COMMENTARY

IS THIS REALLY NECESSARY?

The Need for a New APA

The APA is an important statute. It specifies the ground rules for the operations of over 100 regulatory agencies. Many of those agencies are the subject of this publication. The extent to which they affect our lives is little understood. Political scientists and journalists are enamored with the more visible posturing of elected officials and the dramatic pronouncements of the judiciary. But it is the everyday decisions of our regulatory agencies which most affect our lives, and it is this forum which is least understood. It is ignored not only by academia and the press, but by other political institutions as well. The degree of deference paid to these agencies by courts and the legislature is well out of proportion to that quantum which may be deserved.

We have previously commented on the need to alter the portion of the APA dealing with quasi-legislative rulemaking—particularly the need to restrict the Office of Administrative Law from reversing decisions of boards based on an alleged lack of "necessity" for the rule, or based on ex parte (private) contacts with special interests complaining about rules after they have received a fair hearing. (See CRLR Vol. 8, No. 4 (Fall 1988) at 8.) The feature article written by Professor Michael Asimow in this issue raises a broad panoply of important questions. We accept his invitation to begin discussion of APA reform—long overdue—by commenting on the current structure of adjudicatory discipline proceedings and their review.

The adjudicatory part of the APA defines the due process steps necessary to discipline a licensee. Let's look at how it works now. Normally, an investigation is undertaken by investigators of a licensing board (or of the Department of Consumer Affairs). Where there is cause for discipline and it cannot be resolved through a warning, a formal "accusation" is filed under the APA. The Act then provides assiduously for due process safeguards to protect the accused. The right to continue to practice as a physician, pharmacist, barber, embalmer, dentist, or landscape architect is a "vested right" and its suspension or revocation is a serious matter. The statute properly allows for notice of charges, filing of an answer, right to discovery, right to present evidence, the opportunity to be represented by counsel, right to confront the witnesses and evidence against you, a decision by a finder of fact, recording of the proceedings, and right to appeal. The burden is on the agency to prove violation of its standards by "clear and convincing" evidence—more than the "preponderance of the evidence" test in a civil proceeding for damages.

This is all as it should be. But mechanically, the system runs as follows:

First, an evidentiary hearing is held before a committee of the regulatory agency or an administrative law judge (ALJ) of the Office of Administrative Hearings (OAH). Where a committee of the regulatory agency presides over the hearing, it often uses an ALJ to make evidentiary rulings but otherwise decides the case entirely itself. These committee panels are generally dominated by persons in the trade or profession of the accused. They are always volunteers. In the case of medical discipline, they are drawn from 250 physicians of various specialties from fourteen different regional panels scattered throughout the state. They sit on one or two such hearing panels per year at most. They may or may not practice in the particular specialty of the accused—most do not.

Where local volunteer practitioners serve as hearing judges, they have no training in administrative law and little in law. They generally have never "judged" outside this single context. They do not know of the decisions of other similar panels or of appellate cases. But they make the critical decision: as the trier of fact, they make findings as to what happened and recommend discipline.

Where an ALJ is assigned to perform this task without such a panel, a number of these deficiencies are remedied. But here the trier of fact has no expertise at all in the subject matter of what may be a technical case and no access to expertise. In fact, the scope of practice of ALJs may be wide and may encompass cases ranging from removal of an alcohol license to a Structural Pest Control Board case.

After this initial hearing occurs, the matter is submitted as a "proposed decision" to the regulatory body as a whole. This agency may then rewrite it. It may or may not hear oral argument. These agency governing boards, as with the hearing panels, include—and are often dominated by—those currently practicing the trade or profession of the accused, although not necessarily (or likely) in the particular practice specialty at issue in the case.

After this process is completed, the case usually enters the courts for judicial review of the administrative adjudication. It is subject to writ of administrative mandamus review by one of several thousand superior court judges. Since a "vested right" is at issue, this court applies what is called the "independent judgment" test for review. He/she looks at the raw evidence anew and makes an independent evaluation. He/she has no expertise in the subject matter at issue.

Then the case goes to a court of appeal for review, and then by petition to the California Supreme Court. If there is a federal constitutional issue, petition to the U.S. Supreme Court is possible.

Where contested by the accused, this process takes six to eight years to complete. Discipline is finalized commonly over ten years from the time the initial events leading to it occurred. Further, the system has no reasonable means for interim remedy to protect the public. In cases where immediate action is warranted, the agency's only recourse is to obtain a temporary restraining order (TRO) and preliminary injunction from a superior court judge. Because the superior courts see very few of these cases and lack the expertise to feel comfortable making a judgment about interim suspension or even about temporary license restrictions to protect the public, very few are granted. Only three have been obtained over the past three years for physicians—where the potential harm is particularly egregious and the need for interim safeguards most urgent. Not one TRO has been obtained over the past year in the face of 4,500 complaints against physicians, 249 of whom had their privileges revoked by hospitals for medical incompetence endangering

the public.

