Article 4 must be met.²⁰⁴ This is a change from prior practice and model acts. In the past, when the Constitution required hearings, federal law on procedural due

194. See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 713 (2011) (defining which interactions should trigger administrative trial-type procedures).

195. MODEL ST. ADMIN. PROC. ACT § 102 (2010), 15 U.L.A. cmt. at 11 (West Supp. 2012).

196. *Id.* § 101(7) (2010), 15 U.L.A. 8 (West Supp. 2012); *id.* § 1(2) (1961), 15 U.L.A. 184 (2000).

197. *Id.* (defining a contested case as “an adjudication 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”).

198. *Id.* § 102(11) (2010), 15 U.L.A. 8 (West Supp. 2012).

199. *Id.* § 102(1) (2010), 15 U.L.A. 8 (West Supp. 2012).

200. *Id.* § 102(23) (2010), 15 U.L.A. 9 (West Supp. 2012).

201. See *id.* § 401 (2010), 15 U.L.A. 42 (West Supp. 2012) (“This [article] applies to an adjudication made by an agency in a contested case.”).

202. See *id.* § 407 (2010), 15 U.L.A. cmt. at 51 (West Supp. 2012) (striking an appropriate balance between public need and private fairness).

203. See *id.* (consolidating present divergent approaches into one generic provision).

204. See *id.* § 401 (2010), 15 U.L.A. cmt. at 42 (West Supp. 2012).

process as described in the case of *Mathews v. Eldridge*²⁰⁵ controlled.²⁰⁶ The *Mathews* balancing test gave considerable leeway to the states in providing for procedures that would satisfy the requirements of procedural due process.²⁰⁷ Indeed, *Mathews* held that in cases of termination of social security disability payments, no pre-termination oral hearing was required.²⁰⁸ The Supreme Court added in *Mathews* that “[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective method of [decision making]”²⁰⁹ Under the new provisions of the 2010 MSAPA, that leeway appears to be gone. The 2010 MSAPA provides that all hearings now arising under either the federal Constitution or a state constitution must receive full, formal, on-the-record, trial-type hearings.²¹⁰

Section 403 of the 2010 MSAPA defines the minimum incidents of a hearing in a contested case.²¹¹ They include notice in writing of the charges and procedures available,²¹² opportunity to file briefs, pleadings, and objections,²¹³ and the opportunity to argue, rebut, submit evidence, and to cross-examine.²¹⁴

Like earlier MSAPAs, the 2010 MSAPA includes a provision for admissible evidence.²¹⁵ Evidence, even hearsay, is admissible if it is relevant and of the type relied upon by prudent individuals.²¹⁶ The presiding officer may choose to exclude certain evidence with or without

205. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

206. *Mathews* described when a pre-termination hearing must be held as follows:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334–35.

207. *See id.* at 347–48 (striking a due process balance with the public interest).

208. *See id.* at 349 (“[A]n evidentiary hearing is not required prior to the termination of disability benefits”).

209. *Id.* at 348.

210. *See* MODEL ST. ADMIN. PROC. ACT § 401 (2010), 15 U.L.A. 42 (West Supp. 2012) (changing the process outlined in the 1961 MSAPA).

211. *Id.* § 403 (2010), 15 U.L.A. cmt. at 46 (West Supp. 2012).

212. *Id.* § 403(b) (2010), 15 U.L.A. 45 (West Supp. 2012).

213. *Id.* § 403(c) (2010), 15 U.L.A. 45 (West Supp. 2012).

214. *Id.* § 403(d) (2010), 15 U.L.A. 45 (West Supp. 2012).

215. *Id.* § 404(1) (2010), 15 U.L.A. 47 (West Supp. 2012).

216. *Id.*

objection if it is unduly repetitious, immaterial, or irrelevant.²¹⁷ All evidence must be part of the record, and the presiding officer must base his or her decision solely on the record.²¹⁸ Section 407 defines the occasions and procedure for emergency adjudication.²¹⁹

The ban on ex parte communications in a pending contested case is continued from earlier MSAPAs.²²⁰ However, the 2010 MSAPA makes a major change in the ability of commissioners sitting as presiding officers in a contested case to receive staff advice.²²¹ Section 408(e) of the 2010 MSAPA severely limits ex parte staff 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.²²² This was one of the most contentious issues that the drafters faced and represents a compromise between the opposing sides.²²³ Two sections of the American Bar Association took opposing positions on the issue of staff advice to agency heads in adjudication of contested cases.²²⁴ The resulting compromise provides only a limited opportunity for agency head ex parte communication with staff under the section 408 of the 2010

217. *Id.* § 404(2) (2010), 15 U.L.A. 47 (West Supp. 2012).

