FALL 2000 | VOLUME 2 | NO. 2

NYSBA
Government, Law and Policy Journal

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Message from the Chair

Calling Law School Students to Public Service

Many people are actively looking for ways to help others and make a difference.[1] Some go on to law school with the intention of pursuing a career in public service. With increasing frequency, however, law students favorably disposed to public service end up in the private sector. Why?

One reason is economics. Over the past decade tuition at law schools has increased by 127%, dramatically boosting student debt. The average law school graduate today faces the daunting task of repaying a debt load of $67,500.[2] As one observed: "You go to law school and think it's about justice, but it's about $600 monthly loan payments."[3]

This dynamic is driving law students away from public service, particularly given the widening disparity between public and private law salaries. Graduates employed in public service in New York City typically earn a salary ranging from $33,500 to $44,000.[4] By contrast, the basic pay for first-year associates at large New York City law firms is as much as $125,000, with year-end bonuses making possible total pay of up to $160,000.[5]

"Many people are actively looking for ways to help others and make a difference."

With the burden of student loan repayment hanging over law school graduates' heads, it is no wonder many shun lower-paying public service jobs.[6] This financial burden, moreover, hits underprivileged students hardest and can make public service a financial impossibility for them.

Law students' enthusiasm for public service is also diminished by widespread misconceptions on campuses. Standing in the way is the perception that public service jobs—especially jobs in government—are difficult to obtain and once obtained, lack in excitement, advancement opportunities, and creativity.[7] Students see few reinforcing messages about the opportunities and rewards offered by public service. Indeed, according to a 1999 report conducted by the Center for Media and Public Affairs, entertainment television's depictions of government officials have grown increasingly negative. Television and movies show one in five positive depictions of public sector employees.[8]

Thus, economics and perception are reducing the number of attorneys entering public service. True, public service work will always attract the highly motivated few. For not only is there no higher calling than public service, no other calling affords so many opportunities to make a positive difference in people's lives. But a few good attorneys are not enough—not if we want to protect the public and provide quality justice.

To ensure a continuous supply of the best and brightest attorneys in public service, a greater commitment from our nation's law schools is needed. Some are providing resources to assist students in entering public service. Approximately one-third, for example, are helping graduates repay their debts in exchange for a commitment to take public service jobs.[9] But one-third is not nearly enough.

"To ensure a continuous supply of the best and brightest attorneys in public service, a greater commitment from our nation's law schools is needed."

Furthermore, law schools must promote public service more aggressively than they have in the past. Calling students to public service careers is largely a matter of tapping into what already exists: the desire to help others and make a difference. The job lies in the hands of educators to teach students that perception is not reality—at least when it comes to public service—and provide them with the knowledge necessary to choose public service.

Bar associations need to be more vocal in championing public service, too. As the voice and conscience of the legal profession, the organized bar cannot accept a state of affairs where law students "can ill afford to fulfill their best intentions when those intentions lie in the field of public service."[10] And, in this regard, I am pleased to report that the New York State Bar Association's Committee on Attorneys in Public Service is taking the first step to providing leadership in this area.

In particular, the Committee has contacted all of the deans of New York's law schools to survey what steps their respective institutions are taking to help law students make a commitment to public service. Upon com-

pletion of this survey, the Committee will explore ways to reverse current developments.

Lord John Buchan Tweedsmuir, who combined careers in public service and the arts, wrote in his autobiography that public service "is the crown of a career," and to a young person is "the worthiest ambition."[11] I suspect that most people reading this *Journal*—a publication tailored to meet the needs of public service attorneys—would heartily concur. For those who do, the task at hand is to spread the word, and to assist law students disposed towards public service with the means and opportunity to realize their ambitions. The cause of justice demands nothing less.

Henry M. Greenberg

Endnotes

1. According to a 1996 Youth Voices Poll conducted by Lake Research, young Americans are committed to their communities, believing in volunteering and government policies that can make a positive difference in people's lives.
2. David Veasey, *Law School Debt a Burden? Rutgers Will Help You Pay,* The New Jersey Lawyer, Aug. 3, 1998, at 5 (citing study done by the Access Group, a Wilmington, Delaware-based, nonprofit lender owned by the 180 law schools accredited by the American Bar Association).
3. Allyson Quibell, *Getting Harder to Forgive,* The Recorder, October 16, 1996, at 1 (quoting Stanford Law School graduate).
4. This range reflects salaries paid to new graduates who work in New York City for district attorneys' offices, the Legal Aid Society, or federal judges as law clerks. Joseph P. Fried, *New Lawyers Still Seek Public Service Jobs,* The New York Times, May 10, 2000, at B7; *see also* Rachel Chazin, *Let's Keep Pay Raises in Perspective,* New York Law Journal, March 8, 2000, at 2 (noting that, in response to salary increases at law firms, the Legal Aid Society increased the salary for first-year attorneys to $33,500).
5. *Id.*
6. In May 2000, an Illinois Task Force with a mission to study the Illinois justice system found that "[m]any young lawyers simply cannot afford to go into public service because they must have a higher salary to responsibly discharge their law school debt." Report of the Task Force on Professional Practice in the Illinois Justice Systems, at 3 (May 12, 2000). *See also* Joseph P. Fried, *New Lawyers Still Seek Public Service Jobs,* The New York Times, May 10, 2000, at B7 ("Officials of the district attorneys' offices in Queens, Manhattan and Brooklyn reported declines in total job applications from graduating law students–to about 900 from 1,100 in Queens since 1992, to 1,300 from 1,500 in Manhattan over the last year and to 1,850 this year from an average of 2,000 in recent years in Brooklyn.").
7. More precisely, a recent study funded by The PEW Charitable Trusts and conducted by the George Washington University and the National Association of Schools of Public Affairs and Administration showed that a majority of students feel that government and public decision-making jobs are less attractive career options than working in other fields. Similarly, a 1998 survey funded by Do Something Inc. and conducted by Princeton Survey Research Associates, Inc. found that 55% of students surveyed do not think that the government is a good place for someone like them to work.
8. This finding was made in a 1998 Public Allies Survey conducted by Hart Research Associates, Inc.
9. Patricia M. Scherschel, *Loan Blues: Beating the Law School,* The Indiana Lawyer, June 9, 1999, at 14.
10. Ginny Edwards, *Loan Forgiveness: Making Public Interest Law Interesting,* 7 The Public Lawyer 6, 6 (Winter 1999).
11. *Quoted in* John F. Kennedy, Profiles in Courage 12 (memorial ed. 1964). Lord Tweedsmuir's public service career led him from the Boer War to intelligence work in World War I, to eight years as a member of Parliament, and eventually to the Governor-Generalship of Canada. He was also a widely read author of numerous works of fiction and non-fiction. *The Thirty-Nine Steps* is the book for which he was best known.

Henry M. Greenberg is Chair of the New York State Bar Association's Committee on Attorneys in Public Service. Government posts in which he has served include General Counsel to the New York State Department of Health, Assistant United States Attorney and law clerk to Judge (now Chief Judge) Judith S. Kaye of the New York Court of Appeals.

The Committee on Attorneys in Public Service Is Actively Working to Advance the Interests of Public Service Attorneys

By Patricia K. Bucklin

One of my most rewarding professional activities has been my involvement with the NYSBA Committee on Attorneys in Public Service. Formed in 1998, the Committee has been working diligently in a number of areas to advance the interests of public service attorneys and to establish a meaningful presence within the organized bar. We would like to update you on the many interesting initiatives that the Committee is working on. We hope that they will be of interest and assistance to you in your professional endeavors, and also that you will consider joining us in our work.

Among the Committee's most exciting initiatives is the *Government, Law and Policy Journal* ("the *GLP Journal*"), which the Committee produces biannually with the assistance of the Government Law Center of Albany Law School. The *GLP Journal* is written by public service attorneys and is devoted exclusively to legal and policy issues affecting the public bar. The first two issues addressed ethics for government attorneys and technology, and the current issue contains articles on administrative law. By examining issues of unique interest to the public bar, the Committee hopes that the *GLP Journal* will provide a valuable resource for public service attorneys' continuing professional development.

The escalating costs of law school have saddled students with enormous debts, making it increasingly difficult for them to pursue careers in public service. Recognizing these obstacles, the Committee has written to the deans of New York's law schools to determine the steps their respective institutions are taking to help law students commit to public service. We are interested in learning how many law schools presently waive tuition or forgive loans for students who go into public service. We also are interested in learning whether these law schools are providing counseling and placement programs for public sector job seekers, and whether speakers experienced in public interest law are invited to these law schools to talk to students about careers in public service. Upon receiving this information, the Committee will explore ways in which the legal profession can address this important issue.

To encourage greater participation by public service attorneys in bar associations, and to clarify that rules of ethics do not preclude such participation, the American Bar Association (ABA) has developed a set of principles of professional development for such attorneys. Following the ABA's lead, the Committee, with the assistance of the New York State Ethics Commission, is working to develop its own set of principles. The Committee hopes to have its principles endorsed by the Ethics Commission and ultimately adopted by the New York State Bar Association. The Committee believes that this will foster greater participation in bar activities by attorneys in public service.

"The escalating costs of law school have saddled students with enormous debts, making it increasingly difficult for them to pursue careers in public service."

Developing educational programs tailored to meet the unique needs of the public bar has been a high priority of the Committee. The Committee has had great success attracting attorneys to its educational programs and currently is working with the NYSBA's CLE Committee in planning several additional programs. This fall, the Committee will sponsor a four-hour MCLE program focusing on ethics issues for public sector attorneys at sites in Albany, Buffalo and New York City. During the Annual Meeting in January, the Committee will sponsor a three-hour MCLE program reviewing recent public law cases handed down by the United States Supreme Court. The nationally recognized constitutional scholar and Supreme Court commentator, Erwin Chemerinsky, will present the program. For the spring of 2001, the Committee is planning to again produce at three sites, as it did earlier this year, a 6.5 MCLE credit program focusing on the prosecution and judging of administrative hearings.

Last year, the Committee instituted an annual "Award for Excellence in Public Service" to honor attorneys who have distinguished themselves in public service and have demonstrated an abiding commitment to serving the public. The first award recipient was former Court of Appeals Judge Joseph W. Bellacosa, who received the award at a well-attended reception held

during this year's NYSBA Annual Meeting. We are in the process of selecting next year's honoree and are again planning to hold the award ceremony at a reception during the Annual Meeting.

"Without the active participation of government and non-profit agency attorneys, the NYSBA cannot properly represent the full spectrum of the legal profession."

The Committee has launched a Web site, which can be accessed through the NYSBA's home page (click on "Committees" and then choose the link to the Committee on Attorneys in Public Service), or directly at http://www.nysba.org/committees/aps/. The "Legal Links" section contains one of the most comprehensive collections of links of law-related Web sites. The Committee plans to archive online all issues of the *GLP Journal* to enable NYSBA members to retrieve articles from past editions. The Committee also plans to make the Web site as interactive as possible with input from NYSBA members, Sections and Committees. We expect this Web site to become a meaningful and valuable resource for NYSBA members.

Most of the Committee's work is generated by its nine subcommittees. They cover the following subject areas: Education, Publications, Non-Profit Attorneys, Awards, Technology, Section and Committee Liaisons, Court Attorneys, Legislation and Policy Review, and Administrative Law Judges. This assures broad expertise to address the wide-ranging issues of interest to the public bar. Members of the bar are invited and encouraged to actively participate on these subcommittees.

As you can see, the Committee seeks to be an active, energetic voice for public service attorneys. We hope government and public sector attorneys will consider joining a subcommittee. A sign-up form is included on page 67 of this edition of the *GLP Journal*. We also urge our public service colleagues to lend their voices and talents to NYSBA's Sections and other committees. Without the active participation of government and non-profit agency attorneys, the NYSBA cannot properly represent the full spectrum of the legal profession. Our perspectives are not only needed, but also welcomed. Join a committee or Section today. We are confident that those who actively participate will find this to be a valuable and fulfilling professional endeavor.

Patricia K. Bucklin, Vice Chair of the NYSBA Committee on Attorneys in Public Service, is Director of Public Affairs at the New York State Office of Court Administration. She previously served as First Assistant Counsel to Governor Mario M. Cuomo and Chief Law Assistant and Deputy Consultation Clerk at the New York State Court of Appeals.

Editor's Foreword

Vincent M. Bonventre

Administrative law and policy is perhaps the most pervasive and yet least acknowledged and understood force in modern federal and state governments. The tripartite model of American democratic governance is misleading, if not outright inaccurate. There is no easy fit within that conventional model for the countless administrative agencies that, in fact, bear responsibility for carrying out so many of government's essential functions.

Indeed, rather than comprising a readily reconcileable aspect of the traditionally understood separation of government powers, administrative law and policy in some very real senses constitutes a joinder of those powers within a single branch or agency of government. Rule making (legislative), law implementing and enforcing (executive), and adjudicating (judicial) functions are combined in administrative agencies in ways that might well be viewed as violating separation of power principles or as being a necessary and convenient exception to them.

"Administrative law and policy is perhaps the most pervasive and yet least acknowledged and understood force in modern federal and state governments."

But regardless of the view taken, it can hardly be denied that administrative law and policy is an extraordinarily significant, powerful and unique aspect of government throughout the United States, and particularly in large industrial states such as New York.

Of course, legal expertise is a *sine qua non* in virtually every function of administrative agencies. Not surprisingly, then, a large proportion of public sector attorneys work within or before those agencies in one capacity or another. It thus seemed to us at the *GLP Journal*, for this reason as well as the others recounted above, that an issue dedicated to administrative law and policy would be most appropriate and helpful. We have attempted to cover topics that are interesting, enlightening and useful. Obviously, we could not expect to cover comprehensively even part of the field. But we do believe that the selections offered here do span a wide range of some of the most topical, critical, and current issues.

Several articles here explore the administrative adjudicatory process. Michael Asimow examines the evolution and nature of the unique institution of the administrative law judge (ALJ). He contrasts the competing views of administrative adjudication: "institutionalist," the primary function being considered one of helping to implement public policy, and "judicialist," the emphasis being on fairness and due process for the parties involved in administrative proceedings. John Hardwicke explores the pros and cons of using central panels of ALJs to insure adjudicative independence in resolving disputes involving agencies for whom the ALJs would otherwise be "employees." He underscores the need for "decisional integrity," but also for recognition of the "interdependence" of administrative functions in order to avoid undermining policy integrity. Julius Marke describes how one such central panel of ALJs has operated, i.e., New York City's Office of Administrative Trials and Hearings (OATH) which functions as an independent agency within the City's executive branch. And Amanda Hiller examines the issue exhaustion rule in the context of public benefit cases. Although the rule is a central tenet of administrative law, it is arguably inappropriate in New York's "non-adversarial" public assistance hearings—just as the Supreme Court has recently deemed the rule inappropriate in corresponding federal proceedings.

"[I]t can hardly be denied that administrative law and policy is an extraordinarily significant, powerful and unique aspect of government throughout the United States, and particularly in large industrial states such as New York."

Two articles consider the subject of ethics in administrative proceedings. Donald Berens reviews the mandates of New York's Public Officers Law as applied to ALJs and hearing officers, and Barbara Smith discusses the results of her survey of ALJs on the increasing concerns about professionalism among attorneys, state employed and private, who appear before them.

Two authors address rule making in New York. Michael Balboni describes several state mechanisms for overseeing the rule-making process: the procedural requirements of the State Administrative Procedure Act (SAPA), the Legislature's bipartisan Administrative Regulations Review Commission (ARRC), and the gubnatorially created Governor's Office of Regulatory Reform (GORR). An essay by Patrick Borchers critiques efforts to minimize or halt administrative rule making as largely misguided. Those efforts have resulted, for example, in the mere preservation of old rules with poorly defined obligations, and in "interpretive" memoranda—as opposed to "rules"—which need not be published to put the public on notice.

Technology in the administrative process is explored in two articles. Sharon Silversmith, Susan Antos and Amanda Hiller examine the use of computerized decision databanks to assist ALJs in drafting decisions consistent with the outcomes in similar cases, and to increase and expedite access to such decisions by advocates who otherwise confront difficulty or even impossibility in their research. Robert Snashall describes the experience of New York's Workers' Compensation Board with technological innovation such as electronic case folders which insure up to date information on all active cases as well as instantaneous and simultaneous access to case files to all Board employees across the state.

Finally, alternative dispute resolution has been making inroads into virtually every area of the law, and administrative law and policy is no exception. Jaclyn Brilling takes a look at negotiated rule making ("soft rule making"), and specifically at how a consensus process with all interested parties participating and the ALJ acting as facilitator was employed for the first time at the Public Service Commission. Susan Raines and Rosemary O'Leary discuss their research on the views of private sector and government attorneys who have participated in dispute resolution in the U.S. Environmental Protection Agency's mediation program. Their findings suggest that ALJ mediators are perceived as somewhat less prepared and less knowledgeable of the subject matter of the disputes than outside mediators, but that these ALJ mediators are deemed to have been more fair overall. And Daniel Louis warns that any grand plan for using ADR in New York's agencies would be unrealistic and unworkable at the present. Rather, an agency-by-agency approach, sensitive to agency-specific characteristics and opportunities, is preferable.

Rose Mary Bailly

This issue of the *GLP Journal*, like the first two, reflects the thought and work of many contributors in addition to our authors. Among those deserving special mention are our student editors, particularly Student Executive Editor Catherine Ferrara; the staff at the Bar Association, especially Patricia Wood at membership Lyn Curtis and Wendy Pike at publications; the officers of the Committee on Attorneys in Public Service, particularly the new Chair, Henry Greenberg, and Vice-Chair, Patricia Bucklin, for their support and encouragement; and the Editorial Board at Albany Law School's Government Law Center, especially my Associate Editor Rose Mary Bailly, who in large measure is responsible for all that is good about the organization and composition of this issue. Any shortcomings are likely attributable to yours truly, and any comments, negative as well as positive, may be addressed to me c/o the law school's Government Law Center or directly via e-mail (vbonv@mail.als.edu), or regular mail or telephone at the law school.

Vincent Martin Bonventre

Vincent Martin Bonventre, Editor-in-Chief of the *GLP Journal*, is Professor of Law at Albany Law School. He is also the Editor of *State Constitutional Commentary*, published annually by the Albany Law Review.

Rose Mary Bailly, Associate Editor of the *GLP Journal*, is the Executive Director of the New York State Law Revision Commission. She serves on the Board of Editors of the *New York State Bar Journal* and is Contributing Author of *McKinney's Practice Commentaries* on Mental Hygiene Law.

Tribute to Chief Judge Lawrence H. Cooke, 1914-2000

He was a giant. In every good and important way, Lawrence Cooke was a towering figure. In his profession, in his community, in his family, with his friends and colleagues, and for all who came to know him. He made a difference for so many.

His passing is a great loss, an occasion of great sadness for all those he helped, supported, encouraged, counseled, consoled, uplifted, befriended. His achievements, positions and stature as a leading judicial figure of the past century have assured him a place in the pantheon of his profession. But more than that, his kindness, generosity, humility, charity, gentleness and moral and ethical decency have placed him indelibly in the hearts of countless individuals and families whose lives he touched.

Chief Judge Lawrence H. Cooke

Lawrence Cooke will long be remembered for his position and service at the pinnacle of the legal profession. For his contributions as a judge, and as Chief Judge of New York and its highest tribunal. As Chief Executive of one of the world's largest and busiest judicial systems.

He will be remembered for his tenure on the Court of Appeals, as its foremost guardian of individual rights, its most unrelenting opponent of inequity, oppression and inhumane treatment. For his human dimension to judging. For his sensitivity to individual and community needs. For his commitment to reducing injustice and elevating the conduct of public officials.

He will be remembered for initiating bold reforms in the administration of justice—usually in the face of fierce resistance from those with other interests or who were comfortable with the way things were. For all his efforts to ensure the speedy, efficient, professional and fair operation of the courts.

He will be remembered for the distinctions and honors bestowed on him—far too many to list or even summarize. He will be remembered for transforming such recognitions into opportunities for further contribution. Such are his selection and service as Chair of the National Conference of Chief Justices, President of the National Center for State Courts, and presidential appointee to the Board of the national State Justice Institute.

He will be remembered as a leading national figure who remained faithful to his roots, always there to lend his hand and wisdom to organizations at home. He gave his time generously, in numerous capacities, to the New York State Bar Association, as well as to local bar associations across the state, to the Fireman's Association of New York, and to his beloved Monticello as a volunteer fireman himself for over 40 years. Most recently, he served as a founding board member of this *Journal*, participating actively, even in the preparation of this issue, always supportive, encouraging, and insisting on excellence.

Finally, he will be remembered by all who met him, worked with him, chatted with him, for their brush with greatness, with this giant of a man.

But beyond that, for those who were blessed to know Lawrence Cooke, to share a part of his personal life, we will forever cherish the memory of this most decent, courageous, attentive, affectionate, ever-caring and faithful friend. We will cherish the memory, and feel the loss of his passing, just as we do that of a lost father or brother.

We will cherish what he taught us. The lessons from a wealth of life. From career and family, from adversaries and friends, from setbacks and successes, from criticism and adulation, from politics and the powerful, from public service and the people served, from realism born of experience and idealism retained through undampened faith and optimism, from age and youth, from head and heart.

We will especially cherish his call for the very best, the good and the decent within us. To do what is right and admirable. To follow the impulse that is ethical, moral, kind. Recalling his father's words to him, he told us time and again to "Take the high road." We cherish the memory of the man who always took that road, and we honor him each time we remember to do the same ourselves.

Like the countless others who mourn the loss of Chief Judge Cooke, we at the *Journal* extend our sympathies and condolences to his beloved wife Alice and their magnificent family. We thank the family for sharing this good man with us. And we thank God for the time were were given with one of His noblest creatures.

V.M.B

Administrative Law Judges (ALJs) and Our Place in the New York State Bar Association (NYSBA)

James F. Horan

This issue of the *Government, Law and Policy Journal* devoted to administrative law and policy is being published specifically to coincide with the October 14-18, 2000 Annual Meeting and Seminars of the National Association of Administrative Law Judges (NAALJ) in Albany, New York. This publication is one of many current initiatives by the New York State Bar Association this past year that illustrates increasing interest in the administrative arena. Sponsored by NYSBA Committee on Attorneys in the Public Service (CAPS) and the Government Law Center at Albany Law School, among others, it is the most recent in a series of events that have highlighted administrative law.[1] In January 2000, the NYSBA House of Delegates accepted the Committee on Administrative Adjudication's Report on Administrative Adjudication. This past spring NYSBA conducted a continuing legal education (CLE) program on *Administrative Adjudication in New York*, chaired by Chief ALJ Tyrone Butler of the New York State Department of Health. That program last spring drew such a strong favorable response from ALJs, government attorneys and the private bar that NYSBA will offer the program on *Administrative Adjudication in New York* chaired once again by Chief ALJ Butler in the Spring 2001.

Also this past spring, CAPS created a subcommittee for ALJs. The ALJ Subcommittee of CAPS will provide ALJs with a voice within NYSBA and will constitute the first entity within NYSBA to deal specifically with the unique status and needs of ALJs.

Unlike traditional actions and proceedings held in the judicial branch which functions independent from other branches of government, most administrative adjudication in New York, at the federal, state or municipal level takes place within the "Agency Model" in which the ALJ works for and within the executive branch agency for which the ALJ conducts administrative hearings.[2] Although ALJs work within agencies, their status differs from that of any other attorneys working in those agencies. ALJs do not represent the agency or provide legal counsel to the agency; indeed they regularly make findings of fact or recommendations contrary to the positions taken by agency counsel in the administrative proceeding. This unique relationship between ALJ and agency creates specific needs and perspectives.

The Subcommittee will provide ALJs a chance to network with others who do the same work and to share common concerns and experiences. The Subcommittee will also create CLE programs to address the needs of ALJs and will assist in other CLE programs by providing an ALJ perspective in topics intended for wider audiences.

The CLE needs of ALJs differ from those of other attorneys within public service and from those of attorneys in general. For example, many CLE ethics programs for public sector attorneys include a component on "who is the public attorney's client." An ALJ has no client. An ALJ owes a duty to the parties before them to provide a fair hearing and a legally sound decision and they owe a duty to the public in general to advance the administration of justice. Although ALJ work involves litigation, there would be little benefit to an ALJ from a CLE litigation program focusing on effective direct or cross-examination. An ALJ must worry about developing the record in an administrative hearing, and in that context, about when it is appropriate or necessary to question witnesses. An ALJ often deals with *pro se* litigants. An ALJ must control the hearing and maintain civility among the litigants without court officers. Only in CLE programs tailored specifically for ALJs are there likely to be classes on developing the hearing record, on dealing with *pro se* litigants and on security and civility in administrative hearings.

The ALJ Subcommittee currently consists of 14 members, from state and municipal agencies in the Albany and New York City areas. The plan is to expand the membership to approximately 25 members in order to add members from western New York and Long Island and as well as to increase our membership from the New York City area. Additionally, it is hoped that federal ALJs who conduct hearings in the state can be enlisted.

The Subcommittee is far from the only opportuity for ALJs to participate in NYSBA and there is certainly no intent to attract ALJs away from other committees or Sections. In fact, many of the Subcommittee's members have been and will continue to be active in other committees and Sections.

There is a concern among attorneys in the public sector, including ALJs, about whether the primary or

even exclusive purpose of bar associations is to serve attorneys in private practice. By creating CAPS and publishing its *Government, Law and Policy Journal*, especially devoted to the interest of public service attorneys, NYSBA is demonstrating a strong commitment to public sector lawyers as an integral part of, and active participants in, the association. Through the ALJ Subcommittee in CAPS, the administrative adjudication projects undertaken this year, and this issue of the *Government, Law and Policy Journal*, NYSBA is similarly demonstrating a strong commitment to ALJs.

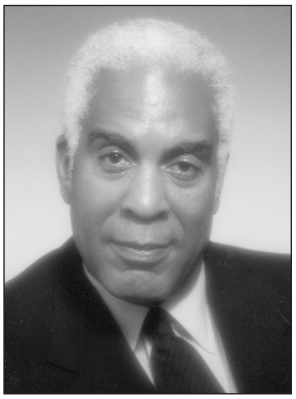
Endnotes

1. The Conference offers a wide variety of seminars aimed specifically at ALJs over a four-day period. Another article in this issue by Chief ALJ Butler discusses NAALJ and the Annual Conference in greater detail.
2. The Division of Tax Appeals on the state level and the New York City Office of Administrative Trials and Hearing on the municipal level provide exceptions to the Agency Model in New York.

James F. Horan serves as an ALJ with the New York State Department of Health and chairs the ALJ Subcommittee within CAPS. He also serves on the Executive Committee of the NYSBA Health Law Section and chairs that Section's Professional Discipline Committee. He earned his A.B. from the University of Notre Dame and his J.D. from Albany Law School.

The National Association of Administrative Law Judges 26th Annual Meeting and Conference

By Tyrone Butler



This year the National Association of Administrative Law Judges (NAALJ) will hold its 26th Annual Meeting and Conference in Albany, N.Y. This annual meeting is being sponsored by the New York State Administrative Law Judge's Association (NYSALJA), one of NAALJ's many state affiliate organizations, the Government Law Center of Albany Law School, the New York State Bar Association's Committee on Attorneys in Public Service and the West Group and Thompson Tax and Accounting. The conference, headquartered at Albany's Desmond Hotel, will open on Saturday, October 14, 2000 and close on Wednesday, October 18, 2000. The CLE program will offer a total of 19 hours of educational presentations geared towards the practice of administrative adjudication. The pre-conference events will included trips to the FDR residence and the Culinary Institute in Hyde Park, and visits to Cooperstown, NY and Saratoga Springs, NY. It is expected that the conference will be attended by Administrative Law Judges and their guests from all over the United States.

This year's conference marks a milestone for the Association as well as the Albany community. In the past annual conferences have been held in the Southern and Western regions of the country. This year's meeting will begin what hopefully is a trend to include participation of the Eastern NAALJ affiliates in the association's national activities as host organizations. In addition it is an opportunity to highlight the beauty of New York State in the fall and the historic legacy of the state capital, Albany. NYSALJA is proud to be the one of the sponsors and conference chair of NAALJ's 26th Annual Meeting.

NAALJ is keenly aware of that in recent years there has been a phenomenal growth in the field of administrative law which affects the everyday affairs of a large segment of the public. Originally called the National Association of Administrative Hearing Officers, NAALJ began as the result of an unofficial resolution adopted at a Monterey, California meeting in late 1974. Today NAALJ is a non-profit professional association established and incorporated under the laws of Illinois.

