STAFF REPORT IN SUPPORT OF CONFERENCE STATEMENTS ON ABA PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT

ADMINISTRATIVE CONFERENCE REPORT ON ABA PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT*

(May 24, 1973)

RESOLUTION NO. 1[1]

Resolution No. 1, elaborated upon in the implementing Recommendation, proposes a fundamental change in the statutory boundary line between rulemaking and adjudication. The term "rule" is presently defined by the Administrative Procedure Act as "the whole or a part of an agency statement of general or particular applicability and future effect. . . ." 5 U.S.C. 551(4). Recommendation No. 1 would delete the words "or particular," thus redefining "rule" to mean agency

*This Report has been prepared by the Chairman's Office of the Conference. It is intended accurately to reflect the factors considered by the Council and the Committees responsible for the Statement. It does not, however, have their express endorsement.

[1]The proposed Statement on Resolution No. 1, as presented to the Assembly by the Council and by the Committees on Rulemaking and Agency Organization and Personnel, was as follows:

> The Conference approves in principle Resolution No. 1, calling for improved definitions of "rule" and "order" so as to distinguish clearly between the nature of rulemaking and the nature of adjudication. Specifically, we agree that agency action of tightly focused applicability should be classified as adjudication whether or not it has future effect. This, we believe, is in keeping with the traditional understanding of rulemaking as a process akin to legislation, which applies to open classes of persons rather than identified individuals.
>
> In endorsing the proposed redefinition, the Conference does not imply that fixing the permissible rates of a specific enterprise—the agency activity principally

action "of general applicability and future effect." Agency action of particular applicability and future effect—*e.g.*, ratemaking— would be reclassified as "adjudication."

The words "or particular" in the present definition of rule have long been a source of puzzlement to practitioners and students of administrative law. As Professor Kenneth Davis has observed, under a literal application of the words almost every agency process would qualify as rulemaking; "adjudication" would cover nothing but licensing, and that only because the statute specifically says so. K. Davis. Administrative Law Treatise §502, at 295 (1958). Early drafts of the Act defined "rule," in accordance with the accepted meaning, as "any agency statement of general applicability. . . ." The words "or particular" were added at the eleventh hour—after enactment by the Senate. (H. Rep. No. 1980, 79th Cong., 2d Sess. App. A, p. 283 note 1 (1946)). The House Judiciary Committee explained that the "change of language to embrace specifically rules of 'particular' as well as 'general' applicability is necessary in order to avoid controversy and assure coverage of rulemaking addressed to named persons." The phrase was added, in Professor Davis's view, "to make sure that what has traditionally been regarded as a rule will still be a rule even though it has particular instead of general applicability." Davis, Administrative Law Treatise §502, at 296 (1958).

The proposed redefinition would have a number of specific procedural consequences. Part of formal rulemaking would become formal adjudication, hence subject to the separation-of-functions and manda-

---

affected—should be treated in all respects like other formal adjudication. To the contrary, although we believe that ratemaking, like initial licensing, should be made subject to the separation-of-functions requirements of 5 U.S.C. §554(d) (with the reservations discussed below in connection with Resolution No. 3), we are of the view that it should not be subject to the mandatory initial decision requirement of 5 U.S.C. §557(b) and should continue to be governed by the provision of 5 U.S.C. §556(d) authorizing agencies to require that all evidence be submitted in writing. Any amendments of the Act necessary to achieve these results should accompany the proposed redefinition of rulemaking.

We note that, under the proposed definition, part of what is now informal rulemaking would become informal adjudication, and thus no longer be subject to the notice-and-comment requirements of 5 U.S.C. §553. The question of appropriate procedures for informal adjudication is a subject deserving much further study. Meanwhile, we believe agencies should continue to accord informal action of particular applicability and future effect (though reclassified as adjudication) the procedural protections prescribed for informal rulemaking by 5 U.S.C. §553.

The discussion in text is addressed to the above proposal, which was substantially amended on the floor of the Assembly.

tory-intermediate-decision requirements of Sections 554 and 557. Part of informal rulemaking would become informal adjudication, hence no longer subject even to the notice-and-comment requirements of Section 553. Conceivably, some agency action of particular applicability might be classified as informal rulemaking under the present definition but as formal adjudication under the new one, either because Congress might be more inclined to formalize a proceeding defined as adjudication or because the courts might be more inclined to construe an ambiguous statutory hearing requirement as requiring formality (*i.e.*, determination on-the-record).

The principal argument for the Recommendation—and the basis on which the proposed Conference Statement supports it—does not depend upon the merits of these specific consequences. It is simply that omission of the phrase "or particular" would yield a sounder, more logical definition of "rule," a definition in keeping with our common understanding of rulemaking as a process, essentially legislative in character, resulting in decisions applicable to open classes of persons, not merely to named individuals or closed classes. According to this view, the present definition of "rule" does not reflect a basic Congressional judgment that the generality or particularity of agency action is procedurally immaterial; it represents an essentially ad hoc decision to confer the status of rulemaking on certain governmental functions—chiefly ratemaking—that had historically been performed by legislatures but differ fundamentally from other legislative processes. This faulty definition, it is argued, has been conducive to muddy procedural thinking and may well have contributed to the unfortunate Congressional tendency to overformalize rulemaking and underformalize adjudication. Setting the categories straight might help to arrest this tendency.

Against all this, one can argue that the value of the new definition would be outweighed by the difficulty of applying it. For the first time, courts would have to determine whether agency action is of general or particular applicability, an often difficult question which need not be answered under the present statute since nothing hinges upon it. The borderline cases would be those involving agency action general in form but particular in impact or intent—as when a "rule" not addressed to named parties in fact applies to one or a very few individuals. This objection would be more telling were it not for the fact that cases troublesome under the proposed revision are potentially troublesome even now. A proceeding "that in form is couched as rule-

making, general in scope and prospective in operation, but in substance and effect is individual in impact and condemnatory in purpose." (*American Airlines v. CAB*, 359 F.2d 624, 631, *cert. denied* 385 U.S. 843 (1966)) may even now be unmasked as an imposter and subjected to the more rigorous procedures required of formal adjudication. And even agency action concededly rulemaking under the statute may, because of its particularity of impact, be held to require trial-type procedures as a matter of constitutional due process. (See *Anaconda Co. v. Ruckelshaus*, 31 Ad. L.2d 1004 (D. Colo 1972)). Arguably, it is preferable that the issue of "particularity" be resolved at the statutory rather than at the constitutional level, and the proposed redefinition of "rule" would make this possible.

It remains to examine the specific consequences of the proposed redefinition (a) in the area of informal agency action and (b) in the area of formal agency action.

Informal Agency Action

Agency action of particular applicability and future effect is presently classified as rulemaking. Unless required by statute to be based on the record of an administrative hearing, it is *informal* rulemaking. Under Recommendation No. 1, it would become informal adjudication. The APA prescribes trial-type procedures for formal rulemaking and adjudication, notice-and-comment procedures for informal rulemaking and no procedures at all for informal adjudication. Thus, adoption of Recommendation 1 would relax, rather than tighten, the procedural requirements for this important class of agency action. This might well be considered an undesirable result. To be sure, ABA Resolution No. 11 proposes certain procedural reforms in the area of informal adjudication, requiring each agency to establish procedural rules calling for at least one level of internal review and providing that notice of adverse action be accompanied by a written statement of reasons. This Resolution, however, presents formidable difficulties of its own. See p. 456, *infra*. Even if adopted, moreover, Recommendation No. 11 would seem to afford less in the way of procedural protection than the notice-and-comment requirements of Section 553, which likewise demand a statement of reasons and in addition provide opportunities for written, and where appropriate, oral comment and argumentation. The proposed Conference Statement, in accordance with the views of the Committee on Rulemaking, suggests that agencies continue to use these notice-and-comment procedures for informal action of par-

ticular applicability and future effect, even though such action be reclassified as adjudication.

Formal Agency Action

Much more important are the consequences of Recommendation No. 1 in the area of formal agency action. These consequences are worth spelling out.

