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Off-the-Record Consultations and the Revised Model State Administrative Procedure Act

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Off-the-Record Consultations and the Revised Model State Administrative Procedure Act

Many suggestions have been made for legislation which will impose definite procedural standards on the activities of administrative agencies. The basic aim of such legislation is to guarantee minimum, uniform, and fair modes of agency operation that are familiar to the participants and administratively efficient.[1] Most of this commentary on administrative procedural reform, however, both before and after the enactment of the Federal Administrative Procedure Act of 1946,[2] has focused on the federal agencies.[3] Thus, assessment of the need for procedural acts in the various states has been rather limited; in fact, prior to 1961 the only significant activities related to the states were the Report on Administrative Adjudication in New York[4] and the Model State Administrative Procedure Act.[5] Such comparative neglect does not reflect the true significance of administrative law in state government. The operations of state agencies probably affect more people than do the activities of federal agencies;[6] as a result, there has been increased concern in recent years for administrative procedural reform in the states. In 1961 the Commissioners on Uniform State Laws promulgated the Revised Model State Administrative Procedure Act,[7] which was intended to function as a guide for state legislatures in evaluat-

1. See REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 204 (1961) (Prefatory Note); 1 COOPER, STATE ADMINISTRATIVE LAW 13 (1965).

2. 60 Stat. 237 (1946), 5 U.S.C. § 1001(c) (1964).

3. Major proposals leading to enactment of the Federal Administrative Procedure Act were PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937); The Walter-Logan Administrative Procedure Bill, S. 915, 76th Cong., 1st Sess. (1939); Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941). See generally 1 COOPER, *op. cit. supra* note 1, at 7-13 (1965); DAVIS, CASES ON ADMINISTRATIVE LAW 6-12 (1965). Since 1946 the more important suggestions for revision of the federal act have been embodied in the COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE (1955); ABA FINAL DRAFT OF PROPOSED CODE OF ADMINISTRATIVE PROCEDURE (1957), introduced as S. 1070, 86th Cong., 1st Sess. (1959). See generally Benjamin, *A Lawyer's View of Administrative Procedure—The American Bar Association Program*, 26 LAW & CONTEMP. PROB. 203 (1961). Two recent bills also contain extensive revisions of the Administrative Procedure Act. S. 1336, 89th Cong., 1st Sess. (1965); S. 1663, 88th Cong., 1st Sess. (1963).

4. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942).

5. HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 202 (1946).

6. See 1 COOPER, *op. cit. supra* note 1, at 1-2.

7. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT [hereinafter cited as REVISED MODEL ACT], in HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 206 (1961) [hereinafter cited as 1961 HANDBOOK], and in 9C UNIFORM LAWS ANN. 123 (Supp. 1965).

ing the need for administrative procedural reform and in enacting a comprehensive procedure act.[8]

The activities of administrative agencies are generally divided into two categories. The first, rulemaking, involves the formulation of policy and regulations of broad or general applicability.[9] While it is important to have minimum standards of procedure to govern rulemaking, the real value of any suggested procedure act depends in large part upon the standards governing the second category of administrative activity, adjudication—the delineation of individual rights and duties in specific factual settings.[10] When an agency engages in adjudicatory activity, the policy aims of fair procedure, efficient agency operation, and a consistent agency program seem to converge in direct confrontation. Although the Revised Model Act eschews the word "adjudication" in favor of the term "contested case,"[11] this change in terminology in no way affects the basic problem of determining the most appropriate way to balance the policy objectives of fairness, efficiency, and consistency. Rather, the change was intended merely to avoid definitional confusion with "adjudication" under the Federal Administrative Procedure Act;[12] "contested case" is defined more broadly than is "adjudication."[13] Thus, the way in which a fair balance is struck between the various objectives of administrative activity is perhaps more important under the Revised Model Act than under the federal act.

The drafters of the Revised Act have sought to resolve the confrontation of policy objectives in part by insisting that the decision maker refrain from off-the-record communications with any of the parties to the proceeding.[14] However, there are a number of ambiguities in the act which indicate that it may be possible for state agencies to avoid this objective. Furthermore, implementation of the policy decisions of the drafters may prove to be undesirable for

8. See 1961 HANDBOOK 205.

9. See 1 COOPER, *op. cit. supra* note 1, at 107-19.

10. See *id.* at 119-24.

11. REVISED MODEL ACT § 1(2): "'Contested case' means a proceeding, including but not restricted to ratemaking, [price fixing], and licensing, 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."

12. 1961 HANDBOOK 207.

13. Rate fixing is part of rulemaking procedures under the Federal Administrative Procedure Act § 2(c), 60 Stat. 237 (1946), 5 U.S.C. § 1001(c) (1964), but comes within the "contested case" provisions in the REVISED MODEL ACT. The term "contested cases" under the REVISED MODEL ACT § 1(2) also specifically includes licensing.

14. See REVISED MODEL ACT § 13: "[*Ex Parte Consultations.*] 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. 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 overall operation of state administrative agencies. This comment will consider these two possible criticisms of the Revised Model Act and will suggest that changes be made in the language of certain provisions when enacted by state legislatures.

I. The Provisions

Several provisions operate jointly to control off-the-record communications by the decision maker in contested cases. In general, section 13 prohibits any ex parte consultation between the decision maker[15] and a party,[16] and section 9(e) delineates the information which the decision maker must include in the hearing record.[17] Specifically, section 13 provides that the decision maker cannot discuss questions of *law* with any party, nor questions of *fact* with the parties or any other person unless all parties are given notice and an opportunity to participate in the proceeding. However, section 13 does permit agency members to consult among themselves and to have one or more personal assistants for aid and advice.[18] Thus, it appears that the effect of section 13 will be to force all parties in a contested case to spread their evidence and arguments on the hearing record. The broadly inclusive record requirements of section 9(e) reinforce that interpretation of section 13. Section 9(e) states that the record must include not only all evidence[19] and all matters of which official notice is taken[20] but also all staff memoranda or data submitted for consideration by the decision maker.[21] Moreover, the official comment to section 9 seems to indicate that memoranda and data submitted after an opportunity for reply must also form part of the record.[22]

The drafters' obvious attempt to isolate the decider of contested cases from influence outside the record reflects an effort on their part to eliminate at least two possible consequences of uncontrolled administrative adjudication. The first such consequence is secretly

15. See Revised Model Act § 13, quoted *supra* note 14.

16. Revised Model Act § 1(5): " 'Party' means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party."

17. Revised Model Act § 9(e): "The record in a contested case shall include: (1) all pleadings, motions, intermediate rulings; (2) evidence received or considered; (3) a statement of matters officially noticed; (4) questions and offers of proof, objections, and rulings thereon; (5) proposed findings and exceptions; (6) any decision, opinion, or report by the officer presiding at the hearing; (7) all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case."

