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Morell E. Mullins

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MANUAL for ADMINISTRATIVE LAW JUDGES

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FOREWORD

This special issue of the Journal of the National Association of Administrative Law Judges makes available the *Manual for Administrative Law Judges* by Morell E. Mullins to many Administrative Law Judges throughout our country. We are delighted that Professor Mullins has made this manual available through our Journal and want to thank him for his generosity and kindness. We would also like to thank Administrative Law Judge Larry Craddock for seeing the value of a hard copy, easy to use manual, as well as the Board of Advisors of the Journal and the Board of Governors of the National Association of Administrative Law Judges (NAALJ) for their support of the project. We owe a special thanks to Paige Hren, Editor-in-Chief of the Journal and third-year law student at Pepperdine University School of Law, for her leadership all year and especially for her personal work on this special edition, including the cover design.

We are making this special issue available to many judges who are not yet members of the National Association of Administrative Law Judges. We have made special arrangements with the National Conference of the Administrative Law Judiciary to provide this manual to their members at a special discount price; this manual will also be available through The National Judicial College. Hopefully, many who are not yet familiar with the National Association of Administrative Law Judges or the Journal will see the quality of the Journal and will wish to join the National Association to receive the Journal twice a year. It has been a personal pleasure working with Professor Gregory Ogden, the Faculty Editor for the Journal. He and his students have done an excellent job the last four years in working with authors to make the Journal an excellent publication. Twice a year, the Journal provides excellent articles from Administrative Law Judges, academicians, judicial branch Judges and practitioners who are striving to improve administrative adjudication; NAALJ also produces an on-line newsletter twice a year.

We are always looking for topics and authors to help Administrative Law Judges improve their professionalism. Please

feel free to contact Professor Gregory Ogden, John W. Hardwicke, the new Executive Director of the National Association of Administrative Law Judges, or any member of the Journal Board of Advisors or Board of Governors in the back of this issue. We are confident that you will find this Manual of great use as you provide quality administrative adjudication throughout your career.

Edward J. Schoenbaum,
Chair, Board of Advisors, Journal of the National Association of Administrative Law Judges

2004 PREFACE AND INTRODUCTION

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In 2001, I updated the third edition of the *Manual for Administrative Law Judges* and posted it on the University of Arkansas at Little Rock website as the 2001 Interim Internet Edition of the Manual.[i] The response to the Interim Edition has been most gratifying. Unfortunately, the Manual was not available in printed form. Anyone who wanted a printed copy had to download the Manual from the site. Last year, the National Association of Administrative Law Judges, responding to the need for a printed edition of the Manual, contacted me about publishing it as an issue of the Journal of the National Association of Administrative Law Judges (J. NAALJ), a project which I enthusiastically endorsed.

The Journal staff has done an outstanding job in making editorial and format changes, without altering substance of the 2001 Interim Internet Edition, and the predecessors on which the 2001 edition had built. I would like to extend a special thanks to Paige Hren, Editor-in-Chief of J.NAALJ, and Sheryl Pilch, Special Issue Editor of J.NAALJ, for their outstanding editorial work on this edition of the *Manual*.

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i. The 2001 Interim Internet Edition of the *Manual for Administrative Law Judges* can be found through the University of Arkansas at Little Rock website *at* http://www.ualr.edu/~malj. This 2004 edition of the *Manual for Administrative Law Judges* can also be found in electronic form on the National Association of Administrative Law Judges website *at* http://www.naalj.org.

2001 INTERIM INTERNET EDITION PREFACE

© 2001 Morell E. Mullins[i]

Background

Almost a decade ago, I was the principal revisor for the Third Edition of the Manual for Administrative Law Judges (Manual or 3rd Edition), which was prepared and published under the auspices of the Administrative Conference of the United States (ACUS or Administrative Conference). As noted in the Preface to the Third Edition, the Manual had become something of a standard in its field.[ii]

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ii. Previous editions of this Manual were published by the United States Government, under the auspices of the now-defunct Administrative Conference of the United States. This edition has been prepared in a spirit of public service, and copyright in original government materials is not claimed. Copyright in this edition is asserted primarily to prevent commercial piracy. Permission is hereby given for any noncommercial use of this Manual (including, but not limited to, noncommercial or not-for-profit educational use and noncommercial use by any governmental entities), as long as the law school and I are appropriately credited.

iii. Agency decisions citing the 3rd and earlier editions of this Manual include In the Matter of Pepperell Assocs., 1999 EPA ALJ LEXIS 16 (DOCKET NO. CWA-2-I-97-1088, Feb. 26, 1999) (United States Environmental Protection Agency, Office of Administrative Law Judges) (discussing ALJ's affirmative duty to ensure complete and accurate record, even if ALJ must raise issue *sua sponte*); In the Matter of Woodcrest Mfg., 1997 EPA ALJ LEXIS 81, Docket No. 5-EPCRA-96-007, June 13, 1997) (United States Environmental Protection Agency; Office of Administrative Law Judges) (discussing the importance of impartial decision-maker); In re David Harris, Ruling on Certified Questions filed May 1, 1991, 50 Agric. Dec. 683 (P.Q. Docket No. 91-27) (noting that ALJ is required to follow policies set out in agency's published opinions) (citing 1982 edition of Manual); Dept of Veteran's Affairs, Veterans Admin. Med. Ctr., Boise, Idaho (Respondent) and Am. Fed'n. of Gov't Employees Local 1273, AFL-CIO (Charging Party), 40 F.L.R.A. 992 (May 24, 1991)(noting ALJ's responsibility to call agency's attention an important problem of law or policy) (citing 1982 edition of this Manual); In the Matter of Sequoyah Fuel Corp. and Gen. Atomics, 41 N.R.C. 253, n.20 (Apr. 18, 1995) (citing Form 19-d in the Manual). Cites in law review articles include: Michael Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151 (Spr. 1997); Alan W. Heifitz, *The Continuing Need for the Administrative Conference: Fairness, Adequacy, and Efficiency in the Administrative Process*, 8 ADMIN. L.J. AM. U. 703 (Fall 1994) (testimony before

Although the Third Edition has been out of print for several years, the Office of Administrative Law Judges, U.S. Department of Labor (OALJ DOL), made a modified version of that edition available in 1998 at: http://www.oalj.dol.gov/public/apa/refrnc/aljmantc.html.

The OALJ DOL is owed a double debt of gratitude for this public service. First, it kept the Manual available to the public after it was no longer in print.[iii]

Second, the OALJ site provided the inspiration for this particular, and experimental, 2001 Interim Internet Edition. For various reasons, a complete textual overhaul was not feasible, and probably was not necessary. However, a few textual revisions to the 3rd Edition were needed. In addition, citations to the CFR had become outdated. Some of the regulations cited in the 3rd Edition had been amended. Others had been repealed. Moreover, there had been significant developments during the 1990's – which are described below.

The OALJ DOL site therefore provided the inspiration for a less conventional format – a webpage publication. Using a webpage format for some modest updating and upgrading seemed to be not only an intriguing experiment, but also a simpler and more efficient way to do the needed revisions.

Developments Since 1991

As for federal administrative adjudication itself, developments in the past decade have been evolutionary, rather than revolutionary. For example, alternative dispute resolution (ADR) continues to flourish and grow in the administrative law setting. Also, the shift away from old line economic regulatory agencies continues, as

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Congressional Committee of Chief Administrative Law Judge, U.S. Department of Housing and Urban Development, discussing at 704 the value of the Manual to ALJs); James P. Timony, *Demeanor Credibility*, 49 CATH. L. U. REV. 903 (Summer 2000) (quoting 3rd Edition in fn.117, regarding standards for resolving credibility issues).

iv. Because of the OALJ DOL site, I have been able to respond to requests for copies of the Manual in the last few years – including representatives of at least three state agencies wanting to use it for training purposes – by referring callers to that site.

typified by the termination of the Interstate Commerce Commission.[v]

As for matters outside the immediate realm of administrative adjudication, two developments warrant special mention in this Preface. First, the demise of the Administrative Conference (ACUS). Congress ended funding for ACUS during the 1990's, in effect terminating that agency. The termination of ACUS was statutorily recognized under Public Law 104-52, title IV, 109 Stat. 480 (Nov. 19, 1995). The legislative process leading to the demise of ACUS was treated at length in Toni M. Fine's article, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19 (1998). A number of other articles about the extinction of ACUS appeared in the same issue of that law journal, and in other law journals. In general, the loss of ACUS was a serious blow to the study of federal administrative law. In particular, for purposes of this Manual, the loss of ACUS meant that there was no longer any government organization readily available to sponsor and publish a new edition of this Manual.

