



A CITIZENS GUIDE TO ADMINISTRATIVE APPEALS WITH THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Overview

Many of the decisions made by department staff can be appealed to a higher authority within the department. These are called “administrative appeals.” The department regulations establish three administrative appeal procedures

- Informal reviews
- Fee reviews
- Formal adjudicatory hearing requests

Each of these procedures have requirements with specific deadlines for requesting a review. If these and other regulatory requirements are not followed, your appeal may be denied or dismissed. The purpose of this document is to help you understand these procedures and requirements and use them to exercise your right to appeal a department decision.

Administrative appeals address the need to provide due process to someone who is directly and adversely affected by a department decision. Due process includes the right to a neutral and unbiased decision-maker who presides over proceedings that are fair and that have the appearance of fairness.

Those decisions can be

- A decision to issue or deny a permit
- A decision to approve or disapprove a plan
- A decision to charge a fee or assess an administrative penalty

Appeals of a department decision are filed with the Office of the Commissioner, which initially serves in a gatekeeper role to determine

- Does the requester have standing to file an appeal?
- Has the requester met the criteria for filing an appeal?
- Did the division follow the proper process to reach a decision?
- Does the decision meet the department's regulatory standards?
- If requested, should the decision be stayed during the appeal process?

The Commissioner's Office gatekeeper role in this initial phase is limited to determining whether there is a genuine dispute over a material fact or question of law that affects the requester. This role is similar to that of a court judge reviewing the initial pleadings for a lawsuit. This initial determination by the commissioner to grant or deny an administrative appeal is based on whether the threshold standards for granting an adjudicatory hearing have been met, not whether the requester will successfully challenge the department's decision. The "soundness" of the department's decision is not the issue before the commissioner at the point of granting or denying an adjudicatory hearing, as it would not be proper to pre-judge the outcome without having all the facts presented.

The requester bears the burden of presenting evidence in the hearing request that is submitted. Depending on the answers to the questions posed above, the commissioner can grant the appeal, deny the appeal, or return the decision to the division for additional work. Typically, a person must exhaust their administrative appeal rights before filing an appeal with the court system. This helps assure that the department's decision is fully considered all the way up through the commissioner and is the "final" decision by the department before it goes to the courts for their review.

Introduction

This guidance document provides a brief overview of the process and procedures involved in an administrative appeal of a permit, approval, authorization, or decision issued by the Alaska Department of Environmental Conservation. This guidance is intended for someone without formal legal training who wishes to appeal a decision made by the department and explain what is being requested in certain sections of the department's *Request for*

Adjudicatory Hearing Form. This guidance should answer some of your questions and direct you to sources for more detailed information.¹

This guidance document provides only general guidance on administrative appeals, process and procedures. For you to participate effectively in an appeal you need to read the specific statutes and regulations that apply to your request. The department's website "Appeal a DEC Decision" provides a brief overview of the appeal process, links to the Administrative Procedures regulations, forms and document templates and may be found here:

<http://dec.alaska.gov/commish/ReviewGuidance.htm> Some words have special meaning in the context of administrative appeals. Please refer to the definition section of this document if the meaning of a word is unclear to you.

Who can request an administrative appeal?

If the department's decision involves something that you own or use, such as a water body or a parcel of land, or the air in your neighborhood, you may have legal "standing" to request an administrative appeal. You can request an administrative appeal if you are "directly and adversely affected" by the department's permit, approval, authorization, or decision. If the department's decision concerns a permit, approval, authorization, or decision issued to you or your business, you have "standing" to request an administrative appeal. Organizations that represent the interests of resource users may also be authorized to request an administrative appeal, but the requirement for being "directly and adversely affected" still must be satisfied.

If the department provided an opportunity for public comment on the permit, approval or decision, you must have provided comments during the public notice period or commented at a public hearing regarding the permit, approval or decision. This requirement is intended to ensure that the division that issued the permit had an opportunity to consider the requester's concerns and respond to them during the comment period for the draft permit, approval or decision. This requirement exists because it is important that permit or decision processes be predictable and come to a conclusion in a reasonable time. Allowing issues to be raised for the first time on appeal would not contribute to this effort.

