The Revised Model State Administrative Procedure Act - Critique and Commentary

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In November of last year, a Joint Legislative Committee was appointed by the Governor of Louisiana and charged with preparing uniform rules of administrative procedure for Louisiana state agencies performing adjudicative and rule-making functions. In an initial news release from the committee, it was noted that "there are over fifty Louisiana state agencies that hold administrative proceedings or hearings and . . . many of these agencies do not have any written rules of procedure." The committee, it was said, would "attempt to formulate its proposed administrative procedure act from a combination of the better and more workable rules of procedure now in effect in various agencies in the Federal government, Louisiana, and other states which have adopted uniform administrative procedure acts."1

The problem is thus seen in its two major aspects: the diversity of those agency procedures which have already been brought under complete statutory control, and the partial or complete absence of statutory procedures in other agencies, which for some reason, often inadvertence, have escaped the attention of the legislature. Attempts to remedy present deficiencies could take the form of agency by agency study and amendment of governing statutes with corrective procedures, wherever the need exists. This method might be more likely to meet the specific needs of each agency, but it would obviously involve extensive study and piecemeal legislation which could be many years coming to full fruition. The shorter range solution is the

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one which the committee has announced its determination to follow, namely, the preparation of a procedure act which will apply to all agencies not specifically excepted and which will consist of a formulation of procedural safeguards in agency rule-making and adjudication. While imposing more than minimal limitations, it will presumably be broadly enough conceived so as not seriously to hamper performance of agency duties in the process of assuring fair and meaningful participation by affected parties.

It has now been more than twenty-five years since serious drafting began on state and federal model administrative procedure acts, and the model addressed particularly to the problems of the states is already in its first revision. Louisiana comes relatively late to the enterprise of preparing a general agency procedure act but consequently has the benefit of much legislative experience elsewhere, as well as the benefit of a great deal of scholarship on the problems of procedure in administrative agencies, or on what has been apprehensively dubbed the "headless fourth branch" of government.

It is the purpose of this paper to explore the present Revised Model State Administrative Procedure Act as prepared by the National Conference of Commissioners on Uniform State Laws in 1961, to note modifications which have been deemed necessary from the original model of 1946, and particularly to note modifications and criticisms presented by scholars and the legislative committees of sister states. The National Commissioners have stated that, in formulating the model, their concern has been to assure: (1) that in rule-making all interested parties will have notice and an opportunity to submit information and views; (2) that there will be proper publicity for rules made; (3) that there will be an opportunity to obtain advance deter-

2. See 1 Davis, Administrative Law Treatise § 1.04 (1958) for historical summary.
7. The 1946 model was subjected to extensive criticism and comparison in a Symposium, 33 Iowa L. Rev. 196-375 (1948).
mination of the validity and applicability of rules made; (4) that there will be assurance of fundamental fairness in administrative adjudications; (5) that there will be personal familiarity with the evidence on the part of deciding officials; and (6) that there will be review of adequate scope to assure correction of administrative errors.\(^8\) Some or all of these objectives are achieved in the operation of certain administrative agencies in Louisiana; however, there are obviously many other agencies having an important impact on the economic and social welfare of the citizenry which, in some of their procedures, fall short of the mark. It is this latter circumstance, of course, which has prompted the concern of the legislature of Louisiana.

**THE REVISED MODEL ACT OF 1961\(^9\)**

**Definitions**

As is usual in present-day drafting practice, the revised model act includes an initial section devoted to definitions. In the earlier 1946 version, it was thought necessary to include definitions of only three terms: "agency," "rule," and "contested case"; to these have now been added "license," "licensing," "person," and "party." The reasons for these additions are discussed below.

"**Agency**"

Absent special constitutional provisions for some agencies, an act which provides satisfactory procedures for rule-making and adjudication could, of course, be made applicable to all agencies; specific statutes could be left operative to provide additional procedures deemed necessary because of the nature of the agencies. Since the model is primarily concerned with fundamentals, little conflict would probably result from this approach. Thus, "agency" could be defined, as in the model, to mean "each state board, commission, department or officer, other than the legislature or the courts, authorized by law to make rules or to determine contested cases."\(^10\) Even with some agencies specifically provided for in the Constitution and special statutes, such an approach might be utilized, saving the task of excepting designated agencies for specific provisions later in

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8. Revised Model Act 118.
9. Id. at 119.
10. Id. at § 10.
the statute. Such an approach would have, in its favor, the concentration of all exceptions from the act in one section, or at least in one part of the act. It would seem to work satisfactorily for Louisiana.

"Rule and Rule-making"

The revised model act next proceeds to define "contested case", although symmetry might seem to favor defining "rule" and "rule-making" first. The model also would seem deficient in not defining "rule-making," so as to distinguish it from adjudication or "contested case" procedure. Furthermore, it would seem useful to provide, as Wisconsin has, for specifically excluding ad hoc rule-making from the formal rule-making process, so as to avoid later arguments over the applicability of certain procedures to participation and publication requirements. If the federal definition of "rule" were combined with that of "rule-making," and if the definition of "rule" were expanded so as to specifically exclude ad hoc rule-making, it would appear as follows:

"Rule" means each agency statement of general applicability and future effect that implements, interprets or prescribes substantive law or policy, or prescribes the procedure or practice requirements of the agency. The term includes the amendment or repeal of a prior rule but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public; (B) declaratory rulings or orders; or (C) intra-agency memoranda. "Rule-making" means the process employed by an agency for the formulation of a rule. The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts involved does not render the same rule within this definition or constitute specific adoption thereof by the agency so as to be required to be issued and filed as provided in this subsection.