Second, the 1990's saw substantial growth among organizations of Administrative Law Judges and hearing officers, both federal and state. These important organizations include the Federal Administrative Law Judges Conference (FALJC) (http://www.faljc.org/); the National Association of Administrative Law Judges (NAALJ) (http://www.naalj.com/); the National Conference of Administrative Law Judges (NCALJ, ABA Judicial Division) (http://www.abanet.org/jd/ncalj/home.html), and the Association of Administrative Law Judges (AALJ) (http://www.aalj.org/). Moreover, there are many state-level organizations of state ALJs and hearing officers, such as the Oregon Association of Administrative Law Judges (http://www.efn.org/~oaalj/). The growth of these organizations has facilitated communication among, and increased the influence of, the ALJ and hearing officer community. The websites and web pages mentioned above are manifestations of this development. Another

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v. Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (codified as amended at scattered sections of 49 U.S.C.).

offshoot of this development has been publications such as the Journal of the National Association of Administrative Law Judges, which is frequently cited in this edition of the Manual. These organizations, their activities, and their publications, will be an important source of growth and change in administrative law during the next decade.

Contents of the 2001 Interim Internet Edition

In terms of contents, this 2001 Interim Edition is a modest updating, or upgrading, of the 3rd Edition. Revisions have been made to text, of course, where warranted. Citations to the Code of Federal Regulations (C.F.R.) and U.S. Code have been revised or updated. Law review articles were added to footnotes and to the bibliographical appendices. Many of these articles deal with state administrative adjudications, and a separate section has been devoted to state materials in one of the bibliographies. Cases have been added to various footnotes.

Form of the 2001 Interim Internet Edition

The substantive contents of the Manual have not been changed dramatically. In terms of form, however, the 2001 Interim Edition is an experiment.

Hopefully, this electronic format will have a number of advantages over the traditional print media. Obviously, it is a lot cheaper for the user. Obviously, it has greater potential for more frequent updating and upgrading. Errors can be called to our attention and brought to my attention at malj@ualr.edu.

The Future

As the title indicates, the 2001 Interim Internet Edition is an effort to update the 3rd Edition of the Manual. It is, to put it bluntly, something of a stop-gap. A more extensive revision, in the form of a full-fledged 4th edition which contains materials on state administrative adjudication, is certainly a possibility for the future. In

the meantime, suggestions and ideas for future development of this Manual are welcome.

Thanks and Acknowledgments

Special thanks relative to the 2001 Interim Internet Edition are in order to David Loyall, my computer consultant who prepared the 2001 Interim Internet Edition for publication in this format, and to Steve Hyatt, Melissa Serfass, and the UALR Computing Services for their assistance in putting it on the UALR William H. Bowen School of Law site. Likewise, I want to thank Dean Charles W. Goldner for his enthusiastic support of this project.

Special thanks also are in order to my recently-graduated research assistant Erin Vinett not only for her work, but also for her assurance that substantial revisions of the text were not needed. I also wish to thank Ken Gallant and Sheila Freidman for their assistance in updating the ADR materials. Very Special Thanks also are extended to Deborah Schick Laufer, for her assistance and her permission to use in the appendices a substantial amount of her bibliographical material regarding ADR in the federal government. Ms. Laufer (BA, Barnard College, Columbia University; JD, Georgetown University Law Center) is an attorney and mediator, who also is Director of the Federal ADR Network and is co-editor of the Federal Administrative Dispute Resolution Deskbook (ABA 2001).

I also want to thank from Chief Judge John M. Vittone, Office of Administrative Law Judges, U.S. Department of Labor and Acting Chief Judge Ronnie Yoder, Office of Hearings, U.S. Department of Transportation, for their helpful suggestions and information in preparing the 2001 Interim Internet Edition.

Finally, I want to recognize, again, all of those whom I acknowledged and thanked in the Preface to the 3rd Edition, because that Edition forms so much a part of this one.

1993 EDITION PREFACE

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Revising this Manual for Administrative Law Judges, which was originally written by an Administrative Law Judge of Merritt Ruhlen's stature, presented a unique challenge. To begin with, there was a natural reluctance to tamper with the voice of experience. Moreover, Judge Ruhlen's little book had become something of a standard in its field. An article in one law journal described it as an "admirable handbook [which] reflects his long experience . . . with the CAB . . . ."[vi] In fact, Judge Ruhlen's Manual has been cited in several scholarly articles,[vii] and in a number of agency and administrative law judge decisions.[viii] Recognizing this, the present edition has tried to leave intact as much of the original as possible. Special efforts have been made to preserve the spirit of Judge Ruhlen's text, and sometimes the exact words, where they address the actual process of judging and conducting administrative proceedings.

However, important changes in administrative law have occurred

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vi. William H. Allen, *Twilight or Just an Overcast Afternoon?*, 1986 DUKE L.J. 276, 278, n.10 (Apr. 1986).

vii. Frederick Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 356, n.357 (Apr. 1985); Marshall S. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, n.4 (Mar. 1986); Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. ILL. L. REV. 353, 370, n.125 (1991); Karen Y. Kauper, Note, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Statute*, 18 U. MICH. J.L. REFORM 537, n.1 (Winter 1985); Elizabeth Ayres Whiteside, Comment, *Administrative Adjudications: An Overview of the Existing Models and Their Failure to Achieve Uniformity and a Proposal for a Uniform Adjudicatory Framework*, 46 OHIO ST. L.J. 355, 371, n.139 (1985).

viii. *E.g.*, In the Matter of Benedict P. Cottone, 63 F.C.C.2d 596, 605 (1977) (citing 1974 edition of the Manual); Sec'y of Labor v. D. Federico Co., 3 O.S.H. Case (BNA) 1970, 1971, 1975-76 (1976) (Occupational Safety & Health Review Commission: majority citing 1974 edition of the Manual, describing it as "[a] highly respected guide for Administrative Law Judges," at 1971, and dissent citing other passages from the Manual, at 1975-76); Emery Richardson v. Dep't of Justice, 11 M.S.P.R. 186, Docket No. SF07528110018 (1982); Dep't of Veteran's Affairs, Veterans Admin. Med. Ctr., Boise, Idaho, *supra* note ii, at v.

since 1982. For instance, the Administrative Dispute Resolution Act (Pub. L. No. 101-552, 104 Stat. 2736 (1990)) incorporated alternative dispute resolution (ADR) into federal administrative law and amended the Administrative Procedure Act to remove any doubt that ADR could be an integral part of agency adjudications.

Even before that watershed, the administrative adjudication landscape had changed significantly. Legislation had reduced several agencies' economic regulatory authority over such matters as routes, rates, and licensing in industries such as trucking (Motor Carrier Act, Pub. L. No. 96-296, 92 Stat. 793 (1980)), the railroads (Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980)), and natural gas (Natural Gas Policy Act, Pub. L. No. 95-621, 92 Stat. 335 (1978)). Under the Airline Deregulation Act, (Pub. L. No. 95-204, 92 Stat. 1705 (1978)), route and price regulation in the airlines industry met the same fate, and Judge Ruhlen's old agency (the Civil Aeronautics Board (CAB) was phased out.

These enactments hastened an ongoing evolution in administrative law. The number, and type, of cases decided by administrative law judges had already changed drastically between 1946 and the 1980s. In 1946, there were fewer than 200 federal administrative law judges (then called hearing examiners) and 60 percent of these were employed by agencies engaged primarily in the regulation of routes, rates, and other economic aspects of various industries.[ix] After 1982, there were almost 1200 federal administrative law judges, but only about seven percent of them were in the old-line regulatory agencies. More than ninety percent were employed in agencies where contested benefits claims and law enforcement adjudications were the norm.[x] These agencies included the Social Security Administration, the U.S. Department of Labor, the National Labor Relations Board, and the Occupational Safety and Health Review Commission.

Since 1982, the center of gravity for cases decided by

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ix. Victor W. Palmer, *The Evolving Role of Administrative Law Judges,* 19 NEW ENG. L. REV. 755, 784-85 (1984), citing and giving appropriate credit to Lubbers, *A Unified Corps of ALJs: a Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 268-69 (Nov. 1981).

x. *Id.* at 785.

administrative law judges has continued to shift away from economic regulatory agencies such as the old CAB, the ICC, and the F.C.C.[xi]

Revisions to Judge Ruhlen's 1982 edition of the Manual were therefore needed. In fact, these revisions became somewhat more extensive than originally planned. In many respects, it simply was not enough to update citations and revise the 1982 text to correlate with current practices. Too many changes and too much evolution had occurred since 1982.

Nevertheless, Judge Ruhlen's 1982 Manual was not necessarily obsolete. Although much of the 1982 edition refers to agencies like the CAB, and much of it speaks in the immediate context of economic regulation cases, the process of judging remains at the center of the book. Complex, multi-party cases are not limited to litigation over rates, licenses, and routes. Judge Ruhlen still provided a sound point of departure and sound ideas concerning how to manage complex, difficult cases. That is where the need for a Manual for Administrative Law Judges is most acute. And that is one reason why special efforts were made, despite considerable revision and updating, to preserve much of Judge Ruhlen's text.

