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THE PEER REVIEW PROCESS IN ADMINISTRATIVE ADJUDICATION

Robert Robinson Gales*

I. INTRODUCTION

A topic that is becoming increasingly popular these days is the Peer Review Process. This process, according to David Kronick in his article entitled *Peer Review in 18th Century Scientific Journalism*,¹ can be traced to the publication of *Philosophical Transactions* by the Royal Society of London in 1752.² Some agencies view the process as a panacea for avoiding potentially troublesome agency decisions. However, it can be a mechanism for enhancing the quality and consistency of those decisions, of discouraging judicial innovation, or even influencing or prescribing the outcome or the bottom line of pending cases. Individual administrative adjudicators, whether they are characterized as administrative judges, administrative law judges, hearing examiners, hearing officers, magistrates, or judges, view the process with considerable suspicion. To them, the foremost purpose of this process – another pair of eyes armed with a sharp red pencil, reviewing their work – is decisional interference de-

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1. David Kronick, *Peer Review in 18th Century Scientific Journalism*, 263 JAMA 1321 (1990).

2. See Lars Noah, *Sanctifying Scientific Peer Review: Publication as Proxy for Regulatory Decisionmaking*, 59 U. PITT. L. REV. 677 (Spring 1998) (critically analyzing the peer review process).

signed to deprive them of the degree of decisional independence essential for continued true due process.

Some administrative adjudicators contend that judicial independence can only exist when the individual adjudicator's decision-making process and the crafting of a decision is constrained solely by their own reason, logic, knowledge of the law, literacy, and professional ethics and responsibility.

Ex parte input by the agency, also known as subsequent review or approval, of the decision by the agency prior to issuance is considered inappropriate control of the decision-making process presenting a false pretense of due process. The administrative adjudicator whose name or signature is affixed to the bottom of the decision, should, in the words of Justice Vincent Brogna of Massachusetts, "have the courage of your own error."³ The zealously independent administrative adjudicator believes he or she should be free to be wrong, biased, inconsistent, illogical, inarticulate, and incomplete. Furthermore, these types of adjudicators believe that they should be free to ignore facts, law, and policy.

To these adjudicators, errors or disagreements should be resolved during an open agency appellate review process, much as it is with "real judges," and not through, what they see as, pre-issuance, "quality control," decisional interference. After all, "[t]here can be little doubt that the role of the modern . . . hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge."⁴ Chief Administrative Law Judge Edwin Felter, Jr.⁵ suggested that the process be taken beyond the appellate process and argued that there are other appropriate ways for agencies to deal with undesired adjudication outcomes.⁶ He identified the undesired outcomes as statutory or rule changes, and increased training of litigation and investigatory staff.⁷

3. Justice Vincent Brogna, Address to the American Academy of Judicial Education, Cambridge, Mass. (July 9-14, 1978).

4. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

5. Director and Chief Administrative Law Judge, Colorado Division of Administrative Hearings, Denver, Colo.

6. Edwin Felter, Jr., *Maintaining the Balance Between Judicial Independence and Judicial Accountability in Administrative Law*, 17 J.NAALJ 89, 93 (Spring 1997).

7. *Id.*

Chief Administrative Law Judge John Hardwicke,⁸ in his exceptional exchange with Administrative Law Judge Ronnie H. Yoder,⁹ of the U.S. Department of Transportation addressed these issues, adding that:

There's no question that [issues regarding the correctness or bias of a judge] are for the reviewing appellate court. But it is awfully good to try to get it right the first time, because the appellate reviewing court gets into action only at considerable expense and delay to the system So it is entirely proper for a judge, a reviewer charged with the duty of due process, to take a look at the work of other judges My experience has been that the judges who do not like to be reviewed are the very judges who must be reviewed.¹⁰

The agency generally perceives such a degree of judicial independence "exercising the 'freedoms' and practicing self-constraint" as encouraging a lack of adjudicator accountability or responsibility, thereby creating "renegade" adjudicators who tend to "run amok," to the potential detriment to the agency as well as the system.¹¹

**SHOULD THE ADMINISTRATIVE ADJUDICATOR BE FREE
TO BE WRONG, BIASED, INCONSISTENT, ILLOGICAL,
AND INARTICULATE? SHOULD THE ADMINISTRATIVE
ADJUDICATOR BE FREE TO IGNORE FACTS, LAW, AND
POLICY?**

8. Chief Administrative Law Judge, Maryland Office of Administrative Hearings.

9. Acting Chief Administrative Law Judge of the U.S. Department of Transportation.

10. Ronnie A. Yoder & John Hardwicke, *Yoder-Hardwicke Dialogue: Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence, Due Process or Ex Parte Prohibitions?*, 17 J.NAALJ 75, 86 (Spring 1997).

11. *Id.* at 86.

While both sides offer some reasonable rationales for embracing or rejecting the process, in reality, the peer review process is not entirely deleterious, depending on the specifics of the system selected by the agency. Before the positions of the “combatants” become too hardened, it appears appropriate to examine the process from a variety of perspectives, unburdened by parochial bias.

II. THE GENERIC PEER REVIEW PROCESS

Traditionally, a peer review process in some areas known, as “refereeing” has been a method of:

1. Evaluating physicians’ qualifications for staff privileges at a hospital to ensure quality care of patients.
2. Monitoring the quality of medical and nursing services that patients receive.
3. Determining the merits of complaints concerning the quality of medical or nursing services furnished.
4. Evaluating teaching qualifications for university faculty appointments and retention.
5. Assessing the quality, validity, and accuracy of scientific arguments, procedures, and findings, as well as the correctness and plausibility of results for the allocation of resources, including publication in scientific journals, research funds, and recognition.

The internal monitoring and evaluation of other professional activities and performance by members of individual professional firms such as architects, engineers, and attorneys, has also commenced.¹² Until relatively recently, however, the formal process did not extend to the decision-making of administrative adjudicators. It is now rapidly achieving agency approbation.

12. See Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271 (Winter 1997) (analyzing attorney attitudes regarding peer review).

A. The "Peer"

1. Is the Reviewer Actually a Peer?

Before the peer review process can be meaningfully discussed, it is crucial to explore the individuals who might reasonably constitute an appropriate "peer" matrix. A common definition of the word "peer" is "a person . . . of the same rank, value, quality, ability, etc.; equal; specifically, an equal before the law."¹³ Another resource defines "peer" as an "equal, match, fellow, like, equivalent, equipollent, coequal, parallel, ditto [coll.]; peer, compeer, rival."¹⁴ Finally, a third adds "one that is very similar to another in rank or position: *doctors' competency reviewed by their peers. She is the peer of any tennis player on the professional circuit,*" as well as the synonyms: "coequal, colleague, compeer, equal, equivalent, fellow" to the definitions of the word "peer."¹⁵

Thus, it appears that the "peer" selected to "*peer review*" decisions of administrative adjudicators should be of the same or equal background, grade, position, or responsibility as the deciding administrative adjudicator; in other words, a colleague. This raises several fundamental questions as to the propriety of appointing individuals serving in the following positions as a peer reviewer: a supervising, presiding, or chief judge; an agency director of policy; an agency staff attorney; any agency supervisor; any member in an agency Subject Matter Specialist division; a clerical, administrative, or staff person within the agency judiciary division; a judicial colleague in an agency Subject Matter Specialist division; or a judicial colleague in the agency judiciary division.

2. Goals of Peer Relationships.

"The goal of peer relationships is cooperation among equals."¹⁶ The person selected to perform "*peer review*" responsibilities must be free of any agenda or bias. Furthermore, for the process

13. WEBSTER'S NEW WORLD DICTIONARY 996 (3d ed. 1988).

14. ROGET'S INTERNATIONAL THESAURUS 13 (3d ed. 1962).

15. ROGET'S II: THE NEW THESAURUS 719 (1988).

16. SANDRA BURT & LINDA PERLIS, PARENTS AS MENTORS 175 (Prima Publishing 1999).

to achieve maximum effectiveness, and to improve the overall quality of the decision, the peer reviewer must provide fair, balanced, and constructive criticism and comment. To do otherwise may prove to be counterproductive.

III. THE PEER REVIEW PROCESS

For the purposes of this discussion, I have chosen to divide the peer review process into segments identified as Pre-Issuance Review and Post-Issuance Review, terms which will be further explained below.

The Pre-Issuance Review possesses the potential of interfering with decisional independence, especially if it focuses on the "bottom line." Decisional consistency within the agency essentially serves as a quality critique and refinement of those components of the decision which precede the "bottom line." It is a quality enhancer. Unfortunately, it is also an impediment to timeliness. Pre-Issuance Review is the focus of this article.

The Post-Issuance Review takes place after the decision has been issued. It suffers from few of the negative characteristics of the Pre-Issuance Review, and serves primarily as an educational tool for future improvement of fact-finding, legal research, interpretation, legal drafting, and analysis. It can also be used as a method of gauging professional performance. Post-Issuance Review will not be discussed any further in this article.

