Comments by Jeff Lubbers:

General Concerns

The draft throughout uses the word "must" where the earlier version used "shall."  I would think agencies would prefer to use "shall."

I think the Committee should consider adding rules relating to the use of translators in hearing and issues relating to accessibility for the disabled.

MAR 100

(A)—Definition of "Adjudication"—I would delete "structured" as an unnecessary addition to the old rule.

(C)—Definition of "Agency"--Although the old rule also used the one in the FOIA (5 U.S.C § 552(f)(1)), I wonder why the APA definition in § 551(1) isn't used.  As a book by Jack Beerman pointed out, that I found on Google books, FOIA's definition is broader so as to encompass agencies that only produce reports and recommendations (e.g., ACUS) and don't issue rules or adjudicative orders. See https://books.google.com/books?id=Hzs2KqTe0SYC&pg=PA176&lpg=PA176&dq=definition+of+agency+in+the+APA+vs.+FOIA&source=bl&ots=LFLfEpfK4u&sig=0xDS-Vv_QE3tAeEbXy_TLDUBFoc&hl=en&sa=X&ved=0ahUKEwjG9LO01YXZAhVrs1kKHYqgA44Q6AEIRzAG#v=onepage&q=definition%20of%20agency%20in%20the%20APA%20vs.%20FOIA&f=false (page 176).

It probably doesn't really matter, but I think it is better to use the APA's definition.

MAR 102—need to define "interested persons" or use a different term, such as "affected persons."

MAR 110—technically, under the APA, the agency head could preside or an agency could use more than one ALJ to preside.  Perhaps this is covered by the definition of "adjudicator" in MAR 100.  Maybe add a comment here about that.

MAR 112:  I would omit or revise the second sentence of comment 3.

MAR 120:  I think the Committee should revisit this MAR in tandem with MAR 121.  Comment 3 is in apropos to this MAR.  I disagree with it on substantive ground, but in any event it relates to separation of functions not ex parte rules.

MAR 121—As for the scope of the separation of functions rules, this is an oft-disputed issue. Mike Asimow, in his leading article on separation of functions, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*. 1981 ACUS 141. Reprinted in 81 COLUM. L. REV. 759 (1981), argued that agencies should take advantage of the APA's exemptions to strict separation of functions to not apply the rules to initial licensing proceedings, allow uninvolved staff to educate agency adjudicators, and to allow adjudicators to talk to each other. ACUS did not issue a recommendation after that report. In the debates over the 2010 MSAPA, this issue came to a head again. Practitioners argued for very strict rules other commentators agreed with the federal APA approach. The original MARs were slightly stricter than the APA. The comments to MAR 121 suggest that agency consider even tighter rules. I think this is a mistake. For more on the MSAPA see pages 5, 69-73 of the Act, http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf I note that the MSAPA Section 408 combined ex parte and separation of functions into one rule—which I personally don't like.

MAR 150

(A)(6)—use "fax" rather than the antiquated rule "facsimile."

(C)(1) and (1)(a)—no need for a hyphen between "social security"

(D)—I would cross-reference MAR 151(B)(3) here (relating to electronic signatures).

MAR 220

(A)—There might be times when "limited participants" would not be allowed to participate in conferences. Should it say "and, where permitted, limited participants"?

(C)—As discussed this seems to have the potential for unfairness in rare circumstances. The solution of saying the adjudicator "may" treat this as a waiver seems like a good one.

MAR 234(C) & comments 1 & 5—the words "noticing" and "noticed" seem awkward to me. I would go back to "requesting" and "requests."

MAR 239(h) and comment 4. I doubt that all adjudicators can award expenses to parties.

MAR 240 (Comment 6). The ACUS Model Rules for EAJA was not a recommendation, and anyway, it is unclear why this comment is appended to this MAR.

MAR 301—Begin by saying: "Subject to the agency's rules or polices, and to the requirements of the APA, the Adjudicator may determine…"

MAR 302—In the first sentence, the exception for a "complainant in a discrimination case" needs to be explained by citing the applicable (*Greyhound*?) case.

Amend the second sentences of Comment 1 to say something like "Once sequestration is invoked, the Adjudicator shall advise witnesses not to discuss, with other witnesses or potential witnesses…"

I see now that the comment 3 deals with witnesses who are not in the courtroom, so I would leave it as is.

MAR 320—I would replace must with "should" in the MAR. In Comment 2—Kent was going to draft something. In comment 3, it should read at the end: "is the basis for the second sentence."

MAR 322—In comment 2 I would replace "MAR 150" with "MAR 150(C)."

MAR 326(B)—I would combine the revise the first two sentences by combining them and removing the word "any." "Parties have the right to cross examine witnesses whose testimony is introduced by an adverse party or by the Adjudicator." I might begin the next sentence with "However,"

MAR 328(A)—should this exception extend to all "government employees," not just employees "of a federal agency." For example should congressional employees be eligible for such fee payments?

Comment 4—I think this needs to be fine-tuned, because it gives the impression that witnesses in administrative cases have the same rights under the Fifth Amendment as witnesses in criminal cases. In administrative cases, witnesses have to at least take the stand, the fact-finder can draw adverse inferences from invocation of the privilege, it can be overcome by an offer of use immunity, it normally doesn't cover the contents of private papers prepared voluntarily, it doesn't apply to corporations or unions, it doesn't covered records required to be prepared by statute, etc.

MAR 400(D)—check the word "dispositive." Maybe "important" is better.

MAR 420 (Comment 1): should "page limitations" be "word limitations"—as it is in the MAR itself?