1) Section 554(d) of the Act, which applies to formal adjudication but not to formal rulemaking, provides that a hearing examiner may not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate" or "be responsible to or subject to the supervision or direction of an employee or agency engaged in the performance of investigative or prosecuting functions for an agency." It further provides that an "employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings." These "separation of functions" requirements do not apply, however, "in determining applications for initial licenses" or "to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers." Recommendation No. 1 would make these requirements applicable to certain type of proceedings presently classed as rulemaking—*e.g.*, approval of corporate reorganizations by the SEC—but not to ratemaking, which would still be expressly excepted. Only the elimination of that exception—as proposed by ABA Recommendation No. 3—would bring separation-of-functions to ratemaking.

2) Section 556(d) provides that a party to any formal proceeding "is entitled to present his case or defense by oral or documentary evidence . . . ," except that in "rulemaking or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." The negative implication is that in matters of adjudication other than initial licensing or claims determination, no party may be denied the opportunity for oral presentation of testimony, at least where material facts are in issue. Under Recommendation No. 1, a party to a ratemaking proceeding could presumably demand that opportunity. This result—surely undesirable—could be avoided only by carving out a specific exception for ratemaking, and the proposed Conference Statement so recommends.

3) Section 557(b) of the Act requires an intermediate decision—either initial or recommended—by an administrative law judge, in all cases other than rulemaking or initial licensing. There the intermediate decision may take the form of a tentative decision of the agency heads or a recommended decision of a responsible staff member, or may be omitted altogether if the agency finds on the record "that due and timely execution of its functions imperatively and unavoidably so requires." Under Recommendation No. 1, that exception would no longer apply to ratemaking or other rulemaking of particular applicability but would continue to apply to initial licensing and to rulemaking of general applicability. If the intermediate decision procedure is to remain flexible in ratemaking—as the proposed Conference Statement recommends in connection with Resolution No. 8—adoption of Recommendation No. 1 must be accompanied by a specific exception for "ratemaking," along with rulemaking and initial licensing.

Recommendation No. 1, however, cannot be considered in isolation from other components of the ABA package which deal specifically with separation of functions and intermediate decision. Recommendation Nos. 3, 4 and 8, if adopted without modification, would eliminate all functional differences between on-the-record adjudication and on-the-record rulemaking (except that created by the written evidence provision of Section 556(d)) and thus deprive Recommendation No. 1 of nearly all practical consequence in respect to formal proceedings.

Thus, if one's goal is to establish a uniform procedural rule for all agency action required by statute to be based on a hearing record—the goal which underlies Recommendation Nos. 3 and 8—Recommendation No. 1 is neither necessary nor even helpful; it is redundant. If, on the other hand, one's goal instead is to establish a uniform rule for a narrower class of agency action—namely, that which is both on-the-record and of *particular applicability*—Recommendation No. 1, along with certain other changes, is a convenient means. Under this principle, the separation-of-functions and mandatory-intermediate-decision requirements would apply to initial licensing, ratemaking, and other proceedings involving named parties but not (as under Recommendation Nos. 3 and 8) to rulemaking of general applicability. This result would be accomplished by adopting Recommendation No. 1, deleting the initial-licensing and ratemaking exceptions in Section 554(d) (without transferring the separation-of-functions requirements, as under Recommendation No. 3), and deleting the initial-licensing (but not the rulemaking) exceptions in Section 557(b).

The proposed Conference Statement does not, however, adopt the approach just outlined. It takes the position that ratemaking of particular applicability (though reclassified as adjudication) ought not be made subject to the mandatory initial-decision requirement of Section 557(b)—a position, it might be added, not inconsistent with ABA Recommendation No. 8 (which would authorize omission of the presiding officer's decision, upon appropriate findings, not only in ratemaking and initial licensing, but in all formal agency proceedings). The proposed Statement expresses the further view that ratemaking, along with initial licensing, should be subject to the separation-of-functions requirements of Section 554(d), with the limited exceptions discussed in connection with Resolution No. 3. See p. 433, *infra*.

RESOLUTION NO. 2

ABA Resolution No. 2 calls for "broadening the coverage of provisions for notice and opportunity for public participation in rulemaking . . . by limiting . . . exemptions now included in the Administrative Procedure Act. . . ." To implement this resolution the ABA Recommendation calls for deleting from 5 U.S.C. §553(a)(2) the exemption for matters relating to "public property, loans, grants, benefits or contracts" and substituting for the present exemption to Section 553(a)(1) for military and foreign affairs functions an exemption for "rulemaking which is specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy."

The Administrative Conference has in its Recommendation No. 69–8 already called for elimination of the exemption for matters relating to "public property, loans, grants, benefits or contracts." The Conference's Committee on Rulemaking and Public Information has been studying proposals to narrow or eliminate the military and foreign affairs exemption. The Committee has had the benefit of a comprehensive report from its consultant, Professor Arthur Bonfield, which concluded that the exemption for military and foreign affairs functions should be deleted, perhaps with substitute language for matters requiring secrecy, along the lines of the ABA's Recommendation:

> The reasons advanced to justify the current exemption from Section 553 for all rule-making involving a "military or foreign affairs function" are insufficient. At most, those justifications dictate the need for a more narrowly tailored exemption from usual rulemaking proceedings than is currently found in Section 553(a)(1). The existing "impracticable, un-

necessary, or contrary to the public interest" provision found in Section 553(b)(B) and the "good cause" exemption found in Section 553(d)(3) provide such an exclusion from the requirements of Section 553 (b) – (d). They would work an adequate accommodation of the competing interests involved, carefully balancing the need for public participation against the need for effective, efficient, expeditious, and inexpensive government administration. And an exemption from the right to petition conferred by Section 553(e) seems no more necessary or justifiable for Subsection (a)(1) rulemaking than for rulemaking already covered by Section 553. When a special need for secrecy appears in cases of rulemaking involving a "military or foreign affairs function," it can adequately be handled by Section 552(b)(1). If this is not sufficient, the language of Section 552(b)(1) can be expressly carried over and incorporated into Section 553. That is the ABA proposal. It seems wise because it will reassure the agencies involved that their legitimate needs for secrecy will in no way be interfered with by the repeal of Section 553(a) (1).

The Committee is generally favorable to Professor Bonfield's conclusion and has been attempting to formulate a Conference Recommendation on the subject. It has consulted with the interested agencies. The Departments of State, Defense and the Treasury have expressed opposition to elimination of the exemption on three grounds:

1) There are situations where the procedures of notice-and-comment rulemaking are inappropriate because of a need for secrecy in the interest of national defense or foreign policy.

2) Some of the affected agencies, particularly the Department of Defense, make a vast number of rules and other directives arguably considered rules as to which public procedures would be inappropriate. It would be burdensome for the agencies to have to apply on a case-by-case basis the statutory exception that requires a finding that public procedures are "impracticable, unnecessary or contrary to the public interest," 5 U.S.C. §553(b)(B).

3) The agencies are unwilling to abandon the security of the broad present exemption in favor of the "impracticable, unnecessary, or contrary to the public interest" test, the applicability of which may be doubtful in given cases and possibly subject to judicial review.

The Committee recognizes there is some force in these points and is attempting to draft a recommendation to meet them. It does not, however, presently have a definitive solution to propose.

The text of the proposed response to ABA Resolution No. 2 is intended to endorse the general terms of the resolution, to point to our previous action respecting the so-called proprietary exemption, and to express support for elimination or narrowing of the military-foreign

affairs exemption conditional upon the feasibility (not yet conclusively established) of achieving it without impairing military or foreign affairs operations.

RESOLUTION NO. 3

Resolution No. 3, and the Recommendation designed to implement it, would bar agency employees engaged in investigative or prosecuting functions in an adjudicatory or formal rulemaking proceeding from participating *ex parte* in the decision of that proceeding by agency heads, review boards, or hearing examiners. Such a bar is already imposed by Section 554(d) in all formal proceedings other than rulemaking, ratemaking, and initial licensing. The ABA proposal would remove these limitations.