18. Also excepted is the disposition of ex parte matters authorized by law. Revised Model Act § 13, quoted *supra* note 14.

19. Revised Model Act § 9(e)(2), quoted *supra* note 17.

20. Revised Model Act § 9(e)(3), quoted *supra* note 17.

21. Revised Model Act § 9(e)(7), quoted *supra* note 17.

22. See 1961 Handbook 214.

obtained ex parte information. In the *Sangamon Valley Television* cases[23] and in the investigations of the Harris Subcommittee on Legislative Oversight,[24] it was revealed that agencies and other parties sometimes rely heavily upon irregular approaches to the decision maker to ensure a favorable outcome in their cases.[25] It is obvious that this practice can be inherently unfair to other parties in a contested case. Indeed, the same problem arises when the internal bias of the agency prosecution or investigatory staff is permitted to shape the outcome through ex parte contacts with the adjudicatory personnel of the agency. When this type of activity is exposed, it can only generate public distrust in the administrative process.[26] Whether these practices are labeled "influence peddling" or are merely termed "off-the-record consultation," they still pose an insidious threat to the integrity and continued efficacy of the hearing process.

It is apparent that the drafters also sought to place the burden of decision on one identifiable person. Heretofore, agencies have traditionally issued anonymous and impersonal group opinions, a practice which has created not only fear of bias resulting from off-the-record communications to the decision maker[27] but also suspicions that a conclusion in some contested cases is reached long before the rationale emerges, and that crucial determinations are often made by staff members other than the nominal decision maker.[28]

23. Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959), *vacating* 255 F.2d 191 (D.C. Cir. 1958). This litigation involved the propriety of ex parte approaches to members of the Federal Communications Commission regarding television channel allocations.

24. See generally *Hearings on Administrative Process and Ethical Questions Before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. (1958). The disclosures of this investigation and the manner in which it was handled provoked a book by the former chief counsel of the subcommittee. See SCHWARTZ, THE PROFESSOR AND THE COMMISSIONS (1959).

25. The incidents scrutinized at that time portrayed a shocking reliance by agencies and other parties on irregular approaches and the presence of suspicious financial dealings between at least one agency member and parties to a proceeding. See SCHWARTZ, *op. cit. supra* note 24, at 111. A spate of remedial suggestions resulted, including proposed codes of ethics and criminal sanctions. See generally Peck, *Regulation and Control of Ex Parte Communications With Administrative Agencies*, 76 HARV. L. REV. 233 (1962); Note, *Ex Parte Contacts With FCC in Quasi Judicial Proceedings*, 73 HARV. L. REV. 1178 (1960).

26. In short, there must not only be the intent to do justice but also the appearance that justice is done. See BENJAMIN, *op. cit. supra* note 4, at 10; Peck, *supra* note 25, at 235. The oft-quoted query of Lord Hewart sharpens the point: "How is it to be expected that a party against whom a decision has been given in a hole-and-corner fashion . . . should believe that he has had justice?" HEWART, THE NEW DESPOTISM 48 (1929).

27. See Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 204 (1941).

28. See Beelar, *The Dark Phase of Agency Litigation*, 12 AD. L. REV. 34, 35 (1959); Hector, *Government by Anonymity*, 45 A.B.A.J. 1260 (1959). Compare Nathanson, *Recent Statutory Developments in State Administrative Law*, 33 IOWA L. REV. 252, 280 (1948).

The Revised Model Act attempts to remove such possibilities by isolating the identified decision maker from off-the-record contacts with others[29] and, except for advice from personal assistants to agency members, by placing on him the burden of deciding the case solely on the basis of the record.[30] In fact, one commentator[31] has suggested that section 13 actually bars the use of a separate, anonymous opinion-writing staff.[32]

II. Ambiguities in Contested-Case Decision Making

A. *Hearing Examiners*

The great volume of matters handled by many agencies requires that the members have assistance in disposing of the cases. The most familiar method of supplying such assistance is the one suggested by the provisions of the Federal Administrative Procedure Act.[33] At an initial hearing, the examiner[34] receives evidence, listens to arguments, and makes findings of fact; depending on the exact scope of his duties, he may also render an initial or recommended decision for the agency's consideration in making its final disposition.[35] In stark contrast to the federal act, the Revised Model Act does not indicate who is to hear cases or render decisions. While the diverse character of state agencies may have caused the drafters to forego any specific provision in regard to which person or persons shall hear the evidence, it is clear that the drafters did contemplate that initial hearings would be held in some types of contested cases. In the first place, section 9(e)(7) specifically refers to "data submitted to the hearing officer *or* members of the agency."[36] Second, section 11 requires

29. See Revised Model Act § 13, quoted *supra* note 14.

30. The broad requirements of § 9(e), quoted *supra* note 17, are meant to supply the decider with all relevant information, while § 13 ensures that no other evidence is used. In addition, § 11, which operates when a majority of those making the final decision have neither heard the case nor read the record, attempts to force the nominal decider to make an actual determination. Under that section, if the decision is adverse to the respondent, there must be a proposed decision served upon the parties followed by an opportunity to present exceptions, file briefs, and argue orally.

31. Bloomenthal, *The Revised Model State Administrative Procedure Act—Reform or Retrogression?*, 1963 Duke L.J. 593, 614.

32. If an agency member is himself rendering the decision, it is clear under the act that he can use personal assistants. Additionally, the section seems to allow the use of staff writers so long as the decider makes the actual decision and dictates the essence of the opinion without consulting the writers for suggestions.

33. See Administrative Procedure Act §§ 7(a), 8(a), 60 Stat. 241, 242 (1946), 5 U.S.C. §§ 1006(a), 1007(a) (1964).

34. Section 7(a) states that the hearing may be presided over by all of the agency members, some of the members, or a hearing examiner. The last of these is almost always used.

35. If the agency so directs, the decision of the hearing examiner may become the agency determination. See Administrative Procedure Act § 8(a), 60 Stat. 242 (1946), 5 U.S.C. § 1007(a) (1964).