¹ This guide is not a substitute for reviewing and following the regulations and statutes governing administrative appeals. Rather, it is a tool to familiarize a person with the process and provide references to the regulations. In the event of a conflict between this guide and the regulations, the regulations are controlling.

Do I need an attorney?

You are not required to be represented by an attorney to file an appeal with the department. You are welcome to have an attorney represent you if that is your preference. The informal nature of the informal review process allows you to represent yourself without having to know legal jargon or procedures. Please note that a request for an adjudicatory hearing involves a more formal process, with specific requirements for submitting paperwork and filing motions with the Office of Administrative Hearings. Please be aware that failing to comply with those requirements could result in all or a portion of your request being denied.

Should I request an informal review or request an adjudicatory hearing?

The informal review process is intended to be a relatively quick, simple and informal way to raise and resolve a concern with a staff decision. A request for informal review is appropriate if you believe an error has been made that can be easily corrected. The informal review is conducted at the division director level. A request for informal review must be filed no later than twenty days after the permit, approval, authorization, or decision has been issued.

The adjudicatory hearing process is intended to allow a requester to formally dispute a permit, approval or decision made by the department. The adjudicatory hearing process addresses the need to provide due process required by the Alaska constitution. Due process includes the right to a neutral and unbiased decision-maker who presides over proceedings that provide fair treatment of affected persons. Typically, you must exhaust your administrative appeal rights before filing an appeal with the Alaska Court System. A request for adjudicatory hearing needs to be filed with the Office of the Commissioner. You must also serve a copy of your request on the division that issued the decision, as well as the permittee (if applicable). A request for an adjudicatory hearing must be filed no later than thirty days after the permit, approval, or authorization of decision has been issued. There are shorter time frames for expedited hearings that involve imminent health hazards. Please refer to the definitions section of this document for more details on the regulations where expedited hearings may apply.

What are the steps in an informal review?

A person who is dissatisfied with a permit, approval, authorization or decision issued by the department must file their request for informal review within the deadlines outlined in the Administrative Procedures regulations at 18 AAC 15.185. In general, an informal review request must be filed no later than twenty days after the permit, authorization, or decision has been issued. It is in your best interest to provide copies of all documents or data you believe would

assist the director with your request for informal review, rather than assuming that the director will contact you later for this information. The division director has seven working days to decide whether to grant or deny the request for informal review.

The division director may also ask for additional information regarding the request. Please respond quickly, accurately, and as thoroughly as possible to this request, as it can expedite the informal review process. The division director will make a final decision within 15 working days of your initial request or within fifteen working days of receiving the additional information requested, whichever is later. The division director's decision will be in writing, typically in the form of a letter. If your request indicates you have email or fax capability, a courtesy copy of the letter may be provided that way with the official letter following in the regular mail. If the division director decides to deny your request, they will inform you of that decision, along with the reason(s) for denying the request. An informal review denial will be in writing and is typically in the form of a letter to the requester. If your informal review request indicates you have email or fax capability, a courtesy copy of the letter may be provided to you in that way, with the official letter following in the regular mail. Once you have received the division director's decision, you may consider whether to pursue your appeal through the adjudicatory hearing process. A request for adjudicatory hearing must be filed with the Office of the Commissioner within thirty days after the informal review decision has been issued.

What are the steps in an adjudicatory hearing request?

A person who is dissatisfied with a permit, approval, authorization, or decision issued by the department must file their request for adjudicatory hearing within the deadlines outlined in the regulations at 18 AAC 15. In general, an adjudicatory hearing request must be filed not later than thirty calendar days after the permit, authorization, or decision has been issued. If you have already filed a request for informal review on the specific issues raised in your request and you are dissatisfied with the result of the informal review, you must file your request for adjudicatory hearing not later than thirty calendar days after the informal review decision has been issued. Please note that your appeal must be based on the original permit or decision, not on the outcome of the informal review. Documents or additional information received as part of the informal review process will not be included in the department's decision record, unless it was previously submitted to the department as part of timely comments prior to the issuance of the contested decision.

Step One

The Office of the Commissioner serves in a gatekeeper role by granting or denying an adjudicatory hearing. This gatekeeper role also includes determining whether there is a genuine dispute over a material fact or question of law that affects the requester. This role is similar to that of a judge in a court of law reviewing the initial pleadings for a lawsuit. This initial determination by the Office of the Commissioner is on whether some of the threshold standards for granting an adjudicatory hearing have been met.

