COMMENTARY

IS THIS REALLY NECESSARY?

THE BOARD OF PSYCHOLOGY: WE'RE OKAY, YOU'RE NOT

Political conservatives contend that much of government consists of self-serving attempts by interested parties to use the power of the state for group aggrandizement. They will find aid and comfort for their *weltanschauung* in the operations of the state Board of Psychology. Not that anyone need look far for demonstrations of cartels masquerading successfully as public officialdom—but this Board may be an illustrative archetype. The word "quintessential" captures the spirit.

Only Bob Newharts Need Apply: The Problem of Testing Competence

The first problem faced by a board attempting to regulate professional psychologists through licensure is concededly difficult: How does it determine who should be licensed? As with most agencies regulating a trade or profession, the Psychology Board is given the power to license in order to assure honest and competent practitioners. But how does one assure a competent psychologist? Do you test for it? How? Do you require an apprenticeship? What are the criteria? What is a correct answer? Are you sure?

The Psychology Board has taken the traditional approach—educational requirements, supervised experience, a nationally standardized written test used in all fifty states, and an oral examination. However, the examinations do not assure competence. They are more a measure of a student's familiarity with vocabulary and general doctrine. To be fair, such a criticism can be made of many trades and professions licensed through examination. Even the licensure examinations administered to physicians or attorneys have little to do with the actual skills relied upon by clients or patients. Rather, they are a kind of general intelligence test measuring the ability of the student to retain material recently absorbed over the past several months or years. The Board of Psychology, as with most regulatory agencies, does not attempt to measure competence—even minimally—in the areas of actual practice as practitioners specialize, nor does it require retesting over the forty- or fifty-year span of a career. In other words, the purported rationale for the entry barrier in many cases is only loosely related to its actual function. In a very indirect sense, a person able to pass the test must have general skills of retention, reasoning, and writing which probably relate to indices of competence. However, it is gilding the lily to think that there is a *bona fide* effort to assure actual competence—something probably more effectively accomplished not by one "you're in the club" general intelligence days-long test barrier, but by a short two-hour examination every three years in the particular specialty and practice of the professional as relied upon by the public.

Be that as it may, the Psychology Board is no more cartel structured than are most similar agencies. However, its examination—given the nebulous and sometimes disputed nature of the services provided—is particularly imprecise as an indicator of competence. Moreover, the Board's cartel cup runneth over as it confronts applications from licensed psychologists of other states moving to California. Here is an interesting test of the *bona fides* of a regulatory scheme. The Board of Psychology does not pass this examination.

Circle the Wagons— Here Come the Infidels

Unlike attorney practice (which turns on knowledge of a state's common law and procedures), psychology is not state-specific (aside from basic knowledge of California law or public policy pertaining to psychology). Although some commentators contend otherwise, there is no unique California "psyche" requiring separate training. Under these circumstances, how should a regulatory agency set up reciprocity with other states? Automatic reciprocity with all states could be suggested, but there is concededly a legitimate interest in each state assuring the protection of its citizens from dishonest and incompetent practice—perhaps under standards higher than those selected by other sovereign jurisdictions. Okay. But on the other extreme, why would an agency wish to bar a demonstrably competent practitioner from another jurisdiction? Where such a practitioner applies, look what the agency has to work with. It has an applicant who has not only taken a likely similar examination, but one who has practiced for some time and may have a track record to examine.

The legislature was aware of the appropriateness of reciprocity when it enacted section 2946 of the Business and Professions Code, creating a second track (actually three additional tracks) for the licensure of out-of-state psychologists.[1] The Board is commanded to consider licensure without examination based on the performance of an applicant already licensed in another jurisdiction. The law specifically permits the Board to waive the exam for psychologists "who have made a significant contribution to psychology and have had at least 10 years of experience." This should be a ready avenue for licensure. Here you have an academic record, the examination passed, and the experience and professional record to review. Where such a practitioner is able to approach the midrange of current practitioners now being licensed, one would think that approval should be forthcoming. After all, here you are not rolling dice while blindfolded.