36. Revised Model Act § 9(e)(7), quoted *supra* note 17. (Emphasis added.)

that a proposed decision be furnished to the parties, and that they be given an opportunity to file briefs and make oral argument in all cases where those who make the ultimate decision have not read the record.[37] This provision is an obvious recognition that someone other than agency members may make an initial determination.[38] Third, section 13 refers to "members or employees of an agency" as the persons who would be assigned to "render a decision or to make findings of fact and conclusions of law."[39] The duality of the latter phrase suggests that a hearing examiner could render a complete decision. On the other hand, the hearer's only function might be to submit findings of fact or conclusions of law upon which the agency board or commissioners would make the final determination. In any case, it is clear that a hearing examiner would be used at the initial stage of the proceedings.

Although it is apparent that the drafters contemplated the use of hearing examiners in some types of cases, it is not clear who can be appointed as an examiner. Such an omission constitutes a potential threat to the underlying policy of section 13. Since section 13 states that "members or employees of an agency assigned to render a decision . . . shall not communicate . . . with any party or his representative . . . ,"[40] it appears that the drafters did not contemplate the use of hearing examiners who were employed by a unit of the state government other than the agency itself. Nevertheless, such a system is used by at least one state,[41] and this external separation of decision making from agency prosecution could have sufficient appeal to be adopted in other jurisdictions. If the language "members or employees of an agency assigned to render a decision" is read to restrict the application of section 13 to situations where the decision maker is an employee or member, then a hearing examiner who is independent of the agency would not be bound by the restrictions on ex parte consultations. In terms of policy, this interpretation would have to be premised on the belief that dangers of improper influence from parties are present only when the hearer draws his salary from the agency, and disappear when he is not an employee. Such a distinction seems untenable. Consequently, it would appear preferable to eliminate this possible means of avoiding the impact of section 13 by re-drafting the phrase to read: "*those* assigned to render a decision . . . shall not communicate . . . ."[42]

37. REVISED MODEL ACT § 11.

38. See KY. LEGISLATIVE RESEARCH COMM., REP'T NO. 12, ADMINISTRATIVE PROCEDURES LAW IN KY. 74 (1962).

39. REVISED MODEL ACT § 13, quoted *supra* note 14.

40. *Ibid.*

41. CAL. GOV'T CODE §§ 11370, 11502.

42. See KY. LEGISLATIVE RESEARCH COMM., *op. cit. supra* note 38, at 87.

B. *Personal Assistants to Agency Members*

As an exception to the requirements of section 13, agency members themselves are permitted to have and to consult with personal assistants.[43] On the surface, this provision seems to sanction the use of expert evaluation at the critical point of most contested cases—the time of the making of the final decision. However, the Revised Model Act specifies neither the manner in which the personal assistants are to be appointed nor the manner or extent of their permissible advisory function. Without statutory clarification of these critical points, it appears that the supposed safeguards of section 13 could be nullified.

Presumably, these assistants would be appointed and would function in a manner similar to a judge's law clerk.[44] However, it would be possible for each agency member to recruit a permanent staff of experts whose duties would parallel those of the legal assistants to each member of the National Labor Relations Board.[45] Alternatively, each member or commissioner could appoint persons with expertise in differing fields. This method was the one established by the Communications Act of 1952, whereby each commissioner of the Federal Communications Commission was required to appoint legal, engineering, and administrative assistants.[46] On the other hand, if agency members were permitted to appoint experts in various fields on an *ad hoc* basis, these assistants could be drawn from the ranks of the agency's prosecutors or investigators. Since a state agency normally would have limited manpower,[47] some such arrangement might promote the most efficient utilization of staff. However, since these persons would be classified as personal assistants to the decision makers, it would be theoretically possible for them to influence the outcome of cases, in contravention of the policy behind section 13. Dealing with this matter, several current proposals for revision of the Federal Administrative Procedure Act are quite clear in prohibiting from assignment as a personal assistant anyone who participates in agency business in an investigatory or prosecuting role.[48] Since most commentators agree that investigators and prosecutors should not be part of the decision-making apparatus,[49] it would seem that state legislatures, in enacting the

43. See last sentence of REVISED MODEL ACT § 13, quoted *supra* note 14.

44. See 2 COOPER, *op. cit. supra* note 1, at 441.

45. See Labor Management Relations Act (Taft-Hartley Act) § 101, 61 Stat. 139 (1947), 29 U.S.C. § 154(a) (1964), amending NLRA § 4(a), 49 Stat. 451 (1935).

46. Communications Act of 1952, ch. 879, § 4, 66 Stat. 712.

47. See 1 COOPER, *op. cit. supra* note 1, at 3-5; text accompanying note 64 *infra*.

48. See S. 1663, 88th Cong., 1st Sess. § 5(g) (1963); S. 1336, 89th Cong., 1st Sess. § 5(a)(6)(A) (1965); *cf.* S. 2335, 88th Cong., 1st Sess. § 1005(c) (1963); S. 1879, 89th Cong., 1st Sess. § 1005(c) (1965).

49. See, *e.g.*, Bloomenthal, *supra* note 31, at 619. Compare STASON & COOPER, CASES ON ADMINISTRATIVE TRIBUNALS 333-36 (3d ed. 1957).

Revised Model Act, should include a provision similar to the suggested proposals for federal agencies.

There is a second potential weakness in the "personal assistants" exception to section 13. Specifically, such personal assistants may not have to observe the prohibition of secret ex parte communication. The assistants to whom the agency members may turn for aid and advice are likely to be agency employees, but they are not employees "assigned to render a decision."[50] Consequently, they might be considered at liberty to discuss with the parties any and all matters at issue. This only shifts the level of ex parte communication; it does not eliminate it.[51] Thus, an otherwise fair contested-case proceeding could still be contaminated by off-the-record communications.

C. *Prohibition on Policy Discussion*

The rules against ex parte consultations specifically apply to communications concerning issues of fact and law.[52] However, it is not clear whether the prohibition encompasses one of the most important aspects of effective agency operation—discussion of policy aims and goals.[53] It is clear that discussion of these policy concerns is not explicitly proscribed, and it is possible that section 13 does not even *impliedly* prohibit such activity.