218. *Id.* § 406 (2010), 15 U.L.A. 50 (West Supp. 2012).

219. *Id.* § 407 (2010), 15 U.L.A. 51 (West Supp. 2012).

220. *See id.* § 408(b) (2010), 15 U.L.A. 52 (West Supp. 2012) (“[T]he presiding officer . . . may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication.”); *id.* § 4-213 (1981), 15 U.L.A. 92 (2000) (“[A] presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending . . .”); *id.* § 13 (1961), 15 U.L.A. 426 (2000) (“[M]embers or employees of an agency . . . shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party . . .”).

221. *Id.* § 408 (2010), 15 U.L.A. 52–53 (West Supp. 2012).

222. *See id.* § 408(e) (2010), 15 U.L.A. cmt. at 53 (West Supp. 2012) (limiting staff advice to presiding officers in contested cases).

223. The author is a ULC commissioner member of the drafting committee of the 2010 MSAPA. In that capacity, while attending drafting committee meetings, he observed the contentious, though civil, exchanges among the drafting committee members and various tendered attempts at compromise. The exchanges continued over the entire six-year period in which the drafting committee considered the 2010 MSAPA. *See also id.* § 408 (2010), 15 U.L.A. cmt. at 54 (West Supp. 2012) (explaining the drafters’ compromises on restrictiveness of provisions); Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 721 (2011) (“This provision was the subject of intense debate by the drafting committee . . .”).

224. 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 advice ex parte 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. MODEL ST. ADMIN. PROC. ACT § 408 (2010), 15 U.L.A. cmt. at 54 (West Supp. 2012).

MSAPA.²²⁵ As a result, Professor Michael Asimow, the American Bar Association Liaison to the Drafting Committee of the 2010 MSAPA, strongly recommended the 2010 MSAPA to the states but did not recommend adoption of section 408 regarding staff advice to the agency head.²²⁶ He argued that, as drafted, section 408 was unworkable and would severely impede agency operations.²²⁷

The 2010 MSAPA contains essentially unchanged provisions on intervention²²⁸ and subpoenas.²²⁹ However, the new MSAPA includes changes to discovery.²³⁰ The 1961 MSAPA contained no provision for discovery, while the 1981 MSAPA provided that a presiding officer had discretion to provide for discovery in accordance with the rules of civil procedure.²³¹ This provision contained broad allowances, because most states already had broad discovery provisions in their rules of civil procedure, and the presiding officer had the discretion to order discovery under those rules.²³² Therefore, the 2010 MSAPA provision for discovery strikes a careful balance between the 1981 MSAPA broad discovery provisions and earlier MSAPAs, which lacked discovery provisions.²³³ The discovery provisions of the 2010 MSAPA are limited so that the efficiency of administrative procedure under the Act is not impaired.²³⁴ This limited provision for discovery represents a major

225. *See id.* § 408 (2010), 15 U.L.A. cmt. at 54 (West Supp. 2012) (“The current compromise is more restrictive . . .”).

226. *See* Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 721 (2011) (indicating the author’s strong opposition to section 408(e)(2)).

227. *Id.* at 724 (“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 statute . . .”).

228. MODEL ST. ADMIN. PROC. ACT § 409 (2010), 15 U.L.A. cmt. at 55 (West Supp. 2012) (basing 2010 MSAPA provision on 1981 MSAPA section 4-209).

229. *Id.* § 410 (2010), 15 U.L.A. cmt. at 56 (West Supp. 2012) (“Section 410 is similar to 1981 MSAPA section 4-210.”).

230. *See id.* § 411 (2010), 15 U.L.A. cmt. at 57 (West Supp. 2012) (describing updates from previous MSAPAs).

