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## **The Hidden Executive Branch Judiciary:**

### **Colorado's Central Panel Experience – Lessons For The Feds\***

by Edwin L. Felter, Jr.\*\*

The Heflin Bill, U.S. Senate Bill 486<sup>1</sup> (S.486) was reintroduced in the U.S. Senate on March 3, 1993. The Bill, which concerns the creation of a federal central panel of administrative law judges ("A.L.J.s"), was first introduced in 1983 as U.S. Senate Bill 1275.<sup>2</sup> The movement to make a federal central panel appears to have picked up considerable momentum. One federal administrative law judge with the United States Department of Labor, who is running for vice-chair of the National Conference of Administrative Law Judges of the American Bar Association, in her campaign letter, states "I have long, and actively, supported this legislation (the Heflin Bill), and have communicated with my Congressional representatives in an effort to ensure that they understand the importance of this legislation to the administration of justice by securing the independence so crucial to us all."<sup>3</sup> Throughout the 1980s, support for the Federal central panel, or corps, idea was not highly visible among federal administrative law judges.

The concept of a central panel, or corps, of administrative law judges ("A.L.J.s") differs from traditional notions of administrative law. Traditionally, hearing officers and referees were housed in the agencies they served. This is still true for federal administrative law judges. These agencies have typically been charged with investigating, prosecuting and

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\*\* Director and Chief Administrative Law Judge, Colorado Division of Administrative Hearings.

<sup>1</sup> S.486, 103d Congress, 1st Session (1993).

<sup>2</sup> S.1275, 98th Congress, 1st Session (1983), reprinted at 129 Cong. Rec. 5610-13 (daily ed., May 12, 1983.)

<sup>3</sup> July 12, 1993 letter from the Honorable Jody Rosenzweig, Administrative Law Judge, United States Department of Labor, to members of the National Conference of Administrative Law Judges, American Bar Association.

adjudicating cases involving the citizens they regulate. The paramount reason for establishing a central panel is to give A.L.J.s independence from the agencies they serve.

### **Central Panel Structure**

This article is intended to familiarize practitioners and members of the public with the central panel concept and structure. It looks at the issues that would be involved in establishing a federal central panel of A.L.J.s and details the workings and results of Colorado's central panel.

Presently there are 17 state central panels, including Colorado's, and New York City's central panel, which totals 18 state or city central panels.<sup>4</sup> With one exception<sup>5</sup> all of these central panels are located in the executive branch of government. Six, or more, are organizationally independent agencies. Colorado's central panel operates as part of another state agency.<sup>6</sup> All but one<sup>7</sup> of the central panels have a chief A.L.J. or a director or both. The A.L.J.s in two states are gubernatorial appointees.<sup>8</sup> In all of the other states, the administrative law judges are selected by the director or chief judge. The chief judges are selected either by the governor, the chief justice of the Supreme Court,<sup>9</sup> the Secretary of State and legislature<sup>10</sup> or a cabinet officer who is the head of a principal department of state government.

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<sup>4</sup>The other states are California, Florida, Iowa, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Washington, Wisconsin, and Wyoming. New York City has a central panel, but New York State does not. The State of Hawaii has a limited, independent corps of administrative law judges and the jurisdiction of this corps has recently been enlarged by the Hawaiian Legislature and the Governor.

<sup>5</sup>Tennessee (legislative branch)

<sup>6</sup>As do the central panels in Iowa, Massachusetts, Missouri, California, Tennessee and Wisconsin.

<sup>7</sup>Missouri

<sup>8</sup>The A.L.J.s in New Jersey and Missouri are gubernatorial appointees.

<sup>9</sup>North Carolina

<sup>10</sup>Tennessee

Two of the central panels<sup>11</sup> are funded by general appropriations, while four<sup>12</sup> are funded strictly through agency user fees. In the user-fee states, the agencies that utilize the services of the A.L.J.s provide the funding for the operation. Four states<sup>13</sup> fund their systems through a combination of general appropriations and agency user fees, and there is presently no available information for the remaining five states.<sup>14</sup> In all the states that have central panels, A.L.J.s are salaried employees.

Although the central panel states vary significantly in their case jurisdiction, they share some common threads. All have jurisdiction over occupational licensing board cases, and the majority hear employee discipline cases. However, there are only three, including Colorado, which preside over workers' compensation cases.<sup>15</sup> In addition, only one state hears unemployment insurance compensation cases.<sup>16</sup>

In 12 of the states, including Colorado, A.L.J.s issue final decisions only in selected cases, such as those concerning rate setting, mental health and minority business matters<sup>17</sup>. In Colorado, final decisions are issued in workers' compensation cases, appealable to the Industrial Claims Appeal Panel in the Department of Labor and Employment and in social services Medicaid provider appeals.

### **"Agency Law" versus the Independent Central Panel**

The stereotypical image of administrative law is that of an agency hearing officer, with a tape recorder under his or her arm, heading for a windowless basement cell to conduct a

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<sup>11</sup>Massachusetts and North Carolina

<sup>12</sup>California, Colorado, Minnesota and Washington

<sup>13</sup>Florida, Missouri, New Jersey and Tennessee

<sup>14</sup>Iowa, Maryland, North Dakota, Texas and Wisconsin.

<sup>15</sup>Minnesota and Wyoming

<sup>16</sup>State of Washington

<sup>17</sup>Missouri is the only state where the decisions of the ALJs are final agency action in every case.

hearing. According to the stereotype, the outcome of this hearing is a foregone conclusion. One critic of administrative law maintains that although the A.L.J.:

"May enjoy and exhibit an attitude completely independent from the agency or its staff, physical location and continuous relationships with only the personnel of the employing agency may bias his analytical capacities, or they may contribute to an inclination to narrow his perspectives to only those social problems and regulatory objectives sought by this one agency."<sup>18</sup>

This other commentator considers, "the unavoidable appearance of bias" when an A.L.J., attached to an agency, presides "in litigation by that agency against a private party."<sup>19</sup>

There are two competing concepts in modern administrative law. One is the concept of adjudicators who are truly independent from the regulatory agencies they serve. The second is the concept of what this author calls "Agency Law." The proponents of the latter concept maintain that adjudications by the agency are a necessary part of statutorily mandated policy formulation. In contrast, the opponents of "Agency Law" hold that the best approach to policy formulation is the adoption of rules and regulations by the agency.

These concepts are at issue in the movement to establish a federal central panel (corps) of A.L.J.s. One proponent of the federal central panel states that the:

"Vast majority of hearings now consists of large numbers of fairly fungible cases which involve private rights rather than proceedings in which the agency has a major stake in a policy making issue."

Antiquated ideas that for decades have controlled administrative practice and procedure must give way to a more practical and economic system if the public and the congress are to continue to accept this means of dispute resolution.<sup>20</sup>

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<sup>18</sup>Davis, "A New Declaration of Independence for Administrative Law Judges," 17 *The Judges' Journal* (Winter 1978) at 16-19.

<sup>19</sup>*Id.*

<sup>20</sup>Thomas. *Administrative Law Judges. The CORPS Issue* (ABA National Conference of Administrative Law Judges, 1987)

On the one hand, administrative law, historically, was intended to provide alternative dispute resolution (an alternative to judicial branch courts). On the other hand, it was intended to be a policy-formulation mechanism. The policy-formulation approach, carried to its logical extreme, may take its toll on individual citizens seeking recourse from their administrative agencies of government. In this author's opinion, the individual could be ground under by the larger wheels and the greater interest of policy formulation.

An A.L.J. with the National Labor Relations Board has argued that while a federal central panel, or corps, would supposedly ensure decisional independence, sufficient guarantees of such independence already exists in the form of federal statutes and judicial perception of federal A.L.J.s.<sup>21</sup> He further argues that the first Heflin Bill would have caused the agencies to lose control of their enforcement obligations, thus, making preservation of agency expertise illusory.<sup>22</sup>

Judge Zankel makes no observations concerning perceptions of members of the general public.

Some participants at the state level also appear determined to preserve the *status quo*. For example, the New York State legislature passed a bill in 1989 creating a central panel of administrative law judges and Governor Cuomo vetoed the bill.<sup>23</sup>

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<sup>21</sup>Zankel, "A Unified Corps of Federal Administrative Law Judges is Not Needed," 6 *Western New England L. Rev.* 723 (1984). The overall tenor of Judge Zankel's article is to defend the present situation where federal administrative law judges are housed the agencies they serve and to observe that the federal central panel is as yet untested.

<sup>22</sup>*Id.* at 737

<sup>23</sup>In his veto message, Governor Cuomo proposed guidelines for agency A.L.J.s. Subsequently, he issued an executive order requiring agencies to: (1) allow A.L.J.s independence in reaching conclusions and making specific findings; (2) strictly enforce prohibitions against *ex parte* communications; (3) prohibit consideration of whether an A.L.J.'s rulings have been favorable to the agency in determinations regarding salary, benefits or working conditions; and, (4) require that hearings be conducted in a timely, efficient and fair manner. *See*, Ely, "New York's Corps Bill," 4 *The*

### **Colorado's Central Panel**

#### *Efficiency and Cost-Effectiveness*

It has been argued that the cost-effectiveness and improved efficiency of a federal central panel is undocumented.<sup>24</sup> Because such a panel, or corps, has never existed, at this point is, of course, correct. However, it is possible to examine similar mechanisms, such as the one in Colorado, to see if they work. The improved efficiency and cost-effectiveness of central panels has been documented in all of the states that have had such a panel for several years. Given these successes, it is conceivable that a federal central panel could realize similar improvements in the administration of administrative justice.

In 1976, the Colorado General Assembly determined that a central panel was necessary in Colorado.<sup>25</sup> Colorado's central panel was principally comprised of the former Division of Labor workers' compensation referees and former Social Services Department hearing officers. Originally the panel was called the "Division of Hearing Officers." In 1987, the name was changed to the Division of Administrative Hearings, and the term "Hearing Officer" was changed to "Administrative Law Judge."

