COMMENTARY

An Open Letter to DCA Officials and Other Users of Office of Administrative Hearings Administrative Law Judges

by Robert C. Fellmeth and Julianne B. D'Angelo

The Center for Public Interest Law (CPIL) has long been concerned about the review of disciplinary decisions issued by Office of Administrative Hearings (OAH) administrative law judges (ALJs) by multimember regulatory boards.[1] That review of ALJ decisions is now required by the Administrative Procedure Act (APA).[2] Under the APA, ALJ decisions are only "proposed decisions" to the officials controlling the agency. Thus, the agency officials who make the subsequent and final quasi-adjudicative decision are the same persons who hire and control those who investigate the case for the state and decide to file the charges. We contend that—with proper resources and the availability of independent, on-point subject matter expertise where needed—ALJs are better suited to making consistent and predictable final decisions in individual disciplinary cases.

Rather than reviewing and deciding disciplinary decisions, regulatory boards composed of professional and public member volunteers are better suited to monitoring disciplinary proceedings and adopting broad regulations and standards to deter abuses. We believe that standardsetting through rulemaking—which is applicable to thousands of licensees statewide—is more protective of consumers' interests and is a much better use of the limited time of the volunteer members of multimember regulatory boards than is preoccupation with the fact-based details of individual disciplinary cases.

With regard to Department of Consumer Affairs (DCA) agencies, we first presented a proposal to enhance the quality of ALJ decisionmaking and eliminate agency review, allowing direct court review for error, in a 1989 report on the Medical Board's physician discipline system entitled *Physician Discipline in California: A Code Blue Emergency*.[3] Our reasoning behind this proposal has been consistent for five years: Board members are not present at evidentiary hearings. They do not see the witnesses or have an opportunity to judge their credibility—one hallmark of American jurisprudence. They do not know of ALJ, agency, or court decisions in similar cases. They are not judicially trained, and have little or no experience in weighing evidence or knowledge of the rules of evidence applicable in administrative cases. They may exhibit bias (a predisposition toward harsh punishment or lenience) toward wrongdoer colleagues, which—in either direction—is inappropriate. They meet as a group only once every two or three months and have no reasonable opportunity to take decisive action in emergency cases; their required review of ALJ proposed decisions only delays action which could have been taken months earlier. Board review of ALJ decisions is also part of a system of five separate steps and reviews for administrative discipline, which contrasts with the three-step process for imprisoning violent felons.

Resistance by Bureaucracy. Several DCA executive officers and enforcement staff members disagree with the notion of permitting ALJs to make final disciplinary decisions, and urge retention of the current system of board review of proposed ALJ decisions. Some of these individuals have engaged in generalized "ALJ bashing," contending that some ALJs are incompetent, fail to understand or appreciate the nature of the violation(s) charged or the evidence produced in certain types of cases, make erroneous findings of fact due to their misunderstanding of the subject matter at issue, and are "civil-service-protected" employees who are not accountable to the agencies who pay them to hear cases.

This recent spate of unspecific "ALJ bashing" appears to have more to do with maintaining agency "territory" (and defeating our proposal) than it does with documented deficiencies in ALJ decisionmaking. As in any judicial setting, both the prosecution and defense sides sometimes complain about the quality of the judging—usually when an expected judgment or remedy is not granted.

However, the agency which controls the executive decision to prosecute and manages the underlying investigation should not expect to have all of its preferences reflected in a judicial result. The implication that such complaints should be determinative of judicial error and that the adjudicative result should be totally controlled by the relevant prosecuting agency is not a credible position. Moreover, it is impractical, given the fact of subsequent judicial review. Whether or not we have the unnecessary step of agency review, constitutional law requires additional step(s) of judicial review; at that level, persons who lack direct contact with the witnesses seen by the ALJ *and* the purported expertise of the agency in the substantive subject matter make the decision. Although we have completed no definitive survey, our observation of court review over many years suggests that the decisions of agencies counter to the ALJ's findings and proposed penalties are substantially more often reversed by courts than are ALJ rulings left undisturbed by an agency. In other words, when an agency interferes (even to "make an example" of a licensee in the direction of greater punishment), courts often side with the more detached judgment of the ALJ.