231. This provision permitted a presiding officer to conduct discovery in accord with the rules of civil procedure of the involved state. *Id.* § 4-210(a) (1981), 15 U.L.A. 88 (2000); *see also id.* § 411 (2010), 15 U.L.A. cmt. at 57 (West Supp. 2012) (comparing the 2010 MSAPA to the 1981 provision permitting a presiding officer to conduct discovery in accord with the rules of civil procedure of the involved state).

232. *See id.* § 4-210(a) (1981), 15 U.L.A. 88 (2000) (“The presiding officer . . . may issue subpoenas, discovery orders and protective orders, in accordance with the rules of civil procedure.”).

233. *See id.* § 411 (2010), 15 U.L.A. cmt. at 57 (West Supp. 2012) (limiting the broad discovery provisions of the 1981 MSAPA).

234. *See id.* § 411 (2010), 15 U.L.A. cmt. at 57 (West Supp. 2012) (“Providing a range of options for discovery procedures will allow for flexibility.”).

change from the 1981 MSAPA.²³⁵

The 2010 MSAPA recognizes the difference between, and the procedures for, initial, recommended, and final orders.²³⁶ The Act offers different approaches to deal with each type of order and alternative approaches on whether uncorroborated hearsay can constitute the basis for a finding of fact in an order, an issue among which the states are split.²³⁷ Section 414 provides for agency head review of initial orders of a presiding officer²³⁸ and states that the agency head has the power to conduct its review hearing as if it were conducting the hearing that initially produced the order under review.²³⁹ However, the agency head is limited by law and shall consider that the presiding officer below had the opportunity to observe witnesses in making credibility determinations.²⁴⁰

In a significant step toward transparency, section 418 of the 2010 MSAPA imposes a duty on agencies to make all orders available to the public.²⁴¹ It accomplishes this by requiring all final orders to be indexed and made available to the public at the principal offices of the agency.²⁴² If the agency wishes to use an order as precedent in the future, it must designate the order as a "precedent order"; failure to so designate means that the agency may not rely on that order in the future.²⁴³

Like all earlier MSAPAs, the 2010 MSAPA recognizes that an agency may not suspend or revoke a license once it is granted without notice and an opportunity for the licensee to be heard.²⁴⁴ The Act provides that,

235. Compare *id.* § 411 ("Section 411 does not follow [the 1981 MSAPA discovery] approach."), with *id.* § 4-210(a) (1981), 15 U.L.A. 88 (2000) (authorizing discovery orders and protective orders to be issued by the presiding officer according to the rules of civil procedure).

236. See *id.* § 413 (2010), 15 U.L.A. 58-59 (West Supp. 2012) (basing the 2010 provision on the 1981 MSAPA section 4-215).

237. See *id.* § 413(f) (2010), 15 U.L.A. 59 (West Supp. 2012) (offering two alternatives, Alternative A and Alternative B, for the states to choose between).

238. See *id.* § 414(a) (2010), 15 U.L.A. 60 (West Supp. 2012) (permitting agency heads to review initial orders on their own initiative).

239. See *id.* § 414(e) (2010), 15 U.L.A. 61 (West Supp. 2012) ("[T]he agency head shall exercise the [decision making] power that the agency head would have had if the agency head had conducted the hearing that produced the order . . .").

240. See *id.* (describing the limitations on agency head's decision making process as being controlled by other laws and requiring that an assessment of credibility of evidence take place).

241. See *id.* § 418(a), (d) (2010), 15 U.L.A. 63 (West Supp. 2012) (declaring public inspection as one of four requirements necessary before an agency relies on an adverse final order).

242. See *id.* § 418(a) (2010), 15 U.L.A. 63 (West Supp. 2012) (instructing agencies to create an index of contested final orders).

243. See *id.* § 418(d) (2010), 15 U.L.A. 63 (West Supp. 2012) (stating clearly that an order must be designated as precedent to be relied on in future adjudications).