The Colorado Division of Management Services conducted a study in 1977, which revealed that cases were handled more efficiently by the then Division of Hearing Officers (now Division of Administrative Hearings) than by previous decentralized referees and hearing officers. Specifically, the report stated:

"The hearing officers as a group are dedicated and methodical in the hearing process. No instances of undue delay were observed due to hearing officer quandary or indecisiveness."<sup>26</sup>

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*Administrative Judiciary News and Journal* at 3 (Issue 2, Winter 1990). It is open to question why it was considered essential to mandate such fundamental guidelines taken for granted by central panels.

<sup>24</sup>Zankel, *supra*, note 17 at 737-42.

<sup>25</sup>C.R.S. §24-30-1001 *et seq.* [1988 Rep. Vol. 10A (1993 Cum. Supp.)].

<sup>26</sup>Roberts and Kennedy, *Workload and Functional Analysis of the Division of Hearing Officers (Division of Management Services: State of Colorado, April 1977)* at 14.

In 1980, in-house statistical research revealed that the central panel was able to handle workers' compensation cases more economically than the Division of Labor's referees had done prior to the 1976 consolidation.

The Division of Administrative Hearings ("Division") handles most of the administrative law adjudications for the State of Colorado. There are a few statutory exceptions for this, such as adjudications involving agencies overseeing public utilities, personnel, unemployment insurance, driver's licenses and natural resources. In fiscal year 1992/93, 17 A.L.J.s (14.95 FTEs), statewide, handled 12,811 cases for a cost of approximately \$2.1 million<sup>27</sup> (as compared to Minnesota's \$3 million, Florida's \$3.9 million and Washington State's \$10.5 million). The administrative offices of the Division are housed in Denver. A satellite office, housing the A.L.J.s and their support staffs (including staff court reporters) who hear workers' compensation cases, also is located in Denver, five floors above the administrative offices. There are regional offices in Colorado Springs, Pueblo, Ft. Collins and Grand Junction.

### *Structure*

The Colorado Division of Administrative Hearings is a statutory division of the Department of Administration.<sup>28</sup> The Executive Director of the Department of Administration has specific authority to promulgate procedural rules for the Division.<sup>29</sup> Procedural rules for the Division of Administrative Hearings first became effective on August 1, 1987.<sup>30</sup> The most recent amendments to the Division's procedural rules became effective on April 1, 1993.<sup>31</sup>

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<sup>27</sup>Annual Report to the Governor and the General Assembly (Division of Administrative Hearings: State of Colorado, Dec. 1992) at 13 and 16.

<sup>28</sup>C.R.S. §24-30-1001 et seq.

<sup>29</sup>C.R.S. §24-30-102(2)(h) [1988 Rep. Vol. 10A (1993 Cum. Supp.)]

<sup>30</sup>Colorado Code of Regulations, 1 CCR 104-1.

<sup>31</sup>*Id.*



The stated mission of the Division is: **To Deliver High Quality Adjudication Services for the State of Colorado in a Timely, Efficient and Cost-Effective Manner, with Respect for the Dignity of Individuals and their Due Process Rights.**

The Division is cash-funded, billing client agencies only for services performed. It operates on a break-even basis with billing rates set by the Joint Budget Committee of the General Assembly. Small agencies that use services infrequently, thus, have access to timely, professional adjudication services at a low cost.

The Division serves approximately 70 state agencies. Agencies handling workers' compensation, social services and licensing boards account for a major portion of the Division's services.

Licensing hearings are conducted formally in a manner similar to a District Court trial but on a more economical and expeditious basis. Workers' compensation hearings, which last approximately one hour, also are conducted formally. However, experience in Colorado's system has shown that the full range of discovery mechanisms, which are available in the District Courts are not necessary in workers' compensation proceedings before an A.L.J.

Social services cases are heard less formally. The Colorado Rules of Evidence apply in the hearing room. The Colorado Rules of Civil Procedure also apply, unless portions thereof are specifically made inapplicable by the A.L.J. in a particular case. Finally, if there is a conflict between agency rules and Division Rules, the agency rules preempt because of well-established principles of administrative law.

### **Indicators of Colorado's Success**

A survey evaluating the Division's A.L.J.s by lawyers, was first implemented in 1982. Since then, the survey has been taken on an almost consistent biannual basis. The

survey has demonstrated that the Division's A.L.J.s have performed at a high professional level and earned the respect of practitioners on both sides of the issue. The last survey, which was conducted in 1992 by of the Office of State Planning and Budgeting of the Governor's office (reported on December 30, 1992), shows that all the A.L.J.s function at an overall approval rate of 88%. The A.L.J.s handling workers' compensation cases function at an overall approval rate of 85%, according to the 1992 survey.<sup>32</sup> Also, a recent study of workers' compensation decisions on permanent disability awards reveals that neither side gets what it asks for in most cases. The awards indicate that the A.L.J.s have taken a middle-of-the-road approach.

Recent case statistics reveal that each A.L.J. works more efficiently -- by producing more decision in less time -- than they did prior to the 1976 consolidation. Additionally, although each A.L.J. spends more time in the hearing room than in the past, there is no decrease in the A.L.J.'s ability to produce decisions. On the contrary, there is an increase in decisions. For example, in fiscal year 1992/93, each A.L.J. heard an average of 411 cases and decided an average of 816 cases per year (including matters other than those that were heard on the merits and, in some cases, more than one decision per case). In fiscal year 1991/92, each A.L.J. heard an average of 401 cases per year and decided an average of 655 cases per year. Appeals of A.L.J. decisions in workers' compensation cases, (to the first appellate level) have averaged approximately 10 to 15%. In other cases, the average is less.

In February 1990, the Division of Administrative Hearings, on its own initiative and with the cooperation of the then Division of Labor, and the Workers' Compensation Section of the Colorado Bar Association, conducted a "Settlement Week" project to

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<sup>32</sup>*Annual Report*, after p. 20, reprinted memorandum of December 30, 1992 from Marcello Kort, Office of State Planning and Budgeting Analyst.

alleviate the workers' compensation hearings backlog. All of the workers' compensation cases set for hearing in May and June, 1990 were included in the project which, ultimately, produced a 39% settlement rate for all cases targeted.<sup>33</sup> As a result of this project, the recently created Division of Workers' Compensation (the successor to the Division of Labor in workers' compensation) of the Department of Labor and Employment hired three permanent pre-hearing judges to do exactly what the "Settlement Week" project did.

In 1982, then-Governor Richard D. Lamm's Management and Efficiency Committee ("Committee") noted that, in creating a central panel:

"The legislative intent . . . was to avoid the appearance of conflict of interest within the Department of Labor and Employment and to create a separate state administrative law system to decide administrative cases. The Hearing Officers were to be independent of the agencies over whose claims they had jurisdiction.<sup>34</sup>

The Committee went beyond its charge and urged the state to consider establishing an "administrative law court." But for the executive branch structure appearing on organizational charts, the Colorado Division of Administrative Hearings is indistinguishable from an "administrative law court" at the present time.

A study of the Colorado Workers' Compensation system, which was submitted to the General Assembly in January 1989, done at the request of the General Assembly and the Colorado Division of Labor, found that the A.L.J.s, who handled workers' compensation cases were successful in fashioning remedies despite a poorly worded workers' compensation Act.<sup>35</sup> The study indicated that the A.L.J.s who dealt with workers' compensation cases had to perform many tasks other than adjudication in order to keep the system functioning. Ultimately, the study recommended a stronger administration-based

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<sup>33</sup>*Annual Report, supra*, at p.13.

<sup>34</sup>*Report of Management and Efficiency Committee (Colorado, 1982)*

<sup>35</sup>Lewis, *Report of Independent Study of the Colorado Workers' Compensation System* (John H. Lewis, 1989)

system, whereby the A.L.J.s would be liberated to perform their principal function: to hear and decide cases -- in a timely fashion -- that involved genuine controversies incapable of resolution by mediation or settlement.<sup>36</sup>

On February 9, 1993, the Colorado Division of Administrative Hearings underwent a Legislative Audit Committee (of the General Assembly) hearing on its workers' compensation programs, which accounts for approximately 55 to 60% of its business.<sup>37</sup>

The Legislative Audit Committee was highly complimentary of the Division's performance under Senate Bill 218 (the Workers' Compensation Reform Package which became effective on July 1, 1991) to the point that Senator Tillman Bishop of Grand Junction, President *Pro Tem* of the Senate, invoked a personal privilege on the floor of the Colorado Senate on Wednesday, February 10, 1993, praising the Division for its outstanding performance in reducing the backlog of workers' compensation cases by 95%; providing hearings in 1/3rd the time it provided them before July 1, 1991 (within an average of 88.2 days as opposed to the previous 263.8 days); and, in rendering decisions in 1/5th of the time utilized prior to July 1, 1991 (9.6 days as opposed to 49.1 days). The Legislative Audit Committee had praise for the Division for doing more with less. Prior to July 1, 1991, 10.2 FTE A.L.J.s were handling workers' compensation cases. The caseload per individual A.L.J. actually went up after July 1, 1991 with 10.0 A.L.J.s handling workers' compensation cases, and it has gone up even more after July 1, 1992 with 8.9 FTE A.L.J.s handling workers' compensation cases.

The Division attributes its successful performance to its two-plus year involvement with the Total Quality Movement. Colorado, like most other states, is facing

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<sup>36</sup>C.R.S. §8-40-101 *et seq.* [1986 Rep. Vol. 3B (1993 Cum. Supp.)].

<sup>37</sup>*Report of the State Auditor "Workers' Compensation Hearings, Division of Administrative Hearings, Department of Administration; December 1992."*

budget cuts in government because of higher expectations on the part of the public that government should do more with less. The traditional "bureaucratic" approach to budget cuts, *i.e.*, "services to the public must be cut because of the budget cuts" will receive a chilly reception with members of the public and with members of the General Assembly. The only salvation for central panels -- the only road map to survival in leaner governmental times -- is for central panels to adopt a total customer-focus within legitimate areas of expectations (excluding outcomes on individuals cases); and, to be able to measure and improve performance and, to prove the fact that the central panel has, in fact, been able to do more with less without sacrificing due process.

Colorado is proud of the fact that its General Assembly has recognized its successes with the workers' compensation caseload. More importantly, the members of the Legislative Audit Committee expressed deep concern that the Division's budget not be cut one iota so that it can continue performing at its present level. This refutes the common misconception that legislators will only cut you more if you perform well.

