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ARTICLE

THE NEW NORTH CAROLINA APA: A PRACTICAL GUIDE TO UNDERSTANDING AND USING IT

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I. INTRODUCTION

The 1985 North Carolina General Assembly's recent re-enactment of North Carolina's Administrative Procedure Act (APA) is a significant development in North Carolina administrative law. The purpose of this article is to provide interested lawyers, including those in general practice, with an overview of the changes in the Act.

While much of the law is largely a re-codification of the existing APA in North Carolina General Statutes Chapter 150A, there are some major policy changes in the bill, including: (1) creation of a new pool of hearing officers to conduct contested cases in administrative appeals for those agencies covered by the APA; 2 (2) establishment of a new state register to publish (at least monthly) "information relating to agency, executive, legislative or judicial actions" issued under the APA; 3 (3) creation of a new Office of Administrative Hearings, which will be responsible for implementing the new changes in the Act; 4 and (4) creation of a new Administrative Rules Review Commission which will be responsible for reviewing agency rules. 5 These changes are the latest in a series of legislative enactments concerning agency rulemaking in the executive branch of state government.

A. Origins of the APA

Administrative procedure legislation dates back to the New Deal. The rapid expansion of the federal bureaucracy led the American Bar Association to issue reports in 1935 and 1938, pointing out the absence of a standard administrative process. These reports, combined with public outcry, led to the creation of the Attorney General's Committee on Administrative Procedures in 1939. The Committee issued its final report in 1941 and recommended a federal Administrative Procedure Act, but United States involvement in World War II delayed enactment of the legislation until 1946. 6 In 1946, the National Conference of Commissioners on Uniform State Laws also adopted the first Model State Adminis-

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trative Procedure Act. North Dakota had adopted the first state APA in 1941 based upon an early draft of the Model Act. The Conference published a Revised Model Act in 1961, which until 1980 served as the basis for state APA legislation in over one-half of the states, including North Carolina.

B. History of the APA in North Carolina

In 1974 the North Carolina General Assembly enacted North Carolina’s first APA. This enactment was the product of work begun in 1970 by the Revisor of Statutes of the General Statutes Commission. Due to agency objections based on cost, the APA’s effective date was delayed until February 1, 1976. While a number of agencies had their own unique procedures, prior to this enactment no comprehensive statutes governing administrative agency action existed.

In 1977, the legislature first expressed its concern about the proliferation of agency rulemaking by creating a standing committee of the Legislative Research Commission, the Administrative Rules Review Committee. This Committee was charged with reviewing agency rules to determine the agency’s statutory authority to promulgate them.

In 1981, over the active opposition of Governor Hunt, Senate Bill 250 was introduced to grant the Committee authority to suspend agency rules. The bill was promptly dubbed the “legislative veto” of agency rules, even though it did not contain a veto provision. The legislative compromise allowed the Committee not only to delay implementation for sixty days, but also to have its objections noted in the history note of the particular rule. After the

10. N.C. GEN. STAT. ch. 120, art. 6C (1986).
North Carolina Supreme Court handed down its famous 1982 separation of powers decision in *Wallace v. Bone*, the Committee continued its work under the 1981 legislation for two years before its powers were changed again. It was scheduled to be replaced by a new Governor's Administrative Rules Review Commission. The Commission membership was to consist of ten members, four appointed by the Governor and six by the general assembly. Because a majority of its appointments were legislative, Governor Hunt had reservations about the constitutionality of the Commission. Therefore, he did not make his appointments and the Commission was never created.

Nevertheless, legislative concern about agency rulemaking lingered. In 1983, the general assembly repealed not only the APA, but also all agency rules, effective July 1, 1985. Given that many of these agency rules formed the basis for North Carolina's participation in numerous federal programs and were prerequisites to receiving federal funds, state agencies and legislative observers concluded that the legislature intended to prod the executive branch into action. The legislature also created an APA Legislative Study Commission with the responsibility of reporting either to the 1984 "short" session or to the 1985 session with a proposed APA rewrite.

The Study Commission chose to re-enact most of chapter 150A of the General Statutes. Many of the changes found their source in the 1974 Minnesota APA. That state used a draft which the National Conference of Commissioners on Uniform State Laws later adopted as the 1981 revision to the Model Act.

Although the Study Commission completed its task in time for

the 1984 session, the bill\textsuperscript{17} ran into a political thicket. Its sponsor, Representative George Miller, (D-Durham County), and its prime supporter, Representative William A. Watkins, (D-Granville County), quickly shepherded the bill through the house, but it ran into opposition from then-Senator Robert B. Jordan, (D-Montgomery County). The house attempted to include the legislation in the appropriations bill, by attaching it to a bill to ban phosphates in detergents and an interstate banking bill, but when the senate refused to concur in any of these attempts, the legislation died.

The stage was set for the 1985 legislative session. Representative Watkins introduced House Bill 52, which was largely similar to the legislation from the previous year, except that it included many of the prior year's compromises, which resulted in reduced opposition. After extensive negotiations and a conference committee hearing, the present law emerged.

This legislative history is both significant and unique to North Carolina. Professor Kenneth Culp Davis, a leading administrative law scholar, states that eighty to ninety percent of all federal administrative action is “informal” in that there is no formal hearing and agency action is not subject to judicial review.\textsuperscript{18} Typically, administrative law scholars are more concerned about adjudicatory hearings than rulemaking hearings.\textsuperscript{19} The North Carolina legislature, however, has been more preoccupied with rulemaking, publication of agency rules, and separation of powers issues rather than adjudicatory hearings. Given North Carolina's history of a strong legislature and a weak Governor, the general assembly has especially stressed preserving its authority to make laws.

II. PURPOSE AND SCOPE OF THE NEW APA

North Carolina's preoccupation with rulemaking is evident when one compares the previous purpose statement of General Statute 150A-1\textsuperscript{20} with the new purpose statements in General Statute 150B-1,\textsuperscript{21} which concern the Act's overall policy and scope; and 150B-9,\textsuperscript{22} which concerns rulemaking. Indeed, the General Statute 150B-9 limitations on agency rulemaking in terms of procedure,
delegated authority, prohibition of authority to impose criminal conduct, and verbatim publication of rules, as well as the General Statute 150B-59 requirement of agency rules review,\textsuperscript{23} clearly indicate legislative dissatisfaction with agency rulemaking.\textsuperscript{24}

The 1946 Handbook of the National Conference of Commissioners on Uniform State Laws established certain major principles which the Commission suggested should be present in a comprehensive bill. These include: (1) notice of rulemaking; (2) publication of adopted rules; (3) adjudication safeguards; and (4) judicial review.\textsuperscript{25} According to Professor Daye, the purpose statement in General Statute 150A-1 was intended to encompass all of these principles.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{23} N.C. GEN. STAT. 150B-59 (Supp. 1985).
\item \textsuperscript{24} N.C. GEN. STAT. § 150B-9 (Supp. 1985) states:
\begin{itemize}
\item (a) It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules. Except for temporary rules which are provided in G.S. 150B-13, the provisions of this Article are applicable to the exercise of any rule-making authority conferred by any statute, but nothing in this Article repeals or diminishes additional requirements imposed by law or any summary power granted by law to the State or any State agency. No rule hereafter adopted is valid unless adopted in substantial compliance with this Article.
\item (b) Each agency shall adopt, amend, suspend or repeal its rules in accordance with the procedures specified in this Article and pursuant to authority delegated by law and in full compliance with its duties and obligations. No agency may adopt any rule that implements or interprets any statute or other legislative enactment unless the power, duty, or authority to carry out the provisions of the statute or enactment is specifically conferred on the agency in the enactment, nor may any agency make any rule enlarging the scope of any trade or profession subject to licensing.
\item (c) The power to declare what shall constitute a crime and how it shall be punished and the power to establish standards for public conduct are vested exclusively in the General Assembly. No agency may adopt any rule imposing a criminal penalty for any act or failure to act, including the violation of any rule, unless the General Assembly authorizes a criminal sanction and specifies a criminal penalty for violation of the rule.
\item (d) No agency may adopt as a rule the verbatim text of any federal or North Carolina statute or any federal regulation, but an agency may adopt all or any part of such text by reference under G.S. 150B-14.
\end{itemize}
\item \textsuperscript{25} HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 195 (1946).
\item \textsuperscript{26} Daye, supra note 9, at 837 n.18. These six principles are:
\begin{itemize}
\item (1) Requirement that each agency shall adopt essential procedural rules
\end{itemize}
\end{itemize}
The commentary to the 1981 Revised Model Act states:

This Model Act, like the 1961 Revised Model Act, creates only procedural rights and imposes only procedural duties. It seeks to simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their functions. Further, this Act seeks to increase public access to all of the sources of law used by agencies, and to facilitate and encourage the issuance of reliable advice by agencies as to the applicability to particular circumstances of law within their primary jurisdiction. In addition, it attempts to facilitate public participation in the formulation of the law adopted by agencies, ensure accountability of agencies to the public, and enhance legislative and gubernatorial oversight of agencies.27

Combined with the purpose statements, this commentary evidences a clear legislative intent to limit agency action, especially in the area of rulemaking.

Although the new Act states its purpose is to establish “a uniform system of administrative rulemaking and adjudicatory procedures for State agencies,”28 it does not do so. As under the previous APA, some agencies are completely exempt and others are partially exempt.

Section 150A-1 exempted the following agencies from the Act: the Employment Security Commission, the Industrial Commission,

and that, so far as practicable, all rulemaking, both procedural and substantive, shall be accompanied by notice of hearing to interested persons;

(2) Assurance of proper publicity for administrative rules that affect the public;

(3) Provision for advance determination or “declaratory judgments” on the validity of administrative rules, and provision for “declaratory rulings” affording advance determination of the application of administrative rules to particular cases;

(4) Assurance of fundamental fairness in administrative hearings, particularly in regard to rules of evidence and the taking of official notice in quasi-judicial proceedings;

(5) Provision for assuring personal familiarity on the part of the responsible deciding officers and agency heads with the evidence in quasi-judicial cases decided by them;

(6) Assurance of proper scope of judicial review of administrative orders to guarantee correction of administrative errors.

Id. (quoting HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 195 (1946)).


the Occupational Safety and Health Review Board, the Department of Correction, and the Utilities Commission. Section 150B-1 continued all of these exemptions and added the new Administrative Rules Review Commission and the North Carolina National Guard’s court-martial jurisdiction. The exemption for the Department of Correction continues but the Department must now file its rules for publication under article 5 of chapter 150B. In addition, the Act retains certain limited exemptions. The Department of Transportation’s Division of Motor Vehicles is exempted from the rulemaking and adjudicatory hearings requirements of articles 2 and 3. The University of North Carolina is exempted except for the judicial review provisions of article 4. The new Act adds limited exemptions for the State Banking Commission, the Commissioner of Banks, the Savings and Loan Division of the Department of Commerce, and the Credit Union Division of the Department of Commerce. All of these agencies are covered by the Act but are exempt from the judicial review requirements of article 4. Professor Daye notes that these exemptions were granted because each of these agencies has an established set of procedures governing their adjudicatory hearings. As a practical matter, some were originally excluded in General Statute 150A-1 because of the political strength of the agencies in the legislature. Their continued exemption became a status quo requirement to facilitate passage of the bill.

The significant new exemptions are the occupational licensing boards. These boards generated much of the legislative opposition to the new Act. Because the 1984 bill had proposed removing the “final agency decision authority” from the agency head or board and giving it instead to the administrative hearing officers (now called administrative law judges), the occupational licensing boards feared a loss of their independence and control. The compromise, which became article 3A of chapter 150B, created separate procedures for licensing board hearings.