11. Revised Model Act § 1(2).
"Order" and "Adjudication"

In the definition of "contested case," the model act has used more abstract language than seems necessary, defining such a case to mean "a proceeding ... in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." The Federal Administrative Procedure Act seems much more forthright and less likely to raise unnecessary questions, simply defining "adjudication," or a "contested case," as the final disposition of any matter other than "rule-making." The need for separately defining "license" and "licensing" could be eliminated by specifically including non-revenue licensing in adjudication, where it should be. The task sought to be accomplished in the model act in the definition of "contested case" would seem more securely accomplished by substituting "adjudication" for "contested case" and defining "order" and "adjudication" as in the federal act, except for specifically including non-revenue licensing. Thus:

"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule-making but including non-revenue licensing. "Adjudication" means agency process for the formulation of an order.

"Person" and "Party"

The revised model act includes in its definitional section the terms "person" and "party" specifically for the purpose of clarifying the limitations on ex parte consultations with decision-making officers which are imposed in a later section of the act. However, in adopting this method, it has used the term "person" differently from the federal act and so as to include, seemingly, "employees" of the agency. As will be noted later, the objectives thus sought to be obtained could be achieved directly without resort to definitions at the outset.

14. Revised Model Act § 1(2).
15. Federal Act § 2(d).
16. Revised Model Act § 1(5) ; (6) ; § 13.
17. Federal Act § 5(e).
Expansion of Rule-Making Procedures and Notification Requirements

The revised model act devotes six sections to the rule-making process, in many respects going substantially beyond the 1946 model act in imposing adherence to rigid procedures. For example, it is suggested that the revised model act may go too far in its sanction for insuring public information and that the publication of each agency's procedural and substantive rules could be assured by a simple statement of the requirement without the threat of invalidation. On the other hand, it can be argued that procedures for notifying interested parties and affording them an opportunity to participate in the rule-making process are of such importance as to warrant the proposed sanction of invalidity unless prescribed procedures are followed. But, at least, agency power to shorten the notice period in the event of emergency rule-making seems required.

The new requirement of a statement from the agency setting forth considerations for and against adoption of a rule seems entirely warranted, but a specific recital of the reasons for rejection of considerations urged by participants might well prove unduly time-consuming. Provision for an opportunity to make application to the agency for rule-making action also seems needed. However, provision for a time limit of thirty days within which the agency must act may induce precipitate

18. Revised Model Act §§ 2, 3, 4, 5, 6, 7.
19. Id. § 2(b) provides that "no agency rule, order, or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required." The sanction is softened somewhat by not being extended to persons having actual knowledge of an unpublished rule.
20. Id. § 3(a) and (c) provides that:
"Prior to the adoption, amendment, or repeal of any rule, the agency shall: give at least 20 days' notice of its intended action" and "afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing." and that: "No rule hereafter adopted is valid unless adopted in substantial compliance with this Section."
21. Id. § 3(b) provides that:
"If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule."
22. Id. § 3(a) (2) provides that:
"Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption."
action which would not serve the public interest. It is suggested that action within a reasonable time would impose sufficient pressure on the agency to overcome inertia, if it exists.

Filing and Effectiveness of Rules

The revised model act carries forward substantially the same provisions for the filing and exhibition of rules in the office of the Secretary of State and requires that office to provide a permanent register of rules open to the public. However, rules would now become effective twenty days after filing instead of upon filing, unless there is reliance upon an emergency provision for shortening the period in the event of "imminent peril to the public health, safety, or welfare." It is suggested that additional safeguards might be provided for those persons specifically entitled by law to receive copies of rules by adding a third exception that for these persons rules shall become effective upon mailing.

Compilations and Legislative Review of Rules

The revised model act contains a provision for charging the Secretary of State with the duty of preparing and publishing a compilation of the rules and regulations of all agencies covered by the act and with keeping such compilation current by at least biennial supplements. In addition, the Secretary would be charged with publishing a monthly bulletin setting forth all rules and regulations adopted during the preceding month. A number of states have adopted provisions for publication of such a compilation; New York, for example, has an elaborate loose-leaf service published by the Department of State which represents substantial outlays for the state and for lawyers and others subscribing to the service. Whether a Secretary of State's office or some other state office could be supplied with

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23. Revised Model Act § 6 provides for such a petition with the further requirement that: "Within 30 days after submission of a petition, the agency either shall deny the petition in writing (stating its reasons for the denials) or shall initiate rule making proceedings. . . ."

24. Id. § 4.

25. Ibid.


27. Revised Model Act § 5.

28. Ibid.

sufficient funds and personnel to perform this substantial task in Louisiana would seem a major issue; it seems doubtful that it could be done privately without substantial state subsidy.