### **Conclusion**

In advancing the position that all is well at the federal level, critics of the central panel concept overlook the successful experience of many states. Interestingly, the principal constituencies of the state central panels are the respective state legislatures and not necessarily state agencies. Eventually, state agencies give up their turf and become fans of the central panels as long as the agencies maintain some control over final agency action under appropriate due process strictures.

Because of the independence of the central panels, agencies have an equal chance of winning or losing cases. More importantly, the citizen seeking adjudication of an agency action gets to play on a level playing field and, generally, senses this from the beginning. State legislatures are beginning to find that the central panel is the best answer to providing dignified, impartial and cost-effective administrative adjudications.

## Administrative Hearings: State Central Panels In The 1990s\*

By: Allen Hoberg\*\* \*\*\*

### Introduction

Administrative law judges, administrative hearing officers, and hearing examiners have become major figures in the American justice system today. One author, talking about "the hidden judiciary," claimed in 1981 that there were more than 4,000 federal and state "administrative law judges" in this country.<sup>1</sup> Depending on the definition of an "administrative law judge," the figure was probably far understated. Ten years later, there are probably thousands more than that. In 1991, California alone had anywhere between 400 and 800 such judges and hearing officers, again, depending upon how they are counted.<sup>2</sup> Maryland has approximately seventy-two administrative law judges in its Office of Administrative Hearings, which has jurisdiction over most, but not all, state agency

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\*\*\* The author especially appreciates the cooperation received from the Maryland Office of Administrative Hearings and Texas Office of Administrative Hearings, and their Directors, Chief Administrative Law Judges John W. Hardwicke and Steve L. Martin.

<sup>1</sup>Malcolm Rich, "Central Panels of Administrative Law Judges: An Introduction," 65 *Judicature* 233 (1981). There are also administrative law judges on the local level, the numbers of which are not readily available. The term "administrative law judge" has varying definitions. In some states, e.g., Maryland, it refers only to legally trained presiding officers for central panel agencies. It also has a general connotation, however, and can be used to refer to all presiding officers at administrative hearings. In some states, e.g., North Dakota, the term is not used, but rather all presiding officers, whether law-trained or not, are referred to as "hearing officers" or (until a recent law change) "hearing examiners." Hereinafter, "administrative law judge" or "ALJ" will refer to all types of presiding officers at administrative hearings, including "hearing officers" and "hearing examiners," unless otherwise specifically noted.

<sup>2</sup>Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals* 44 (Oct. 1, 1991) (unpublished manuscript, on file with the author). This article arose out of studies prepared by the author for the California Law Revision Commission. It was presented at the Eighth Annual Central Panel Directors Conference in November 1991. Professor Asimow is a professor at UCLA Law School.

hearings in Maryland.<sup>3</sup> In any event, there are many thousands of federal and state administrative law judges in this country presiding over and processing, undoubtedly, well over a million administrative matters (cases) a year.

These administrative law judges resolve sometimes complex legal disputes between public agencies and members of the public in such diverse areas as commerce, communications, health and safety, social security, public utilities, education, professional licensing, gambling, taxation, agriculture, workers' compensation, unemployment compensation, and personnel matters. Although, administrative adjudication is a relatively recent development, it is now pervasive in this country's society and in all levels of government.

Administrative adjudication is handled in a variety of ways on the federal, state, and local levels of government. The purpose of this article is to discuss one approach to administrative adjudication at one level of government--the central panel system in state governments. The primary focus of the article is the recent establishment of three versions of that approach in three states (Maryland, North Dakota, and Texas). First, the article will introduce the concept of the central panel system, relate a brief history of the central panel movement, and discuss the jurisdiction and structure of central panels with special emphasis on the earlier panels. After focusing on the more recent Texas, North Dakota, and Maryland experiences, the article will then review some positive "by-products" of the central panel movement and the establishment of central panel systems in the states. Finally, the article will close by giving some of the author's views about the future of central panels and the central panel movement.

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<sup>3</sup>1991 Md. Off. of Admin. Hearings Ann. Rep. 2. [hereinafter 1991 Maryland Annual Report].

### **Conceptual Background And History**

A central panel system is simply an independent administrative law judge (ALJ) corps in which a central office of administrative hearings employs a staff of ALJs and assigns them, upon the request of administrative agencies, to preside over agency proceedings that are within the jurisdiction of the central office. Agencies generally request central panel ALJ services either because they are required to do so by law, or because the central panel has discretionary authority to preside over the proceedings of agencies not required to use its ALJs. In other words, an agency has discretion to use independent ALJs, but it is not required to do so. Essentially, then, the agency agrees to use central panel hearing officer services for some reason (e.g., to avoid a conflict of interest).<sup>4</sup>

The basic purpose of the central panel system is to give ALJs a certain amount of independence from the agencies over whose proceedings they preside.<sup>5</sup> Specific reasons for implementing a central panel system with independent ALJs, usually given by proponents, include the likelihood of fairness, in fact, the appearance of fairness, case management and workload efficiencies, cost efficiencies, decisional independence, protection of hearing officers, self-policing peer review, hearing officer professionalism and satisfaction, public confidence, different perspectives, and the elimination of ex parte contacts.<sup>6</sup> Additionally, expectations for established central panel systems have included consolidation of a large number of disparate hearing units into a professional, well-managed agency; efficiency in implementing management systems for quality assurance (e.g., case docketing, hearing scheduling, and cross-training); better ALJ performance evaluations; streamlined hearing processes and uniform rules; reduction in the number of hearings;

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<sup>4</sup>See L. Harold Levinson, "The Central Panel System: A Framework That Separates ALJs from Administrative Agencies", 65 *Judicature* 236 (1981).

<sup>5</sup>*Id.*

<sup>6</sup>See, e.g., *Office of Administrative Hearings: Hearings on S.B. No. 2243 Before the Committee on Judiciary*, 52d Legis. Assembly of N.D. (Jan. 14, 1991) (written testimony of Allen C. Hoberg).



reduction of postponements; implementation of billing procedures to ensure that all agencies pay their fair share of hearing costs where budgets are based on reimbursement from user agencies; the ability to handle more cases with fewer judges; better performance than previous part-time hearing officers on complex cases; fostering timeliness in the decision making process; provision of a flexible resource base; maintenance of a fair process; use of only legally trained hearing officers who may be better able to deal with attorneys and complex hearings (this is usually considered after initial period of consolidation and grandfathering hearing officers and ALJs); location of ALJs under one roof; development of a code of professional ethics and performance standards for ALJs; upgrade of ALJ pay scales; and provision of some uniformity in decision formats.<sup>7</sup>

The movement toward the establishment of central panel systems began with the California Administrative Practice Act.<sup>8</sup> In 1945, it was the pioneer document for establishing an independent ALJ corps.<sup>9</sup> The central panel system has now been adopted in a significant number of other states: Colorado, Florida, Iowa, Massachusetts, Maryland, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming.<sup>10</sup> Central panels have also been established on the local level in some large cities.<sup>11</sup> Many other states have studied the concept, and legislation to establish a central panel system has been introduced in some.<sup>12</sup>

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<sup>7</sup>See, e.g., Div. of Management Analysis and Audits, Md. Dep't of Budget & Fiscal Planning, Management Review of the Office of Administrative Hearings i-iii (Jan. 1992).

<sup>8</sup>1945 Cal. Stat. ch. 867. The existing provisions relating to the California Office of Administrative Hearings are found in Cal. Gov't Code §§ 11,370-11,370.5 (West 1992).

<sup>9</sup>*Id.*

<sup>10</sup>L. Harold Levinson, "News from the States," 17 *Admin. L. News* 9 (Fall 1991); "State of the States," *The Central Panel* (Md. Off. of Admin. Hearings, Lutherville, Md.), Winter 1992, at 1, 1; Wyo. Stat. §§ 9-2-2201 to 2203 (1992).

<sup>11</sup>For example, New York established a central panel created by executive order in 1979. See 1989 City of N.Y., Office of Admin. Trials & Hearings (OATH) Ann. Rep. 4.

<sup>12</sup>The 1989 New York Assembly considered legislation to establish an Office of Administrative Hearings. See S. 3613-A, 212th Sess. (1989). It was passed by the legislature, but vetoed

The 1991 Model State Administrative Procedure Act also provides for establishing a central panel system.<sup>13</sup> At the federal level, the idea has been repeatedly proposed but never adopted.<sup>14</sup>

### Jurisdiction And Structure Of Central Panels

The general consensus is that central panel systems have worked well in the states.<sup>15</sup> Not one state that has adopted the central panel system has repealed the implementing legislation. The jurisdiction and structure of the various state central panels differ considerably, however.

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by the governor. See governor Mario M. Cuomo, Veto Message #22 (July 25, 1989) (on file with author). In 1989, the Oregon Commission on Administrative Hearings studied the implementation of a central panel but declined to recommend that "sweeping remedy." See Commission on Administrative Hearings, Report to the Sixty-fifth Legis. Assembly, the Chief Justice of the Oregon Supreme Court, and the Governor of the State of Oregon at 12 (April 21, 1989). The South Dakota Legislative Assembly considered legislation to establish a central panel system in 1991, but the legislation was defeated. Efforts continue there to propose and pass acceptable legislation. Telephone interview with Judge Steven L. Zinter, South Dakota Circuit Court, Sixth Judicial District (May 4, 1992).

<sup>13</sup>Model State Administrative Practice Act, §§ 4-301, 4-202(a) (1981) [hereinafter MSAPA]. The Act offers a choice between a mandatory and a voluntary central panel system. See *infra* note 110.

<sup>14</sup>See Asimow, *supra* note 2, at 43 n.75 (citing Thomas, *Administrative Law Judges: The Corps Issue*, 1987 A.B.A. Nat'l Conf. of Admin. L. Judges, Jud. Admin. Division; Nahum Litt & Joseph Simeone, "An Administrative Law Judge Corps: Its Value and Relation to the Traditional Justice System," 11 *Whittier L. Rev.* 569 (1989)); Rhonda McMillion, "Autonomy for ALJs," *A.B.A. J.*, Aug. 1992, at 103, 103; S. 594, 101st Cong., 1st Sess. (1989); S. 826, 102d Cong., 2d Sess. (1992); H.R. 2910, 102d Cong., 2d Sess. (1992).