GALES' COMPONENTS OF PRE-ISSUANCE REVIEW:

Clerical Review

Quality Review

Agency Compliance Review

Agency Acceptability Review

GALES' COMPONENTS OF POST-ISSUANCE REVIEW:

Agency Decision Consistency Analysis**Agency Education and Training Review***A. Pre-Issuance Review - The Clerical Review*

The initial step in the process, and the one which creates the least *angst* or opposition among administrative adjudicators, is what I have styled the Clerical Review. If decision drafters will concede that the self-proofreading review is difficult because the eye sees what it *believes* is written on the page rather than what is actually on the page, opposition to having a second pair of eyes generally diminishes. Someone other than a true "peer" may perform this form of review, the typist, clerk, or administrative assistant who reports to the decision-making administrative adjudicator. Alternatively, the function may be performed by a colleague, the true peer.

The Clerical Review consists of the rudimentary form of review, and is usually limited to the most noticeable imperfections without the peer possessing cognizance of the facts or issues of the particular case. In other words, only the decision is examined, and review of the case file is unnecessary. The use by the administrative adjudicator of generally accepted standards of grammar, syntax, punctuation, and spelling is significant, and a peer's knowledge and ability in these areas, as well as in proofreading, are beneficial.

Among the most widely read and respected writers, teachers, and commentators in this area are William Strunk, Jr. and E.B. White,¹⁷ Joseph M. Williams,¹⁸ and Richard C. Wydick.¹⁹ Other sig-

17. WILLIAM STRUNK, JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* (3d ed., MacMillan 1979).

18. JOSEPH M. WILLIAMS, *STYLE: TEN LESSONS IN CLARITY AND GRACE* (4th ed., HarperCollins College Publishers 1994).

19. RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (4th ed., Carolina Academic Press 1998).

nificant contributors are Paul A. Bateman and Michael H. Frost,²⁰ Elizabeth A. Francis,²¹ and Timothy P. Terrell.²² Their individual views and presentations, whether in person or in writing, while not identical, do offer a degree of similarity, and are highly valued and recommended to anyone who is unfamiliar with them. A brief comment regarding the basics of grammar, syntax, punctuation, and spelling, is inevitable if this concept is to be sufficiently analyzed.

"The [judge] confronted with the task of writing a legal document would do well to remember what may be called the ABC of legal writing. These letters represent three indispensable requirements of brief writing in particular and legal writing in general *"Accuracy, Brevity, and Clarity."*²³

Joseph Williams, in his *Style: Ten Lessons in Clarity and Grace*, stressed the significance of six areas of focus in writing: (1) Clarity; (2) Concision; (3) Cohesion (a sense of flow from old to new); (4) Coherence (a sense of focus); (5) Punctuation; and (6) Spelling.²⁴ He observed the three (or was it four) rules of correct grammar. Referring to what he called "**Real Rules**" – the first group of his rules – he stated: "When we violate these rules, (the Rules of Standard Usage) our educated readers notice and condemn."²⁵ He theorized that, "the most important rules include those whose violation unequivocally brand you as a writer of nonstandard English."²⁶

20. Professors of Law, Southwestern University School of Law; visiting faculty member at The National Judicial College.

21. Professor, University of Nevada at Reno; visiting faculty member with The National Judicial College.

22. Professor of Law, Emory University School of Law, co-authored STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, *THINKING LIKE A WRITER: A LAWYER'S GUIDE TO EFFECTIVE WRITING AND EDITING* (1992).

23. ALDISERT, *OPINION WRITING* 187 (1990) (citing EDWARD DOMENIC RE, *BRIEF WRITING AND ORAL ARGUMENT* (6th ed., West Publishing Co. 1983)).

24. WILLIAMS, *supra* note 18, at 19.

25. *Id.* at 18.

26. *Id.* at 19.

JOSEPH WILLIAMS' REAL RULES:

Double negatives: The car had *hardly no* systematic care.

Nonstandard verbs: They *knowed* what would happen.

Double comparatives: This way is *more quicker*.

Some ADJECTIVES for ADVERBS: They worked *real good*.

Some incorrect pronouns: *Him and me* will study it.

Some subject-verb disagreements: *We was* ready to begin.²⁷

Referring to what he called “**Folklore**” – the second group of his rules – Joseph Williams maintained that when we violate these “rules,” few, if any, educated readers notice, much less condemn. So these are not rules at all, but folklore, enforced by many editors and schoolteachers, but ignored by most educated and careful writers; “that we can ignore, unless those we are writing for have the power to exact from us whatever kind of writing they like.”²⁸

JOSEPH WILLIAMS' FOLKLORE:

Never begin a sentence with *and*, *but*, or *because*.

Use the RELATIVE PRONOUN *that*, not *which*, for restrictive clauses: use *which* for NON-RESTRICTIVE CLAUSES.

Use *fewer* with nouns that you can count, *less* with quantities you cannot.

Use of *since* and *while*.

Disinterested versus *uninterested*.²⁹

Referring to what he called “**Optional Rules**” – the third group of his rules – Joseph Williams stated: “These rules complement the Real Rules: Few readers notice when you violate these Optional Rules, but most readers will notice when you observe them and assume that you are signaling special formality.”³⁰

27. *Id.*

28. *Id.* at 18-19.

29. *Id.*

30. *Id.* at 24.

JOSEPH WILLIAMS' OPTIONAL RULES:

Do not split infinitives.

Use *shall* as the first person simple future, *will* for second and third person future; use *will* to mean strong intention in the first person, *shall* for second and third person.

Use *whom* as the object of a verb or preposition.

Do not end a sentence with a preposition.³¹

Referring to what he called “**The Bêtes Noires**” – the fourth group of his rules – Joseph Williams asserted: “These are the items the columnists and commentators endlessly cite as evidence that cultivated English is an endangered species [T]hey have become the symbolic flags around which those most concerned with linguistic purity have apparently agreed to rally. None of these ‘errors’ interferes with clarity and concision”³²

JOSEPH WILLIAMS' BÊTES NOIRES:

Never use *like* for *as* or *as if*.

After *different* use *from*, never *to* or *than*.

Never use *irregardless* for *regardless*.

Do not modify an absolute word such as *perfect*, *unique*, *final*, or *complete* with *very*, *more*, *quite*, and so on.³³

Joseph Williams also described the art of concision, or succinctness, by referring to his “**Five Principles of Economy**” in pruning wordiness.³⁴ Those principles are: (1) Delete words that mean little or nothing: *very* and *all*; (2) Delete words that repeat other words: *every* in *each and every*; (3) Delete words whose meaning your reader can infer from other words: that someone offers us is from suggestion; (4) Replace a phrase with a word: *listen to and think over* to *consider*; (5) Change unnecessary negatives to affirmatives.³⁵

31. *Id.*

32. *Id.* at 27.

33. *Id.*

34. *Id.* at 89.

35. *Id.*

**JOSEPH WILLIAMS' 1ST PRINCIPLE OF
ECONOMY:**

Delete Meaningless Words

kind of

actually

particular

individual³⁶

**JOSEPH WILLIAMS' 2ND PRINCIPLE OF
ECONOMY:**

Delete Doubled Words

full and complete

any and all

each and every

first and foremost

various and sundry³⁷

36. *Id.*

37. *Id.*

**JOSEPH WILLIAMS' 3RD PRINCIPLE OF
ECONOMY:**

Delete What Readers Infer:

Redundant Modifiers

basic fundamentals

future plans

personal beliefs

final outcome

end result

true facts

important essentials

past history

eventual outcome

Delete What Readers Infer:

Redundant Categories

period of time

membrane area

pink in color

shiny in appearance

large in size

unusual in nature

in a confused state³⁸

38. *Id.*

**JOSEPH WILLIAMS' 4TH PRINCIPLE OF
ECONOMY:**

Replace a Phrase With a Word

the reason for

for the reason that

due to the fact that

owing to the fact that

in light of the fact that

considering the fact that

on the grounds that

(use because, since, why)

despite the fact that

regardless of the fact that

notwithstanding the fact that

(use although, even though)

it is possible that

there is a chance that

it could happen that

the possibility exists for

*(use may, might, can, could)*³⁹

39. *Id.*

**JOSEPH WILLIAMS' 5TH PRINCIPLE OF
ECONOMY:**

Change Negatives to Affirmatives

not different versus **similar**

not many versus **few**

not consider versus **ignore**

not have versus **lack**

not the same versus **different**

not accept versus **reject**⁴⁰

Richard Wydick, in his *Plain English for Lawyers*, stressed the significance of word selection and arrangement, as well as punctuation, as his focus in writing.⁴¹ He also observed:

The moral is this: do not be too impressed by the Latin and archaic English words [lawyerisms such as *aforementioned*, *whereas*, *res gestae*, and *hereinafter*] you read in law books. Their antiquity does not make them superior. When your pen is poised to write a lawyerism, stop to see if your meaning can be expressed as well or better in a word or two of ordinary English.⁴²

He emphasized the importance of being precise and consistent in using words of authority such as *must*, *shall*, *will*, *may*, *should*, and their negative forms, such as *must not*, and *will not*.⁴³ The term *shall* causes the most difficulties, with United States drafting authorities slowly coming around from the previous interpretation that it imposes a duty to do something, to the United Kingdom view that the term is simply too unreliable to use for any purpose.⁴⁴

40. *Id.*

41. WYDICK, *supra* note 19, at 63.

42. *Id.*

43. *Id.* at 66-67.