The revised model act does not suggest provisions for supervision of the rule-making process by the legislature or otherwise, should this be deemed desirable. Various possibilities suggest themselves, and a number of procedures are now in effect in various states. The Wisconsin legislature, for example, has what it has designated a Committee for Review of Administrative Rules, consisting of two senators and two representatives. The committee, however, is given advisory powers only; it is charged simply with "the promotion of adequate and proper rules by agencies and an understanding upon the part of the public respecting such rules" and with making biennial recommendations to the legislature and governor. The Oklahoma legislature, on the other hand, has retained a veto power for itself with respect to rule-making by providing that all rules shall be filed with the legislature within ten days after their adoption and that the legislature may, by joint resolution, disapprove of any rule so transmitted. If disapproved, no attempt may be made to re-promulgate the rule during the same legislative session; and failure to disapprove within thirty days of transmittal or within the first thirty days of a subsequent legislative session, which ever is the later, will result in approval of the rule under the Oklahoma procedure.

**Adjudication Procedures**

The provision in the revised model act which specifies the procedure to be used in adjudication utilizes the term "contested case" to describe the proceeding to which it is addressed and, as we have noted, defines this term to mean "a proceeding ... in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." The Federal Administrative Procedure Act, on the other hand, simply defines adjudication as "agency process for the formulation of an order" and order as "the whole
or any part of the final disposition of any agency in any matter other than rule-making but including licensing.\textsuperscript{35} The reason given for the language used in the revised model act is said to be to make sure that rate-making is included in adjudication rather than under rule-making as in the federal act.\textsuperscript{36} However, since this was accomplished in the federal act with specific exceptions and inclusions,\textsuperscript{37} the federal terminology taken without such exceptions and inclusions would seem entirely satisfactory and would avoid the possibility of some proceeding being omitted; in the federal act, if a proceeding is not rule-making, it is necessarily adjudication. Since it is only for rule-making that hearing requirements are relaxed, the full hearing requirements of "adjudication" will necessarily apply to all other proceedings unless specific exceptions are made. These requirements seem comprehensive enough for defining the scope of notice to parties and the scope of participation afforded them in hearing and settlement.\textsuperscript{38} However, it would seem that more logical arrangement would be achieved, as well as clarity, if the opportunity to conduct cross-examination were provided, along with the opportunity to respond and present evidence.\textsuperscript{39} This section, devoted as it is to adjudication procedure, would also seem the appropriate place to provide specifically that all parties shall have the right to appear by counsel if they choose, and for such counsel to act for and on behalf of the party he represents. It is not clear whether this omission from the model was deliberate or inadvertent, but in any event it seems obvious that a legislature would desire to provide such right to the parties.\textsuperscript{40}

As to the content of the record for adjudication, this section

\textsuperscript{35} Federal Act § 2(d).
\textsuperscript{36} Revised Model Act § 1(2), Commissioners' Note.
\textsuperscript{37} In the Federal Act, the section devoted to adjudication specifically exempts "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers" from its requirements as to separating functions of agency employees. Federal Act § 5(c). The definition of rule is also carefully expanded to include "the approval or prescription for the future of rates." \textit{id.} § 2(c).
\textsuperscript{38} Revised Model Act § 9. "The notice shall include . . . a statement of the time, place, and nature of the hearing . . . a statement of the legal authority and jurisdiction under which the hearing is to be held . . . a reference to the particular sections of the statutes and rules involved . . . a short and plain statement of the matters asserted. . . ." When necessary, the initial notice may consist of a statement of the issues involved subject to later particularization upon request.
\textsuperscript{39} The right to cross-examine is provided by the model in \textit{id.} § 10(3), a section devoted to "Rules of Evidence."
\textsuperscript{40} There would seem only advantage in also providing in \textit{id.} § 9(e) that: "Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved and to conduct such cross-examination as may be required for a full and true disclosure of the facts."
of the model contains a novel provision described as of "especial significance" and "in accordance with the recommendations of the Hoover Commission Task Force Report."\footnote{41} It states that there shall be included in the record "all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case."\footnote{42} Such a provision runs quite counter to usual practice and seems only productive of charges of "secret evidence" based on rumors of staff memoranda not in the record. The difficulty with the proposed inclusion is that it goes too far and would seem to require inclusion in the record of any advice given in writing bearing on the analysis and interpretation of record facts, even though the data or memoranda may originate with staff expert personnel entirely unconnected with the proceeding.\footnote{43} In federal agency practice, it is a commonplace for analyses and digests of facts to be prepared by assistants for the use of deciding officers without the need for disclosure to the parties.\footnote{44} The proposal that such memoranda be included in the record is said by the Commissioners to rest on the need for preserving the "exclusivity of the record" principle, which is to say, assurance that the case will not be decided on extra-record facts.\footnote{45} However, the proposal would seem to direct the inclusion of all law-clerk studies devoted to analyzing the record and looking up law, studies which are not adding extra-record facts at all but simply making evaluations of the record facts. Reports by a presiding, but not deciding, officer, based on his observation of a party's demeanor for resolving issues of credibility, should of course come within the requirement of inclusion in the record, since

\footnote{41}{The reporter for the Model Act appears to rely upon a recommended provision in the report to the effect that "no deciding officer . . . shall . . . be . . . advised by any other agency officer or employee except as a witness or counsel in public proceedings of which all parties have notice and in which they have full opportunity to participate." \textit{COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT TASK FORCE, REPORT ON LEGAL SOURCES AND PROCEDURE} \textit{368} (1955).}

\footnote{42}{Revised Model Act § 9(e)(7).}

\footnote{43}{The extent to which such a provision would paralyze the administrative process and isolate the deciding officers from the expert resources of the agency is extensively developed in 2 \textit{DAVIS, ADMINISTRATIVE LAW TREATISE} § 11.16 (1958).}