244. Compare *id.* § 419 (2010), 15 U.L.A. 64 (West Supp. 2012) (asserting that notification of the licensee is a precedent requirement of a revocation or suspension of a license), with *id.* § 14 (1961), 15

when an agency makes charges against a licensee or intends not to renew a license, the licensee must be given an opportunity to show compliance with retention requirements.²⁴⁵ This language appears to provide for at least a document review by a high-ranking official prior to suspension or revocation of the license in emergency cases.²⁴⁶

E. *Central Panel Article*

The 2010 MSAPA includes a new article that establishes a central administrative law judge panel.²⁴⁷ This type of administrative judiciary provision creates a corps of administrative law judges who, unlike the traditional arrangement in which hearing examiners are part of the agency that hears disputes of a particular type, are part of a separate agency unaffiliated with any other agency.²⁴⁸ The sole function of this separate agency is adjudication of administrative cases.²⁴⁹ Article 6 is based upon the Model Act Creating a State Central Hearing Agency, which was adopted by the American Bar Association in 1997.²⁵⁰ The central hearing panel concept is well-tested in the states; more than one-half of the states have adopted central panel provisions.²⁵¹ Furthermore, many states adopted central hearing panel provisions with sunset provisions if the panel proved ineffective.²⁵² Yet, not one state has failed to make the

U.L.A. 429 (2000) (requiring notification to licensees for revocation or suspension of a license similar to the notice required in the 2010 MSAPA).

245. *See id.* § 419(b) (2010), 15 U.L.A. 64 (West Supp. 2012) (stating that, in addition to notification, an opportunity to demonstrate compliance with all license-retention laws must be given prior to revocation).

246. *See id.* § 419 (2010), 15 U.L.A. cmt. at 64 (West Supp. 2012) (referring to the comment to section 401, which subjects the section to the exception stated in section 407).

247. *See id.* § 601 (2010), 15 U.L.A. cmt. at 72 (West Supp. 2012) (suggesting that states create an independent agency whose purpose would be to adjudicate cases that were initiated by separate agencies).

248. To ensure that the process is fair and impartial, Article 6 describes altering the procedures in Article 4 by transferring the adjudication function from the agency that investigates and prosecutes contested cases to an Office of Administrative Hearings that would have judicial power and would not be subordinate to the agency head whose case is being investigated. *See id.*

249. *See id.* (calling for the creation of a central panel to handle cases from other agencies).

250. *See id.* (referring to section 1-2(a) of the 1981 MSAPA as the basis for the 2010 provision).

251. Estimates of the number of states that have adopted such provisions vary from twenty-five to thirty states. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1484 n.29 (2009).

252. *See, e.g.,* James F. Flanagan, *An Update of Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 401, 405 (2005) (discussing the successful implementation of Oregon's central panel law leading to the elimination of sunset provisions in 2004).

central hearing panels permanent when the sunset provision expired.²⁵³ Agencies that have experience with central panels of administrative law judges indicate overwhelming support for the construct.²⁵⁴

Article 6 created a new agency, the Office of Administrative Hearings,²⁵⁵ with a chief administrative law judge (ALJ) as its head.²⁵⁶ Section 604 grants the chief ALJ extensive powers.²⁵⁷ Article 6 also provided for appointment of ALJs and sought to ensure appointment under the states' civil service laws so that they are independent of the agencies.²⁵⁸ With very few exceptions, ALJs from the central hearing panel hear and have authority to decide all contested cases.²⁵⁹ If inclined, the state legislature may grant the ALJs of the central hearing panel final decisional authority; otherwise, the ALJs prepare a recommended order for the agency head.²⁶⁰

F. *Judicial Review*

There is little change in judicial review provisions in the 2010 MSAPA. The new Act carries forward the right to judicial review of agency action from earlier MSAPAs.²⁶¹ Similar to prior MSAPAs, there are also provisions for review of final orders,²⁶² exhaustion of administrative

253. "[N]o state that has adopted a central panel has abolished it, reverting to the old system." John Hardwicke & Thomas E. Ewing, *The Central Panel: A Response to Critics*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 231, 241 (2004).

254. *Id.* at 239. In an agency "customer satisfaction" survey conducted in Oregon, ninety-eight percent of the agencies surveyed were either "satisfied" or "very satisfied" with central panel ALJ services. *Id.*

255. *See* MODEL ST. ADMIN. PROC. ACT § 601 (2010), 15 U.L.A. cmt. at 72 (West Supp. 2012) (naming the central panel hearing agency the Office of Administrative Hearings).

