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111 N. Wabash, Suite 1010
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Dear President Stein:

The Section of Administrative Law and Regulatory Practice of the American Bar Association commends the Uniform Law Commission, and in particular its Drafting Committee to Revise the Model State Administrative Procedure Act, for the diligent and conscientious efforts that they have devoted to the much-needed task of updating the MSAPA. We also want to express our appreciation for the committee's receptivity to many of the suggestions we have made on successive drafts. The purpose of this letter, however, is to draw attention to one significant provision as to which the committee's and Section's minds have not met.

The views expressed herein are presented only on behalf of the 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.

Our specific concern here is with the "ex parte communications" provision, Section 408, and in particular with the agency head exception codified in subsection (e). In our view, the narrow scope of the exception is out of keeping with existing state and federal law, as well as sound policy. The ability of agency heads to consult privately with staff members in contested cases — other than those staff members who have engaged in prosecutorial, investigative, or advocacy functions — should be preserved. We object, therefore, to the current draft, which would forbid those consultations where the subject matter relates to "the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses" (Section 408(e)(2)(C)). Accordingly, we recommend that clauses (A), (B), and (C) of

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subsection 408(e)(2) be deleted.¹

We do agree with much of Section 408. It maintains strict constraints on ex parte communications between agency decisionmakers and persons *outside the agency* (subsection (b)). It also strictly confines ex parte communications between agency staff and *presiding officers other than agency heads* (including administrative law judges) (subsections (b), (c), and (d)). Likewise, agency heads may not communicate ex parte with staff members who have served as investigators, prosecutors or advocates in the case (so-called adversaries) (subsection (e)(1)(A)). And even communications between agency heads and non-adversaries are forbidden if they include extra-record facts (subsection (e)(2)) or would allow the staff member to act as a conduit for ex parte communications from persons who cannot consult with the agency head directly (subsection (e)(1)(B)).

All of this falls within generally prevailing law or can be readily extrapolated from it. But the draft Act's additional condition – that the consultation must not relate to the quality of evidence or credibility of witnesses – is unprecedented. Within the limits just stated, both federal and state law allow agency heads to consult with non-adversary staff in contested cases, without restrictions as to subject matter. The federal APA and the 1981 MSAPA are clear on this point. Although the 1961 Model Act and the statutes of many individual states may be more ambiguous on this score, we are aware of no state that, in practice, prohibits these non-adversary contacts. Indeed, there does not seem to be any modern case that limits such contacts more stringently than the version of Section 408 that we are advocating. In the appendix to this letter we review the relevant authorities, but we will not belabor the discussion at this point, because we are not aware that anyone disputes the proposition that the proposed restraint in Section 408(e)(2)(C) would be an innovation in American law. We turn, therefore, to discussing its merits.

The theory behind the draft Act's approach, as we understand it, is that, as a matter of fairness, private litigants should have an opportunity to know about, and thereby contest, the advice that agency heads receive from non-adversary staff members. Implicit in this argument is the premise that the operative principles in this area should be patterned on the judicial model followed in civil litigation. We accept that premise insofar as it is applied to an administrative law judge or other presiding officer who conducts the trial-level hearing. At the agency head level, however, the process of administrative adjudication can be described as "judicial," but it is not *solely* judicial. Administrative agencies typically have a wider range of responsibilities than courts do, and they must be able to use a decisionmaking model that enables them to discharge those responsibilities effectively.

For one thing, agencies frequently use adjudication for policymaking. Decisions on what policy to adopt naturally invite confidential back-and-forth dialogues between administrators and the staff who work under their leadership. For example, when a utilities commission renders a decision on a complex question of energy regulation, the commissioners (some of whom may be new appointees who

¹Clauses (A) and (B) of Section 408(e)(2) identify certain areas in which consultation between agency heads and their staff *would* be permissible. Although we agree with those provisions, their main function is to spell out some of the negative implications of clause (C). Thus, if clause (C) were deleted, as we recommend, clauses (A) and (B) would become unnecessary and should be dropped as well.

have not developed much expertise themselves) need to be able to talk over various policy options and explore compromise positions with the assistance of agency personnel who have longtime experience in the area. This policymaking function is not one that we expect from the judicial branch. In the words of one Tennessee case:

The TRA [Tennessee Regulatory Authority] deals with highly complicated data involving principles of finance, accounting, and corporate efficiency; it also deals with the convoluted principles of legislative utility regulation. To expect the Authority members to fulfill their duties without the help of a competent and efficient staff defies all logic. And, we are convinced, the staff may make [undisclosed] recommendations or suggestions as to the merits of the questions before the TRA. Otherwise, all support staff -- law clerks, court clerks, and other specialists -- would be of little service to the person(s) that hire them.²

Moreover, the questions confronting an agency head during administrative adjudication are frequently managerial in nature. For example, a decision about whether to apply the agency's governing statute to some new area may require internal discussions about matters such as the agency's resource constraints and competing priorities, ripple effects on other agency initiatives, as well as whether the extension would advance or retard the public acceptability of the agency's overall program. These are not judicial-type questions, and one should hesitate to assume that judicial-type decisionmaking methods will allow administrators to resolve them effectively.

We certainly appreciate the reasons why private interests may be uneasy about an administrative adjudication in which an agency head is free to engage in consultations to which they are not invited. Those concerns are relevant to the need to maintain legitimacy and public confidence in the administrative process. However, an agency head's communications with non-adversary staff do not pose the same risks as *ex parte* communications with adverse private litigants, because staff members work for the agency itself, and their professional interest would normally be expected to lie in helping the agency head accomplish his or her own goals.³ More fundamentally, we believe that conceptions of "unfairness" that work well in the realm of civil litigation need adaptation when transposed to the realm of administrative litigation. Administrative law, as it has evolved over the years, does contemplate that *advocates* for the two competing sides in a contested case should stand on an equal footing, even if the advocates on one side work for the government. Administrative law also contemplates that the facts elicited at the evidentiary hearing in such a case should serve as the exclusive record for decision.⁴ But

²*Consumer Advocate Div. v. Tenn. Reg. Auth.*, 1998 Tenn. App. Lexis 428, at *5-*6.

³See *Nationwide Mut. Ins. Co. v. Insurance Comm'r*, 509 A.2d 719, 726 (Md. App. 1986) ("As to the *ex parte* communications, Nationwide relies on [cases that] dealt with *ex parte* communications from counsel representing one of the parties at the hearing Nayden [a staff specialist], in comparison, did not represent either [side], but was merely assisting Raimondi [the Assistant Insurance Commissioner who decided the case]").

⁴The draft Act adheres to this principle not only in the introductory clause of Section 408(e)(2), which we support, but also in Section 406(c) ("The hearing record constitutes the exclusive basis for

“fairness” has not heretofore been treated as negating the agency head’s ability to consult with non-adversary staff about the existing record, because such a restriction would impair the agency’s ability to exercise the very functions that presumably induced the state to entrust the decision under discussion to an administrative agency, rather than the courts, in the first place. Administrators should be left free to administer, even though controversy about the validity of their methods has not abated.

We must acknowledge that the drafting committee did take cognizance of the concerns that we and others were expressing. The result was the compromise language written into the subordinate clauses of Section 408(e)(2). It would allow contacts between agency heads and their staff if, in addition to the generally accepted restrictions already discussed, the conversation “does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses” (clause (C)). We do not believe intra-agency consultations can be so easily compartmentalized. It is hard to see how the participants could meaningfully discuss “the technical and scientific basis of . . . the evidence in the record” (expressly permitted by clause (A)) without also discussing “the weight that should be given to” such evidence. Nor do we see how they can discuss the staff expert’s views on “policies . . . of the agency (permitted by clause (B)) without also discussing the “credibility of witnesses” who may hold a contrasting opinion. Even if it is feasible, we discern little merit in a rule that would allow a staff member to explain the technical meaning of an expert witness’s testimony, but would not allow the staff member to point out problems with the science underlying that testimony.

Faced with these elusive distinctions, we anticipate that some agency heads would do their best to navigate their way through the rules prescribed by clauses (A), (B), and (C), resulting in strained and unenlightening conversations. Other agency heads would probably decide to minimize their litigation risks by simply not engaging in consultations with non-adversary staff in contested cases. Neither alternative seems satisfactory, and for reasons stated above we do not think that the tradeoff reflected in this awkward compromise solution needed to be made in the first place.