<sup>15</sup>Asimow, *supra* note 2, at 44 n.79 (citing M. Rich & W. Brucar, *Central Panel System for Administrative Law Judges: A Survey of Seven States* (1983); Governor's Comm. on the Off. of Admin. L., State of N.J., 1984 Rep. (1984)).

In California, for example, the jurisdiction of the Office of Administrative Hearings (OAH) extends primarily to licensing agencies, but other state agencies and local governments frequently draw on its services even when not legally required to do so.<sup>16</sup>

Massachusetts's Administrative Law Appeals Division (ALAD) jurisdiction extends only to the Contributory Retirement Appeal Board, the Board of Registration in Medicine, the Division of Capital Planning and Operations, the Office of Veterans Services, and to other state agencies that request the DALA to conduct adjudicatory hearings.<sup>17</sup>

In New Jersey, the jurisdiction of the Office of Administrative Law extends to nineteen principal departments; the State Parole Board, the Public Employment Relations Commission, the Division of Workers' Compensation, the Division of Tax Appeals, and any agency not within N.J. Stat. Ann. § 52:14B-2(a) are exempted.<sup>18</sup>

In Tennessee, the Administrative Procedures Division (APD) was originally created to provide hearing officers only for the regulatory boards, the Department of Public Health, and the Department of Commerce and Insurance. Through the years, many more agencies have been required to use APD's independent hearing officers, or have elected to use them. The exempt agencies include the Public Service Commission, the Board of Equalization, and several departments--Revenue, Employment Security, Corrections, Military, Human Services (eligibility hearings), and Special Education, as well as the Teacher Career Ladder Program.<sup>19</sup>

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<sup>16</sup>Asimow, *supra* note 2, at 45. Although California's central panel jurisdiction extends to about 65 agencies, the vast majority of ALJs work for larger state agencies, and thus do not belong to the central panel. *Id.* at 43-44.

<sup>17</sup>"Jurisdiction," *The Central Panel* (Md. Off. of Admin. Hearings, Lutherville, Md.), Fall 1991, at 5, 5; *see* Mass. Ann. Laws ch. 7, § 4H (Law. Co-op 1988 & Supp. 1992).

<sup>18</sup>"Jurisdiction," *supra* note 17, at 5; *see* N.J. Stat. Ann. §§ 52:14F-1 to -13 (West 1986 & Supp. 1992).

<sup>19</sup>"Jurisdiction," *supra* note 17, at 5-6; *see* Tenn. Code Ann. § 4-5-321 (1991).

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Wisconsin's central panel, the Division of Hearings and Appeals, is limited in jurisdiction to conducting hearings for the Department of Natural Resources, relating to environmental protection and resource management; the Department of Health and Social Services, involving nursing home regulation and juvenile aftercare revocations; the Department of Justice, relating to crime victim compensation awards; and the Department of Corrections, regarding revocations of probation and parole.<sup>20</sup>

Washington's OAH has jurisdiction that extends to thirty-three state agencies including areas of unemployment compensation, social services, occupational licensing, alcoholic beverage control, and utilities.<sup>21</sup> Workers' compensation, environmental, personnel, and tax matters are exempted.<sup>22</sup>

Minnesota's OAH conducts hearings for nearly all state agencies, except for unemployment compensation and welfare eligibility matters.<sup>23</sup> Minnesota's central panel hearing officers also hold hearings for the counties in child support enforcement matters.<sup>24</sup>

Colorado's Division of Administrative Hearings holds hearings for about seventy state agencies on matters including teacher/tenure cases, occupational licensing, juvenile parole, election law violations, Social Services, and Workers' Compensation.<sup>25</sup>

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<sup>20</sup>"Jurisdiction," *supra* note 17, at 6; *see* Wis. Stat. Ann. §§ 227.43, 301.035 (West 1991).

<sup>21</sup>Division of Admin. Hearings, Colo. Dep't of Admin., 1990 Ann. Rep. to Governor and the Legislature 15 [hereinafter 1990 Colorado Annual Report]; *see* Wash. Rev. Code Ann. §§ 34.12.030-34.12.042 (West 1990).

<sup>22</sup>*Id.*

<sup>23</sup>1991 Minnesota Office of Administrative Hearings Ann. Rep. 1 [hereinafter 1991 Minnesota Annual Report]; *see* 1991 Central Panel Conference, Summary of Central Panel States 3 (unpublished summary compiled by Maryland's Office of Administrative Hearings from *The Central Panel* newsletters, on file with author) [hereinafter Summary]; Minn. Stat. Ann. § 14.50 (West 1988).

<sup>24</sup>1991 Minnesota Annual Report, *supra* note 23, at 1.

<sup>25</sup>Edwin L. Felter, "Colorado's Central Panel of ALJs: The Hidden Executive Branch Judiciary," 19 *Colo. Law.* 1307, 1308-09; 1990 Colorado Annual Report, *supra* note 21, at 11; *see* Colo. Rev. Stat. Ann. §§ 24-30-1001, 24-30-1003 (Supp. 1991).

In North Carolina, seventeen agencies are required to use the Office of Administrative Hearings; six agencies and all occupational licensing boards may use it at their discretion; and thirteen agencies are exempt, including several major agencies.<sup>26</sup> North Carolina's OAH also has the unusual responsibility of publishing the *North Carolina Register* and the *North Carolina Administrative Code*.<sup>27</sup>

In Florida, the jurisdiction of the Florida Division of Administrative Hearings extends to thirty-three state departments, but not to workers' compensation, unemployment compensation, or welfare matters.<sup>28</sup>

In Iowa, the Appeals and Fair Hearings Division serves twelve major agencies, several smaller agencies, all professional licensing boards, and the Alcoholic Beverage Division, as well as other state agencies upon request.<sup>29</sup>

In Missouri, the Administrative Hearings Commission has jurisdiction over revenue, sales tax, occupational licensing, income tax, alcoholic beverage licensing, and employee discipline matters.<sup>30</sup>

In Virginia, the central panel consists of a list of qualified hearing officers who are members in good standing of the Virginia State Bar, have practiced at least five years, and have taken a required special training course.<sup>31</sup> The Executive Secretary of the Supreme Court maintains the list. When a Virginia agency requests a hearing officer, the hearing officer is selected from the list on a rotation system.<sup>32</sup> All agencies must use the

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<sup>26</sup>1990 Colorado Annual Report, *supra* note 21, at 14; *see* N.C. Gen. Stat. §§ 7A-756, 150B-18, 150B-23 (1991).

<sup>27</sup>Julian Mann, III, "State of the States," *The Central Panel* (Md. Off. of Admin. Hearings, Lutherville, Md.), Spring 1991, at 1, 3.

<sup>28</sup>1990 Colorado Annual Report, *supra* note 21, at 12; *see* Fla. Stat. Ann. § 120.65 (West 1991).

<sup>29</sup>Iowa Code Ann. § 10A.202 (West 1989 & Supp. 1992).

<sup>30</sup>1990 Colorado Annual Report, *supra* note 21, at 13; *see Summary*, *supra* note 23, at 4.

<sup>31</sup>Va. Code Ann. § 9-6.14:14.1 (Michie).

<sup>32</sup>*Id.*

central panel for litigated matters except any board or commission where a quorum of members are present, the Alcoholic Beverage Control Board, the Industrial Commission, the State Corporation Commission, the Virginia Employment Commission, the State Education Authority, and the Department of Motor Vehicles.<sup>33</sup>

Not all systems that may be called central panels are really "pure" central panels. A pure central panel may be described as a central panel corps that is housed separately from, and operates in complete independence of, any other agency. It is itself a separate agency. For example, the Minnesota, North Carolina, North Dakota, and Texas central panels are housed in completely independent agencies in the executive branch.<sup>34</sup> California, Colorado, Florida, Massachusetts, and Wisconsin are central panel systems housed in a department of administration.<sup>35</sup> New Jersey's and Tennessee's central panels are housed in a department of state.<sup>36</sup> Maryland's and Washington's are housed in the governor's office.<sup>37</sup>

Although housed with another agency, a central panel may still operate independently--in effect, as a separate state agency.<sup>38</sup> Housing with an already existing agency--one that may have few, if any, administrative hearings of its own--can provide a central panel corps with support, both from a political and practical standpoint. In tough budget times, it may also be helpful to be part of a larger agency's budget. Some states,

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<sup>33</sup>*Id.*; *see Id.* §§ 9-6.14:12, 9-6.14:11.

<sup>34</sup>Central Panel States Directors' Salary Survey (1990) (unpublished, on file with the Maryland Office of Administrative Hearings) [hereinafter Salary Survey]; Tex. Rev. Civ. Stat. Ann. art. 6252-13f (West 1992); N.D. Cent. code § 54-57-01 (1991).

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* Central panels are frequently titled "Office of Administrative Hearings," or at least have the words "Administrative" and "Hearings" or "Law" in the title.

<sup>38</sup>*See Wood v. Department of Community Affairs*, Bureau of Regulatory Affairs, 5 OAL Dkt. Nos. CAF 7744-88, 7745-88, 7746-88, 7681-88 (N.J., Dec. 12, 1989).

however, prefer the pure approach for purposes of public perception, if for no other reason. Whether any executive branch agency can actually be completely independent is problematic. Appearances, however, can be very important to a central panel agency.

The term "central panel" has a different meaning to different people, and some states have systems of administrative adjudication that may only loosely be termed "central panel systems." The Missouri Administrative Hearings Commission is sometimes not referred to as a central panel, but it is an independent agency, one that hears primarily revenue cases.<sup>39</sup> Until recently, Wyoming's OAH was not a true central panel. It was an independent office of administrative hearings under the governor, but it conducted only workers' compensation hearings.<sup>40</sup> Iowa's central panel is part of the Department of Inspection and Appeals, which is an umbrella for such diverse divisions as a health facilities division (which is responsible for inspection, licensing, and regulatory functions); a hospital licensing board investigations division (which conducts many types of investigations, including alleged Medicaid fraud); and an inspection division (which inspects food establishments, among other responsibilities).<sup>41</sup> Wisconsin's Division of Hearings and Appeals does not refer to its office as a central panel, but its organization and structure is similar to a central panel system. Although it is attached to another state agency, the Department of Administration, it combines responsibility for a variety of administrative hearings in one agency and does not conduct any hearings for the Department of Administration.<sup>42</sup> Virginia's variation of the central panel system, with its list of qualified

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<sup>39</sup>Summary, *supra* note 23, at 4-5; *see* Mo. Ann. Stat. ch. 621 (Vernon 1988).