\footnote{44}{The Federal Act provides in § 7(d) that "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision."}

\footnote{45}{See 2 \textit{DAVIS, ADMINISTRATIVE LAW TREATISE} §§ 11.08, 11.09, 11.10 (1958) for an extensive analysis of a New Jersey case, Mazza v. Cavicchia, \textit{105 A.2d} \textit{545} (1954), which went far to further the idea but which, it is urged, misinterprets and underestimates federal decisions.}
the report adds new facts to the record. Reports of this kind from presiding officers are provided for in a later section of the model, specifying the procedure to be followed where the deciding officials have not heard the evidence or read the record. Provision is also made for submission of a proposed decision to be served on the parties. Seemingly, such a proposed decision, if reasonably comprehensive, would contain everything necessary for an adverse party to know in order to take meaningful exceptions.

Rules of Evidence

In the section devoted to rules of evidence, the model proposes two major innovations in agency practice, both of which, it is believed, are essentially unworkable. First, the model proposes that "irrelevant, immaterial, or unduly repetitious evidence" be mandatorily excluded. It thus proposes to impose as a categorical directive on agencies, whose members are often completely without legal training or experience, a rule of conduct which experienced trial judges find extremely difficult to adhere to, even as a matter of policy. It would seem that, rather than impose a requirement which is calculated to strike dismay into the heart of an experienced trier of fact and which in any event would doubtless precipitate countless hours of wrangling, it would have been more discreet to make this provision only precatory. The federal act, for example, simply provides that "every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." This admonition would seem sufficient, supplemented, as it should be, by the agency's desire not to complicate its task by clogging a record unnecessarily.

The second innovation seeks to impose on state agencies, as a body of law, "the rules of evidence as applied in non-jury civil cases in the District Courts." Inasmuch as researchers are generally unable to point to such a body of rules as existing

46. Revised Model Act § 11.
47. Id. at § 10(1).
49. Federal Act § 7(c).
50. Revised Model Act § 10(1).
in any coherent sense like the exclusionary rules applicable to jury trials, this would seem to accomplish very little. The model draftsmen would have been better advised to prescribe the Learned Hand rule that the evidence shall be "convincing evidence" of the type "on which responsible persons are accustomed to rely in serious affairs." The model resorts to this latter rule but only "when necessary to ascertain facts not susceptible of proof under . . . [non-jury] rules." It would seem preferable to adopt the Learned Hand rule as governing; such a rule will be meaningful to the laymen upon whom we must often depend to carry on the work of agency adjudication and will result in about as much uniformity of evidence evaluation as can be achieved in the administrative process.

The model contains no provision for obtaining evidence by compulsory process, although it would seem essential that such process be uniformly available to agencies and affected parties alike; to serve the convenience of parties and expedite proceedings, provision might also have been made for taking depositions. The federal act, on the other hand, contains a simply phrased provision for subpoena power implemented by conventional judicial enforcement.

51. The provision has its origin in Recommendation 42, COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 72 (1955) and in the AMERICAN BAR ASSOCIATION, FINAL DRAFT OF PROPOSED CODE OF ADMINISTRATIVE PROCEDURE § 1006(d) (1957). The provision has been described as a "cross reference to meaninglessness." 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 14.04, 270 (1958).

52. NLRB v. Remington Rand, 94 F.2d 862 (2d Cir. 1938), cert. denied 304 U.S. 576 (1938).

53. Revised Model Act § 10(1).


55. The Oklahoma legislature expanded the model to include provision for both subpoena power and the taking of depositions, depositions to be taken "in the same manner as is provided by law for the taking of depositions in civil actions in courts of record." OKLA. STAT. ANN. § 315 (1964).

56. Federal Act § 6(c) : "Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest, the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."
The Decisional Process

The model contains a provision designed to insure that parties will have an adequate opportunity to prepare exceptions, briefs, and oral argument in answer to any adverse decision which is submitted for adoption to agency heads who have not "heard the case or read the record." The comment on this provision by the Uniform Commissioners states that its purpose is "to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument." It is probably an overstatement to say that the provision will "make certain" that the deciding officers have "mastered the record" although it will presumably insure to some greater extent than without it that the deciding officers have mastered the issues involved. What the provision really accomplishes is that there will be adequate notice of positions taken by recommending officers before submission to deciding officers, so that exceptions and briefs can be presented when of maximum effectiveness rather than later, on petition for rehearing. In this respect, the model might well be modified, so as to make it applicable even when the deciding officers have presided at the taking of evidence but a recommended decision is prepared by the staff, as is frequently the case with Public Service Commission orders in Louisiana.