Certainly these out-of-state practitioners could be required to take the entry examination. "They should take the exam like we did." "Why not take the examination? It should be no problem for them if they should be licensed." But such sentiments are disingenuous. As we have noted, the entry examination does not directly relate to competence in actual practice, particularly for practitioners who have specialized in particular areas of practice and are developed in their careers. How easily would an advanced neurosurgeon pass the standard national board exam? Would a renowned criminal defense attorney, patent expert, or immigration specialist automatically pass the multistate portion of the Bar examination, or the general essay questions concerning areas of the law far removed from and irrelevant to their practices?[2]

The point is that the out-of-state senior practitioner should not be subject to the same examination imposed on entry; it does not test actual competence except in an indirect sense not relevant to advanced and usually specialized skills. When applied to advanced practitioners, it becomes a cynical device to keep the infidels out—not because they are incompetent, but because they are

competitors. "A harsh judgment," you observe. "Prove it!" you rightfully demand. Enter Dr. Frank McGuigan, Exhibit A.

McGuigan v. Board of Psychology: The Cartel Is Tested

Let's see, how would we fashion a resume to test our thesis? Let's give him a bachelor's and master's degree from UCLA, a California institution of some competence. Let's give him a doctorate from the University of Southern California. Then let's give him a distinguished 42-year career, including both extensive clinical practice and academia. Let's make him a *teacher* of psychology, one who has trained California students to practice psychology for the past nine years. A professor of psychology and director of a research institute. Let's license him in two states. Let's make him the author of some one hundred articles in the major journals of psychology scholarship. Have him write not one or five but more than twenty books in the field of psychology, including a text on experimental psychology which has been translated into six foreign editions and is among the most used in colleges throughout the world today. Give him international awards. Make him a diplomate in expert professional societies for which the psychologists who sit on the Psychology Board are not qualified and only dream about.[3] List him in 22 directories as a noted practitioner and scholar.

Now you have our hypothetical test. Except we did not make him up as Stanford students have done for years in attempting to graduate dogs and fictional persons from their institution. Frank McGuigan is not a "Warren G. Wonka." Frank exists, and he asked the Board for reciprocity licensure under section 2946.

What do you think happened? Perhaps, you might muse, there was a three-second discussion at a Board meeting during which the members expressed pleasure that such a prominent practitioner would want to join their club and scoffed at the notion that such a person would not meet the minimal standards for practice in California. Perhaps you opine that such a decision would be, in the current vernacular, a "no-brainer." If so, you do not fully appreciate the cartel "circle the wagons" mentality of a group of peers in full regalia as "keepers of the faith" and "defenders of the flame." You do not understand the dynamic that controls the Board of Psychology—consisting in majority of practicing psychologists who lack Frank's qualifications and largely engage in a competing theory of analysis and treatment. They said no to Dr. McGuigan. No waiver, and no license without taking that exam.

Dr. McGuigan could have studied a great deal of material irrelevant to his current practice, and taken the examination. But he was understandably insulted, and rightfully curious why section 2946 of the Business and Professions Code exists and who, if not he, would qualify under it. He inquired of the Center for Public Interest Law about his remedies. We informed him that under the Administrative Procedure Act (APA), he had a right to a "statement of issues" detailing where and how his application failed to meet the relevant standards, and to a hearing if he believed the statement of issues was in error. We agreed to make sure Dr. McGuigan got a hearing, because we believed that this oversight would be redressed. No, we are not naive, but we believed that—at least at the *extremes*—cartel tribalism would give way at least to basic constitutional requirement. We felt that in the course of a hearing, the Board would change its mind—with profuse and appropriate apology in hand. And, if the Board did not do so, we were certain that an administrative law judge would do so, and that a court would certainly look askance at any effort to violate legislative intent. We were wrong on all three counts.

Let us briefly describe Frank McGuigan's six-year odyssey. He initially asked the Board for reciprocity licensure in 1984. The Board denied his request repeatedly over a four-year period, with shifting "justifications" in each denial. We learned early on that the Board had adopted *no* rules, criteria, or standards to guide exam waiver approvals for out-of-state licensees. It wasn't interested in standards to which it might be held, but preferred *ad hoc* individual decisions—one at a time—without reference to each other or to any consistent policy. Except there was one theme permeating these individual decisions: the Board said no.

Upon our advice, Dr. McGuigan requested the statement of issues and hearing to which he is mandatorily entitled in 1988; this prompted a denial, Frank's request for reconsideration, and another denial. We agreed to represent Frank in 1990, and reiterated his demand for an APA statement of issues and hearing. That request was denied in March 1990.

