Title

Initial Report
Bureau of Automotive Repair
Enforcement Monitor

Presented to

Department of Consumer Affairs and
Joint Committee on Boards, Commissions and
Consumer Protection

date

December 20, 2005

Management Auditing
Process improvement
Strategic planning
Performance measurement
Financial analysis
Organizational design

STRATEGICA INC.

Contents

Executive Summary 1

INTRODUCTION

Mission of the BAR 5
History of the BAR 5
Snapshot of the BAR 6
Project objectives 7
Procedures performed 8
Key questions 9

FINDINGS AND RECOMMENDATIONS

1 - Does the BAR disciplinary process provide for due process? 10
2 - Should the Repair Act include a specific definition of fraud? 20
3 - Are regulators enforcing documentation and paperwork standards that don't exist? 23
4 - Is the system of sanctions commensurate with the degree of violation? 25
5 - Should the BAR be in the business of setting and enforcing trade standards? 30
6 - Is the BAR doing enough to prevent violations other than applying sanctions? 35
7 - Areas for further study 39

APPENDICES

Appendix 1 – List of acronyms 41
Appendix 2 – Text of SB 1542 42
Appendix 3 – Process maps 46

EXECUTIVE SUMMARY

This project is an outgrowth of the 2003 Sunset Review process that focused on the Bureau of Automotive Repair (BAR). After the Sunset Review the California Legislature passed Senate Bill 1542 (Figueroa) (SB 1542) establishing the position of Enforcement Monitor for a two-year period. This project got started in April 2005 and will end in December 2006 with the third and final report. This is the first report.

Our initial investigatory work and discussions with project stakeholders resulted in a line of inquiry focusing on six key questions. These questions incorporated the objectives of SB 1542 as well as stakeholder expectations and are used as an organizing principle for this report. These questions are:

1. Does the BAR disciplinary process provide for due process?
2. Should the Repair Act include a specific definition of fraud?
3. Are regulators enforcing documentation and paperwork standards that don't exist?
4. Is the system of sanctions commensurate with the degree of violation?
5. Should the BAR be in the business of setting and enforcing trade standards?
6. Is the BAR doing enough to prevent violations other than applying sanctions?

Does the BAR disciplinary process provide for due process?

The BAR disciplinary system has come under criticism from industry for being stacked against licensees[2] involved in investigations and disciplinary actions. These criticisms include:

- Proposed decisions, made by Administrative Law Judges (ALJs) after an administrative hearing, can be rejected by the Director of DCA and a new decision can be rendered. Members of industry and the defense bar feel that this provision, called a non-adopt, creates a natural bias against the licensee's case because the mission of DCA is consumer protection. In addition, because the DCA Director is not present at the administrative hearing, a final decision is rendered without the benefit of hearing testimony first-hand or observing witnesses.

- Besides the non-adopt provision, other barriers to seeking a fair hearing include no possibility of recovering the cost of a defense and being required to pay the BAR's investigation costs for the case. Also, the options for discovery available to a licensee under state law are restricted. Finally, the record inspection provision in the Repair Act is considered to be heavy-handed and a violation of due process.

[2] Auto repair dealers are "registrants" and smog check stations and technicians are "licensees." Since many of the findings and recommendations in this report apply to both, for convenience the term "licensee" is used for both types of businesses.

The issue of what due process is required in regulatory systems such as the BAR has been addressed by various courts including the U.S. Supreme Court. These courts found:

- States can condition the right to enter a profession or trade if there is a compelling public interest. Under this scenario the right becomes more of a privilege and the license is subject to the rules of the regulatory program,
- The federal Constitution does not guarantee full due process in administrative hearings. Only notice and the right to a hearing are guaranteed. However, regulatory schemes and their administration cannot be unreasonable, arbitrary or capricious,
- Case law allows an agency head to adjudicate a case falling within his/her jurisdiction despite the appearance of a conflict of interest. The law assumes that agency adjudicators are impartial in the absence of evidence to the contrary, and
- Warrantless searches, which is what BAR program reps do during record inspections, are legal insofar as the statute authorizing them supports a legitimate regulatory interest of the state and there are sufficient safeguards against the searches getting out of hand.

In our observations and case auditing, we found that the BAR staff conducted the program in a professional but firm manner. Cases were well prepared and field staff conducted themselves appropriately.

The Legislature, DCA and the BAR should work to improve some of the due process safeguards even if the current system passes constitutional muster:

- Exclude the non-adopt option from the BAR's use of the Administrative Procedure Act. Even though the non-adopt option is legal, it helps create a stacked system, is infrequently used, and creates a barrier for licensees seeking a fair hearing on a licensure issue,
- The regulations should allow licensees to recover legal fees if a substantial majority of allegations in an accusation are not proven, and
- The role of the ombudsman should be strengthened so they have more authority and independence in investigatory and discipline matters.

Should the Repair Act include a specific definition of fraud?

The Repair Act includes several acts of conduct that are grounds for sanctioning or revoking a license. Two of these acts delve into the realm of constructive fraud. Constructive fraud is similar to actual fraud except it doesn't require the element of intent to defraud. Constructive fraud usually occurs in a context of a fiduciary or contractual relationship (e.g., an auto repair transaction) where there is a presumed duty to disclose any information that would impact the transaction (e.g., the true condition of the vehicle.) The problem with these provisions is that they can potentially snare one-time mistakes in the same net as more insidious, repeated acts of constructive fraud. Unless the agency can determine whether the "mistakes" are part of a pattern it is difficult to tell the difference.

Because California laws other than the Repair Act apply the concept of constructive fraud on the auto repair industry (i.e., the Civil Code applies the concept to contracts), it is hard to argue that the concept applies in some situations, such as the validity of a repair contract, but not other situations, such as the licensee's fitness to hold the license.

A bigger issue is the difficulty of understanding the concept of constructive fraud, how the line is crossed between honest mistake and constructive fraud, and how to avoid crossing that line. The Legislature and the BAR should provide more clarity and guidance in statute and/or a pre-licensing educational and testing program for all licensees.

Are regulators enforcing documentation and paperwork standards that don't exist?

This question can also address whether the BAR is enforcing rules that are divorced from the original intent of the Repair Act and the Health and Safety (H&S) Code. These two statutes include many seemingly persnickety rules and regulations covering such things as what information goes into a work estimate, what a smog technician is supposed to do under the hood of a car, etc. There has been criticism that these rule are not only irrelevant but they constitute scope creep from the original intent of the law which was to go after the bad operators and leave the good ones alone.

Besides the fact that these rules have been part of the statutes since day-one it should be acknowledged that the rules do serve a purpose. Documentation standards that require things like the correct address of an ARD on an invoice are intended to improve communication between ARDs and their customers so that the scope of potential problems and disputes is narrowed down to more substantive issues such as workmanship and fraud.

Program representative checking on a consumer complaint.

A bigger issue may be that systems used to manage estimates and other documentation frequently lacks functions to fully comply with the law. In addition, many ARD operators are either unaware of don't acknowledge the rules. A mandatory, but brief, pre-licensing course and exam could resolve some of these issues.

Is the system of sanctions commensurate with the degree of violation?

We conducted an audit of BAR cases to determine:

1. Do non-adopt decisions result in greater sanctions?
2. Do cases get resolved with greater sanctions than the guidelines allow?
3. Do cases get resolved with greater sanctions than the facts would warrant?

We found:

- Non-adopt decisions frequently result in greater sanctions (17 out of 26 non-adopt cases over the last three years.) This lends credence to industry concerns that a hearing is risky and will not be fairly adjudicated.
- All cases are resolved within guidelines and are even frequently sanctioned less than the guidelines. In fact, two of the non-adopt cases in the sample were ultimately decided at less than what the guidelines call for.
- In nearly all the cases, the sanctions applied appeared to match the severity of the proven allegations and were consistent with other cases with similar facts and circumstances.

Should the BAR be in the business of setting and enforcing trade standards?

The Repair Act and the H&S Code are mostly silent on what constitutes trade standards even though the BAR files disciplinary actions citing trade standard violations. Rather than define what the trade standards should be, which would eliminate discretion for repair technicians and vastly expand the scope of BAR's regulatory activities, the Legislature and BAR should create a specialized panel of ALJs within the Office of Administrative Hearings (OAH) to better adjudicate BAR cases especially those that deal with tricky issues such as trade standards.

Is the BAR doing enough to prevent violations other than applying sanctions?

One area where the Repair Act is lacking enforcement capability is in licensing service writers, managing employees, and beneficial owners of ARDs. The current system of registering business entities is sometimes unable to prevent violators from re-entering the industry under another guise. The ARD license should be structured more in line with how smog check licenses are issued where actual operators are licensed in addition to the business. Key individuals should be required to take a short class on BAR standards, pass a test, be issued a license and be subject to discipline in the event of violations. Existing licensees should be required to take the course and pass a test as a condition for continued licensure. This system would:

- Help ensure a minimal level of proficiency without costing industry much down time,
- Build licensee's awareness of what the standards are, how they can be complied with, the business benefits of compliance, and how the BAR operates,
- Provide a greater incentive to adhere to the Auto Repair Act and the H&S Code because individuals will be personally accountable for their actions in addition to the business entity,
- Allow more accurate targeting of sanctions to the responsible parties. This can be a real advantage when addressing a large ARD like a dealership, and
- Provide that those who financially benefit from violations can be disciplined with more consistency than is currently the case.

INTRODUCTION

Organization of this report

The findings and recommendations in this report are organized according to a series of broad questions that we sought to answer. These questions, in turn, pertain to the themes that emerged during our initial survey of the Bureau of Automotive Repair (BAR.)

This introduction describes the mission of the agency, the history of the BAR, and a snapshot of what the BAR does, its workload and how it is organized. We also discuss the original objectives of this project and the methods, techniques and steps we undertook to accomplish those objectives.

Mission of the BAR

The mission of the BAR is to protect and serve California consumers by ensuring a fair and competitive automotive repair marketplace and implementing a model motor vehicle air quality improvement program.

The mission of the Department of Consumer Affairs (DCA), of which the BAR is a unit, is to protect and serve consumers while ensuring a competent and fair marketplace.

A significant distinction between the two missions is the BAR's incorporation of an environmental protection goal (i.e., promoting air quality) in it's mission where the DCA mission focuses solely on consumer protection. The BAR air quality enhancement goal is implemented through the Bureau's enforcement of smog check station rules and procedures.

History of the BAR

The Automotive Repair Act was passed 1971 through Senate Bill 51 (SB51) (Beilenson). The act mandated a statewide consumer protection program for the auto repair industry and a system of registering auto repair dealers (ARDs). In 1972 the BAR was established within the Department of Consumer Affairs (DCA). The Automotive Repair Act was codified in Business & Professions Code (B&P Code), Chapter 20, sections 9880 et seq.

In 1977, amendments to the Federal Clean Air Act required those states not meeting air quality standards to implement Inspection and Maintenance (I/M) programs whereby vehicles

would be tested for compliance with emission standards at smog check facilities. In 1982 the BAR was given responsibility for enforcing smog check station rules and standards.

In 2003, a Sunset Review[3] was conducted that attracted significant interest from the auto repair and smog check industry. Extensive criticism was directed at agency management for what was perceived to be heavy-handed enforcement tactics, constricted due process rights and insensitivity towards the concerns of the industry. In response the state legislature sponsored Senate Bill 1542 (SB 1542) (Figueroa) to establish the position of Enforcement Monitor to investigate the claims put forth by industry and evaluate the fairness of the agency's practices. Enforcement monitors have been appointed for other state consumer protection boards and bureaus in the past so the appointment of a monitor for the BAR was not unprecedented for state government.

Snapshot of the BAR

The BAR employs 551 staff in 12 field offices around the state in addition to the Sacramento headquarters. These field offices allow BAR staff to be close to licensees[4] and consumers. The BAR also has seven documentation labs where state-owned vehicles are prepared for conducting undercover operations.

About half of the staff are employed as Program Representatives, a title denoting an investigator that responds to, and investigates complaints, conducts formal investigations, pursues disciplinary actions. Program reps also provide formal and informal coaching and education for members of industry on ways to comply with auto repair and smog check regulations.

The agency is organized functionally with three major divisions:

- Smog Check Engineering and Operations,
- Consumer Assistance and Administration, and
- Field Operations and Enforcement.

Most of the activity addressed by the Enforcement Monitor project occurs in the Field Operations and Enforcement Division.

Legal authority for BAR operations is found in three main sources:

- B&P Code 9880 et seq. – commonly called the Auto Repair Act. This series of statutes covers the consumer protection part of the BAR. This statute was originally passed in 1971.
- Health & Safety (H&S) Code Sections 44000 et seq. – This series of statutes covers the oversight of smog check stations. The portion most relevant to the BAR and this project is Section 44014 et seq.

[3] Sunset reviews are conducted periodically by state government to determine if a program is meeting the objectives of the enabling legislation, operating efficiently or accomplishing it's mission. Usually a sunset review coincides with a pre-programmed opportunity to either reauthorize the existence of the program, change it or shut it down.

[4] Auto repair dealers are "registrants" and smog check stations and technicians are "licensees." Since many of the findings and recommendations in this report apply to both, for convenience the term "licensee" is used for both types of businesses.