256. *Id.* § 602(a) (2010), 15 U.L.A. 72 (West Supp. 2012) (describing the chief ALJ as the head of the office).

257. *Id.* § 604 (2010), 15 U.L.A. 73–74 (West Supp. 2012). Those powers include: (1) managing and supervising the office; (2) assigning administrative law judges their cases; (3) assuring independence of the administrative law judges; (4) adopting rules to implement Article 6; (5) handling ethics and training of the ALJs; and (6) handling discipline of ALJs. *Id.* § 604(1)–(11) (2010), 15 U.L.A. 74 (West Supp. 2012).

258. *Id.* § 603(a) (2010), 15 U.L.A. 73 (West Supp. 2012) (directing chief administrative law judges to appoint ALJs as a part of the state merit system).

259. *Id.* § 606(a) (2010), 15 U.L.A. 74–75 (West Supp. 2012) (requiring that an ALJ preside over contested cases unless the agency head, an individual from a multi-member body that acts as the agency head, or a designee of the agency head stands in his place, as stipulated in section 402(a)).

260. *See id.* (allowing that final orders be delivered by ALJs when delegating such authority, and that recommendations be delivered to the agency head when final decisional authority is not delegated).

261. *See id.* Article 5 (2010), 15 U.L.A. 66–71 (West Supp. 2012) (Judicial Review); *id.* Article 5 (1981), 15 U.L.A. 119 (2000) (Judicial Review and Civil Enforcement).

262. *Id.* § 501 (2010), 15 U.L.A. 66 (West Supp. 2012) (Right to Judicial Review; Final Agency

remedies,²⁶³ and standing.²⁶⁴ The provisions on judicial scope of review are virtually unchanged from the 1946 and 1961 MSAPAs.²⁶⁵ The reporter explained that the drafters' refusal to change the scope provisions occurred because the drafting committee believed that scope was "notoriously difficult to capture in verbal formulas, and its application varies depending on context."²⁶⁶ Noteworthy, by 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 conclude and was being encouraged to do so by the ULC leadership.²⁶⁷

G. Rulemaking

The 2010 MSAPA has numerous new provisions that improve public notice and participation in rule making,²⁶⁸ agency input from the public during rulemaking,²⁶⁹ and judicial review.²⁷⁰ Some new provisions in Article 3 regarding rulemaking include a definition of the agency record in rulemaking,²⁷¹ advance notice of contemplated rulemaking,²⁷² negotiated rulemaking,²⁷³ and a special, simplified procedure for direct final rules,²⁷⁴

Action Reviewable); *id.* § 5-102 (1981), 15 U.L.A. 119 (2000) (Final Agency Action Reviewable).

263. *See id.* § 506 (2010), 15 U.L.A. 69 (West Supp. 2012) (Exhaustion of Administrative Remedies); *id.* § 5-107 (1981), 15 U.L.A. 126 (2000) (Exhaustion of Administrative Remedies).

264. *See id.* § 505 (2010), 15 U.L.A. 68–69 (West Supp. 2012) (Standing); *id.* § 5-106 (1981), 15 U.L.A. 125 (Standing).

265. *See id.* § 508 (2010), 15 U.L.A. cmt. at 71 (West Supp. 2012) (comparing the short form of section 508 to the 1961 MSAPA section 15(g)).

266. *Id.* (providing the rationale for using a shorter, skeletal formulation for the section).

267. The author of this Article served on the drafting committee that produced the 2010 MSAPA and witnessed the drafting process. Many of the observations are based on his personal experiences during that time.

268. *See id.* § 201 (2010), 15 U.L.A. 16 (West Supp. 2012) (requiring publishing, indexing, and inspection for all rules).

269. *See id.* § 306 (2010), 15 U.L.A. 29 (West Supp. 2012) (requiring opportunities for public participation).

270. *Compare id.* § 504 (2010), 15 U.L.A. 68 (West Supp. 2012) (allowing courts to grant a stay pending appeal even when a challenging party does not request a stay from the agency), *with id.* § 5-111 (1981), 15 U.L.A. 136 (2000) (providing only a provision for judicial review of an application for stay in the context of the agency's response to the application).