In conclusion, the issue posed by Section 408(e) is not new. A similar issue arose when the ABA adopted a package of proposals in 1970 to amend the federal APA. Among these proposals were measures that would have *strengthened* the Act’s safeguards against ex parte communications in several respects. But the ABA refrained from extending the proposals to encompass all contacts between agency heads and staff members, for reasons explained in its supporting report:

It should be noted that the proposed amendment expressly preserves the continuing contact between agency members and agency employees which is involved in the responsibility of agency employees to agency members and the freedom of agency members to supervise agency employees. The members of an agency have broad responsibilities to the public. These responsibilities extend beyond the proceedings which may be pending before an agency at any given time. . . . At this highest level of an agency, the protection of the public interest against improper conduct must depend on the appointing process rather than on limitations on conduct which, if applied, could be more detrimental to the public interest than any gains which would

agency action in a contested case.”).

be achieved by their application.⁵

We believe the same principles are applicable today, and we urge the Commission to adhere to them. It can do so by deleting clauses (A), (B), and (C) of Section 408(e)(2).⁶

We thank the Commission in advance for its consideration of these views.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "William V. Luneburg". The signature is fluid and cursive, with a large initial "W" and "L".

William V. Luneburg
Section Chair

attachment

⁵*The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 Admin. L. Rev. 389, 393-95 (1972).

⁶Clauses (A) and (B) should be omitted along with clause (C) for the reasons given in note 1 above. In addition, if our recommendation is accepted, a conforming change in Section 408(e)(1)(B) would become necessary. We recommend that clause (B) be revised to provide that the employee or representative "has not received an ex parte communication of a type which the agency head would be prohibited from receiving." This wording, taken almost verbatim from Section 4-213 of the 1981 Act, would simplify the language of the clause while serving the same purpose, i.e., to prevent the staff member from becoming a conduit for ex parte communications from interested persons outside the agency or from "adversary" staff within the agency.

APPENDIX

This appendix provides support for our contention that the limitation on the subject matter of intra-agency consultations in Section 408(e)(2)(C) of the draft MSAPA is not supported by existing federal or state law. This survey deals exclusively with that narrow issue and does not cover every issue relating to separation of functions in administrative law.

There is no real dispute that federal law is contrary to the draft Act's approach. The federal APA provides in 5 U.S.C. § 554(d):

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. (Emphasis added.)

By negative implication, the provision does not constrain consultations by employees who do not perform investigative or prosecuting functions. The distinction is well recognized, and much administrative practice has grown up around it.⁷ Consultations between agency employees and decisionmakers are also not constrained by the APA's main provision on ex parte communications, because that provision applies to communications to or from "interested person[s] *outside the agency*." 5 U.S.C. § 557(d)(1)(A)-(B).⁸

Section 4-214(a) of the 1981 MSAPA contains essentially the same distinction as the federal provision: "A person who has served as investigator, prosecutor or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding."

The 1961 MSAPA was more obscure regarding these issues. It provided in Section 13:

Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to

⁷See *White v. Ind. Parole Bd.*, 266 F.3d 759, 766 (7th Cir. 2001) ("[N]on-record discussions between an agency's decisionmakers and members of the agency's staff are common and proper. . . . Agencies and courts have different methods of resolving disputes; what is unthinkable for a court may be normal for an agency").

⁸Section 554(d) also states that "the employee who presides at the reception of evidence . . . may not – (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate. . . ." This provision does constrain consultations with staff by administrative law judges. *Butz v. Economou*, 438 U.S. 478, 514 (1978) (dictum). However, it does not apply to agency heads, even if they preside at the hearing, because "the agency or a member or members of the body comprising the agency" are specifically exempted from the subsection. § 554(d)(C).

participate. An agency member (1) may communicate with other members of the agency, and (2) may have the aid and advice of one or more personal assistants.

The language was ambiguous because, in the abstract, agency staff members who have no advocacy role might be characterized as “parties” or as “personal assistants,” but neither label obviously fits.⁹ Probably the best reading is that Section 13 simply did not deal with this issue. At least this was the view of the drafters of the 1981 Act. They incorporated the substance of Section 13 into their own “ex parte communications” provision, Section 4-213(a)-(b), but then dealt *separately* with separation of functions in the above-quoted language of Section 4-214(a). The official Comment accompanying the latter provision stated that the 1961 Act “did not address the question” [i.e., separation of functions]. Even so, the language of Section 13 could potentially have been construed to mean that all agency staff members were “parties,” so that their ex parte communications would be just as constrained as those of outside parties. In practice, however, that stringent interpretation has not prevailed, as we will explain.

According to a comprehensive survey by the Reporter for the present draft MSAPA, thirty-six states have statutory provisions addressing ex parte communications. Of these, twenty-one were based on the 1961 Act, six on the 1981 Act, four on a blend of the two Model Acts, and four on neither Model Act. Despite these variations among various jurisdictions, the case law appears to be uniform in upholding staff contacts with agency heads within the limits that we propose in our letter.