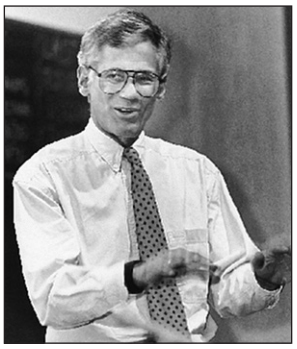
Its mission is to improve the administrative justice system. NAALJ provides a forum for the exchange of ideas and opinions; holds annual conferences and mid-year meetings at which continuing education programs are offered for administrative law judges. NAALJ is dedicated to developing and maintaining, among administrative law judges, the highest standards of neutrality, fairness, and respect for the law in the hearing and decision-making process. The Association is active in promoting continuing conscious efforts to insure against bias or discrimination in administrative adjudication and supporting ongoing improvements to reduce costs and delays in the administrative process.

The Association encourages scholarship in improving administrative adjudication and supports other educational efforts to further professionalize the administrative judiciary. NAALJ publishes a quarterly journal and a newsletter. The Association's national membership is made up of persons employed by governmental agencies, at the municipal, state and federal levels, who are empowered to preside over statutory fact-finding hearings or appellate proceedings arising within, among or before public agencies. NAALJ also has an associate membership category consisting of persons retired from employment as active administrative law judges.

Tyrone T. Butler is the Chief Administrative Law Judge and Director of the Bureau of Adjudication, Division of Legal Affairs, New York State Department of Health. In 1998 and again in 1999, he was voted to the Board of Governors of the National Association of Administrative Law Judges (NAALJ). He is the NAALJ's "Year 2000" Annual Conference Chair, which is scheduled to be held in Albany, New York, October 14-18, 2000. Judge Butler also serves on the Board of Directors of the National Conference of Administrative Law Judges (NCALJ); American Bar Association, the Committee on Attorneys in Public Service; New York State Bar Association, and he is the current President of the New York State Administrative Law Judges Association. Judge Butler is a graduate of John Jay College of Criminal Justice, 1977, summa cum laude, with a B.A. in English and New York Law School, 1981. He was admitted to the New York State Bar in 1981, and to the United States District Court for the Southern and Eastern Districts in 1982.

Administrative Law Judges: The Past and the Future

By Michael Asimow



A striking feature of American administrative law is the administrative law judge (ALJ).[1] ALJs are full-time trial judges, nearly always lawyers, who preside at administrative hearings. Every working day, ALJs conduct tens of thousands of state and federal hearings and render proposed decisions that become final in the vast majority of cases. ALJs are the face of justice for countless ordinary people who come into conflict with the government.

A glance at the institution of the administrative law judge reveals significant paradoxes. Most ALJs work for the agency for which they decide cases; thus they are specialist judges.[2] While they are captives of the agency, they have substantial de facto and de jure independence and a highly independent mind-set. ALJs hear testimony, find the facts, apply the law, and exercise discretion, but their opinions are proposed rather than final.[3] Agency heads are free to substitute their judgment for that of the ALJ on questions of fact, law and discretion, although they actually do so in relatively few cases. Courts review the decisions of agency heads, not those of the ALJ.

The paradoxes continue: ALJs generally act like true judges; their only job is to hear cases and they usually receive no ex parte staff assistance. Yet the agency heads who have the final call at the agency level typically receive large doses of ex parte staff assistance. Those agency heads often exercise the combined functions of rule making, investigation, prosecution, and adjudication.[4]

ALJs are so familiar in state and federal administrative law that we fail to appreciate their uniqueness. Other countries with advanced administrative law systems have no comparable institution. There was nothing inevitable about the way that the ALJ profession evolved in American administrative law. A look back at some often forgotten historical materials will illuminate the origins of ALJs and explain some of the paradoxes.[5]

It all started with the railroads. After the Civil War, as the nation industrialized, the political and economic power of the railroads posed immense problems. Powerful shippers were able to negotiate favorable deals with the railroads; small farmers and less favored business interests were drastically overcharged. Cutthroat competition between railroads with high fixed costs put many roads into bankruptcy. While there was, in theory, a judicial remedy for unfair rates, courts were unequal to the task. In other countries, railroads were nationalized, but that was never politically feasible in the U.S.

A number of states responded to political pressure from disgruntled shippers and the Grangers by creating state agencies empowered to regulate the railroads. However, these state agencies failed miserably. The railroads resisted them tenaciously; court decisions accorded no finality to administrative rate decisions and prevented state commissions from regulating even the intrastate portion of an interstate journey.

Clearly, a national solution was required, but the process of developing one consumed nearly 20 years of intense legislative struggle. Ultimately, Congress finally created the Interstate Commerce Commission (ICC) in 1887. The ICC was modeled on the combined-function regulatory agencies that had emerged in the states. Like the state agencies, the ICC combined functions of investigation, prosecution, and adjudication. Soon after its formation, it became independent of executive control. The ICC was the prototype of the American federal regulatory agency—possessing all the functions and powers necessary to compel private business to operate in the public interest.

The 1887 Commission was remarkably toothless. The statute that created it provided little more than a delegation of authority to the Commission to find answers to the difficult issues of railroad regulation. Indeed, in order for the legislation to pass, it had to offer something for everyone without resolving any issues in ways that the various interest groups could not support. What few teeth the Commission possessed were swiftly drawn by hostile court decisions. By 1920, however, with the aid of excellent commissioners and staff, statutory amendments, and more sympathetic judicial treatment, the Commission became a powerful, effective, and respected regulator of the railroads.

The ICC did its business through case-by-case adjudication of specific disputes between shippers and carriers. It seldom resorted to rule making. Supreme Court decisions required that due process be observed in this adjudication process, meaning that issues of railroad economics had to be resolved through trial-type hearings. Since there was a high volume of cases, many of them technical and most of them time-consuming, the ICC commissioners were unable to hear the cases en banc or even by splitting up into panels. In 1906, legislation authorized the ICC to appoint trial examiners and it immediately began doing so. In 1907, the ICC appointed a chief examiner.

By 1917, the examiners began preparing proposed reports from which the parties might seek review. At first, those proposed decisions were accorded little deference and considered of little importance. The ICC staff worked institutionally with the commissioners to produce the final agency decision which took the form of a detailed written precedential opinion. In time, however, ICC hearing examiners became more professionalized and their decisions received greater deference. Indeed, the examiners often worked closely with the Commissioners in producing final decisions. Ultimately, ICC examiners gained considerable prestige for their skill in presiding over hearings, for their independence, and for their expertise in analyzing the complex cases presented for decision. These ICC hearing examiners were the progenitors of today's ALJs.

The ICC served as the model for the Federal Trade Commission (FTC) which emerged in 1914 to deal with the problem of monopoly. All sides were dissatisfied with judicial enforcement of the Sherman Act. As in the case of the ICC, the legislation creating the FTC provided virtually no guidance to the new Commission (it banned "unfair methods of competition" without defining what those might be. Like the ICC, the FTC was an independent, combined-function regulatory agency with broad responsibilities that did its work through case-by-case adjudication rather than rule making. Its trial examiners (who often were also the investigators) conducted hearings and worked closely with the agency heads in producing final decisions. As in the case of the ICC, initial court decisions were extremely hostile to the FTC but subsequent court decisions were strongly supportive.

During the New Deal of the 1930s, numerous independent, combined-function agencies emerged to deal with the actual and perceived causes of the Great Depression. The idea was that agencies would specialize and develop expertise in managing their assigned sector of the economy. Agency heads and staff would utilize their expertise to solve the problems that the market had failed to solve. The ICC and FTC served as the model for these new agencies (as well as many regulatory agencies being formed at the state level).

By this time, regulation by federal combined-function agencies had become extremely controversial. Most everyone respected the ICC (or at least conceded its inevitability), but the new agencies were another story. New Deal agencies interfered with the kind of business decisions that had always been free of regulation and propelled by market forces—labor relations, corporate finance, communications, banking, agriculture, pricing and output decisions of all kinds. The volume of administrative adjudication increased rapidly.

Regulated parties bitterly resented this form of meddling in their private affairs. In addition, there was a great deal of quite justified skepticism about the fairness of agency decisionmaking. Even some New Deal supporters shared in these convictions. Agencies had no internal separation of functions, so that prosecutors participated off the record in the decisionmaking process. Both the hearing examiners and agency heads seemed to the private sector to be biased against them.

For a time, the conservative justices of the Supreme Court stood as a bulwark against the New Deal. The Court invalidated a variety of state and federal regulatory schemes on the basis of federalism, separation of powers, or due process.[6] Beginning in 1937, however, the Court made an abrupt switch. It abandoned efforts to obstruct the administrative state by invalidating programs or upgrading agency procedures.[7] This judicial default caused New Deal opponents to seek relief from Congress. The struggle over administrative procedure led eventually to enactment of the federal APA in 1946.[8] The epic political battle can be understood as involving two separate struggles.

One struggle was between institutionalists and judicialists. An institutionalist believes that the primary function of administrative adjudication is to formulate and apply public policy. The process for producing an agency adjudicatory decision should resemble a corporation's decision to produce a new product. Decisionmakers should be free to talk to anyone who can contribute, including the parties to the dispute. Every member of the staff should participate in making the decision in whatever way seems appropriate; there should be no internal separation of functions. An institutionalist is concerned with producing accurate and consistent decisions quickly and efficiently. The emphasis is on fitting each decision into a wise application of regulatory policy. Due process and judicial review, in this view, are necessary evils.

A judicialist has a wholly different orientation. The judicialist believes that the emphasis should be on fairness and due process for the private party. The model should be civil litigation in court.[9] Adjudication should apply existing policy, not make new policy with retroactive application. The official taking responsibility for the ultimate decision should be personally familiar with the issues and arguments. There should be a rigid separation between prosecution and judging, even if this means the process is less efficient and may not produce a decision that implements consistent agency policy. Judicial review is essential and courts should have broad powers. Needless to say, avid New Dealers tended to be institutionalists; opponents of the New Deal tended to be judicialists.

A second struggle was overtly political. Proponents of the New Deal believed that government regulation by expert agencies was the only salvation for the economy. Opponents believed that government interference

with free markets was catastrophically wrong, would make the Depression worse, and would lead to socialism or fascism. These views translated directly into views on administrative procedure. Proponents of regulation favored streamlined agency procedures with little attention to due process, separation of functions, or judicial review. Opponents of regulation favored detailed administrative procedure codes, formalized hearings, and intensive judicial review in order to assure accurate decisions that took full account of their views. To opponents, the fact that judicialized process would slow down and encumber the regulatory process was a benefit, not a detriment.

The judicialist/New Deal opponent coalition, strongly supported by the American Bar Association's Section on Administrative Law, first attempted to induce Congress to adopt legislation for an administrative court, but this got nowhere. Ultimately, as Roosevelt weakened politically, this coalition succeeded in passing the Walter-Logan Bill of 1940 which would have drastically inhibited the regulatory process in New Deal agencies. Walter-Logan required more intrusive judicial review and would have rigidified the adjudication process (for example, it required three-person panels to conduct adjudication). Roosevelt vetoed the bill and his veto barely escaped being overridden.

Meanwhile, in 1939 Roosevelt appointed the Attorney General's Committee on Administrative Procedure, hoping that it would suggest moderate reforms. That Committee's 1941 report[10] provided extensive monographs on the administrative process, replacing superheated political rhetoric with solid empirical information on how agencies actually functioned. The majority report of the Attorney General's Committee stands as one of the great pieces of administrative law scholarship of all time. Its profound analysis of the administrative process remains excellent reading today.

The majority report emphasized the enormous diversity of administrative adjudication as it existed in 1940. This diversity prevented the majority from recommending one-size-fits-all reforms to the adjudication process. Thus the majority recommended quite modest reforms. It declined to recommend that combined-function agencies be divided into separate adjudicatory and non-adjudicatory agencies (although the two minority reports favored breaking up combined-function agencies). The majority focused instead on the role of hearing officers who had become fixtures in administrative adjudication by 1940. The majority believed that the objective of improving the fairness of adjudication could be achieved by dramatically upgrading the status of hearing officers.

The administrative procedure battles were set aside during World War II, but revived afterwards. Roosevelt realized he had to agree to reform; conservatives realized that any solution had to be acceptable to Roosevelt. In a historic compromise, the APA emerged from Congress in 1946 and served as the model for state APAs in the years to come.[11] Virtually every word in the Act represented a hard-fought compromise. Historians of the APA have observed that the unanimous votes that produced the APA were highly misleading. Nobody was happy with the proposed legislation, but all sides felt they were better off with the it than with the status quo.

Who got what in the APA compromise? From the point of view of institutionalists/New Deal supporters:

a. The New Deal combined-function independent agencies survived. The adjudicatory function was not separated from rule making, investigation, and prosecution.

b. Hearing examiners remained employees of the agency for which they decided cases; no central panel of hearing examiners was established. Agency heads retained power to make final agency decisions.

c. A great deal of federal administrative adjudication remained outside the APA structure (so-called informal adjudication, including many benefactory programs).[12]

d. Judicial review remained subject to sharp limitations such as the requirement of exhaustion of remedies and limited scope of review of factual and discretionary decisions.

From the point of view of judicialists/New Deal opponents:

a. The APA provides for an array of due-process-like protections for formal adjudication.[13]

b. The APA imposed internal separation of functions, preventing adversaries from taking part in adjudication (albeit with considerable exceptions).[14]

c. Hearing examiners were granted an array of protections. Agencies lost control over the hiring, evaluation, compensation, and termination of their judges. The judges could not be supervised by prosecutors, were to be full-time judges, were protected from ex parte contact, and were assigned cases in rotation. They issued proposed decisions which became final unless the agency heads took over the case.[15]

d. Rule making was subject for the first time to mandatory notice and comment requirements (again with significant exceptions).[16]

e. Access to judicial review was assured in most cases.[17]

Thus both sides got something from the APA, but neither side was pleased. New Deal proponents predicted that the administrative process would be negatively affected by the new array of judicial-type provisions. New Deal opponents lamented that they still had to contend with the same old combined-function agencies that seemed so biased against business. Neither, perhaps, foresaw that the APA would turn out to be the Magna Carta for the administrative state, legitimizing the process of rule making and adjudication, and remaining fundamentally unchanged into a new century.

For purposes of this article, the big story of the APA is that it transformed the disrespected crew of agency hearing examiners into the highly respected and highly protected corps of ALJs we know today. This apparently occurred because the New Dealers insisted on preserving the combined-function agency. Agencies like the National Labor Relations Board (NLRB) and the Securities Exchange Commission (SEC) must, they thought, continue to make the rules, investigate, prosecute, and adjudicate. Unable to force an external separation, the opponents of the New Deal (supported by all members of the Attorney General's Committee) fell back on elevating the status of the front-line decision-maker—the hearing examiner. They went as far as they could in the direction of making the person who hears the witnesses into a true judge. Thus the array of independence-protecting provisions in the APA.

Once the role of the hearing examiner was strengthened and the administrative process judicialized, the institutionalists/New Deal proponent coalition needed to assure themselves that the agency heads (not the hearing examiners) would have the final call on *all* issues of fact, law, and discretion. And thus the key provision in the APA emerged: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision. . . ."[18]

It would seem that none of this would have happened if Congress had followed the views of the minority members of the Attorney General's Committee. Under that approach, the adjudicating function would have been separated from the rule making and adversary functions. Alternatively, the hearing examiners might have been stripped from their employer agencies and placed into a central panel. If adjudication were conducted in a separate agency or in an administrative court of some kind (as it is in most other countries), or through a central panel, the various elaborate protections for hearing examiner independence in the APA would have been unnecessary and superfluous. The adjudicating agency or administrative court or central panel would have hired and evaluated its own ALJs and assigned them to cases as it saw fit; since that agency would not be engaged in law enforcement, there would be little need to construct elaborate protections of the judges' independence. Thus the ironic effect of the decision to preserve combined-function agencies was to spawn the aggressively independent administrative judiciary as we know it today.

In this highly abbreviated historic survey, only a few more events are worth mentioning. The status of hearing examiners was sharply elevated, and the status of agency heads sharply diminished, by the *Universal Camera*[19] decision in 1951. In *Universal Camera*, there was a credibility dispute between A and B concerning the reasons for discharging an employee. The hearing examiner believed A. The agency heads believed B. The Supreme Court held that the courts must review the agency head decision, not that of the ALJ.[20] Nevertheless, the fact that the ALJ believed a witness that the agency heads disbelieved is a minus factor in applying the substantial evidence test. As a result, agency heads became less likely to substitute their judgment on credibility questions for that of a hearing examiner. The hearing examiner's proposed decision became far more significant than it was before.

The next event worth mentioning was the 1972 decision by the Civil Service Commission (later codified by legislation) that renamed federal hearing examiners as ALJs. This very welcome improvement in status only recognized what had already occurred: the APA's independence-protecting provisions had already transformed the federal administrative judiciary into a highly independent, highly professionalized judicial corps.

The final event that should be mentioned is the trend toward central panels in the states.[21] About half the states and several important cities have stripped at least some of their agencies of their captive judges, moving the judges into a separate agency. Central panels have some important advantages, particularly in giving private parties the sense their cases are being heard by a truly impartial judge. This trend is gathering momentum, something like freedom of information or sunshine laws did a generation ago. If the trend continues, the vast majority of the states will undoubtedly have central panels in the next 20 years.

Ultimately, the federal government will have to fall into line. One viable scheme, in my opinion, is to merge the judges in benefactory agencies (such as Social Security, black lung, the Board of Veterans' Appeals, and Workers' Compensation for Maritime Employees) into a single independent agency exclusively devoted to adjudicating claims disputes. Perhaps when the federal central panel finally emerges, the APA provisions relating to the ALJs (particularly those relating to hiring, specialization, and evaluation) can also be reconsidered.[22]

The ALJ emerges out of this long history as the result of a series of compromises unique to the United States. First came the combined-function regulatory agencies which became necessary because essential industries remained in private rather than governmental hands. In part because of due process constraints imposed by the Supreme Court, those agencies mostly made policy through case-by-case adjudication and pursued judicialized methods. As a result, they ultimately found it necessary to delegate the function of conducting hearings to hearing examiners. Next came the titanic struggles between judicialists and institutionalists and between proponents and opponents of the New Deal. The historic compromise that emerged in the form of the federal APA retained combined-function agencies but it also produced the relatively extreme provisions relating to the hiring, management, compensation, evaluation, and independence of the person conducting the hearings. Today, those highly professionalized and independent-minded men and women, whom we call ALJs, have become the vast state and federal administrative judiciary.

Endnotes

1. Unless otherwise stated, the term "ALJ" as used herein covers all administrative trial judges, whether called ALJs, administrative judges, hearing officers, referees, or other titles. *But see* note 22 which distinguishes federal ALJs from other federal administrative judges.
2. An increasing number of state and local ALJs work for central panels, meaning they are not captives of any particular agency and are generalized rather than specialized judges. *See* text at note 21.
3. In an increasing number of cases, especially in the states, ALJs now make the final decision at the agency level. Agency heads are out of the loop. *See* Jim Rossi, *ALJ Final Orders on Appeal: Balancing Independence with Accountability*, 19 J. of Nat. Ass'n of Administrative Law Judges 1 (1999).
4. Many agencies, especially at the state level, engage only in adjudication; rule making, investigation and prosecution have been split off into different agencies.
5. The following sources are useful in understanding the historic trends sketched here. Louis L. Jaffe, Judicial Control of Administrative Action (1965); Attorney General's Committee on Administrative Procedure, Final Report: Administrative Procedure in Government Agencies (1940) (and accompanying monographs); Robert E. Cushman, The Independent Regulatory Commissions (1941); Paul Verkuil et al., *The Federal Administrative Judiciary* 1992-2 ACUS Rec. & Rep. 777; James Landis, The Administrative Process (1938); Ralph F. Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 Cornell L.Q. 281 (1955); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189 (1986); Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 Admin. L. Rev. 1 (1997).
6. Particularly noteworthy were the *Morgan* cases which struck powerful blows for the judicial process in economic decision-making. *Morgan I* required the agency head to be personally familiar with the issues, *Morgan v. United States*, 198 U.S. 468 (1936); and *Morgan II* inhibited ex parte contacts between prosecutors and decisionmakers. *Morgan v. United States*, 304 U.S. 1 (1938). *See* Daniel J. Gifford, *The* Morgan *Cases: A Retrospective View*, 30 Admin. L. Rev. 237 (1978).
7. In *Morgan IV,* the Court made it nearly impossible to prove violation of the rules in the first two *Morgan* cases. *Morgan v. United States*, 313 U.S. 409 (1941).
8. Scholars of this period are indebted to George B. Shepard's illuminating treatment of the origins of the APA, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw.U. L. Rev. 1557 (1996).
9. The *Morgan* cases, discussed in note 6, *supra,* are powerful statements of the judicial view.
10. Attorney General's Committee on Administrative Procedure, *supra* note 5.
11. The 1961 Model State APA was heavily influenced by the federal act.
12. Under the APA, the adjudication provisions apply only if "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (the APA will be cited without the prefatory 5 U.S.C.). There is no statutory requirement of a hearing on the record in the case of a vast number of adjudicatory situations. The APA does not apply in such situations.
13. *See* APA §§ 554, 556, 557.
14. *See* APA § 554(d). *See* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Columbia L. Rev. 759 (1981).
15. *See* APA §§ 554(d), 556, 557; 5 U.S.C. §§ 1305, 3105, 5372, 7521.
16. *See* APA § 553.
17. *See* APA § 701.
18. *See* APA § 557(b).
19. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).
20. *Id.*
21. *See, e.g.*, Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1181-91 (1992).
22. In the view of an influential study for the now defunct Administrative Conference of the United States, these controls on hiring and management of ALJs are the reason why most new administrative schemes are outside the APA. *See* Verkuil, *supra* note 5, This trend has caused the adjudication provisions of the federal APA to be less and less significant. The APA applies primarily to Social Security cases and a relatively small number of cases from traditional economic regulatory agencies. Judges not covered by the APA (so-called administrative judges) outnumber judges covered by the APA (ALJs) by more than two to one.

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The Central Panel Movement: Problems, Solutions and Ethical Considerations

By John W. Hardwicke

The proposition that the adjudicatory functions of executive agencies can be neatly severed from other agency responsibilities and assigned to an independent judge is attractive. The traditional hearing officer, an employee of the agency, is, by virtue of his legal status as "employee" of the agency within the technical, if not actual, control of the agency. Even though the agency may restrain its hand and permit the examiner to call decisions as he/she sees them, this restraint is voluntary, subjective and suspect to those wholly dependent on a fair, impartial decision. State executive agencies are, almost without exception, resistant to the current movement among the states to shed their adjudicatory responsibilities by assignment of hearings to a central panel of judges, a Central Hearing Agency (CHA).

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There are now 26 states which have adopted some form of CHA legislation, thus extending the hearing responsibility of a multiple of diverse agencies to a single agency created for that purpose. These states, and the number of agency constituents or programs are as follows: Alabama (no data available), Arizona (21 agencies), California (130 programs), Colorado (8 agencies), Florida (26 agencies), Georgia (10 agencies), Iowa (all agencies except Corrections, Workers' Comp. and Personnel), Kansas (7 agencies), Louisiana (12 agencies), Maine (9 agencies), Maryland (28 agencies), Massachusetts (19 agencies), Michigan (9 agencies), Minnesota (11 agencies), Missouri (13 agencies), New Jersey (23 agencies), North Carolina (19 agencies), North Dakota (14 agencies), Oregon (70 programs), South Carolina (8 agencies), South Dakota (6 agencies), Tennessee (41 agencies), Texas (46 agencies), Washington (28 agencies), Wisconsin (8 agencies), Wyoming (3 agencies), City of New York (5 agencies) and the City of Chicago (5 agencies). As noted, the cities of New York and Chicago have CHAs with complex and extensive responsibilities; it is expected that the mayor of Washington, D.C. will propose legislation to that City's Council in the fall of 2000. New York, Pennsylvania and Illinois lead the list of states which have failed to join the movement looking toward the unbundling of the hearing process.

This brief article will not rehash all of the commonly stated and agreed upon problems implicit in a system in which the prosecutor agency is also the judging agency. "Chinese walls" separating agency functions have low credibility with concerned citizens; even if such "walls" could, in reality, be created, the public will believe that the separation is not honored behind the scene.

Just as there is agreement in the legal and political community concerning defects in the present system, there is also a general agreement that the CHA solution creates other problems, considered to be insuperable by many in the several states and in the federal system. The usual and most vocal objections to the CHA solution fall under three general headings: 1) objections to an "independent administrative judiciary" per se, 2) loss of agency expertise, and 3) threat to agency policy integrity. Each of these will be considered in turn and specific solutions proposed.

I. Objections to an "Independent Administrative Judiciary"

Advocates for the CHA solution who argue for an independent administrative judiciary overstate their case. Ongoing experience in those states with a CHA suggests that the bold term "judicial independence" without explanation implies too much in an executive branch setting. Moreover, it seems highly unlikely that a legislature, whether that of a state, or the Congress of the United States, would deliberately structure an "independent" judiciary in the executive branch.

The real issue is the separation of the hearing process from the substantive agency whose executive mission is to enforce the law. But the accumulated separations, all transferred to a separate executive agency, do not result in an independent judiciary; the new agency remains in the executive branch and is incorporated into the larger mission of government. An executive branch agency charged with the function of adjudi-

cation may work comfortably with its sister executive agencies provided the responsibilities and authorities of each are well defined and deeply built into the administrative scheme.

Vague and fragile statutory protection leaves the administrative law judge susceptible to the whim of the executive or his/her minions. On the other hand, unbridled judicial "independence" can undermine the policy mission of an executive agency and threaten to transform the agency to government by an executive "judiciary."

The key to due process of law is that there is an *opportunity* for a hearing, i.e., an opportunity for the citizen to present a case to an uninvolved adjudicator after appropriate notice. The ultimate decision must be based solely upon facts and law available to both affected parties, that is, the agency and the citizen alike. The purpose of judicial independence in the executive branch setting is to achieve fundamental fairness on a case-by-case basis. At the heart of fundamental fairness is "decisional integrity." All of the branches of government are engaged in a common undertaking, all collaborating for the common good. A leading Maryland case[1] summarizes this view: "both the agencies and the courts are governmental ministries created to promote public purposes, and in this sense they are collaborative instrumentalities, rather than rivals or competitors, in the paramount task of safeguarding the interests of our citizens."

"The key to due process of law is that there is an opportunity for a hearing . . ."

This collaboration implies interdependence, and in turn, dependence in varying degrees upon forces outside each agency residing elsewhere in the government.

It is clear that "independence," while somewhat absolute in the abstract, is a matter of degree in practice. Decisional independence recognizes the practicability of "unbundling" the judicial function of the agency without offending the executive mission of the substantive agency. The creation of a separate hearing agency requires the establishment of a proper basis for the joint exercise of conflicting missions. Joint interdependence should be achieved and a plan devised for that accomplishment.

In summary, advocates for the CHA who would create an unqualifiedly independent administrative judiciary in the executive branch seek too much. Such a goal is neither practicable and nor politically acceptable. Moreover, it does not recognize the necessary interdependent function of executive agencies. However, decisional integrity, residing within a separate agency responsible for the total hearing process, is eminently desirable—indeed, essential to the enterprise—and achievable. Most importantly, in order to recognize and achieve interdependence, the responsibilities and authorities of the substantive agencies vis-à-vis the hearing agency must be clearly defined so that the functions of each can be harmonized with the functions of the other.

II. Loss of Agency Expertise

The most commonly stated objection to the CHA concept is that agencies, not judges, are experts and that unless the adjudicator is an employee of the agency, steeped in agency lore, he cannot appreciate the technical features of its litigation subject matter. The problem is exacerbated by the fact that CHAs with responsibilities across a broad range of agencies generally "cross-train" their ALJs who then have caseloads covering many different fields rather than a narrower or single concentration.

The view that agencies are "experts" and their decisions sacrosanct was well summed up by Judge Learned Hand who, in an appearance before the U.S. Senate Committee on Labor and Public Welfare in 1951, stated:

> The Supreme Court has been very severe with us if we do not give [the regulatory commissions] almost complete autonomy. They are not quite as severe as they used to be four or five years ago, while we were held on a very close rein. There was attributed to them a specialized acquaintance with the subject matter which gave them—to put it in logical form—major premises that we did not possess; and in deference to which we ought to yield.[2]

However, this long-standing reverence has suffered substantial erosion as stated by Justice Scalia:

> The opinions we federal judges read, and the cases we cite are full of references to the old criteria of "agency expertise," the technical and complex nature of the question presented, "the consistent and long-standing agency position"—and it will take some time to understand that those concepts are no longer relevant, or no longer relevant in the same way.[3]

Criticisms of so-called expertise abound. Professor Frederick Davis summarized them well:

> In addition to the fact that the ALJ position was not designed with an eye

> toward special expertise, specialization may put a presiding officer at a distinct disadvantage in the discharge of his function as a fact-finder. As an eminent jurist observed, "One of the dangers of extraordinary experience is that those who have it may fall into the grooves created by their own expertness." Fact-finders with great expertise in a particular area may *have strong preconceptions about certain problems that they will not be able to evaluate evidence or arguments before them fairly or accurately.* (emphasis provided).[4]

Strangely enough, there is little or no case law defining agency expertise. Agency expertise, in the sense of scientific or technical learning, is commonly inserted into the record through the testimony of experts. That testimony is, of course, subject to cross-examination and subject to contradiction by experts produced by other parties to the litigation.