- These statutes are backed up by regulations found in Chapter 1, Division 33 of Title 16 of the California Code of Regulations (CCR).

The BAR is a self-supporting agency and does not rely on state general fund support. In FY 2003-04 the BAR had a budget of $108 million. Key revenue sources include smog check fees paid by consumers and licensing fees paid by ARDs and smog, lamp and brake stations and technicians.

Key workload statistics include (all figures are for FY 2002-03 unless otherwise noted):[5]

- 41,000 registered ARDs (these include smog check stations which are required to have an ARD registration as well as a smog check facility license)
- 670 educational presentations held
- 23,000 complaints received
- 24,000 complaints closed
- 7,000 complaints referred to BAR field offices for investigation
- Top 3 complaint categories:
    1. Auto body/auto glass repair
    2. Steering/brake repair
    3. Transmission repair
- 21,000 inspections of smog check facilities[6]
- 2,170 investigations of auto repair and smog check locations[7]
- 581 office/citation conferences held
- 1,302 citations issued to smog check licensees with total amount fined of $457,000
- 238 cases referred to the Attorney General for disciplinary action
- 172 cases referred to local prosecutors for criminal prosecution
- 137 stipulated settlements
- 295 licenses revoked

Project objectives

Objectives for the Enforcement Monitor program were covered in SB 1542, the bill authorizing the Enforcement Monitor. The specific language of the bill is shown in Appendix 2 but is summarized below:

- Examine the accuracy and consistency in the application of sanctions or discipline,

[5] Most numbers are approximations.
[6] Smog check stations are inspected twice a year.
[7] The majority of investigations are triggered by complaints (in the case of auto repair establishments) or evidence of compliance issues (in the case of smog check stations).

- Evaluate the viability and fairness of procedures available to licensees and registrants to respond to allegations of violations,
- Evaluate the accessibility, fairness and independence of the appeals process,
- Evaluate the prioritization of investigatory and prosecutory resources,
- Evaluate the expertise of bureau staff in accepted industry standards,
- Evaluate the effectiveness of DCA's ombudsman and advisory committee,
- Analyze and consider a statutory definition of the term "fraud" and how it applies to licensees and registrants,
- Analyze and consider the establishment of formal diagnostic and repair standards,
- Analyze and consider the licensing or registration of technicians,
- Consider the establishment of a formal code of conduct, and
- Evaluate the processing of complaints and investigations.

As mentioned elsewhere, these objectives were converted into a series of key questions that provided a structure for our investigatory work and for this report. These key questions encompass the objectives of SB 1542 and the expectations of the project sponsors. These six key questions are listed on the next page.

Procedures performed

Strategica, Inc. performed the following procedures during the Enforcement Monitor project to date:

- Conducted an entrance conference,
- Met industry stakeholders at a series of forums held throughout the state,
- Interviewed 42 BAR employees, legislative staffers, prosecutors, industry representatives, defense attorneys, consumer advocates,
- Read 29 reports and other documents (e.g., BAR plans, reports and letters from industry reps, educational materials, statutes & regulations),
- Developed an essential elements of due process list and compared it to the Administrative Procedure Act (APA),
- Conducted 9 ridealongs with BAR program reps and observations of office conferences and administrative hearings,
- Observed DCA staff at 2 mediation centers,
- Mapped processes for investigating complaints and handling disciplinary matters,
- Audited 17 cases for due process, consistency,
- Examined the legal basis for various elements of the Auto Repair Act and the APA, and

- Examined features of other regulatory practices at peer agencies such as the Alcoholic Beverage Commission, the Medical Quality Board and the Contractors State License Board.

Key questions

Our initial investigatory work and discussions with project stakeholders resulted in a line of inquiry focusing on six key questions. These questions incorporated the objectives of SB 1542 as well as stakeholder expectations. These questions are:

1. Does the BAR disciplinary process provide for due process?
2. Should the Repair Act include a specific definition of fraud?
3. Are regulators enforcing documentation and paperwork standards that don't exist?
4. Is the system of sanctions commensurate with the degree of violation?
5. Should the BAR be in the business of setting and enforcing trade standards?
6. Is the BAR doing enough to prevent violations other than applying sanctions?

These questions are addressed individually in the Findings and Recommendations section. These questions cover significant portions of the BAR organization, its operations and governance.

FINDINGS AND RECOMMENDATIONS

Chapter 1 - Does the BAR disciplinary process provide for due process?

What is the BAR disciplinary process?

The disciplinary process starts with some indication that there may be compliance issues at a licensee. There are over 41,000 ARDs and smog check stations in California but only 260 program reps to regulate the industry making it necessary to only target businesses that demonstrate signs of trouble. For the automotive repair program, this trigger is usually a consumer complaint. In the smog check program, the trigger could be the findings from a semi-annual inspection or anomalies in smog check data transmitted from a smog check station.

Both programs rely on field investigation to determine if a licensee is complying with the law but the procedural steps have some differences. Appendix 3 contains maps showing the disciplinary processes used for a typical case.

Both programs also use a sliding scale of disciplinary measures with the severity of a sanction dependent on the severity of the violation. The following graphic shows this sliding scale.

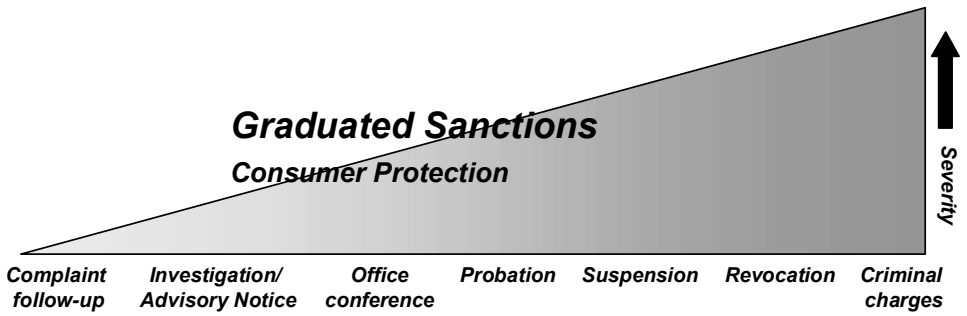


Figure 1 – Sliding Scale for Sanctions – Automotive Repair

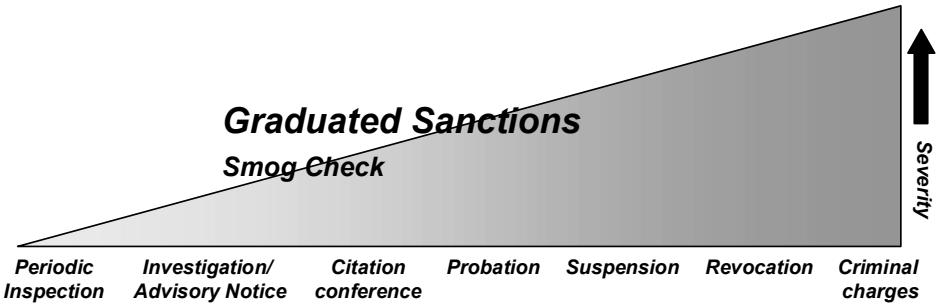
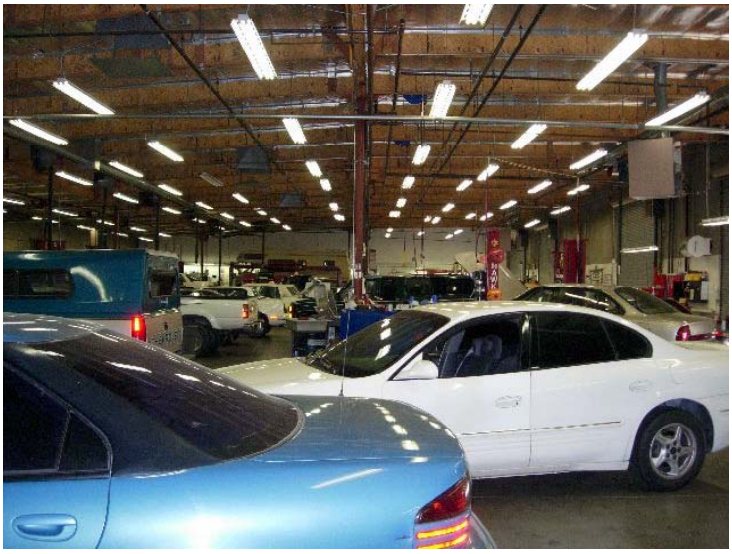


Figure 2 – Sliding Scale for Sanctions – Smog Check Program

Some elements of BAR disciplinary processes are very unique to the BAR and should be described here. In an effort to establish the "intent and design" element of fraud, the BAR will try to show that a violation is a pattern of behavior rather than a one-time mistake or slip-up. To establish this pattern at repair shops suspected of fraudulent business practices, the BAR sends vehicles with built-in operating problems or defects to the licensee being investigated. The cars are driven by undercover operators. The cars are prepared at one of seven "documentation labs" in the state. At these state-of-the-art facilities, cars are checked to ensure good running condition and then a defect is "induced" by a BAR technician. For example, the technician may induce a crack in a spark plug's insulation to induce a misfire. An undercover operator will take this vehicle to the licensee being investigated to determine if the licensee is diagnosing and communicating problems truthfully and not selling unnecessary services or parts. For example, a licensee may make false statements about the condition of a vehicle in order to sell unnecessary parts (e.g., shock absorbers) or services (e.g., engine flushing) when all that was needed were new spark plugs. Usually two or three cars are taken to the licensee to replicate the violations and prove that the violations are part of a pattern and not a mere aberration of otherwise good conduct.



View of the Sacramento Documentation Laboratory where undercover cars are prepared.

BAR investigators will also place surveillance cameras within cars to record what a technician does. This is common in the smog check program because of the requirement for smog

check technicians to perform specified visual and functional inspections of a vehicle's smog control equipment, something that a hurried technician may opt to skip.

What due process is provided?

A serious violation of the Repair Act or the Health and Safety (H&S) code is usually treated as a violation of administrative law and is handled through an administrative hearing. The state law that governs administrative hearings is the Administrative Procedure Act (APA) (Government Code 11500 et seq.) The APA governs how administrative hearings are to be conducted, discovery rights for the parties, decision-making authority for Administrative Law Judges (ALJ), and noticing requirements. The APA was first promulgated in 1946 in response to the need for a streamlined quasi-judicial[8] process for cases involving claims against government agencies or violations of administrative law. The use of the APA by consumer protection agencies offers an expedited, less expensive way for regulated entities and the government to resolve violations. Most states have something similar to the APA on the books as well. Some BAR cases involving more severe violations are referred to local district attorneys for prosecution through the criminal justice system.

Provisions of the APA have attracted criticism from industry for alleged deprivations of due process protections as guaranteed by the 5th and 14th amendments to the U.S. Constitution.[9] These deprivations include the following four issues:

1. In California, an ALJ makes a proposed decision based on a finding of fact (i.e., what the ALJ decides is the true course of events based on the evidence and testimony presented) and the relevant statutes. Government Code 11517(c)(2)(E) then allows an agency director (i.e., the DCA Director) to:

   - Adopt the decision entirely,
   - Reduce the penalty and adopt,
   - Make minor changes to the decision and adopt it,
   - Reject the decision and remand it back to the ALJ for further fact gathering, or
   - Reject the decision and make another decision based on the record.[10] This is called the non-adopt option.[11]

   About 90% of cases that went to hearing are adopted by the agency as originally proposed by the ALJ with non-adopts comprising about 10%.[12]

   The criticism stems from a concern that the final decision is not made by an ALJ, an ostensibly unbiased person with regard to the case, but rather by the head of a

[8] Quasi-judicial actions are those not adjudicated by a judge.
[9] The 5th amendment applies only to federal courts but the 14th amendment applies to state courts and agencies.
[10] In the case of BAR non-adopts, the final decision is usually made by a DCA staff attorney.
[11] Not all states have a non-adopt option for a proposed decision. In Washington State for example, the decision of an ALJ is final. In contrast, the federal APA does provide for a similar non-adopt provision in cases not presided over by an employee of the agency bringing an action.
[12] For the last three completed fiscal years, 1047 disciplinary cases were closed out. 21% were default decisions where the licensee didn't contest the charges. 55% were resolved through settlements. Another 244 cases (23%) went through a full hearing. Of these 244 hearing decisions, 218 (89%) were adopted by DCA, 26 (11%) were non-adopts.

government-run consumer protection agency, someone who will ostensibly have a bias in favor of the consumer rather than the industry.[13] In addition, since the final decision maker at DCA, usually an agency attorney, does not attend the hearing and makes a final decision based on the record, the decision is based on second-hand testimony. The decision maker has not had the opportunity to observe the proceedings, witnesses, the demeanor of the respondents, etc.

Enough proposed decisions are non-adopted and then ultimately changed by the DCA Director in favor of harsher sanctions to raise concerns among industry that even if a favorable decision is obtained at a hearing (e.g., probation), the final penalty will end up being harsher (e.g., a 10-day suspension.) In our case audit we found that of 26 non-adopt decisions in our sample, sanctions were ultimately increased by the DCA Director in 17 of them. In three cases the sanction was reduced.[14]

According to private attorneys who handle BAR cases, the existence of the non-adopt provision in GC 11517 is a disincentive to seek a hearing to either disprove the allegations or, more typically, provide enough mitigating circumstances at a hearing to reduce the penalty to something more acceptable to the respondent.[15] A well-functioning judicial system should have as few barriers as possible for the litigants. The concern of industry is that the non-adopt provision and the resulting creation of a biased referee is a deprivation of due process and a barrier to availing themselves of the judicial process that is set out for them.