271. *Id.* § 302 (2010), 15 U.L.A. 24–25 (West Supp. 2012). The section imposes a duty for the agency to maintain a record in a rulemaking proceeding that is available to the public at section 302(a) and lists the material the agency must include in the record at section 302(b). *Id.* § 302(a)–(b) (2010), 15 U.L.A. 24–25 (West Supp. 2012).

272. *See id.* § 303(a) (2010), 15 U.L.A. 26 (West Supp. 2012) (permitting an agency to solicit recommendations from the public).

273. *See id.* § 303(b) (2010), 15 U.L.A. 26 (West Supp. 2012) (permitting agencies to perform negotiated rulemaking).

274. *See id.* § 310 (2010), 15 U.L.A. cmt. at 33 (West Supp. 2012) (describing a direct final rule

which are expected to be noncontroversial.²⁷⁵ Most of these innovations are the result of experimentation by the states and federal government with different rulemaking procedures that turned out successfully.²⁷⁶ The 2010 MSAPA defines a rule as a “statement of general applicability that implements . . . law or policy . . . and has the force of law.”²⁷⁷

Another important new provision in Article 3 is the express recognition and inclusion of agency procedure for use of guidance documents.²⁷⁸ The Act defines guidance documents as generally applicable records that express an agency’s legal interpretation or explain the way in which the agency will exercise its discretion, but do not invoke the force of law.²⁷⁹ The new guidance document definition and procedure clarify the relationship between agency rules as contrasted with interpretive and policy statements.²⁸⁰ The 2010 MSAPA does not require agencies to use notice and comment procedure for the promulgation of guidance documents.²⁸¹ However, the section limits agency use of guidance documents: if an agency seeks to rely on a guidance document in a proceeding, it must give an affected party an opportunity to address the legality or wisdom of the agency position.²⁸² Similarly, if an agency proposes to act at variance with a guidance document, it must give a reasonable explanation for the variance.²⁸³ If an affected party relied on the guidance document, the agency must explain why its interest outweighs the party’s interest.²⁸⁴ The agency must also maintain an index of all

as one that can be made without full rulemaking procedure if it is noncontroversial and no objections are lodged by the public within thirty days of public inspection).

275. *See id.* (describing a noncontroversial rule as one that merely makes stylistic corrections or corrects a subjectively noncontroversial error).

276. *See, e.g., id.* (citing conclusions drawn from the application of VA. CODE ANN. § 2.2-4102.1 as an inspiration for altering the requirements to issue direct final rules).

277. *Id.* § 102(30) (2010), 15 U.L.A. 9–10 (West Supp. 2012).

278. *See id.* §§ 102(14), 311 (2010), 15 U.L.A. 8, 33–34 (West Supp. 2012) (defining and differentiating guidance documents from rules).

279. *Id.* § 102(14) (2010), 15 U.L.A. 8 (West Supp. 2012).

280. *See id.* § 311 (2010), 15 U.L.A. cmt. at 34 (West Supp. 2012) (noting that different nomenclature between guidance documents and rules allows agencies to promulgate these documents with fewer procedural requirements).

281. *See id.* § 311(a) (2010), 15 U.L.A. 33 (West Supp. 2012) (stating that agencies do not need to follow sections 304 through 307 when issuing a guidance document).

282. *See id.* § 311(b) (2010), 15 U.L.A. 33 (West Supp. 2012) (allowing a person affected deleteriously by a decision to challenge the agency’s position).

283. *See id.* § 311(d) (2010), 15 U.L.A. 33 (West Supp. 2012) (requiring that an agency account for deviation from stated positions).

284. *See id.* (stating that the decision to vary from the stated position must stem from a reasonable justification that is in excess of the reliance interest of the affected person).

guidance documents and make that index available to the public.²⁸⁵ This provision should eliminate agencies' abuse of their broad promulgating discretion to create unknown or secret law to control the outcome of proceedings.²⁸⁶