Now for the customary acknowledgments and thank yous. (That these acknowledgments are traditional in no way reduces the sincerity with which they are expressed). As always, the staff of the Administrative Conference have gone out of their way to be helpful and responsive to the needs of the revision process. Special thanks, of course, are extended to Jeffrey Lubbers, ACUS Research Director, and the Administrative Conference. Several Administrative Law Judges have been particularly helpful, and at some risk of inadvertent omission, let me mention in particular Acting Chief Administrative Law Judge Jose A. Anglada (SSA), Judge Ivan Smith (NRC), Chief Administrative Law Judge Curtis Wagner (FERC), and Deputy Chief Administrative Law Judge John Vittone (USDOL). Thanks also are in order for Peter Dowd, Director, Division of Field Practices and Procedure (SSA), and Judge Moody R. Tidwell, U.S. Claims Court.

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xi. Holmes, *ALJ Update: A Review of the Current Role, Status, and Demographics of the Corps of Administrative Law Judges*, 38 FED. BAR NEWS & J. 202 (May 1991).

This list would be incomplete, of course, without appropriately recognizing Danny R. Williams, a tireless research assistant (and third-year student at UALR School of Law), Melba Myers for all of that "hurry-up-I-need-it-now" secretarial support earlier in this project, and Juaniece Ammons for her help in completing it.

Morell E. Mullins
September 14, 1992

I. INTRODUCTION

Today, the powers and responsibilities of federal Administrative Law Judges (ALJ or Administrative Law Judge) are defined in the Administrative Procedure Act[1] (APA) and in the enabling acts and procedural rules of the various agencies.[2] Their powers, duties, and status have been considered on several occasions by the federal courts.[3]

Historically, however, the need for administrative hearing officers was recognized well before the APA.[4] The large number of cases where an agency was required, statutorily or constitutionally, to afford a hearing impelled federal agency heads to delegate responsibility for conducting those hearings to subordinates.[5]

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1. Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. §§ 551-559, 701-706, 1305, 1306, 3105, 3344, 5372, and 7521 (1994 and Supp. V 1999), originally enacted as ch. 324, 60 Stat. 237 (1946). The APA is printed in an Appendix to this Manual.

The source of the federal Administrative Law Judge's authority and independence have been succinctly described at the website of the Federal Administrative Law Judges Conference, http://www.faljc.org/faljc1.html.

Administrative Law Judge powers and decisional independence come directly from the Administrative Procedure Act "without the necessity of express agency delegation," and "an agency is without the power to withhold such powers" from its Administrative Law Judges. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 74 (1947), reprinted in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 140 (2d ed. 1992); In the Matter of Bilello [Current Transfer Binder] Comm. Fut. L. Rep.(CCH) 26,032 (Mar. 25, 1994) (citing S. REP. NO. 752, 79th Cong., 1st Sess. 21 (1945)); Tourist Enterprises Corporation "ORBIS", C.A.B. Docket No. 27914, Recommended Decision served October 7, 1977, p. 11, n.9, adopted by C.A.B. Order 78-5-11, dated May 8, 1978, p. 2; "Judicial Response to Misconduct," p. 114 (ABA Center for Professional Responsibility 1995).

2. A list of citations to the procedural rules of many federal agencies that conduct adjudicative hearings is set forth in Appendix IV.

3. *See, e.g.,* Butz v. Economou, 438 U.S. 478 (1978); Ramspeck v. Fed. Trial Exam'rs. Conference, 345 U.S. 128 (1953); Riss & Co. v. United States, 341 U.S. 907 (1951); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Benton v. United States, 488 F.2d 1017 (Ct. Cl. 1973).

4. *See* Morgan v. United States, 298 U.S. 468 (1936). For an article summarizing the historical background of administrative adjudication and ALJs in the United States, *see* Michael Asimow, *The Administrative Judiciary: ALJs in Historical Perspective*, 19 J. NAALJ 157 (2003). For another historical account, which unfortunately is no longer widely available, *see* The Federal Administrative Judiciary, 1992 ACUS 771, 798-303. This is a report prepared by the Administrative Conference of the United States, a government organization which is not longer in operation.

5. *See* Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128 (1953).

However, these subordinates were subject to the direction and control of the agency, and thus perceived as being prone to make findings favorable to the agency. Considerations of fairness led to granting these hearing officers increasing degrees of independence, culminating in the provisions of section 11 of the APA,[6] which accords the Administrative Law Judge[7] a unique status.[8]

Although an employee of the agency, the ALJ is responsible for conducting formal proceedings, interpreting the law, applying agency regulations, and carrying out the policies of the agency in the course of administrative adjudications.[9] To insure independent exercise of these functions, the ALJ's appointment is absolute. The ALJ is not subject to most of the managerial controls which can be applied to other employees of a federal agency. For example, ALJs are not subject to performance appraisals, and compensation is established by the Office of Personnel Management, independent of agency recommendations.[10] Furthermore, the agency can take disciplinary

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6. The original section 11 has, of course, been amended and its successor provisions are now found mainly in 5 U.S.C. §§ 3105 (1994), 5372 (1994 and Supp. V 1999), and 7521 (1994).

7. The title was changed to Administrative Law Judge by United States Civil Service Commission regulation on Aug. 19, 1972, 37 Fed. Reg. 16787, and by statute on March 27, 1978, 5 U.S.C. § 3105 (1994).

8. *See* Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128, 132 ("'a special class of semi-independent subordinate hearing officers'"); *see also* Local 134, Int'l Bhd. of Elec. Workers, AFL-CIO v. N.L.R.B., 486 F.2d 863, 867 (7th Cir. 1973).

9. The discussion in this Manual assumes that the Administrative Law Judge is an employee of an agency charged with enforcement and policy making responsibilities for a substantive program. However, a few Administrative Law Judges are employed by agencies which adjudicate cases originating in the enforcement programs of other agencies. For example, the Occupational Safety and Health Review Commission (OSHRC) (29 U.S.C. § 661 (1994)) and the Mine Safety and Health Review Commission (MSHRC) (30 U.S.C. § 823 (1994) are independent agencies which conduct hearings in enforcement cases brought by the Department of Labor. Therefore, some of the discussion in the text dealing with the relationship of the Judge to his agency is not directly applicable to OSHRC, MSHRC, or similar agencies.

10. *See* 5 U.S.C. § 4301(2)(D) (1994) (exempting ALJs from the definition of "employee" in context of performance appraisals). Basic grades and pay levels of ALJs are addressed in 5 U.S.C. § 5372 (1994 and Supp. V 1999), which also provides that OPM shall determine levels of ALJ positions by regulation. For an article summarizing many aspects of performance evaluation of ALJs and

action against the judge only when good cause is established in proceedings before the Merit Systems Protection Board.[11]

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proposals to modify the current system, *see* James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U. 629 (1994). An earlier student note on the topic also provides background on this topic. *See* L. Hope O'Keeffe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591 (1986). For an article which also deals with state ALJs, *see* Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17 J. NAALJ 1 (1997).

11. 5 U.S.C. § 7521 (1994). An important early decision of a Merit Systems Protection Board (MPSB) ALJ stated that discipline or discharge for good cause should not normally be based on the content of an ALJ's opinions or the ALJ's conduct of his/her cases, unless there were "serious improprieties, flagrant abuses, or repeated breaches of acceptable standards of judicial behavior." *In re* Chocallo, 1 M.S.P.R. 612, 632 (1978), *aff'd*, 2 M.S.P.B. 20, *aff'd w/o opinion*, 716 F.2d 889 (3d Cir. 1983). Another significant, relatively early decision was Soc. Sec. Admin. v. Burris, 39 M.S.P.R. 51, *aff'd w/o opinion*, 878 F.2d 1445 (Fed. Cir. 1989) (stating that good cause was shown by proof of insubordination, but as to another charge, agency did not establish good cause for disciplining ALJ for ALJ's including in his decisions statements that the agency was attempting to influence his decisions). Some other significant cases interpreting or applying this provision are Benton v. United States, 488 F.2d 1017 (Ct. Cl. 1973); Ass'n of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D. D.C. 1984); Goodman v. Svahn, 614 F. Supp. 726 (D. D.C. 1985); Brennan v. Dep't of Health & Human Servs., 787 F.2d 1559, 1563 (Fed. Cir. 1986) (stating that charges based on reasons which constitute improper interference with administrative law judge's performance of quasi-judicial functions cannot constitute "good cause"); McEachern v. Macy, 233 F. Supp. 516 (W.D. S.C. 1964), *aff'd*, 341 F.2d 895 (4th Cir. 1965)(involving failure to pay financial obligations).