2. The second key issue are the limited discovery rights that are provided by the APA. GC 11507.5 limits the discovery available to a respondent. A key exclusion is the right to take depositions and interrogatories. These limitations can hamper the defense that can be brought to bear.

3. Third, B&P Code 125.3 allows the State to recover the cost of investigating a case from a respondent if allegations are proven.[16] There is no provision for a respondent to recover the cost of their defense even if none of the allegations are proven. The respondent will always be responsible for the cost of their defense and probably the State's investigatory costs as well. This significantly raises the cost to seek a hearing, limits access to the judicial system for a respondent and increases the probability that a respondent will settle charges rather than challenge them in a hearing.

4. Fourth, the Repair Act allows BAR personnel to conduct unannounced inspections of ARD business records such as repair authorizations, invoices, etc. regardless of probable cause.[17] This provision is unpopular with ARDs who consider the practice to be disruptive, heavy-handed and a violation of the Constitutional protection against unreasonable search and seizure.[18]

[13] It should be mentioned that the APA has an ex-parte communication provision that prohibits the DCA Director from communicating with any BAR employee about the case. This provision cuts both ways. It prevents any case-specific bias from interfering with the Director's decision. It also contributes to the lack of direct knowledge about the case or how the hearing was conducted.
[14] About half of the increased sanctions resulted in full revocation. In the three case (actually part of a single case) where sanctions were reduced the amount of cost recovery was reduced.
[15] A respondent is a licensee who is the subject of a formal disciplinary matter.
[16] The average cost to the BAR of investigating a case that is referred to the Attorney General was $9,900 in FY 02/03.
[17] B&P Code section 9884.11
[18] 4th amendment to the U.S. Constitution.

What due process is required?

A related question to "What due process is provided?" is what due process is really required? Should there be a completely unbiased referee? Should a respondent have unlimited ability to present evidence and testimony? Should the BAR have the ability to conduct warrantless record searches? To answer these questions it is necessary to explore legal precedent of due process and how it is applied in this situation.

What due process is required?

A key precedent to answer these questions is Nebbia v. State of New York decided by the U.S. Supreme Court in 1934.[19] Nebbia concerned a regulatory action involving price supports in the dairy industry. A key issue in Nebbia was whether full due process as afforded by the 5th and 14th amendments to the Constitution were required in undertaking a regulatory scheme.[20] According to the majority opinion:

> ". . the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In the context of auto repair regulation, this means that full due process is not required in a regulatory scheme if the regulatory means and methods have a direct relation to the objective of the regulatory program.

The decision also addresses the issue whether a regulatory license constitutes a right or a privilege:

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of businesses may be prohibited and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified."

Again in the context of auto repair regulation, this means that conducting an auto repair or smog check business in California is not an unfettered right but rather a privilege that can be "conditioned" by the state in the interest of enhancing the health and welfare of the state. By making the distinction that a license is a conditional privilege and not a Constitutional right, this also lowers the bar for what due process rights are required in a regulatory scheme.

[19] Nebbia v. People of State of New York, 291 U.S. 502 (1934). Majority opinion delivered by Justice Owen Roberts.
[20] Due process guarantees under the 14th amendment are limited to notice of the charges and the right to a hearing.

Should there be an unbiased referee?

Obviously the referee should be unbiased but does the current system create a biased referee as some in industry contend? Regarding the question of whether the non-adopt provision in GC 11517 results in a biased referee or adjudicator, two legal sources apply:

GC 11425.30(a) states:

> "A person [which includes an agency] may not serve as presiding officer in an adjudicative matter [such as a BAR administrative hearing] in any of the following circumstances: (1) the person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. (2) the person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage."[21]

This statute applies to DCA as BAR employees, who are ultimately under the direction of DCA, serve as investigators on BAR cases and act as prosecution witnesses in administrative hearings. All DCA staff, including the Director, are assumed to be advocates for consumers based on the agency mission and the business of the agency. This statute is in conflict with GC 11517 as 11517 allows the DCA Director to be the final adjudicator in BAR cases.[22] While this doesn't prove that the referee (i.e., the DCA Director) is biased against a respondent, it does create the potential for bias to influence the outcomes of these cases. Balancing this, the APA does have a provision, GC Section 11430.70, that creates a firewall between the DCA Director and BAR staff and prevents any ex-parte communication regarding a case. GC 11430.70 can mitigate the effect of combining the adjudicative and investigatory functions within one agency. However, the issue of overall agency bias remains.

The second source is a 1975 U.S. Supreme Court case, Withrow v. Larkin,[23] that involved a disciplinary action against a physician in Wisconsin. In Withrow, the court ruled that combining investigative and adjudicative functions within an agency does not automatically constitute a violation of due process under the 14th amendment to the U.S. Constitution. The court ruled that agency adjudicators, such as the DCA Director for example, are assumed to be impartial in the absence of evidence to the contrary. This ruling would appear to permit the current system of agency non-adopts.

As seen in the previous paragraphs, there is no clear answer as to what due process is required as it pertains to agency adjudicators and the non-adopt provision. The federal case allows the GC 11517 provision but it does not invalidate the California statute, GC 11425.30(a), that seeks to separate the functions. The federal case serves as a boundary to what constitutes due process. States are free to craft their due process provisions any way they want as long as they don't cross those boundaries.

[21] Phrases in brackets added for clarification.
[22] Since GC 11517 applies to all agencies, bureaus and boards that use the APA the conflict applies to a vast spectrum of government actions in California.
[23] Withrow v. Larkin, 421 U.S. 35 (1975)

Should the BAR have the ability to conduct warrantless record searches?

The unfettered access to business records as provided in the Repair Act has also been tested in the courts. Numerous cases have upheld the government's ability to conduct warrantless searches in the context of a regulatory program. In these cases it has been held that in effect the statute authorizing the regulatory scheme becomes the warrant and that the state could conduct these searches so long as they supported the purposes of the regulatory scheme and the authorizing statute was carefully crafted to establish this relationship.[24]

Inspecting invoices at a smog check station.

To summarize this section, in California regulatory schemes such as the BAR the limited due process provided by the APA is adequate given the regulatory interests of the state in promoting the public's health and welfare and the state's power to condition the ability to conduct a business to achieve the objectives of the regulation. The only requirements upon the state are that the regulation not be unreasonable, arbitrary or capricious and that the regulatory methods have some relation to the regulatory objective.

Is the BAR unreasonable, arbitrary or capricious?

Our investigation included a limited audit of BAR cases, and observations of field staff, office/citation conferences and administrative hearings. Other than one isolated exception our investigation did not uncover any evidence that BAR personnel are unreasonable, arbitrary or capricious. During ridealongs with program representatives in the field, the representatives were unfailingly professional in their demeanor and actions. Similarly, observations of office conferences and citation conferences showed that BAR representatives were definitely firm and meant business but were fair and professional and did not cross the line into being unreasonable, arbitrary or capricious. Obviously these program representatives knew the Enforcement Monitor's role and were doubtlessly careful to project a positive image. However, there was no indication that the behavior observed was extraordinary. Furthermore, no specific examples have been related that suggest that the behavior observed is extraordinary.

[24] See New York v. Burger, 482 U.S. 691(1987) and Donovan v. Dewey, 452 US 594 (1981). The Dewey case established a three-part test to determine if warrantless searches were permissible: 1) Does the state have a substantial interest in regulating a particular industry?, 2) Does the regulation serve that interest?, and 3) Do statutory safeguards provide an adequate substitute for a warrant requirement?

A limited audit of cases that were resolved either through settlement or administrative hearings showed that cases were well documented and, as discussed in more detail later, resulted in sanctions that were in line with the violations either proven or admitted. In only one case did the sanction seem unreasonable given the proven violations and the aggravating and mitigating factors.[25]

An office conference with a licensee.

One issue observed is the varying levels of clarity regarding documenting office and citation conferences. Citation conferences, associated with the smog check program, are documented with clear, descriptive citation reports. These reports are signed by the licensee with an explanation of the consequences of the conference and what a licensee is guaranteeing or acknowledging by signing the report. In contrast, conference reports used in automotive repair office conferences lack a similar guarantee or acknowledgement associated with a signature. A related issue is the use of the term "confirmed violations" in automotive repair conference reports. Since there has been no hearing or other adjudicative steps, nothing is "confirmed." The report should simply use the term "violations" rather than imply that they are "confirmed." The smog check citation report uses this approach.

Due process with a small "d"

Above and beyond what the Constitution and the APA guarantee as a minimal floor of due process protection is the notion of due process with a small "d". That is, should the state provide for additional due process measures above and beyond the minimal requirement in the interests of economic development, fairness, or implementing checks and balances on the regulatory powers of the government?

Even though the BAR regulatory system passes muster as being constitutionally sound, it is still a system that is stacked against licensees. As mentioned earlier, the uncertainty of the non-adopt provision and the cost of contesting a case in a hearing without the ability to recoup those costs pose substantial hurdles for a licensee that wishes to test the state's case.

Even though almost no examples of unreasonable, arbitrary or capricious conduct were observed the potential exists as shown by the isolated cases. A well-functioning judicial or quasi-judicial system should have safeguards to either prevent or rectify unfair outcomes. In addition to the APA, the BAR system does have some of these safeguards:

- Licensees who wish to appeal the results of an administrative action can file a writ of mandamus and have their case reviewed by a Superior Court judge in their county. This review is limited to the record from the administrative hearing augmented by briefs

[25] Setrakian & Isayan, ARD # AK202057, 2003.

prepared by the attorneys representing the state and the licensee. No new testimony or evidence can be presented. The Superior Court judge can reverse or affirm a decision of the ALJ/Department or remand the case for further consideration. Further appeal is to the State Supreme Court. An appeal to Superior Court can cost a licensee additional legal fees above and beyond what was spent in the administrative hearing. In addition, there is no guarantee that the judge will have any relevant knowledge about the BAR, the auto repair or smog check industry or even consumer protection for that matter.

- In 2003 an ombudsman was appointed to be available to licensees that had concerns or questions about mediation, consumer complaints, investigations or disciplinary proceedings. The individual appointed to this position also supervises one of the four mediation centers operated by DCA. The hope was that the ombudsman would be able to address industry concerns about BAR processes and be able to resolve matters that were deemed to be handled unfairly or unprofessionally. However, the authority of the ombudsman is not defined well and it is unclear to many observers, including the ombudsman, how much discretion or power the position has to resolve any matter. Properly structured, the ombudsman position could be an effective way to handle matters involving arbitrary or unreasonable program representatives, problem cases or mediation matters, etc.

The legislature and DCA should consider if it makes sense to implement due process enhancements in the interest of improving fairness and access to a hearing. If these enhancements do not impair the ability of the agency to regulate the industry and take action when warranted they should be implemented.

Recommendations

Recommendation 1 – The Legislature should exclude the non-adopt provision from the Auto Repair Act. The Auto Repair Act section that specifies using the Administrative Procedure Act for a BAR hearing (Section 9884.12) should be amended to exclude Government Code Section 11517. The rest of the APA would still apply.

Recommendation 2 – The BAR should amend office conference reports to include an acknowledgement at the end of the report regarding the attendee's understanding of what was discussed and the purposes of the conference. The conference report text used in smog check citation conferences could serve as a useful guide for this.

Recommendation 3 – The Legislature should amend B&P Code 125.3 directing DCA to pay all actual legal fees incurred by licensees where the BAR was not able to prove a substantial number of the allegations in an administrative hearing.

Recommendation 4 – DCA should enhance the guidelines and authority of the ombudsman. The ombudsman should report directly to the Director of DCA and should not be encumbered with any other duties that would involve another reporting relationship. The ombudsman should have the ability to investigate any report of unreasonable or arbitrary conduct and have access to any documentation regarding an open or closed investigation or disciplinary matter. The ombudsman should report any unreasonable or arbitrary conduct to either the DCA Director or the Special Operations Unit of DCA.

Chapter 2 - Should the Repair Act include a specific definition of fraud?

How is fraud defined now?