31. Daye, supra note 9, at 841.
33. As Representative Watkins stated, “Taking out the licensing boards really was a gimmick. That was the major opposition.” B. FINGER, J. BETTS, R. COBLE & J. NICHOLS, ASSESSING THE ADMINISTRATIVE PROCEDURE ACT: A SPECIAL REPORT 12 (North Carolina Center for Public Policy Research 1985) [hereinafter cited as NORTH CAROLINA CENTER STUDY]. The senate agreed. “The political reali-
III. RULEMAKING

The previous APA defined a rule in its broadest terms.34 The new definition of “rule” is substantially the same.

“Rule” means any agency regulation, standard or statement of general applicability that implements or interprets laws enacted by the General Assembly or Congress or regulations promulgated by a federal agency or describes the procedure or practice requirements of any agency not inconsistent with laws enacted by the General Assembly.35

While the definition tracks the definition found in the 1981 Revised Model Act, the substitution of the phrase “laws enacted by the General Assembly or Congress or regulations promulgated by a federal agency . . .”36 for the suggested phrase “law or policy,”37 reflects the legislature’s intent to limit agency rulemaking authority to those matters enacted and specifically delegated by legislation and to prevent rulemaking beyond delegated authority.

A. Exceptions to Rulemaking Procedures

Like its predecessor, the new APA contains exceptions to the definition of a rule.38 However, the new Act carries the exceptions
forward with considerably more specificity to ensure that agencies and the affected public have sufficient guidance about whether they need to comply with the rulemaking procedures of the new APA. The increased specificity came from three sources: the Minnesota Statute and therefore the 1981 Revised Model Act, the legislature, and executive branch managers who wanted more clarity in the scope of the definition.

Instead of the previous broad language regarding internal management, the new exception excludes

[s]tatesments concerning only the internal management of an agency or group of agencies, including policies and procedures manuals, if such a statement does not directly and substantially affect the procedural or substantive rights or duties of persons not employed by the agency or group of agencies.

This section addresses what had been a hotly debated matter between many agencies and the legislature as to “manual material.” In addition to their codified rules, many agencies maintained manuals which frequently contained policies and procedures that affected the public but were not changed as mandated by the APA. The section’s intent was to allow continued use of such manuals as long as their content did not affect the public. The language was drawn from the 1981 Revised Model Act and the Iowa APA.

The budgets and budget policy exception excludes all budgets and budget policies and procedures issued by those persons au-

Many of these exceptions had been brought forward from the 1961 Revised Model Act.


40. Much of the information in this section is personal to the author who was then Deputy Legislative liaison to the Governor and responsible for assisting the legislative study commission with the drafting of the bill and in particular the language to be included in the definition of a rule.


42. This problem is not unique to North Carolina. See Bonfield, The Iowa APA: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 IOWA L. REV. 731, 827 n.379 (1975) [hereinafter Bonfield].

43. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3-116, 14 U.L.A. 106 (Supp. 1987); see also Bonfield, supra note 42, at 832-34.
The rationale for the exception was the same as that for "internal management," but due to the significance of the budgeting process on policy formulation in North Carolina, the legislature felt that a specific exception was needed. The interpretive statements exception was intended to add more specificity to the previous exception regarding interpretive rules. The approach taken was different from the 1981 Revised Model Act. The Revised Model Act includes the word "interprets" in the definitional section.\(^4\) The new Act, however, separately establishes an interpretation as an exception if it is "nonbinding" and the interpretive statement "merely define[s], interpret[s] or explain[s] the meaning of a statute or other provision of law or precedent."\(^4\) Additionally, the form contents exception previously found in section 150A-12(f)\(^4\) has been moved to section 150B-(8a)d.\(^4\)

The previous Act excluded declaratory rulings.\(^4\) While the previous Act did not address rates and tariffs, the 1981 Revised Model Act did.\(^5\) Although Professor Bonfield debated the pros and cons of excluding public participation in rate-setting, the legislature has clearly reserved this authority to itself\(^5\) and therefore the agency is excluded as a forum for debate on rate-setting authority. The signs or symbols exception is an expansion of the exception in the previous APA,\(^5\) and is also found in the 1981 Revised Model Act.\(^5\) Clearly, a sign publishing a rule is sufficient notice to the public about any prohibition or limitation. The auditing or legal guidelines exception is new and is based upon the 1981 Revised Model Act. Its need is self-evident.\(^5\)

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44. N.C. GEN. STAT. § 150B-2(8a)b (Supp. 1985).
45. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1-102, 14 U.L.A. 75 (Supp. 1987).
46. N.C. GEN. STAT. § 150B-2(8a)c (Supp. 1985).
47. N.C. GEN. STAT. § 150A-12(f) (1983).
50. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2-103, 14 U.L.A. 86 (Supp. 1987); see also Bonfield, supra note 42, at 839-41.
52. N.C. GEN. STAT. § 150B-2(8a)f (Supp. 1985).
53. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3-116(5), 14 U.L.A. 107 (Supp. 1987); see also, Bonfield, supra note 42, at 842-43.
54. N.C. GEN. STAT. § 150B-2(8a)g (Supp. 1985). This section excepts "[s]tatements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial
The scientific, architectural and engineering standards exception is based upon an earlier version of the 1981 Revised Model Act. In the author's experience, these types of rules posed codification problems because of the unique nature of the data or materials which could only be filed and published as summary rules under the previous section 150A-63(c).

In addition to these carefully drawn definitions, the general assembly also placed three limitations on agency rulemaking authority. Section 150B-9(b) on delegation of authority is a new statutory requirement, but is probably a restatement of existing North Carolina law. It provides that:

Each agency shall adopt, amend, suspend or repeal its rules in accordance with the procedures specified in this Article and pursuant to authority delegated by law and in full compliance with its duties and obligations. No agency may adopt any rule that implements or interprets any statute or other legislative enactment unless the power, duty or authority to carry out the provisions of the statute or enactment is specifically conferred on the agency in the enactment, nor may any agency make any rule enlarging the scope of any trade or profession subject to licensing.

This provision reflects legislative concern about the licensing of professions. Under the previous Administrative Rules Review Committee, licensing boards had frequently attempted to establish licensing requirements in areas not addressed by the enabling legislation.

Section 150B-9(c) on criminal sanctions in effect prohibits agencies from establishing new crimes via rulemaking. This provision also probably reflects current case law. It provides that:

The power to declare what shall constitute a crime and how it shall be punished and the power to establish standards for public conduct are vested exclusively in the General Assembly. No agency may adopt any rule imposing a criminal penalty for any disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases . . . .” Id. See also MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3-116(2), 14 U.L.A. 106 (Supp. 1987); Bonfield, supra note 42, at 787-91, 839.

55. N.C. GEN. STAT. § 150B-2(8a)h (Supp. 1985). This section provides that the term (rule) does not include the following: “[s]cientific, architectural, or engineering standards, forms, or procedures.” Id.

56. N.C. GEN. STAT. § 150A-9(b) (Supp. 1985).

57. Id.

58. N.C. GEN. STAT. § 150B-9(c) (Supp. 1985).
act or failure to act, including the violation of any rule, unless the General Assembly authorizes a criminal sanction and specifies a criminal penalty for violation of the rule.\textsuperscript{59}

The original language that had been proposed created some concern among agencies that used civil penalties as a means of enforcement. This was especially true for those state agencies that were enforcing federal environmental laws.

Section 150B-9(d)\textsuperscript{60} imposes what might seem a trivial limitation on agency rulemaking. However, during the legislative review of agency rules, legislators found that numerous rules repeated the text of federal regulations or state statutes verbatim. The general assembly therefore enacted this provision to reduce the number of otherwise superfluous rules.

In addition to these three new limitations on agency rulemaking, the general assembly re-enacted section 150A-11(4) as section 150B-11(3).\textsuperscript{61} This provision requires an agency to submit a summary of any proposed rule requiring expenditure or distribution of state funds to the Director of the Budget, and to obtain his prior approval.\textsuperscript{62}

\textbf{B. Rulemaking Procedures}

The principles of notice and opportunity to be heard under procedural due process are basic to administrative law.\textsuperscript{63} In his article reviewing the previous APA, Professor Daye noted three aspects of rulemaking that suggested adequacy of notice: (1) the time between actual notice and the public hearing; (2) whether the persons receiving the notice were informed of the substance and effect of the proposed rule in order to determine if they were affected by it; and (3) the method and scope of dissemination of the notice.\textsuperscript{64}

Section 150A-12 required an agency to “give notice of public hearing and offer any person an opportunity to present data, opinions, and arguments.”\textsuperscript{65} The agency had to publish the notice at

\begin{footnotes}
\item[59.] Id.
\item[60.] N.C. GEN. STAT. § 150B-9(d) (Supp. 1985). This section provides that “[n]o agency may adopt as a rule the verbatim text of any federal or North Carolina statute or any federal regulation, but an agency may adopt all or any part of such text by reference under G.S. 150B-14.” Id.
\item[61.] N.C. GEN. STAT. § 150B-11(3) (Supp. 1985).
\item[62.] Id.
\item[63.] See The Assigned Car Cases, 274 U.S. 564 (1927).
\item[64.] Daye, supra note 9, at 855-56.
\item[65.] N.C. GEN. STAT. § 150A-12 (1983).
\end{footnotes}
least ten days before the hearing and twenty days before the promulgation (i.e. adoption, amendment or repeal) of the rule. The previous APA allowed agencies to publish the notice either in three newspapers of general circulation across the state or by mailing copies to those persons who had requested that they be placed on the mailing list for such notices. Newspaper publication met the minimal dissemination requirements; however, it would take a vigilant citizen to read the want ads and stay informed of proposed agency actions.

The new APA created a *North Carolina Register* which began publication on April 15, 1986. Under the new Act, agencies may publicize the public hearing through a newspaper ad, but they are also required to use the *Register*. In the previous Act, section 150A-12 required ten days notice before the hearing. Under section 150B-12, the time for publishing such notices is now thirty days before the public hearing and sixty days before the promulgation of the rule. Under the new Act, section 150B-12 requires the notice to include:

1. a reference to the statutory authority under which the action is proposed;
2. the time and place of the public hearing and a statement of the manner in which data, opinions, and arguments may be submitted to the agency either at the hearing or at other times by any person; and
3. the text of the proposed rule, or amendment in the form required by section 150B-63(d2) and the proposed effective date of the rule or amendment.67

The Act provides that the notice shall be given "within the time prescribed by any applicable statute, or if none then at least 30 days before the public hearing . . . ."68 Persons interested in receiving notice of rulemaking or participating in the rulemaking process should be thoroughly familiar with the agency promulgating the rules. A 1985 study indicated that fifty-one percent of agency rulemaking hearings are conducted by a commission or board, twenty-eight percent are conducted by a hearing officer and fourteen percent are conducted by the agency head.69 Most boards

67. N.C. GEN. STAT. § 150B-12(a) (Supp. 1985).
68. Id.
69. NORTH CAROLINA CENTER STUDY, supra note 33, Appendix I at 50.
and commissions follow the notice procedures of section 143B-18, which allow the proposed rules to be heard and adopted on the same day. Therefore, a person wishing to provide input must be present at the hearing in order to have impact on the decision-making process. Section 150B-12 states that the purpose of the public hearing is to allow persons "an opportunity to present data, opinions, and arguments."