An official comment to section 13 states that the intention is "to preclude litigious facts reaching the deciding minds without getting into the record. Also precluded is *ex parte* discussion of the law . . . ."[54] Generally, it would seem that ex parte discussions of policy should be precluded as matters of law. Indeed, off-the-record policy discussions would appear to be wholly inconsistent with the drafters' attempt to eliminate secret communications of key information. Furthermore, the adjective "litigious" apparently refers to facts over which there is disagreement or controversy. Since policy directions may be central to this determination, they too would be precluded unless placed in the record. On the other hand, the drafters of the Revised Model Act may have been trying to draw the same distinction between litigious and nonlitigious facts as the Attorney General's Committee on Administrative Procedure made between "litigation" and "non-litigation" facts.[55] The former referred to in-

50. REVISED MODEL ACT § 13, quoted *supra* note 14.

51. If the personal assistants consulted with parties off the record at the instigation of, or on behalf of, the decider, there would be a violation of the prohibition against "indirectly" engaging in ex parte contacts. See REVISED MODEL ACT § 13.

52. See REVISED MODEL ACT § 13, quoted *supra* note 14.

53. The term "policy" is here used in a broad sense to include overriding goals, detailed objectives, and preferred means for implementing decisions which aim for those targets.

54. See 1961 HANDBOOK 219.

55. See Report of the Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 72 (1941).

formation gathered in the course of the inquiry surrounding the pending case, while the latter meant information developed over a period of time and constituting the agency's experience and expertise. Since the category of "non-litigation" facts would clearly encompass policy, ex parte discussion of that policy would be permissible under this interpretation of the drafters' intent. In fact, such a distinction would appear to be consistent with the last sentence of section 10(4), which specifically recognizes that "the agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence."[56] However, section 10(4) relates only to official notice, and limits the scope of official notice to "judicially cognizable facts" and "generally recognized technical or scientific facts within the agency's specialized knowledge."[57]

Nevertheless, if agency policy has been previously set out in rules and regulations, it seems that these declarations would fit within the definition in section 10(4) of official notice as "judicially cognizable facts." Although this might be a potential device for obtaining necessary policy guidance under the Revised Model Act, the wisdom of relying on it seems doubtful. Many federal agencies have astutely avoided use of the rulemaking process,[58] and it is unlikely that state agencies will exhibit a different disposition.[59] Thus, there may be little opportunity to refer to rules and regulations to escape the prohibitions of section 13. In addition, all matters of which official notice is taken must be presented to the parties, who must be given an opportunity to contest the accuracy of such matters.[60] Consequently, it appears that the range of official notice is too narrow, and the opportunity to contest too inviting, for effective use to be made of the official notice provision as a means of circumventing the section 13 prohibitions on ex parte discussions.[61]

III. Soundness of Contested-Case Consultation Provisions

The analysis presented above has been directed to ambiguities in the prohibitions on off-the-record communications which may allow

56. Revised Model Act § 10(4).

57. *Ibid.*

58. See Friendly, The Federal Administrative Agencies—The Need for Better Definitional Standards (1962); Note, 50 Va. L. Rev. 652, 739-43 (1964).

59. Clearly, some state agencies disregard the rulemaking process. See 1 Cooper, State Administrative Law 179-80 (1965). Revised Model Act § 2 requires an agency to adopt as rules a description of its organization and the nature and requirements of all procedures available. This section also requires public disclosure of all rules and written statements of policy "formulated, adopted, or used by the agency." It is questionable whether this requirement is sufficient to precipitate active use of the rulemaking process, rather than contested cases, for articulating policy and statutory interpretations.

60. *Ibid.*

61. See Davis, Cases on Administrative Law 585 (1965); Blumenthal, *supra* note 31, at 611.

agencies to avoid the clear policy aims of the drafters of the Revised Model Act. A second criticism of these provisions relates to whether they impose a valid method of day-to-day operations on state administrative agencies. The soundness of the provisions can be challenged on several counts.

A. *Size of State Agencies*

As is the case in most administrative procedure acts, the definition of "agency" in the Revised Model Act is extremely broad. In fact, it encompasses all state-government groups authorized to make rules or determine contested cases except the courts and the legislature itself.[62] Thus, the Revised Model Act governs such diverse bodies as the state apple commission, the liquor control commission, and the departments of the executive branch, such as the Secretary of State's office. Although the number of persons employed by an agency will of course vary with the scope of the agency's functions, state agency staffs are generally much smaller than their federal counterparts.[63] Consequently, the drafters' attempt to segregate the decision maker and his personal assistants from the remainder of the agency staff may be impractical, for it is unlikely that a state agency will have sufficient personnel to assign assistants to each agency member and still provide a pool of staff experts for investigation and prosecution. Indeed, it is possible that only a few of the many state agencies will have the size to comply fully with the Revised Model Act.[64] While the act does not *require* the hiring of personal assistants, the need for evaluation of records and for guidance will probably compel the members to retain such assistants. Thus, where adequate personnel are not now employed, the extent to which an agency can operate within section 13 will depend on its willingness to incur the expense of a larger staff.[65] For the most part, it would appear that the increased cost will make this section impractical for many state agencies.

Since the Revised Model Act was designed as a model rather than as a uniform act, it is clear that the legislatures can make

62. See REVISED MODEL ACT § 1(1).

63. See 1 COOPER, *op. cit. supra* note 61, at 3-5; FESLER, THE INDEPENDENCE OF STATE REGULATORY AGENCIES 2 (1942).

64. The late Chief Justice Vanderbilt has stated: "While segregation of functions may be practicable in the case of the large federal agencies, it may often be a more acute problem in the state agencies with small staffs." VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 483 (1949).

65. See BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 70 (1942); *Hearings on S.I. No. 3827 and A.I. No. 5728 Before State of New York Senate and Assembly Committees on the Judiciary* 12, May 11, 1965 (Testimony of G. Wallace Bates). According to Cramton, *Some Modest Suggestions for Improving Public Utility Rate Proceedings*, 51 IOWA L. REV. 267, 279 (1966), separate staffs of personal assistants are costly and are not required by the current problems.

necessary exceptions to the definition of "agency." However, exemptions from the definition do not appear to be a satisfactory response to the problem. If section 13 is in fact designed to obtain fundamental fairness,[66] exempting even small agencies would simply perpetuate the dangers of secret consultation and combined prosecution and decision-making functions. One possibly viable solution would be to create a staff of independent hearing examiners not connected to any one agency, but available to all the various agencies as the case loads of the agencies demand, supplemented by an adequate means of giving to these examiners policy guidance and assistance in record evaluation.[67]

B. *Essence of Agency Government*

Administrative agencies are deliberately established to utilize all three of the traditionally separate powers of government—legislative, executive, and judicial.[68] Within the boundaries delineated by its enacting statute, an agency is charged with the responsibility of exercising its expert discretion to formulate a coherent policy for assisting and regulating persons and interests. This awesome concentration of the power to set, administer and enforce a segment of the law conflicts violently with historical notions of separation of powers.[69] Consequently, there is a natural desire to require the agency to separate its functions and observe procedures that are in keeping with those functions. The division of procedure into rule-making and adjudication is a partial response to this desire, as well as a recognition that added safeguards are needed, indeed perhaps constitutionally required, in the determination of individual rights and duties. Traditional notions of the separation of powers also provide the impetus for segregating agency investigation and prosecution from compliance and enforcement decisions. However, any effort to model the agency decision-making process after the judicial process interferes with the very reason for having a functionally integrated "fourth branch of government."