Fraud is defined in the California Civil Code in section 1572 as actual fraud and in section 1573 as constructive fraud.[26] The key distinction between the two being that constructive fraud does not require fraudulent intent. Either case removes the essential element of consent from a contractual relationship and renders a contract void. Auto repair transactions, being a form of a contract are covered under the Civil Code, therefore constructive fraud is applicable to auto repair contracts at least as far as they would be treated in a civil lawsuit. Penal Code sections 8 and 532 also define the scope of fraud for criminal cases. The B&P Code defines fraudulent activity for application in auto repair licensing cases to include the following acts:

1. Any other conduct which constitutes fraud.[27]
2. Making false promises of a character likely to influence, persuade, or induce a customer to authorize the repair, service, or maintenance of automobiles.[28]
3. Making or authorizing in any manner or by any means whatever any statement written or oral which is untrue or misleading, and which is known [to be untrue or misleading][29], or which by the exercise of reasonable care should be known, to be untrue or misleading.[30]

For purposes of sanctioning or restricting an auto repair license, the second and third elements in the list are much easier to prove given that the standard for proving a violation is "false promises . . . likely to influence" <u>or</u> "making . . any statement . . which by the exercise of reasonable care should be known, to be untrue or misleading." In contrast, the first element requires actual intent and injury. Thus the Legislature has imposed a duty on the industry to "exercise reasonable care" in truthfully diagnosing the condition of vehicles presented by consumers rather than simply making any diagnosis and hoping that it is true with no consequences otherwise. In addition, industry has a duty to ensure that they make no false

[26] Both statutes added in 1872.
[27] B&P Code section 9884.7(a)(4)
[28] B&P Code section 9884.7(a)(8)
[29] Phrase in brackets added for clarification.
[30] B&P Code section 9884.7(a)(1)

statements that would "likely influence" a consumer to agree to a repair, not just a false statement that really did influence a consumer to their detriment. By establishing these hurdles it is argued that industry has been held to an unreasonable standard and that making a mistake is now a punishable act.

To distinguish between those licensees that merely make mistakes and those that do not exercise reasonable care in diagnosing auto repairs on a consistent basis, the BAR usually attempts to replicate a particular punishable act through documenting more than one consumer complaint of the same nature or running multiple undercover cars through an ARD to see if the same or similar violation results.[31] Our case audit includes a component to determine whether isolated mistakes are being treated as grounds for sanctioning or whether a licensee has to demonstrate a systemic lack of reasonable care in diagnosing vehicles. Audit results suggest that sanctions have not been applied unless a pattern of violations was observed.[32]

Should the Repair Act have an industry-specific definition?

Industry has suggested that the definition of fraud found in the Auto Repair Act is too broad and, in fact, encompasses acts that may be mere mistakes rather than fraudulent behavior. These suggestions advocate limiting the definition of fraud to just those acts which meet the definition of actual fraud especially the element of intent to deceive. This would exclude any definition that could be read as constructive fraud, which doesn't require the element of intent. By doing this, the reasonable care standard as found in B&P 9884.7(a)(1) would be eliminated and making false and misleading statements would be a punishable violation only if the licensee knew them to be false or misleading. Without the reasonable care standard the BAR would have a much harder task in proving that licensees intentionally made false or misleading statements.

There are two key problems with taking this approach:

1. It can be argued that without the reasonable care standard, consumers may be harmed as licensees could merely guess or speculate about the true source of vehicle problems rather than make a reasonable effort to diagnose a problem correctly as long as they did not attempt to intentionally oversell services and parts. Making an insufficient effort to diagnose vehicles, while detrimental to the business and customer goodwill, would not have any consequences as far as the license is concerned. In addition, by eliminating a reasonable care standard this would run contrary to the fiduciary duty of the licensee to the consumer who relies on the advice of a professional technician to diagnose a problem and make repairs where most consumers are ill-equipped to question the professional.[33] This appears to conflict with the intent of the Automotive Repair Act which is to protect the public.

[31] Replicating a violation is standard practice in consumer protection schemes where fraud needs to be proven in order to make a distinction between systemically fraudulent behavior and simple mistakes. In weights and measures enforcement for example, inspectors will test the accuracy of retail scanning devices by making several test purchases at multiple locations to prove that fraudulently mis-pricing merchandise is a systemic problem, whether intentional or not.

[32] See Chapter 4 for more detail.

[33] See Estate of Gump (1991) 1 Cal.App.4th 582 for a discussion of the fiduciary relationship and its bearing on constructive fraud.

2. The second key problem is that other areas of California law do not exclude a reasonable care standard in making statements forming the basis of a contract. As mentioned earlier, Civil Code section 1573 - Constructive Fraud, specifically includes as a basis for voiding a contract the act of misleading another party to their detriment even if the element of fraudulent intent was absent. It seems clear that the Legislature intended that the conduct of business in California was to be based on a higher standard than being able to unwittingly make false statements in the course of a transaction without consequences or a minimal requirement to determine the truthfulness of those statements. This seems especially true in a fiduciary relationship such as that exists between a presumably trained professional mechanic and the average motorist. It would seem hypocritical to have two standards to judge the same behavior: one for judging the validity of private contracts and another, lighter standard for judging a licensee's fitness to hold that license.

Based on these two key points, it seems clear that the intent of the Act and the interest of the state government in enhancing the public welfare would argue for preserving the existing definition of fraud in the B&P Code.

Is there a more helpful description of what conduct constitutes fraud in an auto repair context?

One of the real issues with the way fraud is defined in the B&P Code is not that the definition is too broad but rather that it is difficult to understand and apply in a real-world business setting on a daily basis. Any layperson reading either the fraud definitions in the B&P or Civil code would be perplexed. As mentioned earlier, the BAR tries to distinguish between isolated mistakes in diagnosing and selling auto repairs and systemically fraudulent activity. It may benefit industry to hear how that line is crossed explained in plain English rather than in legalese.

Recommendations

Recommendation 5 – The Legislature and/or the BAR should provide more clarity to the notion of constructive fraud. This can be accomplished in a couple of ways:

- The actual statute, especially B&P Code 9884.7(a)(1) and 9884.7(a)(8) can be amended to include specific examples of what behavior is a violation with a qualifier that the examples are not exhaustive or all-encompassing;

  And/or

- BAR educational materials such as the Write-it-Right series of publications could be expanded to include sections on what fraud is (both types), what "reasonable care" entails, real-world examples of how ARDs get into trouble with the fraud statutes, simple steps and safeguards for running a business, operating work order systems, etc. while avoiding committing fraud violations. This can also be accomplished in a program of basic licensee training (See Recommendation 8 on page 37 for more details)

Chapter 3 - Are regulators enforcing documentation and paperwork standards that don't exist?

Another way to ask the question is:

Does the BAR enforce standards that are divorced from the original intent of the Act?

The original Automotive Repair Act was passed in 1972. Like many laws, in the last 33 years the Act has evolved to better address contemporary industry conditions and public policy considerations. Using the original intent of the Repair Act as a target for comparing how today's program is operated and how discipline is meted out lacks relevance. It should also be noted that many of the Act's provisions that are characterized as being out of touch or minutiae have been in the Act since the beginning. For example, statutes requiring a licensee to provide a written estimate, consent of the customer for additional work, full disclosure on an invoice were all included in the original legislation. Paperwork standards and the seemingly persnickety rules for how estimates and invoices are written up and submitted seem to be at the heart of some discomfort among industry.

Discussing documentation standards with a BAR ARD registrant.

The current, and original intent of these statutes was to standardize and clarify how auto repair diagnoses are communicated to consumers to eliminate misunderstandings that could potentially turn into complaints, demands for rework, refunds, small claims filings, etc. The intent of the statutes is also to bring the entire industry up to an acceptable standard of professional conduct.

A bigger issue may be the inability of auto repair/smog check systems to generate estimates, work orders and invoices in a way that is compliant with the Repair Act. It seemed clear from field observations that many licensees (i.e., the owners and/or service writers) are simply unaware of what the paperwork standards are. In other cases they seem to be aware of the standards but don't acknowledge them. In some field visits where the issue being investigated was based on documentation standards the ARD would fish out a copy of "Write-it-Right" from a filing cabinet apparently unread. In many cases the ARDs rely on whatever their automated estimating/invoicing system produces which in some cases is not compliant with California law. The problem seems to be one of limited system function, education and awareness as much as it is complicated regulations.

Recommendations

Recommendation - The BAR should implement minimal, required training in Repair Act standards as a condition for licensing. See Recommendation 8 on page 37 for more details.

Chapter 4 - Is the system of sanctions commensurate with the degree of violation?

We conducted a limited, non-statistical audit of resolved BAR disciplinary actions to help answer three questions:

1. Do non-adopt decisions result in greater sanctions?
2. Do cases get resolved with greater sanctions than the guidelines allow?
3. Do cases get resolved with greater sanctions than the facts would warrant?

The case audit sample had the following characteristics:

- 17 total cases

- 3 cases were resolved through stipulated settlements
- 14 cases were resolved after an administrative hearing

- 7 cases were selected by the BAR[34]
- 5 cases were selected at random by the Enforcement Monitor
- 5 cases were referred by industry

- 10 cases were for auto repair dealers
- 7 cases were for smog check stations

- 5 cases were non-adopt decisions

An additional 21 non-adopt cases were examined in less depth to determine the impact of non-adopt decisions on sanctions that were ultimately applied.

Do non-adopt decisions result in greater sanctions?

Non-adopt decisions refer to a feature of the Administrative Procedure Act (Section 11517(c)(2)(E) that allows an agency to "reject the proposed decision [of the Administrative Law Judge], and decide the case upon the record."[35] The provision is used occasionally by the Director of DCA or their designee to change the proposed sanction. As discussed in

[34] BAR was asked to select some cases for the sample because we wanted to review recent non-adopt cases. BAR staff were in a position to identify these cases.
[35] Phrase in brackets added for clarification.

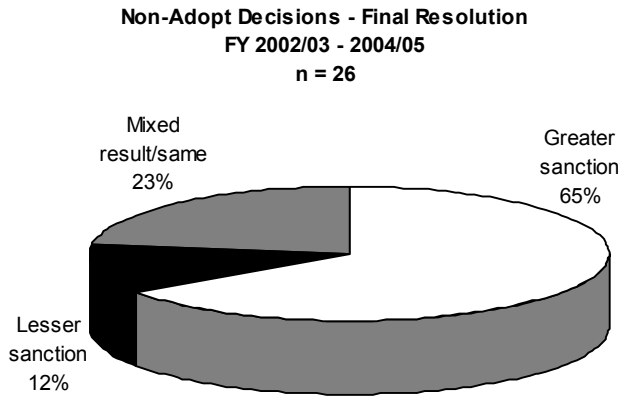
Chapter 1 this feature has the appearance of depriving the respondent of an unbiased referee in the case since the ultimate decision is made by an individual with an ostensible bias toward the consumer as the head of a consumer protection agency. In addition, the ultimate decision maker does not even attend the hearing and instead relies solely on the record. This feature is criticized by industry as a disincentive to seeking a hearing.

In our audit, we sought to determine whether there was any practical impact from Section 11517. We examined the proposed and final decisions for cases where the ALJ's proposed decision was not adopted by DCA for a 3-year period. The results were categorized as follows:

- Final decisions where the ultimate sanction was greater than that proposed,
- Final decisions where the ultimate sanction was lesser than that proposed, and
- Final decisions where the ultimate sanction was the same as that proposed.

The following chart shows the results of our audit:

Figure 3 – Non-adopt decisions – final resolution



As seen in the chart, 17 of 26 (65%) final decisions resulted in a greater sanction than that proposed by the ALJ.[36] A typical "Decision after non-adoption" may add a 5 or 10-day suspension if the ALJ was just proposing probation. This chart lends credence to industry concerns that seeking a hearing may not be a good strategy as the decision of the ALJ cannot be relied upon as the final resolution. In fact, there is about a ten percent chance that a final decision may be rendered by DCA after non-adopting the ALJ's decision and of those, most are unfavorable to the respondent.

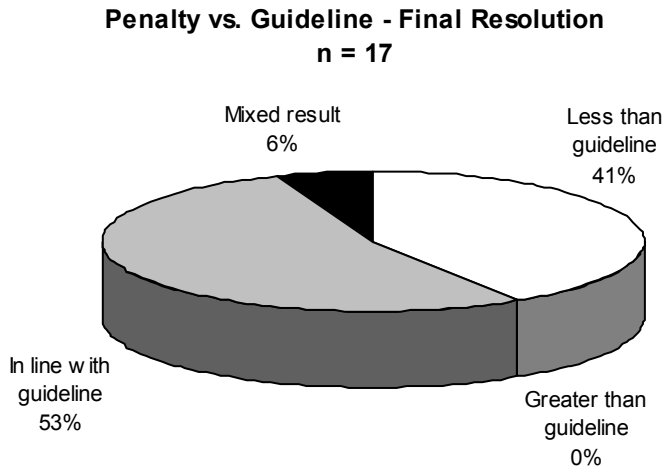
[36] Only about 10% of all cases heard in an administrative hearing are non-adopted. The other 90% are adopted as proposed by the ALJ. Also, 77% of all cases never make it to a hearing and either settle or the charges are not contested and result in a default decision.

Do cases get resolved with greater sanctions than the guidelines allow?

The BAR has prepared Guidelines for Disciplinary Penalties and Terms of Probation[37] that establishes a range of sanctions for common violations of the Repair Act and the Health & Safety Code. For example, the range of sanctions for violating B&P Code 9884.7(a)(1), making false and misleading statements, would be revocation on the high end and a 10-day suspension[38] plus 2 years of probation on the low end. Like most sentencing guidelines used in judicial environments, the disciplinary guidelines are intended to instill consistency in how sanctions are applied so that there is a greater nexus between violations and penalties.

To ensure that cases are not being resolved with greater or lesser sanctions than called for in the guidelines we compared final decisions with the published guidelines in our audit.[39] The following chart shows our results:

Figure 4 – Penalty vs. guidelines – final resolution



As seen in the chart, 53% of cases in our sample were decided within the guidelines. The chart also shows that cases are frequently decided with a sanction that is less than the guidelines. In fact, of the five non-adopt decisions in our sample, two were ultimately decided with sanctions less than the guidelines which shows that under-sanctioning is not just within the realm of ALJs. The audit also showed that no cases were decided at a sanction that was more than the guidelines although the highest sanction for most violations is revocation so it would be hard to exceed this sanction.