We were forced to file suit to compel the Board to afford this individual his basic rights to procedural fairness. As we approached the court date for the hearing on his demand, the Board suddenly conceded. Okay, Dr. McGuigan would get his hearing, but *only* Dr. McGuigan. The Board reiterated its position that a hearing on a denial of an exam waiver is not required, and announced its intent to deny such hearing to anyone and everyone else. We discuss the problem of obtaining such elementary due process in our second commentary below.

The Office of Administrative Hearings in Supine Repose

Eventually, the good doctor got his hearing, presided over by Chief Administrative Law Judge Karl Engeman. The result? The Board was sustained in its denial. The administrative law judge, to his credit, fairly stated the record and the qualifications of Dr. McGuigan; it was an impressive recitation and appeared to lead to an obvious conclusion to license. So how did the decision make a *non sequitur* leap from prolific praise to affirmation of the agency decision not to license? Factually, the only ephemera cited by the ALJ was the fact that although Dr. McGuigan had impeccable qualifications as a scholar, theoretician, writer, and teacher, it was not entirely clear that he has the *practical* skills necessary for effective clinical practice.

Wait a minute. If one is qualified to write the book and to teach current practitioners, how does it follow that he is unable to practice himself? To be sure, there are teachers of medicine who cannot perform surgery because they lack the tactile skill to tie surgical knots within the proverbial matchbox. But with all due respect to Judge Engeman, the clinical skills of a psychologist are not physical, but involve the ability to listen and communicate effectively. To know what to say and do and why and how. These are hardly different skills than those involved in teaching, particularly when one is teaching others what to say and do and why and how. In this profession at least, the ability to teach others to do it is rather a strong indication that the teacher can do it.

Further, Judge Engeman accepted an unlawful "underground rule" standard proffered by the witness for the Board at the hearing. The Board's witness testified that the Board interprets the phrase "significant contribution to psychology," as that term is used in Business and Professions Code section 2946, to mean that "the applicant has contributed one or more works widely recognized and accepted by a broad range of psychologists and that books reflecting that work would ordinarily be found on the reference shelf of most practicing psychologists." The Board has never adopted this criterion under the Administrative Procedure Act, and the fairness of (mis)applying it to an

applicant who has no knowledge of it is dubious at best. In any event, the ALJ has no business accepting this so-called "standard" from the mouth of a Board witness; next time around, regarding another applicant, in front of a different ALJ, a different "standard" may emerge.

The real explanation for the Engeman decision may be found in his referral to the legal standard, *i.e.*, he was unable to find that the Board "abused its discretion." "While the Board could take what might be characterized as a more generous interpretation of this basis for exam waiver, the statute vests in them the sole discretion to grant any waivers of the examination," wrote Judge Engeman. The ALJ openly deferred to the judgment of the agency—even under what he acknowledged to be *in extremis* facts.[4]

One purpose behind an independent Office of Administrative Hearings is just that: its independence. Scholars have long complained about jurisdictions which place their administrative law judges as employees of the very agencies whose prosecutions they adjudicate. It does little good to have independent review and factfinding followed by application of legal standards when they are applied in such a servile fashion.

Conclusion: The Cartel Gets Shelter

The Board of Psychology's judgment that "we're okay, you're not" covers anyone not already in the club. It is interesting that, as with the other medical profession regulators, entry barriers are assiduously applied—while, at the same time, practitioners who demonstrate incompetence after they are licensed are seldom removed or sanctioned.[5] Those who are in the circle are protected. Outsiders are from a dangerous and alien "tribe."

What has puzzled Dr. McGuigan angers us. We understand the need to erect barriers to entry in extraordinary circumstances—to bar from practice a person whose incompetence can create irreparable harm. But does a psychology examination do that? Even if it afforded such an assurance, is it an indication entitled to greater weight than forty years of brilliant performance? Why have not all of the out-of-state applicants since 1990 (six at last count) been welcomed with gratitude, rather than rejected? Most appear to have credentials easily warranting licensure. Is this Board protecting us?

And we are more disappointed with the Office of Administrative Hearings. California has removed this office from agency control and given it independence so its administrative law judges may serve as a separate check on agency abuse of discretion. What is the message when the director of the entire Office delivers what amounts to an adjudicative blank check to the agency?