Perhaps the "expertise" that CHA critics refer to is that of the Commission, or its Chairs or members of its board. However, most Commissions and Boards are not professionals or academics, but are chosen as lay representatives of the community at large or to provide leadership for policy goals and objectives within the executive portion of the governmental framework. In a recent article, Professor Joan Flynn discusses the "troubled tenure" of William B. Gould IV, recent chair of the National Labor Relations Board (NLRB).[5] The thesis of the article is that his "theoretical" expertise in labor law actually proved to be a stumbling block to success at NLRB. He publicly criticized Congress, did not understand the administrative process, and criticized members of the NLRB both publicly and privately. This "uncollegial conduct" contributed, according to the article, to his tenure being a dismal failure. Chairman Gould's "expertise," consisting of 25 years as a professor of labor law at Stanford University, was highly touted prior to his appointment. It proved, however, to be a handicap. His insistence that the NLRB was an "independent" federal agency, and his resentment toward "political interference" and "intrusion" served the NLRB poorly.

The experience of the NLRB under Chairman Gould is instructive. Professor Flynn argues that agency "expertise" is complex and not necessarily subject matter driven. While it involves knowledge of subject matter, it also involves the ability to foster collegiality and to work interdependently with other branches of government. Any legislative branch has in hand many opportunities legitimately to punish "rambunctious" bureaucrats whether they be the chair of a substantive agency or a chief administrative law judge. This "awesome arsenal" includes "legislation, appropriations, hearings, investigations, personal interventions, and 'friendly advice' that is ignored at an executive's peril."[6]

Readers of the Flynn article are reminded that narrow-minded, thin-skinned expertise can be a stumbling block both for the independent agency and for an independent executive adjudicator. So long as the CHA exists in the executive branch of the government, as a vulnerable creature of legislation, without constitutional protection, collegiality, cooperation, and interdependence are key to its success. Success cannot be achieved, however, at the expense of the integrity of the hearing and decisional process. Otherwise, unbundling of the adjudication process is a futile and cynical exercise.

Should the judge be an expert? Judge Richard A. Posner has remarked that "our judges are generally not appointed on the basis of their intellectual merit. . . ."[7] Certainly, in the Article III Courts of the federal system judges are not chosen as experts. Economists are not chosen for anti-trust cases, nor scientists for patent cases nor civil engineers for condemnation cases. The beauty of the common law in its democratic setting is that the judge is chosen for his skill in the requisites of fairness and objectivity. Indeed, mere subject matter "expertise" may be the adversary of due process. The technically trained bureaucrat may be insensitive to the impact of regulation and policy on ordinary citizens. Substance, not fairness, is the game of such an "expert."

The adjudicator should be one skilled in the law as applied to life and to the market place. Perhaps Plato said it best: "a good judge must not be a youth but an old man . . . who learns of injustice by discernment of it in alien souls . . . for he who has a good soul is good."[8]

III. Threat to Policy Integrity

To recap the two most commonly articulated objections to the creation of CHAs: first, "judicial independence" is, in reality, decisional independence in a milieu of functional interdependence; and, second, scientific and technical expertise is not a requisite of the adjudicator, but rather the decision domain of expert witnesses, cross-examination, and rebuttal during the hearing process.

A third objection, the CHA threat to the agency's policy integrity, remains to be examined, and anticipated by any state considering the creation of a CHA.

Further examination of the "expertise" criticisms previously discussed reveal a confusion among the critics as to the precise meaning of "expertise." In fact, critics have in mind "policy expertise," or simply "policy." In other words, the true apprehension is that decisional independence, not to mention judicial independence, poses a threat to agency policy prerogatives.

When considering "agency expertise," it becomes apparent that the term is used in differing contexts. Depending upon the specific meaning, agency expertise has a greater or lesser impact upon the function of agency adjudicator:

a) "expertise" as having an encyclopedic knowledge of a vast array of technical or scientific facts; and

b) "expertise" as having a practiced and demonstrated ability to draw inferences from technical or scientific facts; and

c) "expertise" as having marshaled relevant facts and inferences to develop a sound, coherent and cohesive policy, designed to further certain agreed-upon social, economic and political goals.

It would seem that (a) and (b), singly or in combination, represent the traditional concept of expertise. It is this expertise which resides, for example, in an expert witness, one who is to "assist the trier of fact to understand the evidence or to determine a fact in issue."[9]

The third definition describes agency expertise. It subordinates science and technical skill to the larger mission of an agency and to its political and policy objectives. The relevant expertise is that which pertains to the development and implementation of agency policy. This expertise is not secret, but openly exists in the scientific or academic domain. It is the servant, not the master, of policy. In fact, expertise is policy driven, and incorporated into the broader range of knowledge, interest and skill implicit in the larger objectives of the agency. Professor Charles Koch used an alternative word—agency "specialization": a word perhaps more descriptive of the policy source of judicial deference to which the agency is entitled. His perception is that:

> In some sense, expertise is merely the acquisition of superior knowledge, and the agency can surpass judges in this regard. However, expertise includes another asset: superior ability to synthesize information into a judgment. Even assuming that courts could accumulate particular information, they cannot make the same use of the information as the expert agencies. Administrative policymaking often represents this second asset of expertise. Courts cannot, even with all of the necessary information acquire the requisite expert judgment as to accomplishment of societal goals; an agency is assigned or occasionally created to bring this kind of expert judgment to a particular problem. This ability justifies the exercise of policymaking discretion by agencies. It is a major reason why the legislature assigned the task to the agency and why courts should meticulously avoid circumventing that choice.[10]

Whether deference to agency expertise (or specialization) is provided by the administrative law judge or a reviewing court, that deference should be defined by a continuum rather than by absolute categories such as "fact" or "law." Factual issues outside the agency's special competence should be at the low end of deference, whereas issues involving the agency's specialized knowledge or within a technical area entrusted to it exclusively by legislation should receive more deference in the process of adjudication. Questions centering on policy positions should receive the broadest, perhaps virtually absolute, deference. Moreover, it makes little difference whether it is the constitutionally empowered judge or the administrative law judge who properly defers to specialization or expertise so long as the deference is justified and described on the record.

IV. Assimilation of Policy into the Hearing Process

The separation of technical and scientific expertise from policy-driven specialization is important in the establishment of a CHA. Agency policy may be promulgated through the rule-making process, and, as policy, is an aspect of the law governing the case. As policy, it is the source of greatest deference to the agency when its adjudicating function is separated from its administrative functions. Certainly, matters of policy and specialization are brought into the adjudicatory process through rule-making procedures or through public pronouncements of policy in accordance with due process and subject to statutory law.

Whether policy should be adopted or modified by rule making or by adjudication has been the subject of much comment in court decisions and treatises. Although the leading Supreme Court decision on the subject, *SEC v. Chenery Corp.*,[11] suggests that rules should be promulgated "as much as possible" through formal procedures, it also recognized that policy can be adopted through adjudication. Contrary to *Chenery*, however, many states have held "that when a policy of general application, embodied in or represented by a rule, is changed to a different policy of general application, the change must be accomplished by rule making."[12]

The most juridically acceptable method of assimilating agency technical or scientific expertise is through the hearing process. The most juridically acceptable method of enunciating and developing policy is through the rule-making process. Where the hearing is assigned to a CHA, the CHA can recommend decision, leaving the final decision to the agency. While this

method may limit the opportunity of the commission or agency head to change the recommended result, it nevertheless will put on the table all factors considered in arriving at a fair and impartial decision. If agency expertise is confined to the hearing process, the agency head, in reviewing the ALJ's decision, is limited to the articulation of goals and objectives of agency policy and the application of that policy to the case at hand.

All cases or controversies, large and small, civil and criminal, formal and informal, involve four questions: (1) what are the facts, (2) what is the law, (3) how does the law apply to the facts, and (4) what is to be done? The action part of the adjudicatory process, what is to be done, is a hybrid, executive and policy driven as well as adjudicatory. Whether the controversy is a family dispute involving quarrelsome children, or a major anti-trust suit involving a multinational enterprise, the format is the same. The sanction part of the decision requires action; otherwise, judgment is an idle threat. And the sanction, the depth of punishment, or the reach of reward, falls within the agency's mission as well as the prerogative of the judge.

If the agency does not participate in the fourth step of the adjudicative process, and if this step is assigned to the adjudicator without restraint or guidance, the agency will have delegated this portion of its policy function as part of the hearing process. If the adjudicator is permitted, unfettered, to make final policy decisions in the real world of controversy, an executive adjudicator could intrude into the executive function of government. Whether the administrative law judge renders a final decision or a recommended decision, proposed sanctions should be placed by the agency on the table at the hearing. If by statute, rule, or assignment by the agency, the judge is empowered to render a final decision, thus exhausting the administrative process, criteria should be clearly delineated for the scope and application of sanctions. Without criteria or guidance, there may not be a proper balance between policy and adjudication.

In addition to criteria for the administrative law judge to apply in determining sanctions, the judge must be keenly aware of the goals and mission of the substantive agency in the evaluation of alternative sanctions. When Maryland's Office of Administrative Hearings was established in 1989, the statutory responsibility of choosing the new administrative law judges from the rank and file of hearing officers fell upon the Chief Administrative Law Judge. Serving in that capacity, my question to a potential appointee was, "what is the purpose of an administrative hearing?" Frequently, the response was similar to that given, for example, by motor vehicle officers: "to keep the highways and roads safe," or "to keep the drunks off the roads." Of course, the answer sought was "to provide a fair and impartial hearing opportunity." The "wrong" answers drew strong negatives in my decision to retain or not to retain. Although I remain negative, more than ten years of experience have softened my view. The mission of the substantive agency, the mandate of cooperation among agencies in the executive branch, requires that adjudicators be aware of the fundamental purpose of law and the policies that give rise to law.

But there may not be a hearing, or the hearing may be waived, or aborted by non-appearance, or may be imperfectly realized because of incompetent counsel or by the citizen *pro se* or by the informality and inherent imperfection of the proceeding. The ALJ must decide in accord with, and subject to, law, which includes policy, and the ALJ must have knowledge of that policy, independent of the hearing, and whether argued or not.

"In truth, policy prerogatives of the agency may be whimsical, short-lived, punitive or otherwise illogical. How can an ALJ comprehend whether there is in fact a policy mission and if so, the nature of that mission?"

However, the underlying policy may not be stated or anywhere defined. Maryland's OAH holds over 50,000 hearings each year for 28 state agencies involving over 225 different programs. The word and concept of "policy" is often used as though all government actions formulated and implemented through the engines of agency are driven by a deliberate and well-considered policy. In this, we give too much credit to government. James Q. Wilson, has observed:

> It is a common mistake to assume that a president or governor appoints the head of a department or bureau with a view to achieving certain policy goals. Sometimes that happens, but more often the president (or governor or mayor) has no clear idea of what policy his appointee will pursue. Agency executives are selected in order to serve the political needs of the president, and these may or may not involve policy considerations.[13]

In truth, policy prerogatives of the agency may be whimsical, short-lived, punitive or otherwise illogical. How can an ALJ comprehend whether there is in fact a policy mission and if so, the nature of that mission?

The common sense answer is that there is an atmosphere of judicial comprehension of societal policy, both general and specific and the judge, particularly an administrative adjudicator, has a common sense lati-

tude comprehending what that policy is, or ought to be. This comprehension may even be intuitive, derived from experience—the terms "experience" and "intuitive" in the Holmesean sense. As Holmes wrote in the opening paragraph of The Common Law:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more than the syllogism in determining the rule by which men are governed.

The mandate that the administrative adjudicator work in harmony with the other engines of government includes the in-common "*intuitions* of public policy, avowed or unconscious." The administrative adjudicator intuits that the underlying policy of the Motor Vehicle Administration is assurance of highway safety, or that the underlying policy of involuntary confinement to a mental institution is care of the mental patient and protection of both public and patient, or that the underlying policy of the Department of the Environment is protection of natural resources from the ravages of rampant industrial activity. All of these public policies, intuitive in nature, some conscious, some unavowed, enter into the process of adjudication as well as administration. The fact that these intuitive policies are part of the process does not render the administrative adjudicator dependent upon external forces or destroy that fairness required by due process of law. It only assures that the decisionmaking of the adjudicator is more tied to legislative intent and agency purpose rather than on mere abstractions derived from whim or fancy.

Judge Richard A. Posner, an advocate for "pragmatism" as a primary basis for judicial decisionmaking, builds pragmatism as a sense of value, common sense and experience on the part of the judge in the development of decisions. His fundamental theory is that "a proof is no stronger than its premises, and at the bottom of the chain of premises are unshakable intuitions, our indubitables," that it is necessary for the judge to locate "a ground for judicial action in instinct rather than in analysis."[14]

However, an administrative adjudicator is on a shorter leash than the constitutional judge. The ALJ must give reasons for every essential element of a decision and these reasons must be specifically derived from fact, law and the application of law to fact. It would not suffice for the administrative judge to assert his private values or philosophical, religious, economic or political views as reason as Posner suggests are appropriate bases for judicial discretion.[15] However, intuition and instinct are reasonable, even necessary, for the administrative law judge insofar as they relate to the overarching mission of the agency on the one hand, and to requisite uncompromising fairness and impartiality for the citizen on the other.

V. Creating a Central Hearing Agency: How It Should Be Done

The apprehensions about a CHA previously discussed can be addressed statutorily:

First: A sound, organic CHA statute should be adopted;

Second: State administrative procedure acts should be clarified and amended; and

Third: A strong code of ethics for CHA judges should be developed.

These three suggestions, taken together, would serve to protect agency policy prerogatives as well as CHA decisional independence, better assuring necessary interdependence of agency functions within the executive branch.

A. A Sound, Organic CHA Statute

The American Bar Association (ABA) has formally proposed a model CHA agency statute. This model statute is intended to be sufficiently flexible to permit any state to adjust centralized administrative adjudication to the governmental set-up within the state. The ABA model:

A. Permits exclusion of various agencies as political policy within the state may require;

B. Permits the Governor to exempt additional agencies temporarily;

C. Provides for a Chief Administrative Law Judge (CALJ) to be appointed for a term of years by the Governor with approval by the state Senate;

D. Requires that the administrative adjudicatory function be separated from the agency for which the hearings are held and guarantees independence for the agency adjudicatory process;

E. Requires that the CHA and the executive agency work together cooperatively in providing fair and impartial hearings;

F. Permits the agency to delegate to the CHA final decision-making authority or, alternatively, delegate the authority to make recommended decisions only as the agency may elect;

G. Provides for a state advisory council made up of agency designees, members of the bar, and representatives of the attorney general's office to assist the CALJ in administering the CHA.;

H. Assures the integrity of the agency's policy-making function and authority.

B. Conforming Amendments to State Administrative Procedure Acts (APAs)

The creation of a CHA should be paired with appropriate amendments to that state's APA. The Model 1983 State APA contains option language for CHA states permitting them to make necessary amendments to their APAs in order to accommodate their central panel. However, the 1983 Model has not been well received, having been adopted only in the State of Iowa. Perhaps states should consider other APA provisions at the time they adopt a CHA.

Since the political culture of states differ, they should pick and choose those provisions necessary and appropriate to them to avoid friction between the hearing agency and the substantive agency.

The following concepts are suggested:

1. A declaration of policy providing that the purpose of the Administrative Procedure Act is to ensure the right of all persons to be treated in a fair and unbiased manner in the resolution of disputes in administrative proceedings;

2. A provision whereby the substantive agency may retain adjudicatory responsibility for hearing disputes the agency considers crucial to its policy function. This retention, available only to the agency, board or commission and not to an outside hearing officer, will protect the agency's power to pronounce policy by way of adjudication;

3. A provision requiring the agency, if it does not hear the case itself, to assign the case to the CHA. The assignment may be by way of a "menu," that is, to make findings of fact only or to issue a recommended decision to the agency, or to render a final decision (alternatively, this provision may be the CHA organic statute);

4. A provision that the CHA shall recognize and apply policies, rules and regulations adopted by the agency in accordance with law in the same manner and to the extent as if the agency itself were holding the hearing;

5. A provision that the agency head or executive authority shall not directly or indirectly intervene in the functions of the central hearing agency unless such intervention shall be in accordance with provisions of the state APA;

6. A provision that all hearings shall be open to the public unless federal or state law requires otherwise;

7. A provision that if the CHA renders a recommended decision, the final decision must identify and explain any change, modification or amendment to the recommended decision;

8. A provision that the agency shall have the same right to appeal to a court of law as the citizen from a decision of the CHA;

9. A provision for interplay between regulations of the CHA and procedural regulations of the agencies with the requirement that the CHA regulations shall govern in the event there is a conflict;

10. A provision for a time frame within which the decision must be issued.

C. Strong Code of Ethics for CHA Judges

A strong code of ethics is the centerpiece of judicial integrity whether the judge is in the judicial or in the executive branch of government. Strict conformity to the code provides the judge with full protection from outside agency interference in the decisional process. If the code is adopted by legislative mandate it assures decisional integrity and independence. It is a shield to the adjudicator when an agency official seeks to intrude into the decisional process.

"A strong code of ethics is the centerpiece of judicial integrity whether the judge is in the judicial or in the executive branch of government."

The American Bar Association's Mode Code of Judicial Conduct of 1990 provides ample coverage for administrative adjudicators. For purposes of agency inter-relations, the essential element of the ABA Model Code is the prohibition against *ex parte* communications found in Canon 3 (A)(6) as amended by the National Conference of Administrative Law Judges on February 1, 1998. These provisions follow:

> (6) A state administrative law judge shall accord to all persons who are legally interested in a proceeding, or their representative, full right to be heard according to law. A state administrative law judge shall not initiate, permit or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provisions promptly to notify all other parties of the substance of the *ex parte* communication and allow an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to the proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult other judges and support personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(3) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

The prohibition against *ex parte* communication is at the heart of a judicial code of ethics. It is obvious, of course, that if the judge communicates directly, or indirectly, with one of the parties to the proceeding, without the knowledge of or out of the presence of the other party to the proceeding the hearing itself may become a hollow mockery. It is the hearing which is the scene of the contest between opposing forces; any influence on the judge, exercised unilaterally by one of the parties violates the basic concept of due process.

One final word about agency interference with a CHA: the Chief Administrative Law Judge stands between the agency and the adjudicator. It is the Chief's responsibility to protect that judge from agency interference, wrath or indignation when the agency is on the losing end of the judicial contest. The chief judge, responsible for the competence of the process, should conscientiously evaluate complaints, but generically, and never with regard to a case at hand or with regard to a specific outcome. In this way, competence is assured but the *ex parte* prohibition observed.

Conclusion

It has been the purpose of this article to offer reasons that adoption of a central panel can be undertaken as one of the "felt necessities" of our time. Government, through its agencies, will grow more complex and, unfortunately, more pervasive and, conceivably, more intrusive.

If this premise is correct, should adjudicatory responsibility remain within the agency prosecuting the action?

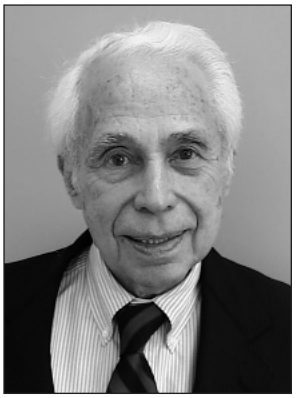
Endnotes

1. *Department of Natural Resources v. Linchester*, 274 Md. 211, 221, 334 A.2d 514, 521 (1974).
2. *The Spirit of Liberty, Papers and Addresses of Learned Hand* 239 (3d ed. 1960).
3. 10 Journal of the National Association of Administrative Law Judges, 118, 127-129 (Fall 1990) (Quoted material is from a lecture delivered at Duke University Law School, January 24, 1989 and first published as *Judicial Deference to Administrative Interpretation of the Law,* 1989 Duke L.J. 511).
4. *Judicialization of Administrative Law: The Trial Type Hearing and the Changing Status of the Hearing Officer,* 1977 Duke L. J. 347, 402.
5. *Expertness for What?: The Gould Years at the NLRB and the Irrepressible Myth of the "Independent" Agency,"* 52 Admin. L. Rev. 465 (Spring 2000).
6. James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It 236 (1989).
7. Overcoming Law 194 (1995).
8. The Republic, Book III, 409 B, C (1982).
9. Fed. R. Evid. 902.
10. 54 Geo. Wash. L. Rev. 469, 485 (1986).
11. 332 U.S. 194, 202 (1947).
12. *CBS v. Comptroller*, 319 Md. 687, 696, 375 A.2d 324, 328 (1990), and cases cited therein; *but see Ryder Truck Lines, Inc. v. U.S.*, 716 F.2d 1369 (11th Cir 1983).
13. Bureaucracy: What Government Agencies Do and Why They Do It 198.
14. Overcoming Law at 192.
15. *Id.* at 197.

Judge John W. Hardwicke is Maryland's first Chief Administrative Law Judge, appointed effective January 1, 1990. He was re-appointed to a second term effective January 1, 1996. He received his law degree from the George Washington University and his A.B. degree from the University of North Carolina. He is Past President, National Association of Administrative Law Judges. Currently, he serves as Vice Chair, National Conference of Administrative Law Judges, Judicial Division, American Bar Association.

A Modern Revision of Traditional Administrative Law

By Julius J. Marke



Although the Office of Administrative Trials and Hearings (OATH) is a court little known to many lawyers, still it plays an impressive judicial function within the executive branch of New York City government.

OATH has functioned since 1979 as a central tribunal with the authority to conduct administrative hearings for any agency, board or commission of the City of New York. Established by Executive Order No. 32 (1979) its purpose was to function as an independent agency of government whose judges would not be subordinate to any petitioning agency.

The New York City Charter Revision, which enacted the City Administrative Procedure Act (CAPA) made OATH a charter agency in 1988. In this context, CAPA adopted minimum standards for the conduct of administrative hearings and the establishment of OATH as the City's presumptive independent tribunal. Charter § 1048 provides that OATH "shall conduct adjudicatory hearings for all agencies of the city, unless otherwise provided for by executive order, rule, law or collective bargaining agreement."

As emphasized by OATH's Chief Administrative Law Judge, Rose L. Rubin,

> OATH remains committed to fulfilling the mandate envisioned for it by the Charter Revision Commission: 'To establish an independent adjudicative body that can be a resource to agencies in conducting their adjudications, while at the same time establishing an independent structure outside the agency to provide an unbiased assessment of the matters to be adjudicated.'

Transferring administrative adjudications from various agencies' internal hearing units to OATH has accomplished three results: First, because OATH judges function independently of the agency that refers the case, the parties and the public enjoy an increased confidence in the fairness and neutrality of the adjudication; second, OATH is larger than each of the separate tribunals it replaces and therefore consolidation of hearings at OATH achieves economics of scale, cheaper and more efficient adjudication results in savings for the city as a whole; third, OATH brings a uniform high standard of professionalism to the city's administrative adjudications that does not vary from agency to agency.

Generally, an administrative hearing is held when a city governmental agency is reviewing certain legally protected rights. Until the advent of OATH, such a review was unusually conducted by a hearing officer who was an employee of the same agency involved with the dispute. The emergence of OATH reflects a trend in which modern administrative law is shifting from such internal hearing officers toward central tribunals such as OATH, where administrative law judges are fully independent of the agencies whose advocates appear before them, and both the prosecution and defense are treated similarly by the OATH judge.

Although some 20 states have moved at least partially to central panel systems, OATH was the country's first municipal central panel. Recently the City of Chicago followed suit. It is understandable why OATH Deputy Chief Administrative Law Judge, Charles McFaul describes OATH as "serving as a protective barrier to unwarranted or improvident executive action" and as "a modern revision of traditional administrative law."

Section 1048 of the City Charter provides that all city agencies' administrative trials will be referred to OATH for adjudication "unless otherwise provided for by executive order, rule, law or pursuant to collective bargaining agreements." As a result, OATH's jurisdiction extends to hearing administration cases referred by any city agency, board or commission or any state-created authority or other entity that is fully or partly funded by the city.

After it was created by executive order in 1978, OATH adjudicated matters consisting almost entirely of disciplinary cases brought by city agencies against their employees: OATH's caseload, began to diversify considerably, however, after Charter revisions gave OATH general jurisdiction in 1988. City agencies began to refer various matters pertaining to their licensing and regulatory authority involving city contractors. Then again, although OATH is a mayoral agency, many non-mayoral agencies began to refer an increasing number of cases.

During Fiscal Year 1999 case referrals to OATH grew 33 percent from the previous year. A total of 2,383 cases were docketed at OATH for adjudication from 33 agencies involving 16 different case types. OATH administrative judges completed 436 trials and issued 421 decisions after trial. They also conducted numerous settlement conferences, directly contributing to 1,162 settlements.

OATH classifies the cases referred to it for adjudication into five categories: personnel, license and regulatory, real estate and land use, contract, and discrimination.

This article appeared in the *New York Law Journal* on Feb. 1, 2000, p. 1. It is reprinted with permission from the edition

Personnel matters are the largest single category of cases referred to OATH, including disciplinary, disability and name clearing proceedings. All four of the City's uniformed services refer disciplinary cases to OATH. The Department of Correction in FY 1999 referred 1,023 disciplinary cases, many involving improper use of force against inmates, insubordination and time and leave violations. The Police Department referred 244 disciplinary cases: All of these cases pertained to police officers whose conduct was found by the Civilian Complaint Review Board to warrant disciplinary action due to abuse of authority, discourtesy or use of ethnic slurs. It should be noted however, in this context, that a major portion of the Police Department's disciplinary caseload is heard by its internal disciplinary unit under the Police Department's Trial Commissioners.

Other agencies referring disciplinary cases to OATH for adjudications in FY 1999 were the Department of Sanitation (70), Fire Department (21), The Human Resources Administration (210), The Health and Hospitals Corporation (130) and the Transit Authority (52).

License and regulatory cases were referred to OATH by the Taxi and Limousine Commission, the Health Department and the Department of Building. The Health Department cases mostly involved mobile food vendors and restaurant owners. The Department of Building referred matters such as revocation or suspensions of architects, engineers, expediters, electricians and master plumbers.

Cases dealing with real estate and land use reflect the Department of Buildings' enforcement of the City's Zoning Resolution ("padlock law cases"), usually requiring OATH to determine whether a commercial occupancy should be closed because it operates in a district zoned for residential use.

Loft Board cases referred to OATH during FY 1999 involved a variety of landlord and tenant disputes, including housing maintenance violations, harassment complaints, rent matters, interference with use and noncompliance with the deadlines for legalizing interim multiple dwellings.

The Department of Housing Preservation and Development refers matters to Oath to determine whether single room occupancy tenants have been harassed into vacating or waiving their occupancy rights. Questions concerning an owner's application to alter or demolish an SRO building have recently been added to OATH's jurisdiction.

OATH has also adjudicated contract cases involving prevailing wage enforcement proceedings invoked by the comptroller and appeals by vendors whose prequalifed status was either revoked or denied by agency heads. As of September 1999, OATH has been designated to Chair and administer the Contract Dispute Resolution Board, involving claims arising from the administration of city contracts for goods, services and construction.

Even the City Commission on Human Rights refers cases to OATH for adjudication involving charges of discrimination by employers and landlords based on the complainant's age, race, sexual orientation or physical disability.

Trials conducted by OATH are open to the public. Usually, most parties are represented by counsel, but pro se litigants and non lawyer advocates are also recognized by OATH.

OATH proceedings are governed by its Rules of Practice, published in Title 48, Chapters 1 and 2, Rules of the City of New York.

Most OATH cases are conferenced before trial by an administrative law judge, other than the trial judge. OATH trials generally follow regular trial format—opening statement, each party's direct case with cross-examination by the other party and closing arguments. Usually, the burden of proof is on the petitioner who must prove the case by a preponderance of the evidence.

Unless otherwise noted, OATH decisions are only findings of fact and recommendations, and therefore are not binding on the parties until adopted as the order of the referring agency. Appeal can be taken from an administrative judge's findings and recommendations in a case which had been affirmed by the commissioner of the department involved, either to the Civil Service Commission or by a CPLR Article 78 Proceeding in the courts.