Section 150B-12(e) requires that the "agency shall consider fully all written and oral submissions respecting the proposed rule." Most agencies allow written input prior to the hearing; if the rules are not promulgated on the date of the hearing, the agencies will also consider written submissions subsequent to the rulemaking hearing and prior to the actual filing of the rule. Section 150B-12(e) also requires agencies to maintain a rulemaking record. Although the statute does not specify all of the contents of the rulemaking record, it does require that any comments re-

70. N.C. GEN. STAT. § 143B-18 (Interim Supp. 1986). Many agencies cite N.C. GEN. STAT. § 143B-10 (Interim Supp. 1986); technically, this citation only applies to agencies conducting rulemaking hearings and not boards and commissions conducting rulemaking hearings. This incorrect citation should not invalidate the rule or notice. See N.C. GEN. STAT. § 150B-61 (Supp. 1985) which allows editorial changes in history notes.

71. The North Carolina Center study shows how public input is received in the agency's rulemaking process. The study found that the most frequent participants in the rulemaking process are business interest groups, regulated persons (i.e. licensees), public interest groups and other state agencies. NORTH CAROLINA CENTER STUDY, supra note 33, Appendix I at 50. The study also indicated that forty-six percent of the public hearings have zero to ten persons present. Id. at 51.

72. N.C. GEN. STAT. § 150B-12(e) (Supp. 1985). This subsection in full provides:
The proposed rule shall not be changed or modified after the notice required by this section is published and before the rule-making hearing. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the consideration urged against its adoption. The record in every rule-making proceeding under this Article shall remain open at least 30 days either before or after the hearing for the purposes of receiving written comments, and any such comments shall be included in the hearing records. All comments received, as well as any statement of reasons issued to an interested person under this section, shall be included in the rule-making record.

73. Id.
ceived at the hearing or for a thirty-day period after the hearing must be included. A statement of reasons issued under section 150B-12(e) must also be included. Most agencies record public hearings on tape. Although section 150B-12 does not require the recordings to be maintained or included in the rulemaking record, if they are maintained, then under chapter 132, they become public records. The better practice is to include the tapes in the rulemaking record. Since the new Act does not require a rulemaking hearing for forms or instructions, or for repealing a rule provided in the Constitution of the United States, the Constitution of North Carolina, any federal or North Carolina statute, or any regulation or court order, then no rulemaking record should be required if tapes are used.

Despite these extensive requirements for public notice and opportunity for input under both the previous and the new APA, little written input into the rulemaking process exists. As noted in the North Carolina Center study, twenty-three percent of agencies indicated that no parties commented in writing while thirty-five percent of the agencies indicated that only one to five participants commented in writing. More significantly, forty-six percent of the agencies indicated that they would provide written responses to written comments. Interested persons are advised to provide written comments and request written responses from the rulemaking body. Under section 150B-12(e), if requested, an agency must issue “a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the consideration urged against its adoption.”

Section 150B-10 requires all agencies to adopt rules describing how the public may obtain information or make submissions or requests. Participants in the rulemaking process should contact the agency and determine how they should make any written or oral input. These public hearings are covered by the Open Meetings Law, and are subject to public notice requirements.

74. N.C. GEN. STAT. § 150B-12(f) (Supp. 1985).
75. N.C. GEN. STAT. § 150B-12(h) (Supp. 1985).
76. NORTH CAROLINA CENTER STUDY, supra note 33, Appendix I at 50.
77. Id.
78. Id.
79. N.C. GEN. STAT. § 150B-12(e) (Supp. 1985).
Agencies do not have the inherent authority to make rules. Except as authorized by the North Carolina Constitution, the general assembly may not delegate its power to make law. It may, however, delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated power.83

Of course, an agency may not promulgate rules contrary to statutory provisions.84 The legislature was sufficiently concerned about unauthorized rulemaking or rulemaking contrary to statutory provisions to have specifically directed the Administrative Rules Review Commission to review agency rules with the statutory limitation as a criterion.85

The new APA, like the previous Act, contains a number of special rulemaking requirements. Agencies must prepare a description of their organization and the procedures for obtaining information or making requests or submissions.86 Agencies must also adopt rules setting forth the nature and requirements of all formal and informal procedures,87 and a listing of all forms except for those involving internal management.88 Agencies must make all rules and other written statements of policy or interpretations formulated, adopted, or used by them in the discharge of their functions available for public inspection.89 These requirements should be read as supplemental to the public records statute.90

In section 150B-13, the new Act provides very specific procedures for an agency adopting temporary rules.91 These procedures have been established because the general assembly found that agencies had abused the previous delegation of authority to enact temporary rules. In order to enact a temporary rule, an agency must show that:

(1) Adherence to the notice and hearing requirements of [chapter

86. N.C. GEN. STAT. § 150B-10 (Supp. 1985).
87. N.C. GEN. STAT. § 150B-11(1) (Supp. 1985). In the author's experience, very few agencies have promulgated such rules.
91. N.C. GEN. STAT. § 150B-13(a)-(b) (Interim Supp. 1986).
150B] would be contrary to the public interest; and that
(2) The immediate promulgation is necessitated by and related to:
   a. A threat to public health, safety, or welfare resulting from any natural or man-made disaster or other events that constitute a life threatening emergency;
   b. The effective date of a recent act of the General Assembly or the United States Congress;
   c. A federal regulation; or
   d. A court order...92

Finally, there must be a written certification of need from the agency head.93

In addition to the procedures for temporary rulemaking, the new APA also provides exceptions to ordinary rulemaking.94 In adopting these procedures, the general assembly took note of the extra time that the new procedures would require. The general assembly also wanted to facilitate agencies’ elimination of superfluous rules that had either been established under other legal authority or did not affect the public. There are four exceptions to the established procedures for rulemaking.

No rulemaking hearing is required for the promulgation of a rule which describes forms or instructions used by the agencies,95—for example, personnel forms reporting changes in an employee’s personnel status. No rulemaking hearing is required to repeal a rule if the repeal is specifically provided for by the Constitution of the United States, the Constitution of North Carolina, any federal or North Carolina statute, any federal regulation, or a court order.96 For example, if a federal agency publishes certain mandatory regulations such as the Medicaid program, a state need not conduct rulemaking hearings to implement the required policy. Similarly, a federal court order against a state agency may be implemented without rulemaking.97

92. Id.
93. Id. Agency head means the Governor, the head of the council of the state agency or the chair of the occupational licensing board. N.C. GEN. STAT. 150B-13(a1) (Interim Supp. 1986).
95. N.C. GEN. STAT. § 150B-12(f); see also N.C. GEN. STAT. § 150B-2(8a)d (Supp. 1985).
96. N.C. GEN. STAT. § 150B-12(h) (Supp. 1985).
97. Query: If a federal regulation or court order left discretion to the state agency, then should rulemaking procedures be followed? In the author’s opinion,
As under the previous APA, an agency may adopt certain information by reference rather than repeat it verbatim. This provision is somewhat unusual. It is not included in the Revised Model APA and only one other state has such a provision. The procedure is permitted under the Federal APA. While the intent of this requirement is to minimize publication costs, it cannot be interpreted to preclude notice and a rulemaking hearing. Section 150B-14 contains a number of protections: specification of the material which can be adopted by reference, identification of the adopted material and availability of the adopted material.

Like the previous APA, section 150B-15 allows continuation of rules when an agency has been reorganized. Also, if the Director of the Office of Administrative Hearings certifies that an amendment to a rule does not change its substance and that the amendment meets certain statutory requirements, no rulemaking hearing is required.

Again, like the previous APA, the new APA allows a citizen to request an agency to promulgate a rule. Any person may petition an agency to promulgate, amend, or repeal a rule, and may include with his petition such data, views, and arguments as he thinks pertinent. Each agency must prescribe by rule the form of the petition and the procedure for its submission, consideration the agency should follow the statutory procedures because the requirements are not mandatory.

103. See N.C. GEN. STAT. § 150B-12(g) (Supp. 1985) which provides the following statutory requirements:

(1) A relettering or renumbering instruction; or
(2) The substitution of one name for another when an organization or position is renamed; or
(3) The correction of a citation to rules or laws which has become inaccurate since the rule was adopted because of repealing or renumbering of the rule or law cited; or
(4) The correction of a similar formal defect; or
(5) A change in information that is readily available to the public such as addresses and telephone numbers.
and disposition. Many agencies have adopted model rules of procedure. These rules require: an indication of the subject area to which the petition is directed or the actual rule to be amended or repealed, a draft of the proposed language, any reasons for the proposal, the effect of the change on existing rules, any data supporting the proposal, and the name and address of the petitioner. Practitioners should carefully review the rules of procedure for the particular agency to determine the actual requirements for the petition.

After submission of a petition, the agency, board or commission must either initiate the rulemaking hearing or deny the petition. If the agency initiates rulemaking, it must follow the procedures of sections 150B-12 and 150B-13. If the agency denies the petition, it must do so in writing and state its reasons. Denial of the petition is considered a final agency decision for purposes of judicial review.

Participants in the rulemaking process should carefully examine the agency procedures for filing such petitions. Participants are also urged to consider section 150B-11(3), which requires that the proposed rule address the expenditure or distribution of state funds. If the agency accepts the petition, it will have to provide a statement concerning the expenditure or distribution of funds. Usually, a petitioner does not know of such information, but the agency should be able to provide it.

IV. DECLARATORY RULINGS

Section 150B-17 requires that upon request of a person aggrieved, an agency shall issue a declaratory ruling on the validity or applicability of a rule or a statute to a given set of facts. The

109. An agency has thirty days in which to deny the request or initiate rulemaking procedures; a board or commission (which may only meet quarterly) has 120 days in which to act.
agency, for good cause, may elect not to issue a ruling. If so, that election becomes a final agency decision subject to judicial review. If the agency elects to issue the ruling, it is binding on the agency and the person requesting the ruling unless it is altered or set aside by a court. An agency may not retroactively set aside or alter a ruling.\textsuperscript{113}

This declaratory ruling provision in the new APA is substantially the same as in the previous APA. While the changes are based on section 2-103 of the Minnesota and the Revised Model Acts, the new APA’s provision does not contain many of the specific procedures required in those acts. As noted in the Commentary to the Model Act, “[t]he purpose of that proceeding is to provide an inexpensive and generally available means by which persons may obtain fully reliable information as to the applicability of agency administered law to their particular circumstances.”\textsuperscript{114}

Surprisingly, the provision is seldom used in North Carolina. Most agencies simply request an attorney general’s opinion, which may or may not be written. Such an opinion is not entitled to the same weight as a declaratory ruling, is not subject to appeal, and must be litigated to be a legally enforceable determination.\textsuperscript{115}

V. PUBLICATION OF RULEMAKING

Prior to the enactment of House Bill 52 into chapter 150B, both notice of rulemaking and publication of proposed and final rules were limited. The new APA makes important changes in these areas by establishing the \textit{North Carolina Register}.\textsuperscript{116}

The previous APA, section 150A-12(c), required that:

The agency shall publish the notice as prescribed in any applicable statute or, if none, shall publish the notice in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the proposed rule. Methods that may be employed by the agency, depending upon the circumstances, include publication of the notice in one or more newspapers of general circulation or, when appropriate, in trade, industry, governmental or professional publications. If the persons likely to be

\textsuperscript{113} N.C. GEN. STAT. § 150B-17 (Supp. 1985).
\textsuperscript{114} MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2-103 comment, 14 U.L.A. 87 (Supp. 1987).
\textsuperscript{116} N.C. GEN. STAT. § 150B-63 (Supp. 1985).
affected by the proposed rule are unorganized or diffuse in character and location, then the agency shall publish the notice as a display advertisement in at least three newspapers of general circulation in different parts of the State. 117

Most agencies merely published a legal notice in three newspapers. There was little uniformity in the newspapers selected. To stay informed of any agency's proposed rulemaking, a diligent citizen either had to stay in constant contact with agency officials about their proposed action or read the legal advertising portions of several newspapers.

Some agencies developed a mailing list of groups affected by rulemaking and mailed copies of rulemaking notices to everyone on the list. Once a year each agency had to contact the people on its mailing list to determine if they wished to remain on it. In the author's experience, few agencies ever made this effort.