Final Decisions and Orders

The model provision dealing with the content of a final decision tries to steer a middle course between "a detailed reciting of the evidence on the one hand and the bare statement of the conclusions of fact or the 'ultimate' facts on the other." It does

57. Revised Model Act § 11.
58. Id. § 11, Commissioners' Note.
59. This was the issue presented in the second Morgan decision, Morgan v. United States, 304 U.S. 1 (1938). In the Federal Act, § 8(b) is addressed to this deficiency by providing that: "Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions."
60. e.g., Louisiana Public Service Commission v. Southern Bell Telephone & Telegraph Co., 14 P.U.R. (3d) 146 (1956).
61. Revised Model Act § 12, Commissioners' Note.
this by a requirement that each finding of fact, if expressed in statutory language, "shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." 62 This seems a laudable objective and one which may generally be achieved by the directive. Less hope can be entertained for the requirement that "[a] final decision shall include findings of fact and conclusions of law, separately stated." 63 Such a requirement seems to leave open the question whether drawing the ultimate statutory fact inference from evidentiary facts proved is a matter of fact or law. 64 Yet, logical analysis would characterize this process as fact finding and only the interpretation of the statutory or ultimate fact standards and the determination of the requisite elements therein as conclusions of law. 65 The Wisconsin legislature has substituted its own language which comes closer to eliminating confusion by providing:

"Every decision of an agency in a contested case shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each contested issue of fact without recital of evidence." 66

Rehearings

There is only an elliptical reference to rehearing in the model judicial review section, but the effect of its inclusion there seems to make it mandatory for a party to petition for a rehearing if the agency rules of practice afford one. 67 It is believed that the preferable practice would be to require the agency to afford the parties a rehearing if requested but to make it optional with

62. Id. § 12.
63. Ibid.
64. See cases collected in Note, 17 LA. L. REV. 833, 836 (1957) for diverse judicial treatment of this question.
65. 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 30.02, at 192, 195 (1958).
66. WIS. STAT. ANN. § 227.13 (1957). Both the model and Wisconsin provisions might be further strengthened by adopting the federal language to the effect that "No sanction shall be imposed or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence." Federal Act § 7(c). This would also have the virtue, to the writer, of insulating the agencies from pervasive application of either the exclusionary rules of evidence used in jury trials or in the "rules of evidence and requirements of proof as found in civil non-jury cases."
67. Revised Model Act § 15(a) : "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review. . . ."
the party whether he will do so prior to seeking judicial review. Oklahoma has recently dealt with the problem in this way.\textsuperscript{68}

\textit{Separation of Functions}

The model proposes a provision proscribing certain ex parte communications between deciding officers and members of the staff or parties to the proceeding. This provision, it is believed, goes too far in cutting off such officers from the advice of agency experts who have not been engaged in investigating or prosecuting the case, and it would require a degree of isolation for deciding officers which could only be achieved at prohibitive cost for most state agencies.\textsuperscript{69} Thus, the model would cut off subordinate deciding officers from any expert aid at all, seeking to place them, presumably, in the situation of a district judge.\textsuperscript{70} Members of the agency, on the other hand, are permitted to communicate with other members of the agency and are allowed the aid of personal assistants.\textsuperscript{71} Apparently, each member of an agency may have his own experts, but there may not be a pool of experts, not engaged in investigation and prosecution, avail-

\begin{footnotesize}
\begin{enumerate}
\item 68. OKLA. STAT. ANN. 75, § 317(1965) : “A decision in an individual proceeding shall be subject to rehearing, reopening or reconsideration by the agency, within ten (10) days from the date of its entry. The grounds for such action shall be either: (a) newly discovered or newly available evidence, relevant to the issues; (b) need for additional evidence adequately to develop the facts essential to proper decision; (c) probable error committed by the agency in the proceeding or in its decision such as would be ground for reversal on judicial review of the order; (d) need for further consideration of the issues and the evidence in the public interest; or (e) a showing that issues not previously considered ought to be examined in order properly to dispose of the matter. The order of the agency granting rehearing, reconsideration or review, or the petition of a party therefor, shall set forth the grounds which justify such action. Nothing in this Section shall prevent rehearing, reopening or reconsideration of a matter by any agency in accordance with other statutory provisions applicable to such agency, or, at any time, on the ground of fraud practiced by the prevailing party or of procurement of the order by perjured testimony or fictitious evidence. On reconsideration, reopening, or rehearing, the matter may be heard by the agency, or it may be referred to a hearing examiner. The hearing shall be confined to those grounds upon which the reconsideration, reopening or rehearing was ordered. If an application for rehearing shall be timely filed, the period within which judicial review, under the applicable statute, must be sought, shall run from the final disposition of such application.”
\item 69. Revised Model Act § 13.
\item 70. Ibid. : “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 participate.”
\item 71. Ibid. : “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.”
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able to both members of the agency and subordinate deciding officers to furnish analysis of law and fact incident to preparation of either a recommended or final decision.

This provision is proposed as necessary "to preclude litigious facts reaching the deciding minds without getting into the record." It does not preclude discussions of the law between deciding officers and agency experts, forbidding such discussions only between the officer and any party or his representative, except on the record. As to the first objective, it is important to distinguish between analysis of facts already in the record and actual additional facts. The threat of injecting new non-record facts into the mind of the deciding officer comes not from the expert staff but from office conferences with party applicants, which should be prohibited. On the other hand, expert analysis of complex factual data already on record should be available to a deciding officer, so long as it does not come from the investigative or prosecuting staff and so long as it is analysis of records facts. There seems insufficient reason to cut off a subordinate deciding officer from the expert resources of the agency and at the same time provide that deciding agency members could have such expert resources on a personal staff basis. It is believed that communications with any party or his representative should be precluded both on issues of fact and law, but that both the subordinate deciding officer and the agency members should have access to the expert resources of the agency where the experts are not also engaged in the pending case in an investigative or prosecuting role.