Agency operation is far more complex than would appear from the theoretical identification of legislative and judicial functions.[70]

66. See REVISED MODEL ACT, 1961 HANDBOOK 204-05 (Prefatory Note).

67. See suggestions discussed in text accompanying notes 87-91 *infra*. Cramton, *supra* note 65, at 279, indicates that consultation with the staff is more predominant in state agencies than federal agencies.

68. The essential and "distinctive characteristic of the administrative process is its blending of different functions and powers in a single agency." Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652 (1965). See generally *Reasons for Establishment of Administrative Agencies*, in GELLHORN & BYSE, ADMINISTRATIVE LAW 1 (4th ed. 1960).

69. See COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES 176 (1955). See generally 1 COOPER, *op. cit. supra* note 61, at 15-29.

70. Categorizing the administrative process in terms of legislative and judicial molds

Effective administrative activity involves functions which would not normally be a part of the rulemaking or adjudicatory process. Promotion of the industry, negotiation, policy formulation, and executive administration may be just as much a part of effective regulation as are rulemaking and adjudication.[71] Furthermore, it should be observed that contested cases may in practice be very similar to rulemaking, since the agency's broad concern in either type of proceeding is the formulation and implementation of a consistent policy program. The artificiality of the labels is emphasized by the example of ratemaking proceedings, which are considered "rulemaking" under the Federal Administrative Procedure Act[72] but "contested cases" under the Revised Model Act.[73] In short, no matter how it is broken down, agency operation is a broad continuum of functions having similar attributes and a common orientation.

This continuum of agency functions raises the basic questions whether, and to what degree, contested-case decisions should be made independently of the agency in order to ensure that fair procedure will be followed. Modern regulation is intimately bound up with economic and technological considerations, and reasonable persons, experts as well as laymen, disagree in evaluating means and objectives involving those considerations.[74] Therefore, choosing or preferring a certain approach or philosophy with regard to policy is both unavoidable and essential in formulating agency action and permeates all phases of the continuing process that is administration or regulation.[75] Policy—a statement of more or less controversial objectives—can be seen on all levels of administration. There is a gradation "from broad statements of purpose to increasingly specific decisions and action."[76] Thus, in speaking of organizational decisions, one political scientist has drawn the following conclusion:

> In this complex hierarchy of decisions and actions, there is no logically discernible dividing line between "policy" decisions and "administrative" decisions nor between decision making and decision applying. The application of decisions itself involves further decisions.[77]

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was probably done in part to facilitate the acceptance of the agency operations within the philosophic framework of separation of powers. See STASON & COOPER, *op. cit. supra* note 49, at 1. Some impetus for this classification may also be ascribed to the desire to reduce an unfamiliar concept to known and familiar terms. See Woll, *Administrative Law Reform: Proposals and Prospects*, 41 NEB. L. REV. 687, 699 (1962).

71. See Massel, *The Regulatory Process*, 26 LAW & CONTEMP. PROB. 181 (1961).

72. Administrative Procedure Act § 2(c), 60 Stat. 237 (1946), 5 U.S.C. § 1001(c) (1958).

73. REVISED MODEL ACT § 1(2), quoted *supra* note 11.

74. See Bernstein, *The Regulatory Process: A Framework for Analysis*, 26 LAW & CONTEMP. PROB. 329, 341 (1961).

75. "Policy-making *is* politics." Jaffe, Book Review, 65 YALE L.J. 1068, 1070 (1956).

76. Parker, *Policy and Administration*, 19 PUB. ADMIN. (SYDNEY) 113, 117 (1960).

77. *Id.* at 117.

The same writer has stated that "the 'administrative values' of efficiency, consistency, and the like, require that decisions taken by less authoritative individuals or bodies should not be inconsistent with or defeat the purposes expressed by more authoritative persons on the same subject."[78] Consequently, if a hearing examiner is expected to play a meaningful role in contested proceedings, he must know the policy objectives already articulated by the agency and be able to evaluate a factual situation against those objectives. However, the breadth of this guidance will depend in large part upon the assigned role of the hearing examiner in the total process of decision making. Since the Revised Model Act fails to define this role, it is difficult to determine whether the preclusive provisions of section 13 will be detrimental to effective agency operation. If great reliance is placed on an initial decision, then the fact that section 13 may prevent the use of agency employees for policy guidance and record evaluation could hinder the administrative process.

It has been argued that when the hearing examiner is charged only with finding basic facts, policy considerations simply should not play any part in his function.[79] Although there can be no quarrel with that general proposition, apart from pointing out the occasional difficulty of ascertaining what precisely is a question of fact,[80] the issue cannot be so readily determined. In certain types of agency proceedings it still may be necessary for the examiner to have assistance in evaluating data. For example, in rate proceedings before federal agencies a substantial number of experts may be utilized to evaluate the evidence.[81] Furthermore, while facts can and should be established independently of policy considerations, the bare facts may suggest several possible conclusions. Policy considerations, blended with the ultimate facts, provide a directional element to resolve the issue.[82] Thus, if the hearing examiner is expected to make a complete recommended decision, and certainly if he is expected to render a final decision, he should have the overall policy goals of the agency in mind or within reach. Otherwise, he will be making his

78. *Id.* at 117-18.

79. See BENJAMIN, *op. cit. supra* note 65, at 22.

80. The distinction between questions of fact and questions of law is highly evasive. See STASON & COOPER, *op. cit. supra* note 49, at 525.

81. See MUSOLF, FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION 93 (1952); Russell, *The Role of the Hearing Examiner in Agency Proceedings*, 12 AD. L. REV. 23, 26 (1959).