[37] Published September 2003.
[38] The guidelines actually call for a 90-day suspension with 80 days stayed or reduced.
[39] Final decisions incorporate those decisions made after a non-adopt.

Do cases get resolved with greater sanctions than the facts would warrant?

The third part of the bigger question of whether sanctions are commensurate with the degree of violation is whether cases get resolved with greater sanctions than the facts would warrant. This question addresses an industry concern that relatively minor offenses are heavily sanctioned. This is a much trickier question to answer as there are frequently mitigating and aggravating circumstances that can complicate the question of whether a licensee deserves a particular sanction. Typical mitigating factors are:

- Respondent had no prior disciplinary record or record of problems,
- Respondent terminated the employees committing the violation as soon as it was brought to their attention,[40]
- Respondent fully cooperated with the investigation and showed remorse, and
- Respondent refunded consumers who had complained or been financially injured.

Typical aggravating circumstances include:

- A history of disciplinary problems, citations or prior violations,
- Respondent was not cooperative or demonstrated a negative attitude,[41] and
- Respondent made no effort to rectify the practice in question.

Also complicating this is the degree of the violation. A smog check practice that violates the Health & Safety Code may be a misunderstanding of the rules. In other cases, smog check stations may be out-and-out cheating the system by clean piping cars.[42] A first-time clean piping violation will usually result in full revocation while a first-time offender who is simply performing the wrong test may get a lesser sanction. The BAR has a policy of revoking licensees who commit the most egregious violations no matter what their disciplinary history.[43]

Our case audit showed that almost all allegations in BAR cases were found to be factual in the course of a hearing.[44] This determination was made by comparing the allegations in an accusation to those listed in the Findings of Fact section of a decision. If the ALJ felt the allegations were true they would be included in the Finding of Fact. This high rate is attributable to the extensive investigation that typically occurs in a disciplinary case. Another factor could be the limited defense that a licensee can employ as discussed in Chapter 1, a factor that makes the system slightly stacked in favor of the State.

[40] Although terminating the offending employee is not identified as a factor in BAR disciplinary guidelines, it is mentioned in ALJ decisions.
[41] Ibid.
[42] Clean piping involves testing a clean-running vehicle and using the test results to certify another vehicle that would not pass on its own. The practice is deemed to be a serious violation of the Health & Safety Code.
[43] This policy is based on B&P Code 9880.3 where protection of the public is the paramount goal of the program. If a licensee is deemed to be a threat to the public by committing egregiously fraudulent acts or clean piping cars the agency will err on the side of harsher sanctions.
[44] Finding allegations to be factual is analogous to proving them.

Besides the question of whether the system is stacked in one direction or another, our audit also made a judgment as to whether the sanctions applied in a case seemed appropriate given the sanctions ordered in similar cases and based on the relative severity of the violation. We found that:

- Serious sanctions such as revocation and long suspensions were exclusively reserved for the most serious violations such as fraud, clean piping cars, repeat offenders or cases with multiple aggravating circumstances.

- In most cases sanctions seemed to be consistently applied and generally in line with the severity of the offense. In one exception, a smog check business was fully revoked for conducting the incorrect tests on vehicles in spite of multiple mitigating circumstances.[45] In similar cases, this would have resulted in probation with a short suspension.

We intend to continue sampling cases to further examine this question.

Conclusions

Due to the effect of the non-adopt provision in the APA, some cases are sanctioned at a greater level than what is proposed in administrative hearing. This lends credence to the concern of industry that a hearing ultimately may not result in an unbiased decision. In addition, while the majority of cases are decided within (or even less than) established disciplinary guidelines, it is not unknown for sanctions to exceed what the facts and precedent would suggest is fair.

These conclusions lend support to the notion that the disciplinary system, while it passes constitutional muster regarding due process, is slightly stacked in favor of the State. Simple measures to improve fairness, if they can be implemented without degrading the enforcement powers of the agency, are warranted.

Recommendations

Recommendation – The Legislature should exclude the non-adopt provision from the Auto Repair Act. See recommendation 1 on page 18 for more details.

[45] In this case, Setrakian, the licensees had no prior disciplinary history and had started implementing corrective actions after the disciplinary process started. A proposed decision ordered probation. A non-adopt was filed by DCA with the non-adopt decision ordering full revocation.

Chapter 5 - Should the BAR be in the business of setting and enforcing trade standards?

How are trade standards codified?

The Auto Repair Act and the Health & Safety Code define trade standards a couple of different ways:

- B&P Code 9884.7(a)(7) gives the BAR the ability to invalidate or restrict an auto repair dealer (ARD) registration for "Any willful departure from or disregard of accepted trade standards for good and workmanlike repair in any material respect . . . " The statute does not make a reference to what trade standards could be departed from or disregarded.
- Title 16 of the California Code of Regulations (CCR) specifies trade standards for various auto repairs such as ball joints, air conditioning, automatic transmissions and ignition interlock devices. For the most part, these trade standards mostly regulate how the condition of vehicles is diagnosed, documented and communicated to the customer. Only in a couple of cases do the regulations actually specify how a repair is to be made. For example, Section 3365 of Title 16 specifies that corrosion protect should be applied in accordance with manufacturer's specifications.
- Health & Safety Code 44016 and Section 3340.41 of Title 16 CCR specify that smog checks and emission control equipment repairs should be performed according to "industry-standard reference manuals and periodicals" or the "vehicle manufacturer's recommended procedures"

Checking emission testing equipment.

As seen, California law is mostly silent on standards for how vehicle problems should be diagnosed and repaired. Wide discretion is give to ARDs and smog check businesses on how motor vehicles are to be diagnosed and repaired.

In fact, B&P Code 9884.7(a)(7) is rarely used on its own as the basis for a disciplinary action. In our case audit it was not used on its own in any case. 9884.7(a)(7) is a frequently cited violation but it is usually combined with other subsections of 9884.7(a) such as false or misleading statements or fraud. A typical example would be where an ARD allegedly oversells brake repair work such as wheel cylinder or caliper replacement where only a pad/shoe replacement was needed. In this case, 9884.7(a)(1)-[false and misleading statements], would be cited because the ARD diagnosed and/or stated problems with the wheel cylinders or calipers that did not exist. B&P 9884.7(a)(4)-[fraud] would be cited because the consumer relied on the false statement and was economically injured (i.e., they paid for the unnecessary work). B&P 9884.7(a)(7)-[willful departure from trade standards] could be cited because an accepted standard would be to not replace wheel cylinders or calipers unless they were not operating correctly (e.g., leaking brake fluid). Some technicians, however, insist that brake calipers should be replaced more frequently than traditionally called for. As seen in this example, much of the case comes down to a judgment call whether the additional brake repair was needed or not. Regarding trade standards, the statutes or regulations make no mention of when wheel cylinders or calipers should be replaced.[46] If the standards are not defined in statute then the baseline used for comparison becomes one of opinion rather than fact.

Trade standards also become relevant when cars are documented for undercover operations. As mentioned earlier in the report, cars are prepared with an induced operating problem or the condition of a component is checked against some standard such as manufacturer specifications. The technician preparing the vehicle for an undercover operation will prepare a statement citing the condition of the vehicle for use in a disciplinary action if needed. The statement will often reference that a component or part was verified to be within trade standards such as factory specifications (e.g., the thickness of a brake rotor). If an ARD then states that the component is not operating correctly or needs repair it may become an alleged departure from trade standards.

In these two ways trade standards become relevant for purposes of taking disciplinary actions against licensees.

Should the BAR set or adopt trade standards?

It is tempting to define the standard in statute using manufacturer specifications, repair guidelines or published standards such as those from the Mitchell Repair Information Company (Mitchell) that compile standards from various manufacturers into one reference library. In this way, ARDs could diagnose problems and make repairs using an established and accepted baseline for making these judgments.

On the other hand, defining a standard in statute or referring to an existing standard in statute could remove the ability of ARDs to make discretionary decisions about vehicle repairs as they would be legally bound to diagnoses and repairs strictly according to the defined standards. Any departure from this would constitute a departure from standards and would

[46] Many ARDs prefer to replace calipers along with brake pads if the vehicle has high mileage because of a belief that the caliper pistons will not work evenly and consistently, especially in heavier vehicles. This example was used because there seems to be a variety of opinions among repair professionals about the need for this type of work.

subject the ARD to discipline even if the diagnosis and repair resulted in a perfectly good outcome for the consumer. A strict definition could conceivably greatly expand the number of violations and disciplinary actions. Finally, this would obligate the BAR to look into many more cases where the issue was simply workmanship, something the BAR usually limits to mediation except where safety is concerned or the issue is combined with fraud, misleading statements, etc.

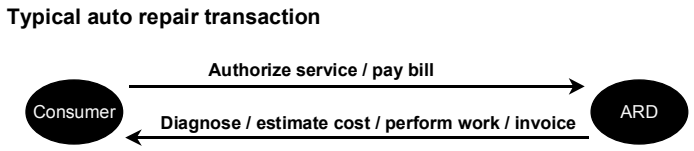
A concern of industry is that if trade standards are not defined in statute then ARDs are being held to an undefined standard when diagnosing and repairing vehicles. Honest mistakes or differences of professional judgment can get caught up in the same net as truly fraudulent behavior. The key seems to be finding a way to separate these two classes of conduct rather than establishing a defined standard in the statute that would completely eliminate any discretion on the part of ARDs. Separating these two classes should be the task of investigators so that only cases involving fraud (including constructive fraud as discussed in Chapter 2) should be disciplined. Should an error be made at this stage and a case involving an honest mistake or a difference in professional judgment reach the stage of an administrative hearing, then an ALJ should be able to make this distinction and reflect it in the findings. A significant flaw with this safeguard is that most ALJs do not specialize in a particular area of government operations. This makes it difficult for ALJs to develop the expertise in auto repair matters to be able to separate the trade standard violations from the differences in professional judgment. A panel of ALJs dedicated to BAR cases would help to improve this safeguard.

Collision repair standards

State law is similarly largely silent regarding trade standards for collision repair. By exception, a small reference is made in CCR 3365 about following manufacturers standards for sectioning body components and applying corrosion resistant material.

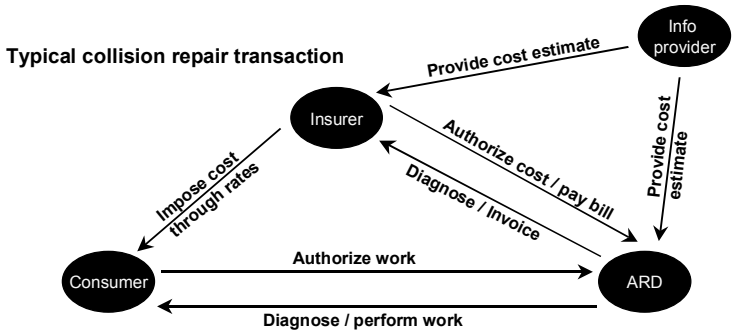
The most significant standards used in collision repair are the parts and labor estimating guidelines provided by "information providers" such as Automatic Data Processing Corp. (ADP) or Mitchell. These estimating guides are used by auto insurers to provide some predictability to the costs of collision repair. This in turn reduces underwriting risk. This results in a system of fixed price contracts for collision repair that most collision repair dealers must abide by.[47] The consumer, relying on the coverage provided by the insurer to pay for the repair, also is de-facto bound by the estimate and bill of material. This system transfers much of the decision making power from the consumer to the insurer and the information provider. The following graphics illustrates this:

Figure 5 – Typical auto repair transaction



[47] Labor hour estimating guides also exist for general auto repair but are not as influential as those used in collision repair.

Figure 6 – Typical collision repair transaction



This graphic shows plainly the flip side to having defined standards. In this case the standards are defined by the information providers and they eliminate much of the discretionary decision making on the part of the consumer and the ARD. The defined standards also create perverse incentives that foment a significant amount of insurance fraud that harms consumers, rate payers and insurers and the reputation of the collision repair industry.

The BAR conducted a study of the collision repair industry in 2003[48] that came to much of the same conclusion. The report noted "the lack of statutory or regulatory requirements informing the working relationship between auto repair facilities and insurance carriers."

Should the BAR adopt a code of ethics?

The language of SB 1542 requested that the Enforcement Monitor determine whether a formal code of ethics should be developed for the auto repair industry in California. In our research, we found an existing code of ethics developed by the Automotive Service Center Program.[49] The code has 13 points that program participants are to adhere to. These 13 points fall into three categories for purposes of this project:

Six of the 13 points are already codified in the Auto Repair Act in some form:

- "Recommend and explain the correct service to repair the customer's car." The inverse to this is a violation of B&P Code 9884.7(a).
- "Provide the customer with a written price estimate before work is performed." This is covered by B&P Code 9884.9.
- "Have the customer authorize all work before it is performed." This is also covered by B&P Code 9884.9.
- "Provide an itemized invoice for all customers." This is covered by B&P Code 9884.8.