Licenses

The model contains a provision designed to assure that licensing will be covered by the procedures prescribed for adjudication, wherever the particular form of licensing must be

72. Ibid., Commissioners' Note.
73. See 2 Davis, Administrative Law Treatise § 11.10, at 86 (1958). A chairman of the Federal Communications Commission has testified: "I have no shame in saying here that I rely ... upon the expertise of the staff. ... I think it quite important and I do rely, in questions of what the evidence is in a proceeding of an engineering character, upon the expertise of our chief engineer or his aides in the Commission." Hearings before the Committee on Interstate and Foreign Commerce, H.R. 82d Cong., 1st Sess., on S. 658, 67, 68 (1951).
preceded by notice and opportunity for hearing. This would not impose the adjudicative procedures on so-called licensing for revenue, such as automobile licensing, since no procedural safeguards are imposed or deemed necessary in such licensing. In non-revenue licensing, such as liquor licensing, Louisiana statutes contain adequate safeguard for licensees in the requirements of notice and opportunity for hearing preliminary to withholding, suspending, or revoking any license, but no provision is made for keeping the license in effect pending appeals except by the issuance of restraining orders or writs of injunction incident to appeal. The model proposes a procedure pursuant to which such a license shall not expire "until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court." Summary suspension of a license may be ordered, but only on a finding by the agency that "public health, safety, or welfare imperatively requires emergency action." The model also contains a provision requiring that a licensee be given notice of facts which may warrant the agency in taking action with respect to a license and be afforded "an opportunity to show compliance with all lawful requirements for the retention of the license."

Judicial Review: Validity or Applicability of Rules

The model provides for very considerable protection by the judiciary against the misuse of the rule-making power by an agency. Thus, an agency which fails to follow the procedure for adoption of rules may find the validity of the rule "contested." No indication of the kind of suit to be brought is given; it is provided simply that "a proceeding to contest any rule on the ground of non-compliance with the procedural requirements ... must be commenced within 2 years from the effective date of the rule." Presumably it is intended, however, that such invalidity may be contested in a suit for a declaratory judgment, since the act at a later point provides that "the validity or applicability of a rule may be determined in an action for declaratory judgment in the District Court ... if it is alleged that the

75. Revised Model Act § 14.
77. Id. at 26:106.
78. Revised Model Act § 14(b).
79. Id. § 14(c).
80. Ibid.
81. Id. § 3(c).
82. Ibid.
rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." However, the Commissioners' note points out that, whereas a two-year limit is imposed on the contest of a rule's validity because of agency failure to follow prescribed adoption procedure, no such time limitation is imposed on the bringing of a declaratory judgment to contest validity or applicability generally. Furthermore, the model leaves open the question whether there must be a showing of threatened injury to a petitioner contesting a procedurally defective rule. But, if it was intended that there should be such a showing, then a contest of procedural invalidity would differ only in the time limitation on bringing the suit, and the provision might just as well have been included with the general provision of a declaratory judgment proceeding for testing the validity or applicability of a rule. Under the federal act, rule-making is reviewable generally under a provision for review of final administrative orders, and no provision is made for the use of a declaratory judgment proceeding.

The declaratory judgment provision appears well drawn both in requiring the showing of injury and in including both rights and privileges. The inclusion of privileges effectively avoids any argument, particularly in licensing proceedings, that petitioner has only a privilege and hence is not entitled to sue. Classification of an interest as one of privilege only has on occasion resulted in denial of fair procedure to petitioners. There is no provision for choice of venue in declaratory judgment proceedings; it might be placed either in the parish where the agency is located or the parish in which the potentially affected property interest lies. Whether such a choice should be afforded a party petitioner would turn on whose convenience should be served. The predominant practice in Louisiana has been to lay venue in the parish of agency location, a practice which has resulted on occasion in serious burdening of the Nineteenth Judicial District judges. This practice, however,

83. Id. at § 7.
84. Id., Commissioners' Note.
85. Federal Act, § 10.
87. See, e.g., Walker v. City of Clinton, 244 Iowa 1099, 59 N.W.2d 785 (1953).
88. Revised Model Act § 7.
89. E.g., LA. R.S. 45:1192 (1950): "If any of the persons . . . shall be dis-
has probably also been a factor in the expansion of judicial personnel in that district, and it may now be that only petitioner's convenience would be served by affording a choice; the price of giving such a choice may well be too high if it means diverting suits from a forum convenient to the agency and with personnel already sufficient to accomplish the task.

The model also provides a rather involuted process for obtaining judicial review of petitions for agency declaratory rulings by prescribing first that agencies shall provide by rule for the filing and disposition of such petitions and then that "rulings disposing of petitions have the same status as agency decisions or orders in contested cases." In view of the general lack of success in getting federal agencies to issue declaratory orders under a simple authorization for such orders, the model approach may be warranted; it subjects to judicial review the denial as well as the issuance of a declaratory order.

Judicial Review: Agency Adjudication

In adjudicated cases, the requisite for review has been generally that a person be "aggrieved by a final decision." The new model, however, imposes a limitation at the outset to the effect that, in general, "a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review." This seems at least to inject a mandatory requirement that, where available, petition for rehearing precede a petition for judicial review, a prescription of doubtful desirability. Requirement of a final order subject to exception where the administrative process can be shown to be inadequate seems sufficient. Furthermore, injection of the requirement of exhaustion of "all administrative remedies" seems anomalous in this paragraph, which also provides for review of interlocutory administrative orders "if review of the final agency decision would not provide an adequate remedy." In this latter

satisfied with any order entered by the commission . . . the dissatisfied person may . . . file in a court at the domicile of the commission, a petition. . . ."