Although the hearing examiner or agency members may possess some personal expertise, it is not likely to be sufficient to handle the wide range of special questions that arise. See COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REPORT ON REGULATORY COMMISSIONS 22 (1949); *Hearings on S. 658 Before the House Committee on Interstate and Foreign Commerce*, 82d Cong., 1st Sess. 67, 168, 173 (1951).

82. See Gardner, *The Administrative Process*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 108, 128 (Paulsen ed. 1959).

decision in a vacuum, and the agency will not have fulfilled its basic *raison d'être.*

Although an agency will submit its policy arguments and general goals at the hearing, this limited way for the examiner to learn policy does not appear to meet the need. It is not until after the hearing that the decision is made, and it may be only at that point that the need for expert assistance is realized and policy explanations and interchange of ideas required.[83] Thus, one of the great dangers of section 13 is that the hearing examiner, who is unable to consult or otherwise obtain policy guidance, may render a report or decision based on policy considerations greatly divergent from those which the agency expected to be applied in the proceeding. This result has occurred at the federal level. For example, in the Civil Aeronautics Board's *Seven States* case,[84] the hearing examiner spent two years hearing evidence, but produced a report based on very different policy foundations from those contemplated by the CAB. As a result, the CAB had to alter the routes decided upon by the hearing examiner. In short, the examiner's ignorance of policy goals creates the danger of dissonance between initial determinations and agency objectives, with consequent delay and added cost to litigants.

When the decision is made by agency members rather than by a hearing examiner or other agency employee, there is scant danger of ignorance of policy. However, there is still a hazard of improper record evaluation. Often, the real expertise is in the staff rather than in the agency members.[85] Unless there are open channels of communication to this expertise, uninformed decisions are a distinct possibility.[86]

Regardless of the title and role of the decision maker, he must be within and not isolated from the mainstream of agency policy making if he is to be an effective participant in the regulatory process. One possible way of achieving a fair balance between the needs of the agency and the protection of the individual has been advanced by Professor Davis. He suggests that hearing examiners be allowed to consult freely with staff specialists in formulating an ini-

83. See DAVIS, TEACHERS' MANUAL FOR ADMINISTRATIVE LAW 38, problem 212 (1965). The necessity for such explanations arises in part from a failure to utilize rule-making powers to delineate policy. See Note, 50 VA. L. REV. 652, 739-43 (1964). See generally Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. U.L. REV. 781 (1965); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965). Such necessity also results in part from obscure or nonexistent standards in previous adjudication. See FRIENDLY, *op. cit. supra* note 60, at 5.

84. See *Hearings on Procedural Problems in Administrative Agencies Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. 231-32 (1960).

85. See DAVIS, *op. cit. supra* note 59, at 227; KY. LEGISLATIVE RESEARCH COMM., REP'T No. 12, ADMINISTRATIVE PROCEDURES LAW IN KY. 88 (1962).

86. See Cramton, *supra* note 65, at 279-80.

tial or recommended decision. The results of this consultation would then appear in the initial decision and could be subject to challenge by briefs or oral arguments to the final decider.[87] Other possible means of meeting the need for assistance and consultation while still protecting the individual are those proposed in New York and Kentucky. The New York Law Revision Commission's proposed Administrative Procedure Act follows the language of the Revised Model Act except that it permits an agency member to obtain the aid and advice of staff personnel other than those engaged in investigative and prosecuting functions.[88] A proposed statute in Kentucky prohibits the decision maker from consulting with "any person, party, or agency member, who was engaged in the investigation or prosecution of the case."[89] All other agency employees may be consulted. A third possible solution is that suggested by proposed amendments to the Federal Administrative Procedure Act. Senate Bill 1663 allows personal assistants to be assigned to the hearing presider or decision maker and permits any agency member to communicate with other members, their personal assistants, or any other agency employees who have not participated in the investigatory or prosecuting functions.[90] Senate Bill 1879 recognizes that it is proper for the hearing presider or decider to consult, for purposes of analyzing and appraising the record, with members of the agency, personal assistants, and any other agency employees not participating in investigatory or prosecuting activities.[91] Before enacting the Revised Model Act, state legislatures should consider these various alternatives in light of the intended functions of the agencies to which the act would apply. In any case, the role of the decider must be clarified so that the assistance required by his functions can be provided at the critical moment and in a proper manner. Otherwise, adoption of the act involves a substantial risk of interfering with the very nature of administrative agencies.

C. *Types of Communications*

When the prohibition on communications of section 13 and the inclusive record requirements[92] of section 9(e) are read together, it

87. See 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 11.12 (1958); DAVIS, *op. cit. supra* note 59, at 281. The suggested procedure would enable the decider to obtain necessary information and would remove the objection of anonymity. *Cf.* Cooper, *Administrative Law: The Process of Decision*, 44 A.B.A.J. 233, 235 (1958).

88. NEW YORK LAW REVISION COMM., LEG. DOC. No. 65(A), REPORT AND RECOMMENDATIONS RELATING TO ADMINISTRATIVE PROCEDURE ACT 49-50 (1965).

89. KY. LEGISLATIVE RESEARCH COMM., *op. cit. supra* note 85, at 87.

90. See S. 1663, 88th Cong., 1st Sess. § 5(g) (1963).

91. See S. 1879, 89th Cong., 1st Sess. § 1005(c) (1965). The staff as a group may be one source of information for agency heads in agencies concerned primarily with rate proceedings. See Cramton, *supra* note 65, at 278-79.

92. REVISED MODEL ACT § 9(e), quoted *supra* note 17.

is apparent that the prosecuting arm of the agency must be certain that the special knowledge possessed by the agency experts is presented or read into the record—probably at the hearing.[93] This procedure is too burdensome, time-consuming, and expensive to be practical.[94] Fairness certainly does not require the judiciary to include its off-the-record thoughts or clerks' memoranda in the record. Furthermore, incorporation of memoranda and reports would provide fertile grounds for a delaying inquiry into collateral issues concerning the accuracy and completeness of the items. However, there is substantial support for the Revised Model Act's insistence that there be communication only when there is an opportunity for all parties to participate. For example, in *Mazza v. Cavicchia*,[95] Chief Justice Vanderbilt, writing for the majority, held that the initial report or decision made by the hearing examiner must be communicated to both sides.[96] In dicta the majority also indicated that all other items which are designed to influence the decision maker must be similarly communicated to the parties.[97] It has been suggested that one serious shortcoming of the reasoning in *Mazza* (and hence also of the provisions of section 13) is the failure to distinguish and approve proper consultations between decider and agency staff.[98] Consultations which add undisclosed evidence or provide a substitute for presentation of facts at the hearing are a recognized evil,[99] but there is a crucial distinction between secret evidence and off-the-record ideas,[100] since the latter can be vitally important to a full consideration of all aspects of a situation. For this reason, the judiciary commonly uses law clerks to analyze and evaluate the record and present ideas to the judges, who then analyze and argue among themselves the merits, ideas, and policies of the case. However, there seems to be just as great a need for a decider of contested agency cases to consider new ideas and to

93. The requirements of the act are ambiguous. Section 10(4), dealing with official notice, stipulates that "parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed . . . ." Inclusion of "or otherwise" clouds the whole requirement.