[48] Auto Body Repair Inspection Pilot Program, Report to the Legislature, September 2003

[49] We could not find any current reference to the Automotive Service Center Program. It is believed that the program is no longer in operation. The Automotive Service Councils of California (ASCCA) has a 10-point code of ethics which covers much of the same ground as the 13-point code discussed in the text. The ASCCA code includes one unique point: a promise "to refrain from advertisement which is false or misleading and likely to confuse or deceive the customer." This point is covered in the Repair Act as B&P Code sections 9884.7(a)(1) and 9884.7(a)(8). Interestingly, the "likely to confuse or deceive the customer" phrase goes beyond the statutory definition of fraud which requires that the deception actually occur.

- "Return all replaced parts for the customer's inspection unless they are held as a core." This is covered by B&P Code 9884.10.
- "Provide warranty information on both parts and service." This is covered by CCR Section 3376.

The next three points, which emphasize high quality, exceed the standards set by the Auto Repair Act which simply require that ARDs deliver "good and workmanlike" repairs as determined by "accepted trade standards." As mentioned earlier, specifying a specific trade standard would greatly expand the scope of the BAR and would eliminate the discretion of the ARD. Some consumers may not want to pay for the highest quality parts and repairs.

- "Perform the highest quality repair work possible."
- "Use only high quality replacement parts."
- "Employ the most highly skilled automotive technicians."

Other points would be difficult to enforce or fall outside the scope of the Auto Repair Act:

- "Recognize the individual automotive needs of each of my customers." This sounds nice but how would the BAR enforce it?
- "Schedule work by pre-arranged appointment." Same point on this one.

The following two points could be incorporated into statute:

- "Remind the customer of recommended preventive maintenance." This could be within the BAR's purview. However, like specifying trade standards, it would greatly expand the scope of the BAR's enforcement and would be heavily open to interpretation.
- "Notify customers if work will not be completed as promised." This one point seems appropriate for the BAR but it would have to be defined more tightly.

With the possible exception of the last bullet, adopting a code of ethics is either already instilled in much of the Repair Act and regulations or it is unenforceable.

Recommendations

Recommendation 6 – The Office of Administrative Hearings should establish a dedicated panel of judges for BAR cases. This will create a panel of judges more familiar with auto repair cases, standards and issues and result in better decisions. This panel will also be able to identify and address true trade standard cases. A model for how this can be implemented is the dedicated panel that has been established for medical quality cases.

Recommendation 7 - Implement recommendations from the Auto Body Repair Inspection Pilot Program Report to the Legislature. These recommendations include:

1. Consider requiring that those who have the mechanical and/or collision background and equipment to properly evaluate the true condition of the vehicle do the formal estimating of collision damage.

2. Documents produced by insurance adjusters should be identified and explained as a "visual damage assessment."

Chapter 6 - Is the BAR doing enough to prevent violations other than applying sanctions?

What other tools are available?

There are several tools available to the BAR that may improve program outcomes. One option would be to utilize the role of the marketplace to regulate ARDs and smog check stations. Other consumer protection agencies do this through providing a forum where the disciplinary history of regulated businesses is available to consumers. Consumers would then presumably take their business to those without disciplinary problems. The BAR operated a forum like this by listing complaints on a website. The unfortunate, unintended consequences of this website are well known.

Another strategy would be to better educate licensees so that regulatory problems are prevented from happening in the first place. The BAR currently conducts educational seminars for licensees on a voluntary basis. In FY2002/03 BAR staff conducted 670 educational sessions. BAR staff also provide counseling and education sessions for individual licensees on request, during the follow-up for complaints, and during smog check station inspections. The limitations of this strategy were apparent during this project when field observations showed that some licensees and service writers were unaware or ambivalent about some of the more common compliance problems such as giving a customer a copy of an estimate. Doubtlessly for some of these licensees it has never presented a problem but such practices are often at the root of consumer displeasure later in the transaction.

The BAR could also revisit who or what is actually being licensed and disciplined. One issue is that the Repair Act provides that an ARD registration can be issued to a business, not a

person.[50] In some cases, when a violation occurs it is the business entity that is disciplined and not the actual human beings that committed the violation or benefited financially. In the smog check program, by contrast, the smog check technician is also licensed and is susceptible to discipline along with the smog check business entity.[51] In the auto repair field, when a registration is invalidated (i.e., revoked), sometimes only the business entity is shut down. The perpetrators and beneficiaries can, and often do, work elsewhere. Even when an individual is subsequently denied a license because of involvement in prior disciplinary actions (a common scenario) they are free to work as employees for another ARD. This frequently results in "fronting" schemes where an individual who has had a license or registration revoked buys or starts another auto repair business in someone else's name, such as a relative. In the end, the net protection afforded to the public is zero.

Discussing a consumer complaint with a service manager at a larger dealership.

A related issue is that many of the problems enforced by the BAR occur at the front counter of an ARD and not the service bay. The employee that communicates with the consumer, prepares the estimate, obtains the work authorization, prepares follow-up estimates, and invoices the work is the primary perpetrator in most violations. In a small business, this person may also be the owner and technician but in larger businesses service writers are the source of many violations. As mentioned in the previous paragraph, these individuals are unlicensed and are therefore not subject to discipline. As with the fronting problems, service writers that commit violations can simply work elsewhere in the same capacity if a license is revoked or invalidated with the resulting net protection to the public amounting to zero.

Those who benefit financially from misconduct are usually not in the service bay either. They can be owner/operators, shareholders of large dealerships or service writers that receive commissions based on the amount of work sold. Again, often these individuals are unlicensed and not subject to discipline.

The current licensing model misses an opportunity to license two key individuals:

1. The actual beneficial owners of an ARD or smog check station. In many cases the business entity is subject to discipline but the beneficial owner walks away.[52],[53]

[50] B&P Code 9880.1 defines an ARD as a "person" but the section goes on to define a person as including a partnership, association, limited liability company or a corporation. There is no requirement to license an actual human being either as a managing employee or an owner. In contrast, Health & Safety Code 44014, which governs the smog check industry, licenses an actual facility and the technicians that work there.

[51] Smog check stations must have two licenses: one for being a smog check station and another for being an ARD. Both licenses can be issued to a business entity.

[52] The Enforcement Monitor actually observed this situation in an administrative hearing.

2. Employees that prepare estimates, work orders and invoices, called service writers for convenience. Again, when a business entity is subjected to discipline, the service writer walks away.[54]

Recommendations

Recommendation 8 – Establish a system to teach and test for minimal proficiencies. Passing the test should be a condition for obtaining a BAR license. The BAR should augment their current education programs and licensing system to do the following:

- All ARD employees who prepare estimates, work orders, follow-up estimates and invoices (called service writers) should be required to attend an 8-hour course and pass a test as a condition for receiving a license. Existing licensees should also take the course and pass a test within a staggered three-year period. The course would cover:
    - Documentation requirements as found in the Write-it-Right series of publications,
    - The BAR disciplinary system,
    - Sources of information that would help licensees comply with state law,
    - Basic legal information about fraud and constructive fraud and how to prevent it,
    - Other responsibilities of holding a BAR license.
- All service writers should be required to hold a BAR license. This license would be subject to discipline including revocation in the same manner as current ARD registrations and smog check licenses.
- At least one individual who has a financial stake in an ARD or smog check business and any managing employee who has a financial stake should be required to also hold a BAR license. This license would be subject to discipline including revocation in the same manner as current ARD registrations and smog check licenses.
- When violations occur, the BAR would be able to target disciplinary efforts at responsible individuals as well as at business entities. This allows the BAR to do selective targeting of disciplinary efforts. This can be important in a large ARD such as a dealership. For example, rather than be faced with the dilemma of revoking the license of a large dealership and making all the employees unemployed,[55] the BAR could suspend or revoke the license of a service writer, fine the beneficial owner, and put the business license on probation. In other cases where misconduct is a business-wide strategy, all the licenses can be sanctioned.

The benefits to the approach include:

- By requiring this minimal level of training about state standards, it will help ensure a minimal level of proficiency without costing industry much down time,

[53] An exception to this is when the individual is prosecuted under the criminal system as sometimes happens.
[54] Ibid.
[55] A step that would be fought vociferously and result in many innocent employees being punished.

- Individual licensees, such as service writers, will be much more aware of what the standards are, how they can be complied with, the business benefits of compliance, and how the BAR operates,
- These individual licensees will have a greater incentive to adhere to the Auto Repair Act and Health & Safety Code because they will be personally accountable,
- The BAR can more accurately target sanctions to the responsible parties. As mentioned earlier, this can be a real advantage when addressing a large ARD like a dealership, and
- Those that financially benefit from violations can be disciplined with more consistency than is currently the case.

Chapter 7 - Areas for further study

The Enforcement Monitor suggests that the following areas be studied in subsequent reports during 2006:

- **Arbitration programs**. The Contractors State License Board operates both mandatory and voluntary binding arbitration programs. These programs are a step up from straight mediation but they clear many disputes over workmanship that would otherwise not get resolved at all or end up in small claims court. We have conducted some research into these programs and suggest that further inquiry be made to see if they would benefit the auto repair industry and its customers.

- **Refine explanation of fraud**. We suggest further refinement of fraud explanations as discussed in recommendation 5. This can be accomplished with BAR staff, DCA staff attorneys and members of the defense bar.

- **System Certification**. As discussed in Chapter 3, the functionality of estimating and invoicing systems may not be able to facilitate compliance with the Repair Act. One potential solution would be for BAR to research and certify estimating and invoicing systems for compliance with state law.

- **Expand case audit**. We suggest further auditing BAR cases (both adjudicated and settled) to further test the findings in this report and enhance our final recommendations. One area to investigate is looking at inducements used in undercover cars to determine the link between the inducement used and the nature of the investigation or complaint.

- **Conduct additional ridealongs**. We suggest additional observations in the field to further enhance our findings and final recommendations.

- **Investigate trade standards for brake diagnosis**. Even though it appears infeasible to adopt wide-ranging trade standards, standards for diagnosing and communicating brake repairs may prevent an area of frequent mis-communication and overselling.

- **Review and evaluate certain administrative aspects of DCA and BAR including**:
    - How program reps are trained (both initial and ongoing CE);
    - Review policies for rejecting proposed ALJ decisions;
    - Evaluate whether BAR adheres to strict charging deadlines;
    - Evaluate efforts and resources dedicated to investigating and enforcing against unlicensed operators; and
    - Revisit minimum penalty guidelines for paperwork violations.

IV. APPENDICES

1. List of acronyms
2. Text of SB 1542 (Figueroa)
3. Process maps

Appendix 1
List of Acronyms

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
ARD	Automotive Repair Dealer
BAR	Bureau of Automotive Repair
B&P Code	Business and Professions Code
CCR	California Code of Regulations
DCA	California Department of Consumer Affairs
GC	Government Code
H&S Code	Health and Safety Code

Appendix 2
Text of SB 1542 (Figueroa)

BILL NUMBER: SB 1542 CHAPTERED
BILL TEXT

CHAPTER 572
FILED WITH SECRETARY OF STATE SEPTEMBER 17, 2004
APPROVED BY GOVERNOR SEPTEMBER 17, 2004
PASSED THE SENATE AUGUST 25, 2004
PASSED THE ASSEMBLY AUGUST 23, 2004
AMENDED IN ASSEMBLY JULY 23, 2004
AMENDED IN ASSEMBLY JUNE 21, 2004
AMENDED IN ASSEMBLY JUNE 14, 2004
AMENDED IN SENATE MARCH 22, 2004

INTRODUCED BY Senator Figueroa
(Coauthors: Senators Aanestad and Vincent)
(Coauthors: Assembly Members Correa, Nation, and Runner)

FEBRUARY 19, 2004

An act to amend Sections 9882 and 9884.17 of, and to add and repeal Section 9882.6 of, the Business and Professions Code, relating to automotive repair, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

SB 1542, Figueroa. Bureau of Automotive Repair.

The Automotive Repair Act creates the Bureau of Automotive Repair in the Department of Consumer Affairs, with certain powers and duties relative to the licensing and regulation of automotive repair dealers and various other licensees. The act creates the Vehicle and Inspection Repair Fund and directs that all fees and revenues collected pursuant to the act and pursuant to the motor vehicle inspection program be deposited into the fund. Existing law requires the Joint Committee on Boards, Commissions, and Consumer Protection to hold a public hearing every 4 years to receive testimony from the Director of Consumer Affairs and the bureau, and to evaluate the bureau's effectiveness and efficiency. Existing law requires the bureau to design and approve a required sign at all automotive repair dealer locations advising the public of the bureau's telephone number and other related matters. A violation of the Automotive Repair Act is a crime.

This bill would require the sign to include the bureau's Internet address. By changing the definition of a crime, the bill would impose a state-mandated local program. The bill would make nonsubstantive changes to the provisions governing the committee's review of the bureau.

This bill would require the Director of Consumer Affairs to appoint a Bureau of Automotive Repair Administration and Enforcement Monitor by January 3, 2005, and would appropriate $184,000 from the Vehicle and Inspection Repair Fund for the 2004-05, 2005-06, and 2006-07 fiscal years to the department to contract for this position.

