

AMERICAN BAR ASSOCIATION

**NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association encourages state, local and territorial jurisdictions to consider using a central panel system for state administrative law adjudications in appropriate cases.

FURTHER RESOLVED, That the American Bar Association encourages state legislatures to implement several recommendations to increase central panel fairness and efficiency, including (1) independent funding allocated directly by the legislature; (2) the creation of an advisory council to review, analyze, and advise on current and proposed central panel practices; (3) a more balanced system of generalist/specialist ALJs within the central panels; (4) a complaint process for parties to voice their concerns; and (5) more training for adjudicating cases involving pro se litigants, addressing implicit bias, and increasing ALJ diversity.

REPORT

Introduction

In the 1970s, states began to experiment with the central panel system of administrative adjudication, in which administrative law judges (“ALJs”) are not employed by the agencies whose cases they hear, but by a separate central panel agency created to adjudicate a broad spectrum of cases arising from other agencies. The central panel system is a framework to increase the judicialization of the state administrative process by distancing ALJs from the agencies they serve, to thereby ensure fair, high-caliber decision-making, and to promote cost efficiencies. Central panels may differ in aspects such as the kinds of cases they hear, how they are funded, how decision-making independence is insured, and whether there are cost efficiencies.¹

Those familiar with state administrative law have long favored the central panel system. Malcolm Rich and Alison Goldstein’s *The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*² summarizes a recent, extensive study of the benefits of central panels.³ Rich and Goldstein trace the rise of the central panel system in over 30 states and municipalities in the past 50 years and analyze its state-specific impacts.⁴

Why Recommend Expansion of State Central Panels?

The Resolution encourages state legislatures to consider implementing several recommendations to increase central panel fairness and efficiency, including (1) independent funding allocated directly by the legislature; (2) the creation of an advisory council to review, analyze, and advise on current and proposed central panel practices; (3) a more balanced system of generalist/specialist ALJs within the central panels; (4) a complaint process for parties to voice their concerns; and (5) more training for adjudicating cases involving pro se litigants, addressing implicit bias, and increasing ALJ diversity.

The authors of the Appleseed Report found that state central panels increased administrative transparency, perceived fairness, and ALJ independence. They further noted the historical trend towards the expansion of both the central panel approach to more states and, after adoption, expansion of

¹ Young, Ann Marshall, “Judicial Independence in Administrative Adjudication: Past, Present and Future,” 38 *Judges’ Journal* 16 (1999) [Reprinted with permission in 19 *J.NAALJ* 101 (1999)].

² Malcolm C. Rich, J.D. & Alison C. Goldstein, MPH, *The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*, CHICAGO APPLESEED FUND FOR JUSTICE (Feb. 2019), hereinafter “The Appleseed Report.”

³ The primary author, Malcolm Rich, first published his research on the subject in 1981 when there were only eight state central panels. Malcolm C. Rich, *Adapting the Central Panel System: A Study of Seven States*, 65 *Judicature* 246 (1981).

⁴ Also see, Schoenbaum, Edward J., “A brief History of the Model Act to Create a State Central Hearing Agency,” 17 *J.NAALJ* 309 (1997).

jurisdiction to additional agencies within those states, as the panels have increased due process and efficiency.

Benefits of the Central Panel Approach

Central panels separate investigative and prosecutorial powers from adjudicatory powers, making administrative adjudications fairer and closer to Article III judicial proceedings. They decrease the appearance of bias that occurs when ALJs are hired, promoted, supervised, and paid by the agency that appears before them as a party.⁵

Individuals that bring claims against agencies often feel they are treated unfairly under the traditional agency hearing system. This is largely due to the perception that the presiding ALJ worked directly with, and was dependent on, the litigating agency. This is especially true for pro se litigants representing themselves against the state.

The public generally perceives central panel ALJs as more impartial, and believe that they produce fairer decisions. Litigants feel as if they have been afforded greater due process of law when they appear before an ALJ who is a member of a central panel rather than an agency employee. This appearance of increased judicial independence is an important factor in the success of the central panels.⁶

Most ALJs surveyed identified the benefits of central panels as improved public trust, more positive perceptions of administrative courts, and cost effectiveness. They suggested that more state agencies should be incorporated into the panel's jurisdiction, and that more ALJs should be recruited so that they would be easily able to recuse themselves when appropriate. None of the ALJs that were surveyed thought it would be wise to return to the traditional model of administrative adjudication. Indeed, ALJs generally found greater job satisfaction and prestige belonging to a central panel.⁷