In approaching the separation-of-functions problem, it is well to make clear what the issue is not. It is not whether agency members, in rulemaking and initial licensing, should be free to consult staff advisors on an informal basis concerning pending proceedings. Such consultation would be permitted even under the ABA proposal and, nearly all would agree, is essential to wise and informed decisionmaking. Nor is such consultation logically incompatible with the use of trial-type procedures in the hearing phase; indeed the two are complementary. Trial-type procedures are designed for questions of specific fact; they assure maximum participation and input from those in possession of the relevant evidence. Informal consultation with staff, on the other hand, is designed for questions of policy; it assures maximum participation and input from experts best able to illuminate those questions. The requirement that agency action be based on the record pertains to factual not policy questions. So long as staff consultants do not abuse their position by seeking to introduce additional evidence, their *ex parte* advice on matters of policy does no violence to the "on-the-record" requirement.

The narrow question, rather, is whether agency members should be free to consult, off the record, the very staff members who, directly or indirectly, have played an adversary part in the investigatory or hearing stage of the particular case to be decided, or whether, instead, a wall of separation should be established between the staff which litigates and the staff which advises. The problem arises from the hybrid, quasi-legislative, quasi-judicial nature of formal rulemaking, ratemaking, and initial licensing. In legislation, nothing is thought amiss if those who advocate policy likewise decide policy and do so on the basis

of all available information, whatever its source. In adjudication, however, contrary norms prevail: no man may judge his own cause and decision must be based solely on evidence developed on the record by means of trial-type procedures. This neat dichotomy begins to break down when statutes require rules of general impact to be made "on the record" by means of trial-type procedures. Given the adversary format and the exclusion of non-record evidence, it seems, at first blush, anomalous to permit backstage consultation between agency heads and staff members who have played a partisan role at the hearing. Yet most thoughtful proceduralists strongly disapprove of formality in rulemaking of general applicability. The Administrative Conference, for its part, has recommended against the requirement of trial-type procedures in rulemaking of general applicability. (Recommendation 72–5). It is in keeping with that position that the proposed Statement opposes the extension of the separation-of-functions principle to rulemaking of general applicability.

The problem is more difficult, however, in the case of ratemaking and other named-party proceedings. Here, everyone agrees that adversary procedure and on-the-record decision are appropriate. The impact of a rate decision, and the factual determinations on which it rests, are particular, not general. Not broad facts about the industry or the economy, but specific facts about the costs, service, and revenues of a particular carrier or utility are in issue. True, questions of policy loom larger in ratemaking (and initial licensing) than in the mine-run of adjudication, but not so large as to warrant the use of legislative-type in place of trial-type procedures. It is plausible, therefore, that separation of functions should be required along with the other incidents of adjudicative procedure. In this view, it is basically unfair that one party to a controversy—the agency's staff—should have privileged access to the decisionmaker with no opportunity for reply by its adversary. One can further argue that comingling of functions impairs the effectiveness, no less than the fairness, of the decisional process. A man who doubles as adversary and advisor cannot do either task well. The advocate, having committed himself to a position, cannot be relied upon thereafter for truly objective advice; the advisor, viewing the scene from an Olympian perspective, cannot be an effective voice for interests—notably the consumer interest—that would otherwise go unrepresented. The advisory role is thus compromised, the adversary role devitalized.

The opposing considerations, however, are equally potent. From the standpoint of effectiveness it is possible that duality of function brings

synergistic benefits. Close and continuing familiarity with the thinking of agency heads may enable the trial staff to channel its presentation along more relevant lines; close and continuing familiarity with the particular case, and with the agency's caseload in general, may enable the advisory staff to give more accurate and informative guidance. And even from the standpoint of fairness, the desirability of separation is open to question. Given that agency heads will inevitably seek the *ex parte* advice of trusted staff officials, the parties would surely be better off if the views and arguments of these influential advisors were aired on the record and exposed to rebuttal rather than merely whispered, unchallenged, in the royal ear. Separation of functions, by isolating the advisor from the hearing, magnifies the likelihood that parties may be defeated by arguments they have had no chance to meet. This factor must, of course, be weighed against the possibility that separation would produce more objective advice; that prospect, however, may well be illusory either (a) because even advisor-advocates are capable of objectivity, or (b) because institutional loyalities may exert some influence even upon formally separate components of a single agency.

As a practical matter, every major federal agency engaged in licensing or ratemaking, save only one, already adheres voluntarily to the principle of separation of functions in that agency heads refrain from consulting staff members who participate, or supervise those who participate, in investigation or hearing. The lone exception is the FPC, which, at its weekly meetings, regularly receives advice from high-ranking staff officials (the general counsel and his principal assistants and the chiefs and deputy chiefs of the major technical bureaus) who, in turn, supervise lawyers and technicians at the hearing level. In practice, the separation-of-functions issue may thus come down to the narrow question whether it is worthwhile forcing the FPC to abandon this practice. The Commission would be required to sever either the advisory link between the agency heads and the senior staff or the supervisory link between senior and trial staffs. Either separation would be costly.[2]

[2]If the top officials continued in their supervisory role, a separate staff of advisors would have to be assembled at the Commission level. To provide the Commission the kind of advice to which it is accustomed, such a staff would have to include Indians as well as chiefs, enough of them to keep close running tab on the agency's heavy caseload. Testifying in 1967 before a Senate Subcommittee, Chairman Lee White estimated that such a staff would add 100 new employees to the Commission's present complement of 1200. Nor is it clear that a group of experts comparable in ability and experience to the present senior staff of the Commission could in fact be recruited for faceless, nameless, glamourless jobs as behind-the-scenes advisors. And,

The position taken in the proposed Conference Statement—reflecting the views of the Committee on Agency Organization and Personnel—represents, with respect to ratemaking and initial licensing, a middle view. The General Counsel of the FPC would not be disqualified from advising the agency solely because the attorneys who handled the case below were subject to his authority. Nor would he be barred (as under the ABA Recommendation) because of his personal participation in factually related cases or in cases presenting similar or related questions of law or policy. The only barrier would be his own active participation in the particular case *sub judice*—for example, by helping to design the tactics and strategy of the litigation, or by instructing or counselling the staff attorneys of record. Admittedly, difficult borderline cases can be anticipated in which the role of the supervisor is arguably *de minimis* or only indirectly related to the particular case. Nevertheless, a separation-of-functions requirement that distinguishes between actual participation and unexercised supervisory authority seems preferable to either of the extreme alternatives.

RESOLUTION NO. 4[3]

The ABA's Resolution No. 4 proposes amendment of the Administrative Procedure Act for the purpose of "[p]rohibiting *ex parte*

---

even if a suitably qualified staff of advisors could be assembled at acceptable cost, isolation of the trial staff from the Commission and its current thinking might well diminish the usefulness and relevance of its presentation. The problem of recruitment might be eased somewhat if the present titled officials remained as advisors while doffing their supervisory hats. They might be less difficult to replace in the latter than in the former capacity. It is possible that counseling staff attorneys on points of difficulty at the trial level may demand less maturity and experience than counseling the Commission on matters of policy at the decision level. Yet even on this score one cannot be sanguine. The FPC has experienced high turnover of late and finds it difficult to replace even the foot soldiers, let alone the lieutenants. Moreover, the "FCC model"—a separate trial staff isolated from the senior officials of the relevant bureaus—might be expected to work rather better in an agency which has very few cases than in one which has a steady stream and all the attendant problems of coordination and consistency.

[3]The proposed Statement on Resolution No. 4, as presented to the Assembly by the Council and by the Committee on Agency Organization and Personnel, was as follows:

> The Conference approves in principle Resolution No. 4, which calls for prohibiting *ex parte* communications between agency members and interested persons outside the agency on any fact in issue in an adjudicatory or rulemaking proceeding subject to 5 U.S.C. §§556 and 557.