94. See BENJAMIN, *op. cit. supra* note 65, at 210-12.

95. 15 N.J. 498, 105 A.2d 545 (1954) (state liquor commission).

96. *Id.* at 503, 105 A.2d at 547-48.

97. "It is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert." *Id.* at 516, 105 A.2d at 555. This principle and the *Mazza* decision are discussed with approval in Schwartz, *Institutional Administrative Decisions*, 4 J. PUB. L. 49, 85 (1955). *But cf.* T.S.C. Motor Freight Lines, Inc. v. United States, 186 F. Supp. 777 (S.D. Tex. 1960), *aff'd sub nom.* Herrin Transp. Co. v. United States, 366 U.S. 419 (1961).

98. See 2 DAVIS, *op. cit. supra* note 87, § 11.09; 54 COLUM. L. REV. 1307, 1309 (1954); 68 HARV. L. REV. 363, 364 (1954).

99. See BENJAMIN, *op. cit. supra* note 65, at 210.

100. See authorities cited note 98 *supra*.

analyze and evaluate record evidence.[101] The technical nature of many fields may demand considerable expert assistance in these tasks.

The requirement that all matters, including those officially noticed, must be entered on the record and not be obtained ex parte[102] also fails to distinguish adjudicative facts—those "concerning the immediate parties"[103]—from legislative facts—general facts not ordinarily concerning the parties to the case.[104] Adjudicative facts must be developed and supported on the record, whereas "findings or assumptions of legislative facts need not be, frequently are not, and sometimes cannot be supported by evidence."[105] The judiciary frequently and quite properly obtains legislative facts by an ex parte process without offering support on the record.[106]

A permissible procedure would be to have staff experts present their evaluations or other contributions to the decision maker "upon notice and opportunity for all parties to participate."[107] However, such a presentation may be tantamount to a new hearing or a reopened hearing entailing great delay and expense. A better solution is Professor Davis' proposal that the decider consult experts as needed and then make the results known to all parties. Objections by way of briefs or oral argument might then be permitted.[108] Whatever form such arrangements may assume, it appears that some straightforward mode of getting information to the decision maker is necessary. Prohibiting communications is no solution, and permitting communications only "upon notice and opportunity for all parties to participate" seems inadequate and extremely awkward.

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101. The necessity for evaluating record evidence has been recognized by an official spokesman for the American Bar Association. See *Hearings on S. 1160, S. 1336, and S. 1879 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 100 (1965) (testimony of Robert M. Benjamin). A principal purpose of the ex parte communication provisions in the proposed Kentucky act is to give decision makers off-the-record ideas from impartial staff members while protecting the parties against the use of extra-record facts. See KY. LEGISLATIVE RESEARCH COMM., *op. cit. supra* note 85, at 88; *cf.* DAVIS, *op. cit. supra* note 59, at 226.

102. See REVISED MODEL ACT § 9(e)(3).

103. 2 DAVIS, *op. cit. supra* note 87, § 15.03. For added discussion relative to adjudicative facts, see 1 *id.* §§ 7.02, 7.04.

104. Legislative facts are facts "which help the tribunal to exercise its judgment or discretion in determining what course of action to take." *Id.* § 15.03.

105. *Ibid.* "Administrative tribunals in making their findings are free and indeed required, to draw upon the entirety of their specialized experience, which is necessarily undisclosed in the record," Feinstein v. New York Central R.R., 159 F. Supp. 460, 464 (S.D.N.Y. 1958).

106. See generally 2 DAVIS, *op. cit. supra* note 87, § 15.03 (Supp. 1965).

107. REVISED MODEL ACT § 13, quoted *supra* note 14.

108. See BENJAMIN, *op. cit. supra* note 65, at 213; DAVIS, *op. cit. supra* note 83, at 38, problem 212; 2 DAVIS, *op. cit. supra* note 87, § 11.12; text accompanying notes 88-91 *supra*.

D. *Narrow Range of Applicability*

Adjudication—the contested-case process—is commonly pictured as a two-stage procedure. The first stage involves correspondence, conferences, interviews, inspections, and negotiation.[109] If this initial stage fails to dispose of the problem satisfactorily, then the agency must resort to the second stage, which involves the formal hearing apparatus. It is only at this second stage that the provisions governing contested cases are applicable.[110] Thus, there are many cases which involve determinations of private rights and duties but are not governed or even affected by the procedural safeguards under the Revised Model Act. Furthermore, the realities of agency adjudication do not conform precisely to this two-step model. Instead, the informal activity of the initial stage is carried over and continued during the formal process.[111] Research conducted by Professor Woll shows that extensive use of informal processes has been made from the very beginning in many federal agencies, and that a trend toward the use of informal processes, which are perhaps inherent in administrative adjudication,[112] is greatly increasing today in nearly all agencies.[113] Thus, the contested-case provisions may actually interfere with the most effective means of administrative adjudication.

As a result of his research, Professor Woll has formulated the hypothesis that "requirements of public policy, *expertise,* and speed have rendered administrative adjudication today primarily informal in nature."[114] This hypothesis is quite at odds with the theory that agency determinations of private rights and duties are basically similar to decisions of the judiciary. The hypothesis sharply questions attempts to separate adjudication as a function independent of agency influence. Furthermore, if section 13 is indicative of an overriding policy in favor of minimal procedures to guide deter-

109. These procedures are examined in detail in WOLL, ADMINISTRATIVE LAW, THE INFORMAL PROCESS (1963). Articles by the same author on portions of the same subject are Woll, *The Development of Shortened Procedure in American Administrative Law,* 45 CORNELL L.Q. 56 (1959); Woll, *Administrative Law Reform: Proposals and Prospects,* 41 NEB. L. REV. 687 (1962); Woll, *Informal Administrative Adjudication,* 7 U.C.L.A. L. REV. 436 (1960).