The Evolution of the Central Panel Movement

Concerns about the constitutionality of in-agency adjudicators date back to the early 20th Century; as the administrative state expanded, so too did questions of agency accountability. Agencies, and their adjudicatory processes, have often been criticized for failing to adequately protect the rights of litigants or apply policy fairly. A growing number of states have responded by instituting central panels "to

⁵ Felter, Edwin L., Jr., "Maintaining the Balance Between Judicial independence and judicial Accountability in Administrative Law, 22 *Judges' Journal* (1997) [Reprinted with permission 17 *J.NAALJ* 89 (1997)]; "Special Problems of State Administrative Law judge, 53 *Admin.I.Rev.* 403 (2001) [Reprinted with permission in 8-10 *Law and Justice:Journal of theUnited Lawyers Ass'n* 41 (2001-2003), New Delhi, India].

⁶ Kane, John L., Jr., Senior U.S. District Judge, Colorado, "Public perceptions of Justice;: Judicial independence and Accountability," 17 *J.NAALJ* 203 (1997).

⁷ Rochvarg, Arnold, "Is the Rule of necessity Really Necessary in State Administrative Law: The central Panel Solution," 19 *J.NAALJ* 35 (1999).

better ensure a high-quality, effective, efficient, and independent administrative judiciary.”

The central panel experiment began in 1938, when the California State Bar issued a report detailing the need to separate agencies’ prosecutorial and adjudicatory functions and develop a judicial review process for administrative decisions. After extensive study, both the California APA and the nation’s first central panel were adopted in 1945.⁸

In the 1970s other states began to experiment with their own central panels, and by the end of the decade seven states had adopted a version of the central panel approach. This was often part of broader administrative reform, spurred by a desire for greater transparency, the appearance of justice, and fiscal responsibility. Colorado, for example, adopted a central panel “to promote decision-making independence and cost-cutting.” The movement towards central panels was embraced by nearly all ALJs, who welcomed the opportunity to hear a wider variety of cases, and by state bar associations, who viewed it as a way to enhance their members’ prestige and to make administrative adjudication more independent, efficient, and professional. The State of Maryland adopted a central panel for good government reasons.⁹

Current Issues and Recommended Practices

Structure of Successful Central Panels

Central panel structure can vary widely among states. The movement has grown out of an “interactive web of legislative negotiations, state-based politics, policies and procedures of the hearing system, [and] due process considerations.” To capture some of this variety, the Appleseed Project surveyed 23 central panel directors around the country, asking about both panel structure and more qualitative perceptions of the central panel approach. Some of the main takeaways are summarized below.

Funding

Central panels may receive money through general funding, where the state legislature appropriates a set amount of money for the panel’s operating budget through a revolving fund, or through a mandatory cost allocation system, where the legislature mandates a portion of agencies’ allocated budgets to fund the central panel. Funding may also be through an “Oregon Plan,” where the central panel bills agencies an hourly rate for adjudication services. This system has been tried and rejected by some central panels, including Colorado and Maryland. Many ALJs perceive the first two methods as fostering impartiality, since it frees ALJs from reliance on payment from the agency

Jurisdiction

⁸ Asimow, Michael, “The Administrative Judiciary: ALJs in Historical Perspective, 20 *J.NAALJ* 157 (2000).

⁹ Hardwicke, John W., “The Central Hearing Agency: Theory and Implementation in Maryland, 14 *J.NAALJ* 5 (1994).

Most states have exempted specific agencies or types of decisions from central panel jurisdiction. This is decided by state legislatures responding to particular concerns and political pressures, often from agencies concerned with losing administrative autonomy. Workers compensation proceedings, for example, are frequently exempted from central panel adjudication, making Colorado, Minnesota and Florida unusual in this respect. Some agencies that deal with complex scientific or technical matters opt to exempt specific subsets of their hearings from central panel adjudication, while still sending their more general hearing matters to the panel.

Central panel jurisdiction can be voluntary, mandatory, or a hybrid of the two. Under voluntary jurisdiction, agencies decide which cases to refer to the central panel. Critics believe that this undermines the appearance of justice, as agencies can consciously divide hearing loads between their agency ALJs and the central panel.

Level of ALJ Specialization

One objection that central panel opponents raise is that ALJs hearing a diverse range of cases will be less knowledgeable on technical subjects than their specialized agency counterparts, which may leave them vulnerable to manipulation by the parties. Central panel ALJs are generalist judges, although they generally have more specialized expertise than Article III judges. Proponents argue that the central panel model avoids the “insularity and complacency” of specialized ALJs hearing cases from the same few agencies. Some states have adopted a “hybrid approach,” where specialized ALJs hear more technical cases and other ALJs hear a variety of less-complex cases. Among the central panel directors surveyed, one third divided central panels into sub-units based on ALJ specialization in technical areas. The majority of directors/chief judges reported making assignments with ALJ expertise in mind, and felt that having a generalist hear the arguments added to the impartiality of the hearing process.