Once individuals or groups were aware of proposed rulemaking, they had to contact the agency to obtain a copy of the proposed rule. Generally, most individuals and groups had to be aware of the proposed rulemaking and be knowledgeable enough about the process to contact the agency in advance and request a copy of the proposed rule. Of course, certain interest groups which monitored agency actions were able to obtain advance copies of proposed rules on a routine basis. Some agencies required citizens to pay for copies of the proposed rule. 118 Over time, the cost of legal advertising, copy, and postage grew. In 1981, Deputy Secretary of Administration Jane Smith Patterson undertook a feasibility study to examine the creation of a state register. This would be a state publication similar to the Federal Register, which would publish notices of rulemaking, proposed rules and final rules. As part of the study, the consultant obtained estimates of current expenditures and found that ten state agencies were spending a total of approximately $390,962.50. 119 Another study by the state auditor estimated the cost of legal advertising under the APA for eight selected agencies to be $169,000. 120 Regardless of the accuracy of the figures, state government was clearly spending substantial amounts

117. N.C. GEN. STAT. § 150A-12(c) (1983).
118. NORTH CAROLINA CENTER STUDY, supra note 33, Appendix I at 52.
of money in implementing the Act, especially in the area of legal advertising.

The North Carolina Center for Public Policy Research had long recommended the establishment of a state register. In 1985, the Center conducted a survey of state agencies and issued a report which made recommendations for changes in the revisions to the Administrative Procedure Act then under consideration in the 1985 General Assembly. The Center report noted that North Carolina was the only state in the South and one of only eleven in the country without a register.

With the creation of the North Carolina Register, the Director of the Office of Administrative Hearings must "compile, index and publish executive orders of the Governor and all rules filed and effective . . . ." The Director must also publish "at periodic intervals, but not less than once each month, the North Carolina Register which shall contain information relating to agency, executive, legislative or judicial actions that are performed under the authority of, or are required by, or are issued to interpret, or that otherwise affect, this Chapter." If proposed amendments are published, they must show "the portion of the rule being amended as it is to the degree necessary to provide adequate notice of the nature of the proposed amendment, with changes shown by striking through portions to be deleted and underlining portions to be added." The first North Carolina Register was published on April 15, 1986. The Office of Administrative Hearings publishes...

121. Editorial, 1 NORTH CAROLINA INSIGHT 2 (Spring 1978).
122. See supra note 33.
123. NORTH CAROLINA CENTER STUDY, supra note 33, at 41.
125. N.C. GEN. STAT. § 150B-63(a) (Supp. 1985).
127. N.C. GEN. STAT. § 150B-63(d2) (Supp. 1985).
128. Copies are available from the Office of Administrative Hearings, Post Office Box 11666, Raleigh, North Carolina 27604. An annual subscription costs $95. The 1985 Center survey found that twenty-one states charged $50 or less and that twelve states charged $51 to $150. NORTH CAROLINA CENTER STUDY, supra note 33, at 37. In addition, certain copies must be made available free of charge. For practitioners outside Raleigh, the Board of County Commissioners determines the location in each county. N.C. GEN. STAT. § 150B-63(e)(1) (Supp. 1985). The following free copies must be provided: one copy to each county of the state; one copy to the North Carolina Court of Appeals; one copy to the North Carolina Supreme Court; one copy to the Governor; five copies to the general assembly; one copy to each department receiving copies under N.C. GEN. STAT. § 7A-343.1; five copies to the state library; and one copy to each member of the general assembly.
a "List of Rules Affected" in each issue of the Register, which practitioners can use to determine whether an agency rule has been changed.129

Under the previous Act, rules that were filed with the attorney general were to be published "in print, microfiche, or other form"130 as soon as practicable after February 1, 1976. Due to a lack of appropriations, the North Carolina Administrative Code was not published. Persons desiring copies could either purchase them from the agency that promulgated the rule or from the APA section of the attorney general's office. The Act also required that certain groups receive free copies,131 but since no Code was published, no copies were available. In 1980, the North Carolina Court of Appeals addressed the issue. A citizens' group, as well as Orange County, and the towns of Chapel Hill and Carrboro sued the Department of Transportation over the proposed location of a new section of Interstate 40 in Orange County.132 The court took judicial notice that over 18,000 pages of regulations were then in existence but had not been published.133 The court stated:

While it is generally said that ignorance of the law is no excuse for failure to comply with the law, such a rule does not apply where the citizen is, as a matter of practicality, denied a reasonable means for finding out what the law is in the first place. Consequently, we hold that, under the facts of this case, it would contravene the most rudimentary principles of due process for this Court to deny the appellants a right of judicial review because they had not exhausted an administrative remedy codified in 1 N.C.A.C. § 25.10106 which is effectively hidden in the catacombs of the state bureaucracy.134

129. Practitioners unfamiliar with agency rules should pay close attention to the information in the history note that is attached to each rule. It will indicate the effective date of any changes in the rule. Practitioners should ensure that they have a copy of the rule as it read at the time of its application; the history note should assist in this effort. The Office of Administrative Hearings will certify a copy of a rule as being the version effective on a specific date.
131. N.C. GEN. STAT. § 150A-63(e) (1983) required copies to be distributed as follows: one copy to each county of the state at a place to be determined by the board of county commissioners; one copy to the North Carolina Court of Appeals; one copy to the North Carolina Supreme Court; one copy to the Governor; two copies to the general assembly; and five copies to the state library.
134. Id. (emphasis in original).
After this decision, the general assembly appropriated funds to have the North Carolina Administrative Code published in microfiche. The appropriation also allowed the purchase of microfiche readers in each of the locations required by section 150A-63(e).135

The new APA imposed a deadline on the Office of Administrative Hearings.136 As soon as practicable after July 1, 1985, the Chief Hearing Officer was to publish in print or other form a compilation of rules in force.137 Cumulative supplements had to be published at least annually. The Office of Administrative Hearings indicated that it planned to start publication on March 1, 1987.138 Publication of the Code will be phased in over several months with two or three titles of the Code being published each month until completion. After each Title has been published, updates will be available in loose leaf page inserts. The price has not been determined, but each volume will be sold separately and updates will be sold separately or by subscription.139

VI. ADMINISTRATIVE HEARINGS

A. Background and Legislative History

The creation of the new Office of Administrative Hearings is one of the significant changes in the new APA. It is important to distinguish between "rulemaking" hearings and "administrative" hearings. The former are public hearings on proposed rules which are conducted by the rulemaking officer, board or commission, and are in the nature of legislative proceedings. The latter are quasi-judicial proceedings involving an individual or group appealing an

135. Those persons wishing to purchase a copy could do so for $50; a microfiche reader without a printer cost $125 to $150. Therefore, one could read the rules but could not obtain a copy without contacting the agency or the attorney general's office. If one were to have a microfiche reader with a printer, then one could have the convenience of both reading the rules and printing a copy of what had been read. It should come as no surprise that the microfiche system is not widely used.
137. Id.
138. Interview with Robert Melott, Chief Hearing Officer, Office of Administrative Hearings.
139. Id. Given the limited use and expense of the microfiche system, the author regards it as significant that the new language omits the previous reference to publication by microfiche. Mr. Melott has indicated that the Office of Administrative Hearings will probably not continue the use of the microfiche.
agency rule as it applies to them. To the extent that it consists of an "order establishing or fixing rates or tariffs," 140 rate-making is exempt from rulemaking under section 150B-2(8a). If these activities affect "legal rights, duties, or privileges of a party," 141 or if a statute requires a hearing before setting a rate or tariff, an administrative appeal of that hearing is required. In the author's experience, few rate-setting and tariff-setting statutes actually refer to conducting a hearing or an administrative appeal under the old APA. Therefore, practitioners are likely to find few references under the new APA.

Three definitions are critical in determining whether someone has a right to an administrative hearing: "contested case," "party" and "person aggrieved." Section 150A-2(2), now recodified as section 150B-2(2), defines "contested case" as:

[A]ny agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing. Contested cases include licensing and any administrative proceeding to levy a monetary penalty, regardless of whether the statute authorizing such a penalty requires an adjudicatory hearing. Contested case does not include rulemaking, declaratory rulings, or the award or denial of a scholarship or grant. 142

The definition of "party" within the meaning of the new APA is essential to determining who may assert "legal rights, duties, or privileges" in a "contested case." Section 150B-2(5) defines "party" to mean "any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate." 143 In effect, this definition establishes standing under the APA. Professor Davis notes:

No aspect of administrative law has been changing more rapidly than the law governing standing. Standing barriers have been substantially lowered in recent years. The restricted concept of

140. N.C. GEN. STAT. § 150B-2(8a)e (Supp. 1985).
142. N.C. GEN. STAT. § 150B-2(2) (Supp. 1985). The prior section 150A-2(2) also contained the following language which has not been included in the new definition: "Contested cases include, but are not limited to proceedings involving rate-making, price-fixing and licensing." Clearly licensing is still covered under the special licensing provisions of section 150B-3.
standing that used to prevail has given way during the past decade to an ever-broadening concept that has increasingly opened the courts to challenges against administrative action. It is the expansion of standing that has made possible the veritable revolutions that have occurred in environmental law and the law of consumer protection. The narrow concepts of standing of not too long ago were appropriate to a legal system geared only to hearing John Doe's private-law claim against Richard Roe. If public interest claims are to be adequately considered in today's legal system, the concept of those able to vindicate the public interest must be accordingly expanded.144

The new Act's definition should be broadly interpreted to reflect Professor Davis' view of standing.

Related to the definition of "party" is "person aggrieved," which is defined as "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision."145 This definition appears in the judicial review portions of both the old and the new Acts.146 While both the old Act and the new Act allow for intervention in accordance with Rule 24 of the Rules of Civil Procedure;147 the new APA reflects the broader concept of standing since it appears to allow the Office of Administrative Hearings to make the initial determination of standing. A petition which is filed by a party other than an agency shall state facts tending to establish that the agency deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency: (1) exceeded its authority or jurisdiction; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; or (5) failed to act as required by law or rule.148

Applying these three definitions can be difficult. When a license or permit is at issue, there is little question about the right to a hearing, not only because of section 150B-3, but also because

of recognized administrative law principles. But consider the case of a person requesting an administrative hearing who is not the licensee—for example, a day care center—but who is someone affected by the licensee’s actions—for example, a parent of the child at the day care center. Other types of cases that might arise include public interest suits, class action suits and taxpayer suits. Traditionally, our courts have limited such suits, especially taxpayer suits, in an effort to avoid a flood of litigation. Generally, a taxpayer has no standing to challenge questions of general public interest that affect all taxpayers equally. However, if the taxpayer can show that the tax was levied for an unconstitutional, illegal or unauthorized purpose, he may maintain the action. To do so, the taxpayer must either show that carrying out the challenged provisions “will cause him to sustain personally, a direct and irreparable injury,” or that he is a member of the class prejudiced by the operation of the statute.

The North Carolina courts have begun recently to allow such suits. In *Orange County v. Department of Transportation*, the court of appeals held that the procedural injury implicit in the failure of an agency to prepare an environmental impact statement was a sufficient “injury in fact” to support granting standing as an aggrieved party to an environmental group challenging the location of Interstate 40.