When designing a decisionmaking process, it is best to identify institutions composed of persons who have requisite independence and applicable knowledge, give them additional expertise on point to the matter in question where needed, and rely upon them. Rather than five separate hearings or steps, our proposed system would provide three steps of higher quality—the same number we afford criminal defendants. The result is better decisionmaking, more consistency, and less expense and time consumed. In the regulatory-discipline setting, such a proposed system requires agencies to do something they generally refuse to do: give up territory. We believe that agency officials are in a better position to perform quasi-legislative tasks—to decide important questions of rulemaking, and look at the big picture. They are not best suited to micromanage—for example, to decide whether John really did sell crack cocaine to Kathy on April 22 or not. They are not judges. They do not see the witnesses.

The ALJs are professionals, not volunteers; they are trained as judges to

evaluate evidence, aware of the concepts of admissibility and weight, cognizant of precedent, and they observe the demeanor of the witnesses under examination and cross-examination under oath. They are in the best position to make the findings of fact which should then be subject to single-step judicial review. The agency/prosecutor is not. Hence, if there are problems with an ALJ, or with several of them, those problems should be addressed. The solution is not to find an alleged lack of perfection, and use it as an excuse to move to an institutionally tainted system which cannot work optimally even if blessed with a population of Oliver Wendell Holmes, Louis Brandeis, and company as decisionmakers.

The State Bar Model. California administrative procedure aficionados also know that the proposed model, wherein professional ALJs make final adjudicative decisions without referral to the regulatory agency, is not unprecedented. In 1988, Senate Bill 1498 (Presley) (Chapter 1159, Statutes of 1988) overhauled the State Bar's adjudicative decisionmaking process. Prior to SB 1498, the Bar used 450 volunteer "hearing referees" to preside over evidentiary hearings involving attorneys accused of misconduct. While undoubtedly well-intentioned, those 450 volunteer lawyers were inadequately trained as judges and had no guaranteed knowledge of the Rules of Professional Conduct, the rules of evidence applicable in a State Bar disciplinary proceeding, the area of legal practice at issue, or other hearing referee and California Supreme Court decisions in similar cases. In an attempt to impose some level of consistency on the proposed decisions of these attorneys-turned-judges, the Bar referred all of them to an 18-member "Review Department" composed of twelve attorneys and six public members. The Review Department would meet once a month, and each of its members would be assigned to read a proposed decision or two and recommend the appropriate disposition to his/her colleagues. Needless to say, this model produced inconsistent and unpredictable results, and effectively encouraged respondent attorneys to "roll the dice" and go to hearing rather than stipulate to discipline.[4]

Encouraged by the California Supreme Court's public remonstration of the Bar for the poor quality of its adjudicatory decisionmaking,[5] the legislature passed SB 1498 (Presley) in 1988. The bill wiped away the panel of 450 hearing referees and replaced it with six full-time, professional, independent State Bar Court judges to preside over disciplinary hearings. And it eliminated the 18-member review panel and replaced it with a three-judge Review Department. All of these judges are appointed directly by the California Supreme Court. SB 1498 also required the Bar to publish the *State Bar Court Reporter*, a compendium of State Bar Court and California Supreme Court attorney disciplinary decisions, to encourage a *stare decisis*-type consistency. These judges specialize in a specific type of adjudicatory case, thereby enabling them to gain expertise in deciding them. They make the final agency disciplinary decision—not the Bar's Board of Governors. As a result, the State Bar's disciplinary decisionmaking process is the first in the nation to be completely free from the influence of the practicing profession.[6]

Now four years old, the new system has just survived its first test—an in-depth external review by a distinguished committee chaired by U.S. Ninth Circuit Court of Appeals Senior Judge Arthur L. Alarcón. In its report following months of investigation and public hearings, the Alarcón Committee recognized the improved decisionmaking of the revamped State Bar Court:

> The State Bar Court has...met with remarkable success. In 1993, the State Bar Court disposed of 201 more cases than it did in the preceding year, and 18% more than the total number filed. Even more impressive is the confidence shown by the Supreme Court in the integrity of the work of the State Bar Court. In 1990–91, the Supreme Court granted a writ of review in 30 cases. In 1992, 1 writ was granted. None were granted in 1992 and 1993.[7]

Whereas some members of the press and the Medical Board (in a patent attempt to defeat CPIL's proposal) have emphasized the Alarcón Committee's criticisms of the State Bar for overstaffing its disciplinary system, that overstaffing has only become apparent after four years, and it is due to unanticipated and welcome efficiencies flowing from the new system (if only the Medical Board "suffered" such efficiencies!). The Alarcón Committee recognized that the consistency and predictability of State Bar Court decisionmaking is encouraging more and more respondent attorneys to stipulate to discipline without going to hearing, or to accept the decision of the hearing judge without appeal. As a result, the once-staggering workload of the State Bar's adjudicative system has decreased significantly. With regard to the hearing judges, the Alarcón Committee stated:

> The State Bar Court has more judges and staff than necessary to meet its statutory function....The light caseload of the hearing judges has permitted them to spend one-half of their time writing scholarly twenty-page opinions in every case before them....There is no legal requirement for this costly busy work....The number of hearing department judges should be reduced from six to four and the proposed seventh position should not be filled....The trial department's practice of writing and issuing lengthy memorandum opinions in all cases should be substantially reduced.[8]

And as to the Review Department, the Alarcón Committee found:

> A further measure of the quality of the work of the State Bar Court is that in 1993, appeals were filed before the Review Department in less than 11% of the decisions of the hearing judges. In 1993, 40 opinions were filed by the judges of the Review Department. In the first six months of this year, 18 opinions have been filed. It is obvious from these figures that three judges, supported by full-time secretaries, research or staff attorneys, and clerical personnel, are no longer necessary to support the diminishing load of the Review Department.... The number of Review Department Judges should be reduced from three to two...[and] [s]upport staff should be reduced commensurably.[9]

Thus, far from criticizing the decisionmaking quality or structure of the new State Bar Court, the Alarcón Committee has upheld its integrity and recognized efficiencies in the new system which were unexpected even by its creators. The point? This is a system which has merit, has been tried, and works. It works so well it can ultimately save rather than cost money, if properly implemented. Rather than bashing the OAH ALJs for unspecified sins, DCA boards and other agencies which utilize OAH ALJs should look to the Bar's model and replicate it—eliminate the unnecessary agency review of proposed ALJ decisions, allow ALJs to be grouped into specialty panels reviewing a specific type of case where complexity and a critical mass of cases so warrant, and enjoy its consistency, predictability, and cost savings.

Specific Criticisms. Aside from generalized concerns about ALJ competency to make final decisions, some DCA Executive Officers and enforcement staff

officials have registered specific complaints about OAH ALJs, including the following:

• They frequently fail to apply the relevant agency's disciplinary guidelines in recommending a proposed penalty, and fail to explain why their recommendation does not utilize the agency's suggested penalty.

• They are not adhering to the 30-day requirement in Government Code section 11517(b), and sometimes take four to six months after case submission to forward a proposed decision to the agency.

• They are neither granting cost recovery when it is prayed for in an accusation, nor explaining why they have failed to grant it.[10]

CPIL is concerned about the problems DCA officials have expressed—both the general concerns about ALJ competence to issue final decisions and the more specific problems listed above. We share the agencies' stated interest in improving the system by providing greater protection for consumers from incompetent, impaired, or dishonest practitioners, while simultaneously providing requisite due process.

CPIL herewith invites DCA agencies and others which utilize OAH ALJs to substantiate the problems which have been alleged in conclusory fashion. Send us evidence of specific cases in which you have experienced problems with OAH ALJs. Send us specific ALJ opinions which exhibit the problems described above. Where feasible, include empirical statistics about the frequency of the problem(s) described. For example, if OAH ALJs took four months after submission (instead of 30 days) to forward proposed decisions in six cases from an agency last year, identify whether OAH heard a total of six or 60 cases from that agency last year. In other words, provide information which places the complaint(s) in statistical perspective.