Suggested Practices and Recommendations for Newly Established Central Panel Agencies

Based upon the conclusions reached in their research, Rich and Goldstein advised that state jurisdictions adopting central panel systems should follow these key recommendations in order to create the fairest and most efficient adjudicative system.¹⁰

1. Direct funding of central panels from state legislatures through revolving funds or from mandatory cost-allocation systems in the agencies, rather than from hours billed to state agencies for use of the panel’s adjudicatory services.
2. Creation of an advisory council to provide central panels with direction and advice on rulemaking, with the goal of implementing standardized central panel procedural rules from the beginning. This could include a review of current practices and procedures within both the judicial court system and

¹⁰ The Appleseed Report, *supra* note 1, at 72-73.

the administrative hearing system. Central panels should avoid importing existing procedural rules from diverse agencies.

3. Consultation with ALJs before setting reasonable standards for case quotas, decisional deadlines, along with flexibility in adjusting such standards.
4. Experimentation with assigning ALJs to tiers to determine what cases they could hear based on experience. The ALJs could be promoted to higher tiers, creating an incentive system to reduce complacency.
5. High selection standards for ALJs to increase the cadre's quality and diversity.
6. Implementation of a hybrid system of generalist and specialist ALJs, while avoiding assigning ALJs to cases from their former agencies.
7. Better use of technology, including electronic data collection systems to track cases, electronic filing systems, online access to forms, and a complaint process for parties to voice concerns.
8. Regular implicit bias and pro se litigant training for central-panel ALJs.

In order to monitor progress, new and existing central panels should issue annual reports which provide analytic data for such factors as (1) changes in jurisdiction and documentation of the cost impact of these changes; (2) expertise and experience levels of current and newly hired ALJs and staff; (3) case processing time; (4) case-flow-management data; and (5) cost efficiency data.

Conclusion

State, local and territorial jurisdictions that do not presently have a central panel are encouraged to consider establishing a central panel structure in appropriate cases. The resolution encourages adoption of this proven model of state administrative law adjudications. Doing so would promote public confidence and maintain trust in the independence of administrative law adjudicators, as well as encourage continued efficiency of the administrative adjudicatory processes.

Respectfully submitted,

Judson Scott
Chair, National Conference of
the Administrative Law Judiciary
August, 2019

GENERAL INFORMATION FORM

Submitting Entity: National Conference of the Administrative Law Judiciary

Submitted By: Judson Scott

1. Summary of Resolution(s).

This Resolution encourages state, local and territorial jurisdictions to establish the central panel model for administrative hearings as it has been demonstrated that this system of administrative adjudication delivers decisional independence, increased efficiency, cost effectiveness, greater transparency, a highly-qualified cadre of administrative law judges, expansion of jurisdiction, greater protection for unrepresented litigants, and enhanced public trust in an impartial system of administrative justice for all litigants. The Resolution also outlines five specific recommendations to increase central panel fairness and efficiency.

2. Approval by Submitting Entity.

Yes. The National Conference of Administrative Law Judges approved this submission on January 25, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The improvement and overall national uniformity in the fair and impartial dispensation of administrative justice in the United States.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not Applicable

6. Status of Legislation. (If applicable)

Not Applicable

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The National Conference of the Administrative Law Judiciary (NCALJ), a conference within the Judicial Division, has worked with the Appleseed Project

to assist states in implementing their administrative law systems into a central panel. Through voluntary promotion of this Resolution to states and territories where central panels are not yet in place, NCALJ members will continue to successfully assist state governments in transitioning to a central panel. ABA policies concerning legal systems are compelling to state legislatures. Assistance in this fashion has been successful with Alaska and Oregon. Currently, Illinois has commenced a pilot project to begin a central panel with the assistance of the Appleseed Project and NCALJ members and the Indiana legislature has enacted legislation to fully implement a central panel in July, 2020. NCALJ has the ability to continue its efforts by informing state governments of the underlying Appleseed study, its prior successes, the ABA Resolution, if adopted, and respond to inquiries that state officials may have while acting in accordance with ABA policy.

8. Cost to the Association. (Both direct and indirect costs)

It is not anticipated that passage of this resolution will bear any costs for the Association.

9. Disclosure of Interest. (If applicable).

The only interest the National Conference of the Administrative Law Judiciary has is improving the quality of administrative justice in the United States.