44. *Id.* at 67.

RICHARD WYDICK'S CAUTION TO USE WORDS OF AUTHORITY WITH CARE:

must = is required to

must not = is required not to; is disallowed

may = has discretion to; is permitted to

may not = is not permitted to; is disallowed from

is entitled to = has a right to

should = ought to

will = an expression of obligations

shall = ?⁴⁵

RICHARD WYDICK'S CAUTION TO AVOID SEXIST LANGUAGE:

Don't use expressions that imply value judgments based on sex:

a manly effort, or **a member of the gentle sex**

Use sex-neutral terms if you can do so without artificiality:

workers versus **workmen**, **reasonable person** versus **reasonable man**. But don't concoct artificial terms like **waitpersons**.

Use parallel construction when you are referring to both sexes:

husbands and wives, not men and their wives

Don't use a sex-based pronoun when the referent may not be of that sex: **he** every time you refer to a party or witness⁴⁶

Richard Wydick also discussed the significance of **punctuation**, and attorneys' traditional distrust of it.⁴⁷ The distrust arose from a variety of sources such as:

- [A] secretary having a monetary lapse of concentration;
- [A] fly leaving a deposit that could pass as a comma;
- [S]ome writers' punctuation for rhythmic and elocutionary effect, and;
- [S]ome writers' syntactical punctuation⁴⁸

He cautioned writers to punctuate carefully, and related the stories of cases in which the decisions had turned on punctuation:

45. *Id.*

46. *Id.*

47. *Id.* at 86.

48. *Id.*

[I]n *United States v. Ron Pair Enterprises*, the United States Supreme Court split 5-4 over the significance of a comma in a bankruptcy statute. One lower federal court had called it a “capricious” comma, and another had called it an awfully “small hook on which to hang a [substantial] change in the law.” The majority of five Supreme Court Justices, with no apology, relied partly on the comma to conclude that the statute was clear on its face. The four dissenting Justices, on the other hand, tried to obliterate the comma with a blast of slogans from old cases: punctuation is minor and not controlling, punctuation is not decisive, punctuation is the most fallible standard by which to interpret a writing, and punctuation can be changed or ignored to effectuate congressional intent.⁴⁹

Workshops routinely offer punctuation as a pivotal agenda theme, that is:

- [T]he six most frequently missed rules for using commas
- [H]ow to use semicolons to improve the “flow” of your sentences
- [H]ow and when to use colons
- [W]hen you should use quotation marks, and when you shouldn’t (By the way, does the period go inside or outside the quotation marks?)
- [W]here to place apostrophes in words ending in “s”
- [D]ashes and parentheses (Did you know they are opposites?)

Proofreading is another crucial topic which demands attention to detail. The significance of the process is that the proofreader cannot merely “survey” writings by section or area, but must instead have an ability to check each individual keystroke along with the overall sentence. Another workshop provides basics of proofreading that includes in its agenda: (1) How to increase your proofreading

49. *Id.* at 87 (citations omitted).

speed, without sacrificing accuracy; (2) Are you an editor or a proofreader? How to determine which skill your job really requires; (3) Spotting common typographical errors; (4) How to correct writing without changing the meaning; (5) Tricks for finding duplicate words and omitted letters; (6) Overcoming monotony and staying alert when proofreading; (7) Creating distance from your work so you can catch your own errors; (8) Proofreading with a partner to increase your accuracy; and (9) An ingenious way to proofread numbers.

“The key to good writing is rewriting.”⁵⁰

Judge Ruggero Aldisert, formerly Chief Judge of the United States Court of Appeals for the Third Circuit, in his book *Opinion Writing*, stressed the significance of **rewriting**:

If you will reread your early drafts for style, you will find intensifying adverbs that you put there to add force but which you now see merely sound like bluffing or exaggeration. You will find nouns qualified by one or more adjectives; if you think, or consult a thesaurus, you will be able to find a single noun that will do the job by itself, and do it more pungently. You will find loose, unharnessed sentences that you can rearrange and tighten.

When you think you have a passable draft, read it aloud. Or have a friend, perhaps your [spouse], read it to you. As you listen, you will hear passages that sound flat or awkward. If the reader's voice falters, if he stresses the wrong word, if the rhythm breaks, the passage needs reworking. Perhaps it needs to be thrown away, in favor of a fresh start.

Finally, with much labor and perhaps a little luck, you succeed in wiping out all evidence of the sweat and toil that went into it. You have a paragraph that sounds easy and natural. For that is the aim of all the labor, to make it sound unlabored. “A picture is finished,” said

50. ALDISERT, *supra* note 23, at 262.

the painter Whistler, "when all trace of the means used to bring about the end has disappeared."

If you succeed, you will have the gratifying feeling as you reread your work that the words you have used and your arrangement of them hit just the right note to produce the effect you want. Phrases, sentences, whole paragraphs, ring pleasingly in your mind and your ear. "This is good!" you will say, a little surprised and more than a little pleased. That is your reward, the sense of satisfaction with a job well done that is the ultimate reward of any craftsman.⁵¹

51. *Id.*

28 MATTERS THAT WRITERS OUGHT TO BE APPRAISED OF:

- (1) Subjects and verb always has to agree.
- (2) Make each pronoun agree with their antecedent.
- (3) Just between you and I, case is important too.
- (4) Being bad grammar, the writer will not use dangling participles.
- (a) "Finding no error, the judgment below is affirmed."
- (5) Parallel construction with coordinate conjunctions is not only an aid to clarity but also the mark of a good writer.
- (6) Join clauses good, like a conjunction should
- (7) Don't write run-on sentences they are hard to read, you should punctuate.
- (8) Don't use no double negatives. Not never.
- (9) Mixed metaphors are a pain in the neck and ought to be thrown out the window.
- (10) A truly good writer is always especially careful to practically eliminate the too-frequent use of adverbs.
- (11) In my opinion, I think that an author when he is writing something should not get accustomed to the habit of making use of too many redundant unnecessary words that he does not actually really need in order to put his message across to the reader of what he has written.
- (12) About them sentence fragments. Sometimes all right.
- (13) Try to not ever split infinitives.
- (14) Its important to use your apostrophe's correctly.
- (15) Do not use a foreign term when there is an adequate English quid pro quo.
- (16) If you must use a foreign term, it is de rigor to use it correctly.
- (17) It behooves the writer to avoid archaic expressions.
- (18) Do not use hyperbole; not one writer in a million can use it effectively.
- (19) But, don't use commas, which are not necessary.
- (20) Placing a comma between subject and predicate, is not correct.
- (21) Parenthetical words however should be enclosed in commas.
- (22) Use a comma before nonrestrictive clauses which are a common source of difficulty.
- (23) About repetition, the repetition of a word is not usually an effective kind of repetition.
- (24) Concult the dictionary frequently to avoid misspeling. Corect speling is esential.
- (25) In scholarly writing, don't use contractions.
- (26) Don't abbrev. unless nec.
- (27) Proofread your writing to see if you any words out.
- (28) Last but not least, knock off the clichés. Avoid clichés like the plague.⁵²

52. *Id.* at 187 (citing ROBERT A. LEFLAR, APPELLATE JUDICIAL OPINION 195-96 (1974)).

On a personal note, I might have avoided embarrassment caused by one of my own decisions if I had exercised the opportunity to have a second pair of eyes peer review it prior to issuance. In explaining the milieu in which a party had descended during a lengthy period of illegal substance abuse, I stated, rather succinctly: "He succumbed to peer [sic] pressure."⁵³ A good peer reviewer would catch such an error.

The administrative adjudicator is generally aware of the significance of the appearance of the written decision and the positive impact resulting from an effective Clerical Review. Errors in grammar, syntax, punctuation, and spelling can be routinely discovered and corrected before the decision is issued to the public, thereby avoiding potential embarrassment to the administrative adjudicator. Nevertheless, despite the positive features of the Clerical Review, there remains an intractable minority, perhaps between two and five percent of those polled in a largely unscientific survey of adjudicators who strongly oppose any form of peer review, including this rudimentary form of review. The issue is not quality or practicality, but rather the highly charged "judicial independence."