The bill would require the monitor to evaluate the bureau and research and analyze specified issues. The bill would require the monitor to submit a report to the director, the Secretary of State and Consumer Services Agency, the bureau, and the Legislature by June

1, 2005, and every 6 months thereafter, and to issue a final report by December 31, 2006.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Appropriation: yes.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 9882 of the Business and Professions Code is amended to read:

9882. (a) There is in the Department of Consumer Affairs a Bureau of Automotive Repair under the supervision and control of the director. The duty of enforcing and administering this chapter is vested in the chief who is responsible to the director. The director may adopt and enforce those rules and regulations that he or she determines are reasonably necessary to carry out the purposes of this chapter and declaring the policy of the bureau, including a system for the issuance of citations for violations of this chapter as specified in Section 125.9. These rules and regulations shall be adopted pursuant to Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) In 2003 and every four years thereafter, the Joint Legislative Sunset Review Committee shall hold a public hearing to receive testimony from the Director of Consumer Affairs and the bureau. In those hearings, the bureau shall have the burden of demonstrating a compelling public need for the continued existence of the bureau and its regulatory program, and that its function is the least restrictive regulation consistent with the public health, safety, and welfare. The committee shall evaluate and review the effectiveness and efficiency of the bureau based on factors and minimum standards of performance that are specified in Section 473.4. The committee shall report its findings and recommendations as specified in Section 473.5. The bureau shall prepare an analysis and submit a report to the committee as specified in Section 473.2.

SEC. 2. Section 9882.6 is added to the Business and Professions Code, to read:

9882.6. (a) (1) The Director of Consumer Affairs shall appoint a Bureau of Automotive Repair Administration and Enforcement Monitor no later than January 3, 2005. The director may retain a person for this position by a personal services contract. The Legislature hereby finds, pursuant to Section 19130 of the Government Code, that this is a new state function.

(2) The director shall supervise the administration and enforcement monitor and may terminate or dismiss him or her from this position.

(b) The director shall advertise the availability of this position. The requirements for this position shall include experience in the performing of audits of or operating state administrative regulatory agencies, familiarity with state laws, rules, and procedures pertaining to the bureau, and familiarity with the relevant administrative procedures.

(c) (1) The administration and enforcement monitor shall evaluate the bureau's disciplinary system and procedures, with specific concentration on improving the overall efficiency and assuring the

fairness of the enforcement program, and the need for administrative structural changes. The director shall specify further duties of the monitor.

(2) This monitoring duty shall be on a continuing basis for a period of no more than two years from the date of the administration and enforcement monitor's appointment and shall include, but not be limited to, researching and analyzing the following:

(A) The appropriate authorization for, accuracy of, and consistency in, the application of sanctions or discipline imposed on licensees or registrants.

(B) The viability and fairness of procedures available to licensees and registrants to respond to allegations of violations prior and subsequent to formal and/or other disciplinary actions being taken.

(C) The accessibility, fairness, and independence of the appeals process for licensees and registrants at all levels of the disciplinary process, including procedures to respond to allegations before and after formal and/or other disciplinary actions are taken.

(D) The prioritization of investigatory and prosecutory resources, particularly with respect to cases involving significant consumer harm.

(E) The adequacy of expertise of bureau staff in accepted industry standards, practices, and the applicable state and federal laws.

(F) The effectiveness of the Bureau's Industry Ombudsman and Advisory Committee, particularly in relation to their communication with licensees, registrants, and the public.

(G) The effectiveness of the bureau's cooperation with other governmental entities charged with enforcing related laws and regulations regarding automotive repair dealers and smog check stations and technicians.

(H) The creation of a statutory definition of the term "fraud."

(I) The establishment of formal diagnostic and repair standards.

(J) The licensing or registration of technicians working within the various fields of automotive repair.

(K) The establishment in regulation of a formal code of conduct for automotive repair dealers and technicians.

(L) The quality, consistency, and speed of complaint processing and investigation, and recommendations for improvement.

In performing his or her monitoring duties, the administration and enforcement monitor shall confer with, and seek input from, bureau staff, registered or licensed professionals, the Office of the Attorney General, members of the public, and other interested or relevant parties regarding their concerns and views on the bureau and its operations.

(3) The administration and enforcement monitor shall exercise no authority over the bureau's discipline operations or staff. However, the bureau and its staff shall cooperate with him or her, and the bureau shall provide data, information, and case files as requested by the administration and enforcement monitor to perform all of his or her duties.

(4) The director shall assist the enforcement program monitor in the performance of his or her duties, and the enforcement program monitor shall have the same investigative authority as the director.

(d) The administration and enforcement monitor shall submit an initial written report of his or her findings and conclusions to the bureau, the director, the Secretary of State and Consumer Services Agency, and the Legislature no later than July 1, 2005, and every six months thereafter, and be available to make oral reports if

requested to do so. The administration and enforcement monitor may also provide additional information to either the director or the Legislature at his or her discretion or at the request of either the director or the Legislature. The administration and enforcement monitor shall make his or her reports available to the public or the media. The administration and enforcement monitor shall make every effort to provide the bureau with an opportunity to reply to any facts, findings, issues, or conclusions in his or her reports with which the bureau may disagree.

(e) The administration and enforcement monitor shall issue a final report prior to December 31, 2006. The final report shall include final findings and conclusions on the topics addressed in the initial report submitted by the monitor pursuant to subdivision (d).

(f) This section shall become inoperative on April 1, 2007, and as of April 1, 2007, shall be repealed, unless a later enacted statute, which is enacted before April 1, 2007, deletes or extends the dates on which it becomes inoperative and is repealed.

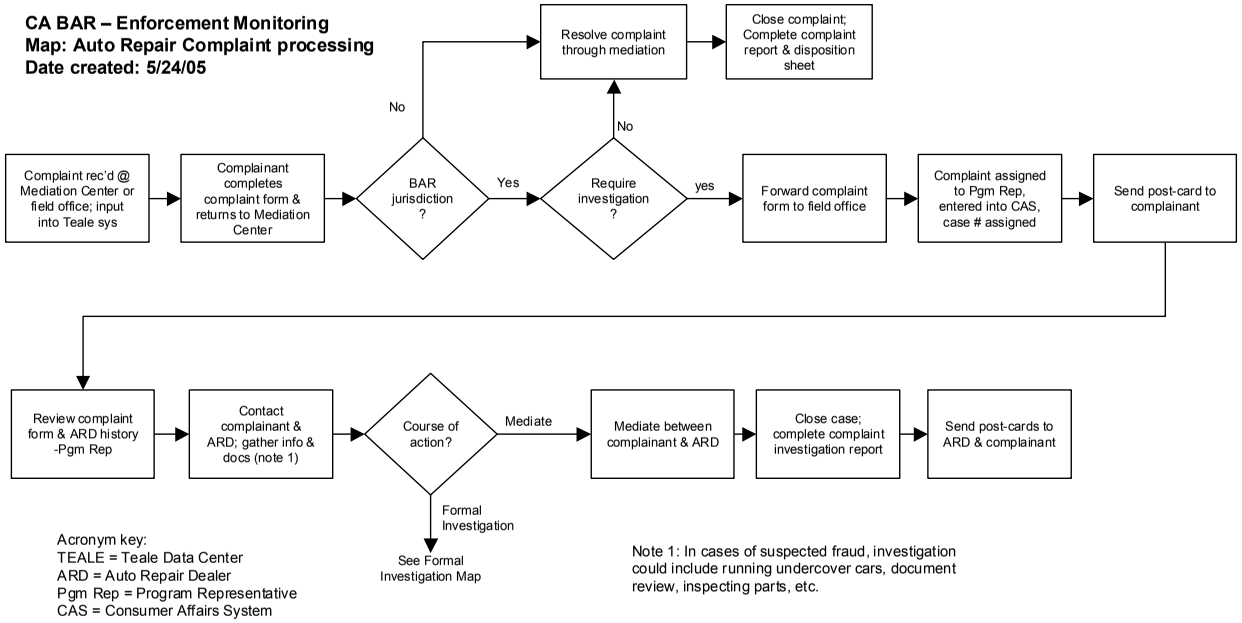
SEC. 3. Section 9884.17 of the Business and Professions Code is amended to read:

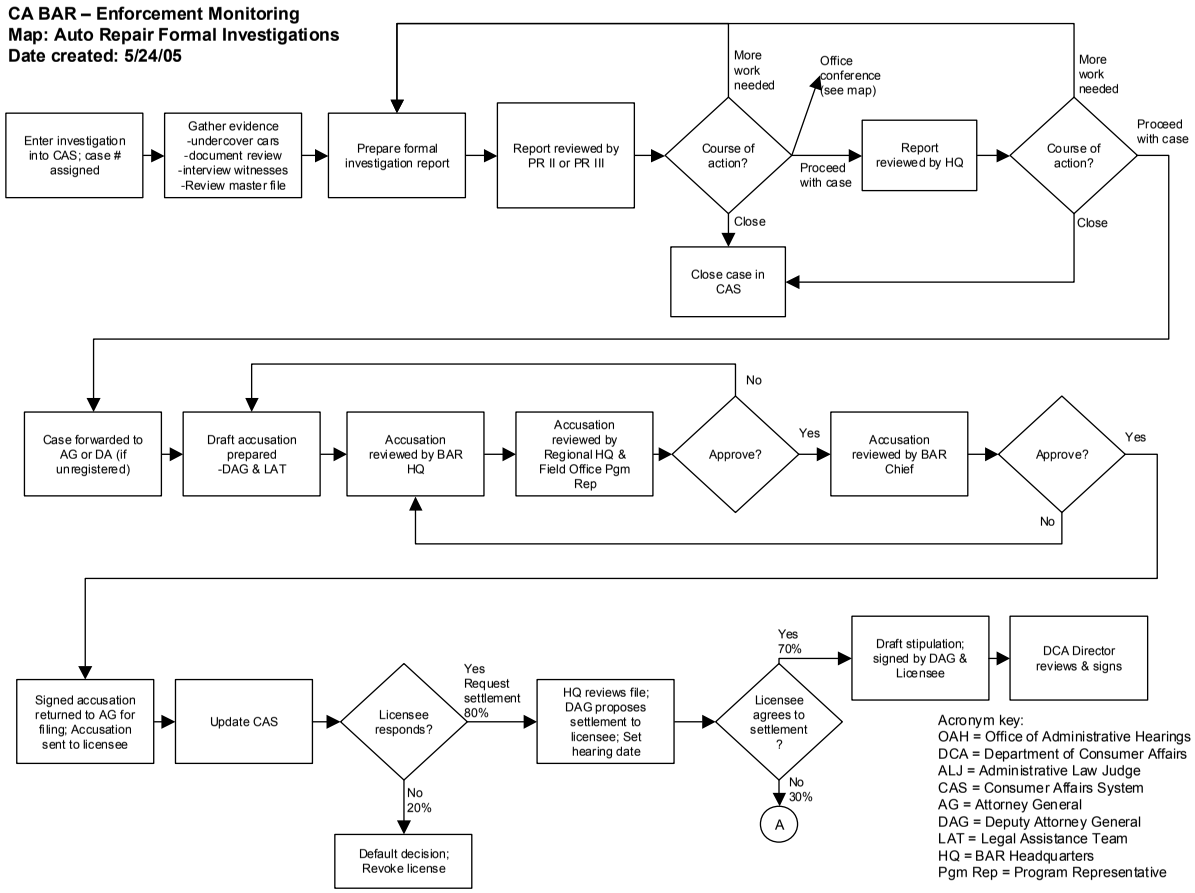
9884.17. The bureau shall design and approve of a sign which shall be placed in all automotive repair dealer locations in a place and manner conspicuous to the public. That sign shall give notice that inquiries concerning service may be made to the bureau and shall contain the telephone number and Internet Web site address of the bureau. The sign shall also give notice that the customer is entitled to a return of replaced parts upon his or her request therefor at the time the work order is taken.

SEC. 4. The sum of one hundred eighty-four thousand dollars ($184,000) is hereby appropriated from the Vehicle Inspection and Repair Fund to the Department of Consumer Affairs for the 2004-05, 2005-06, and 2006-07 fiscal years for the purpose of contracting for the employment of a Bureau of Automotive Repair Administration and Enforcement Monitor pursuant to Section 9882.6 of the Business and Professions Code.