The previous Act merely provided that “[t]he parties in a contested case shall be given an opportunity for a hearing without undue delay.” While the new Act contains this language, it also requires the initiation of a contested case by filing a petition with the Office of Administrative Hearings. Most of the exemptions from the APA were for agencies that had established adjudication

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149. See Carter v. Board of Registration, 85CVS8911 (Wake County) which is on appeal on the issue of the right of a complainant to a contested case hearing. No. 8610SC1345 (N.C. App. filed Nov. 1986).
In the author's opinion, these exemptions were granted to avoid political opposition to passage of the new Act by these bodies and their constituent groups. Therefore, practitioners wishing to appeal an agency decision should pay careful attention to the exemptions to determine if the agency is covered by the Act. In light of the limited application of the statute, practitioners should be prepared not only to analyze and determine whether there is a right to an administrative hearing, but also to argue that such a right does exist.

The 1985 survey by the North Carolina Center for Public Policy Research provided the first real evaluation of the impact of the previous APA on administrative hearings in state government. Prior to this survey, no study of any sort had been made of the use or impact of the administrative hearings portion of chapter 150A. The study's first and most significant finding was that because of the number of exemptions to this portion of the Act, there were very few appeals. During fiscal 1984, the Center survey found

158. The following types of administrative appeals are excluded from N.C. GEN. STAT. § 150B: denials of Unemployment Insurance, which are governed by N.C. GEN. STAT. ch. 96 (1985) and the rules of the Employment Security Commission; Worker's Compensation claims, which are governed by N.C. GEN. STAT. ch. 97 (1985) and the rules of the Industrial Commission; ratemaking appeals for utility companies, which are governed by N.C. GEN. STAT. ch. 62 (1985) and the Utilities Commission; driver's license appeals which are governed by N.C. GEN. STAT. ch. 20 (1983) and the Division of Motor Vehicles; and state and local employee grievances prior to their being heard by the State Personnel Commission.

159. NORTH CAROLINA CENTER STUDY, supra note 33, at 29-34, and Appendix I at 53-55.

160. The number of agencies responding varied considerably; some departments responded as a whole and others had both departmental and division responses. The total number of respondents varied from sixty-five to sixty-eight.

161. The State fiscal year runs from July 1 to June 30 of the following year; Fiscal Year 84 began July 1, 1983 and ended June 30, 1984. The information was collected in this manner so that it could be used to make budgeting comparisons. Thirty-four percent of the agencies had no administrative appeals; twenty-four percent had less than ten appeals; two respondents (three percent) had more than one hundred appeals; and thirteen respondents (nineteen percent) had eleven to one hundred appeals per year. See NORTH CAROLINA CENTER STUDY, supra note 33, Appendix I at 50. The two agencies with the most appeals were the Department of Human Resources (DHR) and the Department of Natural Resources and Community Development (DNRC). Most of the DHR hearings involved public assistance programs (Aid to Families with Dependent Children (AFDC), Medicaid, Food Stamps, etc.) and most of the DNRC hearings involved license and permit appeals from environmental regulations, especially before the Coastal Resources Commission.
that an estimated 2,155 hearings were conducted. Of this number, seventy-one percent were public assistance appeals; eighteen percent were appeals from other Cabinet agencies, mostly from the Department of Natural Resources and Community Development; six percent were from Council of State agencies; and five percent were from occupational licensing boards.

Given the origins of administrative law in protecting property rights, especially the granting, suspending, and denial of licenses and permits, one might expect a significant number of administrative hearings by occupational licensing boards. However, the Center survey found that of the eighteen licensing boards responding to the survey, ten had no administrative appeals in fiscal 1984. During fiscal 1984, only 106 appeals were taken from literally thousands of licenses and permits that were granted.

The Center survey and report was purposely published during consideration of House Bill 52 and its findings impacted on the general assembly's deliberations. Much of the rewrite of article 2 was the same as the previous language in chapter 150A. However, one significant change was the proposed creation of the Office of Administrative Hearings and its authority over the final decision at

162. A Cabinet agency is one whose head is appointed by the Governor and whose duties are listed in N.C. Gen. Stat. § 143B. A Council of State agency head is elected statewide; for example, the Superintendent of Public Instruction. The agencies are listed in N.C. Gen. Stat. § 143A (1983).

163. North Carolina Center Study, supra note 33, Appendix I at 50.


166. The eight Boards that reported hearings were as follows: the North Carolina Board of Architecture (one appeal), North Carolina Auctioneer Licensing Board (four appeals), North Carolina State Board of Dental Examiners (four appeals), North Carolina Alarm Systems Licensing Board (four appeals), North Carolina Private Protective Services Board (five appeals), North Carolina State Board of Registration for Professional Engineers and Land Surveyors (thirteen appeals), North Carolina Board of Nursing (thirty-one appeals), and the North Carolina Real Estate Licensing Commission (thirty-five appeals).

167. Some respondents checked more than one answer so that the percentages total more than 100 percent.
the administrative hearing. During the 1984 deliberations on House Bill 1784, one of the most controversial issues was the final agency decision-making authority. The Center survey found that fifty percent of all hearings were conducted by a hearing officer, twenty-four percent were conducted by a board or commission, and nine percent were conducted by a committee. Significantly, of the hearings conducted by hearing officers, fifty-six percent used an agency employee, eighteen percent used a lawyer under contract, fifteen percent used another agency's employee and twenty-four percent had other arrangements. The survey also revealed that in sixty-two percent of those hearings, the hearing officer was appointed by the agency head. Finally, the survey revealed that in eighty-eight percent of the cases, the hearing officer made a proposal for decision and someone else made the final agency decision. This survey information was considered during the legislative debate over House Bill 52 in the 1985 general assembly.

During the deliberations of the APA legislation in the 1985 general assembly, there was legislative concern about whether an agency could or would use the same person or committee to make rules, hear appeals concerning those rules, and then make the final agency decision on those appeals. There was additional concern that when a hearing officer was appointed by the same agency head who would make the final agency decision, the former might not be impartial. These concerns led to a proposal for the creation of a separate agency of hearing officers with final decision-making authority. While there was general opposition to the creation of the Office of Administrative Hearings, the most specific opposition was to the provision giving the Office of Administrative Hearings final decision-making authority. This opposition largely prevented the passage of House Bill 1784 in the 1984 general assembly. As a result of this controversy and especially the strong opposition from

168. This bill was introduced but not ratified. See supra text accompanying note 17.
169. NORTH CAROLINA CENTER STUDY, supra note 33, at 53.
170. Id. at 54.
171. Id.
172. Id.
173. Id.
174. The sponsor of the bill, Representative Watkins, frequently referred to an agency serving as "prosecutor, judge and jury." NORTH CAROLINA CENTER STUDY, supra note 33, at 7.
occupational licensing boards, two compromises were reached in 1984: (1) hearing officers were not given final agency decision making authority, and (2) two separate administrative hearings Articles were proposed—one for executive branch agencies and another for licensing boards. This compromise was carried forward into House Bill 52 and enacted into chapter 150B.

B. Article 3 and Article 3A Hearings

Article 3A of chapter 150B applies to all occupational licensing agencies, the State Banking Commission, the Commissioner of Banks, the Savings & Loan Division and the Credit Union Division of the Department of Commerce, and the Department of Insurance. Article 3 applies to all other hearings covered by the Act, unless a party waives having the Office of Administrative Hearings conduct the hearing.176

The significant difference between these two articles is that article 3A hearings are conducted by "a majority of the agency,"176 and since the definition of "agency"177 includes boards or commissions, occupational licensing boards continue to conduct their own hearings. The agency may elect to have an administrative law judge conduct the hearing, but even then it will retain the right to make the final agency decision.178 If a hearing is conducted under article 3, the hearing officer makes a proposal for decision and the agency head either adopts or modifies that decision.179 In either case, the agency cannot take additional evidence and is limited to considering exceptions, proposed findings of fact, and receiving oral and written arguments.180 Practitioners should be aware of which of the two articles applies to the type of hearing being conducted. While it will not affect the hearing procedure, it will certainly govern who conducts the hearing and therefore how the attorney should prepare his or her presentation.

An article 3 hearing is initiated by filing a petition for hearing. The petition must be verified or supported by an affidavit if it is

176. N.C. Gen. Stat. § 150B-40(b) (Supp. 1985)).
filed by someone other than an agency. An article 3A hearing is initiated by the agency giving notice of hearing not less than fifteen days before the hearing. One new requirement is that all motions filed by an attorney, including the initial petition, must include the lawyer's North Carolina State Bar number.

Both article 3 and article 3A hearing officers must provide a notice of hearing. The notice must include the following information: a statement of the date, hour, place and nature of the hearing; a reference to the particular statutes and rules involved; and a short and plain statement of the facts alleged. Notice can be given personally or by certified mail, or pursuant to the service requirements in Rule 4(j1) of the North Carolina Rules of Civil Procedure.

The Office of Administrative Hearings has instituted the routine practice of pre-hearing conferences in which numerous preliminary matters are resolved. After receipt of the petition or notice, the administrative law judge assigned to the case must send each party an order for prehearing statements requesting the following information: (1) the nature of the proceeding and the issues to be resolved; (2) a brief statement of the facts and reasons supporting the party's position in each matter in dispute; (3) a list of facts, conclusions or exhibits to which the party will stipulate; (4) a list of proposed witnesses with a brief description of their proposed testimony; (5) a description of what discovery, if any, the party will seek to conduct prior to the contested case hearing and an estimate of the time needed to complete discovery; (6) whether the party will order a transcript; (7) venue considerations; and (8) other special matters.

The hearing officer will then schedule a pre-hearing conference in which all pretrial matters of significance are established. This will result in a pre-hearing order, the drafting of which is usually

181. N.C. GEN. STAT. § 150B-23(a) (Supp. 1985).
182. N.C. GEN. STAT. § 150B-38(b) (Supp. 1985).
183. N.C. ADMIN. CODE tit. 26, r. 03.0001(3) (Sept. 1986).
184. N.C. GEN. STAT. § 150B-23(b) and N.C. GEN. STAT. § 150B-38(b) (Supp. 1985).
185. N.C. GEN. STAT. § 150B-23(c) and N.C. GEN. STAT. § 150B-38(c) (Supp. 1985).
186. Technically, this is a power of the hearing officer under N.C. GEN. STAT. §§ 150B-33(b)(4)-(5) and 150B-40(c)(4)-(5) (Supp. 1985). The Office of Administrative Hearings has established this practice by rule.
187. N.C. ADMIN. CODE tit. 26, r. 03.0004 (Sept. 1986).
assigned to the party initiating the hearing process. Many of the pretrial procedures with which lawyers are familiar are available prior to administrative hearings. A word of caution to practitioners who are unfamiliar with administrative hearings: administrative hearings are informal in nature and much can be resolved with a phone call or a letter. Formal motions are the exception rather than the rule.

Discovery, including depositions, is available under both article 3 and article 3A hearings. Upon request, the agency must make records available to the requesting party. In addition to this requirement, most agency records are covered by the public records statute and are therefore available for inspection and copying. Practitioners will still encounter some agencies which charge a fee for providing copies of documents. Motions for intervention and consolidation are also authorized. While article 3A hearings do not contain an explicit authorization for consolidation, the hearing officer presumably has that authority under sections 150B-33 and 150B-40(c). Pre-hearing stipulations are also provided for in sections 150B-31 and 150B-41(c). Another typical motion is a continuance. The Office of Administrative Hearings has adopted a rule allowing continuances, but it contains a significant limitation. The continuance may only be granted if no other lawyer in the firm is familiar with the case.

Under the previous APA, North Carolina was one of the few states that gave subpoena power to its hearing officers. This power is continued under the new Act. Subpoenas may be objected to and revoked. Witness fees must be paid except to state officials and employees, who receive their normal salary, do not lose their annual leave and have travel expenses reimbursed at the state rate under section 138-6.