FOOTNOTES

1. Section 2946 requires the Board of Psychology to grant a license without examination "to any person who, at the time of application is licensed or certified by a psychology licensing authority in another state if the requirements for obtaining a certificate or license in that state were substantially equivalent to the requirements of this chapter."

In addition, section 2946 authorizes the Board to "waive those parts of the examination, including either the whole of the written or the oral examinations, when in the judgment of the board the applicant has already demonstrated competence in areas covered by those parts of the examination," and to waive the exam in its entirety to "diplomates of the American Board of Examiners in Professional Psychology or psychologists who have made a significant contribution to psychology and have had at least 10 years of experience."

2. The most extreme example of the irrelevance of such an initial barrier is probably the real estate broker's examination. Here you have an interesting multiple-choice question pattern: Each year a percentage of the questions answered *correctly* is eliminated. We all know about the ambiguities often prevalent in multiple- choice questions—and one can imagine the natural selection monster several years of such elimination would create. But there is salvation, because the exam review courses pay examinees to memorize questions and the "schools" then give their students books with the questions and answers from prior exams—including many questions which will reappear. Pay us, memorize these—a true test of competence.

3. Dr. McGuigan is a Fellow of the American Psychological Association, the premier psychological association in the United States. Fellows are selected in recognition of outstanding and unusual contributions to the science and profession of psychology. While Dr. McGuigan is a Fellow of the Association, the psychologist members of the Board of Psychology are mere members of the Association.

4. The same spirit of deference also guided the ALJ's decision that a second basis for Dr. McGuigan's licensure would not apply. Business and Professions Code section 2946 requires the Board to waive the California examination where the applicant has taken an equivalent examination elsewhere. Here is one of the reasons cited by the ALJ in upholding the Board's denial of licensure on this alternate basis: "First, it may be reasonably inferred that the oral component of the Virginia exam did not cover laws peculiar to the practice of psychology in California in 1984." The question raised by this analysis is: When will any examination *ever* qualify as equivalent if it must include California-specific questions? The legislature's statutes supersede the Board and the ALJ is charged with interpreting them. Why would the legislature allow for examination reciprocity by specific command if it could never occur? Again, the criterion here used by the ALJ acquiesces abjectly to the agency. The judge applied a rule neither adopted nor lawfully adoptable, and precludes application of California law while upholding a *tabula rasa* delegation of authority to the Board to deny reciprocity to any and to all applicants.

5. *See* Fellmeth, *Physician Discipline in California: A Code Blue Emergency*, 9:2 **Cal. Reg. L. Rep.** (Spring 1989) at 1. Most of the criticisms directed at the Medical Board of California apply as well to the Board of Psychology, which operates as one of the allied health licensing programs under the Medical Board's general aegis (albeit with substantial independence). The pathetic data concerning physician disciplinary sanctions generally hold true for most of the allied health professions, including licensed psychologists. As with physician discipline, the agency is essentially moribund in removing incompetent practitioners from practice. In the 1989–90 annual report of the Department of Consumer Affairs (the most recent statistics available), the Board of Psychology reports that, out of 15,225 licensees and 442 consumer complaints, it revoked four licenses and suspended three others.

JUDICIAL CHECK OF AGENCY ABUSE: THE THIRD DISTRICT MOOTS ITSELF

As our comment above recounts, Dr. Frank McGuigan was rejected for reciprocity licensure as a psychologist in California notwithstanding an impressive record: degrees from UCLA and USC; 42 years as practitioner, professor, scholar; and Fellow status in the American Psychological Association. As we argue above, one would think that a person who has written one hundred major articles and twenty books, including a

leading text used in the world on experimental psychology, might be viewed as meeting minimum standards to practice. A big Steve Martin "but noooooooooh" to that. And a no to all others so applying from out-of-state. We have noted our disappointment with the Office of Administrative Hearings in its obsequious deference to whatever the agency decides. Dr. McGuigan decided not to test the agency's refusal to license him in court; such a contest would have consumed substantial resources. But he did challenge the agency's failure to give him a hearing. In this regard, Frank sought to preserve his right to procedural due process—our most basic check on bureaucratic abuse.