There also have been several relevant cases decided since the 3rd edition of this Manual was published. Soc. Sec. Admin. v. Dantoni, 77 M.S.P.R. 516 (1998), *aff'd*, 173 F.3d 435 (Fed. Cir. 1998) (decision without published opinion, full text available at 1998 U.S. App. LEXIS 24902) (MPSB opinion recounting discharged ALJ's conduct harassing and embarrassing Deputy Chief ALJ by, among other things, forging Deputy Chief ALJ's signature on order forms and other documents, resulting in Deputy Chief ALJ's receiving 1547 pieces of mail, including solicitations for a book entitled, *How to Get the Women You Desire into Bed*); Carr v. Soc. Sec. Admin, 185 F.3d 1318 (Fed. Cir. 1999) (stating that agency had carried its burden of establishing charges against whistle blowing ALJ whom it sought to remove for, *inter alia*, reckless disregard for personal safety of others; even if ALJ had also engaged in protected activity, agency would have sought to remove her even in absence of that activity; noting also that there were charges which ALJ did not contest, such as persistent use of vulgar and profane language, demeaning comments, sexual harassment and ridicule, and interference with efficient and

A. *General Overview*

Before considering some specific APA-recognized powers of the Administrative Law Judge, a general overview may be helpful. To begin with, the Administrative Law Judge is a common feature in formal agency adjudications. Whenever the APA applies to a matter which must be determined on the record of a trial-type hearing, the proceedings, with some exceptions, are likely to be conducted by an Administrative Law Judge. In fact, the APA is quite explicit. For proceedings required by statute to be determined on the record after notice and opportunity for an evidentiary hearing:

> (b) There shall preside at the taking of evidence—
>
> (1) the agency;
>
> (2) one or more members of the body which comprises the agency; or
>
> (3) one or more administrative law judges appointed under section 3105 of this title.
>
> This subchapter does not supersede the conduct of specified classes of proceedings . . . before boards or other employees specially provided for . . . under statute.[12]

Boards, Commissions, or Administrators heading a federal agency do not routinely preside over hearings. However, as the language quoted above indicates, an Administrative Law Judge is not

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effective agency operations); Office of Hearings & Appeals, Soc. Sec. Admin. v. Whittlesey, 59 M.S.P.R. 684 (1993), *aff'd w/o opinion*, 39 F.3d 1197 (Fed. Cir. 1994) (stating that good cause to remove ALJ was shown by evidence that he violated agency rules and settlement agreement by engaging in unauthorized practice of law).

For some relevant articles, *see* Victor G. Rosenblum, *Contexts and Contents of "For Good Cause" as the Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. NEW ENG. L. REV. 593 (1984) and James P. Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. NEW ENG. L. REV. 807 (1984).

12. 5 U.S.C. § 556(b) (2003).

required if some statute specifically provides otherwise.[13]

An important study in the 1990's established that there are a significant number of proceedings where the hearing officer is not an Administrative Law Judge.[14] Still, the Administrative Law Judge seems to provide a "model," even in such cases. Especially noteworthy, this study pointed out that: (1) such hearing officers often are -- like Administrative Law Judges -- administratively "housed" in "independent" organizations separate from the rest of the agency;[15] and (2) agencies apparently are willing "to accord these presiding officers a fair degree of independence."[16] Moreover, whether the term ALJ or "hearing officer" is used, the essential function of conducting an adjudicative proceeding is basically the same. Most of this Manual, therefore, should be relevant to non-Administrative Law Judge hearing officers.

Several other general points regarding Administrative Law Judges should be made at this juncture. In most types of cases the ALJ issues either an initial or a recommended decision, orally or in writing.[17] The ALJ's decision is subject to review by the agency (a function sometimes delegated to an agency official or to a review board),[18] and the agency's decision is in turn usually subject to review by the courts.[19] The ALJ's decision can become final agency action

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13. *Id.*

14. John H. Frye, III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 264 (1992).

15. *Id.* at 341-43.

16. *Id.* at 343. For another article describing the non-ALJ federal agency adjudicators, as of 1992, *see* Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341 (June 1992).

17. 5 U.S.C. § 557(b) (2003). In cases involving rulemaking or initial licenses, the agency may direct that the Judge's decision be omitted and the formal record be certified directly to the agency for decision. *Id.*

18. *See, e.g.*, Northeast Broad., Inc. v. F.C.C., 400 F.2d 749 (D.C. Cir. 1968) (F.C.C. Review Board); McDaniel v. Celebrezze, 331 F.2d 426 (4th Cir. 1964) (Social Security & Appeals Council); 9 C.F.R. § 317.369 (2003) (Department of Agriculture Nutrition Labeling; hearing before an ALJ with appeal to the Department's "Judicial Officer"; 43 C.F.R. § 4.1 (2003)(various Department of the Interior appeals boards, e.g., Board of Indian Appeals, Board of Land Appeals; 40 C.F.R. § 1.25(e) (2003) (Environmental Appeals Board).

19. 5 U.S.C. §§ 701-706 (2003). However, judicial review can be statutorily precluded, at least in certain kinds of cases. Lindahl v. Office of Pers. Mgmt., 470 U.S. 768 (1985); Webster v. Doe, 486 U.S. 592 (1988).

if review is not directed by the head of the agency or other official designated to entertain appeals from the ALJ's decision.[20]

The Administrative Law Judge is the person primarily responsible for developing an accurate and complete record and a fair and equitable decision in a formal administrative proceeding. The parties to the proceeding, including agency staff, are all subject to pressures and preconceptions which may inhibit objective presentation of facts and policies. The reviewing agencies and the courts, though independent and objective, have heavy work loads and other obligations. They simply do not have the time and the facilities to investigate all aspects of each formal proceeding. This function has come to be the responsibility of the Administrative Law Judge. Consequently, an Administrative Law Judge has a strong affirmative duty not only to try a case fairly and to write a sound decision but to insure that an accurate and complete record is developed.

In *Scenic Hudson Preservation Conference v. Federal Power Commission*, the Second Circuit stated:

> [T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.
>
> The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.[21]

Although the court was referring to an administrative agency and not directly to Administrative Law Judges, the net result is the same.

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20. 5 U.S.C. § 557(b) (1994) ("When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule.") For examples of implementing regulations, *see* 24 C.F.R. § 1720.605 (2003) (HUD); 29 C.F.R. § 580.13 (2003) (civil penalties for violations of federal child labor laws).

21. 354 F.2d 608, 620 (2d Cir. 1965), later quoted in Confederated Tribes & Bands of the Yakima Indian Nation v. F.E.R.C., 746 F.2d 466, 472 (9th Cir. 1984.

Because the agency itself does not preside over the taking of evidence, the ALJ, as presiding officer on behalf of an agency, has the initial responsibility for developing an accurate and complete record.[22] This may require affirmative measures at several stages of a proceeding. The ALJ certainly should call the attention of the parties to gaps in the record and insist that they be filled. The ALJ also may need to question or cross-examine a party's witnesses,[23] and may even call witnesses or raise issues *sua sponte* upon essential matters not covered adequately by the parties.[24] The ALJ may direct the parties to discuss in oral argument, in brief, or in special memoranda, any issues or points which are germane, and he may direct counsel to research a question of law and policy at any time.[25]

If the agency or a court finds omissions in the record, inappropriate procedures, insufficient evidence, or other

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22. *See* Marsh v. Harris, 632 F.2d 296 (4th Cir. 1980).

23. *See, e.g.*, Beck v. Mathews, 601 F.2d 376 (9th Cir. 1978); Holland Furnace Co. v. F.T.C., 295 F.2d 302 (7th Cir. 1961); N.L.R.B. v. Int'l Bhd. of Elec. Workers, 432 F.2d 965 (8th Cir. 1970).

24. Examples of this necessary zeal in developing a complete record may be found in the opinions of Judge Seymour Wenner in *Re Area Rate Proceeding for Permian Basin*, 34 F.P.C. 159 (1965), and Judge Stephen Gross in the *Continental-Western Merger Case*, C.A.B. Docket 33465 (served April 16, 1979), in calling their own witnesses when they found the record inadequate. For examples of cases recognizing a hearing officer's authority, zeal or no zeal, to protect and develop the record in a fair manner, *see* for example, N.L.R.B. v. Staten Island Hotel, 101 F.3d 858, 860 (2d Cir. 1996) (ALJ's authority to reopen a record sua sponte judicially reviewed under an abuse of discretion standard); Freeman United Coal Mining Co. v. Director, Office of Workers Comp. Programs, 94 F.3d 384, 388 n.2 (7th Cir. 1996) (ALJ sua sponte inquiry into earlier application necessary in order to determine which regulations applied to claim); Poulin v. Bowen, 817 F.2d 865 (D.C. Cir. 1987); Fernandez v. Schweiker, 650 F.2d 5 (2d Cir. 1981); Busey v. St. Hilaire, 1990 N.T.S.B. 20, Order EA-3073, Docket SE-8606 (1990) (recognizing that ALJs may address, sua sponte, relevant matters which the parties may have overlooked, or deliberately ignored). For a recent ALJ decision recognizing this duty and power, *see* In the Matter of Pepperell Associates, Respondent, 1999 EPA ALJ LEXIS 16 (February 26, 1999). For recent article related to this topic, *see* Allen E. Schoenberger, *The Active Administrative Law Judge: Is There Harm in an ALJ Asking?*, 18 J. NAALJ 399 (1998); Jeffrey S. Wolfe and Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L. J. 293 (1997).