The discussion in text is addressed to the above proposal, which was significantly amended on the floor of the Assembly.

communications between agency members and parties or other interested persons outside the agency on any 'fact in issue' in the decision of an adjudicatory or formal rulemaking proceeding." In implementation of this Resolution, the Administrative Law Section of the ABA has prepared and revised draft legislation setting forth in some detail the terms of such a prohibition and the consequences of violation.

The subject of *ex parte* contacts first gained widespread attention in the 1950's when several well publicized cases involving licenses led to demands for reform. The 1961–62 temporary Administrative Conference considered the problem in detail, and in its Recommendation No. 16 proposed that each agency promulgate *ex parte* rules in accord with general principles endorsed by the Conference:

> Whereas the Administrative Conference deems it essential that the administrative process should be protected from improper influences and that the agencies should take certain action to help achieve these objectives, It Is Recommended That—
>
> Each agency promulgate a code of behavior governing ex parte contacts between persons outside and persons inside the agency which should be based upon the principles set forth below.
>
> The Conference recognizes that it may not be practical for all agencies to adopt a uniform code embodying its recommendations. Some agencies may find it advisable to add to the recommended prohibitions and requirements, while others may find it inadvisable to accept all the recommendations in connection with particular kinds of proceedings conducted by them. The Conference expects that each agency will seek to effectuate the general recommendations in light of the specific considerations of fairness and administrative necessity applicable to each of the proceedings conducted by it.

The Recommendation went on to state in nine numbered paragraphs the recommended contents of such an agency code.

Conceptually, there are several distinguishable policy factors affecting *ex parte* rules, which may lead to the imposition of different sanctions for violation and, to a lesser degree, to differing scope of the rules. The first approach is concerned with the integrity of the decision-making process: all facts and arguments relating to the decision should be available on the public record so that the bases on which the agency is acting are discernible to affected parties and to the courts, the Congress, and the Executive in their oversight functions. Under this rationale, a proper remedy is insertion of *ex parte* communications into the public record. Similar policies are securing the rights of affected parties to participate in the decision-making process, and enhancing the accuracy of decision by insuring that all relevant data and argu-

ment will be subject to adversary testing; to satisfy these objectives, the proper remedy is not merely disclosure, but also an opportunity to rebut the *ex parte* information.

Somewhat different considerations become operative when the *ex parte* communication involves information that is not, in the legal sense, relevant to the issues to be decided—in short, when a powerful "outsider" brings political or personal pressure to bear on the agency decision-maker. In this situation, while disclosure and an opportunity to rebut may deter future misconduct, they would be of little utility in curing the violation, since permitting other parties to respond in the same fashion would convert the proceeding from a process of deciding specific issues on the merits into a political contest. About all that can be done, once the violation has occurred, is to try to remove from the decisional process those who have been the recipients of impermissible contacts. In aggravated circumstances where the *ex parte* contact verges on bribery, professional misconduct or abuse of a public trust, there may also be sufficient ethical and moral grounds to conclude that punishment, discipline or denial of a benefit for the violator is necessary.

A final situation with distinguishable policy overtones is communication from agency decision-making personnel to persons outside the agency. The principal concern in this area is avoidance of actual or apparent prejudgment, and the traditional remedy is disqualification of the decisional personnel in question. It is appropriate to note, however, that here, unlike in the preceding situations discussed, it is not the communication itself so much as the state of mind it evidences which represents the real threat to the decision-making process. Consequently, rigid enforcement of rules as to what may or may not be communicated can mistake the shadow for the substance of the problem.

Beyond the logic of the various remedies for each policy factor, deterrence of future violations is a useful general approach. Thus it may be thought necessary to provide punishment for merely negligent or attempted violations, or for situations where it seems logically inappropriate, in order to prevent others from stepping over the line in the future. In light of this range of policy factors affecting *ex parte* communications, it is not surprising that existing agency *ex parte* rules encompass a variety of approaches, and that the draft legislation contemplates a number of different sanctions.

The basic question presented by the ABA Resolution is whether there is a need for any additional legislative treatment of the problem

in the Administrative Procedure Act. The Act is not now entirely silent on the subject. Section 554 (d) provides that the presiding officer at a hearing shall not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." But Section 554 (d) is applicable only to formal adjudications, and is subject to the additional significant exceptions set forth in clauses (A), (B) and (C) of the subsection, which exclude initial licensing, all ratemaking and communications with agency members themselves. Basically, therefore, the present prohibitions of *ex parte* communications in initial licensing, ratemaking and formal rulemaking depend on constitutional considerations of due process, see *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959); *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966), on inference from the principle set forth in Section 556(e) that the transcript, exhibits and other papers filed in the proceeding constitute "the exclusive record for decision," and on agency rules.

In supporting individual agency rulemaking as against legislation, the 1962 Administrative Conference report advanced two main arguments: legislation would tend to rigidify the prohibitions, thereby making change and improvement difficult; moreover, allowing the agencies to take the initiative would create the impression that the agencies were "setting their own houses in order," thereby improving public confidence in the administrative process. In addition, it could be argued that the tremendous variety in agency procedures, traditions, and affected interests would make uniform proscriptions inappropriate, particularly in light of the broad scope of the proposed legislation discussed below; no matter how carefully the legislation was drafted, there would likely be many instances in which the statute would either permit improper *ex parte* contacts, or impair the quality of decision by deterring useful communications. It has also been suggested that imposing upon the executive departments a rule requiring disclosure of improper *ex parte* contacts may raise questions of executive privilege. Finally, it might be asked whether legislation is warranted, since there have been few recent cases in which courts have found that *ex parte* contacts have tainted an on-the-record proceeding.

On the other hand, there are certain obvious advantages to uniformity in *ex parte* rules, particularly for those who do not confine their participation in administrative proceedings to one or two agencies. Moreover, in the absence of a statute the failure of an agency to promulgate rules dealing with a particular situation may lead a re-

viewing court to reverse on constitutional grounds, and this could undoubtedly impose more of a "strait jacket" on administrative procedure than a statute.

The Conference's Committee on Agency Organization and Personnel considered the ABA Resolution with the assistance of a report prepared by Barry Boyer, of the Conference staff. The Committee concluded that specific legislative treatment in the APA of the problem of *ex parte* communications would be desirable, and it recommended that the Conference endorse Resolution No. 4 in principle.

The proposed endorsement is not intended to commit the Conference at this time on the questions raised by the text of the ABA Recommendation, including whether the APA should contain a detailed prohibition or a general prohibition to be amplified by agency rules, how the statute should deal with communications of data of general significance to an industry which may be relevant to the merits of a pending on-the-record proceeding (see 1962 Conference's Recommendation No. 16, para. 1(d) (4)), or how the agencies should remedy or penalize violations of the prohibition.

RESOLUTION NO. 5

ABA Resolution No. 5 calls for legislation providing that in formal adjudication agencies shall, to the extent practicable, issue uniform rules governing pleadings, discovery, the admission of evidence, requirements of proof, decisions, and appeals, and that such basic rules shall be sufficiently comprehensive to insure fairness and expedition in all phases of the agency process.

Unlike the other ABA Resolutions, which are directed at the Administrative Procedure Act, the proposed amendment to implement this Resolution would revise the Administrative Conference Act. It would establish within the Conference a special Committee on Uniform Rules with authority to draft rules of procedure for formal adjudication which, if not disapproved by the Assembly, would be binding on all affected agencies. The special Committee would also be empowered to grant waivers or modifications of particular rules on petition, as appropriate. Agencies would be permitted to adopt other procedural rules not inconsistent with any effective uniform rule.

In view of the direct applicability of this Resolution, as implemented by the ABA Recommendation, to the functions of the Conference itself, it was reserved for initial consideration by the Council

rather than any single Committee. As indicated in the proposed Conference Statement, the Council has no doubt of the general desirability of uniformity where fairness and efficiency are not impaired—though there was some disagreement among the Council members as to the degree of desirability and the frequency with which such impairment would be an anticipated result. In essence, however, the Council was in agreement with the ABA Resolution, given its qualifying language "to the extent practicable."