110. Contested case procedures are required only when "the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." REVISED MODEL ACT § 1(2). "By law" apparently includes situations in which only a constitutional requirement exists, as well as those in which a statute provides for a hearing. *Cf.* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

111. See WOLL, *op. cit. supra* note 109, at 28.

112. See *id.* at 29.

113. See *id.* at 101, 142, 164.

114. *Id.* at 2. Professor Woll uses the term "adjudication" in the sense of making a decision disposing of the case, rather than a particular statutory procedure to be followed when an opportunity for hearing is required by law.

minations of private rights and duties in particular factual settings, then the absence of any safeguards in cases where the formal hearing stage is not reached may constitute a serious gap in the effectuation of this policy objective. Section 9(d) of the Revised Model Act responds weakly to the problem by providing that "unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default."[115] At best, this section merely recognizes that informal procedures do exist. Neither it nor any other section of the act encourages prompt disposition of matters or requires the agency to disclose information or establish internal restraints on otherwise unchecked power.[116]

Proper recognition of informal processes, as well as adequate provisions governing their use in a procedural statute, would ensure fairness without weakening an efficient and useful tool of administrative agencies. In fact, informal procedures may be just as desirable to the respondents. The advantage of these procedures is twofold. In the first place, the real foundation for meaningful decisions lies in the various contacts with the parties which are established through other agency functions, such as promotion of the industry. These contacts supply basic background data and establish the channels of mutual understanding necessary for effective regulation.[117] Second, encouraging informal exchanges could remove the necessity for severing communications simply because some arbitrary point termed "formal adjudication" is reached. It is highly artificial and sometimes a bit meaningless to impose prohibitions on consultation between the hearer and a party concerning information freely exchanged at an earlier point.[118] However, the parties receive the full advantages of informal procedures only when the use of such procedures conforms to notions of due process and fundamental fairness. For example, a conference of all parties in which information is freely exchanged offers the opportunity to stir the mind of the deciders, to examine tangential items, to learn the agency's thinking, and to clarify positions and challenge premises.[119] Such a procedure would appear far superior to the prohibition of ex parte communications as a method of ensuring that an argument reaches the

115. REVISED MODEL ACT § 9(d).

116. REVISED MODEL ACT § 2(a) reads: "In addition to other rule-making requirements imposed by law, each agency shall: . . . (2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency . . . ." However, there is no provision regulating the content or scope of the required agency rules.

117. See WOLL, *op. cit. supra* note 109, at 44.

118. *Cf.* Benjamin, *A Lawyer's View of Administrative Procedure—The American Bar Association Program*, 26 LAW & CONTEMP. PROB. 203, 234 (1961); *Hearings on S.I. 3827 and A.I. 5728 Before State of New York Senate and Assembly Committees on the Judiciary* 79, May 11, 1965 (testimony of Robert D. Brooks).

119. See Feller, *Administrative Law Investigation Comes of Age*, 41 COLUM. L. REV. 589, 596 (1941).

minds of the deciders. A respondent who is able to confront the staff in discussion, plead his case, and learn their views may feel far more protected than with elaborate and awkward formal hearing procedures. In addition, round-table conferences might be the most feasible way for small agencies to conduct their affairs, since the staff is usually inadequate for a real separation of functions or for full compliance with section 13.

The advantages of fairness and protection for the respondent are present, however, only if there is assurance that the agency is disclosing in good faith its position and the information available to it. Without rules or safeguards in an administrative procedure statute, it is in the sole discretion of each agency to conform its informal procedures to basic standards of fairness through the use of internal checks, completely open conferences, or other devices.[120] Thus, a statutory standard is needed to ensure that fairness is observed.[121] Perhaps the best solution is to impose a standard of good faith disclosure of relevant information, including testing procedures and inspection reports, on both the agency and the parties. Any requirements beyond this general safeguard must vary with the subject matter entrusted to the agency. For instance, standards of equitable operation under blue sky laws are not likely to be identical to standards of fairness in the proceedings of a state athletic commission or liquor authority. Thus, state legislatures should incorporate more specific standards into the acts establishing each agency, with a general cross reference to the basic standard imposed by the state's standard administrative procedure act.

IV. Conclusion

Since the Revised Model Act focuses on the heretofore neglected requirements of state agencies, it must be viewed as a beneficial contribution to the area of administrative government. However, the contested-case procedures are open to extensive criticism. In the first place, provisions dealing with ex parte communications by the decider are sufficiently ambiguous to allow agencies to avoid their impact. The status of hearing examiners, personal assistants, and ex parte discussions of policy all need further clarification. Second, substantive operation of the provisions can be challenged for impracticality as applied to small state agencies, for failure to distinguish proper from improper communications, for a general blindness to the nature of agency government, and for ignoring the extensive use

120. See generally Woll, *op. cit. supra* note 109, at 186-89.

121. Standards for some types of informal adjudication were proposed in Commission on Organization of Executive Branch of the Gov't, Task Force Report on Legal Services and Procedure 170 (1955). See 1 Cooper, State Administrative Law 127 (1965).

of informal procedures. The result is an act filled with uncertainty and debatable validity.

Before enacting the Revised Model Act, state legislatures should give serious consideration to modification of section 13. Its several ambiguities can probably be eliminated without real problems. With regard to off-the-record consultations in the context of formal hearings, there is considerable merit in permitting the hearing examiner to consult with agency members and with staff experts who have not participated in the investigation or prosecution of the case. Similarly, agency members, in rendering a final decision, should be able to consult with those same staff members. Such a procedure would help ensure the availability of critically important expert record evaluation and policy guidance. As a realistic and desirable safeguard for the respondent, this method of handling the problem might also require that an explanation of the consultation and its results be given to all parties. At the same time, some attention should be given to imposing minimum standards on the informal process so that the wide range of informational and regulatory devices present in that process are used fairly.

Only by a substantial modification of contested-case procedures along the lines of the above suggestions will this portion of the Revised Model Act meet the needs and realities of administrative law in the states. Adoption without alterations seems inappropriate. A forthright mode of dealing with the demands and stresses found in the agency setting seems healthier for the life of the administrative process than attempts to remove these inherent difficulties.[122]

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122. *Cf.* Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652 (1965).