25. Form 8-a in Appendix I is a sample order directing the parties to research a question of law.

inadequacies, frequently the case must be returned to the Administrative Law Judge for correction or supplemental action.[26] This, of course, involves additional work, expense and further delay.

B. *Specific APA Powers of the Administrative Law Judge*

Section 556(c) of the APA furnishes a convenient point of departure by listing some of the powers and functions which an agency may be authorized to delegate to Administrative Law Judges.[27] Specifically, and in the order listed in § 556(c) itself, an Administrative Law Judge may: (1) administer oaths and affirmations; (2) issue subpoenas authorized by law; (3) rule on offers of proof and receive relevant evidence; (4) take depositions or have depositions taken when the ends of justice would be served; (5) regulate the course of the hearing; (6) hold conferences for the settlement or simplification of the issues by the consent of the parties, or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter; (7) inform the parties about the availability of one or more alternative means of dispute resolution, and encourage use of such methods; (8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy; (9) dispose of procedural requests or similar matters; (10) make or recommend decisions in accordance with section 557 of the APA; and (11) take other action authorized by agency rule consistent with the APA.

Two important points should be emphasized with respect to this list. First, the Administrative Law Judge obviously is in many ways the functional equivalent of a trial judge in federal or state court.

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26. *See* Marsh v. Harris, 632 F.2d 296 (4th Cir. 1980).

27. However, § 556(c) is not limited expressly to Administrative Law Judges. By its own terms, § 556(c) extends to "employees presiding at hearings" which are subject to § 556 of the APA. For examples of implementing procedural regulations, *see* 24 C.F.R. § 26.1, et seq. (2003) (HUD) (24 C.F.R. § 26.2 specifically sets out the powers of administrative law judges and hearing officers); for another set of implementing procedural regulations, which are apparently limited to proceedings under one federal statute, *see* 24 C.F.R. § 1720.105, *et seq.* (2003) (HUD) (hearings under Interstate Land Sales Full Disclosure Act).

Receiving relevant evidence, ruling on offers of proof, holding conferences, disposing of procedural matters, and regulating the course of hearings obviously involve the very essence of the judicial function. (Equally obvious, many of the functions enumerated in § 556(c) require Administrative Law Judges to exercise judicial-type discretion and judgment.)

Second, the underlined passages in the list above emphasize a less obvious, but important, aspect of the Administrative Law Judge's role. Recent changes in federal law,[28] and § 556(c) in particular,[29] remove any doubt that Administrative Law Judges can be authorized to go beyond a narrow or rigid version of the judicial role. In a phrase, the changes involve "alternative dispute resolution, "a topic which warrants separate treatment in this Manual.

C. *Alternative Dispute Resolution and Administrative Law*

1. General Background

One of the most significant legal developments during the past three decades has been a strong movement toward using alternatives to formal adjudication in the resolution of disputes. A term frequently employed to describe this movement is "alternative dispute resolution" (ADR or dispute resolution). The term itself, ADR, actually is a short-hand label which covers a lot of territory. It denotes an open-ended, evolving set of techniques and concepts. It is an "inclusive"[30] and elastic term, which embraces not only established concepts such as negotiation, arbitration and mediation,

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28. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (with changes to section numbering in Title 5 made by the Administrative Procedure Technical Amendments Act, Pub. L. No. 102-354, 106 Stat. 944 (1992)) (codified mainly at 5 U.S.C. §§ 571-83, with codification of miscellaneous provisions in various sections of titles 9, 28, 29, and 41). Further amendments were made by the Administrative Dispute Resolution Act of 1996, Act Oct. 1996, P.L. 104-320, 110 Stat. 3870 (amending, *inter alia*, 5 U.S.C. §§ 569, 571, 571 note, 573, 574, 575, 580, and 28 U.S.C § 1491, and 41 U.S.C. § 605).

29. 5 U.S.C. § 556(c) was amended by § 4 of the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736, 2737 (1990).

30. Administrative Conference of the U.S., THE ADMINISTRATIVE DISPUTE RESOLUTION ACT: GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS 3 (1992) (hereinafter, "GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS").

but also a growing variety of innovations and hybrids.[31] As the words themselves imply, perhaps the most important common denominator linking various ADR techniques is their nature as alternatives—alternatives to formal litigation as a means of resolving disputes.

The term "ADR" eludes precise definition. A wide assortment of procedural devices—some of which have not yet been invented—could fairly be classified as ADR. As a concept, ADR is still evolving. The main qualification for being classified as ADR seems to be that the technique or process offers a substitute for formal adjudication.

Despite the open-ended quality of ADR as a concept, ADR still is susceptible to classification and organizing principles of one kind or another. One of the typical ways of classifying ADR techniques is to conceive of them in terms of a spectrum or continuum of methods, arranged according to the degree of control remaining in the hands of the parties.[32] At one end of the spectrum are procedures where the parties retain virtually complete control, with no input from neutrals or non-parties. Here, we would find the very traditional concept of voluntary, unstructured negotiation between (or among) the parties. At the other end of the spectrum are procedures where the parties surrender control over resolution of the dispute to some third party. There, we would find another traditional concept, binding arbitration. With binding arbitration, the result of the arbitrator's decision is indistinguishable, as a practical matter, from adjudication by a court. Between the extremes is a wide range of techniques and devices which, for the most part, share one feature -- the intervention of some third party who plays variations on the theme of mediation.

2. Relevance of ADR to Administrative Law Judges.

Familiarity with ADR, as a concept and process, is likely to

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31. *See* Larry Ray, *Emerging Options in Dispute Resolution*, 75 A.B.A. J. 66 (June 1989). Among the standard publications on ADR in the 1990's, there are ALI-ABA, ALTERNATIVE DISPUTE RESOLUTION: HOW TO USE IT TO YOUR ADVANTAGE: ALI-ABA COURSE OF STUDY MATERIALS (1996); JAY GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS (2d ed. 1997).

32. *See* Ray, *supra* note 31, at 67, and GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 30 at 4-7.

become an important part of the competent ALJ's professional qualifications. Even without the Administrative Dispute Resolution Act,[33] ADR would be a topic of considerable significance to Administrative Law Judges. If nothing else, familiarity with ADR techniques and concepts can help avoid time-consuming litigation by enhancing the judge's ability to foster negotiations and settlements between parties. Many ADR approaches are quite adaptable and fully consistent with agency rules and the organic acts governing particular agencies. Certainly, almost all agencies have a policy of favoring appropriate settlements as an alternative to formal adjudications.

An ALJ therefore may be able to borrow ideas from ADR, adapt them to pending cases, and encourage resolution of disputed matters without formal adjudication. In a sense, ADR is not just an important and evolving assortment of techniques for avoiding formal litigation. It is a state of mind -- a willingness to entertain alternatives and to re-examine assumptions about formal litigation.

In any event, ADR has become a part of administrative law and a fact of life for administrative law judges. However, before discussing the extension of ADR into administrative law, it is advisable to discuss some ADR techniques and devices. Although the following list is far from complete, and does not purport to be exhaustive, it summarizes a number of ADR techniques and devices which should be relevant to judges.

(1) *Informal, unstructured settlement negotiations.*[34] Negotiated agreements always have been, and probably always will be, an alternative to formal adjudication. No citation is needed to support the fact that most cases (upwards of 90% or more) are settled without going to trial.

(2) *Structured case management devices.*[35] Although not

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33. *See supra* text accompanying note 28, and *infra* accompanying notes 70-76.

34. Ray, *supra* note 31, at 67.

35. *Cf.* Administrative Conference of the United States, Recommendation *No. 86-7, Case Management as a Tool for Improving Agency Adjudication*, 1 C.F.R. § 305.86-7 (1993). (As discussed in the Preface and elsewhere in this Manual, the termination of the Administrative Conference (ACUS) was statutorily recognized

commonly included in ADR taxonomies, and although an extremely broad concept, structured case management devices can be used as ADR tools. Within the concept of structured case management are such devices as court or agency rules which systematically regulate the parties' pre-trial preparation. As one study has indicated, negotiations and settlements can be facilitated (and formal litigation therefore avoided) if the parties are forced, by rule or judge's order, to evaluate their own cases.