<sup>40</sup>Summary, *supra* note 23, at 8. On July 1, 1992, it also began conducting driver's license hearings. *See* Wyo. Stat. § 9-2-2201.

<sup>41</sup>*See* Iowa Code Ann. §§ 10A.101-10A.701 (West 1989).

<sup>42</sup>*See* Letter from David H. Schwarz, Administrator, Wisconsin Division of Hearings and Appeals, to Attorney General Nicholas J. Spaeth (Feb. 20, 1991) (on file with author).

hearings officers from the bar maintained in the state Supreme Court offices, is probably the most unusual.<sup>43</sup>

The central panel corps in the various states are headed up by either a chief administrative law judge or a director who is usually appointed by the governor with the consent of the state senate.<sup>44</sup> In some states the chief administrative law judge or director is appointed by the chief justice (North Carolina), the secretary of state (Tennessee), or hired through the civil service system (Colorado and Wisconsin).<sup>45</sup>

Maryland, North Dakota, and Texas were the first three central panels established in the 1990s. They took different approaches in jurisdiction and structure, with the greatest differences in jurisdictional makeup. A closer look at the three state experiences reveals each state's unique approach.

### **Maryland**

Prior to 1990, Maryland's administrative hearings were conducted on the same basis as in most other non-central panel states. Administrative hearing officers or hearing examiners, usually attached to the agency, conducted the agency hearings and issued decisions. Agency rules of practice and procedure and decisional formats varied.<sup>46</sup>

In December 1987, in response to significant dissatisfaction with the existing system of selection and use of administrative hearing officers, and in response to legislative

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<sup>43</sup>See *infra* pp. 7-8; Va. Code Ann. § 9-6.14:14.1 (Michie 1991).

<sup>44</sup>See Salary Survey, *supra* note 34.

<sup>45</sup>*Id.*

<sup>46</sup>See generally Governor's Task Force on Admin. Hearing Officers, Md. Final Report (June 28, 1988) [hereinafter Maryland Final Report] (investigating criticism of the previous system and recommending a Central Panel); 1990 Md. Off. of Admin. Hearings Ann. Rep. (1990) [hereinafter 1990 Maryland Annual Report] (summarizing past practices and the establishment of the OAH); 1991 Maryland Annual Report, *supra* note 3 (summarizing progress in the OAH during 1991); Office of Admin. Hearings, State of Md., 1990 Brochure (1990) [hereinafter 1990 Maryland Brochure] (explaining the creation, organization, and mission of the OAH).



deliberations during the 1987 legislative session, Maryland's Governor formed a Task Force on Administrative Hearings Officers (the Task Force) to explore the possibility of establishing one central agency.<sup>47</sup> In its final report, issued in 1988, the Task Force supported the premise that a central panel of hearing officers was the best way to proceed. It overwhelmingly recommended the creation of a centralized system of ALJs consisting of an independent agency within the executive branch of government to be headed by a chief administrative law judge, and combining existing hearing examiner and hearing officer positions.<sup>48</sup> Legislation to this effect was submitted to the Maryland General Assembly and passed during the 1989 session.<sup>49</sup> This legislation established an Office of Administrative Hearings that would begin operations in January of 1990.<sup>50</sup> All agencies of state government conducting a contested case hearing after January 1, 1990, were required to use ALJs assigned by the chief administrative law judge.<sup>51</sup> Only the Governor, the Comptroller of the Treasury, the Inmate Grievance Commission and Inmate Adjustment hearing officers, the Public Service Commission, the Workman's Compensation Commission, the Parole Commission, the Health Services Cost Review Commission, and the Health Resources Planning Commission were initially exempt.<sup>52</sup>

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<sup>47</sup>Maryland Final Report, *supra* note 46, at 1; see 1990 Maryland Brochure, *supra* note 46; Janet S. Eveleth, "Senate Centralizes Administrative Law Judges," *Md. B.J.* (July/August 1990).

<sup>48</sup>Maryland Final Report, *supra* note 46, at 2-5.

<sup>49</sup>S. 658, 1989 Sess., 1989 Md. Laws ch. 788 (enacted). Governor William Donald Schaefer signed the bill on May 25, 1989. On December 29, 1989, Governor Schaefer issued Executive Order 01.01.1989.21 temporarily exempting certain agencies from the requirement of using OAH hearing officers. See Md. Code Ann., § 9-1601(c) (1993) (listing covered agencies and unaffected agencies). The legislation establishing the Office is codified in 1989 Md. Laws ch. 788. See Md. Code Ann., § 9-1601 to -1610 (1993).

<sup>50</sup>1989 Md. Laws ch. 788, § 2.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* § 1. As of the fall of 1991, the jurisdiction of Maryland's OAH included cases on behalf of about twenty different state agencies for over 200 programs. See *Jurisdiction*, *supra* note 17, at 5. In 1991, the Inmates Grievance Commission hearing responsibilities and hearings for the Maryland Infant and Toddlers Program were transferred to OAH. See 1991 Md. Laws ch. 251, and OAH added

The path to the successful establishment of a central panel seemed to be relatively easy in Maryland. In addition to the recommendations of the Task Force for implementation of a central panel, the OAH had strong support from the governor. The legislature, taking its cue, not only established a very strong central panel but relocated all ALJs to one new building, the Administrative Law Building.<sup>53</sup>

The result is that in Maryland, most hearing officers and hearing examiners were transferred to the central panel of ALJs headed by a chief administrative law judge. They were no longer called hearing officers or hearing examiners but, rather, administrative law judges. The law now requires that all newly hired ALJs be members of the bar of any jurisdiction, but existing non-legally trained ALJs are grandfathered.<sup>54</sup>

In Maryland, the chief administrative law judge is assisted by the State Advisory Council on Administrative Hearings, with members appointed by the governor.<sup>55</sup> The advisory council's responsibilities to OAH are, essentially, policy, liaison, and advisory.<sup>56</sup> Maryland was the first state to employ the advisory council concept for a central panel system. The advisory council can be a tool to provide useful information, critique, and support to newly established central panels.

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responsibility for conducting hearings concerning forced medication for mental patients for the Maryland Department of Health and Mental Hygiene. See Summary, *supra* note 23, at 2. Additionally, OAH began hearing cases for the Office of Aging, Juvenile Services Administration, the Maryland National Capital Park and Planning Commission, and the Nursing Home Appeals Board. See 1991 Maryland Annual Report, *supra* note 3, at 3.

<sup>53</sup>See 1989 Md. Laws ch. 788, § 6; Mann, *supra* note 27, at 2.

<sup>54</sup>1989 Md. Laws ch. 788, § 2; see Md. Code Ann., § 9-1604(a)(2) (1993); Qualification Standards, Administrative Law Judge, Office of Administrative Hearings, 1990 Maryland Annual Report, *supra* note 46 (attach. 2).

<sup>55</sup>Md. Code Ann., § 9-1604 (1993).

<sup>56</sup>*Id.* § 9-1610 (1993). The advisory council has already issued two reports to the legislature. See 1990 Md. State Advisory Council on Admin. Hearings Ann. Rep.; 1991 Md. State Advisory Council on Admin. Hearings Ann. Rep. This approach to visibility and support was copied in North Dakota. See *infra* text accompanying notes 88-89, N.D. Cent. code § 54-57-08 (Supp. 1993).

The Maryland OAH may have the broadest jurisdiction and the largest case load of administrative hearings of any central panel agency in any state.<sup>57</sup> In 1991, Maryland's OAH employed seventy-two ALJs.<sup>58</sup> It scheduled 76,190 cases in 1991, and 80,639 cases in 1990.<sup>59</sup> Maryland's OAH is one of the "Cadillacs" in the central panel system states, taking the expanded jurisdiction approach.<sup>60</sup>

Maryland's chief administrative law judge has the powers and duties to establish qualifications for ALJs; establish classifications for case assignment on the basis of subject matter, expertise, and case complexity; establish and implement standard and specialized training programs; provide materials for ALJs; coordinate continuing education programs and services for ALJs; develop model rules of procedure and other guidelines for administrative hearings; develop a code of professional responsibility for ALJs; and, monitor the quality of state administrative hearings.<sup>61</sup> The chief administrative law judge is also required to submit an annual report to Maryland's governor and General Assembly on the activities of the Office.<sup>62</sup>

Maryland continues to be in the vanguard of central panel jurisdictions. It learned from some of the earlier central panel states and was able to capitalize on an opportune situation. With expanded jurisdiction, a central location, a consolidated staff, a broad base of support, and effective management, the Maryland OAH is able to publish the *Central*

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<sup>57</sup>*Md. Off. of Admin. Hearings, Progress Rep.* (July 11, 1990). The exact breadth of jurisdiction is difficult to gauge because of differing agency structures in the various states. Minnesota, New Jersey, and Washington also have broad jurisdictional structure. *See supra* text accompanying notes 18, 21, and 23. No state has included all possible state agencies within the jurisdiction of its central panel, however.

<sup>58</sup>1991 *Maryland Annual Report*, *supra* note 3, at 2.

<sup>59</sup>*Id.* at 2-3.

<sup>60</sup>Maryland, Minnesota, New Jersey, and possibly, Washington could also be classified as taking the maximum approach; *see supra* text accompanying notes 18, 21, and 23.

<sup>61</sup>Md. Code Ann., § 9-1604 (1993).

