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Francis J. Pavetti, Chair
Drafting Committee to Revise the Model State Administrative Procedure Act
18 The Strand, Goshen Point
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Dear Mr. Pavetti,

As the revision process for the Model State Administrative Procedure Act nears its end, the ABA Section of Administrative Law and Regulatory Practice would like to commend your drafting committee for the diligent and conscientious effort that it has devoted to this important project. We also want to express our appreciation for the committee's receptivity to many of the suggestions we have made on successive drafts. We write to express concern about a few of the committee's recent decisions relating to Section 507 of the draft Act. Although we recognize that the committee has held its final in-person meeting prior to the anticipated floor adoption of the Act in July 2010, the issues discussed in this letter are ones that we could not practicably have raised earlier, and we hope the committee will give them timely consideration in some fashion. The views expressed herein are presented only on behalf of the ABA Section of Administrative Law and Regulatory Practice. They have not been submitted to or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the Association.

A. "Reasonably Available" Information

At its meeting on February 13, 2010, the committee adopted the following language regarding the record for review in a judicial review proceeding:

SECTION 507. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTION.

(a) In a contested case, the court's review is confined to the hearing record and to matters arising from that hearing record. The court, however, may receive additional evidence if the party seeking judicial review makes allegations of procedural error arising from matters outside the hearing record or except when necessary to avoid manifest injustice.

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(b) In any case that is not a contested case, the record for review shall consist of the agency record and all unprivileged material that agency decision makers directly or indirectly considered, or that was submitted for consideration by any person, in connection with the action under review, including information reasonably available to the agency at the time of the agency's action that is adverse to the agency's position. The court may allow discovery and other evidentiary proceedings in order to supervise the agency's completion of the record for review. The court may also consider evidence outside of the agency record:

(1) [if the agency action was ministerial or was rendered without an administrative record or on the basis of a minimal administrative record;]

[(2) insofar as the petitioner alleges procedural error not disclosed by the record]; or

(3) [except when necessary to avoid manifest injustice.].

Specifically, we are concerned about Section 507(b), which would apply to all judicial review except where the validity of a contested case (formal adjudication) is at issue. It provides that the record for review must include all information considered by the agency during the proceeding *and also* "information reasonably available to the agency at the time of the agency's action that is adverse to the agency's position." This language appears to mean that, in any non-contested case, a reviewing court must measure the agency's decision against any "adverse" information that the agency *could* have considered (because it was "reasonably available"), regardless of whether the agency actually *did* consider it.

This is a novel and troubling departure from the modern principle that a reviewing court should, in general, evaluate an agency decision in relation to the same body of evidence that the agency itself considered at the administrative level. In a rulemaking context, for example, if the court is going to measure a rule against factual information that the agency did not consider, we do not see how it can avoid becoming a policymaker in its own right – a surprising alteration of the courts' traditionally accepted role. The California Supreme Court has warned against that possibility:

. . . Were we to hold that courts could freely consider extra-record evidence in [evaluating the factual basis for quasi-legislative actions taken by the Air Resources Board], we would in effect transform the highly deferential substantial evidence standard of review . . . into a de novo standard, and under that standard the issue would be not whether the administrative decision was rational in light of the evidence before the agency but whether it was the wisest decision given all the available scientific data. The propriety or impropriety of a particular legislative decision is a matter for the Legislature and the administrative agencies to which it has lawfully delegated quasi-legislative authority; such matters are not appropriate for the judiciary.

Western States Petroleum Ass'n v. Superior Court, 888 P.2d 1268, 1274 (Cal. 1996) (citations omitted). The court in *Western States* did agree with commentators who argued that "extra-record evidence is usually necessary . . . when the courts are asked to review ministerial or informal administrative actions,

because there is often little or no administrative record in such cases.” *Id.* at 1276. That exception is, in fact, separately written into the language of Section 507(b). In contrast, the court said, “the administrative record developed during the quasi-legislative process is usually adequate to allow the courts to review the decision without recourse to such evidence, and therefore extra-record evidence generally should not be admitted.” *Id.* This is an insight that we believe the committee should now heed.

The workability of Section 507(b) as it stands is open to question. It will exert pressure on officials to search their files and all other “reasonably available” resources, so that they can respond to all “adverse” data that a reviewing court *might* later treat as part of the record. The boundaries of the term “reasonably available” seem highly indeterminate. Would information be “reasonably available” if, for example, it were situated in the files of a staff member who had no direct responsibility for the decision in question? What if it were in a basement storage cabinet, or at an off-site storage facility? Moreover, in the age of the Internet, a limitless body of information is readily “available” to an agency even if it has no physical existence at its offices.