B. Pre-Issuance Review - The Quality Review

The second step in the process, and one which generates a moderate degree of *angst* or opposition among administrative adjudicators, is what I have styled the Quality Review. This form of review should be performed by a true "peer," a colleague, because it requires a magnitude of expertise and experience greater than that ordinarily possessed by the clerical reviewer.

Quality Review scrutinizes the legal accuracy and thoroughness as well as the logic of the document. To accomplish this, total immersion in the case file is needed to enable the peer reviewer to become intimately familiar with the facts, the issues presented, the applicable law and policy, the motions, the evidentiary rulings, and the conclusions. In other words, a *de novo* review occurs with the peer stepping into the thought processes of the administrative adjudicator and, at least on some points, substituting the peer's judgment for that of the administrative adjudicator. Regrettably, it is the same type of undertaking that adjudicators loathe when appellate bodies

53. See DISCR OSD, No. 89-0790, at 9 (Feb. 28, 1990).

endeavor to substitute their judgment for that of the trial judge. At this level of review, grammar, syntax, punctuation, and spelling become secondary to legal analysis, accuracy, thoroughness, logic, and a "peer's" knowledge and ability in these areas.

"We hold these truths to be self-evident that all trial judges are created equal, that they are endowed by their office with certain unalienable rights, that among these rights are the right and the duty to make and issue decisions without mandatory preissuance review by anyone."⁵⁴

"Judges may find that a good way to ensure clarity and sound reasoning is to have an able colleague review, edit, and criticize the decision."⁵⁵

The above remarks provide the discordant positions regarding the appreciation of the Peer Review Process in administrative adjudication. While the former sentiment stresses the "rights" of the adjudicator, to the apparent exclusion of other considerations, the latter emphasizes the benefits to the adjudicator and the system. Due process, while presumably a cornerstone to the entire system, is not even specifically mentioned in the controversy. An examination of the components of the Quality Review should afford greater insight into the issue.

Dean Patrick Hugg⁵⁶ stressed the significance of editing and critiquing in his article entitled *Professional Writing Methodology*.⁵⁷ He opined that the "editing and critiquing of the legal writing and analysis of others are two of the most powerful teaching tools available to supervisors."⁵⁸ He also wrote that because editing and critiquing are difficult supervisory functions, they should be approached

54. Yoder & Hardwicke, *supra* note 10, at 75 (Justice Yoder was responding to the issue of mandatory quality assurance oversight and its potential conflicts with an Administrative Law Judge.).

55. MORRELL MULLENS, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* 123 (3d ed. 1993).

56. Dean of Loyola Law School, New Orleans, La.

57. Patrick R. Hugg, *Professional Writing Methodology*, 14 J.NAALJ 165, 165 (Fall 1994).

58. *Id.* at 238.

with care.⁵⁹ He observed that constructively critiquing and editing the work of others is challenging and should not be rushed.⁶⁰

DEAN HUGG'S EDITING AND CRITIQUING ANALYTICAL

FEATURES:

Clarity

Coherence

Correct Law

Full Facts

Sound and Explicit Reasoning

Conclusion⁶¹

He suggested reading the entire decision twice, first looking for "thoughtful analysis and expression," and not the easier-to-correct errors of style and form, and then looking for overall organization.⁶²

He recommended that reactions be noted, clearly and readable, without cryptic

remarks or vague symbols in the margins, to facilitate acceptance and minimize resentment.⁶³ Additionally, he cautioned against focusing on minutiae or form errors, and exhorted concentration on thoroughness and sound reasoning.⁶⁴

Another important step in the editing and critiquing process was identified as the **identification, characterization** (which he called "statement"), and **analysis of the issue**.⁶⁵

59. *Id.*

60. *Id.* at 239.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 240.

65. *Id.* at 241.

DEAN HUGG'S EDITING AND CRITIQUING "ISSUE"

IDENTIFICATION CHECKLIST:

Issue clearly identified

Issue not clearly identified

Issue missed⁶⁶

DEAN HUGG'S EDITING AND CRITIQUING "ISSUE"

CHARACTERIZATION CHECKLIST:

Incorporates (fails to incorporate) relevant facts and law

(Not) Concise

Too broad⁶⁷

66. *Id.*

67. *Id.*

**DEAN HUGG'S EDITING AND CRITIQUING
ISSUE ANALYSIS CHECKLIST:**

General Responsiveness

Does (not) respond to identified issue

Is (not) well reasoned and logical

Is thorough and well focused

Is superficial

Is conclusory

Use of Authority

Precedent rules & holdings (not) adequately defined/explained

**Relationship of precedent case to analysis (not) supported with
facts/holding/reasoning of cited case**

Authority does not support analysis

Extraneous facts from case obscure analysis

Quotations used appropriately

Quotations: too many, too long, not integrated into analysis

Conclusion

Conclusions (not) adequately summarized⁶⁸

Judge Ruggero Aldisert, in his book *Opinion Writing*, also underscored the magnitude of **issue analysis**, and stressed five different areas of inquiry for appellate consideration, areas which are also applicable at the trial level.⁶⁹

68. *Id.*

69. See ALDISERT, *supra* note 23, at 270.

JUDGE ALDISERT'S ANALYSIS OF ISSUES THE *RATIO DECIDENDI* SYSTEMATIC DISCUSSION OF THE ISSUES POSED:

1. Identify the flash point of the controversy and discuss only what is essential for a resolution.
 - a. If the law and its application alike are plain, your opinion should be short and to the point.
 - b. If the law is certain and the application alone is doubtful, be sure you have explained how the law applies to the facts. Be just as sure you did not waste the reader's time justifying your choice of law.
 - c. If neither the rule nor, *a fortiori*, its application is clear, discuss:
 - i. (1)Choice, interpretation, and application of the legal precept, or
 - ii. (2)Interpretation and application of the legal precept.
2. Is the discussion of the issue overwritten? Have you belabored the point or stated the obvious?
3. Have you discussed the critical issues presented? Have important contentions been discussed or swept under the rug?
4. Is the logical development sound?
 - a. Is the choice of a major premise supported by the applicable law and facts of the case?
 - b. Have you followed the rules of inductive and deductive logic?
 - c. Is the opinion free of formal or material fallacies?
5. What is the "gobbledygook" or "Jabberwocky" factor?⁷⁰

After lamenting that the "promiscuous uttering of citations has replaced the crisply stated, clean lines of legal reasoning,"⁷¹ Judge Aldisert emphasized the proper use of **citations and authorities**.⁷²

70. *Id.*

71. *Id.* at 105.

72. *Id.* at 227-28.

**JUDGE ALDISERT'S RECOMMENDED USE OF CITATIONS
AND AUTHORITIES:**

- (1) If it is at all possible to do so, you should confine citations to your jurisdiction. It makes no sense to refer to another court's decision if your own court has decided the point.
- (2) You should require your law clerks to check meticulously:
 1. To be certain that the law cited in the opinion is current and in the appropriate citation format.
 2. Every quotation, word for word, punctuation mark for punctuation mark.
 3. Each word and symbol for consistency in style. You should not use "percent" on one page and "%" on the next.
 4. Typographical errors and misspellings. Those who cannot spell should consult those who can. If there are none such in your court, it might be well to invest in spell-checking software.
- (3) You should avoid string citations. A single citation, one that demonstrates similar or identical facts, may give you your most effective argument. String citations may be justified, however, in limited circumstances. Some judges use them effectively when a challenge has been lodged against a legal precept that in fact is settled law in the jurisdiction. Sometimes, you may make your point succinctly by citing a leading case and adding "(collecting cases)."
- (4) You should never exaggerate the holding of a citation, *never*. . .
- (5) You should avoid stating the citation in terms of a broad principle. A tight, fact-specific rule of law will serve you better.
- (6) Where there is primary reliance upon only one precedent, you should summarize the holding, the reasoning and the facts.⁷³

Dean Hugg underscored the proper use of authorities in a slightly different manner.⁷⁴

73. *Id.*

74. Hugg, *supra* note 57, at 241.

DEAN HUGG'S EDITING AND CRITIQUING

USE OF AUTHORITY CHECKLIST:

Precedent rules & holdings (not) adequately defined/explained

**Relationship of precedent case to analysis (not) supported with
facts/holding/reasoning of cited case**

Authority does not support analysis

Extraneous facts from case obscure analysis

Quotations used appropriately

Quotations: too many, too long, not integrated into analysis⁷⁵

1. May Judges Ethically and Professionally Confer With Other Judges Regarding Pending Matters, and if so, Should Such Conferring Take Place?