> [S]ome lawyers . . . seem to find it difficult to squarely face their own situations early in the life of a lawsuit. Sometimes counsel have difficulty developing at the outset a coherent theory of their own case . . . . Sometimes [they] are so pressed by other responsibilities that they . . . systematically analyze their own cause only when some external event forces them to do so.[36]

As one example of ways to force parties to analyze their cases early on, rules governing pleadings might require the parties to be specific about the factual bases of the allegations contained in the complaint and answer. The parties, or at least their lawyers, would then need to examine the case more closely, instead of making broad, general assertions in their pleadings which could cover almost any conceivable state of facts. In other words, an agency might impose a kind of hybrid fact-pleading on the parties.[37] Or, by rule or a judge's

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under Public Law 104-52, title IV, 109 Stat. 480 (Nov. 19, 1995). The last C.F.R. to reproduce the ACUS Recommendations in full appears to be the 1993 edition. After ACUS was dismantled, the chapter of the C.F.R. relevant to ACUS recommendations was removed pursuant to 61 Fed. Reg. 3539 (Feb. 1, 1996)).

36. Wayne D. Brazil, et.al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986) (emphasis added).

37. Morrell E. Mullins, *Alternative Dispute Resolution and the Occupational Safety and Health Review Commission: Settlement Judges and Simplified Proceedings*, 5 ADMIN. L.J. 555, 568-69 (1991). (The Occupational Safety and Health Review Commission, however, amended its rules to eliminate fact-pleading in 1992. 57 FR 41676 (Sept. 11, 1992). However, with respect to the F.C.C., *see* 63

order, parties may be required to file a report with the judge summarizing their settlement efforts. These types of techniques differ from various types of mediation because no judge or third party has personally intervened in an effort to mediate directly between the parties. The rules or orders themselves impel the parties to focus on their cases, and may even force the parties to begin negotiating because they must report to the judge.

(3) *Mediation.* Mediation generically is the use of a neutral to help the parties reconcile their differences.[38] Put colloquially, the mediator is a neutral go-between, ideally the proverbial "honest broker." The classic mediator has no power at all to impose an outcome or render a decision. In fact, one set of standards for professional conduct of mediators expressly states, "Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement."[39] Nor is the mediator ordinarily bound to follow any set procedures, rules of evidence, agenda, or approach. Indeed, an important advantage of mediation is its inherent

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FR 690, at 1002, 1007, 10022 (January 7, 1998) (referring to requirement imposed for fact-pleading in formal complaints against common carriers).

38. GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 36 at 5, and Ray, *supra* note 31, at 67; Administrative Conference of the United States, RECOMMENDATION 86-3: AGENCIES' USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION, 1 C.F.R. § 305.86-3 (1993) (at Appendix--Lexicon of Alternative Means of Dispute Resolution) [hereinafter "AGENCIES' USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION"], *reprinted* in ADMINISTRATIVE CONFERENCE, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 113, 117-18 (1987).

39. Standards of Conduct for Mediators, #I, adopted in 1994 by the American Arbitration Association and the Society for Professionals in Dispute Resolution, *reprinted in* SARA A. COLE, NANCY H. ROGERS, AND CRAIG A. MCCAIN, 2 MEDIATION: LAW POLICY AND PRACTICE, Appendix D, p. 2 (1994)(emphasis added). Another Code for mediators states: "It is the mediator's responsibility to assist the disputants in reaching a settlement. At no time should a mediator coerce a party into agreement." Code of Professional Conduct developed by the Center for Dispute Resolution, Denver, Colorado, #1, *reprinted in* Edward A. Dauer, et al., 2 Manual of Dispute Resolution: ADR Law & Practice, Appendix G-1, Art. 1 (1996) (noting that the code was drafted by Christopher Moore, PhD, CDR Associates).

flexibility of form and approach. Unless there are constraints to the contrary, a mediator can meet with all parties together, or separately, or at some times together and at other times separately. Techniques and tactics can vary.[40] The mediator in one dispute may engage in the equivalent of shuttle diplomacy, going back and forth between the parties, communicating offers and counter-offers and the mediator's own views. In another dispute, the same mediator may insist that all parties sit down together with the mediator and engage in some genuine communication with each other. Whatever the procedures and tactics may be, the mediator's goal is to help the parties reach an agreement acceptable to all of them.

(4) *Conciliation.* The distinctions between conciliation and mediation may be fuzzy, but at least one lexicon of ADR terminology implies that there is a difference in degree between the two concepts. The word "conciliation" is used to refer to situations where the neutral must reduce tensions and improve communication among the parties "in volatile conflicts where the parties are unable, unwilling, or unprepared to come to the table to negotiate their differences."[41]

(5) *Facilitating.* Another first cousin to mediation, facilitating (or facilitation) seems to refer to neutrals who intervene procedurally (e.g., to conduct meetings and coordinate discussions), but who avoid becoming involved in resolving disputed substantive issues. In other words, a facilitator concentrates on promoting negotiation and settlement by using procedural devices to bring the parties together, but does not intervene actively in the substance of the parties'

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40. *See generally* SARA A. COLE, NANCY H. ROGERS, AND CRAIG A. MCCAIN, MEDIATION: LAW POLICY AND PRACTICE (1994).

41. Ad Hoc Panel on Dispute Resolution and Public Policy, National Institute for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution* 36-37 (1983), *reprinted in* Administrative Conference of the U.S., SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 44-45 (1987).

positions or negotiations.[42]

(6) *Neutral evaluation, or early neutral evaluation.* This process, often employed early in the course of a dispute, generally entails a neutral factfinder, possessed of substantive expertise if needed, who evaluates the merits of the parties' cases. The evaluation, often in writing, is non-binding, but it gives the parties an idea of how an objective decision maker might perceive the strengths and weaknesses of their respective positions. Several courts and the Departmental Appeals Board of the U.S. Department of Health and Human Services have established early neutral evaluation programs of one sort or another.[43]

(7) *Factfinding.* This process involves a neutral or a panel of neutrals, typically with relevant technical expertise, who make advisory findings of facts on disputed matters. Factfinding often involves informal presentation by each party of its case to the factfinder(s). After the factfinder(s) render their findings, the parties can continue to negotiate.[44] As one textbook on dispute resolution has noted, factfinding by neutral experts has the potential to become particularly important in cases where the disputes orbit around complex technological, scientific, or other data from specialized

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42. *See* AGENCIES' USE OF ALTERNATIVE DISPUTE RESOLUTION, *supra* note 38, in Appendix; *Paths to Justice*, *supra* note 41, at 37, *reprint* at 45.

43. *See* GUIDANCE FOR AGENCY DISPUTE RESOLUTION EXPERTS, *supra* note 30, at 6, and Brazil, *supra* note 31. Two federal regulations expressly referring to early neutral evaluation are 14 C.F.R. §§ 17.17 and 17.31 (2003) (FAA, Procedures for Protests and Contract Disputes). Reference to "neutral evaluation" in the ADR context are found at 45 C.F.R. § 74.91 (2003) (Department of Health & Human Services, Awards and Subawards to Institutions of Higher Education, Hospitals, etc.) and 45 C.F.R. § 2540.230 (2003) (Department of Health & Human Services, grievance procedures re: Corporation for National and Community Service).

44. *See* GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 30 at 6; AGENCIES' USE OF ALTERNATIVE DISPUTE RESOLUTION, *supra* note 38, in Appendix. Rules of the National Credit Union Administration expressly refer to possible authorization of early neutral factfinding. 12 C.F.R. § 709.8(c)(2) (2003).

fields.[45] Rule 706 of the Federal Rules of Evidence already allows a federal court to appoint expert witnesses on its own motion or on the motion of a party.[46]

(8) *Settlement Judge.* The settlement judge is a fairly recent hybrid of special interest to administrative law judges. The settlement judge basically is a mediator or neutral evaluator.[47] What distinguishes the settlement judge from other types of mediators and neutrals is the fact that the settlement judge is typically an administrative law judge from the agency which is adjudicating the dispute.[48] The settlement judge, simply put, is (usually) an agency administrative law judge who is specially assigned to undertake mediation-type efforts in an appropriate case, but who is not assigned to decide that case. The settlement judge has been described as "an ingenious device,"[49] because it preserves the very real advantages of having a judge actively involved in the settlement process, while simultaneously avoiding the problems which could arise if the judge who is to decide the case becomes too actively involved in settlement negotiations.[50] Among other advantages, an agency administrative law judge appointed to serve as a settlement judge: (1) is free of constraints such as the APA's prohibitions on ex parte contacts;[51] (2) brings to the negotiation process authority which stems from being a judge; (3) has a familiarity with the subject-matter which is born of experience in presiding over the agency's cases; and (4) has the flexibility of a mediator as to the tactics and strategies

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45. *See* Dauer, *supra* note 39 at 5.01, p. 5-5.