The Council's principal concern, in view of the manner of implementation suggested by the ABA Recommendation, was the extent to which determination of "practicability" and framing of necessary exceptions would require the continuing devotion of substantial Conference resources. In order to assess this, the Council requested the informal views of eighteen members of the Conference from fourteen agencies most affected by the proposal,[4] concerning the application to their agencies of proposed texts of nine uniform rules developed after an extensive study by the 1953 Conference on Administrative Procedure. These texts applied to what the Council regarded as probably the simpler of the areas embraced by the ABA proposal—computation of time, service of process, subpoenas, depositions and interrogatories, official notice, presumptions, stipulations and admissions, format/content of decision, and appeals from initial decision. It was thought that if the application of these carefully framed texts on these particular subjects posed substantial difficulties, the implementation of the ABA Resolution in the fashion suggested would indeed be a task of considerable magnitude.

Responses from seventeen members ranged from approval in principle to outright rejection. No member expressing his view of effect on his agency gave outright endorsement to any specific uniform rule. Many expressed little difficulty in accommodating their rules in the areas of computation of time, service of process, official notice, presumptions, and stipulations and admissions. In almost every instance, however, some special language would be required to meet a special agency problem. Members from a number of agencies voiced strong objection to uniform rules in the areas of subpoenas, discovery, form and content of decision, and appeals from initial decisions. In some instances a uniform rule would be inconsistent with statutory au-

[4]AEC; Agriculture; CAB; CSC; FCC; FMC; FTC; FPC; HEW(SSA); ICC; Justice (BNDD, INS, LEAA); NLRB; SEC; Treasury.

thority (subpoena); in others it would be contrary to established agency rules as approved by court decisions (discovery). In sum, the sampling suggested that substantial difficulties of accommodation are involved even with respect to the most mechanical of the rules; and that the difficulties tend to increase in proportion to the substantive impact (and hence, presumably, the significance) of the rule in question.

The Council therefore concluded that, in view of the other matters which may usefully occupy the Conference's attention, it would not be a desirable expenditure of its financial resources and the limited time of its members to be compelled to establish (and grant exceptions from) uniform rules of procedure. This decision of course implies a judgment, not as to the desirability, but as to the degree of desirability, of uniformity as an end in itself. It was felt that the mere lack of standard procedures—especially in those areas where standardization seems more "practicable"—is not the principal barrier to practice before the federal agencies by the unspecialized bar.

RESOLUTION NO. 6

ABA Resolution No. 6 calls for authorizing agencies to establish appeals boards to review decisions of administrative law judges in order to "provide expedited and more thorough consideration of routine cases, and to enable agency members to focus on major policy issues by relieving them from the burden of deciding routine cases."

This Resolution is consistent with Conference Recommendation No. 68–6, which urged agencies with substantial case-loads of formal adjudications to consider establishing intermediate appellate boards and delegating them final decisional authority subject to discretionary review by the agency or alternatively delegating final decisional authority to the presiding officer subject to discretionary review by the agency. The Conference Recommendation also called for amending Section 557 of the APA to clarify the agencies' authority to do so.

The problem that the Conference Recommendation attempted to deal with was that, in the absence of specific authority either in organic statute or reorganization plan, agencies are not empowered to delegate final decision-making authority to the presiding officer or appellate board (unless, of course, there is no appeal, 5 U.S.C. §557 (b)) and must, therefore, consider on the merits any appeal from the initial decision. In agencies with a large volume of cases this detracts considerably from the time agency members have to consider longer-range

problems of regulatory policy. One agency where this has been considered a serious problem is the National Labor Relations Board.

ABA Resolution No. 6 is not, of course, on all fours with Conference Recommendation No. 68–6 because the former does not deal with discretionary review of decisions of administrative law judges. However, this Resolution must be considered together with ABA Resolution No. 8, which calls for "conferring greater authority upon the presiding officer," and, in particular, with that part of ABA Recommendation No. 8 which would add to Section 557 (b) the sentence: "An agency may provide by rule that decisions, or categories of decisions including agency appeal board decisions, become final, unless reviewed by the agency at its discretion." It is this language, or something like it, which is necessary to implement both Resolution No. 6 and Conference Recommendation No. 68–6. (It is doubtful that agencies need new statutory authority in order to create appellate boards; but they need it in order to decline appeals from decisions of such boards).

The proposed Conference Statement calls attention to our Recommendation No. 68–6 and states that Resolution No. 6, taken together with the quoted language from ABA Recommendation No. 8, would implement the Conference Recommendation.

RESOLUTION NO. 7

Resolution No. 7 would require agencies "to the extent practicable and useful to provide by rule for prehearing conferences to facilitate and expedite the determination of the facts and issues involved in the proceeding."

Section 554 (c) provides that in cases of formal adjudication the agency shall give all interested parties opportunity to submit and consider offers of settlement and proposals of adjustment when circumstances permit. Section 556(c)(6) authorizes presiding officers to "hold conferences for the settlement or simplification of the issues by consent of the parties." The ABA's Administrative Law Section concluded that these provisions supplied adequate statutory authority for prehearing conferences. Accordingly, it proposed no legislation to implement Resolution No. 7, but instead proposed that it be implemented by the Administrative Conference.

The Conference has already endorsed increased use of prehearing conferences in its Recommendation No. 70–4, Discovery in Agency Adjudication:

1. Prehearing Conferences

> The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time.

This Recommendation, by its terms, is applicable only to adjudications governed by Section 554 of the APA. However, there seems to be no reason why the portion quoted above would not be equally applicable to on-the-record rulemaking.

The proposed Conference Statement calls attention to Recommendation No. 70–4 and agrees that the goal of ABA Resolution No. 7 can better be achieved by Conference action than by legislation.

RESOLUTION NO. 8

This proposal, endorsed by the Council and the Committee on Agency Organization and Personnel, represents a response to the major points of the ABA Resolution but is essentially a deferral of the problems involved in implementing that Resolution, which (together with some other difficult issues) appear in the ABA Recommendation. The Office of the Chairman and the Committee on Agency Organization and Personnel have given extensive consideration to these problems, and discussed them at length with the Special Committee on Revision of the Administrative Procedure Act of the Administrative Law Section of the ABA. That effort in fact resulted in a draft Statement speaking directly to the ABA Recommendations, a copy of which is attached to this discussion as Exhibit A. A variant approach to the ABA Recommendation, reflecting views considered within the Council, is attached as Exhibit B.

Both the Council and the Committee on Agency Organization and Personnel have recommended against Assembly consideration of these fundamental issues at this time because the ABA Recommendation in its present form has certain important effects which do not represent the traditional ABA position and which may not accurately reflect the current thinking of its Section on Administrative Law; hence, to address that Recommendation may be to address the form but not the substance of the Association's position. Achieving legislative enactment of needed amendments to the APA will be a difficult task under any circumstances, without the added handicap of unintended disagree-

ment (or mistaken agreement) between two of the most knowledgeable organizations in the field. For this reason, the Council and the Committee on Agency Organization and Personnel think it desirable to defer consideration of those matters not raised in the ABA Resolution, with the hope that continuing discussions with the ABA Section on Administrative Law can achieve a clarification of its position and perhaps even a revision of the present Recommendation to a form with which the Conference will agree. In the latter connection, it should be noted that in its last meeting the Council of the Section on Administrative Law adopted a resolution emphasizing that at this point it is only the Resolutions (and not the implementing Recommendations) which represent the official position of the ABA.

[In order that the Assembly may appreciate the complicated nature of the issues leading to the present proposal of deferral, there follows a discussion clarifying the more substantive draft Statements on Recommendation 8 attached as Exhibits A and B.]