Officials of DCA boards and other agencies which utilize OAH ALJs and the APA adjudicative process owe it to the citizenry they serve to provide constructive and illuminating documentation. It is neither possible nor advisable to improve this process based on anecdotal evidence or conclusory allegations. Prove your case factually. If you expect to influence public policy, we're all from Missouri: Show us. That is a burden others have properly assumed, and agency officials will have little credibility until they shoulder it as well.

Most of the information needed is within agency domain. Let's see it.

ENDNOTES

1. *See, e.g.*, Commentary, *Six Radical Ideas*, 11:4 CAL. REG. L. REP. 16, 19-20 (Fall 1991); Commentary, *Administrative Procedure Act Reform*, 10:1 CAL. REG. L. REP. 12 (Winter 1990); Commentary, *The Need for a New APA*, 9:3 CAL. REG. L. REP. 6 (Summer 1989).

2. CAL. GOV'T CODE § 11500 *et seq.*

3. Center for Public Interest Law, *Physician Discipline in California: A Code Blue Emergency* (April 1989), a condensed version of which is published in 9:2 CAL. REG. L. REP. 1 (Spring 1989) (copies available upon request).

4. The pre-1988 State Bar disciplinary decisionmaking process is described in detail in Robert C. Fellmeth, *Initial Report of the State Bar Discipline Monitor* (June 1, 1987), a condensed version of which is published in 7:3 CAL. REG. L. REP. 1 (Summer 1987) (copies available upon request).

5. *See, e.g.*, Maltaman v. State Bar, 43 Cal. 3d 924 (1987), in which the California Supreme Court delivered an unusually harsh and public critique of the quality of the State Bar's adjudicative decisionmaking:

> The record generated by the State Bar Court suggests that substantial discipline is warranted, but it does not support the disbarment recommendation....A brief comment is warranted in connection with our decision to reduce the recommended discipline.
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> We must rely heavily on the State Bar Court's disciplinary findings and recommendations, and we do not hesitate to impose the suggested discipline when presented with a record which justifies it. However, this record, like others we are receiving with increasing frequency, leaves material gaps in the analytical path from charges to proof to findings and conclusions to recommendation.
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> Here, as in other instances..., neither the charges nor the ultimate findings and conclusions relate individual facts to specific professional duties and rules the State Bar Court concludes have been violated. Indeed, the instant findings and conclusions bear only a general relationship to the charges and proof; in several instances—some significant—conduct not charged, or not proved, is found and relied upon as a basis for discipline.... [S]uch imprecision "[not] only... [makes] the work of this court more difficult since we are forced to determine the basis for the recommended discipline by deductive reasoning, but it also brings into question the adequacy of the notice given to an attorney of the basis for the disciplinary charges."

Id. at 931 and n. 1 (citation omitted).

6. The post-1988 State Bar disciplinary decisionmaking process is described in detail in Robert C. Fellmeth, *Final Report of the State Bar Discipline Monitor* (Sept. 30, 1991), a condensed version of which is published in 11:4 CAL. REG. L. REP. 1 (Fall 1991) (copies available upon request).

7. *Report of the Discipline Evaluation Committee to the Board of Governors* (Aug. 27, 1994) at 24.

8. *Id.* at 27, 56, 58.

9. *Id.* at 24, 55–56.

10. Effective January 1, 1993, Business and Professions Code section 125.3 created the "cost recovery" mechanism by authorizing occupational licensing agencies within the Department of Consumer Affairs to request the ALJ presiding over a disciplinary proceeding to order the disciplined licensee to pay the agency its "reasonable costs of the investigation and enforcement of the case..., including, but not limited to, charges imposed by the Attorney General." Business and Professions Code section 125.3(d) requires the ALJ to "make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested...."