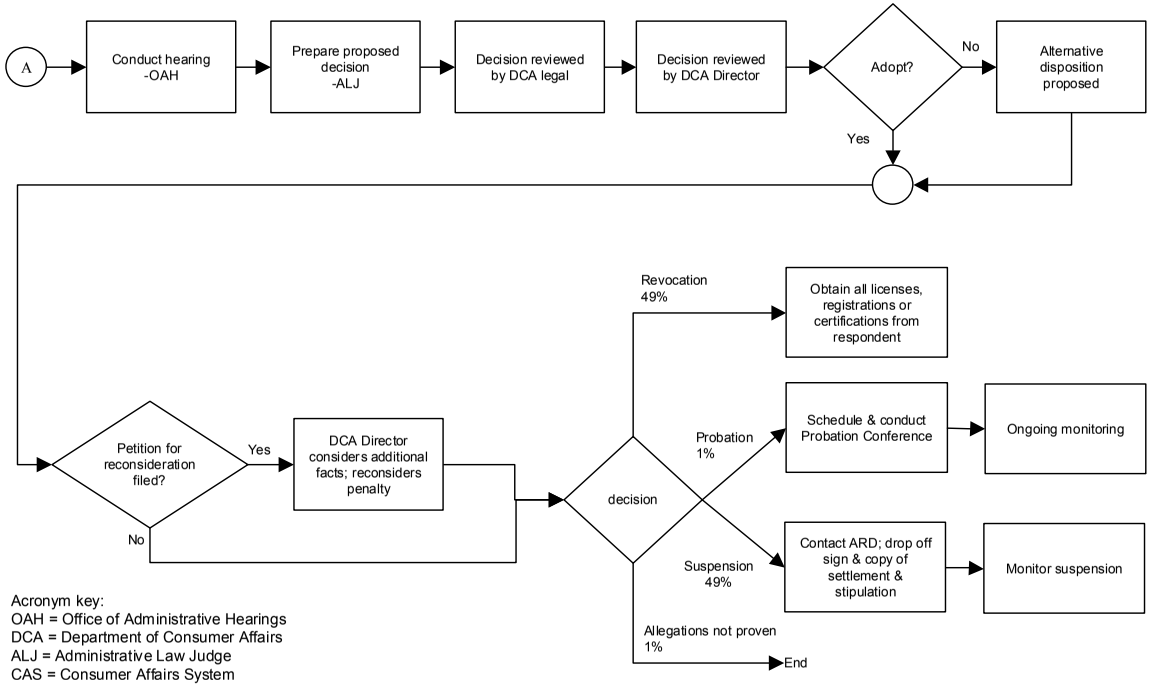
SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Appendix 3 – Process maps



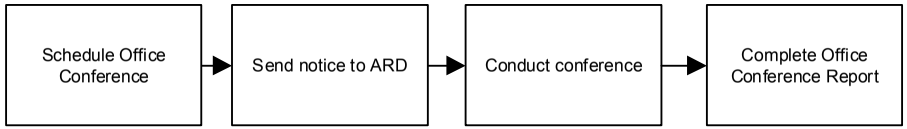

CA BAR – Enforcement Monitoring
Map: Auto Repair Formal Investigations
Date created: 5/24/05
Enter investigation into CAS; case # assigned
Gather evidence
-undercover cars
-document review
-interview witnesses
-Review master file
Prepare formal investigation report
Report reviewed by PR II or PR III
Course of action?
More work needed
Office conference (see map)
Proceed with case
Close
Close case in CAS
Report reviewed by HQ
Course of action?
More work needed
Proceed with case
Close
Case forwarded to AG or DA (if unregistered)
Draft accusation prepared
-DAG & LAT
Accusation reviewed by BAR HQ
Accusation reviewed by Regional HQ & Field Office Pgm Rep
Approve?
No
Yes
Accusation reviewed by BAR Chief
Approve?
Yes
No
Signed accusation returned to AG for filing; Accusation sent to licensee
Update CAS
Licensee responds?
Yes
Request settlement
80%
No
20%
Default decision; Revoke license
HQ reviews file; DAG proposes settlement to licensee; Set hearing date
Licensee agrees to settlement ?
Yes
70%
No
30%
A
Draft stipulation; signed by DAG & Licensee
DCA Director reviews & signs
Acronym key:
OAH = Office of Administrative Hearings
DCA = Department of Consumer Affairs
ALJ = Administrative Law Judge
CAS = Consumer Affairs System
AG = Attorney General
DAG = Deputy Attorney General
LAT = Legal Assistance Team
HQ = BAR Headquarters
Pgm Rep = Program Representative

CA BAR – Enforcement Monitoring
Map: Auto Repair Formal Investigations
Date created: 5/24/05



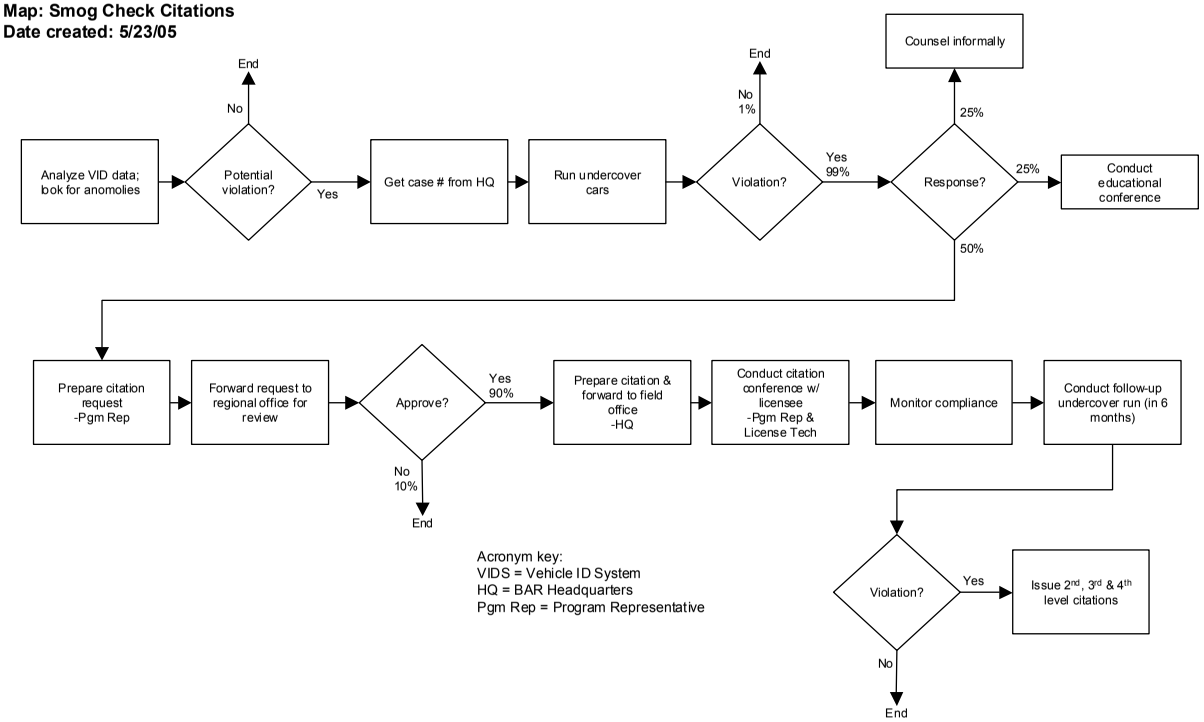
Acronym key:
OAH = Office of Administrative Hearings
DCA = Department of Consumer Affairs
ALJ = Administrative Law Judge
CAS = Consumer Affairs System
AG = Attorney General
DAG = Deputy Attorney General
LAT = Legal Assistance Team
HQ = BAR Headquarters
Pgm Rep = Program Representative

CA BAR – Enforcement Monitoring
Map: Auto Repair Office Conference
Date created: 5/24/05



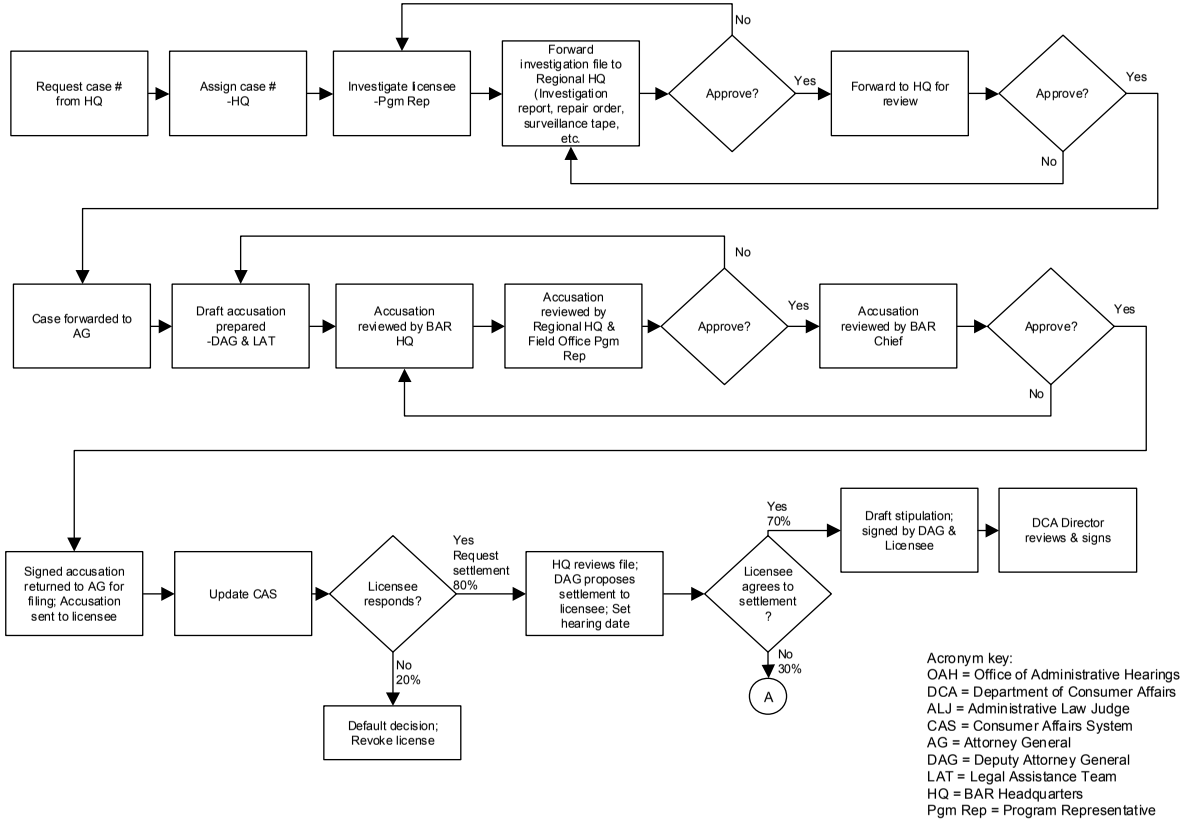
Acronym key:
ARD = Auto Repair Dealer

CA BAR – Enforcement Monitoring
Map: Smog Check Citations
Date created: 5/23/05



Acronym key:
VIDS = Vehicle ID System
HQ = BAR Headquarters
Pgm Rep = Program Representative

CA BAR – Enforcement Monitoring
Map: Smog Check Formal Investigations
Date created: 5/23/05



Acronym key:
OAH = Office of Administrative Hearings
DCA = Department of Consumer Affairs
ALJ = Administrative Law Judge
CAS = Consumer Affairs System
AG = Attorney General
DAG = Deputy Attorney General
LAT = Legal Assistance Team
HQ = BAR Headquarters
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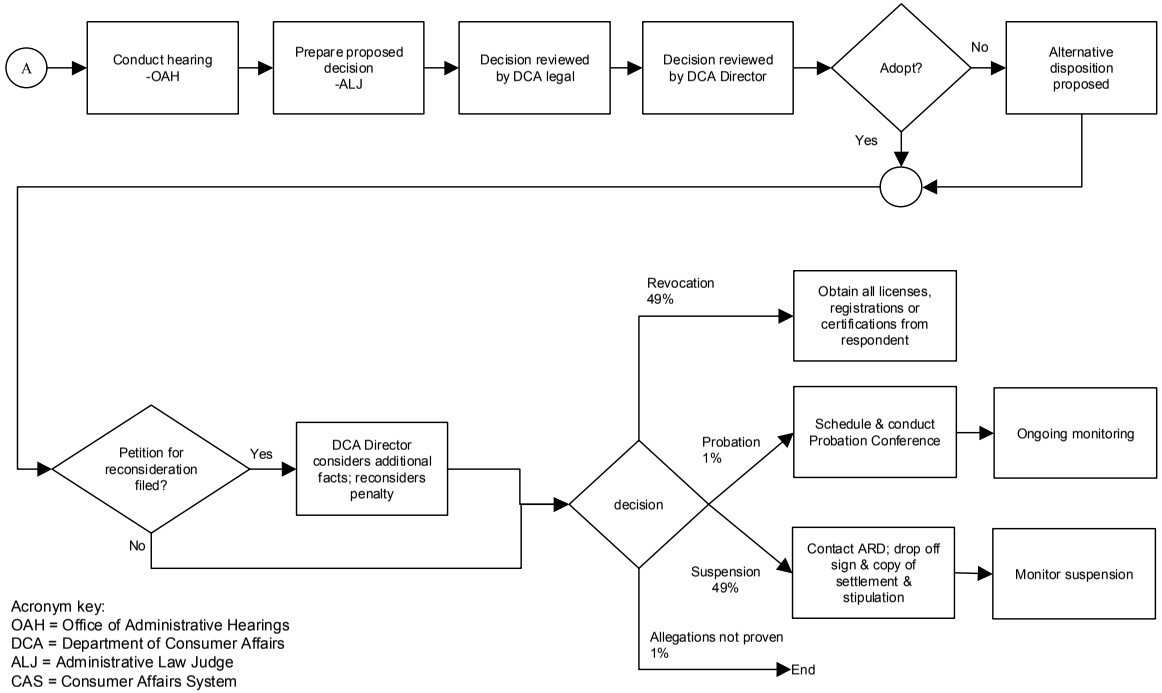
CA BAR – Enforcement Monitoring
Map: Smog Check Formal Investigations
Date created: 5/23/05



Acronym key:
OAH = Office of Administrative Hearings
DCA = Department of Consumer Affairs
ALJ = Administrative Law Judge
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