OATH decisions generally include findings of fact, conclusions of law and recommendations. In cases in which the petitioner prevails, a grant of relief is added, such as a penalty against the respondent or an award to the petitioner. When issues raised are legal in nature, relevant law such as statutory, administrative and decisional, federal, state and local, are analyzed.[1]

OATH's administrative law judges are appointed by the Chief Administrative Law Judge to a five year term and may be removed only for cause. They may be reappointed. In addition to the Chief Administrative Law Judge, there are now nine other administrative law judges. They are all subject to the same Code of Judicial Conduct as are the judges of the New York State Unified Court System. The charter requires these judges to have been attorneys for five years.

Endnote

1. OATH's decisions are reported in the New York City Administrative Law Reporter. Access to all OATH decisions is available in OATH's library at 40 Rector Street, New York. For an appointment, call (212) 442-4941. The latest edition of oath's annotations contains updated point headings for decisions issued between 1990-1997. Complete sets of the Rules of the City of New York (Rcny) are published by Lenz and Riecker and by the New York Legal Publishing Corporation.

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Sims v. Apfel: A New Standard for Issue Exhaustion in Public Benefit Cases

By Amanda Hiller

Each year more than 100,000 New York public assistance applicants and recipients challenge adverse benefit decisions at administrative hearings.[1] Most of these claimants will win their "Fair Hearings"[2] but some will seek judicial review of adverse hearing decisions. In recent years, public assistance claimants seeking judicial review of adverse decisions have come upon a new roadblock: the issue exhaustion rule.

Issue exhaustion is a central tenet of administrative law: litigants are generally required to exhaust administrative remedies before seeking judicial review of agency decisionmaking.[3] If a litigant does not raise an issue in administrative proceedings s/he is deemed to have "waived" the issue for the purpose of judicial review. This doctrine serves the dual purposes: (1) it protects agency authority by deferring to an agency's expertise and upholding its procedures, and (2) it promotes judicial efficiency by allowing agencies to correct their own errors or build records for subsequent judicial review.[4]

The doctrine of issue exhaustion has been applied by courts reviewing all types of administrative hearings, including federal and state public benefits hearings. Most federal circuit courts have applied the rule when reviewing Social Security Administration (SSA) benefit decisions.[5] And in New York, two out of the four appellate departments have adopted the issue exhaustion rule in public benefit cases just in the last few years.[6]

Sims v. Apfel

In 1996 Professor Jon Dubin wrote an article appearing in the *Columbia Law Review* that criticized application of the issue exhaustion rule in SSA cases.[7] At that time all but three of the federal circuit courts had adopted the issue exhaustion rule, and it appeared likely that the rest would follow suit.[8] However, in 1999 two of the federal circuit courts that had previously required issue exhaustion in SSA cases retreated from strict adherence to this doctrine.[9]

In *Sims v. Apfel*[10] the Supreme Court sought to resolve the circuit split regarding application of the issue exhaustion rule in SSA cases. The SSA has a multi-stage administrative appeal process. In the final stage, SSA claimants must appeal decisions by Administrative Law Judges (ALJs) to the SSA Appeals Council before seeking judicial review. The SSA provides a form for requesting review by the Appeals Council although claimants are not required to use it.[11]

Sims focused on whether claimants could raise issues in federal district court that they had failed to identify in their written requests for Appeals Council review. The Supreme Court noted that, although issue exhaustion is often required by the statutes and regulations governing administrative proceedings, the rule is judicially imposed because these administrative proceedings are analogous to adversarial litigation in courts, where appellate tribunals will typically refuse to review issues not raised by the parties at trial.[12] The Court distinguished between administrative proceedings that follow the traditional adversarial model and other less formal, non-adversarial proceedings; it viewed the issue exhaustion requirement as less justified in non-adversarial settings.[13] Justice Thomas, writing for a four-member plurality, emphasized the ALJ's role in SSA proceedings as both fact-finder and decisionmaker, and opined that it was inappropriate for courts to impose an issue exhaustion requirement in SSA cases because these proceedings are intended to be informal and non-adversarial.[14]

In her concurring opinion, Justice O'Connor argued that the issue exhaustion should not be imposed because SSA claimants do not receive notice of the requirement.[15] This concern was echoed in the dissenting opinion, which acknowledged the importance of having claimants on notice of any issue exhaustion requirement. The four dissenters would have imposed issue exhaustion in the *Sims* case because the claimant was represented by legal counsel who should have known that issue exhaustion is a standard precondition to judicial review of administrative decisions. However, even the dissent agreed that an exception to this standard should be made in cases where claimants do not have legal representation.[16]

The Implications of *Sims*

Although *Sims* dealt with federal public benefits hearings, the key factors in the Court's decision, namely the nature of the proceeding, notice of the rule, and legal representation of claimants, are all implicated by application of issue exhaustion in New York public benefit cases.[17] Most public assistance claimants appear *pro se* and are not adept at identifying legal issues and preserving them for appeal.[18] Nor do these claimants have any particular reason to do so, since they are not given notice of the issue exhaustion rule.[19] In theory, the ALJs presiding over these hearings assist claimants in building case records, but often the hearing officers have not done so.[20] Moreover, identification of an issue by a hearing officer may not be sufficient for preservation purposes. Indeed, in a recent New York case a court rejected an appeal where an issue was raised by the administrative law judge but not by the claimant.[21]

1. ALJs' Duty to Assist Claimants in Building a Record

Unlike other administrative hearings, those for public benefits are generally considered to be "non-adversarial;" the ALJ acts as both fact-finder and decision-maker. The regulations governing the responsibilities of hearing officers in New York provide that the hearing officer must "elicit documents and testimony, including questioning of parties and witnesses" in order to ensure a complete hearing record.[22] Policy Guidance issued by the Office of Administrative Hearings expands upon this directive, providing that

> the hearing officer must ask questions, if necessary, to complete the record, particularly where the appellant demonstrates difficulty or inability to question a witness. This may involve the questioning of either party to elicit information that may not have been volunteered due to the lack of understanding of its relevance.[23]

This responsibility had been underscored in a series of decisions from the Second Department where the court held that ALJs had failed to protect the rights of *pro se* claimants when they did not adequately develop hearing records or assist the claimants in doing so.[24]

2. Lack of Notice of the Rule

One of the bedrock requirements of procedural due process is notice. The lack of appropriate notice to claimants was a key factor in Justice O'Connor's concurrence in *Sims*, as well as in the Seventh and Eighth Circuit's earlier retreat from application of the issue exhaustion rule. The Eighth Circuit noted that "the [SSA] Appeals Council's non-adversarial proceedings give claimants . . . no advance notice that issues not specifically raised will be forfeited."[25] Soon after this decision the Seventh Circuit also reversed its prior rigid exhaustion rule, in part because of inadequate notice.[26] In an opinion by Judge Richard Posner, the court noted that the only reference to "waiver" in the regulations requires appellants to go through each step of the administrative review process, and does not provide notice that issues must be preserved for appeal.[27] Analogously, when the Tenth Circuit adopted the issue exhaustion rule, it did so only prospectively because of the due process concerns raised by earlier lack of notice of the rule.[28]

Unfortunately, in New York public benefits claimants never receive notice of the issue exhaustion rule. In fact, a claimant is not even informed of the right to seek judicial review prior to the issuance of an adverse administrative hearing decisions, let alone the technical requirements for issue preservation.[29]

3. Unrepresented Claimants

To a large extent, whether a claimant is on notice of the issue exhaustion rule will depend on whether the claimant is represented by legal counsel.[30] The vast majority of public assistance claimants, however, are not represented at their hearings.[31] Additionally, the New York Court of Appeals has made clear that public assistance claimants are not entitled to assignment of counsel. In *Brown v. Lavine*,[32] the court held that due process only requires that the claimant receive notice that s/he may be represented, by legal counsel or some other representative, and is informed of the availability of community legal services.[33]

The regulations governing New York's fair hearing process specifically provide that appellants receive notice of their right to be represented at the hearing "by legal counsel, a relative, friend or other person" as well as information regarding the availability of community legal services.[34] Courts in the Second Department have held that due process is satisfied when claimants are "made aware that community legal services are available."[35]

Agency reliance upon the availability of community legal services may be inappropriate, however, given the limitations these organizations must accept as a condition of federal financial support. In 1996 Congress imposed significant new restrictions on recipients of Legal Services Corporation (LSC) funding.[36] LSC-funded organizations are prohibited from challenging any provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[37] (other than child support provisions), state laws or regulations implementing PRWORA, or state laws or regulations governing state general assistance programs.[38]

These restrictions apply not only to an LSC-funded organization's use of LSC funds, but also to activities funded with non-LSC funds, essentially restricting the all of the organization's activities.[39]

This prohibition raises extremely thorny ethical issues because an LSC-funded attorney representing an individual client in a welfare administrative hearing can raise many of the relevant legal issues but cannot challenge the underlying policy or regulation.[40] This limitation strikes at the heart of the issue exhaustion dilemma because those claimants fortunate enough to have legal services representation must sacrifice their ability to have certain issues, i.e., those challenging the policies underlying agency action, preserved for appeal.[41]

Conclusion

New York's First Department recently acknowledged the inequities resulting from application of the issue exhaustion rule in public assistance cases. In *Raitport v. New York City Dep't of Social Services*,[42] the court accepted the government's argument that issue exhaustion principles precluded judicial review. But the court proceeded to note that this position "reflects an unfortunate degree of organizational sensitivity" and that "[a] welfare agency does not fulfill its legislative mandate by operating under a policy that extends benefits only to those persons who are sufficiently familiar with the laws to effectively demand them."[43]

The principles underlying the issue exhaustion doctrine are important in the overall scheme of administrative decisionmaking. Requiring parties to raise issues during the course of administrative proceedings gives the agency an opportunity to address these issues and correct any agency error, thereby promoting the dual principles of agency autonomy and judicial economy. However, as the Supreme Court recognized in *Sims*, requiring public assistance claimants to preserve issues for appeal may not be appropriate given the fundamental inquisitorial nature of public assistance administrative hearings, where ALJs have a responsibility for raising issues and building records. This conflict leads to a quandary: how best to uphold the integrity of public assistance administrative hearings while at the same time protecting the rights of often vulnerable claimants.

Many of the concerns raised by imposition of an issue exhaustion in public assistance cases could be mitigated if public assistance claimants were better protected at the hearing level. Improved notice to claimants regarding the importance of raising issues on the record, coupled with increased efforts by hearing officers to assist claimants in preserving issues for appeal, would better protect their rights. Improved access to community legal services organizations, either by easing the restrictions placed on those services or through alternative funding strategies, would reduce the need for welfare claimants to appear at hearings unrepresented by counsel. However, changes at the hearing level will only mitigate, not eliminate, the harsh consequences of issue exhaustion. The issue exhaustion rule will remain a roadblock in the path of public assistance claimants as long as New York courts continue to view non-adversarial public assistance hearings as equivalent to other types of administrative hearings. In the meantime, it would be wise to heed the words of the First Department in *Raitport*: "[t]he 'safety net' provided by the [welfare] program is ineffectual if the most vulnerable among us are allowed to slip through."[44]

Endnotes

1. *See* New York State Bar Association, Report of the Special Committee on Administrative Adjudication 54 (1999) (reporting that the New York State Office of Temporary and Disability Assistance received 220,000 requests for fair hearings in 1998, and rendered 134,000 decisions).
2. *See id*. at 45 (citing a 1998 State Comptroller's audit, which found that social service districts lose 78% of hearings statewide, and 85% of hearings in New York City).
3. *See Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978) ("It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being able to litigate in a court of law.").
4. *See McCarthy v. Madigan*, 503 U.S. 140, 145-46 (1992).
5. *See, e.g., James v. Chater*, 96 F.3d 1341, 1342 (10th Cir. 1996) (holding that "issues not presented to the Secretary through the administrative appeals process may be deemed waived on subsequent judicial review.").
6. *See Raitport v. New York City Dep't of Soc. Servs*., 688 N.Y.S.2d 74, 77 (1st Dep't 1999) (barring a claimant from raising a claim not raised at the earlier administrative proceeding); *Bien-Aime v. New York City Human Resources Admin*., 685 N.Y.S.2d 54, 55 (1st Dep't 1999) (holding that a proceeding was properly dismissed for failure to exhaust administrative remedies); *Frumoff v. Wing*, 657 N.Y.S.2d 646, 648 (1st Dep't 1997) (reversing a grant of relief on the ground that allowing relief would set a precedent allowing unsuccessful applicants to bypass administrative hearings and seek judicial review); *Williams v. Wing*, 688 N.Y.S.2d 347 (4th Dep't 1999) (holding that the claim was not subject to review because it was not raised at the prior hearing); *Shelton v. Wing*, 684 N.Y.S.2d 726, 727 (4th Dep't 1998) (finding that the scope of an article 78 proceeding is limited to issues raised in the hearing); *Vicari v. Wing*, 665 N.Y.S.2d 209, 211 (4th Dep't 1997) (finding no basis for relief where the petitioner did not raise the issue at the fair hearing).
7. *See* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisatorial Administrative Hearings*, 97 Colum. L. Rev. 1289, 1308 (1997).
8. *See id.* at 1313 (collecting cases over the last 15 years where federal circuit courts have begun applying issue exhaustion in Social Security Administration cases).
9. *See Harwood v. Apfel*, 186 F.3d 1039 (8th Cir. 1999); *Johnson v. Apfel*, 189 F.3d 561 (7th Cir. 1999).
10. 120 S. Ct. 2080 (U.S. June 5, 2000).
11. *See id*. at *2-6. SSA's form provides only three lines for claimants to describe the issues they are appealing.

12. *See id.* at *3-4.
13. *See id.* at *5.
14. *See id.* at *6-7.
15. *See id.* at *7 (O'Connor, J., dissenting).
16. *See id.* at *9-10 (Breyer, J., dissenting).
17. In New York, public assistance claimants can request "fair hearings" to challenge adverse agency decisions. Claimants dissatisfied with the resulting hearing decisions can seek judicial review by filing an article 78 proceeding. Although CPLR § 7801 requires exhaustion of remedies prior to judicial review of administrative decisions, neither the statutes nor regulations governing public assistance administrative proceedings require issue exhaustion as a precondition to judicial review. *See* N.Y. C.P.L.R. § 7801 (McKinney 19__); N.Y. Soc. Serv. Law § 22 (McKinney 1992); N.Y. Comp. Codes R. & Regs. tit. 18, § 358 (1991).
18. *See, e.g.*, N.Y.S. Dep't of Soc. Serv. Annual Statistical Report on Hearings, Year Ending 9/30/95 (reporting that 87% of claimants appeared *pro se* while less than 5% were represented by legal counsel).
19. *See infra* text accompanying note 29.
20. *See infra* text accompanying notes 22-24.
21. *See Williams v. Wing*, 688 N.Y.S.2d 347, 348 (4th Dep't 1999); Reply Brief for Petitioner at 16, *Williams* (No. TP 98-8181).
22. N.Y. Comp. Codes R. & Regs. tit. 18, § 358-5.6 (1991).
23. Memorandum from Russell J. Hanks, Office of Administrative Hearings, to All Hearing Officers and Supervising Hearing Officers (Dec. 11, 1996). The purpose of this memorandum "is to reaffirm Office of Administrative Hearings' (OAH) policy on the development of an adequate hearing record and related matters."
24. *See Schnurr v. Perales,* 497 N.Y.S.2d 395, 396 (2d Dep't 1985) (denying *pro se* petitioner a fair hearing by the ALJ's abruptly terminating the hearing without any attempt to develop the testimony presented by the petitioner); *Hendry v. D'Elia*, 457 N.Y.S.2d 115, 116 (2d Dep't 1982) (indicating ALJ should have assisted *pro se* petitioner by focusing her testimony); *Dreher v. Smith*, 409 N.Y.S.2d 26, 27 (2d Dep't 1978) ("Petitioner was appearing pro se and was not given proper notice and assistance with respect to the nature of the issues. Nor was there sufficient development by the hearing officer of the testimony presented by her.").
25. *Harwood v. Apfel*, 186 F.3d 1039, 1043 (8th Cir. 1999).
26. *See Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999).
27. *See id.* (also finding that the agency relied on decisions applying issue exhaustion in an unrelated area of administrative law).
28. *See James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996) ("Given the due process concerns implicated by enforcement of a waiver rule about which the adversely affected party did not have adequate notice, through such means as direct admonition for *pro se* claimants, or published caselaw guidance for counsel, we have reviewed this appeal on the merits.") (citations omitted).
29. In New York, the fair hearing decisions themselves provide the notice to claimants that they can seek judicial review of adverse decisions. *See* N.Y. Soc. Serv. Law § 22(10) (McKinney 1992).
30. *See Fernandez v. Apfel*, 1998 U.S. Dist. LEXIS 14369, 48 (S.D.N.Y. 1998) (finding that the most important factor in determining whether Fernandez was on notice of the issue exhaustion rule was that she was represented by an attorney).
31. *See, e.g.*, N.Y.S. Dep't of Soc. Serv. Annual Statistical Report on Hearings, Year Ending 9/30/95 (reporting that 87% of claimants appeared *pro se* while less than 5% were represented by legal counsel).
32. 37 N.Y.2d 317 (1975).
33. *See id.* at 329 (noting, however, that public assistance applicants and recipients by definition do not have the economic means to secure legal counsel). The court also noted that "legally trained advocates, however desirable, would not appear essential to assure fairness to either side." *Id*. at 321.
34. N.Y. Comp. Codes R. & Regs. tit. 18, § 358-2.2(a)(10), (13) (1990).
35. *Breitfeller v. D'Elia*, 471 N.Y.S.2d 663, 664 (2d Dep't 1984) (citing *Capek v. Blum*, 429 N.Y.S.2d 265, 266 (2d Dep't 1980)).
36. *See* J. Dwight Yoder, *Justice or Injustice for the Poor?: A Look at the Constitutionality of Congressional Restrictions on Legal Services*, 6 Wm. & Mary Bill Rts. J. 827, 834-35 (1998) (referring to the 1996 Omnibus Consolidated Recessions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321).
37. 42 U.S.C. §§ 601 *et seq.*
38. *See* Matthew Diller, *Address: Interpretation of LSC Restrictions*, 25 Fordham Urb. L.J. 285, 291-92 (1998) (discussing the LSC limitations on welfare-related advocacy).
39. *See* Yoder, *supra* note 36, at 842 (analyzing the implications of the LSC restrictions).
40. *See* Diller, *supra* note 38, at 291-92.
41. *See* Megan Elizabeth Lewis, *Subsidized Speech and the Legal Services Corporation: The Constitutionality of Defunding Constitutional Challenges to the Welfare System*, 74 N.Y.U. L. Rev. 1178, 1202 (1999) ("Because of claim preclusion, the litigant who takes advantage of the benefit conferred by the LSC is forced to forego challenging the validity of the welfare system altogether. Claim preclusion requires a litigant to bring all claims arising from a given set of facts—in this instance the termination of benefits—or forever forfeit them.").
42. 688 N.Y.S.2d 74, 77 (1st Dep't 1999).
43. *Id.*
44. *Raitport*, 688 N.Y.S.2d at 77.

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Everyday Ethics for ALJs and Hearing Officers Under the Public Officers Law

By Donald P. Berens, Jr.

Introduction

Besides their own personal norms, participants in New York State administrative proceedings must consider a variety of external ethical standards. Business representatives may follow a corporate code of conduct imposed by their employer. Professionals, such as lawyers, obey codes of professional responsibility. State officers and employees are subject to the New York State Ethics Law, codified at Public Officers Law (POL) §§ 73-74.

N.Y.S. employees often act as advocates for agency positions in administrative proceedings. They must obey their agencies' codes of conduct and, if they are lawyers, the Code of Professional Responsibility. They rarely encounter problems under the POL, at least, not problems that come to the attention of the State Ethics Commission.

The Ethics Commission sees many cases where N.Y.S. employees take off their state hats and, while acting in some other capacity, do administrative business with the state. In these cases, and in those of administrative decisionmakers, the Commission has interpreted the law in Advisory Opinions, acted on requests for approval of outside activities, and—when necessary—investigated and proscribed violations of law. This article will discuss some examples.

The Public Officers Law Standards

The Ethics Law applies to statewide elected officials, state officers and employees in the Executive Branch, members of the Legislature and Legislative Branch employees, as well as to some political party officials. For simplicity, I will limit the discussion to statewide elected officials, state officers and employees and, unless the context requires otherwise, I will refer to them as N.Y.S. employees.

POL § 74 sets general standards for the conduct of N.Y.S. employees, both as public officials and as private persons who may have business before the state, including administrative business. POL § 73 forbids N.Y.S. employees to engage in certain specified conduct, including some conduct as a private participant in state administrative proceedings. POL § 73 also forbids former N.Y.S. employees to engage in certain activities involving any later work before their former state agencies or their former state work in any later forum. POL § 73-a requires financial disclosure by certain N.Y.S. employees.

General Statutory and Regulatory Standards

The general statutory rule with respect to conflicts of interest is that no N.Y.S. employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation, in substantial conflict with the proper discharge of his or her duties in the public interest.[1]

Statutory standards follow the general rule with respect to conflicts of interest. Those of interest here include the prohibition against the use or attempted use of an official position to secure unwarranted privileges for a N.Y.S. employee or others.[2] No N.Y.S. employee should engage in any transaction as agent of the state with any business entity in which she has a financial interest that might reasonably tend to conflict with the proper discharge of her official duties.[3] A N.Y.S. employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.[4] A N.Y.S. employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that she is likely to be engaged in acts that are in violation of her trust.[5] No full-time N.Y.S. employee (nor any firm or association of which such employee is a member nor corporation substantially controlled by such employee) should sell goods or services to any entity which is licensed or whose rates are fixed by the state agency in which such employee serves.[6]

This general statute is supplemented by a New York State Ethics Commission regulation restricting the ability of state officers and employees to engage in certain outside activities.[7] Any N.Y.S. employee, whether or not policy-making and whether or not paid, should avoid any outside activity which interferes or is in conflict with the proper and effective discharge of the individual's official duties or responsibilities.[8] An individual who serves in a policy-making position on other than a nonpaid or per diem basis needs the prior approval of the Commission in order to engage in any private employment, profession or business, or other outside activity from which more than $4,000 in annual compensation is received or anticipated.[9] Such a paid policymaker also needs Com-

mission approval to hold certain other paid public office or public employment or to serve as a director or officer of a for-profit corporation or entity.[10] Even if she anticipates less than $4,000 in annual compensation, if she receives or anticipates more than $1,000, she needs prior approval of her approving authority.[11] For most N.Y.S. employees, the approving authority is the head of the employing agency or the head's designee; for agency heads themselves, it is the Commission.[12]

Specific Statutory Prohibitions

POL § 73 contains specific prohibitions, including some relevant to the administrative process. No N.Y.S. employee, other than in the proper discharge of official duties, shall receive or agree to compensation for the appearance or rendition of services in relation to any case, proceeding, application or other matter before a state agency in connection with—among other things—any rate-making proceeding; the adoption or repeal of any rule or regulation; licensing, as defined in POL § 73(1)(B) and (e); or any Public Service Law franchise.[13]

A N.Y.S. employee who is a member, associate, or shareholder of any firm, association or corporation which is appearing or rendering services in connection with any case, proceeding, application or other matter listed in POL § 73(7)(a) shall not orally communicate, with or without compensation, as to the merits of such cause with an officer or employee of the agency concerned with the matter.[14]

New York has a two-year bar and a lifetime bar to limit one's ability to use the "revolving door" to exploit the knowledge and contacts gained in state service to unfair private gain after leaving such service. Generally, no person who has served as a N.Y.S. employee shall within two years after the termination of such service appear or practice before her former agency or receive compensation for any services rendered by her in relation to any case, proceeding or application of other matter before such agency.[15] Furthermore, no such former N.Y.S. employee shall appear, practice, communicate or otherwise render services before any state agency or receive compensation for such services rendered by such former employee in relation to any case, proceeding, application or transaction with respect to which he or she was directly concerned and in which he or she personally participated during the period of state employment, or which was under his or her active consideration.[16]

Application of POL Standards to Administrative Cases

In its formal advisory opinions and its enforcement actions, the Ethics Commission has applied the Ethics Law standards to N.Y.S. employees appearing in an unofficial capacity in administrative proceedings, to administrative decisionmakers misusing their state positions, and to former decision-makers appearing before their former state agencies.

Unofficial Paid Appearances by State Employees on Administrative Matters Can Be Violations

POL § 73(7)(a)(iv) does not permit a N.Y.S. employee, acting as a paid Executive Director of a not-for-profit organization, to sign an application on behalf of the organization to obtain a grant of money from a state agency.[17] The statute contains an exception set forth in POL § 73(7)(c) for ministerial matters defined in POL § 73(1)(d), but neither the certification of the application by the Executive Director nor the review by the state agency was ministerial. The rationale would apply to any state employee, acting other than in the discharge of official duties, who receives compensation for any appearance or services in relation to any of the administrative matters listed in the statute.

Motor Vehicle Violation Bureau Referees (MVRs) are attorneys employed by the State Department of Motor Vehicles (DMV) to administratively adjudicate noncriminal moving traffic violations. MVRs who represent private clients in traffic violations cases, no matter whether in the county where they are employed, violate POL § 74(2) and (3)(h); furthermore, an MVR is prohibited by POL § 73(7)(a) from representing a private client at a DMV proceeding before another MVR in a licensing matter.[18] Private representation of clients in traffic violations cases requires aggressive defense using every advantage available under the law; yet an MVR must render unbiased and impartial decisions to enforce the same law. An attorney who does both would "raise a suspicion among the public that he is likely to be engaged in acts that are in violation of his trust."

POL § 73(7)(a) precludes a policy-making N.Y.S. employee from appearing or rendering services for compensation before state agencies, not his own, on behalf of his private consulting business in relation to any permit, license or other permission that a corporate client needs to close a particular site.[19] It is immaterial whether there is a connection between his state duties and his outside work. The nature of the work, that is, whether it is arguably objective and quantitative, so long as it is nonministerial, does not bear on the determination whether it is barred by § 73(7)(a).

POL § 73(7)(a) and § 74 preclude a policy-making N.Y.S. employee from engaging in paid outside employment for a county facility licensed and inspected by the employee's state agency.[20] Even if unpaid, the outside employment could give the public cause to perceive that the county facility might receive preferential treatment from the state agency in the administration of its oversight function.

POL § 74(3)(i) prohibits full-time policy-makers from providing consulting services of any kind to entities regulated and licensed by that agency.[21] Private work related to licensing, ratesetting or other regulation of the entity is prohibited.

A State Employee Must Not Render Paid Services to an Entity Licensed by Employee's Agency

POL § 74(3)(i) prohibits full-time policymakers from providing consulting services of any kind to entities regulated and licensed by that agency.[22] Private work related to licensing, ratesetting or other regulation of the entity is prohibited. In 1993 the Commission found reasonable cause to believe that a Senior Motor Vehicle Referee (MVR) with the N.Y.S. Department of Motor Vehicles (DMV) violated 74(3)(i) when the MVR received compensation in the form of a car while representing an automobile dealership, licensed by DMV, in the MVR's private law practice. Pursuant to POL § 74(4), the Commission referred the matter to DMV for possible discipline of the MVR.

The Use of a State Administrative Position to Secure Unwarranted Privileges Is a Violation

The Ethics Commission is empowered to investigate and issue notices of reasonable cause to believe that a violation of POL § 73, § 73-a or § 74 has occurred.[23] Certain violations of POL § 73 or § 73-a may be punished by the Commission's assessment of a civil penalty up to $10,000. Other violations, including those of POL § 74, may be referred by the Commission to the employing agency for discipline in the manner provided by law, including by the Civil Service Law and any collective bargaining agreement. The Commission has made such referrals in cases where administrative decisionmakers tried to use their state positions to secure unwarranted privileges or exemptions for themselves or others, and raised suspicion that they violated their public trust, in violation of POL § 74(3)(d) and (h) respectively.

For example, in 1991 the Commission found reasonable cause to believe that a Hearing Officer (HO) with the State Division of Housing and Community Renewal (DHCR) violated POL § 74(3)(d) and (h) when, identifying himself as an ALJ, he wrote to a municipal agency on behalf of the his neighbor in a private matter. In 1994 the Commission found cause to believe that an Administrative Law Judge (ALJ) with the State Department of Labor violated POL § 74(3) (d) and (h) when, while representing an inmate in a private matter before N.Y.S. DOCS, she stated that she could be reached during office hours at a state telephone number where she was an ALJ. In 1999 the Commission found cause to believe that an Administrative Hearing Officer (AHO) with DHCR violated POL § 74(2) and (3)(d) and (h) when: (a) in a court matter unrelated to any DHCR duties, he implied to an adversary's attorney that he would use his position to ensure prejudice at DHCR against the attorney's firm; and (b) he used the title "Judge" when claiming an entitlement to a private library privilege and when litigating a private personal matter.