The term “adverse” would also present interpretive challenges. One could debate, for example, whether a document would be adverse if it contained twenty pages of analysis that was in tune with the agency’s position, but also two paragraphs that, if believed, would raise doubts about it. More fundamentally, in the rulemaking context, agencies have to choose from among numerous policy options. Is any report or article that on its face would support a weaker or stronger or somehow different option “adverse” to the agency’s position? If not, how would the term be limited?

We see no persuasive justification for the “reasonably available” expansion of the administrative record (with or without the “adverse” qualifier), and we urge its deletion.

B. Discovery Opportunities

Apart from the “reasonably available [information]” language of Section 507(b), we are troubled by what appears to be a one-sided emphasis in that subsection. It states in relevant part that “[t]he court may allow discovery and other evidentiary proceedings in order to supervise the agency’s completion of the record for review.” This language implies that, in judicial review of all agency decisions other than contested cases, discovery should be a normal, perhaps routine, part of the review process.

This pronouncement, in our judgment, gives too little attention to the presumption of regularity that should attach to the judicial review record. Such a presumption is well recognized in the case law.¹ It serves to maintain a cooperative balance of authority as between the executive and judicial branches, neither of which has a monopoly on self-restraint. In administering this presumption, the courts do not refrain from any and all discovery to uncover matters that should have been included in the record for review, but they do impose an initial burden on the challenger to justify such intervention.

¹See *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) (“[T]he designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary.”); *Amfac Resorts, L.L.C. v. U.S. Dep’t of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (“[A] party must

Practical considerations also militate against inviting courts to override the presumption more easily than necessary. By its nature, discovery is time-consuming and can interfere with the agency's orderly conduct of its legislatively assigned responsibilities. If the door to such inquiry is left wide open, participants in the process will frequently take advantage of the opportunities afforded, because the stakes in rulemaking and other policy-laden administrative decisions can be high, and the atmosphere is often adversarial. Advocacy groups ranging across the ideological spectrum, which may have understandable reasons for mistrusting the agency, will regularly seek to resort to these opportunities if they are freely available. Of course, these groups may have valid grounds for suspecting that the record is incomplete, and a judicial safeguard should be available, but we believe that a threshold showing to overcome the presumption of regularity should be built into the language of Section 507.

At the least, the drafting committee should consider modifying Section 507 in relation to review of agency rulemaking. In the first place, this provision should speak to the record for rulemaking review in subsection (a), not subsection (b). Unlike the federal APA and the law of most states, the proposed Model Act contains in Section 302 specific statutory requirements prescribing the contents of the rulemaking record. The presence of a defined record in rulemaking and contested cases, as prescribed in Articles 3 and 4 respectively, suggests that these two types of cases should be grouped together. Indeed, the committee's decision to address rulemaking review in Section 507(b) instead has given rise to a very inelegant redundancy in draftsmanship.²

Moreover, in the specific instance of judicial review of rulemaking under the MSAPA, the presumption of regularity seems particularly apt. The structured protocol prescribed in Section 302 can be expected to make the compilation of the record a matter of bureaucratic routine. Although orderly procedures cannot entirely eliminate the risks of concealment, they do differentiate rulemaking under this Act from other situations governed by Section 507(b), in which the record may be assembled only after litigation has commenced. When that occurs, the incentives for defensiveness and evasion are at their greatest.

Admittedly, the case law that addresses circumstances in which the presumption can be overcome is by no means uniform, and some of it is lenient in allowing discovery to complete the

provide good reason to believe that discovery will uncover evidence relevant to the Court's decision to look beyond the record. Thus, a party must make a significant showing – variously described [in case law] as a 'strong', 'substantial', or 'prima facie' showing – that it will find material in the agency's possession indicative of bad faith or an incomplete record.”).

²In relevant part, Section 507(b) states that “[i]n any case that is not a contested case, the record for review shall consist of the agency record *and* all unprivileged material that agency decision makers directly or indirectly considered, or that was submitted for consideration by any person, in connection with the action under review, including information reasonably available to the agency at the time of the agency's action that is adverse to the agency's position” (emphasis added). The only cases to which the words “agency record” could apply are rulemaking cases, because only in such a case would the “agency record” have any content apart from what is specified in Section 507(b) itself. See Section 102(6). In rulemaking cases, however, Section 302 already requires the agency to include in the record unprivileged materials that agency personnel relied on or consulted in formulating a rule (subsection (3)), as well as comments submitted in the proceeding (subsection (5)). Thus, the rulemaking agency would be subject to two benchmarks that largely overlap. And, to the extent that the two verbal formulas can be read as diverging, the divergence serves no discernible purpose and may engender needless confusion.

administrative record. However, much of the case law on record supplementation has developed in the context just mentioned -- i.e., records compiled only after the agency has been sued -- and judicial pronouncements favoring generous discovery rights should be interpreted in that light.