On behalf of Dr. McGuigan, the Center for Public Interest Law sued the Board of Psychology to compel it to give him an explanation and hearing on its refusal to license him without examination under Business and Professions Code section 2946. As noted above, if a person believes that he has been wrongly denied licensure to practice his trade or profession, he has a right to an explanation of his deficiencies (a "statement of issues"), and—if he believes that this explanation is erroneous or improper—to a hearing.[1] This assurance is constitutionally based, is included explicitly in the Administrative Procedure Act fully applicable to the Board of Psychology,[2] and is even restated in the adopted rules of the agency.[3] Nevertheless, this agency said "no" to both, and reiterated that position over a period of two years of travail as Frank and CPIL attempted to persuade it otherwise.

The Conflicted Role of the Attorney General

It is unclear to us at the outset how the Attorney General can represent a bureaucracy which seeks to violate the law. The Attorney General is in a conflicted position as counsel for the agency while also serving as the chief law enforcement officer of the state. We believe that the Rules of Professional Conduct compel withdrawal as counsel of *any* attorney being asked to facilitate a continuing violation of law; for the Attorney General to remain as counsel under such circumstances appears to us to be a breach of the canons of ethics.

We filed suit in Sacramento County Superior Court to obtain the statement of issues and hearing to which Dr. McGuigan was entitled. As noted above, when the hearing date approached, the Deputy Attorney General representing the Board announced that Dr. McGuigan would be given an explanation and hearing, but that no other applicant would be so treated. She then stood before the superior court and asked for dismissal, contending the matter was moot. The court so dismissed.

Did you get all that? The Board denied Frank's request for a waiver for four years. It then denied his request for a hearing for two more years. The minute he found an attorney willing and able to file suit on his behalf, the Board—presumably upon the advice of its attorney, the chief law enforcement officer of the state—immediately granted the hearing. That same attorney was then able to convince the court—with its overloaded docket—not to rule on the legal issue presented, thus enabling the Board to continue unabated its arbitrary, standardless decisionmaking and its wholesale disregard for the due process rights of applicants.

A brilliant move—simply run every applicant around the barn, force them to exhaust resources on an attorney, and then give them their rightful due only if they pay the high entry fee. All others are denied. Constitutional rights—if you can afford to wait six years and spend your personal treasury. This from the Attorney General—the chief law enforcement officer of the state.

But wait. There is a doctrine in law developed just to prevent such chicanery.

The Protector of Agency Abuse—Exceptions to the Mootness Doctrine

Even if a defendant decides to placate a particular plaintiff, an exception to the "mootness" doctrine *requires* the court to decide the merits of a case where the challenged action is likely to recur or it is in the public interest to do so. Thus, we decided to take the issue of Dr. McGuigan's right to a hearing—an issue not formally decided when the Board decided to grant a hearing "in this one case"—to the Third District Court of Appeal. The appeal was an important one and in defense of a basic principle. Here, in an extreme case, an agency had denied basic rights guaranteed by a long line of constitutional cases, by statutory command, and by its own rules. It had publicly contended that it intended to commit such breaches again. At best, only those able to afford writ actions would be afforded their rights. Further (and as the Board well knew), without a ruling on the merits, Dr. McGuigan could never recover his attorneys' fees; he would never be made whole.

For these reasons, a long line of cases—without compromise or equivocation—have held that where such violations are likely to recur, the court should enter judgment instructing the agency on the proper law and allowing the plaintiff the right to be made whole.[4] Such a policy is not merely just; it is a practical necessity if the courts are to fulfill their most important function—acting as a check on the other two branches. Where the institution sought to be balanced has very little in the way of politically-based checks, such a role demand is especially enhanced. The Board is not amenable to electorate response. It is special-funded and is not under general fund budget scrutiny. Yet it has important judicial, executive, and legislative powers—held in concert.

In order for the courts to perform their important role in balancing and checking the agencies, they must receive cases. They are passive. They do not bring actions. To receive cases, they must be sensitive to the mechanisms which bring controversies into their domain. The mootness exception is one of the most important of those mechanisms. If our judiciary allows agency defendants to pick off from court judgment each plaintiff able to afford to run the legal gauntlet, the courts self-abdicate. The courts are then saying, "We leave it to you defendants to decide what we hear and cede to you the power to reserve the application of our constitutional guarantees and statutory protections to those able to reach us case by case, person by person. There will be no *stare decisis* effect, no collateral estoppel, no attorney fee equity redress."