H. *Legislative Rules Review*

Legislative review of agency rules has enjoyed enactment in many states over the last forty years.²⁸⁷ Drawing on state and federal experience with this device, the ULC has included an elective article, Article 7, in the 2010 MSAPA for rule review by the state legislatures.²⁸⁸ Under provisions of Article 7, the legislature or its delegates examine each new rule for statutory authority, conformity with the law, consistency with legislative intent, compliance with regulatory analysis requirements, and reasonableness of the agency's interpretation of the law.²⁸⁹ If the legislature finds that a rule meets these requirements, then the rule becomes law.²⁹⁰ However, if the agency has not met these requirements, then the legislature may propose an amendment to the rule or disapprove it.²⁹¹ If a rule is disapproved, it may still become effective if both houses of the legislature fail to sustain the review committee's findings.²⁹²

I. *Electronic Procedure*

The 2010 MSAPA also includes entirely new material on electronic procedure.²⁹³ These provisions draw upon developments—the advent of

285. *Id.* § 311(b)–(d) (2010), 15 U.L.A. 33 (West Supp. 2012).

286. *See id.* § 311 (2010), 15 U.L.A. cmt. at 34 (West Supp. 2012) (stating that the issuance and publication of guidance documents reduces unintentional violations by the public and “incorporates safeguards to ensure that agencies will not use guidance documents in a manner that would undermine the public’s interest in administrative openness and accountability”).

287. *See id.* § 702 (2010), 15 U.L.A. cmt. at 77 (West Supp. 2012) (citing laws in Texas, Iowa, Utah, Wisconsin, and Montana that provide for legislative oversight of agency rulemaking).

288. *See id.* § 701 (2010), 15 U.L.A. 76 (West Supp. 2012) (noting that committee processes differ too greatly amongst states to create a ubiquitous legislative rule review law).

289. *See id.* § 702(b) (2010), 15 U.L.A. 76 (West Supp. 2012) (listing the criteria that a rules committee may review).

290. *See id.* § 703 (2010), 15 U.L.A. 77–78 (West Supp. 2012) (stating that approval by the rules review committee renders the rule effective according to section 317).

291. *See id.* § 703(c), (d) (2010), 15 U.L.A. 77–78 (West Supp. 2012) (permitting a review committee to suggest amendments to the rule or disapprove it).

292. *See id.* § 703(d) (2010), 15 U.L.A. 78 (West Supp. 2012) (declaring that, even if the rules review committee disapproves the rule, failure of the legislature to concur with the review committee’s decision renders the adopted rule effective upon the recess of the subsequent session).

293. *See id.* Article 2 (2010), 15 U.L.A. 16–23 (West Supp. 2012) (adding a new article to the 2010 MSAPA to encompass electronic provisions).

personal computing and the Internet—that have occurred since earlier versions of the MSAPA and deal with technology that did not exist at the time of the last revision of the Act. The 1961 MSAPA had one section on publication, public access, and availability of rules and orders.²⁹⁴ On the other hand, the 2010 MSAPA contains an innovative, new article involving electronic provisions.²⁹⁵ Although the article provides more detail than the 1961 MSAPA, it is justified by the unforeseen developments in electronics that have occurred in the past forty years. The drafters explain that “[t]he development of the [I]nternet and the widespread use of electronic media have made public access to agency law and policy much easier. The arrival of the Internet and electronic information transfer . . . has revolutionized communication. It has made available rapid, efficient[,] and low cost communication and information transfer.”²⁹⁶ Consistent with those changes, the stated objective of Article 2 is to “provide easy public access to agency law and policy.”²⁹⁷ The provisions in Article 2 require publication of all notices, rules, guidance documents, and orders on an agency website.²⁹⁸ Many state and federal agencies have successfully used these types of electronic provisions.²⁹⁹

VII. CONCLUSION

The 2010 MSAPA represents nearly seven years of intense research and drafting by experts in administrative procedure. It is a valuable tool for states to use to maintain the fairness, efficiency, and accuracy of their administrative procedure statutes. The committee solicited and received extensive input from several organizations with interest and expertise in agency procedure.³⁰⁰ The American Bar Association, the National Association of Secretaries of State, and the National Conference of

294. *See id.* § 2 (1961), 15 U.L.A. 209 (2000) (requiring that agencies make rules available, but failing to specify the manner in which it must be done).

295. *Id.* Article 2 (2010), 15 U.L.A. 16 (West Supp. 2012) (Public Access to Agency Law and Policy).

296. *Id.* § 201 (2010), 15 U.L.A. cmt. at 17 (West Supp. 2012).