The previous APA clearly established a preference for conducting hearings in Wake County. The new APA provides for

188. N.C. GEN. STAT. §§ 150B-28(a) and 150B-39(a) (Supp. 1985).
189. N.C. GEN. STAT. §§ 150B-28(b) and 150B-39(b) (Supp. 1985).
191. N.C. GEN. STAT. §§ 150B-23(d) and 150B-38(f) (Supp. 1985).
195. Id.
venue as follows: (1) in the county in which the person’s property or rights are the subject matter of the hearing; (2) in the county where the agency maintains its principal office if the property or rights do not affect any person or if more than one county is involved; or (3) in the county determined by the agency or hearing officer that will promote the ends of justice or better serve the convenience of the witnesses.198

Legislative debate raised questions about the impartiality of the hearing process. The previous APA contained provisions by which impartiality could be preserved, and these provisions were re-codified into the new APA. Hearing officers under both article 3 and 3A hearings are prohibited from ex parte communications “in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate.”199 Additional discretion is given to hearing officers in article 3A hearings.

An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually-related case. This section does not apply to an agency employee or party representative with professional training in accounting, actuarial science, economics or financial analysis insofar as the case involves financial practices or conditions.200

Like the previous Act, the new Act provides procedures for requesting the hearing officer to disqualify himself. The party must file a timely, sufficient and good faith affidavit of personal bias or disqualification of the hearing officer.201 The agency must make a determination as to bias which must be included in the record.202 Article 3A also allows the hearing to be referred to the Office of Administrative Hearings.203 Finally, if substantial prejudice will result in continuing the case, even with a new administrative law judge, either a new hearing will be conducted or the case can be

198. N.C. GEN. STAT. §§ 150B-24(a) and 150B-38(e) (Supp. 1985).
199. N.C. ADMIN. CODE tit. 26, r. 03.0018 (Sept. 1986).
201. N.C. GEN. STAT. §§ 150B-32(b) and 150B-40(b) (Supp. 1985).
202. Id.
dismissed without prejudice.\textsuperscript{204}

While administrative hearings are intentionally informal, if a party fails to appear in a contested case after proper service of notice and if no adjournment or continuance is granted, the agency or hearing officer may proceed with the hearing in the party's absence. Despite the informality, hearings are still quasi-judicial. Both parties must be given the opportunity to present evidence on issues of fact, to examine and cross-examine witnesses, to present arguments on issues of law and to submit rebuttal evidence.\textsuperscript{205} Although formal rules of evidence do not necessarily apply, irrelevant, immaterial and unduly repetitious evidence may be excluded. The Office of Administrative Hearings has adopted the newly enacted Rules of Evidence.\textsuperscript{206} Evidence is made part of the record. Documentary evidence may be received in copy form or incorporated by reference. Neither a party nor attorney need object to the introduction of evidence in order to preserve the right to object to the agency's considering it in reaching its final agency decision or a court doing so on judicial review.\textsuperscript{207}

The use of official notice is a procedure unique to administrative hearings. While it is similar to judicial notice, it allows the hearing officer to take notice of matters that are within the specialized knowledge of the agency. The noticed fact and its source must be stated and made known to the affected parties at the earliest practicable time. Any party may request an opportunity to dispute the noticed fact through submission of evidence and argument.\textsuperscript{208} Official notice is noted in the proposal for decision and the parties may orally argue its use or applicability prior to the final agency decision.\textsuperscript{209}

All hearings are to be open to the public.\textsuperscript{210} While this is certainly consistent with the constitutional directive that all courts shall be open to the public,\textsuperscript{211} it is not entirely consistent with the Open Meetings Law.\textsuperscript{212} Among the enumerated exceptions that au-
authorize an executive session and which might be the subject of an administrative hearing are: (1) investigation of a complaint, charge or grievance by or against a public officer or employee (except that final action for a discharge or removal must be taken in a public meeting); (2) hearing, considering and deciding matters involving admission, discipline or termination of members of the medical staff of a public hospital; and (3) consultation with an attorney to the extent confidentiality is required in order for the attorney to exercise his ethical duties as an attorney.\(^{213}\) Since personnel matters are also covered under section 150B-23, the possibility of conflict exists. Presumably, the statutory rule of construction that specific legislation should control general legislation would apply and the new APA would require the hearing to be open to the public.

The administrative law judge must issue a draft decision called a "proposal for decision". It must contain findings of fact, conclusions of law, and a proposed decision, opinion order or report. The findings of fact and conclusions of law must be consistent\(^{214}\) and they must be sufficiently specific to avoid a remand by the courts.\(^{215}\) Once the hearing officer has issued the decision, a copy must be delivered to each party to provide an opportunity to file exceptions, proposed findings of fact and written arguments.\(^{216}\) Under both article 3 and article 3A hearings, a party may make oral arguments to the final decision-maker.\(^{217}\) While the new APA does not specifically state that no new evidence may be taken, the general assembly intended to confine decision-making to the record developed by the administrative law judge.\(^{218}\)

The opportunity for oral argument is not routinely provided and it must be requested. Advocates should not let the opportunity to make oral arguments pass. Frequently, the final decision-maker will only know what is presented to him or her in the proposal for decision. While the APA requires decision-making based on the official record,\(^{219}\) in the author's experience the final decision-makers really only review the proposal for decision. Once the final agency

\(^{216}\) N.C. Gen. Stat. §§ 150B-34(a) and 150B-40(e) (Supp. 1985).
\(^{217}\) Id.
decision is reached, it must be served upon each party personally by certified mail and a copy must be sent to the attorneys of record.\textsuperscript{220} If the recommendation of the administrative law judge is not adopted, then the final decision must contain "a concise and explicit statement of the underlying facts supporting [it]."\textsuperscript{221}

In court proceedings, the record is important, but in agency proceedings, it is even more so. On judicial review, the court may look at the "whole record" in reviewing the agency's final decision. In contrast, an agency's findings of fact, if supported by competent, material and substantial evidence, are conclusive on the reviewing court.\textsuperscript{222} The official record must contain the following information: (1) notices, pleadings, motions, and intermediate rulings; (2) questions and offers of proof, objections, and rulings thereon; (3) evidence presented; (4) matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose; (5) the hearing officer's proposal for decision, exceptions and proposed findings of fact; and (6) the hearing officer's recommended decision, opinion, order or report.\textsuperscript{223}

Practitioners should not assume that the hearing will be recorded, even though this is the typical practice. If oral evidence is offered, that portion of the proceeding must be recorded.\textsuperscript{224} The hearing officer has the authority to "determine whether the hearing shall be recorded by a stenographer or by an electronic device."\textsuperscript{225} If a transcript is requested, the requesting party must pay for it.\textsuperscript{226} Since this can be an expensive process, practitioners may want to request a copy of the tape and then either handle the transcription themselves or only transcribe those portions of significance.\textsuperscript{227}

The powers of the administrative law judge are substantially the same as those of a judge in a judicial proceeding.\textsuperscript{228} The main

\textsuperscript{222} North Carolina Dept. of Correction v. Gibson, 58 N.C. App. 241, 293 S.E.2d 664, rev'd on other grounds, 308 N.C. 131, 301 S.E.2d 78 (1982).
\textsuperscript{224} N.C. Gen. Stat. §§ 150B-37(b) and 150B-42(c) (Supp. 1985).
\textsuperscript{225} Id. The Chief Hearing Officer indicates that his office will consider one of the two to be mandatory.
\textsuperscript{226} Id.
\textsuperscript{227} All hearings conducted by the Office of Administrative Hearings are recorded on a four-track tape which will require a special player.
\textsuperscript{228} See N.C. Gen. Stat. §§ 150B-33 and 150B-40(c) (Supp. 1985) for a list of the enumerated powers; note that these powers are slightly more extensive than
difference between them is the contempt power. The administrative law judge must apply to any resident judge in either superior or district court where a hearing is pending for an order to show cause why a person should not be held in contempt. If the court so finds, then it has the power to punish as if the contempt occurred in court. 229

Certain differences exist between the powers given to article 3 and article 3A administrative law judges. The most significant is the authority of an article 3 hearing officer to
determine that a rule as applied in a particular case is void because: (1) it is not within the statutory authority of the agency; (2) it is not clear and unambiguous to the persons it is intended to direct, guide, or assist; or (3) it is not reasonably necessary to enable the administrative agency to perform a function assigned to it by statute or to enable or facilitate the implementation of a program or policy in aid of which the rule was adopted. 230

In effect, this section gives the article 3 hearing officer summary judgment authority. These three criteria are similar to those by which the Administrative Rules Review Commission has been instructed to review agency rules.

The changes in administrative hearings and the creation of the Office of Administrative Hearings are the most significant changes in the new APA. The Chief Hearing Officer and the newly appointed administrative law judges are experienced lawyers who are eager to cooperate in assisting other lawyers to understand the new system.

VII. JUDICIAL REVIEW

Judicial review of administrative action pre-dates the enactment of chapters 150A and 150B. Previously, the court limited its review to abuse of discretion. Perhaps the best statement was made by Justice Barnhill in 1955. 231

When the jurisdiction of a court is properly invoked to review the action of a public official to determine whether he, in choosing one of two or more courses of action, abused his discretion, the court may not direct any particular course of action. It only de-

those enumerated under the previous N.C. GEN. STAT. § 150A-33 (1983).
cides whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice.\textsuperscript{232}

Over time, this statement evolved into the following rule of judicial review:

The courts will not review or reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable, or arbitrary action, or disregard of law. The findings of the agency must be made in accordance with the legal meaning of the terms of the statute.\textsuperscript{233}

Procedurally, the means of judicial review varied. If an agency refused to perform its statutory duty, then mandamus was the procedural basis for suit; but its use was limited to compelling the performance of a ministerial duty and it could not control a discretionary power.\textsuperscript{234} If the challenged administrative act involved election of a public official or his/her authority, quo warranto was the basis for suit.\textsuperscript{235}

In 1951, the North Carolina General Assembly made its first attempt to codify the right to judicial review in chapter 143, article 33.\textsuperscript{236} In 1953, the Uniform Revocation of Licenses statute was en-

\textsuperscript{232} Id. at 407, 90 S.E.2d at 702-03.
\textsuperscript{233} North Carolina Real Estate Licensing Bd. v. Woodard, 27 N.C. App. 398, 399, 219 S.E.2d 271, 273 (1975) (citing 1 STRONG, N.C. INDEX 2D, Administrative Law § 5, at 43 (1967)).
\textsuperscript{234} Even this limitation led to exceptions: if the party to be coerced was under a legal duty to perform the act which was to be enforced and the act depended upon the existence of predicate facts and if the discretion only applied to determining the existence of the predicate facts, then mandamus would lie upon proof of the existence of those facts. Also, when the applicant could show that the agency had abused its discretion or had acted in an arbitrary, capricious manner or in disregard of the law, then even discretionary acts could be subject to mandamus. See generally 8 STRONG, N.C. INDEX 3D, Mandamus § 2 (1977) and cases cited therein; see also Stocks v. Thompson, 1 N.C. App. 201, 161 S.E.2d 149 (1968).
\textsuperscript{235} Hedgpeth v. Allen, 220 N.C. 528, 17 S.E.2d 781 (1941); Swaringen v. Poplin, 211 N.C. 700, 191 S.E. 746 (1937); see also 5 STRONG, N.C. INDEX 3D, Elections §§ 8-9 (1977).
\textsuperscript{236} N.C. GEN. STAT. § 143-307 (1973) provided:
Any person who is aggrieved by a final administrative decision, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking

http://scholarship.law.campbell.edu/clr/vol9/iss2/3
acted in chapter 150; section 150-24 provided for judicial review of board action. When chapter 150A was enacted, it recodified the right of judicial review from section 143-307. Section 150A-43 provided that:

Any person who is aggrieved by a final agency decision in a contested case and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute.