The Court Moots Itself into Impotence

Would a court deny its own essential role and suffer its own abdication? Yes, it would and it did. It implied full recognition that the agency was wrong, but opined that the issue was moot. While the issue will recur, it will do so in the context where the individual so abused can seek his or her own redress by court suit, as did Dr. McGuigan, and obtain the rights abridged. In a spate of pathetic linguistic legerdemain, Presiding Justice Puglia managed to state the very reason for the exception, as ensconced in over a dozen published opinions, as the justification for not applying it.[5] The Board of Psychology made a laughingstock of the Court of Appeal, and Justice Puglia—along with Justices Marler and Davis—joined in the laughter.

The opinion, which was mercifully designated as unpublished,[6] is not nearly as interesting as is figuring out why it was written. To some extent, the oral argument in the case is worth discussing, because it reveals symptoms of a larger problem—larger certainly than the cartel pattern of the Board of Psychology.

Our Amateur Psychoanalysis: Why the Courts Abdicate

The Critical Legal Studies movement centered at Harvard contends that most judicial opinions are result-oriented. Further, scholars of this school contend that personal ideology is one of the leading explanatory variables. I agree that most (not all) judicial opinions are result-oriented; however, I believe the CLS explanation misses the mark.

It is not ideology or even class which determines the result. It is something much more interesting. Our society has divided into tribes as never before. Instead of the overarching national tribes or the intimate family tribes, we now find succor in occupational tribes. Every trade and profession is politically represented as never before in our history. We identify with our professional peers, those who have endured similar boot camp entry experiences and share similar occupational problems. We identify horizontally, not vertically. We associate more with other hospital administrators, attorneys, merchants, not with our patients, clients, and customers.[7]

Let's illustrate the problem from the oral argument in the *McGuigan* case. Justice Puglia, visibly irritated that the Psychology Board is being bothered, notes that the statement of issues and hearing requirement can be a problem for the agency. What if the Board decides that the New York examination is flawed and cannot be relied upon for licensure? "Would the Board have to rehear the case again and again as other New York applicants object?" The last phrase was stated with incredulity. Of course, the Board may avail itself of collateral estoppel, or adopt a rule for examination reciprocity that New York does not meet and cite it as justification. Why would an applicant waste time and money relitigating a decided question before the very same forum which had just decided it in any event? And, of course, such a problem has *never* occurred in any serious dimension. But the point is, who was the court identifying with? Where was the empathy? Whose shoes are being stepped in? It is fine to step in the agency's shoes, so long as the shoes of the citizen are also occupied.

The court might consider the alternative hypothetical to its own: Let's say the New York examination is exactly the same as the California examination and scored the same, except the order of questions is different. But California officials examine the first ten questions and erroneously assume it is a different exam. Under the scenario implicit in the court's approach, nobody would ever know that the tests are identical and the applicant should be granted licensure without examination. The applicant would simply be told no. No explanation, no hearing. With a statement of issues, the applicant is told, "Your exam is different and here is how." And the applicant would have the chance to say, "Whoa, it is the same, look at this." And there would be a resolution at least based on notice and hearing. The truth would more likely emerge—as is always the case where the alternative is uninformed or unilateral edict.

Why should we have to point out the advantages of notice and hearing? Why should we have to make such an argument to a sitting judge? Why should we have to convince him that notice and hearing are of benefit to all concerned, even an agency with an unconstitutionally restrictive or unlawful policy? Even it has an interest in seeing that its decisions are applied based on an accurate understanding of the facts. That is what the court system is all about. That a court does not appreciate such basics is not a reflection of lack of experience; it is based on—and Dr. McGuigan could likely explain it better than we—psychological identification with one of the parties. Regrettably, the party identified with is the one the court must check in the broader public interest, undermining that duty.