46. FED. R. EVID. 706(a).

47. GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 36, at 6-7.

48. *Id.*; *see also* Administrative Conference of the U.S., AGENCY USE OF SETTLEMENT JUDGES, RECOMMENDATION 88-5, 1 C.F.R. § 305.88-5 (1993).

49. Daniel Joseph & Michelle L. Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 3 ADMIN. L.J. 571, 573 (1989).

50. *See* Mullins, *supra* note 37, at 560.

51. 5 U.S.C. §§ 554(d), 557(d) (1994); *see also* Joseph & Gilbert, *supra* note 49, at 582-84.

which can be employed.[52] Among the agencies using settlement judges are the Federal Labor Relations Authority (FLRA), Department of Housing and Urban Development (HUD), the Federal Energy Regulatory Commission (FERC), the U.S. Department of Labor, the Occupational Safety and Health Review Commission (OSHRC), and the Federal Communications Commission (FCC).[53]

(9) *Minitrial.* The word "minitrial" is somewhat misleading. A minitrial does involve presentations by each party in a hearing-type setting. However, the presentations are given before senior officials, of each party, who are authorized to settle the case. Thus, a minitrial actually is a structured settlement process. Each side, after agreeing on details of the procedure, presents a highly abbreviated version of its case to the senior officials, who are sometimes aided by a neutral. These senior officials, authorized to settle the dispute, can see for themselves how their case and that of the other party (or parties) could be perceived at a full-fledged trial, thus providing a basis for more realistic negotiations.[54] Agencies which have used minitrials include the Army Corps of Engineers (contract and environmental disputes), NASA; the Department of the Interior; the Department of Energy, and FERC.[55]

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52. *See* Joseph & Gilbert, *supra* note 49 at 585-86; Mullins, *supra* note 37, at 560-61, 591-99.

53. 5 C.F.R. § 2423.25 (2003) (FLRA); 18 C.F.R. § 385.603 (2003) (F.E.R.C.); 24 C.F.R. § 180.620 (2003) (HUD); 29 C.F.R. § 18.9 (2003)(Department of Labor, general rules of practice and procedure); 29 C.F.R. § 2200.101 (2003) (Occupational Safety & Health Review Commission); 47 C.F.R. § 1.244 (2003) (F.C.C.); 48 C.F.R. § 6302.30 (1991)(DOT Board of Contract Appeals).

For an interesting critique of a proposal that the N.L.R.B. use settlement judges, *see* Erin Parkin Huss, Note, *Response to the Experimental Role of Settlement Judges in Unfair Labor Practice Proceedings*, 37 ARIZ. L. REV. 895 (1995).

54. *See, e.g.,* AGENCIES' USE OF ALTERNATIVE DISPUTE RESOLUTION, *supra* note 38 in Appendix -- Lexicon of Alternative Means of Dispute Resolution; GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 30, at 7.

55. GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 36,

(10) *Conference.* Although omitted from some lists of ADR techniques, the good old-fashioned pre-hearing or other conference, presided over by a Judge (or other hearing official), has substantial ADR potential and should not be ignored. Unless there are some very good reasons to the contrary, a Judge holding a conference with the parties should, almost as a matter of routine, explore the possibilities for settlement. The APA expressly authorizes conferences for the settlement or simplification of issues,[56] and agency procedural rules typically contain virtual boiler-plate language authorizing ALJs and other hearing officers to hold conferences for the settlement or simplification of issues.[57] Moreover, several agencies have regulations explicitly providing, in various contexts, for settlement conferences.[58]

(11) *Arbitration.* In terms of its practical effect, arbitration is only a step or so removed from adjudication. The arbitrator, like a judge, is a neutral (supposedly) who is authorized to resolve a dispute between or among parties. Generally, the parties will make some kind of presentation to the arbitrator, in the equivalent of a hearing. (Also, there may be a panel of arbitrators, rather than a single arbitrator.) However, the arbitrator is not necessarily required to follow the lawbooks, either substantively or procedurally. The parties themselves

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at 7. Agency regulations expressly referring to minitrials in the ADR context include the FAA, 14 C.F.R. § 17.31 (2003); the Federal Energy Regulatory Commission (F.E.R.C.), 18 C.F.R. § 385.604 (2003); and the Department of Justice, 28 C.F.R. § 35.176 (2003) (nondiscrimination on the basis of disability in state and local government services).

56. 5 U.S.C. § 556(c) (2003).

57. *See, e.g.*, 16 C.F.R. § 3.42(c)(7) (2003) (Federal Trade Commission, Rules of Practice for Adjudicative Proceedings); 29 C.F.R. § 417.6 (2003) (Procedures for Removal of Local Labor Organization Officers); 49 C.F.R. § 386.54 (2003)(Motor Carrier Safety Regulations).

58. *See, e.g.*, 14 C.F.R. § 1264.117(b)(3) (2003)(NASA, Implementation of the Program Fraud Civil Penalties Act of 1986, Authority of the presiding officer); 18 C.F.R. § 157.205 (2003)(F.E.R.C., Interstate Pipeline Blanket Certificates, Notice Procedure); 33 C.F.R. § 20.202(e) (2003) (Coast Guard, powers of administrative law judges).

may select the arbitrator, agree on the procedures to be followed, and even determine the criteria for the arbitrator's decision -- although much depends on the kind of arbitration being conducted. For example, at one extreme, the original negotiation of a commercial transaction between two parties may result in contractual provisions under which the parties agree to submit all (or certain) disputes arising under the contract.[59] At the other extreme, but quite rarely, one may find examples of mandatory arbitration being imposed by law on the parties.[60] In between, there are any number of possible variations on the theme of arbitration, but one key variable is whether the arbitration will result in a binding decision or have merely an advisory effect.[61]

3. Confidentiality.

There is one crucial aspect to mediation, variations on mediation, and ADR in general which must be emphasized, even in a summary treatment of the subject -- confidentiality. Mediators and other ADR neutrals often communicate *ex parte* and obtain information on a confidential basis. The neutral or mediator may be told, in confidence, that a party's bargaining position is substantially different from what the party regards as an acceptable compromise. Without the possibility for confidentiality, the effectiveness of neutrals in ADR would be seriously jeopardized. The Administrative Conference has summarized this need for confidentiality in a way which hardly can be improved upon:

> Most ADR techniques, including mediation, non-binding arbitration, factfinding and minitrials, involve

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59. For one example of cases which enforce such contractual agreements, *see* Grigson v. Creative Artists Agency, L.L.C, 210 F.3d 524 (5th Cir. 2003) (applying equitable estoppel against production company and actor alleging tortious interference with a distribution agreement).

60. *See* 7 U.S.C. § 136a(c)(2)(B)(iii) (1994) (regarding arbitration to determine compensation for development of government-required data); 29 U.S.C. § 1401 (1994) (arbitrating amount of liability for withdrawal from certain kinds of pension plans).

61. *See* Ray, *supra* note 31, at 67.

> a neutral third party who aids the parties in reaching agreement . . . . A skillful mediator can speed negotiations and increase chances for agreement by holding separate confidential meetings with the parties, where each party may give the mediator a relatively full and candid account of its own interests (rather than its litigating position), discuss what it is willing to accept, and consider alternative approaches. The mediator, armed with this information but avoiding premature disclosure of its details, can then help to shape the negotiations in such a way that they will proceed most directly to their goal. The mediator may also carry messages between the parties, launch 'trial balloons,' and act as an agent of reality to reduce the likelihood of miscalculation. This structure can make it safe for the parties to talk candidly and to raise sensitive issues and creative ideas. . . .
>
> With all of these neutrals, many of the benefits of ADR can be achieved only if the proceedings are held confidential. Confidentiality assures the parties that what is said in the discussions will be limited to the negotiations alone so they can be free to be forthcoming. This need extends to the neutral's materials, such as notes and reports, which are produced solely to assist the neutral in the negotiation process and which others could misconstrue as indicating a bias against some party or interest. This is why many mediators routinely destroy their personal notes and drafts and return all other materials to the parties. . . .[62]

However, absolute confidentiality cannot be guaranteed, and

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62. Administrative Conference of the U.S., ENCOURAGING SETTLEMENTS BY PROTECTING MEDIATOR CONFIDENTIALITY, RECOMMENDATION NO. 88-11, 1 C.F.R. § 305.88-11 (1993) (emphasis added) [hereinafter PROTECTING MEDIATOR CONFIDENTIALITY]. As noted elsewhere in this Manual, after ACUS was abolished, this C.F.R. chapter was removed, pursuant to 61 Fed. Reg. 3539 (1996).

there are situations where disclosure could be required. Of particular significance to federal agencies and ALJs are certain provisions of the Administrative Dispute Resolution Act which on the one hand prohibit disclosure of any "dispute resolution communication," but then allow disclosure under several exceptions contained that Act, including disclosures which are judicially determined to be necessary to prevent manifest injustice or public harm.[63]

Nevertheless, it is especially important in this Manual to emphasize the confidentiality aspects of much ADR. An ALJ accustomed to presiding over formal evidentiary hearings is likely to have developed a strong mindset favoring placing everything on the record and avoiding even the appearance of secretive dealings. For formal adjudications this is highly appropriate. However, if appointed to serve as a settlement judge or as some other kind of neutral, the judge must adapt -- sometimes quickly -- to the need for confidential, even *ex parte*, communications.