The "Revolving Door" Rules Restrict a Former Administrative Law Judge

The two-year bar of POL § 73(8)(a)(i) precludes an Administrative Law Judge (ALJ) who worked for the Workers' Compensation Board in one of its offices for ten months from appearing or practicing or rendering services on matters before the Board in all parts of New York State; neither the temporal nor geographic limits of his service mitigates the application of the bar.[24]

Conclusion

The Ethics Commission will investigate and sanction violations of the Ethics Law when it must. It is preferable for N.Y.S. employees to seek the Commission's confidential advice in order to ensure compliance with the law before engaging in questionable conduct.

Endnotes

1. POL § 74(2).
2. POL § 74(3)(d).
3. POL § 74(3)(e).
4. POL § 74(3)(f).
5. POL § 74(3)(h).
6. POL § 74(3)(i).
7. 19 N.Y.C.R.R. part 932.
8. 19 N.Y.C.R.R. § 932.3(a).
9. 19 N.Y.C.R.R. § 932.3(c).
10. 19 N.Y.C.R.R. § 932.3(b), (e).
11. 19 N.Y.C.R.R. § 932.3(d).
12. 19 N.Y.C.R.R. § 932.1(a).
13. POL § 73(7)(a).
14. POL § 73(12).
15. POL § 73(8)(a)(i).
16. POL § 73(8)(a)(ii).
17. AO #89-2.
18. AO #91-16.
19. AO #92-6.
20. AO #94-7.
21. AO #92-13.
22. *Id*.
23. Executive Law § 94(12).
24. AO #99-16.

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Pursuing the Public Good: Attorney Professionalism in Adjudicatory Proceedings

By Barbara F. Smith

Attorney professionalism is dedication to service to clients and a commitment to promoting respect for the legal system in pursuit of justice and the public good, characterized by exemplary ethical conduct, competence, good judgment, integrity and civility.[1]

As a working draft on the topic prepared by a subcommittee of the Committee on Attorney Professionalism put it:

> In our work to serve our clients while promoting respect for the legal system, we do so in the pursuit of justice and the public good. In the strictly legal sense, justice can mean the "proper administration of laws . . . to render every man his due" (Black's Law Dictionary). But most would agree that justice necessarily implies more than the "rightness" or "wrongness" of a given act, or strict compliance with the black letter of the law. In the larger sense, pursuing justice connotes pursuing a morally "good" end. Attorneys must look beyond the short-term results and consider the consequences of their actions and advice.[2]

Both the definition and its amplification resound readily for the government lawyer. For who more pursues the public good than those who serve the public most directly? Much has been written about the perception of general decline in attorney professionalism in the private practice of law. Little attention has been paid, however, to the perception of professionalism in the government sector. This article will briefly highlight how attorney professionalism is manifest in one aspect of government law practice—adjudicatory proceedings. But, first some background as a framework for insight.

In New York, the Code of Professional Responsibility[3] sets the ground rules for appropriate conduct for lawyers.[4] As drafted by its revision commission headed by retired New York Court of Appeals Judge Hugh Jones, and adopted by the New York State Bar Association, its content appears in three parts: the Canons, Ethical Considerations and Disciplinary Rules.

> The Canons are broad statements of policy . . . the Ethical Considerations are careful articulations of the moral values inherent in the Canons . . . [and the] Disciplinary Rules . . . are rules adopted by the Appellate Divisions, which by Section 90, Judiciary Law, have been given control and discipline of lawyers. Their rules are clear, concise and suitable for evenhanded enforcement.[5]

While the Code of Professional Responsibility sets forth standards of conduct, when "professionalism" or "civility" is mentioned, it is almost always meant to be conduct which goes beyond the black letter of any basic requirements. As Haliburton Fales stated: "[t]he very nature of professionalism is that it is spirit. It is inspiration." Fales continued:

> Of course it was always clear that much popular disillusionment with the law and lawyers stems now—as it has perennially—from causes beyond lawyers' control. Some have to do with the impatience built up in persons and groups who see themselves as disadvantaged by the intrinsic character of the law as a restrainer and regulator with a characteristically incremental and uniform approach. Some dissatisfactions spring from a mismatch between what the public (collectively and one-by-one) expects lawyers (collectively and one-by-one) to achieve. That disparity, in turn, results partly from public misunderstanding of the role of the legal system and its inherent limitations and partly from exaggerated claims—some explicit and others implicit—by lawyers about what they and the law can really achieve.[6]

The decline in civility apparent in lawyers' behaviour is characterized most picturesquely as the "Rambo litigator."[7] This shorthand conveys the Rambo mentality as a mindset characterized by the belief that

> litigation is war; . . . a conviction that it is invariably in your interest to make life miserable for your opponent; a disdain for common courtesy and civility, assuming they ill-befit the true warrior; a wondrous facility for manipulating facts and engaging in revisionist history; a hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding; and an urge to put the trial lawyer on center stage rather than the client or his case.[8]

Popular wisdom has it that even without the presence of a "Rambo litigator"many people will nevertheless take a dim view of lawyers, since their exposure is limited and one side of a case always loses. Furthermore, as one commentator noted, "[e]thnic and blonde jokes have been replaced by equally tasteless lawyer jokes. Movie audiences cheer the mandatory anti-lawyer rhetoric in today's films. Talk show hosts continue to stoke this feeding frenzy. . . . Like it or not, we judges and government lawyers have become part of the current national public debate."[9]

What's Being Done

Over the past several years, substantial steps have been taken to address the issue of professionalism. Various committees and task forces were created to study issues relating to attorney professionalism and civility and to recommend solutions. In 1993, Chief Judge Judith S. Kaye appointed the Committee on the Profession and the Courts to study the sources of public dissatisfaction with the legal profession.[10] In commenting on the Committee's Final Report issued in November 1995, Louis A. Craco noted that

> [t]he Committee's most emphatic finding was that, despite the abuse heaped on lawyers from many sides, 'the actual level of professionalism brought to bear on clients' affairs by thousands of lawyers across the state, in court and office, day in and day out, is extraordinarily high. . . . Overwhelmingly, the practicing lawyers of New York earn the respect of their clients on a daily basis.'[11]

Most pertinent to this article is the urging of the Committee on the Profession and the Courts that the bench and the bar "reestablish the standards of civility among counsel that enable lawyers to represent their clients effectively while sustaining the dignity of the legal process itself." As an outgrowth of the Committee's work, in March 1999, Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman appointed a permanent commission, the "Judicial Institute on Professionalism in the Law," to nurture professionalism among members of the bar.[12]

The field of administrative process has also been under scrutiny. In October 1999, the Special Committee on Administrative Adjudication of the New York State Bar Association issued its Report.[13] The Special Committee's charge was to review problems revealed and recommendations made by a predecessor Task Force in 1988[14] and to consider current conditions and concerns connected with the adjudicatory process of five state agencies. The Special Committee found progress since 1988 in many areas in providing full, fair, efficient and dignified hearings but recommended certain improvements in the adjudicative processes. That Committee focused on fairness, impartiality, due process and judicial independence, so its recommendations for improvement followed those categories.[15]

A Survey

In an effort to gather information which would demonstrate the nature of professionalism in the adjudicatory process, this author conducted a survey which was first circulated to a group of administrative law judges in New York State service and then distributed outside the state through a network of administrative law judges throughout the United States.[16] Respondents were asked to rate attorneys who appear before them on the components of professionalism, based on the following attributes: ethical conduct, competence, good judgment, integrity, civility and timeliness. The results follow:

Ethical Conduct	Excellent	Satisfactory	Unsatisfactory
State	59%	36.5%	4%
Private	51.7%	40.7%	7.4%
Non-N.Y. state	73%	21.3%	5.5%
Non-N.Y. private	73%	19%	7.7%

Competence	Excellent	Satisfactory	Unsatisfactory
State	43.1%	45%	11.8%
Private	47%	42%	11%
Non-N.Y. state	45%	45%	10%
Non-N.Y. private	51.6%	37.7%	10.5%

Good Judgment	Excellent	Satisfactory	Unsatisfactory
State	48.6%	40.4%	10.9%
Private	42.1%	44.2%	13.6%
Non-N.Y. state	48.8%	40%	11.1%
Non-N.Y. private	52.2%	34.4%	13.3%

Integrity	Excellent	Satisfactory	Unsatisfactory
State	55.9%	38.1%	5.9%
Private	48.1%	42.8%	9%
Non-N.Y. state	77%	16.3%	6.6%
Non-N.Y. private	74.7%	14.1%	11.1%

Civility	Excellent	Satisfactory	Unsatisfactory
State	57.7%	35.4%	6.8%
Private	47.8%	39.5%	12.2%
Non-N.Y. state	76.6%	15%	8.3%
Non-N.Y. private	71.1%	20.5%	8.3%

Timeliness	Excellent	Satisfactory	Unsatisfactory
State	64%	26%	11%
Private	55%	28%	17%
Non-N.Y. state	65.3%	15.5%	19.1%
Non-N.Y. private	62.5%	17.2%	20.2%

A follow-up question asked whether there has been a change in how the foregoing attributes have been manifested. Respondents were asked to indicate whether there has been no change, an improvement, or decline; and over what timeframe any change might have occurred. Virtually all respondents indicated that the attributes have stayed the same during their period of observation. The decline in professionalism that reportedly afflicts the private practice of law does not seem to have affected the administrative process as negatively.

Another question asked how respondents would rate the morale of the attorneys who appeared before them. These responses, more than those than for any other question, show a disparity between New York State and out-of-state lawyers.

Morale	High	Average	Low
State	17.5%	62.5%	20%
Private	18.1%	61.8%	20%
Non-N.Y. state	48%	31%	21%
Non-N.Y. private	60%	33.7%	6.2%

Still, 80% of State lawyers who appear in the administrative process are reported to have average or high morale along with 79.9% of their private attorney colleagues. Major reasons for lower morale for both state and private sector lawyers were identified as heavy workload, relatively low salary (for state lawyers), and lack of independence in case management.[17]

In most agencies, administrative law judges are randomly assigned cases, most often based on availability. Respondents indicate that the expertise of a particular Administrative Law Judge and the preference of the parties to 'shop' for a particular ALJ are factors rarely considered in making case assignments.

Considering that the lack of proper equipment might affect the quality of the performance of attorneys and ALJs, another survey question requested information regarding the type of equipment that would make the job easier. The respondents expressed a desire for more up-to-date computers and laptops, voice recognition software; better recording devices; better, safer and more comfortable hearing room facilities; better monitors; and cellular phones. One out-of-state respondent noted that his equipment was satisfactory, but he needed a full-time employee assigned to assist him.

Many respondents noted that there are problems with getting qualified experts to testify at agency hearings. The cause most often is an agency's lack of finances to pay for experts. As a result, the quality of experts in the government's case may be lacking compared to the private sector side. Several noted problems with doctors failing to appear.

Virtually all respondents indicated that attorneys who appear before them are generally prepared (perhaps 15-25% are not), and generally on time (about 5% reported as late, up to one-third late for one respondent). Most reported few threats between parties (2-5% at most).

Conclusion

In our technologically driven society, where information is gathered and disseminated at an ever-increasing rate, it seems that the nature of the practice of law has forever changed. There certainly are more attorneys, with more specialties, than ever before. But are there more attorneys now whose behavior is questionable, or are we just better informed about those whose behavior is inappropriate? While there is no pat answer to that question, the news looks good. This survey's effort to produce information on the status of professionalism in the adjudicatory process has yielded fairly positive results. The level of professionalism by both government and private lawyers involved appears high.

At the heart of the matter is each lawyer's personal decision to conduct him or herself in an appropriate manner. Each individual can make a difference. While lawyers all should advocate zealously for our clients, let us do so in the pursuit of justice and the public good.

Endnotes

1. Material on file with Terry Brooks, New York State Bar Association liaison to the Committee on Attorney Professionalism of the New York State Bar Association.
2. *Id.*
3. *See* New York Code of Professional Responsibility (revised as of June 30, 1999.) <http://www. nysba.org>.
4. Statutes also govern the conduct of government lawyers. For example, §§ 73 and 74 of the New York Public Officers Law apply to New York State employees and restrict certain business and professional activities and establish a code of ethics. N.Y. Pub. Off. Law 73, 74 (McKinney 1988, Supp. 2000). Similar provisions govern federal and local employees.
5. Haliburton Fales, 2d, *The Bar Association's Role in Maintaining Professionalism*, 69 N.Y. St. B.J. 48 (1997).
6. Louis A. Craco, *The 'Craco Report' and Its Implementation*, 69 N.Y. St. B.J. 6, 7 (1997).
7. Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, 74 A.B.A. J., Mar. 1988, at 79, as cited in Donna C. Chin, Marcia Crnoevich, Barbara Hoffman, Ernest Nardone, Ellen Lewis Rice & Diane V. Tighe, *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 Rutgers L. Rev. 889, 892, n.16 (1999). *See also* Committee on the Profession and the Courts, Report to the Chief Judge 28 (Nov. 1995) (hereinafter "Craco Report").
8. Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, 74 A.B.A. J., Mar. 1988, at 79.
9. Chief U.S. District Court Judge Marvin Aspen, *Ethics and Professionalism for Government Attorneys and the Administrative Judiciary*, Illinois Bar Association (June 1, 2000).
10. Craco Report at 2. While lawyer's conduct may leave something to be desired, conduct which would be viewed as a breach of professionalism has not resulted in any level of disciplinary

action by the grievance committees or the four Departments' Appellate Divisions. Cases that proceed as far as suspension are necessarily linked to a Disciplinary Rule or statutory violation. In any event, there is no breakdown in the statistics compiled on attorney discipline as to whether the lawyer works in government or the private sector. Committee on Professional Discipline of the New York State Bar Association, *Annual Report on Lawyer Discipline in New York State for Year 1998.*

11. Louis A. Craco, *The 'Craco Report' and Its Implementation*, 69 N.Y. St. B.J. 6 (1997). The Craco Report issued a series of recommendations relating to the categories of improvement of professionalism; improvement of client satisfaction; improvement of attorney discipline and improvement of court management. *See* Craco Report at 21, 34, 43, 52. The Chief Judge appointed several task forces to develop plans for implementation of many of the recommendations; and, as a result, the Unified Court System in 1997 adopted mandatory continuing legal education for newly admitted attorneys and an aspirational code of civility and imposed a requirement that lawyers display in their offices a statement of client rights. <http://www.courts.state.ny.us/prarchive.htm>. (The New York State Bar Association developed a companion statement of client responsibilities that may—but is not required—to be displayed in attorneys' offices.) In 1998, the Unified Court System imposed continuing legal education requirements on all lawyers in New York State. *Id.*

12. <http://www.courts.state.ny.us/newsevent2.html>.

13. New York State Bar Association, Report of the Special Committee on Administrative Adjuciation, <http://nysba.org/whatsnew/report2.pdf>.

14. More specifically, the Committee's charge was to learn "the extent to which the State Departments of Motor Vehicles, Social Services, Health and Environmental Conservation and the Workers' Compensation Board have implemented the recommendations contained in the report of the Task force on Administrative Adjudication as approved . . . on October 29, 1988, and the need for further study and remedial action to implement the objectives contained in the earlier report." New York State Bar Association, Report of Special Committee on Administrative Adjudication 7 (1999).

15. For example, with respect to the Department of Motor Vehicles hearings, the Committee recommended removal of the Traffic Violations Bureau from under supervision of DMV Counsel and eliminating the collection of statistics on conviction rates and fine levels on a judge-by-judge or office-by-office basis. *Id.* at 21-22. For the Department of Social Services, it was recommended that hearing summaries be mandatory; that performance indicators be developed to aid local districts in reducing high reversal rates; and that a system to catalog and distribute precedent be developed. *Id*. at 44, 47, 50. For the Department of Health the Committee recommended removal of ALJs from supervision and jurisdiction of the Division of Legal Affairs and Office of General Counsel and formalizing requirements when a final decision differs from an ALJ's finding or conclusion. *Id.* at 66, 71. For the Workers Compensation Board, the Committee urged that the workers' compensation reforms intended to reduce workers compensation costs to employers not come at the expense of workers' rights under the Workers Compensation Law. *Id*. at 94. At the Department of Environmental Conservation, the Committee acknowledged improvements and approved a structure that establishes an atmosphere which fosters fair hearings in fact and appearance. *Id.* at 104.

16. Responses were received from 15 New York State administrative law judges from various agencies and from nine administrative law judges from other states and the federal government. The information presented represents their opinion.

17. One noted that "private lawyers have more control over their lives. This plus greater income makes for better morale."

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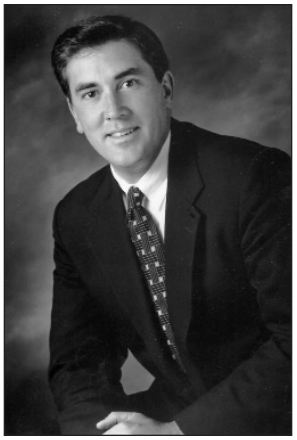
The Rule-making Process in New York State

By Michael A.L. Balboni



Policymaking is an intricate and complex process. Although the State Legislature is largely responsible for creating laws, this is only the beginning of the policy-making process. The Executive Branch carries out the implementation of law through its agencies, which may, in turn, adopt its own set of rules and regulations. Agency rule making, largely hidden from public scrutiny, in some ways has a more direct impact on everyday life than the work of the Legislature.

Agencies implement policy through rule making. An agency may be mandated by statute to promulgate rules that implement new programs initiated by the State Legislature or Congress. Oftentimes, however, it is the agency that takes the initiative and drafts new rules to address important matters relating to the state's public health, safety and welfare. New York State government has approximately 60 agencies having authority to promulgate rules and regulations. The agencies responsible for the majority of rules and regulations promulgated each year are the Departments of Education (DOE), Environmental Conservation (DEC), Health (DOH), and Insurance (DOI). Typically each of them will propose between 50 to 125 regulations and adopt approximately 40 new regulations annually.[1]

To truly understand the power of government, it is essential to understand the nature and importance of agency rule making. Administrative rules and regulations touch virtually every aspect of human endeavor. They establish substantive norms of conduct affecting the public, interpret statutes, set forth agency procedure, and deal with the management and organization of the agencies themselves. Further, administrative rules and regulations have the force and effect of law, and failure to adhere to their prescriptions may result in civil, and in some cases, criminal liability.

To provide a system of checks and balances, the state has created several mechanisms to oversee agency rule making. The first of these was the adoption of the State Administrative Procedure Act (SAPA) in 1975,[2] followed by the creation of the Administrative Regulations Review Commission (ARRC) in 1978.[3] Prior to SAPA, administrative rule making was characterized by randomness and inconsistency. The result, not surprisingly, was considerable public apprehension and mistrust of executive agencies. SAPA provided the operating procedures within which all agencies are required to function.

ARRC, on the other hand, was created specifically to provide legislative oversight of the rule-making process. While SAPA established the procedural framework within which agencies must adopt rules, ARRC ensures that agencies strictly comply with SAPA. A third layer of agency oversight was added in 1995 when Governor's Office of Regulatory Reform (GORR) was created by executive order.[4] While GORR and ARRC serve the same general purpose of oversight, the difference in their creation and accountability are important. GORR was created by the Governor and reports to the Governor; ARRC was created by the State Legislature and reports to the Chairperson of ARRC. Consequently, neither is accountable to the other and each acts on its own, independent of the other. Together, with SAPA, they comprise three mechanisms to provide the Legislature and Governor with tools to oversee and regulate the rule-making process. A look at each is instructive in understanding the rule-making process and its governance in New York.

SAPA

Due to dissatisfaction with the functioning of the state's administrative process, in 1975, the state adopted the State Administrative Procedure Act (SAPA).[5] SAPA created a process by which administrative agencies would conform to standards intended to ensure equitable practices to meet public interest. New York's SAPA is a revised version of the federal Model State Administrative Procedure Act (MSAPA) of 1946.[6] More than half the states have enacted an administrative procedure act (APA) based, at least in part, on either the original version of MSAPA or its 1961 revision.[7] New York's SAPA was adopted during a period experiencing a great deal of state legislative experimentation with administrative policies and programs.

In general, state agencies must follow minimum procedures to ensure that rules, regulations and related documents are written in a clear and coherent manner, using words with common and everyday meanings. Once a rule is adopted, it is included in the Official Compilation of Codes, Rules and Regulations of the State of New York (N.Y.C.R.R.).

The Administrative Regulations Review Commission and State Agencies

ARRC is a bipartisan Commission of the New York State Legislature established pursuant to Chapter 689 of the Laws of 1978. ARRC is currently chaired by author and Assemblywoman Joan Christensen. ARRC provides continuous legislative review of administrative regulations and monitors the implementation of the ever-increasing exercise of rule-making powers by agencies.

The logic behind Chapter 689 is that since rule-making power is delegated by the State Legislature, the review of such power is an integral part of the legislative function. ARRC closely scrutinizes each proposed rule to ensure compliance with the strict procedural requirements of SAPA. Since administrative agency regulations affect the economic, environmental and social well-being of the state, oversight plays an important legislative role in the rule-making process.

In general, ARRC determines whether the agency has the statutory authority to promulgate the rule, whether the content of the proposed or revised rule making accords with legislative intent, whether the impact of the rule on the economy and on government operation would be unduly burdensome on those regulated, and whether the impact of the proposed rule would be detrimental to the affected parties. In addition to carrying out this legislative mandate to review agency rule makings, ARRC has also become a valuable resource to legislative members and their staffs.

Lastly, ARRC is empowered to hold hearings, subpoena witnesses, administer oaths, take testimony and compel the production of books, papers, documents and other evidence in fulfilling its mission.[8]

Governor's Office of Regulatory Reform

GORR was created in 1995 by Governor George E. Pataki pursuant to Executive Order #20.[9] GORR was given the power to review and analyze all proposed agency rules and rule changes prior to adoption.[10] Executive Order #20 gave genuine effect to executive branch review. Previously, a Governor could only recommend that a proposed rule making be abandoned or revised.

Prior to submitting a notice of proposed or revised rule making for publication in the State Register, an agency head must submit the text of the rule to GORR.[11] Executive Order #20 requires GORR to review each proposed or revised rule making for conformance with the criteria outlined in the order.[12] If the proposed rule meets the criteria of Executive Order #20, GORR transmits it to the Secretary of the Department of State (DOS).[13]

If GORR concludes that any of the criteria is not met, the proposing agency is notified and is required to respond with changes or an explanation for the proposed rule's failure to satisfy any of the criteria before the rule can be filed with the Department of State and published in the State Register.[14]

Critical to GORR's review process is the performance of a cost-benefit analysis,[15] weighing the rule's benefits against the cost/burdens of its implementation. The proposed rule is transmitted to the Department of State for publication in the State Register only after GORR has reviewed a proposed rule making and concludes that satisfies the criteria of Executive Order #20.

GORR's other responsibilities include reviewing existing state regulations and directing the Governor's programs in the areas of administrative adjudication, advisory opinions, local government regulatory relief and agency management and productivity improvements.

While GORR functions in a manner similar to that of the ARRC regarding the review of regulations, GORR also offers business permit assistance to those interested in establishing or expanding a business.[16]

Department of State, the Public Comment Period and N.Y.C.R.R.

The Department of State is responsible for publishing the full text of proposed or revised rules in the State Register. If a rule exceeds 2000 words, the notice need contain only a description of rule's subject, purpose and substance in less than 2000 words.[17] The Register is published weekly, and it contains notice of newly proposed rules as well as proposed changes to existing rules. Included in a "notice of proposed rule making" are the text of the rule; the time, date and location of any required public hearings, if required; and the name and address of the agency contact person to whom comments can be addressed. In addition to publishing a weekly Register, the department also provides four "Quarterly Index" issues. The Quarterly is a cumulative list of actions that shows the status of every rule-making action in progress or initiated within a calendar year.

By publishing weekly notices of proposed rules, related public hearings, and the complete text or summary of many of the proposed rules, the Register has become the instrument enabling the public, business, industry and legal and other professional group to express their views before rules are formulated into law.[18]

Comments may be submitted in writing or presented at the public hearing.[19] To be considered, comments must reach the agency before the proposed rule is adopted. SAPA requires a minimum 45-day public comment period after publication in the Register of the notice of proposed rule making; and a 30-day period for every notice of revised rule making.[20] If a public hearing is required by statute, public comments are accepted for at least five days after the last such hearing. Notices of proposed and revised rule makings must specify the deadline for accepting public comments.

Following the requisite comment period, an agency may move to adopt the proposed or revised rule,[21] or it may make changes based on the public comments.[22] Agencies must also prepare "regulatory impact statements" assessing the impact of each proposed or revised rule on the regulated community.[23]

Only after publication in the State Register, and all the requirements of SAPA have been satisfied, is a proposed or revised rule formally adopted. The new rule is then published in the N.Y.C.R.R. and has the effect of law.

Recent Changes in the Rule-making Process

Each year, ARRC prepares and introduces legislation intended to streamline the regulatory process. Legislative members, staff and the public may contact the ARRC with any suggestions relating to such legislation. Additionally, ARRC is available to assist all legislative staff in the preparation of language for legislation relating to the regulatory process. For example the "Regulatory Agenda" legislation in the 2000 Legislative Session[24] requires the top regulating agencies to publish a regulatory agenda annually in the State Register, and to make such information available on their websites as well.[25]

This will afford the public easy access to an agency's plans for programs and rules in the upcoming year.

Under the "Consensus Rule Making" Law,[26] which amends SAPA, agencies will be able to use a streamlined approach for adopting "consensus rules." This approach will apply to any proposed regulation to which no public objection is expected by the proposing agency. Prior to final adoption of the proposal, however, a 45-day waiting period is required following publication of a notice of "consensus rule" in the Register.

The "Five Year Review" law requires review of regulations by all state agencies every five years.[27] Agencies must determine whether or not their rules continue to be effective and have not become technology-limiting or otherwise outdated. If a rule is determined to be either, the agency must act to have it repealed or revised appropriately.

To help satisfy its legislative mandate, ARRC regularly corresponds with various state agencies regarding proposed rules that have substantive and technical errors. As a consequence of this requirement and the Legislative Law,[28] ARRC notifies legislative members who have sponsored recent legislation regarding regulations that are being proposed by the implementing agency. This notification provides member offices with an opportunity to review and determine if the proposed regulations are in keeping with legislative intent. ARRC can assist in such review and help communicate with the state agency involved.

Since a primary objective of ARRC is to ascertain the effect that proposed and adopted rules have upon regulated parties, local government and the business community, representatives of ARRC attend hearings conducted by the agencies in conjunction with rule making. Additionally, ARRC holds its own hearings to receive input on how well the rule-making process is working and to ascertain whether rules are unduly burdensome. Moreover, because concerns regarding the regulatory process touch upon the wide spectrum of subject matter areas, ARRC also co-sponsors hearings with other legislative committees and commissions. Finally, ARRC is available to provide assistance with legislative hearings designed to address concerns regarding particular regulations.

Endnotes

1. These statistics are based on the findings of the New York State Senate Administrative Regulations Review Commission. In 1999, state agencies proposed approximately 509 rules and regulations.
2. N.Y. State Administrative Procedure Act, Chapter 167 of 1975 of the Laws of New York.
3. The Administrative Regulations Review Commission, Chapter 689 of the Laws of 1978 of New York.
4. N.Y. Exec. Order No. 20, N.Y.C.R.R. Tit. 9, § 5.20 (1995).
5. *See* note 2.
6. *See* Model State Administrative Procedure Act (1946) (National Conference of Commissioners on Uniform State Law), 9C U.L.A. 179 (1957).
7. *See* Revised Model State Administrative Procedure Act (1961) (National Conference of Commissioners on Uniform State Laws), 14 U.L.A. 357 (1980).
8. N.Y. Legis. Law § 87(2) (McKinney 1999).
9. *See* note 4.
10. *Id.* § I(3).
11. *Id.* § IV(1). Also included in the transmittal is a regulatory impact statement, regulatory flexibility analysis or rural area flexibility analysis, cost-benefit analysis, risk assessment analysis, and lastly any of the rule's effect on the creation and retention of jobs in the state.
12. *Id.* § II(1).
13. *Id.* § III(2).
14. *Id.* § IV(5)(b), (c), (d).
15. *Id.* § 1(7).
16. http://www.NYS-permits.org.
17. N.Y. A.P.A. § 202(1)(f)(v) (McKinney 1999).
18. The Register is available in most libraries and is available in all county and town clerk offices, and is also available by subscription.
19. N.Y. A.P.A. § 202(1).
20. *Id.* § 202(1)(ii) and § 202(4-a).
21. *Id.* § 202(5).
22. *Id.* § 202(4-a).
23. *Id.* § 202-a. In addition, an agency must prepare a Regulatory Flexibility Analysis for Small Businesses, § 202-b of SAPA, and a Rural Area Flexibility Analysis, § 202-bb of SAPA.
24. 2000 New York Laws Chapter 343.
25. *Id.*
26. 1998 New York Laws Chapter 210.
27. 1996 New York Laws Chapter 262.
28. N.Y. Legis. Law § 87(1) (McKinney 1999).