In addition to being ludicrously lengthy, the system is expensive. The agencies must pay for investigators (either their own or on an hourly basis from the Department of Consumer Affairs), transcripts, Attorney General time, and ALJ time. One case can cost over $100,000. The average case through initial hearing costs over $20,000 out-of-pocket. Many agencies, particularly those which are small, literally cannot afford to discipline more than half a dozen practitioners per year, regardless of abuse. These agencies are limited in their budgets to the "special funding" of license renewal fees from their licensees. For agencies with a small number of licensees, this creates a very real impediment to discipline.

The system also lacks the kind of professional independence appropriate for a serious police power decision to revoke a license. Those judging represent the "state" in the purest sense. That is, they are deciding to invoke *the power of the state* in the interests of the general public. Such a decision is not properly made by competitors or colleagues of the accused. Contrary to the imputations of their defenders, each of these trades and professions is not a medieval guild of tradespersons able to decide in cartel fashion who is in and who is out. The decision is made by a state agency. Expertise and information may well be offered on an advisory basis by those with a financial and emotional stake in the profession, but the decisionmaker on behalf of the state should represent the state's interest—period.

The system lacks the expertise for informed decisionmaking which is, ironically, its justification. The call for "peer review" rests on the false assumption that "only a doctor can judge a doctor" or "only a lawyer can judge a lawyer." In fact, most discipline cases do not involve any technical questions. Why does one have to be a doctor to judge the appropriate penalty for a physician who is defrauding Medi-Cal or committing sodomy on a child or dealing drugs? Most cases, in fact, fall into one of these latter categories. But where there may be a technical question involving expertise, how does it help to then have the current system? Is the hearing panel or the agency board of tradespersons going to have expertise *on point*? How much does someone in OB-GYN know about neurosurgery? Does it really help to have an ear, nose, and throat doctor on a panel judging a technical radiology question? Or is a little knowledge likely to be dangerous? How does it assure such expertise to then have a generalist judge with no knowledge at all of the subject matter have the last word (*i.e.*, writ of mandate independent judgment review)?

Finally, the system lacks the one hallmark of any judicial system: consistency. Predictability of outcome creates consistent expectations, enhances deterrence, and stimulates efficiency-creating settlements. Attorneys are less likely to throw the dice if the end result can be anticipated. The current system has very little assurance of such consistency. The pool of persons making the initial findings is large and uncoordinated—not even knowing of each others' decisions. Judicial review from one of many superior court judges depends upon a *stare decisis* system of review by courts of appeal in six different districts, and is subject to final disposition by a Supreme Court with a workload which precludes realistic accommodation of inconsistencies (except in extreme cases) between districts.

In short, the system is a mess. Nobody would have purposefully designed it the way it is working. It simply evolved.

There is a better way. Here is how it would work:

(1) An ALJ who specializes in a major subject area and who has at least rudimentary training in the terms of art of that subject matter would conduct the initial evidentiary hearing.

(2) The ALJ would have available to him/her a panel of leading experts in all subject areas and disciplines at issue. The ALJ could call on any such expert with relevant expertise to review evidence and offer testimony "on the record" and subject to cross-examination. Rather than being a "hired gun" expert for either side, this panel would be an ALJ resource.

(3) The case would be appealed directly to a single designated panel of the court of appeal and would be sustained if supported by "substantial evidence" (the substantial evidence test). A single panel would hear all cases in a given subject matter (such as medical discipline cases), precluding conflicts between districts and assuring efficiently produced consistency.

(4) A discretionary petition to the Supreme Court would be available, as is currently the case.

The entire process would be shortened from six to eight years to eighteen months. The quality of the proceeding would improve. Rather than asking four different tribunals (plus Supreme Court discretionary review) to make a low quality decision knowing that others will look at it, you would have two steps. But those two steps have accountability, independence, and expertise. The current system has two steps by amateurs who know little about law, judging, or other decisions, followed by two steps by professionals who know little about the subject matter and have no access to expertise outside the hired experts and adversarial posturing which does not always serve finding the truth.

And you would have a body of judges, the special administrative law judges, available to impose interim remedies after hearing to protect the public where warranted. They would have knowledge both of the law and the subject matter, with available expertise, awareness of each other's decisions, and independence to represent the public interest fairly.

The current system is the result of unintentional evolution of administrative law and its review. The system we suggest is now reflected to a large extent in the State Bar reforms of 1988 in SB 1498 (Presley), and is now under consideration for physicians in SB 1434 (Presley). It is a model deserving replication for other trades and for other states.