Throughout the discussion of the Pre-Issuance Review, "The Quality Review" component, I have stressed matters of quality, without any reference to the outcome or the "bottom line" of pending cases. Administrative Law Judge Edward Schoenbaum⁷⁶ urged in his article, *Managing Your Docket Effectively and Efficiently*, that before arriving at the "bottom line," especially in complex cases, it would profit the administrative adjudicator to confer with a colleague in order to consider alternative viewpoints and determine if the "draft" decision is "rational, understandable, and concise."⁷⁷

Administrative Law Judge Ann Marshall Young, also articulated this theme⁷⁸ in her presentation, *Writing and Editing to Make Your Rationale More Rational*, at the 1997 Annual Meeting and Con-

75. *Id.*

76. Administrative Law Judge with the Illinois Department of Employment Security - Tax Unit, in Springfield, Ill.

77. Edward J. Schoenbaum, *Managing Your Docket Effectively and Efficiently*, 19 J.NAALJ 37, 51 (Spring 1999).

78. Formerly, Administrative Law Judge with the Tennessee Department of State, Administrative Procedures Division, in Nashville, Tenn.

ference of the National Association of Administrative Law Judges, in Denver, Colorado:

Seek and use feedback from colleagues wisely, consider it with an open mind, and don't discount any suggestion out of hand. Discuss areas of perceived lack of clarity, to assist you in making your decision more understandable. Remember, however, that in the end your name goes on the decision, and you must ultimately be the judge of what the final product will be, and of whether you have done all you can reasonably do to assure that your writing meets the tests of precision, efficiency, memorability, persuasiveness, clarity, and coherence, in short, whether it makes sense.⁷⁹

Judges, like lawyers, will disagree at times, in matters of substance and matters of style, and the final editor of your decisions is you.⁸⁰

Furthermore, *The Judge's Book* advocated the use of "plain words, simple sentences, and short paragraphs. Read it over, hunting for confusing phrases and inaccurate language. Better yet, read it to somebody else, a colleague, a law clerk, or a secretary. A little time and effort now can save major embarrassment later."⁸¹

Judge Patricia Wald,⁸² in her article entitled *Some Thoughts on Beginnings and Ends: Court of Appeals Review of Administrative Law Judges' Findings and Opinions*,⁸³ stressed the importance of eliminating confusion or inconsistencies in drafting decisions:

ALJs thus need to lay out for us not only the critical findings, but the basis on which they

79. Ann Marshall Young, *Writing and Editing to Make Your Rationale More Rational*, Presentation at the 1997 Annual Meeting and Conference of the National Association of Administrative Law Judges (manuscript at 10) (1997).

80. *Id.*

81. Alfred Di Bona, Jr., *THE JUDGE'S BOOK* 227 (Nat'l Conference of State Trial Judges of Judicial Admin. Div. Am. Bar Ass'n Nat'l Judicial Coll. and Nat'l Judicial Coll. eds., 2d ed. 1994).

82. Formerly Chief Judge of the United States Court of Appeals, District of Columbia Circuit.

83. Patricia M. Wald, *Some Thoughts on Beginnings and Ends: Court of Appeals Review of Administrative Law Judges' Findings and Opinions*, 67 WASH. U. L.Q. 661, 668-69 (1989).

have made them, even spoon-feeding us the record cites for the most important findings. You need to distinguish between the primary findings based on witnesses or documents and the secondary inferences you draw from those sources. You need to draw us a map of how both your primary and secondary findings lead you to your conclusions of law, and what legal standards you are applying to the facts. . . . I know that with article III judges, one's colleagues often succeed in picking up inconsistencies and gaps in one's reasoning or clarity that may produce confusion if left uncorrected. Many remands could be avoided by some comparable internal review process at all stages of agency decisionmaking.⁸⁴

Many administrative adjudicators are assisted in the drafting of decisions by a coterie of legal support staff including decision writers, law clerks, attorneys, paralegals, secretaries, and administrative assistants. Those benefiting from such support have the luxury of the self-contained peer review team. Others, however, perhaps constituting the majority of administrative adjudicators, may have no such staff. When one individual must conduct the hearing, as well as draft and type the decision, informally conferring with a colleague or formally undergoing a peer review may be the only alternative available to assure good quality.

Some of those administrative adjudicators who are most zealous in their opposition to any form of peer review are the very ones benefiting from support staff. For example, during the preparation of his article, Professor Russell L. Weaver discovered that the Social Security Administration had 850 administrative law judges, 650 staff attorneys, and 275 paralegal specialists; with the 925 staff attorneys and paralegal specialists serving primarily as decision writers, preparing initial drafts of decisions, and performing legal research.⁸⁵ The Department of Transportation had four attorney-advisors supporting

84. *Id.*

85. Russell L. Weaver, *ALJ Support Systems: Staff Attorneys and Decision Writers*, 16 J.NAALJ 89, 90-91 (Spring 1996).

the administrative law judges by conducting research and drafting decisions.⁸⁶

These commentaries endorse conferring with colleagues, law clerks, and staff assistants; a teamwork approach that stresses the goal of achievement of quality through reviewing, analyzing, reasoning, exchanging ideas, identifying alternatives, and strategizing. Though the "bottom line" is not specifically addressed, Judge Aldisert pointed out:

Obviously, choosing the most literate law clerk is not enough. It is the judge who makes decisions and then must explain them. It is the judge who holds the commission. It is the judge whose name goes on the opinion. It is the judge who must assume 100 percent of the responsibility. The law clerk is an assistant, and only an assistant. The law clerk must help in research, in the drafting process and in expressing views of the law, but, and this is a big "but," every sentence the law clerk writes in the opinion must be totally understood and endorsed by the opinion-writing judge. To delegate some writing responsibilities to a law clerk is more than proper; it is an absolute necessity in this litigious age. This delegation, however, is legitimate only to the extent that the judge accepts the submitted language, understands what has been written, agrees with it and is willing to stake a professional reputation on it.⁸⁷

One of the explosive issues stressed by opponents of collegial conferring prior to the issuance of decisions is that of *ex parte* communications and the relevance of the ABA Model Code of Judicial Conduct and the ABA Model Code of Judicial Conduct for State Administrative Law Judges. Canon 3 of the ABA Model Code of Judicial Conduct states, in part:

A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside

86. *Id.* at 92.

87. ALDISERT, *supra* note 23, at 8-9.

the presence of the parties concerning a pending or impending proceeding except that: . . .

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.⁸⁸

The Commentary to Canon 3(A)(4) of the Code of Judicial Conduct for State Administrative Law Judges states, in part: "The proscription against [ex parte] communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except as authorized by law to the limited extent permitted."⁸⁹ This does not preclude a judge from consulting with other judges or subordinate personnel whose function is to aid the judges in carrying out adjudicative responsibilities.⁹⁰

Administrative Law Judge Ronnie Yoder boldly speaks out against any "mandated" pre-issuance peer review, and charged that it "is antiethical [sic] to the concept of judicial independence, and raises serious questions concerning *ex parte* communications."⁹¹ He noted that prior to the 1990 amendments to the ABA Model Code of Judicial Conduct, there was controversy as to whether or not judges could confer with other judges because the Code itself did not specifically say they could.⁹² He acknowledged that the commentary had approved such discussions, but that the Code did not.⁹³ As a result, the Code was amended to specifically permit such discussions.⁹⁴

In his exemplar entitled *Administrative Law Treatise*, Professor Kenneth Culp Davis discussed the issue of deciding officers' consultation with staff:

May . . . [an Administrative Law Judge (ALJ)] talk over the problem [in a specific case] with a fellow ALJ? If he has doubts on any kind of problem, may he consult with the chief ALJ?

88. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(c) (1990).

89. MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES Canon 3(A)(4) (1999).

90. *See id.*

91. Yoder & Hardwicke, *supra* note 10, at 77.

92. *Id.* at 78.

93. *Id.*

94. *Id.*

If his problem is one of law, may he consult a member of the agency's legal staff? May he use an assistant to help him analyze a bulky record? May he have a supervisor or an editor look over his report and criticize it for both substance and form? The operating answer to all of these questions is, yes.⁹⁵

Judge Jack B. Weinstein⁹⁶ also addressed the issue of judges consulting with one another regarding a pending case:

Some interjudicial consultations could arguably create an appearance of partiality or could deprive the parties of their right to full participation in the case. For example, one judge's comments about attorneys, witnesses, or parties could prejudice them in another judge's courtroom. Yet, in many instances, a judge should be able to take advantage of the wealth of legal knowledge, insight, and experience possessed by his colleagues. In the easy give-and-take of my own district, we often visit each other's chambers to discuss rulings that need to be made quickly.⁹⁷

He continued:

I believe that consultation among judges on the same court is as acceptable as consultation between a judge and clerk. This view extends, in my opinion, to consultation between judges in different federal districts and between state and federal judges working on related cases Judges should be able to consult with other judges in their own courthouse. It is often helpful to hear how other judges within the same court are handling similar cases.⁹⁸

95. 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 17:8, at 302 (2d ed. 1980).