This section is known as the five-part test for judicial review:

1. The plaintiff must be an aggrieved party;
2. There must be a final agency decision;
3. The decision must have resulted from a contested case;
4. The plaintiff must have exhausted his/her administrative remedies; and,
5. There must be no other adequate procedure for judicial review.

The drafters were so concerned about other remedies that they guaranteed the continued right to use extraordinary writs by adding the following sentence: "Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable by this Article." This section was re-codified verbatim into section 150B-43.

A considerable body of law regarding the right to judicial review developed under the previous statutes. Practitioners should be prepared to research it since the language is the same. One

any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

237. N.C. Gen. Stat. § 150-24 (1973) provided:
Any person entitled to a hearing pursuant to this Chapter, who is aggrieved by an adverse decision of a board issue after hearing, may obtain a review of the decision in the Superior Court of Wake County, or in the superior court of the county in which the hearing was held, or, upon agreement of the parties to the appeal, in any other superior court of the State.


242. The following sources of law are suggested if research is required: the
rule that a petitioner should always invoke is that the statutory right of judicial review must be liberally construed in favor of the party seeking review.\textsuperscript{243} Public interest and consumer cases will raise novel issues on standing and the practitioner must be prepared to argue the extent to which the petitioner is a "person aggrieved."\textsuperscript{244}

The party seeking judicial review must file a petition in superior court within thirty days after service of a written copy of the final decision.\textsuperscript{245} Failure to file within that time period may constitute a waiver, except for good cause.\textsuperscript{246} Practitioners should be aware that agencies are barred from appealing adverse decisions. In the definition of "party," the new Act provides that an agency as a party "shall not be construed to permit the hearing agency or any of its officers or employees to appeal its own decision for initial judicial review."\textsuperscript{247} Unlike the previous section 150A-43, venue is no longer limited to Wake County. The petitioner may file either in Wake County or the superior court where the petitioner resides.\textsuperscript{248}

The petition must explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks. Practitioners are advised to attach a copy of the final agency decision to the petition. It will become part of the certified record that is filed and it allows the judge and the attorney representing the agency, who is usually from the attorney general's office, to know which agency decision is involved. Moreover, if a motion to dismiss is filed, then at least the final agency decision is part of the record on appeal. Within ten days after the petition is filed, the petitioner must serve copies of the petition by personal service or by certified mail upon all parties of record to the prior administrative proceeding.\textsuperscript{249} The practitioner is advised to use the provision of Rule 4(j)(4)(c) of the North Carolina Rules of Civil Procedure, and serve


244. See supra note 112.
246. Id.; presumably the cases decided under Rule 60 (Relief from judgment or order) of the North Carolina Rules of Civil Procedure would apply.
the attorney general or his deputy, if he knows that attorney will be representing the agency. Not only does this accomplish actual service, but it is a professional courtesy to the attorney who has only thirty days to compile a record. Once the petition has been received, the agency has thirty days to transmit the original or certified record of the hearing to the court. Practitioners handling personnel grievance cases should be aware that considerable time is required to transcribe witnesses’ oral testimony, so that a transcript may not be available within the thirty-day period. With the permission of the court, the record may be shortened upon stipulation of the parties. An unreasonable refusal to stipulate may result in costs being taxed to the refusing party.

If the petitioner wishes to stay the agency action, he may apply to the reviewing court for an order staying the operation of the administrative decision pending outcome of the review. Since the terms of the section limit the right to a “person aggrieved,” someone acting in a public interest capacity, or as an intervenor must again be prepared to argue his standing.

Under the two previous judicial review statutes, the standard of review was the “whole record” test, unless an applicable statute provided otherwise. Although the applicable standard of review may seem esoteric, it is not. “Selection of the proper standard is important in every appeal from an administrative decision because use of the correct standard clarifies the basic issues and focuses the reviewing court’s inquiry on the relevant factors.” While the use of the “substantial evidence” test is increasingly accepted as the standard of review for administrative hearings, its use in judicial review of rulemaking has been criticized.

One of the areas that the new APA has opened to question is the scope of review. Previously, under sections 150A-51, 143-315 and 150-27, six areas existed on which judicial review could focus: (1) violation of constitutional provisions; (2) exceeding statutory authority or agency jurisdiction; (3) unlawful procedure; (4) other error of law; (5) lack of substantial evidence; or (6) arbitrary or capricious action. The new Model APA lists eight factors as a basis for judicial review. In contrast, the new North Carolina scholars have argued for the use of the arbitrary and capricious standard of judicial review of rulemaking. This less exacting standard of review makes sense since the rulemaking record is limited and is not an evidentiary hearing.

257. MODEL STATE ADMINISTRATIVE PROCEDURE ACT, § 5-116, 14 U.L.A. 156 (Supp. 1987) provides that:

(c) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:

(1) The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.
(2) The agency has acted beyond the jurisdiction conferred by any provision of law.
(3) The agency has not decided all issues requiring resolution.
(4) The agency has erroneously interpreted or applied the law.
(5) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.
(6) The persons taking the agency action were improperly constituted as a decision-making body, motivated by an improper purpose, of subject to disqualification.
(7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court, under this Act.
(8) The agency action is:

(i) outside the range of discretion delegated to the agency by any provision of law;
(ii) agency action, other than a rule, that is inconsistent with a rule of the agency; [or]
(iii) agency action, other than a rule, that is inconsistent with the agency's prior practice unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency. [; or] [.]
(iv) [otherwise unreasonable, arbitrary or capricious].

Persons interested in this issue should review the Commissioners' Comment on each subsection and the cases and articles cited therein; see Brodie & Linde, State Court Review of Administrative Action: Prescribing the Scope of Review,
APA merely provides that: "Based upon the record and the evidence presented to the court, the court may affirm, reverse, or modify the decision or remand the case to the agency for further proceedings."\textsuperscript{286} It is unclear what standard of review will be used under the Act. Practitioners should be alert to either judicial interpretations or legislative amendments in this area. Although the Act may not be explicit, legislative intent was to eliminate the "whole record" test and substitute the same rule used in appellate cases, that is, affirm, modify, reverse or remand. This change would put greater weight on the decisions of the administrative law judge.

Given that much of the controversy at the judicial review stage involves questions of law rather than fact, the practitioner is advised to file a trial brief. Local Rule 9.2\textsuperscript{259} requires the filing of petitioner's brief within twenty days after the original or certified record has been filed with the court. Respondent's brief is due within twenty days of receipt of petitioner's brief. These periods may be enlarged in the the court's discretion. Local Rule 9.10\textsuperscript{260} requires a prehearing conference and a proposed pretrial order to be filed at least ten days before the date the case is set for trial.

Unlike a normal hearing before a judge, a hearing on a judicial review petition has certain limitations. The review of the decisions is conducted by the court without a jury.\textsuperscript{261} Normally, no evidence is heard. The previous APA left to the court's discretion whether new evidence should be heard.\textsuperscript{262} The new APA merely states that

\begin{itemize}
  \item 258. N.C. GEN. STAT. § 150B-51 (Supp. 1985).
  \item 260. \textit{Id. at Civ. R.} 9.10.
  \item 261. N.C. GEN. STAT. § 150B-50 (Supp. 1985). This was also true under the previous N.C. GEN. STAT. § 150A-50 (1983).
  \item 262. N.C. GEN. STAT. § 150A-49 (1983) provided:
  
  At any time after petition for review has been filed, application may be made to the reviewing court for leave to present additional evidence. If the court is satisfied that the evidence is material to the issues, that it is not merely cumulative, and that it could not reasonably have been presented at the hearing before the agency, the court may remand the case to the agency where additional evidence shall be taken. The agency may then affirm or modify its findings of fact and its decision, and shall file with the reviewing court as a part of the record the additional evidence, together with the affirmation, or any modifications, of its findings or decision.
  
  N.C. GEN. STAT. § 150A-50 (1983) provided:
\end{itemize}
“[i]n a review proceeding under this Article, any party may present evidence not contained in the record that is not repetitive.”

During the deliberations of House Bill 52, the general assembly clearly intended to expand the judge’s authority to take evidence. There can be little objection if the court is willing to hear additional evidence in order to avoid reading a lengthy administrative record. Like many matters at trial, the lawyer should be aware of the judge’s preferences. Clearly, affidavits properly served prior to the hearing may be admissible when oral evidence might be excluded. Some of these decisions are within the court’s discretion and will not be disturbed absent a showing of abuse of discretion.

Nevertheless, the discretion to take additional evidence is not unlimited. It is the superior court judge’s province to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. This is so when the testimony is conflicting, but especially so when the facts are uncontradicted. On the other hand, if the agency decision is prejudiced by administrative findings, inferences, conclusions or decisions unsupported by competent evidence, it may be reversed.

Practitioners should be aware that their zeal to get additional evidence before the superior court judge to reverse a final decision may result in a reversal on appeal because of the judge’s willingness to hear such evidence. On the other hand, the new standard may only require a showing that the evidence was not repetitive.

The review of agency decisions under this Chapter shall be conducted by the court without a jury. The court shall hear oral arguments and receive written briefs, but shall take no evidence not offered at the hearing; except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken by the court; and except that where no record was made of the administrative proceeding or the record is inadequate, the judge in his discretion may hear all or part of the matter de novo.

264. See Clark Equipment Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964), where the trial court found facts which the agency had refused to find; such a finding was held to be an abuse of the trial court’s discretion.
265. Commissioner of Ins. v. N.C. Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, reh’g denied, 301 N.C. 107, 273 S.E.2d 300 (1980).
266. In re Gales Creek Community Ass’n, 300 N.C. 267, 266 S.E.2d 645 (1980).
One exception to taking evidence is the use of judicial notice. While the APA allows judicial notice to be taken of any rule effective under it, all rules of judicial notice probably apply. An adverse decision of the superior court may be appealed under the rules of civil procedure. The North Carolina Rules of Appellate Procedure have made special provision for settlement of the record on appeals of administrative hearings. Both new and experienced administrative law practitioners should be aware of the changes that chapter 150B has made in the area of judicial review. The results are difficult to predict.

VIII. CREATION OF AN ADMINISTRATIVE RULES REVIEW COMMISSION

The new APA creates an Administrative Rules Review Commission which is charged with reviewing agency rules. It must review not only rules filed with it after September 1, 1986, but also all agency rules already in existence. The Commission’s creation is the culmination of a long-running battle, not only between the general assembly and the executive branch, but also within the general assembly itself.

Since 1977, the general assembly has been wrestling with the appropriate role for oversight of agency rulemaking. This trend is not unique to North Carolina, but is part of a national trend among all legislative bodies.

In 1977, the general assembly created the Administrative Rules Review Commission consisting of nine legislators. All agencies filing rules for publication had to file a copy of the proposed rule with the Director of Research prior to its being filed...
with the attorney general. Failure to file a copy resulted in the rule's rejection by the attorney general as invalid.\textsuperscript{276} The Commission was limited to reviewing filed rules and if it identified any problems, it could submit corrective legislation.\textsuperscript{276} In short, its role was legislative oversight.

Some states have established a legislative commission with authority to suspend or veto agency rules. This was considered by the general assembly in 1981,\textsuperscript{277} but was rejected because of concerns about its constitutional validity. Instead, a compromise was adopted giving the Commission the right to object and to refer the rule to the Governor or Council of State for reconsideration. During this reconsideration period, the effective date of the rule was suspended for sixty days. The Commission's objection would become part of the history note of the rule. Presumably, this put per-

\begin{quote}
utes. This subsection does not apply to rules adopted by the Industrial Commission, the Utilities Commission, or the Department of Transportation relating to traffic sign ordinances, and road and bridge weight limits.