297. *Id.*

298. *See id.* § 201(k) (2010), 15 U.L.A. 16 (West Supp. 2012) (mandating that proposed rules, filed rules, regulatory analysis, declaratory orders, guidance documents, and final orders from contested cases be made available on the Internet).

299. *See id.* § 201 (2010), 15 U.L.A. cmt. at 17 (West Supp. 2012) (“Many states as well as the federal agencies have found that [the Internet] is an ideal medium for communication between agencies and the public, especially in connection with rulemaking.”).

300. *See id.* *Prefatory Note* (2010), 15 U.L.A. 2–3 (West Supp. 2012) (providing that judicial opinion, academic commentary, state legislatures, and the ABA helped influence the making of the 2010 MSAPA).

Administrative Law Judges participated throughout the entire six-year drafting period.³⁰¹

The objective of the drafters of the 2010 MSAPA was twofold. First, they sought to use the outline and general drafting style of the 1946 and 1961 versions of the MSAPA.³⁰² This drafting choice has significant implications. It means that states may adopt provisions of the 2010 MSAPA that fit within their statutory history, framework, and policies; there is no necessity to adopt the entire Act.³⁰³ Another advantage is that, to the extent possible, the 2010 MSAPA leaves much of the detail of procedure up to the agencies in the state.³⁰⁴ Thus, agencies with widely varied task delegations may tailor procedural requirements that will accomplish their objectives fairly, efficiently, and accurately. Second, the 2010 MSAPA adapts to the revolution in the digital realm of the last forty years.³⁰⁵ Use of digital media means greater agency transparency and public availability as well as greater public knowledge of agency rules, guidance documents, and orders.³⁰⁶ This will foster a sense of fairness and will increase efficiency by minimizing the need to use paper records.

The 2010 MSAPA is a roadmap for states to improve their administrative procedure and adapt it to twenty-first century standards. Based on successful experiments and experience in the states, the new Act corrects multiple problems lingering from earlier versions.³⁰⁷ The new Act updates several areas where completely changed circumstances and

301. *See id.* (emphasizing the reasons for the 2010 revisions and the various agencies that provided direction to the drafters).

302. *See id. Prefatory Note* (2010), 15 U.L.A. 3 (West Supp. 2012) (noting that the Act was specifically drafted as a model act and was designed to be an updated version of the 1961 Act and less detailed than the 1981 Act).

303. *See id. Prefatory Note* (2010), 15 U.L.A. 3–4 (West Supp. 2012) (providing provisions throughout the Act that defers to application of state laws and allows for state laws to usurp provisions of the Act when they conflict).

304. *See id. Prefatory Note* (2010), 15 U.L.A. 3 (West Supp. 2012) (referring to the use of bracketed words in the sections as a method for state legislatures to tailor the adopted procedures to specific agencies' needs).

305. *See id.* (describing the advent of the Internet since the publication of the last MSAPA as an event that requires consideration in the revision).

306. *See id.* § 202 (2010), 15 U.L.A. cmt. at 19 (West Supp. 2012) (indicating that the purpose of section 2 is to improve notice to the public and to increase the availability of records).

307. *See id. Prefatory Note* (2010), 15 U.L.A. 2–3 (West Supp. 2012) (explaining the changes to previous acts were enacted as a result of experience with the Federal Administrative Procedure Acts, critiques from agencies and legislatures, a study by the American Bar Association, and experience with experimental provisions within the states).

history have rendered existing state APAs obsolete.³⁰⁸ Finally, the new Act seeks to evolve in a manner consistent with the 1961 MSAPA, variations of which more than half the states adopted.³⁰⁹ This combination of factors makes the 2010 MSAPA an indispensable tool for states to use as they adapt their administrative processes to meet the demands of the twenty-first century.

308. *See id. Prefatory Note* (2010), 15 U.L.A. 3 (West Supp. 2012) (proffering examples of major changes made to the MSAPA, such as narrowing the range of disputes that required a residential hearing and expanding the public access requirement to electronic posting).

309. *See id. Prefatory Note* (2010), 15 U.L.A. 2 (West Supp. 2012) (“Over one[-]half of the states adopted the 1961 Act or large parts of it.” (citing *Uniform Laws Annotated* at 357 (1980 Master Edition))).