ABA Resolution No. 8 espouses, in general terms, the conferring of greater authority upon the administrative law judge and the specification, by agency rule, of his powers and duties, including that of rendering initial decision in cases over which he has presided. The implementing Recommendation, however, is addressed solely to the matter of initial decision. Its declared purpose is to restrict the power of agencies to make the first decision in matters in which "evidentiary issues are important, including the demeanor of witnesses, without having presided at the hearing." 24 Ad. L. Rev. 404 (1972). In order to explain the operative effect of the proposal, it is necessary to outline the present statutory provisions governing the intermediate decision process.

Under 5 U.S.C. §557(b) a decision—either "initial" or "recommended"[5]—by the presiding officer is required in all cases other than rulemaking (including most ratemaking) and initial licensing. In rulemaking and initial licensing, the presiding officer's decision may be replaced by a "tentative" decision of the agency or a "recommended" decision of its staff; and may be omitted altogether upon an agency finding that "due and timely execution of its functions imperatively and unavoidably so requires."

[5]A "recommended decision" cannot, like an "initial decision," become the final decision of the agency if unappealed. Other than that, however, the two are functionally equivalent. Both are subject to exception by the parties; both are part of the record and must state findings and conclusions on all issues of fact, law, and discretion; neither is entitled to any particular deference on appeal.

The ABA proposal would require a decision by the presiding officer in all cases except those in which the agency finds either that "an expedited decision in the particular proceeding is imperatively and unavoidably required to prevent public injury or defeat of legislative policies," or that "there are no substantial, relevant and material issues of fact, the resolution of which is required for the decision." Thus the Recommendation would modify the present statutory arrangement in four significant respects:

1) Whereas a decision by the presiding officer is presently mandatory save in rulemaking and initial licensing, the ABA proposal would authorize its omission, upon appropriate findings, in all types of proceedings, including those having a strong accusatory flavor, *e.g.*, FTC unfair trade practice cases or NLRB unfair labor practice cases. This result—seemingly at odds both with the traditional ABA position and with the declared basic thrust of the current Recommendation—apparently flowed from two premises: (i) that omission of the presiding officer's decision might sometimes be justified in ratemaking and initial licensing; and (ii) that all on-the-record proceedings should be governed by uniform procedures. Exhibit A endorses the first premise but rejects the second. It concludes that a decision by the presiding officer should, as under present law, be mandatory in all cases of adjudication other than initial licensing. The basis for this conclusion is that, apart from these specifically excepted categories, the need for speedy determination rarely outweighs the utility of the presiding officer's decision in assessing credibility, focusing the issues, and preserving the appearance (no less than the reality) of fairness; hence the value of a discretionary power to omit it not worth the risk of its abuse. Exhibit B, on the other hand, endorses the ABA's position that, where the need for expedition is imperative or material facts are not in issue, agencies should be authorized to dispense with intermediate decision in any adjudicatory proceeding. This conclusion need not rest—as apparently it did for the ABA—on a philosophical opposition to special treatment for ratemaking and initial licensing. An alternative basis is the conviction that, in agency adjudication generally, questions of credibility and demeanor are not so frequent, or the need for speedy determination so infrequent, as to warrant a categorical requirement of intermediate decision.

2) The ABA proposal, unlike existing law, would authorize the omission of an intermediate decision upon a finding that no material fact is in issue. Here again, the effect is to broaden, rather than restrict, agency discretion in this area. The premise of the amendment seems

to be that an intermediate decision is valuable primarily for the purpose of resolving factual questions hinging on demeanor evidence and ought not to be mandatory where such questions are absent. A strong argument can be made, however, that an intermediate decision (not necessarily by the presiding officer) is equally important as a device for sifting and focusing the issues, whether of fact, law, or policy and thus should be mandatory (absent compelling need for expedition) even where questions of demeanor and credibility are not presented. This view is buttressed by two further considerations:

(i) The difficulty of distinguishing, at the margin, between questions of fact and questions of law or policy. Agency decisions frequently involve issues not clearly denominated either factual or non-factual—such as questions of inference, interpretation, evaluation, characterization, prediction, and "mixed questions" involving the application of law or policy to undisputed data.

(ii) The difficulty of determining at the agency level that no facts are in issue without an initial decision by the presiding officer or its functional equivalent.

Exhibit A takes no position as to whether absence of "material issues of fact" should be made a sufficient basis for omitting the intermediate decision. Exhibit B endorses the ABA view that it should.

3) Both the ABA proposal and the present Section 557 (b) allow omission of the intermediate decision upon a finding of necessity. But whereas under the present statute the agency must find that "due and timely execution of its functions imperatively and unavoidably" requires such omission, the ABA proposal would require a finding that "an expedited decision *in the particular proceeding* is imperatively and unavoidably required to prevent public injury or defeat of legislative policies." (Emphasis added). The key difference lies in the underscored language.

This amendment is aimed primarily at the Interstate Commerce Commission, the only major ratemaking agency which routinely and systematically omits the intermediate decision procedure altogether (as distinct from omitting the presiding officer's decision in favor of a tentative agency or recommended staff decision). The ICC, pursuant to an internal agency rule, makes the "due and timely execution" finding in virtually all its "investigation and suspension" cases on the theory that Congress intended final decision to be rendered within the seven-month statutory suspension period (or as soon thereafter as

feasible) and that the intermediate decision procedure would almost invariably postpone final decision beyond that limit. The ABA Recommendation would require this finding to be made case-by-case instead of by rule. Since it is clear that even under this proposal, the ICC would be able, and certainly willing, to make the required finding in nearly every suspension case, it is questionable whether the amendment would have any significant practical effect other than to impose some additional paperwork upon an already overburdened agency.

Exhibit A takes no position as to whether the relevant findings must be made case-by-case. Exhibit B would permit them to be made on a categorical basis.

4) The ABA proposal would require that the intermediate decision, unless excused by one of the two findings discussed above, be made by the presiding officer; his initial decision could not be replaced (as it presently can be in rulemaking or initial licensing) by a tentative decision of the agency or a recommended decision of staff. The Recommendation would thus bar the practice which the Federal Communications Commission followed until recently, of assigning the recommended decision to the Chief of the Common Carrier Bureau rather than to the officer who presided at the hearing. We believe that in many cases—particularly those in which novel questions of policy are presented—an intermediate decision which discloses the current thinking of the agency or its influential staff may be more valuable to the parties, and more helpful in eliciting from them relevant comment, than the decision of an administrative law judge. Nevertheless, this is not a conclusive objection to the ABA Recommendation, if only because the requirement of a decision by the presiding officer would not preclude the agency or its staff from issuing, either concurrently or in response, a statement of views for comment by the parties.

Exhibit A takes no position as to whether or when an agency should be free to substitute a preliminary decision of its own or its staff for that of the presiding administrative law judge. Exhibit B would permit such substitution in all cases of ratemaking, initial licensing, or rulemaking of general applicability—whether or not findings can be made which would justify omitting the intermediate decision altogether.

The ABA Recommendation would further amend Section 557 (b) by authorizing agencies to "provide by rule that decisions, or categories of decisions including agency appeal board decisions, become final, unless reviewed by the agency at its discretion." The Conference has already proposed to grant agencies such authority (Recommendation No. 68–6).