96. Senior Judge of the United States District Court for the Eastern District of New York.

97. Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 14 (1994).

98. *Id.* at 15-16.

The courts have not shied away from the controversy either. In *People v. Hernandez*,⁹⁹ a sentencing judge of one case had consulted with the sentencing judge in the cited case regarding both the circumstances of the cases and the meaning of a reviewing court's opinion.¹⁰⁰ The California Court of Appeals ruled that this consultation was proper.¹⁰¹ Specifically, the court ruled that:

The record does not support, nor is it reasonably susceptible of, any inference that the trial court received any evidence from another judge for any purpose. It is evident that the determination of what is the law is not evidence but, rather, a determination of the legal principles to be applied to evidence. Thus a discussion between judges as to the law applicable in the case before one of them and even the application of the law to the facts would not fall within the prohibitions of Penal Code section 1204.¹⁰²

The opinion continued:

It should be noted that if procedural due process prohibited conversations between judges in the context we have discussed, then conversations between judges and law clerks would also fall within the same prohibition. More importantly, as has been observed with any of the procedures discussed herein and even with a total prohibition on communications by the judge with other judges or court personnel, the enforcer of the prohibition and the person who would determine its violation is the judge himself. There is a presumption in the honesty and integrity of our judicial officers.¹⁰³

99. 206 Cal. Rptr. 843 (Ct. App. 1984).

100. *Id.* at 847.

101. *Id.* at 852.

102. *Id.*

103. *Id.* at 855 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

The opinion concluded:

The judicial robe is a mantle of responsibility that entrusts an individual with the most sacred obligations that our society can impose "the protection of each citizen's rights in a neutral forum. The acceptance of the judicial function does not confer greater wisdom upon the individual but only greater responsibility. In carrying out that responsibility, judges must search their own minds and hearts in making decisions but they cannot do this without the benefit of the counsel they find in their brethren" this is so for the lowest magistrate and the highest court.¹⁰⁴

If you agree with Judges Wald, Weinstein, Hardwicke, Schoenbaum, and Young, Professor Davis, and others, that, with certain enumerated exceptions, it is ethically and professionally appropriate to confer with colleagues regarding pending matters, then another question is raised.

2. Does the Peer Review Actively Seek to Influence the Outcome of the Pending Decision, or Does the Peer Review Confine Itself to Clerical, Quality, and Compliance Reviews?

The outcome, the "bottom line," of pending cases is the flash-point of controversy between administrative adjudicators and the agency. If the two sides can agree that, aside from the "bottom line," quality issues are also extremely important to the agency, the administrative adjudicator, and the system itself, then there should be no opposition to a pure Quality Review. Accordingly, if errors in legal analysis, accuracy, thoroughness, and logic, can be minimized by the Quality Peer Review, there should be little opposition to those features of the Peer Review Process. Nevertheless, despite those positive features, there remains an intractable minority, perhaps between twenty and twenty-five percent of those polled in a largely unscientific survey, of adjudicators who strongly oppose this form of peer review. Once again, the issue is not quality or practicality, but rather the highly charged "judicial independence." Of course, if the Quality

104. *Hernandez*, 206 Cal. Rptr. at 858.

Review slops over into the “bottom line,” all bets are off, and the opposition figures increase.

C. Pre-Issuance Review - The Agency Compliance Review

To some, the third step in the process, what I have styled as the Agency Compliance Review, is merely a segue from the Quality Review with “minor” distinctions. To others, the magnitude of those distinctions is appreciable. The Agency Compliance Review presents a new set of concerns for, in this instance, the peer reviewer is not serving as the colleague or subordinate of the administrative adjudicator, but rather as the agent of one of the parties to the controversy, the agency. Even in the most benign of circumstances, the agency, through the assigned peer reviewer, is encouraging its perceptions of legal accuracy, thoroughness, and logic analysis. The agency, a party to the action, is attempting to influence the selection of facts for fact-finding, and the preference of law and written policy for legal analysis.

In some more egregious situations, the agency may exhort the adoption and employment of “informal” agency policy or unwritten agency policy, agency “secret law,” to mandate a particular outcome. The other party has no input, and, in fact, may not even be cognizant of the *ex parte* input from the agency. Thus, the Agency Compliance Review engenders a significant degree of *angst* or opposition among administrative adjudicators.

This form of review, likewise, should be performed by a true “peer,” a colleague, because it requires a magnitude of expertise and experience which is greater than that ordinarily possessed by the clerical reviewer, but, depending on the agency, may be performed by a Subject Matter Expert, an individual with expertise in a variety of areas, which may or may not include law or administrative adjudication.

1. Peer Review Should be “Outcome Indifferent.”¹⁰⁵

In 1998, the Louisiana Legislature adopted the central panel model of agency adjudication, but carried its structural changes be-

105. Justice W. Michael Gillette, Ore. Sup. Ct., Remarks to the National Association of Administrative Law Judges (Oct. 15, 2000).

yond that which had been experienced elsewhere.¹⁰⁶ The most surprising provision found in the Louisiana Statute that states, in part: “[I]n an adjudication commenced by the [agency], the administrative law judge shall issue the final decision or order, . . . and the agency shall have no authority to override such decision or order.”¹⁰⁷ On its face, this provision may not be considered so unusual, but in this instance, it is, because the agency possesses no power to mandate improved quality or consistency, and it does not have the power to review, reverse, or even appeal the decision of the administrative adjudicator.

Maryland, on the other hand, which has also adopted the central panel model of agency adjudication, offers an interesting study in Agency Compliance Review. The Maryland Office of Administrative Hearings is an independent agency within the Executive Branch of state government reporting, not to any particular agency, but directly to the Governor. Chief Administrative Law Judge, John Hardwicke, established a division within the office which deals with Quality Assurance.

Quality Assurance in Maryland is maintained through what is called a Subject Matter Specialist (SMS) Process. In that process, prior to issuing a decision, the administrative adjudicator is required to submit the draft decision to a designated SMS, an administrative law judge with expertise in the subject area(s) being dealt with. The SMS examines the draft decision using a checklist, and, if the draft decision is in the correct format, has identified and discussed the applicable law, and the law was logically applied to the facts, the decision can be released, even if the SMS disagrees with the decision’s “bottom line,” a significant factor in maintaining the necessary degree of judicial decisional independence.

106. LA. REV. STAT. ANN. § 49:950-999.25 (West 1998).

107. *Id.* at § 49:992(B)(2).

THE MARYLAND SMS DECISION CHECKLIST:

1. Format is incorrect

Statement of the Case

- (i)insufficient procedural history
- (ii)parties not identified
- (iii)authority and/or procedure for the hearing not identified
- (iv)date, place of hearing missing
- (v)representatives at hearing not identified

Issue(s) incorrectly identified

Summary of Evidence incomplete

- (i)complete list and identification of exhibits not provided
- (ii)description of testimony incomplete

(1)each witness (name and title) not identified

- (2)expert witness(es) with identification of expertise (name and title)

not specified

Findings of Fact inadequate

- (i)lacks statement of standard of proof
- (ii)recitation of testimony or evidence stated as fact
- (iii)incomplete recitation of facts to support conclusions
- (iv)facts not stated in logical order
- (v)findings include conclusions of law or discussion elements

Fails to address and rule on motions

Discussion is inadequate

- (i)fails to cite applicable law and quote when necessary
- (ii)does not apply law to the facts
- (iii)fails to contain complete analysis of relevant law
- (iv)refers to facts which have not been included in the Findings of

Fact

- (v)fails to articulate basis for determinations on credibility
- (vi)fails to describe and resolve parties' arguments

Conclusions of Law are inadequate

- (i)fails to reach conclusions for each issue raised
- (ii) fails to contain a concise statement as to whether cited law was or was not violated
- (iii)contains discussion elements

Order is inadequate

- (i) fails to set forth exactly what the parties are to do as a result of the decision made
- (ii) does not follow from the conclusions of law

Appeal/Review Rights are incorrect or incomplete

- (i)cites inappropriate rights (exceptions or appeal)
- (ii)states the incorrect procedure

2. Fails to conform to File Protocol

3. Contains inappropriate language or gratuitous comments.¹⁰⁸

108. SMS Decision Checklist to All ALJs. Susan S. Fox, Director, Quality Assurance, Maryland Office of Administrative Hearings. Presentation made at the 1996 Annual Meeting and Conference of the National Association of Administrative Law Judges, Nashville, Tenn.

