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Model Revised State APA Fails to Recognize Needs of the Self-Represented — ABA Response Being Debated

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Some of you may have been following the somewhat surprising story of the Model Revised State Administrative Procedure Act approved in late 2010 by the Conference of Commissioners on Uniform State Laws.

That enactment, meant as a model for the states, fails to recognize the right of self-representation (although an earlier draft had done so), includes no recommendations or requirements as to how judges should make sure that the self-represented are heard, and, perhaps most seriously from the point of view of the administrative law judiciary, fails to recognize the need for institutional independence of administrative judges.

It is my understanding that there is substantial activity within the ABA about whether to react to these omissions. One view is that the ABA should explicitly disapprove this document. Another it that since there has been no formal request to the ABA for approval of the document, there is no need for the ABA to respond, and that the appropriate strategy is for state-by-state opposition to these provisions of lack of provisions. (It is true, however, that according to Article 7 of the Constitution of the Conference: "*The President shall also cause an annual written report to be made to the House of Delegates of the American Bar Association upon the work and recommendations of the Conference during the preceding year. The President shall file for the records of the American Bar Association copies of Uniform Acts finally approved and recommended by the Conference for enactment by the several States.")*

I strongly hope that people will become involved in this debate. The materials below might be of assistance.

The enactment includes the following Subsection 403 (h) :

> "*Unless prohibited by law of this state other than this [act], a party, at the party's expense, may be represented by counsel or may be advised, accompanied, or represented by another individual.*"

The enactment also includes the following Comment to Subsection 403 (h).

> *Subsection (h) is based on 1981 MSAPA Section 4-203(b). This Act does not expressly confer a right to self-representation in contested cases. The absence of such a provision reflects a belief that a broad right to self-representation is inappropriate for an APA that will apply globally to all contested cases, ranging from the simplest proceedings to very complex ones. States have the option to provide a right to self-representation in particular statutes that require evidentiary hearings, and the absence of a corresponding right in this Act should not be interpreted as discouraging such legislation.* (emphasis added)

Proposed Black Letter Language and Comment

This was the earlier proposed blackletter and comment on the topic, submitted during the drafting process.

A party may exercise the right to self representation in a contested case.

In such a case, the presiding officer shall provide information about the issues, contentions, applicable law and relevant contested case procedures, including the steps required to submit evidence, to the self-represented party. To ensure that the presiding officer is in possession of all relevant facts, and that the hearing record is fully developed for review, in such cases the presiding officer shall also ask such even-handed questions as are necessary to develop fully the positions of the parties and the evidence in support.

The presiding officer may also take such additional discretionary neutral steps as may be necessary to ensure that the evidentiary record is fully developed.

Comment:

The first paragraph of subsection (_) provides for a right of self representation for parties in contested case proceedings. The second paragraph requires presiding officers to accommodate the self represented party's unfamiliarity with agency procedures in contested cases by explaining those procedures to the extent consistent with fair hearing and impartial decision maker requirements. The third paragraph requires questioning to fully develop the parties factual and legal positions, and the fourth paragraph permits additional discretionary steps to ensure that the case is decided on the facts and the law. Goldberg v. Kelley (1970) 397 U.S. 254 (impartial decision-making is essential to due process of law). Indeed, even-handed provision of information and engagement in the hearing process is not only non-neutral, but may be required for a fully neutral process.

The fair hearing limits would be exceeded if the presiding officer violated impartial decision maker requirements by improperly assisting one party develop his or her case at the hearing. Procedural adjustments such as an explanation of the issues, contentions, law and hearing procedures and even-handed questioning, do not constitute such improper assistance.

Here is also some possible language and explanation, assuming that the black letter stays in place:

Proposed Comment for Current Black Letter

This Act does not by its own force expressly confer a right to self-representation in contested cases. However, such a right may well exist, at least, but not necessarily only, in particular categories of cases, as a result of the federal or state constitutional provision, or federal or state statutes or regulations. Therefore, States have the option to provide a right to self-representation in particular statutes or beyond, and the absence of a corresponding right in this Act should not be interpreted as discouraging such legislation. Such rights should, of course, be explicitly referenced in the state's adoption of this Act. Ambiguity as to the existence of the right is not helpful to the presiding officer, the agency, or the parties.

Moreover, regardless of the status of any right to self-representation in a State, States may add language to (subsection) authorizing or requiring presiding officers to take specific steps to ensure that a party who has elected to represent themselves is fully heard. Such steps, which in many circumstances may be required by state and/or federal law, may include: providing information about the issues, contentions, applicable law and relevant contested case procedures, including the steps required to submit evidence, to the self-

represented party; asking such even-handed questions as are necessary to develop fully the positions of the parties and the evidence in support; and, taking such additional discretionary neutral steps as may be necessary to ensure that the evidentiary record is fully developed. (In adopting such additions, states might consider as a foundation the relevant language in the state's code of judicial conduct, and adding to it such additional greater protections as are required in the administrative hearing context.)

Discussion of Proposed Comment Language:

Paragraph one

It is understood that the text of the Model Act does not recognize any right of self-representation, and that this has occurred as a result of a compromise. However, in drafting comments, the Conference of Commissioners should be fully aware that as a general matter, courts recognize a right of self-representation of individuals and that this right is not limited by the complexity of the case.

It is therefore important not only that the Comment to the Model Act state the fact that the omission of discussion of any right of self-representation does not imply the denigration of such a right, but that they put States on notice that the absence of such a right might be inconsistent with governing state and federal law. Such care is particularly important given that significant federal funds flow to state programs conditioned on compliance with requirements of accessibility. It is hard to believe that the federal government would stand aside if a state were to require an applicant for unemployment benefits, food stamps, Medicaid on TANF to proceed through an attorney.

Indeed, it is hard to imagine a state administrative process in which an individual were challenging a government's action, in which courts would sustain the exclusion of the individual from the process unless he or she were to hire an attorney. (The situation is, of course, different for a corporation, in which such requirement is routine, in that there is, as a matter of law no individual "self").

Paragraph two

There is a now a strong emerging consensus of the appropriateness of judicial engagement with self-represented parties to ensure the right to be heard in trial courtrooms. It is understood that such appropriate engagement, far from being non-neutral, adds to the neutrality of the entire process, and increases public trust and confidence in the justice system. This consensus draws in part on almost one hundred years of experience in the adjudicatory component of the administrative law system.

This consensus is underlined by the addition by the ABA in the most recent version of the Model Code of Judicial Conduct of the following comment language to Rule 2.2 (Impartiality and Fairness), now going through the adoption process in the states, that:

"It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."

The specific suggestions in the proposed Comment reflect extensive research, experimentation and best practices drafting in state courts. Indeed, in 2007, thirty states' Chief Justices nominated teams of judges and others that attended an educate-the-educator conference at Harvard Law School that reflected this

research, and launched a model curriculum for educating state trial court judges in how to manage their courtrooms to facilitate access for those without representation.

Unless Comments incorporating this approach are adopted for the Model Act, the illogical result will be that the MSAPA, the national model for administrative procedure, will be less open to those without lawyers than the trial courts of the Nation. This would be supremely ironic, as well as profoundly destructive to the causes of access to justice and public trust and confidence. Ever since the establishment of the administrative law system it has been not only a fundamental goal of, but a reason d'etre of that system, that it would be more accessible to ordinary people than the inherently more formalistic trial court system.

Indeed, such provisions may be required by the federal agencies that administer the flow of money to the states for programs listed in the discussion under the first paragraph.

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