<sup>62</sup>*Id.*

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*Panel* newsletter for the central panel states' directors;<sup>63</sup> act as a clearinghouse of information for other central panel states;<sup>64</sup> and lobby for legislation to assess filing and processing fees for OAH administrative expenses.<sup>65</sup> Additionally, the Maryland OAH continues to obtain new types of hearing matters for assignment to its ALJs. Several new agencies have already been added to its jurisdiction since its establishment in 1990.<sup>66</sup>

### North Dakota

In 1991, North Dakota joined the ranks of the central panel system states. The North Dakota Office of Administrative Hearings, an independent state agency headed by a director who is appointed by the governor, began operations on July 1, 1991.<sup>67</sup> The North Dakota OAH hit the ground running; there was little lag time between the passage of the legislation creating the agency and its effective date. Eighty-two pending administrative hearing matters were transferred to it from various state agencies on the day it began operations, along with hearing officers, support staff, equipment, and materials.<sup>68</sup>

The creation of the new office in North Dakota surprised both proponents and opponents because the legislation passed on the second to the last day of the 1991 legislative session, and it was the state's first attempt at instituting a true central panel. The enabling legislation, however, was not entirely the result of 1991 efforts. In both 1987 and 1989, there was legislative activity in the areas of administrative hearings and administrative hearing officer legislation.

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<sup>63</sup>See generally *The Central Panel* (Md. Off. of Admin. Hearings, Lutherville, Md.), Spring 1991--Summer 1992.

<sup>64</sup>*Id.*

<sup>65</sup>H.B. 248, 1992 Sess., 1992 Md. Laws ch. 134 (codified as amended at Md. Code Ann., § 9-1604 (1993)).

<sup>66</sup>See *supra* note 52.

<sup>67</sup>S. 2234, 52d Leg., 1991 N.D. Laws ch. 637; N.D. Cent. code §§ 54-57 (Supp. 1993).

<sup>68</sup>See Memorandum from Allen C. Hoberg, Director, North Dakota Office of Administrative Hearings to File (March 10, 1992) (on file with author).

The 1987 Legislative Assembly passed legislation directing the North Dakota Legislative Council to study the Administrative Agencies Practice Act (AAPA) and the feasibility and desirability of establishing a separate administrative hearing officer agency.<sup>69</sup> The Legislative Council did not recommend the establishment of an independent hearing agency, however; rather, the interim study focused primarily on the rule making and hearing practice and procedure provisions of the AAPA.<sup>70</sup>

In 1989, the Legislative Assembly passed Senate Bill 2192,<sup>71</sup> which required a change in the hearing officer at the request of any of the parties to a hearing before any state administrative agency, with certain exceptions. The Legislative Assembly also passed Senate Bill 2193,<sup>72</sup> which required the appointment of an independent hearing officer at the request of any of the parties to a hearing for any state administrative agency. The governor vetoed both of these bills, however.<sup>73</sup>

In his 1989 veto message concerning Senate Bill Nos. 2192 and 2193, the governor made it clear that he was reluctant to implement the requirements of those bills without an ALJ system.<sup>74</sup> He acknowledged that a system that is perceived as being more equitable than the existing system may be necessary for the state.<sup>75</sup> He promised to work with the attorney general, other elected officials, and his appointees to set in motion a pilot program in which ALJs would be separate from state agencies.<sup>76</sup>

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<sup>69</sup>See H.R. Con. Res. 3001, 51st Leg., 1987 N.D. Laws 790. North Dakota's AAPA is found in N.D. Cent. code chs. 28-32 (Supp. 1993).

<sup>70</sup>See *Legislative Council of North Dakota, Report to the Legislative Assembly* at 11 (1988).

<sup>71</sup>S. 2192, 51st Leg., State of North Dakota (1989).

<sup>72</sup>S. 2193, 51st Leg., State of North Dakota (1989).

<sup>73</sup>See Letters from George A. Sinner, Governor of North Dakota, to Jim Kusler, Secretary of State of North Dakota (Apr. 28, 1989) (on file with author). Neither of these bills established a true central panel. The result of passing these bills would probably have been a central panel more like the central panel in Virginia. See *supra* text accompanying notes 31-33.

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

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Beginning June 1, 1989, the attorney general put such a system in place on a limited basis. The attorney general established an Administrative Hearing Officer Division separate from all of the other divisions in the Attorney General's Office--it was even in a separate location. The Division conducted hearings and issued recommended decisions for all of the attorney general's administrative hearings, all the administrative hearings for the Department of Human Services, for many hearings for the Department of Human Services, and many hearings for other state agencies that wanted to have an independent hearing office preside.<sup>77</sup>

Prior to the establishment of the Administrative Hearing Officer Division, North Dakota had approximately forty full-time and part-time hearing officers involved in conducting administrative hearings for many different agencies, boards, and commissions.<sup>78</sup> All of the full-time hearing officers and most of the part-time hearing officers were agency personnel. Some hearing officers were special assistant attorneys general (specially appointed attorneys from private practice) or agency contract hearing officers (usually attorneys in private practice who served pursuant to a contract with the agency).

Approximately one year after the establishment of the Administrative Hearing Officer Division, only a few state agencies continued to maintain full-time and part-time hearing officers. Those agencies that continued to maintain such positions were mostly agencies with large numbers of administrative hearings such as Job Service North Dakota,

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<sup>77</sup>Some DHS hearings were required by law to be heard by an assistant attorney general. See N.D. Cent. code §§ 50-24.4-18(2), 54-12-01(18) (1989). The Administrative Hearings Officer Division ceased operations on July 1, 1991, with the establishment of North Dakota's Office of Administrative Hearings.

<sup>78</sup>*North Dakota Human Services Agency, 1987 North Dakota Attorney General Survey* (Sept. 27, 1987) (unpublished, on file with author). As a result of North Dakota's small population, the State OAH requires fewer hearing officers.

The Workers' Compensation Bureau, and the Department of Transportation.<sup>79</sup> Even some of the agencies employing their own hearing officers used the Division with some frequency. The remainder of the state's agencies, boards, and commissions almost exclusively used the services of the Administrative Hearing Officer Division.

In 1991, the attorney general submitted legislation to create a central panel.<sup>80</sup> Additional legislation was introduced in the 1991 session concerning a requirement to provide independent hearing officers.<sup>81</sup> All of these bills met with considerable resistance during the legislative session, the resistance coming mostly from the larger state agencies. The legislation that passed was much narrower in scope of coverage and jurisdiction than the attorney general's original bill. It requires the hearings of all administrative agencies under North Dakota's AAPA, as well as certain other hearings for agencies not under the AAPA, to be conducted by hearing officers from the OAH.<sup>82</sup> All of the AAPA agencies doing large numbers of hearings, except the Department of Human Services, the Tax Department, the Attorney General, The Agriculture Department, and the State Personnel Board, were exempted, however.<sup>83</sup> Accordingly, although the vast majority of state agencies, boards, and commissions are now required to use independent hearing officers from the OAH, the majority of the state's administrative hearings are still outside its jurisdiction.<sup>84</sup>

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<sup>79</sup>1990 North Dakota Attorney General Telephone Survey (Summer 1990) (unpublished, on file with author).

<sup>80</sup>See S. 2243, 52d Leg., State of North Dakota (1991).

<sup>81</sup>See S. 2257, 52d Leg., State of North Dakota (1991). These bills did not create a separate independent office, but would have created a pool of independent hearing officers controlled by the Attorney General's Office.

<sup>82</sup>N.D. Cent. Code § 54-57-03(1) (Supp. 1993).

<sup>83</sup>See *Id.*

<sup>84</sup>For example, the OAH was allocated four full-time hearing officers to conduct its hearings. Three of the exempted agencies, Job Service North Dakota, the Department of Transportation, and the Workers' Compensation Bureau, together employ a total of nine full-time hearing officers. Several other exempted agencies, the Public Service Commission, the Industrial Commission, the Commissioner of

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Except for one newly authorized hearing officer and one newly authorized support staff position, all of the hearing officer and support staff positions in OAH were transferred to the agency from other agencies, i.e., "grandfathered."<sup>85</sup> There was also a transfer of equipment, materials, and records.<sup>86</sup>

The director of OAH also has authority to hire temporary hearing officers, if needed.<sup>87</sup> This type of authority is exercised when a new office is established to provide administrative hearing officers upon request, and the anticipated volume of requests cannot be determined with sufficient certainty to ensure that the authorized permanent hearing officers will be able to provide the required services.

The North Dakota legislation also created a State Advisory Council for Administrative Hearings.<sup>88</sup> The Advisory Council is a committee of the State Bar Association of North Dakota, and members are appointed by its president. It is charged with meeting with the director of OAH semiannually to advise on policy matters affecting the agency and on rules adopted by the director.<sup>89</sup>

North Dakota's implementing legislation requires the director of the OAH to institute uniform rules of administrative practice or procedure for all AAPA agencies that do not have their own rules of administrative hearing practice or procedure.<sup>90</sup> The director also has authority to adopt rules to further establish qualifications for hearing officers, to

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Labor, and the Insurance Commissioner all employ part-time hearing officers. In contrast, one exempted agency, the State Engineer, has some of its hearings included in OAH jurisdiction. *See Id.*

<sup>85</sup>*Id.* §§ 54-57-06(1)(b),(c).

<sup>86</sup>*Id.* § 54-57-06(1)(d).

<sup>87</sup>*Id.* § 54-57-02.

<sup>88</sup>*Id.* § 54-57-08.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.* § 54-57-05(1). The director has adopted Uniform Rules of Administrative Practice and Procedure. *See N.D. Admin. Code* § 98-02 (1992).



establish procedures for requesting and designating hearing officers, and to facilitate the performance of duties and responsibilities conferred by the Act.<sup>91</sup>

North Dakota has taken what may be called a "middle" approach. Although the three agencies with the largest hearings caseload are exempt by statute from the requirement to use OAH hearing officers,<sup>92</sup> several agencies that conduct a substantial number of administrative hearings are included. Additionally, OAH is authorized to provide hearing officers for any exempted agency that requests one, for any unit of local government requesting one, and for any agency to conduct a rule making hearing.<sup>93</sup> Although this is not the expanded jurisdiction approach of Maryland, it is enough jurisdiction to be viable, even in a small state, and to provide hearing officers with enough variety for job satisfaction. It is also enough jurisdiction to give central panel proponents in North Dakota a good basis for achieving expanded jurisdiction.

### Texas

In May 1991, Texas established a central panel system for ALJs. Senate Bill No. 884 was passed on May 25, 1991, and was subsequently signed by the governor.<sup>94</sup> The Texas Office of Administrative Hearings was established as a new, independent state agency, with a director (chief administrative law judge) appointed by the governor.<sup>95</sup> Texas took a "minimal approach" to establishing a central panel system, starting with a small operation that may eventually achieve expanded jurisdiction over time.