90. Revised Model Act § 8.
92. This was the approach taken in the 1946 model act, § 12: "Any person aggrieved by a final decision in a contested case, . . . is entitled to judicial review. . . ."
93. Revised Model Act § 15(a).
94. See note 68 supra.
95. Revised Model Act § 15(a).
connection, it is also to be noted that granting interlocutory review on the basis of inadequacy of the administrative remedy alone might result in such review solely on the basis of the expense of going through with an administrative hearing. The greater showing of injury usually exacted in injunction cases, by imposing the requirement that irreparable injury or the threat thereof be also demonstrated, provides a deterrent to frivolous petitions to review interlocutory orders.

The model proposals for scope of review over issues of fact are drawn in part from recommendations of the Hoover Commission Task Force and in part from the model act reporters' own beliefs in the virtues of the "clearly erroneous" rule. They seem quite inconsistent and illogical. Thus, the model provision opens on the bold note that "the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Taken at its face value and unmodified by later statements, such a provision would effectively seem to rule out any review of facts if there is any evidence to support a finding, since we may assume that "weighing" facts means appraising the reliability, probity, and over-all persuasiveness of the evidence. But, if a court cannot reweigh evidence, it would seem precluded from substituting its judgment for that of the agency, in assessing the reliability, probity, and persuasiveness of evidence; and the proposal, as so interpreted, would go beyond the "substantial evidence" rule, as widely applied in review of agency decisions. That rule permits a reviewing court to "weigh" the evidence at least to the point of deter-

97. LA. CODE OF CIVIL PROCEDURE art. 3601 (1960): "An injunction shall issue in cases where irreparable injury, loss, or damage may otherwise result to the applicant. . . ."
98. Revised Model Act § 15(g).
101. Revised Model Act § 15(g).
102. In Jordan v. New Orleans Police Dept., 232 La. 926, 930 95 So.2d 697, 698 (1957), the Louisiana Supreme Court noted that it had "repeatedly stated that the ruling of the Commission upholding the dismissal of an employee would not be disturbed where there was some evidence before such body to support its decision" and that this Court is without authority to examine into the question of the weight . . . or the sufficiency of the evidence to establish intoxication. . . ." But cf. Day v. Department of Institutions, 231 La. 775, 93 So.2d 1 (1957).
mining whether the agency has chosen to accept one of two fairly conflicting views, each supported by persuasive evidence.\textsuperscript{103} If the agency has so chosen, under this rule, the reviewing court may "weigh" no further "even though the court would justifiably have made a different choice had the matter been before it de novo."\textsuperscript{104} If, however, the view chosen by the agency is not so supported, the court may reverse and may quash or remand for further proceedings.\textsuperscript{105}

The model draftsmen may, of course, have meant only that there should be no substitution of judgment in evaluating the credibility of testimonial evidence. This would be plausible, since it is the agency which has heard the witnesses, and a proper deference might thus be paid to the trier of fact who has had an opportunity to observe the demeanor of the witness while testifying. That this is not what the draftsmen intended becomes clear as one progresses through the subsection and finds that "the court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: . . . (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . ."\textsuperscript{106} In the Commissioners' note accompanying this provision, we find the following statements: "The 'substantial evidence rule' [of the 1946 model act] has been replaced by the 'clearly erroneous rule'. . . . This change places court review of administrative decisions on fact questions under the same principle as that applied under the Federal Rules of Civil Procedure in connection with review of trial court decisions."\textsuperscript{107} The note goes on to state that "this standard of review does not permit the court to 'weigh' the evidence, or to substitute its judgment on discretionary matters, but it does permit setting aside 'clearly' erroneous decisions." And then this peroration is added: "Certainly a clearly erroneous decision should not be permitted to stand."\textsuperscript{108}

The last statement is plausible only when used without a clear understanding of the meaning of the "clearly erroneous"

\textsuperscript{103} Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

\textsuperscript{104} Ibid.

\textsuperscript{105} Ibid.

\textsuperscript{106} Revised Model Act § 15(g) and § 15(g) (5).

\textsuperscript{107} Ibid. Id., Commissioners' note.

\textsuperscript{108} Ibid.
rule affecting scope of review on appeal. This rule had its origins in the change from an equity practice in which trial evidence was by deposition and review of the trial court de novo, to an equity practice in which the equity trial judge heard testimony in open court and the review of trial court findings resulted in reversal on appeal only if findings were clearly erroneous. When the Federal Rules were formulated, the equity rule was apparently extended to cover all findings of fact, with only special deference shown to findings involving the resolution of credibility issues.\textsuperscript{109} Under the rule thus made applicable to all federal non-jury cases, a reviewing court felt free to upset findings of fact if convinced that there was “clear error” in the finding, a term widely accepted as meaning such error as left the reviewing court “with the definite and firm conviction that a mistake has been committed.”\textsuperscript{110} A reviewing court was free under the rule to substitute its own judgment over findings of evidentiary or primary facts, after giving “due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses.”\textsuperscript{111} It also felt free, as under the de novo review practice in equity, to substitute its own judgment over the findings of ultimate fact inferred from the evidentiary or primary fact, if convinced of clear error, which is to say that it would independently conclude whether it found the ultimate fact finding of the trial court or its own possibly opposite ultimate fact finding persuasive.\textsuperscript{112} “Clearly erroneous” may thus mean no more than that of two conflicting findings of ultimate fact, each supported by persuasive evidence, the reviewing court concludes that the finding not made by the trial judge is more persuasive. In this frame of reference, there is considerably less force to the Commissioners’ comment that “certainly a clearly erroneous decision should not be permitted to stand.” It may be that such a decision should stand, where made by an administrative agency, if it was the legislative intent that findings of ultimate fact should be made by an agency with specific expertness in the subject matter involved and that the finding of ultimate fact of the expert is persuasively supported.