This initial determination does not address whether the requester will successfully challenge the division's decision. The "soundness" of the division's decision is not the issue to be decided at this gatekeeper stage of the decision, as it would not be proper to pre-judge the outcome without having all the facts presented. However, if the commissioner notes an obvious gap or flaw in the agency's decision under appeal, he has the option to vacate the decision at this preliminary stage and send the matter back for further work.

The key pieces of information that you need to provide for an adjudicatory hearing request on the Adjudicatory Hearing Request form are as follows

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- The name and contact information of the person requesting the appeal
- If the person requesting the appeal is representing other people, the names and addresses of the persons adversely affected by the decision

Page 2

- A description of the decision being appealed and who made the decision
- A list of the contested issues to be decided in the appeal

Pages 3 - 5

- Discussion of the contested issues and any information that supports the request, including a description of the requester's interests and how those interests would be directly and adversely impacted by the decision
- Any suggested terms or conditions that could cure the alleged defect in the decision
- An explanation of how the requester's interests are one that the applicable statutes and regulations were intended to protect
- How the decision directly and substantively impairs the requester's interests
- An explanation of why the request should be granted

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- A list of the issues that you believe need to be discussed in an evidentiary hearing which can involve the testimony of witnesses or additional documents
- A description of the questions of fact to be raised at an evidentiary hearing.

Requesting a stay of the decision

In some instances the requester may ask for a stay or a hold on the decision while it is being appealed. Normally a permit or decision is valid once it is issued and there is no stay of the decision unless one of the parties actively seeks it. A stay is a legal term that means a freeze or hold on a department action. This is similar to an injunction court order that requires a party to refrain from taking a specific action. If a requester asks for a stay of the decision while the matter is being appealed, the commissioner has fifteen days to decide whether to grant the stay. In reviewing a request for a stay the commissioner will consider

- The relative harm to the person requesting the stay
- The relative harm to the permit applicant
- The relative harm to public health, safety and the environment
- The resources that would be committed during the pendency if the stay were granted or denied
- The likelihood that the person requesting the stay will prevail in the proceedings on the merits

Step Two

If the Office of the Commissioner has determined that the request for adjudicatory hearing is complete, the commissioner will conditionally approve the request and refer the request to the Office of Administrative Hearings. If the Office of the Commissioner has determined that the request does not involve the department's regulatory authority or decision making authority, the request will be denied.

If the Office of the Commissioner conditionally approves the hearing request, a public notice will be issued within ten working days of the conditional approval. This public notice will advise the division director, and the permit applicant or permittee of the opportunity to respond to the request for adjudicatory hearing. The notice will advise the division and permittee/applicant that any response to the request for adjudicatory hearing must be filed with the Office of Administrative Hearings, the division that

issued the original decision, as well as the permittee, if applicable. All responses must be filed within twenty calendar days after the public notice has been issued. The person or organization that filed the request for adjudicatory hearing then has seven days to reply to any responses, if they wish. Within ten days after the time has expired for a requester to reply to responses, the Office of Administrative Hearings will determine whether the request meets the requirements of 18 AAC 15.200.

Step Three

The Office of Administrative Hearings will then issue a recommended decision to the commissioner on whether the request

- Meets the requirements of 18 AAC 15.200 and an adjudicatory hearing or hearing on the briefs should be held.
- Does not meet the requirements of 18 AAC 15.200 and the hearing request should be denied
- Should be denied because the matter should be vacated and remanded to the division director for further action.

The commissioner will render a final decision on the recommendation from OAH within ten days. If the request for adjudicatory hearing is granted the commissioner will publish a public notice of the action in a newspaper of general circulation for the affected area and send a copy to each person who submitted timely written comments on the draft decision, who testified at a public hearing on the decision or submitted a request for hearing.

Opportunity to Intervene

If a hearing is granted the public notice will also include a statement that a person who wishes to participate in the proceedings may file a request to intervene within fifteen days after publication of the notice or mailing of the notice, whichever occurs last. The request to intervene must be served on the Office of Administrative Hearings, the division director, the requester and the applicant or permittee. Intervenors must meet the same requirements as those requesting an adjudicatory hearing; they must be directly and adversely affected by the department's decision and must have participated in the public review process on the draft decision.