Letters To The Editor: MWD Responds to Water Transfer Article

June 1, 1989

Dear Editor:

We found Jon Ferguson's water transfer article, *The First Major "Water Transfer": Opening the Floodgates*, in your Winter 1989 issue quite informative. His review of related water law focuses needed attention on the institutional complexities required to achieve a major water transfer.

We especially appreciate his use of Metropolitan Water District's recently executed agreement with Imperial Irrigation District as an important development in extending the use of southern California's limited water supplies.

However, the article's title is overly optimistic, and perhaps misleading. The water transfer which the article describes is in fact a water conservation agreement between junior and senior rights holders, rather than an "open market" water transfer. Indeed, one of the other junior rights holders is currently litigating the agreement's impact on its rights in *Coachella Valley Water District v. Imperial Irrigation District, et al.*, No. 890165B (IEG) (S.D. Cal. 1989).

In the interest of developing a workable water transfer model, therefore, we believe it should be emphasized that Metropolitan's agreement with Imperial

does not constitute a water transfer as that term is commonly used.

One-Of-A-Kind Transaction. In particular, the agreement reflects a unique institutional and physical arrangement that may not be readily replicable in other areas of California. More specifically, the agreement provides funding for Imperial Valley water conservation programs that will enable Imperial to meet its water supply responsibilities with less Colorado River diversions than it would otherwise use.

Under long-standing state and federal contracts, Metropolitan would then be able to increase its Colorado River diversions by the amount Imperial reduces its diversions. Those contracts fully allocate all of California's Colorado River entitlement to specific agencies in a clearly identified priority arrangement (*Arizona v. California* (1963) 373 U.S. 546). Obviously this is an arrangement that differs significantly from an open market water transfer.

Federal Characteristics. It is also important to emphasize that Imperial's Colorado River rights are not conventional appropriative state water rights. As Mr. Ferguson indicates, the development of the Colorado River has imposed some important federal characteristics on Colorado River rights. In return, the federal projects assure Imperial a much more reliable Colorado River supply than it originally had.

The federal Colorado River Contract Program also relieves Imperial from any use-it-or-lose-it risks. On the other hand, it allows Imperial to divert only the amount of Colorado River water needed for reasonable beneficial use within its Imperial Valley service area. Any water Imperial cannot use in that manner must be left in the River for Metropolitan and other junior California rights holders (State Water Resources Control Board Decision 1600, at 10-18).

The U.S. Supreme Court has expressly ruled that the federal Colorado River water contracts, rather than state law such as that administered by SWRCB, determines the allocation of California's Colorado River water (373 U.S. at 585-90). Nevertheless, SWRCB has authority to determine whether Colorado River is used wastefully once it is diverted into California (*Imperial Irrigation District v. SWRCB* (1986) 186 Cal. App. 3d 1160).

Consistent State Law. California law also parallels the federal law in other respects. In particular, it precludes any transfer of Imperial's water rights to areas outside Imperial Valley if that would injure junior users such as Metropolitan (Water Code sections 1701, 1702, 1706). Transferring Imperial water to third parties for use in other areas would obviously injure Metropolitan by reducing its rights to Colorado River flows that are not needed for reasonable beneficial uses in the Imperial Valley.

California's water transfer and conservation statutes carefully preserve that protection for junior rights holders such as Metropolitan (Water Code sections 1005, 1012). Water Code section 1011(b) specifically conditions the sale or lease of conserved water on compliance with other "provisions of law," such as Water Code section 1706, and article X, section 2 of the California Constitution.

Furthermore, those statutes apply only to surplus water. Since California's Colorado River entitlement is fully allocated, it does not include any surplus water. The federal contracts, in fact, authorize California rights holders to use nearly a million acre-feet more than California's basic entitlement (SWRCB Decision 1600, at 11-13). Metropolitan's share of that entitlement is over 60% short of the amount of use specified in its Colorado River contract. Obviously, Metropolitan will need any Colorado River water that the Imperial Valley does not need (*id.* at 53).

Prior Major Transfers. Conventional water transfers, involving much larger amounts of water, have been central to California's urban population for generations, although sometimes marked by environmental and other area-of-origin controversies. For example, the City of Los Angeles has been transferring water from the eastern Sierra for over half a century, while the San Francisco Bay area has been transferring water from the western Sierra for a similar period.

While these may not be considered pure open market transactions under today's conventions, they certainly are major water transfers that have proven very beneficial to California over the years.

We very much appreciate this opportunity to clarify these points and certainly commend Mr. Ferguson's continuing search for workable and reasonable methods for increasing the efficiency of our limited water supply resources.

Very truly yours,

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