The Maryland Process is not, unfortunately, a universal standard for an agency compliance review. Some agencies, in their respective pre-issuance review process, concentrate to varying degrees on different aspects of the decision and the decision-making process. Some agencies are seemingly concerned with decision format and structure, some are attentive to issue consistency, others are interested in technical thoroughness, and still others are alert to specific mandatory issues. Surely there can be no reluctance, on the part of the administrative adjudicator, in complying with agency decision format and structure requirements. Likewise, technical thoroughness and adequate treatment of mandatory issues should not create an issue pertaining to judicial independence. The obstacle arises when the administrative adjudicator and the agency peer reviewer differ in their views in three significant areas: (1) the materiality of certain facts and policy; (2) the interpretation of agency policy; and, (3) retroactive application of new agency policy. It is clear that the agency generally has the last word on policy, and the agency's expressed interpretations regarding specific policies should be controlling. But, for a minority of administrative adjudicators, "judicial independence," they believe, permits them to dismiss agency policy.

Separate 1992 surveys of administrative law judges and those administrative adjudicators not classified as administrative law judges, conducted by the Administrative Conference of the United States (ACUS), revealed several interesting impressions.

Of the administrative law judges surveyed for all agencies, when asked: "To what extent do you conceive of your job as involving. . . [a]pplying agency policies and regulations," seventy-one percent of those surveyed responded, "great extent;" twenty-six percent responded, "some extent;" and the remaining three percent responded, "not significant extent."¹⁰⁹ Of other administrative adjudicators surveyed for all agencies, when asked the same question, seventy-eight percent of those surveyed responded, "frequent;" seventeen percent responded, "occasionally;" and the remaining five percent responded, "rarely/never."¹¹⁰ Of administrative law judges surveyed for all agencies, when asked: "In reaching your decisions,

109. 1992 ACUS 1068, response 9.d.

110. *Id.* at 1108, response 15.d.

how important do you consider . . . [p]ublished agency regulations,” ninety-five percent of those surveyed responded, “very;” four percent responded, “somewhat;” and the remaining one percent responded, “not.”¹¹¹ Of other administrative adjudicators surveyed for all agencies, when asked the same question, eighty-seven percent of those surveyed responded, “very;” thirteen percent responded, “somewhat;” and 0.4 percent responded, “not.”¹¹²

One striking response should also be noted. Of other administrative adjudicators surveyed for all agencies, when asked: “In comparison to ALJs, do you think you have . . . [d]uty to be bound [by] agency policy,” seventeen percent of those surveyed responded, “greater;” fifty-four percent responded, “the same;” and twenty-eight percent responded, “lesser.”¹¹³

Thus, it appears that administrative adjudicators differ in their view of their professional responsibilities. The survey results leave one to ponder what the minority of administrative adjudicators are doing if their responsibilities do not involve applying agency policy; or how the administrative adjudicators other than administrative law judges view their responsibilities if they are less bound by agency policy than administrative law judges.

“It is the judge’s duty to decide all cases in accordance with agency policy.”¹¹⁴

“ . . . the agency always has the last word on policy. . . .”¹¹⁵

One additional problem arises when policy is irregularly applied or when new or unpublished interpretations of published policy appear. Professor Morell Mullens suggested stretching the envelope when dealing with questionable agency policy.¹¹⁶ He cautioned:

111. *Id.* at 1073, response 16.b.

112. *Id.*

113. *Id.* at 1115, response 28.f.

114. MERITT RUHLEN, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* 79 (Administrative Conference of the United States, rev. ed. 1982).

115. Wald, *supra* note 83, at 666 (citing *ITT Cont’l Baking Co. v. FTC*, 532 F.2d 207, 219 (2d Cir. 1976)).

116. MORELL MULLENS, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* (Administrative Conference of the United States, 3d ed. 1993).

Although the judge should follow agency policy and the law, the judge's decision may be the last opportunity to call the attention of the agency (or the courts if the agency denies review) to an important problem of law or policy. A judge who is wrong can easily be reversed, but a judge who is correct may prevent substantial inequity and injustice. Such action cannot be taken lightly but must reflect long and careful research and analysis. The judge's facts and reasoning, based on the record and the law, should be so clearly set forth that the agency will know exactly what has been done and why.¹¹⁷

The reverse side of the exhortation is that when there are challenges made to clearly established agency policy, or new unpublished interpretations to published agency policy, the matter should normally be noted, but discussion and analysis of the disputed policy avoided, in a manner similar to the handling of challenges based upon constitutional grounds as matters not appropriate for discussion in the particular forum by the administrative adjudicator. The difficulty lies in the issue of what constitutes "policy" or "the agency rule," on the one hand, and what is the "adjudication" on a factual record, on the other.

The Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹¹⁸ furnished clear, but controversial, guidance regarding agency policy and statutory construction and interpretation:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . If, however, the court determines Congress has not di-

117. *Id.* at 108.

118. 467 U.S. 837, 841-42 (1984).

rectly addressed the precise question at issue, the court does not simply impose its own construction on the statute, . . . as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹¹⁹

The Court continued:

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, . . . and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.¹²⁰

“[I]f the legislative’s intent is not plain to begin with, then the agency gets to decide what that intent was.”¹²¹

Deference to agency policy, properly adopted or enacted agency policy, is appropriate. Obedience to improperly or illegally adopted agency policy, or newly revised contrary interpretations to long-standing interpretations of properly adopted or enacted agency policy, are inappropriate and should be avoided.

There is another potential conflict area regarding the agency compliance review, and it occurs when the agency seeks to influence consistency with earlier agency decisions. This becomes particularly

119. *Id.* at 842-43.

120. *Id.* at 844.

121. Justice W. Michael Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes?*, 20 J.NAALJ 95, 102 (Spring 2000).

awkward when the decisions offered as “precedents” have, according to agency rules, regulations, and policies, no “precedential” value whatsoever, and merely predated the issuance of the decision undergoing scrutiny. Whether or not “non-precedential” decisions are required to be consistent is unclear. However, in general, agency consistency is important, and any departure from prior policies and standards accompanying a “reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”¹²²

The most pivotal issue raised by the Agency Compliance Review, and, in fact, the next question, is what happens if the peer reviewer determines that the decision fails to comply with minimum standards, for example: incorrect format; poorly defined issues; inaccurate or inadequate findings of fact; incorrect or incomplete policy; inadequate discussion; incomplete or inadequate conclusions of law; issues are not adequately disposed of; or the decision fails to adhere to clear legal precedent, and the administrative adjudicator refuses to make suggested modifications and corrections, either because he or she disagrees on substantive grounds, or based on the issue of judicial independence?

2. What Happens if the Peer Reviewer Determines That the Decision Fails to Comply With Minimum Agency Standards?

We come full circle with the question as to what happens if the peer reviewer determines that the decision fails to comply with minimum agency standards. Some administrative adjudicators will happily accept constructive criticism to improve their work product. Others, however, will resist any suggested changes. So long as the “bottom line” is not addressed, reasonable minds may differ on some subjective issues, such as discussions and conclusions, but there should be little, if any, dispute pertaining to format, issues, facts, or policy.

Continuing unresolved disputes may be resolved by including another colleague in the discussions. If the dispute remains unresolved, the options are few: (1) the decision can be released as even-

122. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *see also*, *INS v. Yang*, 519 U.S. 26 (1997).

tually agreed, with the understanding that the administrative adjudicator's accountability and responsibility may be revisited should subsequent events prove the peer reviewer(s) assessments correct; (2) the decision can be withheld by the agency for some subsequent unspecified agency action; or (3) the decision can be reversed by the agency head. In those agencies where the administrative adjudicator issues final decisions, the eventual result may be the withdrawal of the power to do so, with the implementation of a process establishing recommended decisions.

Despite the positive features of the Agency Compliance Review, the presence of the potential areas of dispute generates a sizable majority, perhaps approaching seventy-five percent of those polled in a largely unscientific survey, of adjudicators which strongly opposes this form of peer review. The issue is not quality or practicality, but rather the highly charged "judicial independence." Of course, if the Agency Compliance Review approaches the "bottom line," the opposition figures increase as the form of review develops into the Agency Acceptability Review.

D. Pre-Issuance Review - The Agency Acceptability Review

To many, the fourth step in the process, what I have styled as the Agency Acceptability Review, is merely the bold usurpation of decision-making by the agency, accompanied by the resultant loss of any decisional independence by the administrative adjudicator. To others, especially the agencies, it serves the legitimate purpose of ensuring high decisional quality and consistency. As with the Agency Compliance Review, in this instance, the peer reviewer is not serving as the colleague or subordinate of the administrative adjudicator, but rather as the agent of one of the parties to the controversy, the agency.

Despite justifying agency actions under the Agency Acceptability Review, higher decisional quality and consistency, the agency, through the assigned peer reviewer, is not merely encouraging its perceptions of legal accuracy, thoroughness, and logic analysis, or attempting to influence the selection of facts, for fact finding, and the preference of law and written policy, for legal analysis. Instead, it is mandating a particular outcome. This does not constitute *ex parte* input from the agency, but rather direct decisional imposition. Thus,

the Agency Acceptability Review engenders a firestorm of *angst* or opposition among administrative adjudicators.