Agency decision records

If the adjudicatory hearing request is granted the division director will need to forward a copy of the contested decision records to OAH. The contested decision records should also include any findings documents or responses to public comments, as well as any underlying permit documents. (See 18 AAC 15.237(a) – (b))

Supplemental documents

Within twenty days after the commissioner's final decision granting an adjudicatory hearing, the division director will need to supplement the agency decision records that were provided to OAH earlier. These supplemental documents include any application or supporting documentation, written and electronic correspondence concerning the proposed decision, additional information submitted by the applicant or permittee to the department on the proposed decision, recordings or transcripts of any public hearing, prior department decisional documents referenced in the contested decision, and other materials that the department considered or relied upon in making the department's decision. Department staff are required to number the pages of the agency decision records, but are not required to prepare an index of the agency decision record. (See 18 AAC 15.237(b))

Once this step is completed, the division director needs to provide notice to all involved parties that the agency decision record is complete. A person may inspect or obtain a copy of the agency decision record both prior to and after the agency notice is served. A person wishing to obtain a copy of the agency decision record may do so at the requesting party's expense. (See 18 AAC 15.237(c))

Requirements for exchanging documents in the adjudicatory hearing process

The adjudicatory hearing process relies on the exchange of legal documents, so it is important that there is proof that all involved parties have received these important documents. At any time before a case is referred to the Office of Administrative Hearings, the regulations at 18 AAC 15.340 require documents be submitted by any of the following methods:

- Personal delivery
- First class United States mail
- Priority United States mail
- Express United States mail
- Electronic mail
- Facsimile transmission (fax machine)

“Proof of service” must also be provided with the document(s) to show that all parties have received the documents.

Once a case is referred to the Office of Administrative Hearings, that office will inform you of how to submit and exchange documents, in accordance with its regulation at 2 AAC 64.920.

The Office of Administrative Hearings Decision-Making Process

The Office of Administrative Hearings (OAH) is an independent agency within the Alaska Department of Administration and is charged with providing administrative adjudication services. It was created to “increase the separation between the adjudicatory functions of executive branch agencies and the agencies’ investigatory, prosecutory, and policy-making functions.” This independence allows OAH to make fair decisions for or against any party to the appeal, including the Department of Environmental Conservation. The OAH gives equal consideration to the legal arguments made by members of the public and arguments made by the department. To assure impartiality in its cases, the OAH does not communicate with one party to a case without the other party being present. The decision-making processes at OAH are governed by the statutes found at AS 44.64 and the regulations found at 2 AAC 64.

Case planning conference, submissions and legal motions

Once an appeal has been referred to OAH by the Office of the Commissioner, OAH will assign an administrative law judge to oversee the appeal process. This administrative law judge will schedule a case planning conference with the involved parties, which is typically conducted by telephone. This preliminary conference is not for the purpose of arguing the case; rather it is an opportunity to determine the outlines of the legal issues involved, set a schedule for exchange of information and submission of any briefs or motions that may be helpful to resolving the case, and to agree on a time for the hearing. If appropriate, the administrative law judge may also ask the parties if they would prefer that the alternative dispute resolution process be followed, as provided in 2 AAC 64.200. Alternative dispute resolution is always voluntary.

The administrative law judge may also require the parties to exchange evidence and other information before the hearing. This is discussed in more detail in the OAH regulations at 2 AAC 64.240. Legal motions for summary adjudication or other motions requesting a ruling or order by the administrative law judge are discussed in detail in OAH regulations at 2 AAC 64.250 and 2 AAC 64.270.

How are adjudicatory hearings conducted?

The conduct of an administrative hearing is governed by the OAH regulations at 2 AAC 64.260. In many instances these hearings can be conducted by telephone following a format outlined by the administrative law judge. The length of the hearing is entirely dependent on the complexity of the issues, the

number of documents in the administrative record and the clarity of the briefs filed by each side in the case.

Potential Outcomes of the Hearing Request

The OAH administrative law judge will review the contested decision documents, the supplemental documents, and any additional documents or evidence submitted as part of the adjudicatory hearing process. They will also consider the testimony and evidence presented at the hearing. The administrative law judge will then issue a proposed decision for the commissioner's consideration. The potential outcomes are outlined below:

1. The Office of Administrative Hearings determines that the requester does not have standing and advises the commissioner that the request be denied. The requirement of "standing" is satisfied if it can be said that the requester has a legally protectable and tangible interest at stake in the appeal.