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<sup>91</sup>N.D. Cent. Code § 54-57-05(2)(Supp. 1993).

<sup>92</sup>*Id.* § 54-57-03(1).

<sup>93</sup>*Id.* § 54-57-03(5). Of the other established central panel states, Colorado, Florida, Iowa, North Carolina, and Virginia may also be classified in the "middle" category with North Dakota, i.e. falling short of reaching the optimal jurisdictional structure for the state. Of course, the term "optimal jurisdictional structure" is a subjective term.

<sup>94</sup>*See* 1991 Tex. Gen. Laws 591; Tex. Rev. Civ. Stat. Ann. art. 6252-13f (West 1992).

<sup>95</sup>Tex. Rev. Civ. Stat. Ann. art. 6252-13f § 2a (West Supp. 1993).

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Texas's jurisdictional approach for this new office was unique. The OAH is required to provide ALJs to conduct all administrative hearings for any agency that "does not employ a person whose only duty is to preside as a hearings officer over matters related to contested cases before the agency."<sup>96</sup> Previously, such agencies contracted primarily with attorneys outside of government to act as hearing examiners.<sup>97</sup> Although there was some discussion about including some of the larger state agencies that employ their own full-time hearing officers within the jurisdiction of the newly created office, none were included in the statute as enacted.<sup>98</sup> Therefore, Texas's OAH holds hearings for numerous occupational and professional boards, as well as for numerous other agencies, including some large agencies such as the Texas Secretary of State and the Texas Department of Transportation. The law did not require any of the state's agencies that hold substantial numbers of hearings and that hire one or more of their own hearing officers, to use OAH hearings officers, however.<sup>99</sup>

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<sup>96</sup>*Id.* art. 6252-13f §2(b). This does not imply that OAH has jurisdiction only if there is no full-time hearing officer. An agency could fall outside OAH jurisdiction if it employed a person whose only duty, even if only on a part-time basis, was to preside over agency cases. Telephone Interview with Steve L. Martin, Director, Chief Administrative Law Judge, Texas Office of Administrative Hearings (August 28, 1992).

<sup>97</sup>Letter from Jerry Benedict, Special Assistant Attorney General, State of Texas to Senator John Montford (Apr. 8, 1991)(on file with author)(discussing Senate Bill No. 884); Memorandum from Jim Oliver, Director, Legislative Budget Board, State of Texas, to Texas Senator Bob Glagan (Apr. 8, 1991)(on file with author) (regarding fiscal aspects of Senate Bill No. 884).

<sup>98</sup>Telephone Interview with Steve L. Martin, Director, Chief Administrative Law Judge, Texas Office of Administrative Hearings (May 1, 1992).

<sup>99</sup>*Id.*; see "State of the States," *supra* note 10. The Director reports that in addition to occupational and professional boards, about sixty other agencies use OAH. He also reports that some larger agencies are now approaching OAH to do their hearings even though they are not required to use OAH. Telephone Interview with Steve L. Martin, *supra* note 96.

As of May 1992, the extent of the Texas central panel jurisdiction had still not been finally determined. It was to have begun operations by hiring eight to ten ALJs.<sup>100</sup> As of August 1992, however, it had hired only six ALJs.<sup>101</sup> Texas's OAH was to begin full operations by March 1, 1992, and begin holding hearings by April 15, 1992.<sup>102</sup> It was successful, at least in its attempt to hold hearings by April 15, even if the extent of field operations is not yet known.<sup>103</sup>

The Texas Senate Research Center did a survey, beginning October 11, 1991, to determine the number of hearings and the number of part-time hearing officers or hearing examiners currently used by agencies that fell within the jurisdiction of the new OAH. In January 1992, the governor's Office of Budget and Planning began conducting a survey regarding the hearing workload for the OAH. The data for this study was gathered by sending out an "Agency Administrative Hearing Survey" to each state agency.<sup>104</sup> Now, another legislative study, to be completed by December 1993, will determine which agencies not currently within OAH's jurisdiction should be included under its jurisdiction.<sup>105</sup> All these surveys were conducted to attempt to ascertain the exact extent of OAH jurisdiction.

One unusual aspect of the new law establishing the central panel in Texas is that in hearings conducted by ALJs for the Texas OAH, agencies must provide ALJs with a written statement of applicable rules or policies, and the agency may not attempt to

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<sup>100</sup>"State of the States," *supra* note 10, at 1.

<sup>101</sup>Telephone Interview with Steve L. Martin, *supra* note 96.

<sup>102</sup>Memorandum from Dale Craymer, Director, Governor's Office of Budget and Planning, to State Agency Heads (January 28, 1992) (on file with the author) (discussing General Appropriations Act, House Bill No. 1, 1st Sess. (1991)).

<sup>103</sup>Telephone Interview with Steve L. Martin, *supra* note 98.

<sup>104</sup>Memorandum from Dale Craymer, *supra* note 102. Apparently, Texas plans to fund its new panel out of appropriations from affected state agencies. *Id.*

<sup>105</sup>Telephone Interview with Steve L. Martin, *supra* note 96. A legislative sunset process may effectively take the place of the legislative study. *Id.*

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influence the findings of fact or the ALJ's application of the law other than by proper evidence and legal argument.<sup>106</sup> Additionally, an agency may only change the findings of fact and conclusions of law made by an OAH ALJ, or vacate or modify an order issued by an OAH ALJ, for reasons of policy. The agency must state in writing the reason and legal basis for the change.<sup>107</sup>

Although Texas has started small,<sup>108</sup> it has potential to grow. Even though its enabling legislation does not require OAH to hold hearings for those agencies outside its jurisdiction,<sup>109</sup> OAH ALJs are already doing some other types of hearings. Even agencies opposed to the central panel system find that they need independent hearing officers, if only occasionally. When operations begin small, however, there is so much further to go, and a lot more turf still in dispute.

### **By-Products Of The Central Panel Movement**

The establishment of various central panel systems in the states and federal central panel initiatives are just a part of recent developments in administrative law. The 1981 revision to the Model State Administrative Procedure Act (the Model Act) was adopted by the National Conference of Commissioners on Uniform State Laws to supersede the 1961 Revised Model Act.<sup>110</sup> The Model Act incorporated the central panel concept, offering two versions of the statute so that a state legislature may enact one version or the

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<sup>106</sup>Tex. Rev. Civ. Stat. Ann. art. 6252-13a § 13(j) (West Supp. 1993).

<sup>107</sup>*Id.*

<sup>108</sup>It is estimated there may be as many as 300 ALJs in Texas state government service; however, only eight to ten ALJs are part of the state's OAH. Telephone Interview with Steve L. Martin, *supra* note 98.

<sup>109</sup>See Tex. Rev. Civ. Stat. Ann. art. 6252-13f §3(a) (West Supp. 1993).

<sup>110</sup>See MSAPA, *supra* note 13. The central panel concept was not mentioned in the 1946 or the 1961 MSAPA versions, but its absence at that time is not surprising because only one state had a central panel system. By the time the MSAPA was revised in 1981, however, the central panel had been adopted by a number of states, and the drafters then addressed the topic. Levinson, *supra* note 4, at 238.

other, depending upon preference.<sup>111</sup> States continue to update their own administrative practice acts in relation to the Model Act.<sup>112</sup> Reform of the Model Act probably did not result from the movement to establish central panels, though. It is known that in some states the movement to establish central panels has spawned not only a closer look at, and reform of, state model administrative procedure acts, but also consideration of states uniform rules of administrative practice and procedure. In September 1991, Maryland's governor signed an executive order establishing a 13-member Commission to Revise the Maryland Administrative Procedures Act.<sup>113</sup> This executive order came less than two years after the establishment of Maryland's OAH. Maryland's chief administrative law judge is a member of the commission. He is responsible for submitting a report, including recommended changes, to the governor.<sup>114</sup>

In North Dakota, during the 1991 legislative session, a bill to amend the state AAPA was introduced at the same time as proposed legislation to establish a central panel. Both were proposed by the Office of Attorney General. Both were passed by the 1991 Legislative Assembly.<sup>115</sup> Both bills contained extensive input from the State Bar

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<sup>111</sup>Levinson, *supra* note 4, at 238; see MSAPA, *supra* note 13, at §§ 4-202, 4-301. Under one version, the agency may determine whether the presiding officer for any proceeding will be the agency head, one or more members of the agency, or one or more ALJs assigned by the director of the central panel. Under the other version of the Model Act, the agency has all of the above choices plus one more--the agency may, unless prohibited by law, designate "one or more other persons" as presiding officer. See MSAPA § 4-202(a).

<sup>112</sup>See, e.g., Administrative Agencies Practice Act, N.D. Cent. Code §§ 28-32-01 to 28-32-22 (1991 & Supp. 1993). See also 1991 N.D. Laws 342 (codified in scattered sections of N.D. Cent. Code §§ 28-32-01 to 28-32-22 (1991 & Supp. 1993)), which included many of the 1981 MSAPA provisions, some modified.

<sup>113</sup>"State of the States," *The Central Panel* (Md. Off. of Admin. Hearings, Lutherville, Md.), Fall 1991, at 1.

<sup>114</sup>*Id.*

<sup>115</sup>See H.R. 1194, 52d Leg.; 1991 N.D. Laws 342 (codified at N.D. Cent. Code § 28-32 (Supp. 1993)); see also S. 2234, 52d Leg., 1991 N.D. Laws 637 (codified at N.D. Cent. Code § 54-57 (Supp. 1993)).

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Association Administrative Law Committee that promoted AAPA reform and the establishment of a central panel. Now another state bar committee, the State Advisory Council for Administrative Hearings, continues to play a role in administrative law reforms in North Dakota.<sup>116</sup>

In California, the California Law Revision Commission engaged in a study of administrative procedure in that state, authorized by the California legislature.<sup>117</sup> Many individuals, dozens of agency personnel, ALJs, private lawyers, Attorney General staff members, and California's OAH have been involved. The Commission addresses many issues of administrative adjudication, including the need for a new administrative practice act and an expanded central panel.<sup>118</sup>

There is an indication that, at least in some states, the preference of some agencies, and the preference of attorneys in private practice who appear before these agencies on administrative matters, is to leave the existing system alone. The existing system is something familiar, if not perfect. But, in states with central panel systems, there seems to be a willingness to look at what may be best for administrative adjudication in the state as a whole, including administrative practice act reform.