This form of review can be performed by anyone because it requires no expertise or experience, but rather a goal of decisional consistency which is agency-friendly.

A brief study of the Social Security Administration's attempts to impose such a process can be very instructive. A "targeting" process called the "Bellmon Review Program," was instituted by the Social Security Administration to implement a section of the Social Security Disability Amendments of 1980¹²³ referred to as the "Bellmon Amendment." The "Bellmon Amendment" measures designed to "improve decisional quality and accuracy," was a manifold approach to a perceived problem which directed the Secretary of Health and Human Services to review decisions of administrative law judges, on her own motion, essentially because of concern over the high rate of reversals, viewed as decisions unfavorable to the agency, and the variances among administrative law judges.¹²⁴ The program commenced in October 1981.

According to the then-Associate Commissioner of the Social Security Administration, the Bellmon Review was instituted, in part, because of "Congressional concern about high allowance rates."¹²⁵ He justified reviewing the decisions unfavorable to the agency, in part, because "studies had shown that decisions in this group would be the most likely to contain errors."¹²⁶

As initially contemplated by the Bellmon Review process, individual administrative law judge's decisions would be reviewed on the basis of the judge's prior decisions.¹²⁷ In other words, those administrative law judges whose earlier decisions were unfavorable to the agency at least seventy percent of the time were to be subjected to 100 percent review.¹²⁸ Those whose decisions were more favorable to the agency would be reviewed on lower scales of seventy-five per-

123. Pub. L. No. 96-265 (1980) (discussed in 42 U.S.C. § 421 (1982)).

124. *Ass'n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1134 (D.C. Cir. 1984).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

cent, fifty percent, and twenty-five percent, respectively.¹²⁹ Administrative law judges whose decisions were favorable, viewed as “accurate,” ninety-five percent of the time, would be removed from review.¹³⁰ The legality of this “targeting” process was questioned by the agency’s own legal staff as having a “possible chilling effect on the decisional independence of targeted ALJs,” but the legal guidance was rejected.¹³¹ The agency’s intentions and expectations were unmistakable: AALJ allowance rates were “untenable,”¹³² and targeting would lead to “some reduction in allowance rates.”¹³³

The program had its desired “chilling” effect: the decline in allowance rates was viewed as “good news” to the agency.¹³⁴

A separate segment of the Bellmon Review described, but never implemented, provided for individualized “feedback and counseling” which some administrative law judges feared would serve to “direct high allowance ALJs how to develop, hear and decide cases.”¹³⁵

The next step of the Bellmon Review was “if, after further review an ALJ’s performance had not improved, other steps would be considered.”¹³⁶ This provision was sensed as a warning that unreformed or unsuccessfully re-indoctrinated administrative law judges would be targeted for adverse personnel action, which could include dismissal.¹³⁷

Although described by the agency as a process separate from the Bellmon Review, some administrative law judges at a particularly troublesome office, one which had high allowance rates, viewed by the agency as having “significant deficiencies in the quality and accuracy” of decisions, were given training by senior agency personnel.¹³⁸ The expressed purpose for the training was to “correct decisions and

129. *Id.*

130. *Id.*

131. *Id.* at 1136.

132. *Id.* at 1137.

133. *Id.*

134. *Id.*

135. *Id.* at 1135.

136. *Id.*

137. *Id.*

138. *Id.* at 1137.

not to pressure [the administrative law judges] to reduce allowance rates.”¹³⁹ The court disagreed:

The worthiness of defendants’ stated goal of improving the quality and accuracy of decisions notwithstanding, targeting high allowance ALJs for review, counseling and possible disciplinary action was of dubious legality. . . . [T]he evidence as a whole, persuasively demonstrated that defendants retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. While there was no evidence that an ALJ consciously succumbed to such pressure, in close cases, and, in particular, where the determination of disability may have been based largely on subjective factors, as a matter of common sense, that pressure may have intruded upon the fact-finding process and may have influenced some outcomes.¹⁴⁰

The court concluded:

[D]efendants’ unremitting focus on allowance rates in the individual ALJ portion of the Bellmon Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof. Defendants’ insensitivity to that degree of decisional independence the APA affords to administrative law judges and the injudicious use of phrases such as “targeting,” “goals” and “behavior modification” could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide.¹⁴¹

Both sides won segments of their dispute. The Bellmon Review Program was altered to such a degree that most of the objectionable features thereof were abolished, and those changes enabled

139. *Id.* at 1138.

140. *Id.* at 1141-42.

141. *Id.* at 1143.

the court to obviate the need for injunctive relief, permitting the agency to prevail, at that time. For the next few years all was quiet, until September 1997, when a newly revised form of the Bellmon Review Program was proposed and public comment solicited.¹⁴² But, that is the subject of another presentation.

It is unfortunate that agencies and others choose to deprecate administrative adjudicators for perceived past decisional transgressions, the issuance of decisions deemed to be contrary to the agency's desires and interests, in an obvious effort to influence the "bottom line" of pending cases. There is a potential irrevocable "chilling" effect unleashed when a decision is unfairly disparaged, but the criticism extends beyond an assault upon the decision and ends up as an attack upon the judge and the system. In response to one such continuing media and political barrage, the chief judge and three of his predecessors of the Court of Appeals for the Second Circuit¹⁴³ wrote a public release:

We have no quarrel with criticism of any decision rendered by any judge. Informed comment and disagreement from lawyers, academics, and public officials have been hallmarks of the American legal tradition.

But there is an important line between legitimate criticism of a decision and illegitimate attack upon a judge. Criticism of a decision can illuminate issues and sometimes point the way toward better decisions. Attacks on a judge risk inhibition of all judges as they conscientiously endeavor to discharge their constitutional responsibilities.¹⁴⁴

Despite agency professed concern for ensuring high decisional quality and consistency, Agency Acceptability Review has no place in a system which purports to offer due process and fundamental fairness. The overwhelming majority of those polled in a largely

142. 62 Fed. Reg. 50,266 (1997) (to be codified at 20 C.F.R. §§ 404, 416).

143. JJ. Jon O. Newman, J. Edward Lumbard, Wilfred Feinberg, and James L. Oakes.

144. Statement issued by Second Circuit Chief Judge and three predecessors (Mar. 28, 1996), in JOHN O. NEWMAN, *THE JUDGE BAER CONTROVERSY*, 80 JUDICATURE 156, 158 (1997).

unscientific survey, perhaps as many as ninety-five percent, strongly oppose this form of peer review. The issue is not quality or practicality, but rather the highly charged "judicial independence." The agency's power to usurp the decision-making process, accompanied by the resultant loss of any decisional independence by the administrative adjudicator, perhaps substituting "recommended decisions" for final ones, serves only to maintain the façade of due process and undermines the entire system. If the agency wishes to retain the power to issue its own decisions, in most cases, it has the power to do so. However, if the agency wishes to project the appearance of formality and due process, it should permit the peer review process to end with the Agency Compliance Review.

IV. CONCLUSION

It should be the combined goal of all involved in the administrative adjudication process that errors in grammar, syntax, punctuation, spelling, legal analysis, accuracy, thoroughness, logic, format, issues, facts, and policy, be minimized to the degree that they become invisible to the discussion as to the wisdom of the overall "bottom line." As argued by agencies, quality and consistency may be enhanced when these variables are routinely accomplished. However, while consistency may be an overriding objective, generally, it must be remembered that each decision must stand on its own merits and facts, and that attempts by anyone to mandate universal obedience to a vague notion of consistency, meaning many things to many people, will necessarily fail. Is due process being conducted when the decisions are either all favorable or all unfavorable to the agency? The answer is not the visceral reaction, "no," but rather, "maybe," depending on an analysis of the circumstances of the individual case(s).

Administrative adjudicators and their respective agencies are at odds over how to handle authority, accountability, responsibility, quality, and consistency through the peer review process. When the intractable positions of both sides come to a mutual understanding as to the genuine purposes of the adjudicative process and the value of the peer review process, the system will benefit. In truth, the system was established to furnish individuals a means of redress regarding governmental actions. The agencies acquiesce with the process and aggressively solicit agency-favorable decisions and accommodating administrative adjudicators. When the decisions become less than

desirable, the agency may criticize and demean the administrative adjudicator by characterizing the decisions as being of poor quality and inconsistent, and the adjudicator as a substandard performer. On the other side, the administrative adjudicator shrouds himself or herself in the robe and persona of the "real judge," and generally assumes the responsibilities of the position. Due process is the acknowledged function, and fundamental fairness is the declared objective. To the dedicated and responsible administrative adjudicator, the agency is merely one of the parties to the dispute, and thus, accrues no particular advantage in the process. In reality, this impression is legitimate and commendable.