Note: The following decision scenarios are predicated on the Office of Administrative Hearings determining that the requester has standing.

2. The Office of Administrative Hearings determines that the division's decision is not supported by the existing administrative record and advises the commissioner that the decision be remanded to the division to cure the deficiency. If the division cures the deficiency in the administrative record, the division's decision stands and the request for adjudicatory hearing is denied.

3. The Office of Administrative Hearings determines that the division's decision contains a substantive error and advises the commissioner to remand the decision to the division to cure the error. In some instances the decision or permit will need to be amended and go out for another public comment period. In those instances, the amendment will render the appeal moot and the requester will be provided with additional opportunities to comment and appeal the division's revised decision.

4. The Office of Administrative Hearings determines that the division's decision is flawed and advises the commissioner to remand the decision to the division with specific instructions on revising the decision in order to meet regulatory standards.

5. The Office of Administrative Hearings determines that the division's decision was supported by the applicable statutes and regulations and advises the commissioner that the decision be affirmed.

6. The Office of Administrative Hearings determines that the division's decision was not supported by the applicable statutes and regulations and advises the commissioner that the division's decision be revoked.

7. A settlement of the dispute is reached through alternative dispute resolution and based on the settlement agreement the parties file a motion of voluntary dismissal. The Office of Administrative Hearing would ordinarily then recommend the commissioner approve the settlement agreement and dismiss the appeal.

Proceedings After Issuance of a Proposed Decision

The Office of Administrative Hearings will circulate its proposed decision to the involved parties and the Office of the Commissioner. Under Alaska Statute at AS 44.64.060 and OAH regulations at 2 AAC 64.340 each party has the right to file a "proposal for action" requesting the commissioner take one of the following actions:

1. Adopt the proposed decision as the final agency decision;
2. Return the case to the administrative law judge to take additional evidence or make additional findings or other specific proceedings;
3. Revise the proposed enforcement action, determination of best interests, order award, remedy, sanction, penalty, or other disposition of the case;
4. Reject, modify, or amend a factual finding; or
5. Reject, modify, or amend an interpretation or application of a statute or regulation.

The "proposal for action" submitted by the parties must provide the reasons for the proposed action and a request under item 4 above must identify the evidence in the record that supports the request to change the factual findings. New evidence cannot be submitted at this time. The proposal for action must be submitted to OAH (not to the commissioner) within the time set by the notice circulating the proposed decision. OAH will then forward it to the commissioner, who has a limited time to finalize the decision. If the commissioner takes no action on the draft decision, it becomes final by default 45 days after the proposed decision was first circulated.

Where Can I Read Decisions Issued by the Office of Administrative Hearings?

Past Office of Administrative Hearings decisions on Department of Environmental Conservation matters are indexed here:

<http://doa.alaska.gov/oah/Decisions/dec.html> .

Additional decisions can be found here:

<http://aws.state.ak.us/officeofadminhearings/Category.aspx?CatName=DEC>.

Not all decisions are available on these web pages, but a good sample of the types of decisions and legal arguments are presented.

What does it mean to have an expedited hearing?

Department regulations that address imminent health hazards allow for an expedited hearing that decreases the timeline for holding the hearing. These hearings are addressed in the regulations for

- Environmental Sanitation – 18 AAC 30.985
- Alaska Food Code – 18 AAC 31.910
- Milk and Milk Products – 18 AAC 32.695
- Seafood Processing – 18 AAC 34.940
- Solid Waste Management – 18 AAC 60.260
- Administrative Enforcement - 18 AAC 95

These cases have special procedures. In general, they proceed directly to OAH, in a manner described in the regulations specific to them.