Senator Balboni is the Senate Co-chair of the Administrative Regulations Review Commission and represents the seventh senatorial district in Nassau County. **The author acknowledges the assistance of ARRC Director Thomas Congdon and Assistant ARRC Director John Koury.**

The Strange Attack on Administrative Rules

By Patrick J. Borchers

Agency making of administrative rules and regulations has been under attack for some years now, particularly by those who have been elected to office on "deregulatory" political platforms. The idea that administrative rules are the source of the problem is not new. When President Bush took office in 1988 he issued an executive order temporarily forbidding agencies from promulgating new rules. New York's Governor Pataki took a similar step when he first took office in 1996.

"Preventing agencies from making rules, or at least making it harder *for agencies to make rules, seems like shutting off, or at least turning down, a faucet."*

There is, of course, a certain intuitive appeal to the idea that keeping agencies from making new rules will ease regulatory burdens. After all, the compilations of administrative rules—for the federal government the Code of Federal Regulations (CFR) and in New York's case the New York Code of Rules and Regulations (N.Y.C.R.R.)—are both massive and visible signs of governmental obligation. Preventing agencies from making rules, or at least making it *harder* for agencies to make rules, seems like shutting off, or at least turning down, a faucet.

There is no doubting that it has been made more difficult for agencies to make new rules. Although one could point to similar developments on the federal side, an examination of the new obstacles to the creation of rules by New York agencies suffices to make my point. In the last two decades, New York's State Administrative Procedure Act (SAPA) has been amended to require agencies to create regulatory impact statements,[1] regulatory flexibility analyses,[2] rural area flexibility analyses[3] and job impact statements[4] whenever they create most new rules. Perhaps a more important development, however, has been Governor Pataki's Executive Order 20, which gives the Governor's Office of Regulatory Reform (GORR) quite significant supervisory authority over agency rule makings and allows a group of five of the Governor's closest advisors to veto any agency rule making.

It is my thesis that most of the steps in the name of deregulation are seriously misguided and actually lead to the imposition of larger and more poorly defined regulatory obligations. Let me begin with an obvious point: the pages in the CFR and the N.Y.C.R.R. do not turn blank simply because new rules are not being made. These compilations are not an overweight man who will slim down if his food intake is reduced. Rather, without new rules, these compilations remain as they were, still imposing the same duties and obligations that they have all along. Real deregulation requires new—presumably less burdensome—rules to take the place of the existing rules. I remember testifying in front of the New York Assembly's Administrative Rules Review Committee shortly after Governor Pataki imposed his regulatory freeze. Perhaps by reflex, the Democrats were aghast and the Republicans were supportive of the Governor's order. Actually, the positions should have been reversed. The practical effect of the order was to freeze the N.Y.C.R.R. as it was when Governor Cuomo left office.

The strange attack on administrative rules ignores their benefits when compared to other kinds of agency action. Rules are relatively easy to find and research. While, certainly, the N.Y.C.R.R. could be improved as a research tool, it has a reasonable index and organizational structure. It is available in major law libraries. For the lawyer or lay person attempting to discover what requirements exist, say, for the issuance of a certain permit, finding a rule in the N.Y.C.R.R. that is on point is a giant step in the right direction.

"[M]ost of the steps in the name of deregulation are seriously misguided and actually lead to the imposition of larger and more poorly defined regulatory obligations."

The alternative to having a rule in the N.Y.C.R.R. is to have, for example, an "interpretive" memorandum that sets forth general "guidelines" on the subject. Of course, agencies are generally willing to share such documents with the general public—and, in any event, are so obligated by the Freedom of Information Law—but one has to ask and know whom to ask. Quite unfortunately, the New York Court of Appeals has ruled in several cases, most prominently *Roman Catholic Diocese of Albany v. New York State Dep't of Health*,[5] that New York agencies are not under any obligation to automatically

publish such guidance documents, so they remain mostly in the hands of the agencies. Thus, without a rule in the N.Y.C.R.R., our permit applicant stands a good chance of not finding the most relevant agency pronouncement and immediately faces much higher information costs if he does find it.

Of course, one can sympathize with the agency personnel who decide to go the guidance document route as opposed to making a rule. After all, if the agency decides to notice a rule it will face the welter of procedural requirements described above. Agency resources are limited, and having a less formal guidance document is much less resource intensive. It wasn't always so. Once upon a time, the making of administrative rules was a fairly simple matter of noticing a proposed rule, taking public comments, and issuing a final rule, as set forth in SAPA § 202. And, if the making of administrative rules were still a relatively simple matter, one could more easily imagine the agency deciding to go the rule route rather than the guidance document route.

There are even worse alternatives to guidance documents. Agencies might, for example, have no established pronouncement, leaving the development of requirements in the hands of individual agency personnel. With that come strange, case-by-case distinctions and inconsistencies that the courts have been eager to condemn,[6] but seem inevitable if agencies can't, as a practical matter, have a published rule on the subject.

Nobody favors unnecessary regulation. Undoubtedly, agencies have made plenty of unrealistically burdensome rules. The solution, however, is to appoint agency heads who will make better and less burdensome rules. The attack on the institution of administrative rule making is a cure that is much, much worse than the disease.

Endnotes

1. § 202-a.
2. § 202-b.
3. § 202-bb.
4. § 201-a.
5. 66 N.Y.2d 948, 498 N.Y.S.2d 780, 489 N.E.2d 749 (1985) (adopting Appellate Division dissenting opinion).
6. *See, e.g., Charles A. Field Delivery Service v. Roberts,* 66 N.Y.2d 516, 498 N.Y.S.2d 111, 488 N.E.2d 1223 (1985) (agency arbitrarily classified some delivery drivers as employees and others as independent contractors).

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Utilizing Technology to Improve the Fair Hearing Decision-making Process

By Sharon Silversmith, Susan Antos, Amanda Hiller

How does a state agency hold over 100,000 hearings a year, and issue a decision in each one that presents a comprehensive review of the applicable law as well as a thorough evaluation of the facts, and do it all in less than 90 days from the date that the hearing is requested?

Sharon Silversmith

Susan Antos

Amanda Hiller

When an attorney or paralegal is preparing to represent an appellant in a fair hearing, how does he or she sort through hundreds of thousands of fair hearing decisions, to determine which hearings, if any, may be helpful in the analysis of a particular client's case?

This article will review the efforts of two organizations that usually sit at different sides of the fair hearing table, to utilize technology to improve the functioning of a large administrative hearing system. It will explore the development of a computer-assisted fair hearing decision-making system by the Office of Temporary and Disability Assistance (OTDA) and a parallel effort by the Greater Upstate Law Project, Inc. (GULP), a support center for Legal Aid and Legal Services offices, to use technology to make those hearing decisions, once issued, both searchable and accessible to the public.

An Introduction to the Fair Hearing Process

A fair hearing is the process by which recipients of various types of social services benefits, such as family assistance, safety net assistance, food stamps and medicaid, can obtain a review of local social services district decisions to deny, reduce or terminate benefits. A hearing officer (also known as an administrative law judge) from the Office of Administrative Hearings (OAH), now within the N.Y.S. Office of Temporary and Disability Assistance, determines whether the local district properly applied the pertinent laws, rules and regulations. In many hearing situations recipients continue to receive benefits until the hearing has been held and a decision issued. State regulations require that hearing decisions be issued 90 days after a hearing has been requested, and within 60 days for a decision involving food stamp issues.[1]

The OAH holds hearings from offices in Albany, New York City (three sites), Syracuse, Hempstead and Buffalo. More than half the hearings are held in New York City, and as a result more than half of the OAH hearing officers are based in New York City. In 1999, 116,226 fair hearing decisions were issued by OAH.

In 1987, there was a backlog of 30,000 fair hearing decisions that needed to be drafted. The State's caseload was so backlogged that a homeless family could wait two months in temporary shelters before receiving state housing assistance. In addition, the quality of decisions was often criticized for a lack of consistency among similar cases and for a failure to use legal citations accurately. OAH needed a way to streamline the fair hearing process and improve the quality of decisions reached under that process.

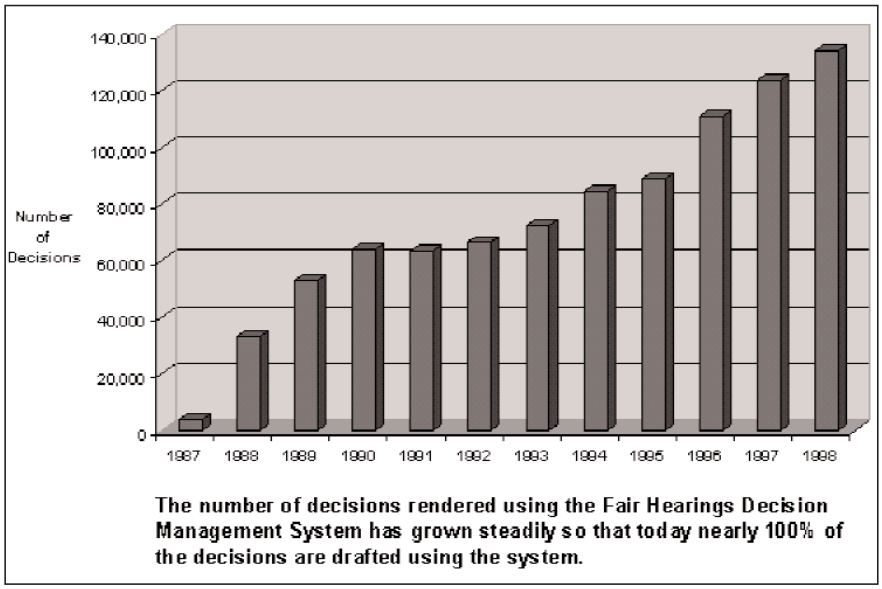
Faced with an increasing number of public assistance fair hearings throughout the state, the Office of Administrative Hearings found that reliance on handwritten drafts of decisions and a non-automated typing pool resulted in a significant bottleneck in the process of issuing timely decisions.

In 1987, New York State began implementing the Fair Hearings Decision Management System (FHDMS) to expedite the process of drafting and issuing decisions for various social programs, including public assistance. FHDMS computerized the fair hearing decision process and enabled administrative hearing staff from different offices around the state to communicate with one another using electronic mail.

The Fair Hearing Decision Management System

Before the establishment of the Fair Hearing Decision Management System, hearing officers around the state would draft a decision by using a copy of an old

decision, crossing out old information, cutting and pasting a number of old decisions or standard paragraphs together and handwriting the rest. The decision would then be shipped by truck to Albany. There a supervisor would review the decision, make handwritten changes, and then give it to a typist. After decisions were typed, they would be proofread, often retyped, signed and issued. The OAH was issuing between 70,000 and 80,000 decisions each year in this manner.



The number of decisions rendered using the Fair Hearings Decision Management System has grown steadily so that today nearly 100% of the decisions are drafted using the system.

Today, timely issuance of decisions has been greatly improved. New York State has combined computer technologies widely used in the private sector into a statewide network and made the technology available to OAH hearing officers. The technology allows hearing officers at offices located in different parts of the state to use standard forms in developing decisions in cases they are reviewing and send them electronically to supervisors in New York City, Albany or other sites for review and issuance.

The FHDMS links personal computers located in Albany and in all regional offices through the OTDA Office Automation network. The system involves approximately 150 workstations located in seven geographic locations across New York State networked together through an electronic backbone. Draft decisions are electronically transferred from hearing officer to supervisor and from one work site to another in a matter of seconds.

FHDMS provides forms and standard paragraphs on an Albany-based mainframe computer for hearing officers to draft their decisions. Each work station has access to a file of over 300 form decisions and almost 100 standard paragraphs, including quotes from statutes, regulations and policy issuances of the Department. Forms and paragraphs are updated as soon as there is a change in law, regulation or policy so that they are always current. In addition, there is a library of 12 months of recently issued decisions which can be accessed by fair hearing number. These files are accessible from all work stations and workers are able to access and view a particular document simultaneously.

Initially, the FHDMS was designed so that, in the decision drafting process, the hearing officer could select specified paragraphs such as law paragraphs or directives to be included in the final decision. The various paragraphs chosen by the hearing officer were merged into a draft decision which could then be edited by the hearing officer to add such material as a discussion and fact findings which were specific to the case at hand. In addition, the hearing officer had to enter appellant specific information, such as the appellant's first and last name, the fair hearing number, the case number, and the date of the hearing request.

When the hearing officer completed the decision, it was electronically routed through the mainframe to the hearing officer's immediate supervisor. The supervisor reviewed the decision and electronically routed it either to a laser printer in Albany, for higher supervisory review, or back to the hearing officer for redrafting. Decisions were printed on a high-speed, letter-quality printer located in Albany with the signature of the Commissioner's designee imprinted on the decision.

Feedback and Continuous Improvement

Although the response to the FHDMS was overwhelmingly positive, hearing officers using the system did have ideas for changes and enhancements. OAH took advantage of their feedback, and of advances in the available technology, in launching FHDMS II in the fall of 1992. The revised system utilizes advanced software which allows the system, based upon responses to questions posed to the hearing officer, to ask appropriate additional questions, to automatically fill in blanks in form decisions, and to insert appropriate law, discussion, fact findings and directives into a decision. Use of this "scripting" software has significantly reduced the time it takes to draft a decision and allows automated computation of budgets for benefits such as food stamps.

In the years since FHDMS II was first launched there have been additional enhancements. For example, the transmittal letters that were sent when decisions were issued were printed in batches overnight and then manually attached to the hundreds of decisions issued each day. The FHDMS system is now integrated with other departmental information systems to produce

transmittal letters and copies of decisions on a high-speed printer for each decision that is issued. Letters are automatically produced for the Appellant, appropriate social services agencies, representatives, other parties and for Department files, and collated with copies of the decision.

The Fair Hearings Decision Management System Is a Success

The Fair Hearings Decision Management System has had a significant, positive impact on the ability of the OAH to produce a high volume of decisions without the need for additional hearing officer resources. The system alleviated a 30,000-case backlog, accelerated delivery of services and saved the state millions of dollars in personnel costs and costs associated with maintaining services for ineligible appellants until decisions were issued. Using the FHDMS also assures that the administrative law judges are using the most current law.

For hearing officers, the time savings have been significant. Less time is required to draft each decision due to multiple issue capability, reduced editing needs, and automated budget computing in public assistance and food stamp decisions. For Supervising Hearing Officers (SHOs), the time savings have also been significant. The local review and batch issuance capabilities work exceedingly well and free up SHOs enough so that they can perform other supervisory duties or be assigned hearing calendars periodically without getting behind in their workload.

Program costs have been offset by reductions in personnel costs and savings associated with a reduction in the time appellants continue to receive benefits unchanged before the hearing decision is issued. There have been additional savings achieved by eliminating the cost of mailing numerous communications to hearing officers and long distance telephone calls as a result of increased use of fixed-cost electronic mail.

The ability to issue decisions in a more timely manner has not only resulted in savings associated with shortening the period during which appellants receive benefits while awaiting a hearing decisions but has also resulted in improved responsiveness in emergency situations, primarily in hearings involving the homeless. Hearings can be requested, held and the decision issued on the same day.

The Fair Hearing Decision Management System is constantly undergoing change to further enhance the system by decreasing the amount of time taken to issue decisions, improving quality and allowing the Department to continue to meet the due process rights of appellants in an environment of rapidly declining staff, increased caseload and fiscal constraints.

Table 1

Fair Hearing Decision Management System Objectives

1. Increasing the quality and accuracy of decisions;
2. Decreasing the amount of time taken to issue decisions;
3. Enabling meaningful supervision of hearing officers and their immediate supervisors; and
4. Producing reports on the timeliness of the decision drafting and issuance process.

Source: Office of Administrative Hearings, New York State Office of Temporary and Disability Assistance.

The Greater Upstate Law Project's Fair Hearing Bank

The FHDMS has not only improved the process of issuing fair hearing decisions, but it has also enabled a unique partnership between OTDA and the legal services community to improve public access to hearing decisions. One of desired enhancements to the FHDMS that was never implemented was the ability to search the FHDMS library using Boolean logic. Now, as a result of this partnership, a collection of significant hearing decisions is accessible via the Internet.

Last June, at the New York State Bar Association's Legal Services Partnership Conference, the Greater Upstate Law Project unveiled the much anticipated Fair Hearing Bank, a new Web site that allows users to access a collection of significant administrative hearing decisions issued by the Office of Administrative Hearings. The Fair Hearing Bank, a joint project of the Greater Upstate Law Project, Inc. (GULP) and the Western New York Law Center, contains over 1000 fair hearing decisions, with new decisions added on a regular basis. This resource will play a critical role in maintaining the fairness and integrity of OTDA's fair hearing process.

Why Do We Need a Fair Hearing Bank?

When advocates representing public assistance clients prepare for fair hearings it is important that they know how prior fair hearings on the same issue were decided. Hearing officers from the Office of Administrative Hearings must follow the rules established in past OAH decisions or else provide explanations as to why they have not done so.[2] This principle of administrative stare decisis is critical to ensuring equal justice to those affected by fair hearing decisions. The failure of an

administrative hearing decision to conform to agency precedent may require reversal as arbitrary even where there is substantial evidence to support the determination made.[3]

For many years it was extremely difficult for legal services attorneys and paralegals to access past OAH hearing decisions. Although state agencies are required by law to index agency administrative decisions,[4] there were many barriers, such as recipient confidentiality, which prevented OAH from establishing an index that was easily accessible to advocates. Legal services staff could obtain redacted copies of specific hearing decisions upon request, but there was no mechanism to assist these advocates in identifying which decisions would be relevant to their particular cases.

Since public assistance fair hearing decisions were not easily accessible from the state agency, members of the legal services community began collecting fair hearing decisions deemed substantively significant or instructive. While with the Legal Aid Society of Northeastern New York, one of the authors, Susan Antos, began one of these collections in the mid-1980s. She brought this collection with her when she joined GULP in 1989, and began soliciting and cataloging decisions from across the state. Over the years several other legal services advocates contributed their own collections of fair hearing decisions to the growing "bank," and GULP's collection grew by leaps and bounds.

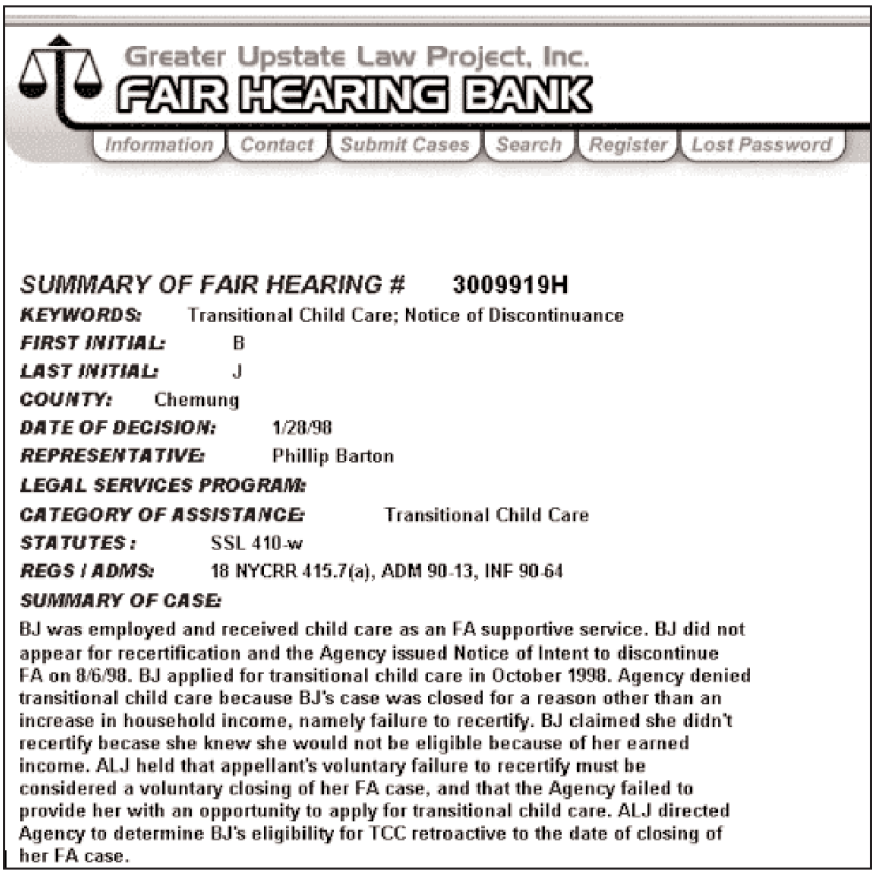
As GULP's collection of fair hearing decisions grew, its value as a resource for the legal services community also grew. However, the process of accessing this collection remained cumbersome. GULP staff summarized each hearing decision and maintained information about each decision in a computer database. Advocates had to call GULP with requests for hearings on specific topics, and GULP staff would search its database to find relevant past decisions. If there were relevant decisions on file, GULP staff would pull them from the file drawer and fax them to the advocate.

In order to improve the accessibility and usefulness of its fair hearing collection, GULP decided to make the "Fair Hearing Bank" available via the Internet. Working in partnership with the Western New York Law Center, GULP developed a Web site that allows users to search summaries of fair hearing decisions, and to download or print copies of the actual hearing decisions.

OAH at the Office of Temporary and Disability Assistance is also a partner in this project, providing GULP with electronic versions of many hearing decisions. Many of the decisions in the Fair Hearing Bank had to be scanned and converted to Adobe PDF format, often resulting in large, sometimes cumbersome files. Client-identifying information had to redacted by hand and in a manner that often made the decisions difficult to scan. By utilizing the Fair Hearings Decision Management System, OAH has been able to provide GULP with hearings issued since October 1998 in electronic form. These electronic files are much smaller and more portable than scanned files, improving the responsiveness and usefulness of the Fair Hearing Bank for many users. The hearings are cleanly redacted by OAH.

Using the Fair Hearing Bank

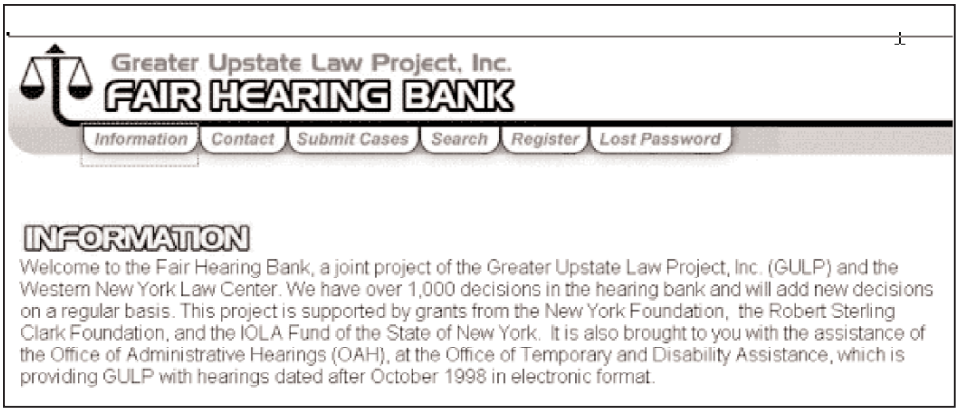
The Fair Hearing Bank consists of summaries of fair hearing decisions that have been submitted to the bank, with each summary "linked" to an electronic file of the actual hearing decision. Each decision submitted to the Fair Hearing Bank is summarized, either by the submitter or by GULP staff. In addition to summarizing the text of the decision, each summary also contains other relevant information, such as the date of decision, county, advocate, and the statutes and regulations relied upon in the decision. The text of these summaries is fully searchable.


Greater Upstate Law Project, Inc.
FAIR HEARING BANK
Information | Contact | Submit Cases | Search | Register | Lost Password

SUMMARY OF FAIR HEARING # 3009919H

KEYWORDS: Transitional Child Care; Notice of Discontinuance
FIRST INITIAL: B
LAST INITIAL: J
COUNTY: Chemung
DATE OF DECISION: 1/28/98
REPRESENTATIVE: Phillip Barton
LEGAL SERVICES PROGRAM:
CATEGORY OF ASSISTANCE: Transitional Child Care
STATUTES: SSL 410-w
REGS / ADMS: 18 NYCRR 415.7(a), ADM 90-13, INF 90-64
SUMMARY OF CASE:

BJ was employed and received child care as an FA supportive service. BJ did not appear for recertification and the Agency issued Notice of Intent to discontinue FA on 8/6/98. BJ applied for transitional child care in October 1998. Agency denied transitional child care because BJ's case was closed for a reason other than an increase in household income, namely failure to recertify. BJ claimed she didn't recertify becase she knew she would not be eligible because of her earned income. ALJ held that appellant's voluntary failure to recertify must be considered a voluntary closing of her FA case, and that the Agency failed to provide her with an opportunity to apply for transitional child care. ALJ directed Agency to determine BJ's eligibility for TCC retroactive to the date of closing of her FA case.



Users can find the summary of any decision in the Fair Hearing Bank by searching with relevant key words, such as "child care" or "Medicaid eligibility." The Fair Hearing Bank search engine uses standard Boolean operators (AND, OR and NOT). Search expressions can be formed using these operators and by grouping keywords using parentheses. Each search will bring up all relevant hearing summaries. After reviewing the summaries, a user can click on the link at the end of each summary and obtain a copy of the fair hearing decision in Adobe PDF format.

New users must register before searching the Fair Hearing Bank. Each new registrant will be asked to choose a username and password. The username and password must be entered at the start of each Fair Hearing Bank session. This registration/username system will allow GULP to track usage of the Fair Hearing Bank, which is necessary to demonstrate (to project funders and others) the value of the Fair Hearing Bank as a resource to the Legal Services community. The system will not monitor the specific searches conducted by the users.

The response to the Fair Hearing Bank has been phenomenal. In the first two weeks of its operation, over 100 advocates from across the state, and even a few from out of state, registered to use the new Web site. Attorneys from state and local government as well as members of the private bar, particularly those with a focus on Medicaid and elder law issues, have also registered.

And already ideas for improvements are streaming in. In response to user feedback, GULP has planned several system enhancements. GULP is also committed to exploring new opportunities for improvements resulting for ongoing technological advances.

The Fair Hearing Bank is supported by grants from the New York Foundation, the Robert Sterling Clark Foundation, and the IOLA Fund of the State of New York. The Fair Hearing Bank would not exist without the generosity of all the advocates who have submitted fair hearing decisions over the years. A special thanks for their willingness to share hearing decisions they have collected over time.

The Fair Hearing Bank is hosted by the Western New York Law Center, which has provided the project with space on its server and invaluable technical assistance. The site can be accessed from their Web site at www.wnylc.com, and clicking the "Fair Hearing Bank" button on the left side of the page, or by going directly to www.server2.wnylc.com/fhintro.

Endnotes

1. 18 N.Y.C.R.R. 358-6.4(a), (b).
2. *Long v. Perales*, 172 A.D.2d 667, 670, 568 N.Y.S.2d 657 (2d Dep't 1991).
3. *In re Charles A. Field Delivery Service*, 66 N.Y.2d 516, 520, 498 N.Y.S.2d 111, 488 N.E.2d 1223 (1985).
4. N.Y. State Administrative Procedure Act, § 307(3)(a), (b).

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Innovations in Administrative Adjudication—"OPTICS" at the Workers' Compensation Board

By Robert R. Snashall

The original purpose for the creation of administrative adjudication proceedings was essentially to establish "alternative dispute resolution" systems which were less complicated, more prompt means of resolving disputes as compared to their more formal, civil court counterparts. The administrative arena presented a simplified approach to the determination of claims through less stringent filing, evidentiary, and hearing procedures and a more cooperative and responsive approach to assist claimants and constituents.

For a variety of reasons over the years many administrative forums have become bogged down by delay and inefficiency. Many administrative adjudication systems have become so exceedingly complex and paper-intensive that they intimidate the very members of the general public whose needs they were created to serve.

Fortunately, the advent of a broad spectrum of technological developments and innovations in business processes has presented an opportunity for administrative agencies to recreate systems capable of resolving disputes and rendering services in a more efficient, accessible, and accountable manner.