The psychological empathy of a decisionmaker is not always determinative, but there seems to be no more reliable predictor of outcome. The powers of rationalization do not decline with the enhanced intelligence of many of our jurists. Rather, they may even increase by allowing a rich patina of facially reasonable justification to dress up a preordained result. Pick the right abstract value, attach the group to whom the jurist is sympathetic to it, and observe the result. The Board of Psychology is itself a product of such a dynamic—consisting in majority as it does of practicing psychologists. But group identification between agencies and the courts is also strong. Both courts and agencies see themselves as government officials having to contend with calendars and supplicants and the legislature. Both courts and agencies get tired of people litigating or otherwise requiring their services who really should go away. Both courts and agencies understand the problem of the complainer who presses his or her claim. Both must be able to say no. Both respect the other's discretion in doing so.

Conclusion

In the *McGuigan* case, the trial court accepted the word of the agency that it would give a hearing to Frank McGuigan (after the agency had stalled for six years), and dismissed the matter as moot solely on its belated word. The administrative law judge then accepted the extraordinary qualifications of the applicant and the clear legislative intent to allow licensure of qualified out-of- state applicants, but deferred to the agency's preference nevertheless. The Court of Appeal allowed the agency to assess the applicant attorneys' fees as the price of obtaining rights assured constitutionally, by statute, and by the rules of the Board itself, and projected hostility to the applicant and deference to the agency, now perfectly free by court commendation to repeat the same abuse.

The courts are becoming horizontalized and psychologically integrated with the agencies they must check. This decision is not an aberration, dear reader; there are many, and their number is on the rise. This is not what Madison and Jefferson had in mind in their brilliant formulation of a system of checks and balances. Would but they were here to help restore them.

FOOTNOTES

1. Section 11504 of the Government Code establishes the remedies of an applicant who has been denied a license or related privilege. "A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing...."

2. The Board of Psychology is undeniably subject to the Administrative Procedure Act, under Government Code section 11501.

3. Section 1381.2 of the Board's regulations in Chapter 13.1, Title 16 of the California Code of Regulations, provides: "An applicant for examination or licensure whose credentials indicate ineligibility shall be notified of the deficiency. The applicant may correct the deficiency indicated or in the alterna-

tive file a request for hearing before the appropriate committee."

4. *Roe v. Wade*, 410 U.S. 113 (1973); *American Civil Liberties Union v. Board of Education*, 55 Cal. 2d 167, 181–82 (1961); *Yellow Cab Cooperative, Inc. v. Workers Compensation Appeals Board*, 226 Cal. App. 3d 1288 (1991); In *Re Lois M.*, 214 Cal. App. 3d 1036 (1990); *Jasperson v. Jessica's Nail Clinic*, 216 Cal. App. 3d 1099 (1989); *North Bay Regional Center v. Sherry S.*, 207 Cal. App. 3d (1989); *Stroh v. Midway Restaurant Systems, Inc.*, 180 Cal. App. 3d 1040 (1986); *Butler v. County of Los Angeles*, 116 Cal. App. 3d 633 (1981); *Barton v. Governing Board*, 60 Cal. App. 3d 476 (1976); *Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 749 (1956); *Rattray v. Scudder*, 67 Cal. App. 2d 123, 127 (1944).

5. "In any subsequent proceeding, the board will either grant the relief sought, as here, or it will continue to deny the relief, in which case the matter will not become moot. Thus, no future litigant will be denied relief without a determination of whether the board is obligated to provide a statement of issues and a hearing." *McGuigan v. California Board of Psychology*, No. C010084 (3d Dist. Ct. App., Nov. 26, 1991) (unpublished opinion).

6. It has become chic for courts to depublish opinions, not out of fear that the appellate reporters are becoming too voluminous, but rather to ensure that review by the Supreme Court and reversal of a dubious opinion will not occur.

7. As one stands in court before Presiding Justice Puglia, one is in the midst of a rather dizzying collection of subtribes. Justice Puglia's son serves as the public relations director at the Office of the Attorney General, counsel for the Board appearing before him. The father of the Attorney General serves on the Board of Psychology's parent agency, the Medical Board of California. The brother of the Attorney General is about to leave the Department of Consumer Affairs, the umbrella agency over the Board. This is not to imply that this or any court made a decision because friends or relatives are in the neighborhood of the case. The problem is far more general and serious than that. The associations are cited to illustrate the interconnections which facilitate psychological identification—empathy lines. The court—designed to check the agency—does not see itself as a check, but as a colleague. It is still easy for a court to check a blue-collar cop, but when confronted with another public official, one with a partial adjudicatory role, with the same problems it has, what then? With whom does it identify?