RESOLUTION

RESOLVED, That the American Bar Association continues to support the judicial independence and authority granted to the Central Panel Administrative Law Judges in the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings), adopted by the ABA House of Delegates on February 3, 1997.
The National Conference of the Administrative Law Judiciary has been part of the Judicial Division since 1971. Its membership includes federal, state, territorial, and local administrative law judges and administrative adjudicators.

In most federal agencies and in many state, territorial and local jurisdictions, administrative adjudications take place within agencies which combine regulatory, enforcement, prosecutorial, and adjudicatory authority in a single agency. This combination of functions creates a potential conflict of interest. It may also compromise the integrity of administrative adjudications and often creates a perception of unfairness by the litigants opposing the agencies. The conflict of interest inherent in the same agency acting as both prosecutor and judge has led to the establishment of state central hearing agencies, also known as central panels. In central panels, an independent Administrative Law Judge presides over the administrative litigation, and this judge is completely independent of the agency prosecutorial functions. Roughly twenty-nine state and local jurisdictions (including New York City, the City of Chicago, Cook County, IL and the District of Columbia) have addressed this conflict by creating a central hearing agency.

The ABA House of Delegates approved a Model Act Creating a State Central Hearing Agency on February 3, 1997 to guide states that wished to create central panels. The ABA enunciated this goal of separation in Section 1-2(a) which states that the “Office of Administrative Hearings is created as an independent agency in the Executive Branch of State Government for the purpose of separating the adjudicatory function from the investigatory, prosecutory and policy-making functions of agencies in the Executive Branch.” The ABA Model Act, as well as the current practices in just about every central panel state, authorizes the central panel to hear all contested cases that arise from a non-exempt agency. Central panel states report that state legislatures continue to expand and confer additional jurisdiction on existing central panels. Likewise, the ABA Model Act and nearly all current central panel states authorized some or all final decisions making authority in the Central Panel Administrative Law Judges.

This resolution urges the House of Delegates to continue its support of the authority granted to the Administrative Law Judges in the ABA Model Act as opposed to a weakened version of that authority. The weakened version appears as Article 6 of the Model State Administrative Procedural Act (MSAPA) proposed by the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) at its 2010 annual conference.

Under the MSAPA, the powers vested in all executive branch agency heads to decide when and whether to use the Central Panel Administrative Law Judges, if at all, and to dictate the terms under which the Administrative Law Judge may exercise any final decision making authority, substantially weakens the authority granted under the ABA Model Act. The ABA Model Act created only one exception to this jurisdictional requirement and that is when the agency head decided to personally hear the case. In all other instances the case must be heard by a Central Panel Administrative Law Judge whose independence protects the integrity of the
administrative process, which is a fundamental goal in the creation of all central panels. In the ABA Model Act, the legislatures had the option to delegate final decision making authority to central panels. Nearly one hundred percent of all central panels have been conferred some or all of this authority. In contrast, the MSAPA confers this power exclusively on the agency heads (not the legislatures). This requirement for the agency head to approve any delegation of final decision making authority to the Central Panel is very different from legislatively delegating final decision making authority to the Central Panel. The exclusive powers vested in the agency head to decide both jurisdictional and decisional authority strikes at the heart of judicial independence and effectively removes much of the neutrality intended when state and local governments created Central Panels.

The Administrative Law Central Panel Directors Conference is a national organization composed of most of the Directors and Chief Administrative Law Judges from the state and local Central Panels. In the 2010 annual meeting of the Administrative Law Central Panel Directors Conference, the attendees unanimously opposed Article 6 of the 2010 MSAPA proposed by the Uniform Law Commission. They recommended instead that states continue to look to the February 3, 1997 ABA Model Act as the proper reference source when creating Central Panels. The National Association of the Administrative Law Judiciary (NAALJ) is the largest freestanding national organization of state and local administrative adjudicators. (It has members from all 50 states and the District of Columbia as well as many Canadian, federal and local administrative adjudicators). The NAALJ Board of Governors concurred with the Administrative Law Central Panel Directors Conference in these recommendations.

The National Conference of the Administrative Law Judiciary agrees the 1997 ABA Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) represents the correct model for the states to follow in creating such agencies and that states considering the adoption of legislation creating a Central Panel should enact the 1997 Model Act Creating a State Central Hearing Agency in preference of Article 6 of the 2010 Revised Model State Administrative Procedure Act. Based upon the foregoing reasons stated in this Report, the National Conference of the Administrative Law Judiciary urges the American Bar Association to adopt this resolution.