One method for enhancing reform, which is employed by at least two states, is the formation of advisory councils.<sup>119</sup> The charge to advisory councils is to give direction, policy counsel, and advice on the adoption of rules to established central panels. The

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<sup>116</sup>N.D. Cent. Code § 54-57-08 (Supp. 1993).

<sup>117</sup>Asimow, *supra* note 2, at 1 (citing 1987 Res. ch. 47).

<sup>118</sup>Asimow, *supra* note 2, at 2.

<sup>119</sup>See Md. Code Ann., §§ 9-1608 to -1610 (1993); N.D. Cent. Code § 54-57-08 (Supp. 1993). In Maryland, the State Advisory Council is comprised of nine members from the legislature, the Attorney General's Office, the State Bar, and the general public. Md. Code Ann., § 9-1608. In North Dakota, the State Advisory Council is a nine-person special committee of the State Bar, composed of attorneys in private practice and attorneys in government service who are appointed by the president of the State Bar Association. See N.D. Cent. Code §54-57-08.

advisory responsibility of these councils seems to extend beyond the central panel office to include related areas such as uniform rules, jurisdictional changes, and potentially the whole administrative hearings process. Maryland's advisory council has already issued two reports of its activities.<sup>120</sup> North Dakota's advisory council has met three times, advising OAH's director on the drafting of uniform administrative rules at its first meeting;<sup>121</sup> discussing the possibility of expanding jurisdiction, establishing ethical standards for hearing officers, and establishing rules for hearing officer qualifications at its second meeting;<sup>122</sup> and discussing further revision to the AAPA, related legislation, and the uniform rules at its third meeting.<sup>123</sup>

Another by-product of the establishment of central panels related to administrative practice act reform is the institution of uniform rules of practice and procedure. Indeed, when central panels are established, enabling legislation often requires or allows the new agency to adopt uniform rules for practice and procedure.<sup>124</sup> Although the requirement for agency use of the uniform rules may vary, the adoption of uniform rules of central panel agencies probably means that at least all those agencies which are required to use central panel hearing officers must comply with uniform rules. Without uniform rules, under pre-existing systems, each agency has its own rules, or no rules of practice and procedure exist at all.

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<sup>120</sup>See 1990 *Maryland Annual Report*, *supra* note 46; 1991 *Maryland Annual Report*, *supra* note 3. The advisory council is to submit an annual report to the Legislative Policy Committee of the General Assembly. See Md. Code Ann., § 9-1610(5) (1993).

<sup>121</sup>See *State Bar Association of North Dakota, 1991-92 Report of the Advisory Council to the Office of Administrative Hearings* (unpublished, on file with the State Bar Association).

<sup>122</sup>See *State Advisory Council, Minutes* (June 10, 1992) (on file with the State Bar Association).

<sup>123</sup>See *State Advisory Council, Minutes* (October 27, 1992) (unpublished, on file with the State Bar Association).

<sup>124</sup>See, e.g., N.D. Cent. Code § 54-57-05 (Supp. 1993).

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Another by-product of the establishment of central panels may be the adoption of judicial codes of conduct for ALJs. At its 1991 meeting, the central panel states' directors adopted a Model Code of Judicial Ethics. The directors of the central panel states, in effect, officially support the implementation of the Model Code of Judicial Ethics by the central panel states. It remains for each state to promulgate an ethical code for ALJs, either by rule or by seeking the passage of legislation. Some central panel states already have direction in this area. One of the specific duties of Maryland's chief administrative law judge is to "develop a code of professional responsibility for ALJs."<sup>125</sup> The New Jersey Executive Commission on Ethical Standards recently approved a new Code of Ethics for the New Jersey Office of Administrative Law (OAL).<sup>126</sup> Additionally, the New Jersey OAL is promulgating a Code of Judicial Conduct for its ALJs.<sup>127</sup> Disciplinary rules for New Jersey ALJs were adopted and became effective January 6, 1992.<sup>128</sup>

A fourth by-product of the establishment of central panels is a continuing movement to establish central panels in other states. The directors of the central panel states and other advocates of central panel systems have worked hard to promote the passage of legislation establishing central panels by testifying at legislative hearings, providing useful information, and offering helpful advice to those seeking the establishment of central panels in other states.

By association with, background work on behalf of, and direct participation in APA reform, uniform rule adoption, adoption of Codes of Ethics, Codes of Conduct, Disciplinary Rules, and the creation of new central panels, players in central panel systems and adjudication reform have shown that they are truly interested in achieving a structured,

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<sup>125</sup>Md. Code Ann., § 9-1604(a)(9) (1993).

<sup>126</sup>"State of the States," *The Central Panel* (Md. Off. of Admin. Hearings, Lutherville, Md.), Summer 1992, at 1, 5.

<sup>127</sup>*Id.*

<sup>128</sup>*Id.*



responsible role for administrative adjudication in their states, not surprisingly, with the central panel as its core.<sup>129</sup>

### FUTURE OF CENTRAL PANELS IN THE STATES

Although the central panel system movement seems to be one that has been gaining strength recently,<sup>130</sup> the movement has for the most part been slow in developing, spread out over a number of years with a few surges here and there.<sup>131</sup> It is reasonable to expect the growth of central panel system jurisdiction to continue at a relatively slow pace. If central panel systems are established for federal administrative hearings--and as state central panel jurisdictions increase--there may be a surge of activity to adopt central panels in more states. Realistically, however, experience teaches that adopting a central panel system in a state is a local decision, and most of the forces at work are peculiar to each individual state. Ideologically, some legal scholars and attorneys, as well as substantial numbers of agency ALJs and agency heads, may be opposed to central panel systems. Strong allies of the central panel cause can sometimes be found in numbers amongst state

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<sup>129</sup>The "players" include central panel states and their directors, ALJs, and others interested in central panel systems and adjudication reform.

<sup>130</sup>Maryland's Office of Administrative Hearings was established in 1990, North Dakota's in 1991, Texas's in 1992, and Wyoming's in 1992. South Carolina and South Dakota established them in 1993, to go into operation in 1994.

<sup>131</sup>Massachusetts's Division of Administrative Law Appeals was originally created as the Division of Hearings Officers in 1972 to hear appeals from determinations of the Rate Setting Commission. *Massachusetts Division of Administrative Law Appeals, Transition Report of the Division of Administrative Law Appeals*, 1-2 (citing St. 1972, C. 122, S. 9). The Division's name was changed in 1983 to its current name, and the title "hearing officer" was changed to "administrative magistrate." *Id.* (citing St. 1983, C. 683). Minnesota's OAH, Florida's Division of Administrative Hearings, and Tennessee's Administrative Procedures Division were created in 1975. *1991 Minnesota Annual Report, supra* note 23, at 1; *Jurisdiction, supra* note 17, at 7; Fla. Stat. Ann. § 120.65 (West 1991). Colorado's Division of Administrative Hearings was established in 1976. Colo. Rev. Stat. § 24-30-1001 (1988). *See Felter, supra* note 25, at 1308. New Jersey's Office of Administrative Law was created in 1978. *See* N.J. Stat. Ann. § 52:14F-1 (West 1992). Washington's OAH began operations in 1982. *See* Wash. Rev. Code Ann. § 34.12 (West 1990). North Carolina's office of Administrative Hearings was established in 1985. *See* N.C. Gen. Stat. § 7A-750 (1992).

legislators and in the governor's office, however. Even in states in which a central panel system has already been established, turf battles continue, usually each legislative session, over expansion of the central panel's jurisdiction. Although it may not be appropriate in any state for a central panel to have jurisdiction over every state agency's hearings, some legislators, and others, believe that this jurisdiction should be the ultimate goal.

Presently, the Central Panel States' Directors, a loose organization of the directors of the central panel states, meets annually to share ideas and experiences, to discuss topics which concern central panels, and to be educated on related matters. The group promotes the central panel concept and provides aid and assistance to states looking at establishing central panels. This organization will grow as central panel states increase. The directors began meeting in 1984. In the spring of 1991, the Maryland OAH began publishing for the directors a newsletter entitled *The Central Panel*.

At the 1991 meeting of the Central Panel States' Directors, Professor Asimow of U.C.L.A. addressed the directors on adjudication fundamentals. He recommended that the central panel directors and ALJs from the central panel states get involved in the work of the ABA Section of Administrative Law & Regulatory Practice. To date, there has been such involvement only on an individual basis. Over the years, however, ALJs studying administrative law at places such as the National Judicial College in Reno, Nevada, have heard about the virtues of the central panel system for administrative hearings.<sup>132</sup> As more states turn to central panels in the future, it is likely that more organization and involvement will result. Not only will substantial numbers of central panel ALJs become involved in

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<sup>132</sup>Judge Duane Harves, former Chief Administrative Law Judge at the Minnesota Office of Administrative Hearings, made such a presentation to the Administrative Law-General Session at the National Judicial College, on November 10-22, 1985. See Duane R. Harves, *The Central Panel System for Administrative Hearings*, Address at the National Judicial College (Nov. 10-22, 1985) (unpublished, transcript on file with author).

such organizations as the American Bar Association and the National Association of Administrative Law Judges, but new associations of central panel ALJs may be formed.

In short, the central panel systems will continue to grow, both within each state as a function of increased jurisdiction, as well as in the number of established state, local, and, possibly, federal central panel systems. Central panel directors and central panel ALJs will probably become increasingly organized and involved in the promotion of this system. It is not unlikely that by the beginning of the new millennium, central panel systems will be in the ascendancy, at least in the states, if not on the federal level. If central panel systems become the norm in states, it will be only a matter of time before a central panel system is adopted at the federal level. If a central panel system is adopted at the federal level, establishment in the states may accelerate. The results could include efficient, well-managed independent hearings agencies in most states where administrative practice acts have undergone considerable reform, where attorneys can look to one set of uniform rules for guidance, and where rules of judicial conduct, codes of ethics, and disciplinary rules govern the profession of ALJs.