Exhibit A

RESOLUTION NO. 8

The rather vague language of Resolution No. 8 is given specific content by the implementing Recommendation, the main thrust of which is to require that administrative law judges render initial decisions in all proceedings over which they have presided, with certain exceptions at once broader and narrower than those presently contained in 5 U.S.C. §557 (b), and that agencies be empowered to accord such decisions administrative finality. The Conference expresses the following views on this subject:

a. The Conference has already recommended that agencies be authorized, at their discretion, to accord administrative finality to the decisions of administrative law judges (Recommendation 68–6). We endorse the ABA proposal insofar as it would achieve that result.

b. Where final decision is to be made by the agency itself, an intermediate decision to which the parties may file exceptions serves to narrow and focus the issues, whether of fact, law or policy. Moreover, where the case significantly involves questions of fact that hinge upon credibility and demeanor, an intermediate decision by the presiding officer is the only means of obtaining a judgment on these factors. For one or both of these reasons, it is ordinarily highly desirable for an agency to provide for intermediate decision.

c. In all cases of adjudication other than initial licensing, both of the foregoing reasons usually apply with full vigor, and an intermediate decision by the administrative law judge should, as under present law, be required absent unanimous waiver by the parties.

d. In ratemaking, initial licensing and rulemaking of general applicability, fact issues turning upon credibility and demeanor are not often central. Moreover, in ratemaking, where statutes frequently provide that proposed rates shall become effective within a specified period of time even without agency approval, the need for expedition may often outweigh the value of an intermediate decision. For these reasons, in ratemaking, initial licensing and rulemaking of general applicability, agencies should be authorized to omit the intermediate decision in some circumstances.

e. With respect to ratemaking, initial licensing and rulemaking of general applicability, we reserve judgment on the following questions: (i) the precise nature of the agency findings that should be prerequisite to omission of an intermediate decision; (ii) whether the statute should require those findings to be made case-by-case or permit

them, as now, to be made by rule; and (iii) when, if ever, an agency should be permitted to substitute for the decision of an administrative law judge a tentative decision of its own or a recommended decision of its staff.

Exhibit B

RESOLUTION NO. 8

a. The Conference shares the Association's view that "with limited exceptions," an administrative law judge who has presided over the reception of evidence should exercise the responsibility for rendering initial decisions.

b. A decision by the presiding official should be required except when:

(i) The agency has required that the matter should be referred to it for initial decision because it has found in that particular instance or in a narrowly defined category which the particular instance exemplifies an overriding need for speedy determination; or

(ii) The matter does not involve the resolution of substantial issues of fact; or

(iii) The matter to be decided is in the nature of ratemaking, initial licensing, or rulemaking of general applicability and an intermediate decision to which the parties may file exceptions has been issued by the agency itself or its staff.

c. Further in accord with the objectives of the ABA proposal, the Conference has already recommended that agencies be authorized, at their discretion, to accord finality to the initial decisions of administrative law judges as if those decisions had been made by the agency itself.

d. Where the final decision is to be made by the agency itself, an intermediate decision to which the parties may file exceptions is, in general, an effective means of narrowing and focusing the issues, whether they relate to fact, law, or policy. The initial decision of the presiding official is designed to serve this purpose. If an initial decision by the presiding official is to be omitted in one of the circumstances indicated in (i) or (ii) above, the agency should remain free to issue in its stead a tentative decision of its own or a recommended decision of its staff.

RESOLUTION NO. 9

This Resolution would *require* agencies to provide by rule for

abridged procedures to be used by consent of the parties. The implementing Recommendation would merely *authorize* such procedures. The following discussion is addressed to the Recommendation, that being the fuller and more recent statement of the ABA proposal.

The position taken in the proposed Conference Statement—that the Recommendation is unnecessary and potentially harmful—represents the view of the Committee on Agency Organization and Personnel, and is supported by the following considerations:

1) By conditioning the use of "abridged hearing procedures" upon the unanimous consent of the parties, the Recommendation impliedly rules out existing and highly valuable non-consensual procedures such as the summary decision procedure recently adopted by the FCC (upon the recommendation of the Administrative Conference) (47 C.F.R. 1.251) and the "modified procedure" by which the ICC dispatches the great majority of its cases (49 C.F.R. 1100.45–1100.54). This extremely undesirable result is not averted by the last sentence of the Recommendation, which confirms existing agency power to dispense with oral presentation of evidence, but *not* existing agency power (a) to restrict cross-examination not "required for a full and true disclosure of the facts" (upon which the ICC "modified procedure" is predicated) or (b) to decide a case without hearing where no material facts are in dispute (upon which summary decision procedures are predicated).[6]

2) The need for specific statutory authority for "abridged hearing procedures" upon consent of the parties has not been demonstrated. Few agencies can be unaware that an oral evidentiary hearing is generally unnecessary in uncontested proceedings or proceedings in which the parties agree to waive such a hearing. The ABA drafting committee apparently had in mind the FPC's former practice of assigning even uncontested cases to an examiner, who went through the motions of dictating an oral hearing to a transcribing reporter in an otherwise empty room. But that grotesque practice has long since been abandoned.

3) Elevating to the level of statutory authority the presently implicit power to omit an oral hearing may have the unintended effect of

[6]The Recommendation, as it stands, unduly limits the use of "abridged procedures" even in cases where the parties do consent. The further precondition that "all evidence and argument have been submitted in writing and without oral cross-examination" impliedly bars the use of simplified procedures where the parties are prepared to waive oral testimony and cross-examination but not oral argument, or where the parties waive all three but the agency requests oral argument *sua sponte*. In short, it would appear that nothing in the way of simplified procedure may be used if any oral residue remains.

undoing earlier Congressional determinations or expectations (however rare they may be) that oral hearings would in fact be required. Only one such situation comes to mind: The Atomic Energy Act, at least when interpreted in the light of legislative history, does require the AEC to conduct an oral and public hearing before issuance of a nuclear reactor construction permit, whether or not any party requests such a hearing or even contests the application. 42 U.S.C. §2239 (a). The purpose of this unusual requirement is to insure that important AEC decisions are made in public and that the community is fully informed of the safety factors involved. The procedure, to be sure, is intended to be flexible; but to omit all oral testimony, cross-examination and argument, as the ABA proposal would permit, would be clearly contrary to the intent of the Atomic Energy Act.

RESOLUTION NO. 10

ABA Resolution No. 10 would grant authority to all agencies to make subpoenas generally available in adjudicatory proceedings. The implementing language contained in the ABA Recommendation provides that "each agency is authorized to issue subpoenas in every case of adjudication." The Recommendation also directs the agencies to "issue such subpoenas upon request made by any party" and to provide a procedure for quashing or modifying subpoenas on motion.

The Resolution and Recommendation were considered by the Conference's Committee on Compliance and Enforcement Proceedings. It was assisted by a report prepared by Richard Berg, Executive Secretary of the Conference.

Grant of Subpoena Power

The Committee concluded that the Resolution and Recommendation raised two significant problems. The first was in what category of proceedings should subpoena power be granted. The Administrative Procedure Act does not presently grant subpoena power to any agency, but merely provides that where agency subpoenas are authorized by law, *i.e.*, by the statute governing the agency or program in question, subpoenas shall be made available to parties, 5 U.S.C. §555 (d). The ABA Resolution is not entirely clear as to what it means by "adjudicatory proceedings" but the Recommendation provides for authority to issue subpoenas "in every case of adjudication," and this language would appear in Section 555, which is not limited in its applicability to proceedings governed by Sections 556 and 557.

While the precise meaning of "adjudication" is in some doubt, the term includes a great many essentially informal proceedings which do not at present involve either a trial-type hearing or any structure for defining and resolving factual issues in an adversary context. Naturally, in such informal proceedings subpoena power is presently lacking, and it is difficult to imagine how it would be used were the ABA's Recommendation to be adopted. To permit parties to an adjudication to obtain subpoenas appears to assume either a trial-type hearing at which the subpoenaed witness is to testify or, at the least, a procedure sufficiently complex to include a formal commencement of the proceeding, a definition of the issues on which evidence is to be considered, and a procedure for collecting, assembling, and submitting the evidence to the agency. A major question mark in the ABA proposal is whether it should be interpreted to require for every case of adjudication a procedural format which will permit effective use of subpoenas where facts are in dispute, or merely to provide that where agency proceedings are carried on in such a format the subpoena power will be available. In any event a serious problem inherent in the ABA proposal is how it can be applied to informal and unstructured adjudications.