Cases that expressly uphold off-the-record consultations between agency heads and non-adversary staff in contested cases include the following:

- *Consumer Advocate Div. v. Tenn. Reg. Auth.*, 1998 Tenn. App. Lexis 428 (quoted in the text of our letter).
- *Smith v. Houston Chem. Servs.*, 872 S.W.2d 252, 278 (Tex. Ct. App. 1994) (upholding against due process attack a statutory provision that allows agency decisionmakers to communicate with non-adversary staff “for the purpose of using the special skills or knowledge of the agency and its staff in *evaluating the evidence*” [emphasis added]).
- *Boswell v. Iowa Bd. of Veterinary Medicine*, 477 N.W.3d 366, 370 (Iowa 1991) (dictum) (“the statute allows [the state veterinarian] to share his expertise as a veterinarian [with the board] as long as he is acting neither as a prosecutor nor advocate”).
- *Nationwide Mut. Ins. Co. v. Ins. Comm’r*, 509 A.2d 719 (Md. App. 1986) (rejecting due process challenge to Commissioner’s ex parte consideration of charts prepared by staff specialist who “did not participate in the Insurance Division’s review of [the] complaint prior to the hearing [but] merely functioned as an arm of the Hearing Officer”).

⁹In the 1961 Act, “person” means an individual or entity “other than an agency,” § 1(5), so it is clearly not relevant to the issue under discussion. Nor would an internal discussion between a decisionmaking “member or employee” of an agency and a neutral staff member be naturally described as a communication with a “party” or “his representative.” The language of Section 13 seems to contemplate a contact with someone who is responsible for “representing” a litigant by promoting its cause in the dispute.

- *Conn. Natural Gas Corp. v. Pub. Util. Control Auth.*, 439 A.2d 282, 287 (Conn. 1981) (“those parts of [an agency consultant’s] report which consist of analysis or summary of the record evidence or which point out inconsistencies in the plaintiff’s witnesses’ testimony or the lack of support in the record for some of their opinions are not evidence. Therefore the plaintiff had no right to rebut those parts or to cross-examine [the consultant] about them”; case remanded to determine whether the report contained extra-record evidence).
- *Puleo v. Dep’t of Revenue*, 453 N.E.2d 48, 54 (Ill. App. 1983) (apparently similar holding, but facts are unclear).

We have found other state cases in which a court did hold or suggest that contacts between agency heads and staff members were impermissible. All of them, however, involved one or more of the aggravating factors that are written into Section 408(e) *other than* the limitation that we are contesting in this letter. In some cases, the staff member was personally involved in prosecuting or investigating the case on the agency’s side.¹⁰ In others, the ex parte contact involved extra-record facts¹¹ or served as a conduit for ex parte communications from outsiders.¹² Thus, all of these cases could have been decided the same way under the version of Section 408(e) that we are proposing. In fact, some of these latter decisions expressly recognized that staff contacts with agency heads would have been permissible in the absence of the aggravating factors involved.¹³

The bottom line is that, *without* the restrictive language of clause (C), Section 408(e) would maintain continuity with the federal APA and the 1981 MSAPA and would constitute an admirable synthesis of every state case on point that we have been able to locate. *With* that restrictive language, Section 408 breaks from standard practice. For reasons outlined in our letter, we do not believe the argument for such a departure is well founded.

¹⁰*Dep’t of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Quintanar)*, 145 P.3d 462 (Cal. 2006); *Cherry Communs., Inc. v. Deason*, 652 So.2d 853 (Fla. 1995); *Peoples Natural Gas Div. v. Pub. Util. Comm’n*, 626 P.2d 159 (Colo. 1995) (dictum – contact not proven); *Ross v. Med. Univ. of S.C.*, 453 S.E.2d 880, 885 (S.C. 1994).

¹¹*Miller v. Workforce Safety & Ins.*, 707 N.W.2d 809, 815 (N.D. 2006); *Appeal of Courville*, 649 A.2d 1233 (N.H. 1994); *Colo. Energy Advocacy Office v. Pub. Serv. Comm’n*, 704 P.2d 298, 302-05 (Colo. 1985).

¹²*Miller, supra*; *Colo. Energy, supra*.

¹³*Quintanar, supra*, at 467, 471; *Miller, supra*, at 815; *Colo. Energy, supra*, at 304 n.7.