N.C. GEN. STAT. § 120-30.25(c) (1973) provided that:

The rules filed with the Director pursuant to subsection (b) of this section shall be accompanied by a report. This report shall contain:

(1) A brief summary of the content of the rule if adopted or repealed, or a brief summary of the change in the rule if amended;

(2) A citation of the enabling legislation purporting to authorize the adoption, amendment, or repeal of the rule;

(3) A statement of the circumstances that required adoption, amendment, or repeal of the rule; and

(4) A statement of the effective date of the rule.

\end{quote}

\begin{quote}
275. N.C. GEN. STAT. § 150A-59 (1983) provided in pertinent part:

(a) Rules adopted by an agency on or after February 1, 1976, shall be filed with the Attorney General . . . .

(c) Rules previously in existence shall be ineffective after January 31, 1976, except that they shall immediately become effective upon filing in accordance with the provisions of this Article. The effectiveness of rules adopted prior to June 29, 1979, shall not be affected by the imposition of the filing requirement with the Director of Research under G.S. 150A-60(5).

276. This procedure should not be considered ineffective. One of the issues that the Commission became concerned about was the lack of statutory authority for agencies that were charging rates and fees. Consequently, the Commission recommended legislation that resulted in the enactment of N.C. GEN. STAT. § 12-3.1 (1986), which requires an agency to have a specific grant of authority to charge a rate or fee.

277. Senate Bill 250 was introduced by then Senator Robert B. Jordan who had also served as co-chairman of the Administrative Rules Review Committee.
sons on notice that problems with the rule had arisen.\textsuperscript{278}

In January 1982, the North Carolina Supreme Court issued its \textit{Wallace v. Bone}\textsuperscript{279} decision on separation of powers. In March 1982, a representative of the attorney general’s office met with the Administrative Rules Review Commission and stated that in the attorney general’s opinion, the Commission’s power to suspend regulations was probably unconstitutional under \textit{Wallace}. In June 1982, the General Assembly created the Separation of Powers Study Commission which recommended a lengthy bill to the 1983 General Assembly.\textsuperscript{280} While this bill largely dealt with the issue of legislators on boards and commissions, it also dealt with other separation of powers issues. The bill was ratified into law.\textsuperscript{281}

In March 1983, Representative Watkins introduced House Bill 524, which proposed rewriting the APA. The bill quickly passed the house and went to the senate. Once in the senate it became embroiled in an internal legislative controversy with two other bills: one bill would have created an APA Study Commission and the other would have authorized the use of legislative standing committees between legislative sessions. Legislators feared that the purpose of the latter bill was to monitor executive branch rulemaking.

In July 1983, the house forced the issue of the APA’s future by inserting, without prior discussion, a repeal of chapter 150A in a state-wide appropriations bill.\textsuperscript{282} The senate retaliated by putting a “clincher” on all three bills.\textsuperscript{283} This house-senate war led to a legislative gridlock in July 1983. Governor Hunt intervened because the

\textsuperscript{278} N.C. Gen. Stat. § 150A-63.1 (1983) provided:

The Attorney General shall retain any reports of the Legislative Research Commission’s Administrative Rules Review Committee’s objection to a rule. He shall append to any compilation, publication, or summation of that rule a notation that it has been objected to pursuant to Article 6C of Chapter 120 of the General Statutes and, where applicable, that the objection has been removed.

\textsuperscript{279} 304 N.C. 591, 286 S.E.2d 79 (1982).


\textsuperscript{281} Id.


\textsuperscript{283} A “clincher” is a parliamentary maneuver that not only kills the bill but requires a two-thirds vote for its reconsideration.
gridlock threatened to prevent passage of any legislation, including the adjournment resolution that would allow legislators to go home. A compromise was agreed upon, the clinchers were removed and the compromise was enacted. The compromise: (1) replaced the Administrative Rules Review Committee with the Governor's Administrative Rules Review Commission;\(^{284}\) (2) created a new APA Study Commission to recommend a rewrite of the APA to the 1984 session;\(^{285}\) and (3) created a July 1, 1985 deadline by which to rewrite the APA, or all agency rules in existence would be repealed.\(^{286}\)

In June 1984, a proposed rewrite of the APA\(^ {287}\) was introduced but it once again became embroiled in internal legislative battles and was not enacted. In February, 1985, Representative Watkins introduced House Bill 52 as a rewrite of the APA which was eventually enacted as chapter 150B.

The Governor did not appoint the Governor's Administrative Rules Review Commission because of doubts about its constitutionality. The Commission consisted of nine members, six of whom were appointed by the legislature. In 1985, the legislature abolished the Commission and re-created the Administrative Rules Review Commission as an executive branch body.\(^ {288}\) However, its cre-

\(^{286}\) 1983 N.C. Sess. Laws 1082, ch. 883, § 1 (Reg. Sess. 1983) provided: All rules adopted under the provisions of Article 2 of Chapter 150A of the General Statutes which are in effect on January 1, 1985, are repealed effective January 1, 1985, unless approved by the General Assembly. The approval of rules by the General Assembly shall not be deemed to enact the approved rules or to prohibit their subsequent amendment, repeal, or recodification by the agency.
\(^{287}\) H. B. 1784, which was not ratified.

1985 N.C. Sess. Laws 734, ch. 19 (Reg. Sess. 1986) provided: "Sections 5 and 6 [of the Act] shall become effective 30 days from the date the Supreme Court issues an advisory opinion on the constitutionality of those sections unless the opinion states that those sections are unconstitutional, in which event those sec- tions shall not become effective."
ation was contingent upon an advisory opinion from the North Carolina Supreme Court on its constitutionality. In October 1985, the court declined to rule and the Commission was not created. In June 1986, the contingent provision was removed and the Commission was created as an executive agency. Members were elected by the general assembly to serve two-year terms. The Commission has met monthly since August 1986.

The Commission is charged with a dual role as to agency review of rules. First, the Commission must determine whether the rule is: (1) within the statutory authority of the agency, (2) clear and unambiguous as to persons it is intended to direct, guide or assist, and (3) reasonably necessary to enable the administrative agency to perform a function assigned to it by statute or to enable or facilitate the implementation of a program or policy in aid of which the policy was adopted. If the Commission finds that the rule does not meet these requirements, it must object to the rule and refer it back to the agency for consideration of the objections. An objection delays the effectiveness of the rule for sixty days. If the cause of the objection is not removed, the rule will still go into effect: the Commission may then either conduct a public hearing or refer the matter to the general assembly.

The Commission's second responsibility is to review existing agency rules. The Commission conducts its review using the same criteria that apply when rules are initially filed with it. The Commission also reviews the following types of rules: any rates or fees to ensure compliance with section 12-3.1; any rules of administrative procedure to ensure consistency with chapter 150B; and any rules that need not be filed under the new definition of "rule."

The Commission must complete its review by June 30, 1989 and submit a report to the general assembly. After June 30, 1989, any agency rule that has not been reviewed will be repealed. The Commission has currently set March 1989 as its deadline for completion of the review.

293. N.C. GEN. STAT. § 150B-59(c) (Supp. 1985).
294. Id.
295. Id.
IX. COMMENTARY ON THE NEW APA

Governor James G. Martin has challenged the manner of the appointment of the Chief Hearing Officer of the Office of Administrative Hearings. In his suit, the Governor alleged that the appointment violated the separation of powers provision of the North Carolina Constitution. Judge Edwin Preston ruled that the manner of appointment was not a violation of the separation of powers clause and the matter is on appeal.

There has been considerable debate about the constitutionality of the Administrative Rules Review Commission. Potentially, three issues exist. First, opponents argue that the manner of appointment may be unconstitutional because it violates the separation of powers clause. They argue that the general assembly cannot appoint non-legislators to an executive branch body. Supporters of the Commission point out that the Wallace v. Bone decision prohibited incumbent legislators from serving on executive branch boards. They also point to the history of the North Carolina Constitution on appointments. Article III, section 5(3) of the 1776 North Carolina Constitution reserved all appointment powers (including the Governor, the Council of State, all executive branch officers and all military officers) to the general assembly. In 1868, the North Carolina Constitution was changed as part of North Carolina's readmission to the Union. Among the changes was article III, section 10 which provided that:

The Governor shall nominate, and by and with the advice and consent of the majority of the Senators elect, appoint all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly.

There were several cases litigating appointments made by the Governor under this provision. In 1875, the general assembly amended the Constitution to delete the last phrase of this provision and thereby reinstate the general assembly's power to make

298. N.C. CONST. or 1868, art. III, § 10 (emphasis added).
299. Welker v. Bledsoe, 68 N.C. 457 (1873); Clark v. Stanley, 66 N.C. 60 (1873); Nichols v. McKee, 68 N.C. 429 (1873).
executive branch appointments. This new provision was also litigated and upheld. The same language, with only minor non-substantive revisions was included in the present North Carolina Constitution during the 1968 Convention. Opponents also argue that the power to delay the effective date of a rule may violate the suspension of laws clause because a legislatively appointed body is delaying an agency rule without action by both houses of the general assembly. Finally, opponents argue that determination of the validity of the statutory authority of a rule is the province of the judiciary and any such determination by the Commission also violates the separation of powers clause. Supporters argue that the general assembly has the authority to delegate rulemaking authority to an agency and it also has the authority to delegate the review of that rulemaking authority as long as it meets the constitutional requirements of delegation. Supporters further argue that effective administration of government requires some oversight of exec-

300. N.C. Const. of 1875, art. III, § 10.
302. N.C. Const. of 1971, art. III, § 5(8) provides: "The Governor shall nominate and by and with the advice of a majority of the Senators appoint all officers whose appointments are not otherwise provided for." A report of the North Carolina State Constitution Study Commission stated:

We are recommending several changes that affect the executive branch of state government and especially the Governor, but these are of sufficient moment that they take the form of separate amendments. Article III of the proposed constitution, while reorganized and abbreviated by the omission of repetitive, legislative-type, and executed provisions, contains few substantive changes of note.

303. Article I, § 7 provides: "All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised."
305. N.C. Const. of 1970, art. II, § 1 provides: "The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." This provision has been frequently interpreted by the Supreme Court in conjunction with article I, section 6 in reviewing delegation of authority to state agencies. Delegations of authority are upheld where there are "adequate guiding standards" to ensure that decision making is subject to procedural safeguards and is not arbitrary and unreasonable. See Adams v. N.C. Dept. of Natural Resources & Community Dev., 295 N.C. 683, 249 S.E.2d 402 (1978).
utive agency rulemaking.

Given the political and constitutional issues surrounding the APA, practitioners should be alert to changes. The most likely area of future legislative action is in the occupational licensing boards. Representative Watkins, the sponsor of the rewrite of the APA, and Lieutenant Governor Robert B. Jordan have both indicated that the creation of article 3A hearings was a compromise necessary to get the legislation enacted. Both have also indicated that the general assembly is likely to consider changes in the future. Since Watkins and Jordan are two of the most powerful figures in the general assembly, some changes are highly likely.

Another likely area of future legislative action is the removal of some of the exemptions from the Act. Typically, the language used to exempt agencies from the Act is a reference to their established administrative procedures—this is especially true of administrative appeal procedures. As a practical matter, these exemptions are the result of political compromises necessary to enact the bill into law. These exemptions fly in the face of the legislatively stated purpose of promoting uniformity of administrative procedures. In the author's opinion, as the Office of Administrative Hearings becomes more established and more accepted, its success will inevitably lead to the addition of more administrative appeals.

X. Conclusion

The new APA represents more than just a significant change in administrative law in North Carolina. It is a harbinger of expanded executive, legislative and judicial activity in the area of administrative law. Given the increased scope of federal and state government activity, administrative law will no longer remain the province of "Raleigh lawyers" but will become an area in which most attorneys must have some knowledge in order to serve their clients' needs properly.