A narrower approach would be to grant subpoena power in all proceedings subject to Section 554 of the Administrative Procedure Act, that is, on-the-record adjudications. This would be consistent with paragraph 9 of the Conference's Recommendation No. 70–4, addressed exclusively to such proceedings, which stated that the presiding officer should have power to issue subpoenas at any time during the course of the proceeding. The practical effect of such an amendment to the APA would be rather limited, however. The staff study disclosed that in only a handful of proceedings clearly subject to Section 554—among them, proceedings in the Postal Service and the Food and Drug Administration, and public land contests in the Department of the Interior—does there appear to be a need for a grant of subpoena power or a broadening of existing subpoena power. A possible disadvantage of amending the APA to grant subpoena power in proceedings governed by Section 554 is that this might precipitate litigation over the question whether a particular proceeding is or is not subject to Section 554. At present an agency may resolve doubts in favor of coverage, and if its procedures comply with Section 554 no one is in a position to object. In other situations, such as contract appeals and debarments, it has been generally assumed that Section 554 is inapplicable. Although a plausible case for coverage can be made, parties have, appar-

ently, not felt sufficiently aggrieved by the existing administrative procedures to litigate the question. If, however, existence of agency subpoena power turns on the answer, parties and even witnesses might compel the resolution of what has been hitherto a largely academic question.

A middle approach would be to grant subpoena power in proceedings, whether or not governed by Section 554, which are structured as adversary proceedings with trial-type hearings. A number of proceedings of this nature are presently conducted without subpoena power, notably contract appeals, debarment cases, and adverse action proceedings for employees in the civil service (see Conference Recommendation No. 72–8). Implementing this approach by amending the APA presents considerable drafting problems, however. One possibility would be to grant subpoena power in connection with adjudications required by statute or by agency regulation to be made on the record after hearing. A variation would be to grant subpoena power to administrative law judges in connection with all adjudications over which they preside. This approach is subject to the criticism that it would permit agencies, essentially, to grant themselves subpoena power by structuring their proceedings to comply with the statutory test. But agencies are hardly likely to do so unless their proceedings are already trial-type, and if the authority to grant subpoenas is confined to an administrative law judge, there would be a check on abuse. Indeed, the greater potential disadvantage in this approach seems to lie in the opposite direction, in that agencies might have an incentive to downgrade the formality of their proceedings in order to avoid party requests for subpoenas. For frequently it is the private party and not the agency staff which feels the lack of subpoena power most keenly.

The remaining possible approach is, of course, not to grant subpoena power in the APA at all, but to amend the statute governing each agency program for which subpoena power is desired. To recommend such an approach would not be inconsistent with paragraph 9 of Recommendation 70–4. That paragraph favored subpoena power for presiding officers in all Section 554 adjudications, but did not address itself to whether this should be accomplished by amendment to the APA.

Procedures for Issuance of Subpoenas

The second major problem considered in connection with Resolution No. 10 arises not from the Resolution itself, but from the Recommendation. The Recommendation would require agencies to issue

subpoenas to parties on demand. The subpoena could be challenged after issuance by a motion to quash or modify on the usual grounds. APA §555(d) now permits the agencies to require by rule that the party applying for a subpoena make an *ex parte* showing before the subpoena is issued, although a motion to quash is also available.

The ABA's Recommendation is consistent with Recommendation No. 13 of the 1962 Administrative Conference. However, of the approximately 20 agencies surveyed, only the National Labor Relations Board follows the procedure prescribed in the Recommendation. (The NLRB practice is required by statute). All other agencies require or permit the issuing officer to require some initial *ex parte* showing in connection with the issuance of subpoenas *duces tecum*, although in a few agencies the issuance of subpoenas *ad testificandum* is well-nigh automatic.

Although the NLRB does not appear to have experienced difficulties in its procedures, comment from the agencies and administrative law judges on this aspect of the ABA Recommendation was generally negative.

Conference Statement[7]

The Conference Statement on Resolution No. 10 is presented by the Committee on Compliance and Enforcement Proceedings. It endorses the principle that subpoenas should be available in agency adjudications determined on the record after hearing. It opposes as unfeasible a grant of subpoena power for every case of informal adjudication. It notes that amending the APA to grant subpoena power in the appropriate kinds of proceedings presents a drafting problem, but it is not intended to rule out the possibility that satisfactory language may be worked out. However, it suggests that it may prove preferable for Congress to make grants of subpoena power on a less general basis than by amending the APA, *i.e.*, by amending the statutes governing the proceedings in which subpoena power is desired.

The Committee concluded that it was not convinced that the proposed procedure for automatic issuance of subpoenas was so superior to the procedures presently followed in the great majority of agencies

[7]The proposed Statement on Resolution No. 10, as presented by the Council and the Committee on Compliance and Enforcement Proceedings, and to which the explanation above in text is addressed, did not contain the sentence: "We favor an amendment to the Administrative Procedure Act which would achieve this result [grant of subpoena power] with respect to adjudications subject to §§554, 556 and 557."

to justify its being written into the Administrative Procedure Act. Therefore, the last sentence of the Statement on Resolution No. 10 is intended to express the Conference's view that agencies should continue to be permitted to require an initial showing of general relevance and reasonable scope before issuing a subpoena.

RESOLUTION NO. 11

ABA Resolution No. 11 calls for requiring the agencies to establish by rule in all cases of informal adjudication procedures for giving written reasons for denial of requests and, unless the agency finds it impracticable, for at least one level of agency review.

The Resolution and its implementing Recommendation were considered by the Conference's Committee on Informal Action. The Committee found a number of definitional problems in the Recommendation, particularly the uncertain breadth of the term "adjudication." The Committee also noted that it is in the very early stages of developing a major study project to test the feasibility of drafting an "Informal Procedure Act." The heart of the project would be an empirical exploration and test with a very good number of representative federal agencies. If this project can be funded and can go forward it should produce either proposals in which we have confidence or a conclusion that the task in our present state of knowledge cannot be done. Resolution No. 11 should be a part of this study, and the Conference should be in regular contact with the appropriate ABA committee as the work proceeds. Until it is done, the Committee believes that the Conference should not recommend any legislation in this intractable field.

RESOLUTION NO. 12

ABA Resolution No. 12 calls for providing that prejudicial agency publicity may be restrained by a reviewing court or held to constitute a ground for setting aside an agency determination.

The ABA Resolution and its implementing Recommendations address two distinct problems: 1) agency statements which indicate bias or prejudgment or otherwise affect the integrity of a pending proceeding; and 2) agency statements which affect a person adversely in his business or reputation.

Consideration of the Resolution and Recommendation was merged into a larger study of adverse agency publicity, undertaken by the

Committees on Compliance and Enforcement Proceedings and Judicial Review on the basis of a report prepared by their consultant, Professor Ernest Gellhorn. The report criticizes the Resolution as:

> . . . inapt and misdirected. First, injunctive relief is usually restricted in its availability; it is a limited remedy designed only to prevent additional serious harm. Consequently equity provides no relief for past injuries and is available only when the complainant can demonstrate by clear and convincing evidence that he is likely to be injured (and not otherwise compensated) by unlawful acts of the defendant. Second, the ABA's concept of "prejudicial agency publicity" seems unnecessarily vague and misconstrues the basic concern arising from adverse agency publicity. The basic concern is that erroneous, misleading or excessive publicity may unfairly injure the identified persons' reputation and business. The concept of prejudice, on the other hand, suggests that agency publicity will impair the fairness of a subsequent adjudicatory hearing. . . . The latter possibility is remote (especially since there is no jury to sway) and is, in any case, fully protected by currently available remedies. Third, the suggestion that adverse publicity should also be a basis for voiding agency determinations not only allows procedure to control substance, but also is oddly designed to protect the guilty and not the innocent. That is, there is no agency order to set aside where the respondent was innocent of any violation. The ABA Resolution would provide only injunctive relief for the innocent while allowing parties guilty of violations the additional protection of voiding the agency order where agency publicity is "prejudicial."

The Conference Statement opposes legislation to deal with the problem of agency publicity which prejudices the conduct of the agency proceeding on the ground that present remedies are adequate. See, *e.g.*, *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965). The Statement agrees that agency publicity practices which adversely affect persons in their businesses, property, and reputations present a problem. This problem is addressed in a separate proposed Recommendation which the Committees are presenting to the Conference.