The experience of the New York State Workers' Compensation Board ("the Board") illustrates how the complexities of a paper-driven system can be transformed by technology.[1] The Board is a state agency whose primary responsibility is to promptly and fairly adjudicate claims for the delivery of health care and wage replacement benefits to injured workers in accordance with the Workers' Compensation Law. Each year, statewide, the Board receives reports of anywhere from 200,000 to 300,000 work-related accidents and illnesses and, at any given time, has an ongoing average active caseload of nearly 300,000 claims requiring administrative action and/or adjudication by the Board. The Board currently employs approximately 1,700 individuals and maintains nine district offices and 30 customer service centers statewide.

Background

The inefficiency with which the Board had come to process claims and disputes over the years had resulted from a number of factors. Primary amongst these factors was the sheer volume of paper the Board processed and continues to process on a daily basis and the volume of paper maintained in its claims files. Daily, the Board receives in excess of 55,000 claims-related documents from injured workers, employers, insurance companies, medical providers and their representatives. For example, injured workers send information and inquiries relating to their claims; employers report accidents, wages, and lost time documentation; doctors provide medical treatment and injury data; insurance carriers provide proof of payments on claims for which they have accepted liability or information pertaining to claims which they are contesting.

"Many administrative adjudication systems have become so exceedingly complex and paper-intensive that they intimidate the very members of the general public whose needs they were created to serve."

In the past, documents arriving at a Board office would be directed to the mailroom for sorting and forwarding to the claims staff. Claims staff would then typically review the documentation and physically search for the relevant paper claims folder before taking any necessary responsive action. Ideally, the correct file would be located among the three million active and inactive paper files maintained by the Board. When action was eventually taken, the documentation would be placed in the appropriate claims folder which would then the filed in one of the tens of thousands of file cabinets housed by the Board statewide.

Not surprisingly, this often lengthy process was complicated by volume-driven backlogs in the mailroom and claims operations as well as the difficulty in locating claims folders which would often be awaiting a hearing, appeal, or other administrative action in another Board area or office. At any given time, only one Board employee could be in possession of, and take action on, a claims file.

This environment significantly impeded not only the Board's ability to administer claims in an efficient manner, but likewise frustrated the attempts of Board staff to respond to basic telephone or written inquiries pertaining to a claim. Equally frustrating was the fact that claimants and their representatives could only review the paper claims folder when it was not circulating among Board staff, awaiting processing of one form or another.

The inefficiencies of this paper-driven environment most significantly affected the adjudication of claims. The Board was frequently compelled to conduct hearings for no other reason but to determine the status of claims and to determine if current documentation was contained in the claims file. The delays associated with the Board's processing of claims information also frequently forced its Workers' Compensation Law Judges to adjourn matters or reserve decisions until the most current documentation actually found its way into the claims file. Consequently, an unacceptably high number of these matters occupied valuable time on the already overburdened hearing calendar, often with few, if any, resolutions of substantive issues.

"[T]he Workers' Compensation Law Judge sits before the parties to a claim—with a computer and automated case file—and renders a decision, with the confidence that he or she has had an opportunity to review the entire contents of a claimant's folder, including documentation received by the Board the day before, quite literally with the click of a button."

By the mid 1990s, it became apparent that, in order to satisfy its primary responsibility of promptly and fairly adjudicating benefits under the Workers' Compensation Law in the manner originally intended, the Board would need to use new technological creativity to overhaul what had become a lengthy, costly, paper-intensive system.

OPTICS

With an eye towards improving efficiency through technology and updated business processes, the Board designed and implemented a program entitled OPTICS (Organization, Process, and Technology Innovations for Customer Service) to revamp its approach to the administration and adjudication of workers' compensation claims.[2]

The Introduction of Technology

The cornerstone of OPTICS has been a technological innovation known as the Electronic Case Folder (ECF). It uses digital scanning and optical disk technology to eliminate paper-based case folders and the traditional manual processing such as identifying, sorting, routing, and filing.

In August of 1999, the Board, through the services of a competitively bid vendor, completed what had previously been regarded as virtually an insurmountable challenge, the conversion of 350,000 active paper case files into electronic case folders. This conversion transferred more than 38 million individual pieces of paper into electronic digital images which were then grouped into a logical format to form online case files.

While this large back file conversion effort was proceeding, the Board also applied ECF processing to incoming mail. Now, mail is scanned into the Board's newly automated system. A sophisticated workflow application analyzes incoming documents and forwards them to the "work queues" of Board employees and/or to the associated electronic case folders. Over one million pieces of claims-related mail per month are scanned and automatically placed on the electronic desktop of the appropriate Board employee.

Today, this electronic case folder contains the most current information available on all of the Board's active cases. Such information is instantaneously and simultaneously available to all Board employees across the state. The delay associated with manually identifying, sorting, routing and filing paper has been eliminated as has the time consumed with physically locating a claims file before taking action on a case. Board employee with claims or adjudicatory responsibilities can view a claims folder in its entirety at any time.

This tool has proven to be especially useful in the hearing process, where days or weeks prior to an actual hearing, parties of interest to a claim, their representatives, and Workers' Compensation Law Judges can log on to the Board's automated system and thereby review the very latest documentation on a case. When the hearing is actually conducted, the Workers' Compensation Law Judge sits before the parties to a claim—with a computer and automated case file—and renders a decision, with the confidence that he or she has had an opportunity to review the entire contents of a claimant's folder, including documentation received by the Board the day before, quite literally with the click of a button.

Process Innovations

Technological advancements of the magnitude associated with ECF and related initiatives engender, if not

necessitate, substantial re-engineering of an entity's administrative and operational processes. Thus, the Board's OPTICS project incorporated an extensive overhaul of its claims and hearing processes.

In the paper-dependent environment, the work of many Board employees was primarily, if not exclusively, dedicated to the manual sorting, distributing, locating and filing of claims documents. Estimates are that approximately 50% of the Board's employees were spending approximately 50% of their time simply processing paper. Further, only one individual could work on a claims file at any given time, a situation which hampered the timely processing of claims, even those requiring only minor action or intervention by the Board. With the advent of the OPTICS electronic workflow environment, Board employees have been vested with much greater opportunities as well as responsibilities. Members of the Board's claims and adjudicatory staff who previously worked independent of one another now have been assigned to newly created work groups. Within these work groups, Board examiners, conciliators and law judges now enjoy a much greater level of interaction, allowing them to process and resolve claims together in a much more cooperative, communicative, and proactive fashion.

A key initiative which has developed from the automation of the Board's claims operations and the empowerment of its employees has been the Board's ability to allow examiners to propose resolutions or "administrative determinations" where no controversies exist, without the parties' appearances at formal hearings. Such proposed decisions are electronically forwarded from examiners to Workers' Compensation Law Judges who receive them in their automated work queues, review them on their personal computers, and electronically respond to the examiners' proposals. This speedy transfer of information permits instant communications between various employees within the Board as well as between such employees and constituents of the Board, allowing administrative determinations to be proposed, reviewed, approved and issued quickly. By referring over 80,000 cases for informal processing through the administrative determinations or "AD" initiative, the Board has preserved valuable hearing calendar time for disputes which require the attention of a Workers' Compensation Law Judge.

An additional process improvement which was instigated by the Board's technological advancements is WISK (Walk In Stipulation Kalendar). This initiative, just recently introduced in a number of the Board's districts across the state, permits parties to negotiate a resolution to disputes on a particular claim and to simply walk in or appear at the Board at flexible times when law judges have been made available for WISK resolutions. The parties present their stipulations to the Workers' Compensation Law Judge. Through ECF, the judge can instantly retrieve the complete claims folder, review it in conjunction with the parties' proposed stipulation and, absent any finding that such agreement is unfair or improper as a matter of law, approve the stipulation and issue a decision. While affording a great deal of flexibility to parties, this option encourages settlements and preserves hearing calendar time for disputed matters. In the six months since WISK has been introduced, over $12 million in benefits have already been paid to injured workers whose claims have been resolved in this forum.

"[T]he technology which supports the triage approach to appeals has greatly enhanced the Board's decision-making capabilities in this very critical area."

Technology improvements at the Board have likewise significantly affected the processing of appeals. In the pre-ECF, paper folder setting, approximately 60% of all appeals from decisions by Workers Compensation Law Judges were "resolved" by rescinding the decision below and restoring the matter to the hearing calendar for further development on the record of the issues in dispute. Oftentimes, such an outcome was warranted because the law judge did not have access to the very latest documentation upon which to base his or her decision. The electronic case folder provides greater certainty that the automated record upon which the law judge has based his or her decision is, in fact, a compilation of the current and complete record of a claim. As a direct result of ECF, the rescission rate on appeals has now dropped to approximately 15%.

ECF and related technological advancements have also enhanced the timely, prioritized processing of pending appeals by facilitating a triage approach to such matters. Whereas the paper environment essentially forced the Board to address pending appeals according to the very basic standard of the date in which they were filed, the electronic case folder has made possible a more sophisticated, case-specific analysis in determining the order in which pending appeals should be handled. Today, the Board's appeals unit is supported by an automated program which identifies the key controversies on appeal and ranks them in terms of the hardship being suffered by the claimant during the pendency of the appeal. Disputes pertaining to the need for surgery or those where benefit payments are being denied to the claimant, for instance, are processed more rapidly than appeals involving less serious disputes. Needless to say, the technology which supports the

triage approach to appeals has greatly enhanced the Board's decision-making capabilities in this very critical area.

Cumulative Benefits

The integration of the Board's technology and process innovations has been very beneficial, particularly to the Board's adjudicatory capacity. To the extent that these improvements have made the Board more efficient, accessible and accountable, they have in fact benefited all constituents of the workers' compensation system.

The implementation of ECF, coupled with enhanced workflow processing and management, has tremendously improved the Board's overall efficiency. In 1998, there existed a two- to three-week backlog of incoming mail (over 225,000 documents statewide) waiting to be reviewed, processed, and filed. Now, at any given time, the Board has an inventory of unprocessed mail which is the equivalent of that received in less than one day. Where cases were previously indexed and assembled over a period of approximately 30 days from the Board's receipt of necessary forms, they are now indexed within two days. Also noteworthy is the fact that, since introducing OPTICS to the administration of workers' compensation claims, the Board has reduced the overall time for processing and resolving informal cases by approximately 50%.

Technological and process innovations have also produced much greater accessibility to the Board. Prior to embarking on the OPTICS project, the Board maintained several district offices throughout the state as the primary sites for conducting Board proceedings. As necessary, the Board also conducted hearings and meetings at temporary sites leased by the Board in armories, schools, firehouses, etc. Paper files would periodically be gathered and shipped to the temporary site for the hearing. Following the hearing, the paper files would be repackaged and sent back to the district office for further processing. Periodically, claims files would be damaged or lost in this routing process, often delaying decisions affecting the delivery of benefits to injured workers. Since the development of the ECF and related technological advancements, the Board no longer confronts the logistical difficulties associated with shipping paper files to remote sites or tracking lost or damaged file documents. Having overcome this impediment, the Board proceeded to open a statewide network of 30 permanent, full-time, fully staffed, automated customer service centers. These additional office sites provide convenient locations where constituents of the system can attend hearings, review automated claims folders and receive assistance from customer service representatives in a personal and timely manner. This greater presence throughout the state has significantly enhanced public access to Board staff and services.

The Board's technology efforts have also enhanced electronic accessibility to the Board. Through the implementation of ECF and related technology, claimants, employers, carriers and their representatives can now enjoy complete, secure access to electronic case folders at their convenience. They need only log onto the generous supply of computers which are available to the public at each of the Board's nine district offices and 30 service centers, enter the necessary password which is specifically assigned to the parties of interest associated with a particular claim, and view the case folder which is conveniently organized in terms of the date in which documents were received and/or the description of the document (medical reports, decisions, Board forms, correspondence, etc.). Through this accessibility and convenience, the Board offers the injured workers and employers of New York State a level of customer service which far exceeds that which the Board had been capable of offering to its constituents just a short time ago.

In utilizing ECF technology as well as the electronic workflow processing to their fullest potential, the Workers' Compensation Board also developed a "performance measures" mechanism. Because a document scanned into ECF is then forwarded to the "work queue" of the Board employee responsible for handling the pertinent task, the electronic desktops of the employees may be viewed by direct supervisors and executive management to ensure that such matters are addressed appropriately and timely. The Board has also created an electronic means of monitoring critical forms, such as notices of controversy and notices of changes in the payment of benefits, to ensure that they are appropriately processed within three days of receipt. Such quality controls advance not only efficiency, but also accountability, in the processing and adjudication of claims.

OPTICS and the Future

One of the immediate goals of the Board as part of the OPTICS project is to allow the secure access to ECF from remote locations. Soon, claimants, employers, insurance carriers, and their representatives will be able to retrieve electronic claims information on their cases directly from their homes or offices. The Board will likewise enhance its utilization of electronic data interchange (EDI) so that parties may electronically submit reports of injury, medical reports, Board forms, and other documentation to the Board for ECF processing. The disclosure and receipt of electronic information will undoubtedly present significant challenges for the Board in terms of maintaining confidentiality of claims

records and the integrity of documentation electronically received by the Board.

Such electronic exchange will, in time, also increase the Board's potential for data collection. Based upon information received through EDI, the Board will be able to track information on natures and incidences of work-related injuries and illnesses as well as data related to treatment and benefits. Further, EDI will permit data collection with respect to parties' performance and compliance with relevant provisions of law, regulations and orders of Workers' Compensation Law Judges. For example, based upon information received through EDI, the Board will be able to capture data fields revealing whether a submission was filed within the time and in the manner ordered by the Workers' Compensation Law Judge and whether benefit payments were issued accurately and timely. As in the case of performance measures applied to Workers' Compensation Board employees, this data collection capability will promote efficiency and accountability on the part of the various parties being evaluated.

In the near future, the Board will also implement a means for Workers' Compensation Law Judges to issue real time, online decisions upon the conclusion of a hearing. Such decisions are now issued by claims examiners days after hearings take place. The instant, automated decisions will eventually be issued by law judges employing state-of-the-art voice recognition software, reducing the time in which a decision is issued and thereby speeding the payment of awards to injured workers.

Further, the Board will expand and enhance its video conferencing capabilities in the adjudication process. Video is now used to effectuate timely hearing appearances by out-of-state or remotely located claimants or health care providers. Desktop video technology is also now utilized on a pilot project basis for conducting conciliations or pre-hearing conferences with self-insured employers or insurance carriers who may have a number of cases pending before the Board. Where feasible, such cases may be batched and scheduled for a particular day when the employer or carrier attends the proceedings from its office via video while the other parties attend the proceedings in person before an officer of the Board. Eventually, the Board hopes to expand the use of its desktop video technology for securing critical testimony of health care providers who may offer such testimony on a case directly from their private offices or the hospitals with whom they are affiliated.

Conclusion

The technological innovations and process improvements associated with the Board's OPTICS initiative have greatly advanced the efficiency, accessibility and accountability of the Board's adjudication process, enabling it to more responsibly administer the Workers' Compensation Law in the manner originally intended.

Given the speed and scope of the advancements made in the last few years alone, it would certainly appear that the opportunities for improving technology, processes and services at the Board in the future are as expansive as the imaginations of its employees and constituents allow.

Endnotes

1. In closing, I wish to note that this incredible transformation of the Workers Compensation Board simply would not have been possible but for the leadership of the Governor who has provided direction and resources for the re-engineering of the Board. I, too, wish to recognize and extend my personal appreciation for the dedicated efforts of the many Board employees who developed, implemented and continue to support the Board's OPTICS vision. Last, but certainly not least, I acknowledge and commend the patience and cooperation of the constituents of the Board, most of whom have been cautiously optimistic about the Board's technological and process innovations, but all of whom are now experiencing a truly remarkable period in the history of the workers' compensation system of this state.
2. Since the introduction of OPTICS and ECF, the Board is pleased to have had its technological and process innovations publicly recognized and commended. For two consecutive years, the Board's ECF and document tracking system were recognized at the Government and Technology Conference. In February of 2000, the nationally published *Government Technology Magazine* cited the Board as a "model agency" for document imaging technology, further noting that the Board's newly automated system "dwarfs most other government imaging systems in size, scope and benefits." (*An Image Transformed*, Government Technology Magazine, February 2000). In March 2000, the Board received an award from the Citizens Budget Commission Public Service Innovation 2000 contest. The Commission, a nonpartisan public interest group, recognized the Board's Electronic Case Folder as "a superior innovation based on its measurable benefits, creativity, scope of public impact and improved public service." While these public awards and accolades are certainly gratifying for the Board and its employees who have worked tirelessly in developing and improving the OPTICS project, the greatest rewards are those which will come when injured workers and employers across the state can confidently and consistently report that their claims have been fairly and promptly administered by the Workers' Compensation Board.

Robert R. Snashall is the Chairman of the New York State Workers' Compensation Board where he has served since May of 1995. Prior to his appointment as Chairman of the Workers' Compensation Board, Mr. Snashall was engaged in private practice. Mr. Snashall received his J.D. from Albany Law School.

Perspectives on Managing a Negotiated Rule Making

By Jaclyn A. Brilling

Introduction

"This is Case 97-C-0139, Proceeding on Motion of the Commission to Review Service Quality Standards of Telephone Companies." With these words began the facilitation of a three-year collaborative proceeding (not yet completed) to review and recommend rule-making revisions and new rules for telephone service quality and customer relations to consumers, service quality standards between telephone carriers, network reliability and, uniform measurement guidelines. This was to be the first negotiated rule making for the purpose of amending PSC rules set forth in title 16 of the New York Code of Rules and Regulations; one of the first few in the state.[1] The context for this case was the growth of a newly competitive local telephone market replacing the monopoly market New York has had since 1910. The growth of competition results from both technological and legal changes especially the federal Telecommunications Act of 1996.

The Public Service Commission commenced this collaborative proceeding to ensure that telephone service quality standards remain appropriate to current and anticipated market conditions, especially in an emerging competitive environment.[2] The Commission's order directed the parties to explore whether competition might warrant a relaxation of regulatory oversight.[3] Effectively, the Commission asked for an omnibus proceeding addressing end-user standards (how services are provided to residential or business customers), inter-carrier standards (how services are provided to other telephone carriers), network reliability, and the establishment of uniform measurement guidelines.[4] Each of these substantive subject areas could occupy a proceeding; case 97-C-0139 would cover them in one.

Procedurally, the dilemma was how to permit the broadest and most diverse participation, while providing a productive and efficient forum to accomplish the tasks. Facilitating and managing such diverse participants and topics required organizing the proceeding into subject areas. To meet all these needs, the proceeding was modeled as a negotiated rule making, wherein subject area working groups and the plenary group would use a consensus process to review issues and develop recommendations.

All participants and the PSC Staff team were trained in consensus decisionmaking[5] to assure productive sessions. In addition, the Staff team was trained for the facilitator-participant role in each working group. The negotiated rule making was ready to begin.

Structure and Process

The negotiated regulation (reg-neg) was structured as a large plenary proceeding divided into four separate modules focused on issues defined by the order instituting the proceeding: end-user and inter-carrier standards, uniform measurements, and network reliability. Monthly plenary sessions of all interested persons, which the PSC ALJ facilitated, were scheduled between May 1997 and January 1999. Working groups of between eight and 24 persons, which Staff facilitated, met between the plenary sessions, using consensus-based decisionmaking to reach milestones. These milestones were presented to the plenary group for consensus at the next monthly plenary session. Thus, as the working groups achieved consensus milestones on these issues, the plenary group was advised and given full opportunity to question, discuss, and approve the milestones. This allowed participants to select a working group without sacrificing an ability to participate in decisionmaking. Consistent with a consensus approach, each participant was given an equal voice in the process of the entire group.

At each monthly session, the working groups presented the milestones they had achieved during their working group sessions. After the presentation, there was a period for clarification and questioning which occurred on the record. During the discussion portion of each module, the stenographer was asked not to take notes. This was done to avoid the possibility of attribution of statements, which would have inhibited participation in the consensus process.

Consensus was used until December 1998, at which time the plenary group determined that they could reach no more consensus "milestones."[6] At that point, the Staff team produced a document containing the consensus milestones and offered recommendations on issues left unresolved. This document was distributed among all the participants for their comment. Again, consistent with a consensus process, the final document which was presented to the Commission contained the

consensus, dissenting recommendations of the parties, and Staff's recommendations. The Commission elected to issue a Notice of Proposed Rulemaking accepting the document as it was presented to them. The Notice specifically sought input on whether these standards should apply to all carriers and whether they may need to be changed again to reflect a more robust competitive market.[7] Public statement hearings were held in four locations throughout the state.[8] Comments received at the public statement hearings and in response to the Notice are being analyzed for presentation to the Commission this fall.

Convening the Process

At the convening[9] of this negotiated rule making, extra pains were taken to insure participation by those most affected by the rule making. Among those were local exchange carriers,[10] competitive local exchange carriers,[11] federal, state, and local governmental entities, consumer and disability advocacy groups, small businesses, large businesses, labor organizations, and individual members of the public. The Business Advocacy unit of the Commission's Office of Consumer Services assisted in obtaining participation from small businesses. The Governor's Office of the Advocate for the Disabled assisted in providing their input and in finding participants from the community. Few stones were left unturned.

Staff of the Office of Consumer Services conducted several roundtable discussions in Long Island, New York City, Glens Falls, and Elmira during June through December 1997. Other consumer organizations, government, and small business representatives were invited to express their expectations of local exchange telephone service during a period of transition to a multi-provider market. At the roundtables, the participants were asked to review the services they or their organization currently receive from their carrier, for example, directory assistance, billing information, maintenance and repair assistance, so as to establish a common understanding of end user standards under review. These participants were then asked to indicate whether existing standards were necessary in a multi-provider environment, or whether competitive pressure would force carriers to deliver high quality service.

The success of a consensus process hinges on the participation of the "community," in this case all affected by the proposed rules, and participation by representatives authorized to speak for their respective organizations or constituents. Moreover, it was critical to have technical expertise available to aid in understanding the operational and technological feasibility of the issues under discussion. In this proceeding, balancing the participation of the technical experts and the decision making representatives within an organization was a difficult task. Many participants did not understand that reaching consensus milestones required them eventually to decide whether they could accept the issue or proposal under discussion. Personal concerns were expressed but sometimes were conveyed as organizational interests. During plenary sessions, it was expected that the consensus milestones would be discussed within each organization by its participating members, so that the plenary group could proceed with assurance that consensus meant consensus not only of those present, but of all organizations represented.

Noteworthy has been the participation throughout the process of the Governor's Office of Regulatory Reform (GORR). Representatives of GORR attended each plenary session. In addition, the Staff team and ALJ worked directly with GORR representatives to address any questions or clarification needed throughout the process. The issues were complex, technically difficult and significant in their impact on public policy. GORR's regular participation and familiarity with the issues was very important to the Notice of Proposed Rulemaking process, as their review and approval was a prerequisite to filing the Notice in accord with the Governor's Executive Order No. 20.[12]

Managing the Process and Participants

With so many participants (approximately 100) and their differing interests, there was a tremendous "off-line" or hidden workload. This hidden workload entailed keeping the parties on task and communicating with them regularly to keep the group in forward motion. Much caucusing was needed to learn and understand the interests of the participants.

At the beginning (before the first procedural conference), and at the end of the consensus phase of the proceeding, the Staff team and ALJ met individually with each participant. These meetings allowed each participant an opportunity to share expectations in a non-threatening environment, permitted us an educational opportunity to explain the process, and identify any "buzzsaws" that could undermine the process.

Groundrules were established to guide conduct during plenary and working group sessions. The groundrules were those used in most collaborative processes, with a few exceptions. One, the "no attribution rule" required that any publicly distributed documents contain reference to the topic, statement or issue rather than to the speaker. This was imposed to foster discussion by all parties. A "no posturing" rule was imposed to keep parties moving forward instead of backpeddling or remaining stationary on an issue. The

parties "grew into" these groundrules and, over time, invoked them without the ALJ's intervention.

The logistics of a consensus process, which require the facilitator to constantly "shepherd" the parties and navigate through communication barriers, led to the adoption of the electronic means of communication. Communicating with the participants in hard copy documents became tedious, engaging our office fax machine for hours on end. I established an e-mail distribution list and all parties used it freely to exchange documents, minutes of meetings, correspondence and notes. Use of electronic communication greatly assisted the parties by offering real-time delivery of documents and more time for task completion. Many participants attended sessions with their laptops so that minutes of the meetings could be sent promptly.

Where the Internet greatly assisted us, teleconferencing was an impediment. Teleconferencing capabilities of the parties varied and many could only listen to our discussions. To maximize participation and limit travel expenses, Bell Atlantic-New York offered the working groups use of its videoconferencing facilities. Participants attended working group sessions at locations in Albany or Manhattan. These facilities were very effective and mitigated most appointment conflicts as parties did not need to add three hours of travel time to their day.

Finally, the Staff team was comprised of an interdisciplinary, inter-office group of nine people. To coordinate the Staff team, several all-day meetings were held where portions of parts 602 and 603 were reviewed and the Staff came to consensus. After receiving final comments of the parties on the full rule-making document, the Staff met again to review its position. Staff modified positions on some issues and offered them to the parties for another round of comments before the item was presented to the Commission. These retreats were very productive and helped to focus Staff interests, formulate their positions and discuss their positions in relation to those of other participants.

Significance of the Proceeding

This is the first proceeding at the Public Service Commission to employ a negotiated rule-making format for the amendment of the N.Y.C.R.R., with a consensus process and with participation of all constituent groups, including members of the consuming public. Previous cases had used similar methods for "soft" rule making. Its benefits to the particular reg-neg are apparent as are its benefits to other PSC proceedings. The consensus model continues to be used effectively by ALJs in the PSC in large collaborative proceedings.[13] The consensus process should yield more "buy-in" for the rule achieved through this process. It is expected that the parties will better comply with the regulatory scheme they have participated in developing.

E-mail distributions and communications are now commonplace, save much time and effort, and permit work to be conducted efficiently. The use of videoconferencing in working group settings to maximize participation continues and state-of-the-art teleconferencing equipment has been ordered.

The Staff team learned valuable facilitation techniques and developed their "toolboxes" for future proceedings. Most are assigned to current collaborative and bring their experience and insights to new participants appearing before the Commission.

Finally, the participants mentored the ALJ in the technical and operational aspects of the issues in the case. This shortened the learning curve for the judge, the grateful recipient of their efforts and patience. The participants learned consensus and bring this knowledge and collaborative spirit to new proceedings, benefiting other decisionmaking efforts at the Commission.

Conclusion

The negotiated rule-making process offered a forum to involve parties with diverse interests in a challenging regulatory task—to review existing rules and recommend a regulatory scheme for telephone service quality standards in an emerging competitive environment. Facilitators can find With the assistance of technology such as videoconferencing and e-mail, participants trained in consensus before commencing the proceeding were able to use the consensus process effectively to develop and resolve issues and focus recommendations to be brought for consideration to the Public Service Commission.

Endnotes

1. While a negotiated rule-making approach was used for all modules, the intercarrier standards module proceeded separately as a "soft" rule making. No revisions or additions to the N.Y.C.R.R. were effected, rather the intercarrier standards were developed as Commission Guidelines. The negotiated rule making was used in its fullest sense for the modules related to telephone service quality for consumers: end-user standards found in 16 N.Y.C.R.R. 602, 603, 644.2. The following discussion will apply to the end user, uniform measurements, and network reliability modules, as these were eventually combined into the rule-making recommendation.
2. Order Instituting Proceeding to Review Service Quality Standards, Issued and Effective February 5, 1997, Case 97-C-0139.
3. *Id.,* p. 3.
4. Uniform measurement guidelines were needed so that all telephone carriers would be reporting service quality performance in the same way.

5. In sum, this is a decisionmaking model which asks participants to resolve issues by determining what they can "live with," rather than by maximizing their interests. Consensus is achieved only after all participants have had an opportunity to express concerns or disagreements and offer solutions.
6. The parties were able to reach consensus on most concepts, particularly whether a regulation should be retained, discarded, or modified in light of emerging competition. Disagreements emerged largely in the wording of proposed rule-making provisions. In all, the parties achieved consensus on approximately 60% of the issues.
7. Case 97-C-0139 - Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies, *Notice of Proposed Rulemaking* (issued January 25, 2000).
8. Albany, New York City, Rochester and Farmingdale.
9. At the convening stage of a collaborative or mediation, the facilitator tries to insure participation of those affected by the outcome of a dispute and that the participants are empowered by their constituents to make decisions.
10. A local exchange carrier is a telephone company that provides local telephone service to end users.
11. Competitive local exchange carriers are new entrants to the local telephone market offering services in competition with the traditional monopoly carriers.
12. State of New York, Executive Chamber, Executive Order No. 20, Issued November 13, 1995.
13. *See* Cases 99-E-1470 and 00-E-0005, *Petition to Initiate an Inquiry into the Reasonableness of the Rates, Terms and Conditions of the Provision of Electric Standby Service*, Order Instituting Proceedings, issued January 10, 2000; Case 00-C-0188, *Proceeding on Motion of the Commission to Examine the Migration of Customers Between Local Carriers*, Order Instituting Proceeding, issued January 26, 2000; Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities*, Order Instituting Proceeding, issued March 21, 2000.