Respectfully submitted,

Thomas W. Snook
Chair, National Conference of the Administrative Law Judiciary

February 2011
GENERAL INFORMATION FORM

Submitting Entities: National Conference of the Administrative Law Judiciary
Submitted by: Thomas W. Snook, Chair, National Conference of the Administrative Law Judiciary

1. Summary of Recommendation(s).

To continue to support the decisional authority and judicial independence granted to the administrative judiciary under the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) as adopted by the ABA HOD on February 3, 1997. And to urge states considering the adoption of legislation creating a Central Panel to enact the Model Act Creating a State Central Hearing Agency in preference to Article VI (Office of the Administrative Hearings) of the 2010 Revised Model State Administrative Procedural Act (MSAPA).

2. Approval by Submitting Entity.

The Recommendation was approved by the National Conference of the Administrative Law Judiciary by electronic vote on November 16, 2010.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

The ABA House of Delegates approved the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) on February 3, 1997. That Act has not been modified by the House of Delegates or the Board of Governors since then. Article 6 of the 2010 Revised Model State Administrative Procedure Act of the Uniform Law Commission is in conflict with existing ABA policy because it weakens the decisional authority and judicial independence granted to Central Panel Judges under the 1997 ABA Model Act.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000, 2001, and 2005. Indeed, the Association’s commitment to the independence of the administrative judiciary is reflected in the jurisdictional authority of the Standing Committee on Judicial Independence which is authorized to promote this value. Article 6 of the 2010 Revised Model State Administrative Procedure Act of the Uniform Law Commission is in conflict with existing ABA policy because it weakens the authority granted to Central Panel Judges under these policies.
5. What urgency exists which requires at this meeting of the House?

States are reviewing the 2010 Revised Model State Administrative Procedure Act of the Uniform Law Commission as a possible source for revised state legislation. It is important that they not use Article 6 of that Act as a model to the extent that it weakens the authority of Central Panel Administrative Law Judges to act independently of the agencies litigating before them.

6. Status of Legislation. (If applicable.)

Not applicable.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Many members of the National Conference of the Administrative Law Judiciary are either Chief Administrative Law Judges presiding over Central Panels or Administrative Law Judges employed by Central Panels. No one abstained discussing or voting on this recommendation due to a conflict or interest.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

Concurrently with the submission of this report to the February 2011 House of Delegates agenda it is being circulated to the following ABA entities:

Judicial Division
National Conference of Commissioners on Uniform State Laws
Section of Administrative Law and Regulatory Practice
Section of Business Law
Section of Environment, Energy and Resource
Section of Labor & Employment Law
Section of Litigation
Section of State & Local Government Law
Section of Tort Trial & Insurance Practice
Senior Lawyers Division
Standing Committee on Judicial Independence
10. **Contact Person.** (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. **Contact Person.** (Who will present the report to the House. Please include email address and cell phone number.)

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EXECUTIVE SUMMARY

a) Summary of the Recommendation.

Over half the states have separate agencies (Central Panels or Offices of Administrative Hearings) composed entirely of Administrative Law Judges whose sole function is to conduct administrative hearings for other agencies. The ABA House of Delegates adopted a Model Act for states to follow in creating such agencies on February 3, 1997. Article 6 of the 2010 Revised Model State Administrative Procedure Act (MSAPA) recommended by the Uniform Law Commissioners would weaken the authority of the Central Panels to dispense impartial justice in cases in which agencies are litigants. It would strip them of much of the authority granted under the February 3, 1997 ABA Model Act to reach decisions independently of the agency litigants. The National Conference of the Administrative Law Judiciary recommends continuing to support the authority granted to the Administrative Law Judges under the 1997 ABA Model Act.

b) Summary of the issue which the Recommendation addresses.

This recommendation addresses the issue on whether Central Panels of State Administrative Law Judges will continue to exercise wide-ranging decision making authority independently of the agencies which appear before them as litigants or become more subservient to the agencies.

c) An explanation of how the proposed policy position will address the issue.

It will recommend that the states continue to follow the ABA Model Act as approved in February 1997 by the ABA HOD instead of Article 6 of the 2010 Uniform Law Commissioners MSAPA which reduces and compromises the authority of Central Panel Judges.

d.) Minority Views or Opposition.
No opposition to this recommendation is known to exist at this time.