\textsuperscript{109} Authorities on the history of the rule are collected in Comment, 21 LA. L. Rev. 402, 419 (1961).
\textsuperscript{111} FED. R. Civ. Proc. rule 52(a) (1963).
\textsuperscript{112} E.g., Greenspon v. Commissioner, 229 F.2d 947 (8th Cir. 1956) and see cases collected in Note, 17 LA. L. Rev. 833, 836, n.20 (1957).
This, of course, is what is accomplished by the "substantial evidence" rule, as adopted by many states and by the federal government in the Federal Administrative Procedure Act.\textsuperscript{113} Its genesis is not from equity practice but from the jury trial practice; and while it had its early development in the review of National Labor Board cases under the Wagner Act,\textsuperscript{114} it was adopted as the standard for all agency review by the Federal Administrative Procedure Act of 1946. It was perhaps most helpfully described in application by the Supreme Court in an early Labor Board case as requiring on review that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive. . . . [T]his . . . means evidence which is substantial, that is affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."\textsuperscript{115} A few years later, in another Labor Board case, the Supreme Court noted that "if the findings of the Board are supported by evidence the courts are not free to set them aside, even though the Board could have drawn different inferences."\textsuperscript{116} Still later, and after the adoption of the "substantial evidence on the whole record" rule in the Taft-Hartley and Federal Administrative Procedure Acts, it said of the rule: "Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo."\textsuperscript{117}

Thus, under the substantial evidence rule, the reviewing court must, as a practical necessity, reweigh the evidence to determine whether or not the evidence has sufficient weight to compel reasonable men to reach the same conclusion as the agency, or sufficient weight for reasonable men to differ among themselves in the conclusion. But once the court decides that the evidence has sufficient weight to meet either of these con-

\textsuperscript{113} Federal Act § 10(e).
\textsuperscript{114} Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-97 (1951).
\textsuperscript{115} NLRB v. Columbian Enameling Co., 306 U.S. 292, 300 (1939).
\textsuperscript{117} Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).
ditions, the court, under the substantial evidence rule, may weigh no further. Within the area wherein reasonable men may differ among themselves, the agency's conclusion, made upon what the agency finds to be the weight or preponderance of the evidence, is final. The agency's determination of credibility issues should be final; or, at the very least, great deference should be given to the opportunity of the agency to judge the credibility of the witnesses. There would seem little basis for the adoption, for state agency practice, of the federal rule that disagreement between a deciding officer and the agency head of an issue of credibility should in turn open up the credibility issue to a reviewing court.118

Admittedly, there is a great deal of flexibility in the substantial evidence concept; it seems clear, however, that the reviewing court is precluded from disturbing findings of fact in a much greater number of cases than under the broader formation of the clearly erroneous rule. It is submitted that this is as it should be, where the legislature has by the very creation of an agency with fact finding power given indication that it wanted special competence brought to bear in certain social and economic areas.

The arguments for the more broadly drawn "clearly erroneous" rule, as presented by the reporter for the model act, are, in the main, that the federal circuit courts of appeal, or many of them, have ignored the limitations of the "substantial evidence" rule when they have wanted to substitute their judgment for the agency's. An impressive array of cases is marshalled in which this may well be true.119 In addition, a number of federal circuit courts of appeal have chosen to regard findings of ultimate fact as questions of law and hence open to the court for substitution of judgment.120 Thus, it is argued, the path of reason leads to the abandonment of the limiting rule and the adoption of the broader rule under which this is legally permissible. Rather than abandon the effort, however, if it is an

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118. The United States Supreme Court has so held, although the language is obscure: "... evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." Id. at 496.


120. See cases collected in Note, 17 La. L. Rev. 833, 836, n.20 (1957).
objective which is implicit in the creation of administrative agencies by the legislature, it seems more reasonable to adopt the substantial evidence rule as governing appellate review of agency findings of fact and make sure that the legislative meaning of the rule is available to the reviewing courts. Then, if it is flouted, the matter will be between the legislature and the courts.\footnote{121 Section 15(g) of the model could be modified so as to achieve the foregoing objectives by modifying the first sentence of the subsection to read: “The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of primary or ultimate fact except in accordance with the substantial evidence rule.” Subsection 15(g)(5) could then be modified so as to read, in conjunction with the opening statement: “The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: . . . unsupported by reliable, probative, and substantial evidence on the whole record; . . . .” An explanatory comment on the meaning of the substantial evidence rule could be included at this point, or, better perhaps, could be included in the definitional section at the beginning of the act.}