Avoid these Common Pitfalls

- For a permit or decision subject to public comment, you must comment on the decision if you plan to appeal. Not participating actively in the public comment period on the draft permit, decision or approval eliminates the opportunity to appeal a decision.
- When commenting on a permit, decision or approval, you must explain why the department's permit or decision does not adequately address your concerns or the regulatory requirements. If you do not explain the problem, the division cannot fix the problem.
- Pay attention to deadlines. Missing the filing deadline for submitting your informal review request or request for adjudicatory hearing eliminates the opportunity to appeal a decision.
- It is important to be on time if an adjudicatory hearing is held. Failure to appear may result in the loss of the case. You can also lose the case if you miss preliminary conferences. If you need to reschedule, be sure to contact the OAH staff as far in advance as possible.

Definitions:

Since informal reviews and adjudicatory hearings (appeals) are legal proceedings it is very important to know and understand the precise meaning of the words being used.

Adjudicatory hearing – a hearing before an administrative law judge assigned by the Office of Administrative Hearings. In many instances, the appeal is conducted as an evidentiary hearing.

Agency decision record or administrative record – is a compilation of all the documents that the department relied upon in making its decision. During the adjudicatory hearing process the administrative record gets divided into two parts in order to expedite the review process.

- Agency record – includes a copy of the contested decision, any findings document or response to public comments document, as well as any underlying permit documents.
- Supplemental documents – includes those documents that are relevant to the issues upon which the hearing is granted. Supplemental documents are the application and supporting documentation, written and electronic correspondence concerning the proposed decision, additional information submitted by the applicant or permittee to the department, public comments and information submitted to the department on the proposed decision, recordings or transcripts of any public hearing, prior departmental decision documents referenced in the contested decision, and other materials that the department considered or relied upon in making the department's decision.

Alternative dispute resolution – a request for adjudicatory hearing can also be combined with a request for alternative dispute resolution under 18 AAC 15.205 and 2 AAC 64.200, if the requester believes that alternative dispute resolution might expeditiously resolve a dispute without a formal adjudicatory hearing. Alternate dispute resolution can include any collaborative method designed to encourage parties to develop a mutually agreeable solution. Often, an experienced, trained mediator will be appointed to help the parties explore the options for an amicable resolution.

Briefs – legal documents that present your legal argument with citations to the specific Alaska Statutes and regulations that apply to your situation.

Evidentiary hearing - an evidentiary hearing involves witnesses giving testimony and the administrative law judge receiving evidence in support or in defense of specific claims that have been made.

Hearing on the briefs - is a hearing decided on briefs submitted to the administrative law judge without an oral hearing.

Motions - an application or request made to the administrative law judge for the purpose of obtaining a ruling or order directing some act to be done in favor of the applicant or requester.

Minor vs. substantive - the regulations at 18 AAC 15.185(d)(3)(A) discuss minor changes to a permit and substantive changes to a permit and how the changes should be addressed in the permit appeal process. The determination of what is a minor change and what is a substantive change will be based on existing case law and legal guidance depending on the facts of the case.

Scope of hearing - the “scope” of a hearing refers to the breadth or listing of issues that will be addressed in the hearing. Administrative hearings specifically focus on the regulatory authority of the department and do not address the constitutionality or other issues outside the department’s regulatory authority. If a requester believes that the dispute centers not on disputed factual issues, but rather on significant legal interpretation or policy issues, the requester can request a hearing on the briefs. This type of request has the advantage of obtaining a review of important legal or policy issues without the time and expense related to a formal hearing. If the dispute focuses on disputed factual issues, testimony may be needed to clearly outline the issues.

Standing - a requirement that the requester or the requester’s rights have been adversely affected/harmed or have been threatened with adverse effect/harm by a department action. Standing focuses on the question of whether the requester is the proper party to request the appeal.

Moot - a question is considered “moot” when it has been resolved or no longer presents a controversy or the problem ceases to exist.

Party - in the context of challenges to a department permit, approval or decision, “party” means the division that issued the permit, approval or decision being challenged, the permittee or permit applicant, and each person whose request for adjudicatory hearing or intervention has been granted.

Remanded decision – a remanded decision is one that has been returned to the division that issued it in order to cure a defect or an error. The department’s regulations at 18 AAC 15.220(b) allow the commissioner to return a permit decision to department staff, with instructions as appropriate, if the commissioner determines that the staff or applicant have failed to comply with a statutory or regulatory requirement.

Vacated decision - a vacated decision is one that has been deleted and is no longer valid. Typically the division that issued the decision will need to address the matter again and go through another public comment process to cure the defect found by OAH or the court system.