Another reason why a presumption of regularity makes particular sense in a rulemaking case is that in that context, unlike a contested case, *oral* contacts between decisionmakers and interested outside parties are freely permitted. See Sections 306(b) (rulemaking), 408(b) (contested cases). That liberality, which is consistent with prevailing federal and state law,³ rests on the fundamentally legislative nature of the rulemaking process. Since the Act accepts the risks of *ex parte* submissions without a paper record, it seems incongruous to authorize or encourage unrestrained judicial monitoring of the agency record, grounded in suspicions of concealment, with respect to written materials.

In view of the analysis just set forth, we append for the committee's consideration two alternative substitute versions of Section 507. Both substitutes would expressly acknowledge a role for the court in overseeing completion of the record for review in all types of cases, including rulemaking cases (subsection (c)(1)). At the same time, however, each would recognize a limited presumption of regularity, by providing that the court should treat the record tendered by the agency as legitimate absent a "substantial showing" of need for further inquiry. We believe that a court that is presented with a legitimate argument for inquiring into the adequacy of the record would not be likely to find the "substantial showing" test an insuperable obstacle to conducting further inquiry.⁴

As between our two alternatives, Version One would codify a presumption of regularity that would apply in all cases. If, however, the committee is not prepared to accept that position, we recommend that it should at least codify such a presumption with regard to contested cases, rulemaking, and other situations in which a contemporaneous record is required by law, including by an external statute or the agency's own rules. Version 2 would accomplish this result. All of the cases just mentioned present situations that are materially different from the situation that exists when an agency compiles a record for review only after litigation has actually commenced. In the latter situations, Version Two would not impose the same presumption, although it would not prohibit the courts from adhering to (a perhaps weaker) one. This formulation would give an agency a desirable incentive to regularize its procedures for maintaining a record when it takes informal actions.

* * *

Thank you in advance for your consideration of these views.

Respectfully submitted,

³*Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *Boyles v. Mississippi State Oil & Gas Board*, 794 So.2d 149 (Miss. 2001); *Massachusetts State Pharmaceutical Ass'n v. Rate Setting Comm'n*, 438 N.E.2d 1072 (Mass. 1982); *Citizens Ass'n of Georgetown v. Zoning Comm'n*, 392 A.2d 1027 (D.C.1978).

⁴If the committee deems the "substantial showing" standard too demanding, it could soften that language by referring to, for example, an "appropriate showing." The effect would be to leave entirely to the courts the issue of what predicate for discovery is "appropriate" in various circumstances. This approach to Section 507 would cure the drafting problem noted above regarding the relative scope of subsections (a) and (b), but it would provide less guidance as to the strength of the presumption of regularity than we think is desirable.



William V. Luneburg
Section Chair

attachment

[PROPOSED] SECTION 507. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTIONS.

VERSION ONE:

(a) In any case in which an agency was required by Article 3 or Article 4, or by law other than this Act, to maintain an agency record during the proceeding that gave rise to the action under review, the court's review is confined to that record and to matters arising from that record.

(b) In any other case, the record for review shall consist of all unprivileged materials that agency decisionmakers directly or indirectly considered, or that were submitted for consideration by any person, in connection with the action under review, including information that is adverse to the agency's position. Where the agency action was ministerial or was rendered on the basis of a minimal or no administrative record, the court may also receive evidence relating to the agency's basis for taking the action.

(c) The court may supervise the agency's compilation of the agency record. Where the challenging party makes a substantial showing of need for further inquiry, the court may allow discovery and other evidentiary proceedings in order to

(1) ensure that the agency record is complete as required by this Act and other applicable law;

(2) adjudicate allegations of procedural error not disclosed by the record; or

(3) prevent manifest injustice.

VERSION TWO: Same as Version One, with the following alterations:

– Insert at the end of subsection (a): “, unless the challenging party makes a substantial showing of need for further inquiry pursuant to subsection (c).”

– In subsection (c), reword prefatory clause as follows: “Subject to subsection (a), the court may supervise the agency's compilation of the agency record and may allow discovery and other evidentiary proceedings in order to”.