10. Referrals.

This Resolution encourages state, local and territorial jurisdictions to establish the central panel model for administrative hearings as it has been demonstrated that this system of administrative adjudication delivers decisional independence, increased efficiency, cost effectiveness, greater transparency, a highly-qualified cadre of administrative law judges, expansion of jurisdiction, greater protection for unrepresented litigants, and enhanced public trust in an impartial system of administrative justice for all litigants.

States and local jurisdictions currently operating with a Central Panel system:

Alaska	Arizona	California	Colorado
Florida	Georgia	Illinois	Indiana
Iowa	Louisiana	Maryland	Massachusetts
Michigan	Minnesota	Missouri	New Jersey
North Carolina	North Dakota	Oregon	South Carolina
Tennessee	Texas	Washington	Wisconsin
Chicago (City)	New York (City)	Washington, DC	Cook County, IL
Quebec (Canada)			

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Hon. Dean Metry
Delegate to the House of Delegates
National Conference of the Administrative Law Judiciary
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EXECUTIVE SUMMARY

1. Summary of the Resolution

As more state, local and territorial governments look to create efficiency in the administration of their duties, administrative adjudication is increasingly utilized to resolve litigation instituted by governmental agencies or the general public. Typically, litigation in an administrative hearing is presided over by an Administrative Law Judge, or comparable hearing officer (“ALJ”), who is employed by or contracted by an agency that is usually a party to the litigation. While the ALJ and the agency can and often do take steps to ensure impartiality and independence, a negatively inherent perception of this relationship remains. This perception seldom reflects the reality of a conflict, but in the eyes of the citizen-litigant the perception creates doubt.

A central panel removes the ALJ from the agency and places the ALJ in a neutral central agency reporting to a chief ALJ. By removing the ALJ from the agency that is a party to the litigation, the central panel removes the stigma of this inherently negative perception. This creates in the ALJ a degree of decisional independence that allows the ALJ the ability to decide cases based on the facts and the law, avoiding even the appearance of a conflict.

This Resolution encourages state, local and territorial jurisdictions to establish the central panel model for administrative hearings as it has been demonstrated that this system of administrative adjudication delivers decisional independence, increased efficiency, cost effectiveness, greater transparency, a highly-qualified cadre of administrative law judges, expansion of jurisdiction, greater protection for unrepresented litigants, and enhanced public trust in an impartial system of administrative justice for all litigants. These conclusions have now been confirmed by the 2019 Chicago Appleseed Fund for Justice Report entitled, ***The Need for a Central Panel Approach to Administrative Adjudications: Pros, Cons, and Selected Practices, authored by Malcolm C. Rich, JD and Alison C. Goldstein, MPH (with pro bono assistance from Goldberg Kohn)***. The Resolution also outlines five specific recommendations to increase central panel fairness and efficiency.

2. Summary of the Issue that the Resolution Addresses

The continued expansion of central panels into state, local and territorial governments will enhance the administrative law judiciary by removing the perception associated with a judiciary that is compensated by a party to the litigation. A majority of the states and many metropolitan areas have already converted from the old decentralized agency adjudicator system to the central panel model. Most central panels are different and custom designed. This resolution recommends the continuation of a custom design central panel based

on conclusions reached in a new comparative central panel study. In support of this concept, Malcom Rich's original research in 1981 was the seminal study of the then existing seven state central panels. His original monograph study was commissioned by the American Judicature Society in 1980 and was later published as a law review article, entitled, ***Adapting the Central Panel System: A Study of Seven States***, in 65 JUDICATURE 246 (1981). After almost 40 years Malcom Rich again undertook a thorough study of the now greatly expanded majority of states that have now established a central panel. Since his original study the central panel model has also spread to several major metropolitan areas. His conclusions in his most recent monograph study emphasizes the success of the existing central panels as "laboratories in developing new approaches to resolving disputes" when "the lives of hundreds of thousands of persons and businesses are at stake." His latest study was partially underwritten by the American Bar Association. This Resolution, supported by the findings of this study and as previously conceptually endorsed by the ABA, encourages jurisdictions that have not adopted a central panel to now do so and thereby provide litigants a more just, effective and efficient forum.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Common within the broader context of the judiciary within American jurisprudence, the core functions of an ALJ is to hear the presentation of facts and law by the parties involved in litigation, make an impartial decision that is independent from all outside influences, and conduct mediations when appropriate. A separate central panel agency within a governmental unit becomes free to focus on judicial independence and efficiencies while providing the citizens a fair and impartial administrative hearing. To that end, ABA endorsement of the central panel approach for administrative adjudications will encourage other states, local and territorial jurisdictions that have not adopted this approach to consider doing so.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

No minority or opposing views have been identified.