    For more information about these cases, consult the Department of Public Service Web site at http://www.dps.state.ny.us.

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Switching Hats: Issues and Obstacles Facing Administrative Law Judges Who Mediate EPA Enforcement Disputes

By Susan Raines and Rosemary O'Leary

I. Introduction

Susan Raines

As the demand grows for mediation, early neutral evaluation, and other forms of alternative dispute resolution (ADR), administrative law judges (ALJs) are increasingly asked to act as mediators. As many ALJs and lawyers have noticed, however, "switching hats" from adjudicator to mediator is not always easy. In mediation, parties have the opportunity to work together in order to find a mutually agreeable resolution to their dispute. While multiple models of mediation exist,[1] in mediation, generally, the responsibility for dispute resolution rests with the parties themselves, not with the mediator. The role of the mediator is to aid the parties in their efforts to work together constructively. In contrast, ALJs are accustomed to having final decision-making authority. As the demands placed on ALJs begin to change, it is important to better understand the possible challenges and issues that may arise when ALJs "switch hats" and take on the role of mediator.

This article briefly examines some issues arising from ALJ mediation, based on the observations of mediation participants. The data utilized for this study were derived from extensive interviews conducted by the authors with both private party and U.S. Environmental Protection Agency (EPA) attorneys who have had their EPA enforcement cases mediated through the Office of Administrative Law Judges (OALJ). Each interview lasted at least one hour and involved 40 questions, some open-ended and closed-ended.

The EPA has been using ADR since the late 1980s, most prominently in cases concerning the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund or CERCLA).[2] Since 1996, mediation has also been offered in cases involving other environmental statutes, including the Resource Conservation and Recovery Act (RCRA), through the OALJ administrative ADR Program. In the few years since this program began, the number of EPA cases using ADR has skyrocketed, going from approximately 18 cases in 1995 to 116 cases in 1998.[3] According to the 1997/1998 EPA ADR status report, this program "has now become the ADR process EPA enforcement personnel participate in most frequently."[4]

Rosemary O'Leary

In the EPA OALJ mediation program, an administrative law judge performs the role of mediator in order to encourage settlement by the parties. Once a complaint is filed, parties are sent a letter inviting them to take part in voluntary mediation. If all parties agree, mediation begins. Mediations are generally conducted over the phone through conference calls. ALJs may speak with each party separately, as is common in traditional mediation caucuses, or to all parties together. If the case is not settled within a brief amount of time (usually 60 days or less), a different ALJ is appointed to hear the case. Approximately 77% of these cases result in settlement, as compared to 79% for EPA mediations using outside professional mediators.[5]

II. Research

Our original research evaluated the EPA's enforcement ADR program by interviewing the program's four primary stakeholder groups: EPA attorneys (61 interviewed), private parties and their attorneys (25 interviewed), mediators (22 interviewed), and EPA's regional ADR specialists (18 interviewed).[6] In the course of conversations with EPA attorneys, it became clear that many had also participated in mediations under the OALJ program. The majority of these attorneys knew of no attempts to evaluate this program. Therefore, in the course of gathering data for the broader research project, the opportunity was used to gather the comments of those attorneys who had participated in the OALJ program. For these reasons, the sample size is fairly small: only 12 of the 61 EPA attorneys interviewed had participated in the OALJ program. While not large enough to be statistically significant, the comments of these attorneys are nevertheless instructive about the EPA OALJ mediation program, as well as other mediation programs that rely on ALJs as mediators.

III. Findings

The three tables below compare the satisfaction levels of EPA attorneys with the EPA's enforcement mediation program using both outside mediators and ALJ mediators. The first table addresses the mediation process, the second table addresses mediator performance, and the third table addresses mediation outcomes. Attorney satisfaction scores are expressed on a Likert scale from 1 to 5, with 1 being "very satisfied" and 5 being "very dissatisfied."

Table 1: Satisfaction of EPA Attorneys: Outside Mediators versus ALJ Mediators
Part I—The ADR Process

Satisfaction with the ADR Experience	*Outside Mediators*	*ALJ Mediators*
Information You Received About the Process	1.70	2.22
Ability to Present Your Side of the Dispute	1.43	1.44
Amount You Participated in the ADR Process	1.38	1.33
Control You Had Over the ADR Process	2.17	1.78
Examination of Technical and Scientific Issues	1.75	2.00
Fairness of the ADR Process	1.51	1.78
1= very satisfied, 2= somewhat satisfied, 3= neutral, 4= somewhat dissatisfied, 5= very dissatisfied		

The findings in Table 1 suggests that EPA attorneys perceive that they are less informed about the mediation process when an ALJ is the mediator than when an outside person is the mediator (2.22 versus 1.70). This makes sense, since ADR using outside mediators has been used in enforcement cases for two decades at the EPA, while the OALJ program began in 1996. Contrasted to this, however, attorneys perceive little difference in their ability to present their side of the dispute in either mediation mode (1.44 versus 1.43) as well as the amount they were able to participate in the ADR process (1.33 versus 1.38).

From this sample it appears that attorneys felt they retained more control over their cases when taking part in the OALJ program than when an outside mediator was used (1.78 versus 2.17). This is not surprising, since attorneys used to litigating are likely to feel more comfortable in a setting similar to a judicial settlement conference, than in mediations using an outside neutral mediator. In contrast, as one might predict, attorneys felt that the face-to-face mediations available with outside mediators allowed for a more in-depth discussion of scientific and technical issues (1.75) than is the case with the telephone mediations conducted in the OALJ program (2.00). However, satisfaction with the ability to discuss scientific and technical issues remained relatively high (i.e., they were somewhat satisfied). Finally, perhaps because of the issue of face-to-face negotiations versus ALJ-mediated telephone negotiations, attorneys perceived that the ADR process was somewhat fairer with outside mediators than with ALJ mediators.

Table 2: Satisfaction of EPA Attorneys: Outside Mediators versus ALJ Mediators
Part II—The Mediator

Satisfaction with the Mediator	*Outside Mediators*	*ALJ Mediators*
Mediator's Preparedness	1.49	1.88
Respect the Mediator Showed You	1.28	1.11
Mediator's Knowledge of the Dispute's Substance	1.79	2.13
Mediator's Impartiality	1.43	1.75
Mediator's Skill at Opening Up New Options	1.96	2.75
Mediator's Skill at Aiding Parties to Find a Resolution	1.81	3.13
Mediator's Fairness	1.51	1.11
Overall Satisfaction with Mediator	1.60	2.75
1= very satisfied, 2= somewhat satisfied, 3= neutral, 4= somewhat dissatisfied, 5= very dissatisfied		

Table 2 summarizes the attorney's satisfaction with the mediators on various levels. While attorneys felt that both groups of mediators showed them respect, responses to other questions showed more divergence. First, there is a perception that ALJ mediators are less prepared for the mediations than are outside mediators (1.88 versus 1.49). This is consistent with the responses we received to open-ended questions. For example, only one of the attorneys stated that the ALJ in his case had conducted a conflict assessment prior to the first mediation conference call. In a conflict assessment, the mediator becomes familiar with the parties, the issues, and the substance of the case prior to commencing mediation. One attorney stated, "Mediations are done over the phone but it is a 'cold call.' The judge had no previous information on the case and has done no background work. It is not true ADR." In fairness, however, two attorneys noted that their ALJs had pre-existing knowledge of their cases, making it unnecessary to conduct a conflict assessment. Overall, it appears that satisfaction with the mediation is higher when there is a perception that the mediator has thoroughly familiarized himself or herself with the case prior to the commencement of mediation.

Secondly, ALJ mediators received lower scores than outside mediators both for their knowledge of the dispute's substance (2.13 versus 1.79) and their impartiality (1.75 versus 1.43). The reasons for this may lie in information revealed in answers to open-ended questions which indicated that there is a perception among some EPA attorneys that ALJ mediators may be too quick to offer their opinions regarding how the cases would fare in court. When asked about the mediator's skill at opening up new settlement options, attorneys gave outside mediators as score of 1.96 (remember, the lower the score, the higher the satisfaction), compared to the ALJ's score of 2.75. When asked about the mediator's skill at aiding the parties in finding a resolution, outside mediators scored a 1.81 compared to the ALJ's 3.13. In open-ended questions on this topic, attorneys made the following comments about the ALJ mediators:

- "The ALJ offered to give us an opinion way too early—we didn't even know what issues were at stake yet."
- "The ALJ program is a good thing, but not all of the ALJs are equally adept at ADR. Agencies need to work on training the ALJs to mediate."
- "This program could be more useful if the ALJs were a little more expressive in explaining the strengths and weaknesses of a case."
- "Our judge was very responsive, listened well."

These comments should not be interpreted to mean that parties prefer that ALJs refrain from evaluating their cases. In fact, many attorneys mentioned that they appreciated the evaluation and feedback received from the ALJ. However, some attorneys mentioned that this evaluation and feedback should not come too early in the mediation process, before the issues have been fully identified.

While the overall satisfaction with the ALJ mediators was less than for the professional outside mediators (2.75 versus 1.60), the attorneys were somewhat more satisfied with the ALJs' fairness (1.11 versus 1.51). Additionally, all of the attorneys mentioned that they were pleased to have the option of using ALJ mediators. Most attorneys did suggest changes (e.g., ALJs should spend more time learning about the case prior to mediation and more mediation training for ALJs), but they also assessed the OALJ mediation program positively and expressed hope that it continues.

Table 3: Satisfaction of EPA Attorneys: Outside Mediators versus ALJ Mediators
Part III—ADR's Outcome

Satisfaction with ADR's Outcome	*Outside Mediators*	*ALJ Mediators*
Speed of Resolution	2.38	2.75
Outcome Compared to Previous Expectations	1.85	3.00[7]
Control Over Outcome	2.19	2.22
Impact on Long-Term Relationships of Parties	2.17	2.00
Resolution's Durability	2.21	2.56
Overall Outcome	1.77	2.67
1= very satisfied, 2= somewhat satisfied, 3= neutral, 4= somewhat dissatisfied, 5= very dissatisfied		

Table 3 examines EPA attorney satisfaction with the mediation outcome. The table shows that attorneys were more satisfied with the outside mediators than the ALJ mediators in the speed of the resolution of the dispute (2.75 for ALJs versus 2.38 for outside mediators), the outcome compared to previous expectations (3.00 versus 1.85), their control over the outcome (2.22 versus 2.17), the resolution's durability (2.56 versus 2.21), and the overall outcome (2.67 versus 1.77). The ALJs, however, scored slightly higher in the category of the impact on the parties' long-term relationships (2.00 versus 2.17).

These results are not unexpected, based on the earlier findings that the ALJ mediators are more likely to give an evaluation of the case rather than focusing on aiding the parties in their search for a mutually acceptable resolution. For example, in environmental mediation it may be possible to find solutions that "expand the pie" by finding lower-cost settlement options that result in gains for both parties (e.g., the defendant agrees to conduct a supplemental environmental project in exchange for a lower cash settlement). When parties are able to find a mutually agreeable resolution to their dispute, in addition to tangible benefits, they feel more "ownership" of, and satisfaction with, the outcome.

IV. Additional Program Differences

A number of additional differences between EPA enforcement mediations with ALJs versus outside mediator bear mentioning. First, all of the OALJ cases examined involved only two disputing parties, whereas 50 percent of the enforcement cases involved more than five parties. It is not clear how well the ALJ telephone-conference call format would accommodate complex multi-party disputes. However, when asked about the impact of the conference-call format, only two attorneys stated they preferred face-to-face mediations. Almost half of the attorneys found the telephone format to be positive, noting specifically that it was, "less burdensome," and "gives additional flexibility." Contrasted to this, however, one attorney noted that, "It is more difficult to get a sense of the personalities of the judge and the other parties over the phone." Another stated, "ALJs cannot be as forceful over the phone." Inasmuch as the use of telephone mediation is fairly new, further research and evaluation is called for in order to ascertain the this format's full impact.

A second difference between the two programs is greater cause for concern. Some (about 20 percent) of the attorneys in the OALJ mediations expressed feeling undue pressure to settle. One attorney stated that he was not afraid that failure to settle would result in a biased ruling in the mediated case, since a different ALJ would be appointed to hear the case. But he was afraid that the judge might hold a grudge that would carry over into future interactions. This is important since agency attorneys deal repeatedly with the same ALJs.

A third difference between the two programs can be found in the amount of resources devoted to each. While not unlimited, some funds and resources have been set aside to further the use of ADR in EPA enforcement cases utilizing outside mediators. In contrast, according to the attorneys interviewed, the ALJs have been given little, if any, additional resources with which to operate the mediation program. Of course, the hope is that mediation save resources in the long run as the result of less crowded administrative dockets. While this may indeed come to pass, some restructuring may be needed in the short run in order to train ALJs as mediators , and to ensure they have adequate time to spend preparing for each mediation.

V. Conclusion

While the role of the mediator is to aid the parties in their efforts to work together constructively to reach a mutually acceptable solution to a dispute, ALJs are accustomed to exercising final decision-making authority. As ALJs are asked to mediate, it is vital to understand the possible challenges and issues that are likely to arise when ALJs 'switch hats' and take on the role of mediators. Despite the challenges and obstacles facing ALJs who mediate, mediation of EPA enforcement cases by ALJs has tremendous positive untapped potential.

Endnotes

1. In facilitative mediation, the mediator tries to assist the parties in their search for a mutually agreeable resolution to the dispute without pressuring the parties toward any particular solution and only offering an opinion about the "strength" of each party's case when asked to do so. In directive mediation, mediators frequently promote one or more particular settlement options and often use their expertise to offer opinions about the strength of the case. In transformative mediation, the focus is on building the parties' conflict resolution and communication skills so they can improve their working relationships and learn to constructively resolve conflict on their own.
2. For the purposes of this article, ADR is treated as a negotiation tool in which third-party neutral mediators or facilitators are called upon to aid parties' attempts to find a resolution to disputes related to enforcement activities at the EPA.
3. U.S. Environmental Protection Agency, *Status Report on the Use of Alternative Dispute Resolution in Environmental Protection Agency and Site-Related Actions* (December 1999).
4. *Id.*
5. *Id.*
6. Each of the EPA's ten regions has one or more ADR specialists. These individuals are responsible for promoting the use of ADR within their regions.
7. Many attorneys stated that the outcomes from the OALJ mediations were just as they had expected, whereas attorneys often stated that the outcomes from mediations using outside mediators were better than they had expected.

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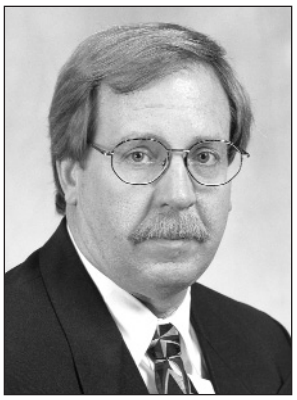
Conflict Management and Dispute Resolution: The Next Logical Steps for Using ADR in N.Y.S.

By Daniel E. Louis



Alternative dispute resolution (ADR) is a much-discussed topic across the nation. However, sometimes lacking from the ADR exchange are simple, common sense approaches that can yield big dividends without expending large amounts of capital.

The focus of this article is the use of ADR within the executive branch.[1] Administrative agencies deal with myriad administrative disputes that ultimately result in approvals, denials, revocation of permits, or imposition of sanctions or penalties. In matters involving sanctions or approvals, the agency procedures normally require use of administrative adjudication processes regardless of case size or complexity. ADR can often help resolve many of these disputes without resorting to formal adjudication. When used appropriately, ADR can be a simple, economical and efficient way to resolve both simple and complex controversies. However, ADR is not a panacea.

Management support for ADR must exist within the agency structure if ADR is to be used effectively. The agency must also tailor ADR to fit within the existing administrative system. Knowledgeable adjudicative supervisors who can identify areas where ADR would result in resource savings are essential. Resource constraints require the use of ADR within the context of limited resources. In that context, it is not necessary to promulgate new rules, hire new personnel, or request new budget appropriations. The reality of modern government is that more must be done with less. In today's climate, government agencies are not expanding; no new agencies are being created. Existing agencies must reassess their way of doing business and realign resources.[2]

A recent conference gathered state representatives together to discuss ADR opportunities. Headquartered in Lexington, Kentucky, the Council of State Governments has sponsored a new initiative, The National Institute for State Conflict Management.[3] The conference was designed to draw conflict management and alternative dispute resolution governmental professionals and interested parties together to begin to assess the use of ADR in state and U.S. territorial governments.[4]

One ADR Ambassador from each state and territory was invited to the conference. I was fortunate enough to be appointed as N.Y.S.'s Ambassador to attend this conference. Also attending were public, private, not-for-profit and for-profit ADR practitioners. The ADR Ambassadors represented all three branches of government, equally dividing along executive, legislative and judicial lines. The collection of perspectives, ideas and agendas from each branch provided thoughtful discussion, both on and off the record.

Generally, state judiciaries are using ADR more than other branches, in part because they are in the business of dispute resolution.[5] Private industry also has a well-established ADR program because business already understands the costs of controversy. For example, the CPR Institute for Dispute Resolution[6] fosters communication and services for the business community and is successful in stimulating ADR in business relationships. Overall, state executive and legislative branches lag.

A quick survey of selected other states' ADR Ambassadors revealed some similarities exist between State ADR programs. For example, Delaware[7] and New Hampshire's[8] judicial branch representatives have been working to integrate ADR in their respective executive branches. Notably, no executive agencies from these states were present.

Maine's Chief Hearing Officer, who operates that state's central adjudication panel, contemplates expanding the role of ADR in programs under his control.[9] North Carolina's Board of Nursing recently commenced ADR services and it reports time and cost savings over that experienced in administrative hearings.[10] Other associated medical organizations also reported favorable results.[11] The Divisions of Emergency Management in Florida and Georgia explained they could reduce costs and increase delivery of services from the Federal Emergency Management Agency, its federal sister, by better managing conflict.[12] The CONEG Policy Research Center, Inc., makes its living by reaching across agencies to study ways to resolve disputes.[13] Maryland offers ADR in most, if not all, administrative jurisdictions.[14] The Tennessee Administrative Law Judge (ALJ) office used ADR to resolve disputes at less cost while fostering better relationships than through the strict use of adjudicative processes,[15] as has the Massachusetts ALJ office.[16] The Texas Natural Resources Commission uses ADR in selected areas and actively seeks ways to

do more.[17] Iowa's environmental unit does not formally employ ADR, yet certain opportunities exist, under selected circumstances, and plans to commence ADR have begun.[18]

The 1996 report of the American Bar Association Survey on the use of ADR in administrative agencies serves as a benchmark. More use of ADR is reflected by those states appearing at the conference[19] and recent information regarding use of ADR in state government continues to mount.[20] ADR is here to stay.[21]

A grand plan for ADR in New York is unrealistic and probably would not work without constant revision and adjustment. A modest start and a common sense approach are needed. So is practicality. An agency-by-agency approach, with limited coordination but with open lines of communication is preferable. Networking and sharing information can help ADR decisionmakers without undue expense.[22] A recent effort between the N.Y.S. Department of Public Service and the N.Y.S. Department of Environmental Conservation is a useful example. Both agencies are involved in power plant siting disputes and both have resource limitations. A recent convening of an exploratory work group between interested stakeholders including environmental and citizen groups, industry representatives and municipal representatives resulted overall in agreement to explore how ADR may be useful in the power plant siting process.[23] Faced with approximately 15 proposed new power plant projects, both agencies must reassess their allocation of resources and ways of doing business to ensure timely review of these competing applications and the timely resolution of disputes that will arise.[24]

Early assemblies to foster ADR information transfer in New York included the efforts by Albany Law School and others to foster communication between interested public sectors.[25] However, there is only so much that can be done without government agency participation. Only managers can identify agency-specific opportunities for the successful application of ADR. They will be motivated to do so in the context of competition for increasingly limited resources, both between and within agencies.[26]

The next step for ADR implementation in New York should be an assembly of New York's state adjudicators to discuss where and how ADR can be used to increase the efficiency of New York's administrative dispute resolution process. A presentation of how each agency is integrating ADR into its dispute resolution process could begin this endeavor. Then, the discussion should explore how these ADR experiences could be transferred to work in other agencies. A dialogue articulating circumstances where ADR may and may not work is critical. Each agency knows its own problems the best.[27] An agency-by-agency ADR survey would also be helpful.

ADR expertise to assist in such endeavors exists in various forms. The newly formed Institute is a valuable resource. Other resources include the National Association of Administrative Law Judges, the American Bar Association, Dispute Resolution Section and the American Bar Association—Judicial Division National Conference of Administrative Law Judges. Collectively,they have sponsored mediation training for state ALJs.[28] Agency personnel can be qualified to train staff and frequently do so.[29]

In conclusion, ADR can continue to be important in conflict management and dispute resolution in executive agencies, but it must be tailored fit specific jurisdictional needs. A starting point in New York would be to assemble agency managers, survey the field and begin to assess where alternative dispute methods might be used to reduce costs, better manage dockets, or sometimes, share resources.

Endnotes

1. A recent report by the New York State Bar Association provides an overview of ADR in New York; however, the report centers on the court system and not administrative agencies. *See NYSBA Committee on Alternative Dispute Resolution, Bringing ADR Into The New Millennium—Report On the Current Status and Future Direction of ADR in New York* (February, 1999).
2. Some agencies are undergoing internal organizational redevelopment designed to increase flexibility and response to important public demands. *See also* New York State Governor's Office of Employee Relations (visited June 14, 2000) <http://www.goer.state.ny.us/>.
3. *The National Institute for State Conflict Management, Council of State Governments* (visited June 6, 2000) <http://www.csg.org>.
4. Albert Harberson, Manager, The National Institute for State Conflict Management, The Council of State Governments, Lexington, Kentucky, address at the Summit of the States on Conflict Management and Dispute Resolution (June 8-10, 2000) (hereinafter "Summit 2000").
5. Symposium, *National Symposium on Court-Connected Dispute Resolution Research. A Report on Current Research Findings - Implications for Courts and Future Research Needs.* National Center for State Courts, State Justice Institute (1994); *see also* The New York State Unified Court System, Division of Court Operations, Office of Alternative Dispute Resolution, Annual Report (Fiscal year 1998-1999).
6. *CPR Institute for Dispute Resolution* (visited June 14, 2000) <http://www.cpradr.org/>. CPR develops uses of private alternatives to costly litigation confronting major corporations and public entities. The membership of CPR consists of more than 500 large companies and leading U.S. law firms. *See also Alternatives*, CPR's informative publication.
7. Interview with Vincent Bifferato, retired Delaware judge. (June 8-10, 2000).
8. Interview with Peter Wolfe, Clerk, Sullivan County Superior Court, New Hampshire (June 8-10, 2000).

9. Interview with Allan A. Toubman, Chief Administrative Hearing Officer, Maine (June 8-10, 2000).

10. Donna H. Mooney, Associate Director/Discipline, North Carolina Board of Nursing, Address at Summit 2000.

11. Dale Austin, Federation of State Medical Boards, Inc., Texas, Address at Summit 2000.

12. Al Bragg, General Counsel, Division of Emergency Management, Florida, Address at Summit 2000; Mike Sherberger, Assistant Director, Georgia Emergency Management Agency, Address at Summit 2000.

13. Anne Stubbs, Executive Director, CONEG Policy Research Center, Inc., Washington, D.C., Address at Summit 2000 (citing electrical restructuring efforts in Massachusetts).

14. Interview with Judith Singleton, Assistant Attorney General, Maryland Attorney General's Office (June 8-10, 2000). Ms. Singleton was formally an ALJ with the Maryland Office of Administrative Hearings.

15. Interview with Thomas Stovall, Assistant Director, Division of Administrative Procedures, Secretary of State, Tennessee (June 8-10, 2000). Recent projects include using mediation on smart growth and land use conflicts assigned to the ALJ office.

16. Interview with Christopher Connolly, Chief Administrative Magistrate, Massachusetts (April 12, 2000). The Division of Administrative Law Appeal has begun using ADR in selected administrative matters.

17. Interview with Carl X. Forrester, Director, Alternative Dispute Resolution Office, Texas Natural Resource Conservation Commission (June 8-10, 2000).

18. Interview with Alan Goldberg, Field Office Supervisor, Iowa Department of Natural Resources, Division of Environmental Protection (June 8-10, 2000). Plans are underway to use ADR in selected areas.

19. *State/Regional Environmental Cooperation Committee,* A.B.A. Ann. Rep. (1996).

20. Rosemary O'Leary, Tracy Yandle, & Tamilyn Moore, *The State of the State's in Environmental Dispute Resolution*, 14 Ohio St. J. on Disp. Resol. 515-613 (1999). This is an informative survey of each state's environmental conflict resolution efforts. *See also* Rosemary O' Leary & Tracy Yandle, *Environmental Management at the Millennium: The Use of Environmental Dispute Resolution by State Governments,* 10 J.Pub. Admin. Res.& Theory, J-Part 10:1 at 137-155 (2000). This article rates state environmental dispute resolution programs. The NYSDEC ADR program received an A-grade.

21. William C. Smith, *Much To Do about ADR,* 86 A.B.A.J. (June 2000 at 62-68).

22. The Staff of the Adirondack Park Agency and DEC's Office of Hearings and Mediation Services have consulted about using mediation in selected APA matters.

23. Public Service Law (PSL) Article X governs the siting of power plants in New York. The N.Y.S. Department of Public Service (NYDPS) provides the presiding examiner and the NYSDEC the associate examiner. PSL § 167. *See also* PSL § 172. Article X provides opportunities for assisted negotiation that can result in identifying points of contention, narrowing issues, crafting certificate conditions or otherwise more clearly focusing the issues for adjudication.

24. *See* New York State Public Service Commission, Department of Public Service (visited June 14, 2000) <http://www.dps.state.ny.us/articlex.htm>.

25. *Alternative Dispute Resolution and the Public Sector: Building Bridges to the Future,* A Professional Development Institute and Conference, Government Law Center, Albany Law School (March 18-19, 1998) (Co-sponsored by the N.Y.S. Office of Court Administration Dispute Resolution Program and the N.Y.S. Dispute Resolution Association).

26. One closely associated example is the sharing of ALJ resources between state agencies when demand surpasses availability; the State Liquor Authority and the N.Y.S. Department of Agriculture and Markets, for example, often seek adjudicators from other state agencies to help process various cases within their jurisdictions.

27. NYSDEC recently promulgated an oxides of nitrogen rule that was developed in consultation with the regulated community and involved stakeholders. The collaborative process was seen by the participants as valuable. See survey results at Office of Hearings and Mediation Services <http://www.dec.state.ny.us>. *See also* N.Y. Exec. Order No. 20, N.Y. Comp. Codes. R & Regs. Tit. 9, § 5.20 (1995).

28. The faculty have trained state ALJs and other adjudicators in Baltimore (May 1998), Nashville (November 1998) and Boston (April 2000). A training is currently planned for the spring of 2001 in Denver. The ALJ student population represents many state agency jurisdictions.

29. The NYSDPS Office of Adjudication and ADR sponsors a four-day program in mediation skills training and is approved for continuing legal education credit. The NYSDEC Office of Hearings and Mediation Services sponsors a one-day program in mediation skills training and is approved for continuing legal education credit.

Mr. Louis is the Chief Administrative Law Judge at the N.Y.S. Department of Environmental Conservation, Office of Hearings and Mediation Services.

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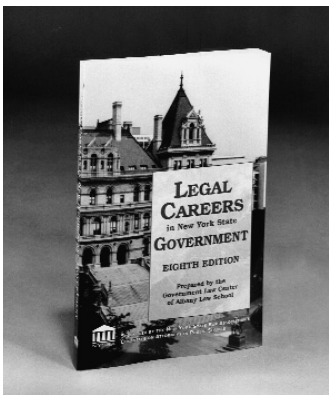

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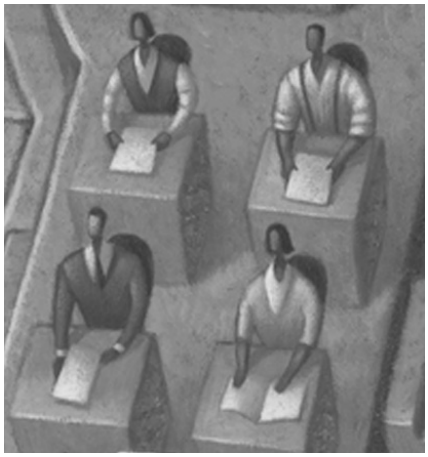

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