4. The Extension of ADR into Administrative Law

Although the impetus for the ADR movement originally stemmed from discontent with the judicial system,[64] extension of ADR into administrative law was both predictable and natural. For one thing, agency adjudications involving the right to a full evidentiary hearing are all but indistinguishable, functionally, from full evidentiary hearings before a state or federal court.[65] For another, such formal agency adjudications far outnumber the federal court caseload.[66]

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63. *See, e.g.*, 5 U.S.C. § 574 (1994 & Supp. V 1999), *formerly numbered as* 5 U.S.C. § 584, *but renumbered* pursuant to the Administrative Procedure Technical Correction Act, Pub. L. No. 102-354, 106 Stat. 944 (August 26, 1992). *See generally* Administrative Conference, MEDIATION: A PRIMER FOR FEDERAL AGENCIES (1993).

64. *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Larry Ray, *Emerging Options in Dispute Resolution*, 75 A.B.A.J. 66 (June 1989); Douglas Riggs & Elizabeth K. Dorminey, *Federal Agencies' Use of Alternative Means of Dispute Resolution*, 1 ADMIN. L. J. 125, 126 (1987); Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

65. For example, *see* the APA's provisions for formal adjudications: §§ 554, 556, 557 (1994).

66. *See, e.g.*, BERNARD SCHWARTZ, ADMINISTRATIVE LAW: A CASEBOOK 62-

Quantitatively and qualitatively the net result has been considerable judicialization of our administrative law system.[67] As ADR gained momentum in state and federal court systems, it was almost inevitable that ADR would be transplanted into the federal agencies.

The extension of ADR to administrative law during the past twenty years or so can be summarized with three key words: experimentation, implementation, and legislation. During the 1980's various federal agencies experimented with ADR techniques and procedures. For example, one early development was the application of ADR to government contracting disputes.[68] Other agencies and kinds of agency actions followed suit, experimenting and implementing.[69] Then came the legislation, starting in 1990.

In a sense, the first Administrative Dispute Resolution Act (ADR Act)[70] was a culmination of earlier experimentation and

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65 (4th ed. 1994).

67. Phillip J. Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393, 1403, n.46 (1984). *See generally* AGENCIES' USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION, *supra* note 38.

68. Eldon H. Crowell & Charles Pou, Jr., *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 1987 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE 1139; Crowell & Pou, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183 (1990).

69. *See, e.g.*, Charles Pou, Jr., *Federal Agency Use of ADR: The Experience to Date*, and Robinson, *ADR in Enforcement Actions at the U.S. Environmental Protection Agency,* in CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT (Fein, ed. 1987); *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L. REV. 399 (1987) (entire issue devoted to this colloquium); Mullins, *supra* note 37, at 558-59.

70. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (with changes to section numbering in Title 5 made by the Administrative Procedure Technical Amendments Act, Pub. L. No. 102-354, 106 Stat. 944 (1992)) (codified mainly at 5 U.S.C. §§ 571-83, with codification of miscellaneous provisions in various sections of titles 9, 28, 29, and 41). Further amendments were made by the Administrative Dispute Resolution Act of 1996, Act Oct. 1996, P.L. 104-320, 110 Stat. 3870. These amendments modified several provisions of the 1990 Act, among them 5 U.S.C. §§ 571, 574 (confidentiality provisions), 580, and 583.

implementation, and a forerunner of more legislation.[71] The 1990 ADR Act still remains the most significant piece of federal legislation because, among other things, it required each federal agency to: (1) review its programs and adopt policies addressing the use of ADR;[72] and (2) designate a senior official as the agency's dispute resolution specialist, to be responsible for implementing the ADR Act and relevant agency policies.[73] The ADR Act also removed any doubt concerning a federal agency's authority to use ADR where the parties agree.[74] It also authorized administrative law judges to use or encourage the use of ADR and to require at settlement conferences the attendance of parties' representatives who are authorized to negotiate concerning disputed issues.[75] The ADR Act also added a new subchapter to Chapter 5 of title 5 of the U.S. Code entitled "ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS."[76] Among other things, this new subchapter: (1) provided criteria for an agency's use in evaluating the appropriateness of ADR;[77] (2) stated

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To convey a somewhat more precise picture of the scope of the original 1990 Act, it should be noted that its provisions adding to or amending the U.S. Code will be found at 5 U.S.C. §§ 571-83 (1994 & Supp. V 1999) (general provisions, definitions, confidentiality, arbitration); 5 U.S.C. § 556(c)(1994) (ALJ authority); 9 U.S.C. § 10 (arbitration, judicial review)(1994); 41 U.S.C. § 605 (public contract disputes)(1994); 29 U.S.C. § 173 (1994 & Supp IV 1998)(Federal Mediation & Conciliation Service authority); 28 U.S.C. § 2672 (1994) (tort claims); and 31 U.S.C. § 3711(a)(2) (1994) (government claims). Pub. L. No. 101-552, 104 Stat. 2736, as amended by Administrative Procedure Technical Amendments Act of 1991, Pub. L. No. 102-354, 106 Stat. 944 (1992).

71. In addition to the 1996 amendments mentioned *supra* note 70, federal statutes dealing specifically today with ADR and federal agencies include 12 U.S.C. § 4806(e)(1994)(requiring pilot program of ADR by federal agencies regulating banks and credit unions); 20 U.S.C. § 1415(e)(1994 & Supp. IV 1998)(expressly listing mediation of disputes involving children with disabilities in educational institutions receiving federal funding); and 26 U.S.C. § 7123 (1994 & Supp. IV 1998) (directing IRS to establish ADR procedures, added in 1998 by P.L. 105-206).

72. Pub. L. No. 101-552, § 3(a).

73. *Id.* at § 3(b); *see also* 5 U.S.C. § 581 (2003).

74. *Id.* at § 4; *see also* 5 U.S.C. § 581 (2003).

75. *Id.* at § 4(a), codified at 5 U.S.C. § 556(c) (2003).

76. *Id.* at § 4(b).

77. 5 U.S.C. § 572(b) (1994).

that ADR procedures authorized under the ADR Act are voluntary and supplemental in nature;[78] (3) went into considerable detail regarding confidentiality and communications which are made during the course of ADR processes;[79] and (4) contained, again in considerable detail, provisions authorizing and governing agency arbitration procedures.[80]

For the foreseeable future, administrative law judges and other agency hearing officers will encounter more -- not less -- emphasis on ADR. Familiarity with ADR, as a concept and a process, is likely to become as much a part of the competent administrative law judge's professional qualifications as the ability to write a decision or substantive knowledge of the applicable law.

II. PRE-HEARING CONFERENCES & SETTLEMENTS

As soon as a case is assigned, the ALJ should thoroughly study the pleadings (and other filings) in order to assess the need for a pre-hearing conference and the possibilities for settlement. Not every case will require a full-blown conference with all of the features described later in this chapter. The issues may be relatively simple, the substantive law or regulations fairly specific, and the facts subject to only a limited range of disagreement. In many kinds of proceedings, the typical case may need only a simple telephone conference call with the parties and a brief conference report summarizing the matters which were agreed upon.[81] Sometimes, the

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78. 5 U.S.C. § 572(c) (1994).

79. 5 U.S.C. § 574 (1994 & Supp. V 1999).

80. 5 U.S.C. §§ 575-81 (1994 & Supp. V 1999).

81. The value of telephone conferences to the attorney is discussed in Victor W. Palmer, *Administrative Hearings for the General Practitioner*, 73 A.B.A. J. 86 (Mar. 1987). For examples of federal regulations authorizing telephone pre-hearing conferences, *see* 5 C.F.R. § 2434.24(d) (2003)(Federal Labor Relations Authority, unfair labor practice proceedings); 9 C.F.R. 202.110(b) (2003)(Department of Agriculture, proceedings applicable to reparations proceedings under Packers and Stockyards Act); 28 C.F.R. § 76.19 (2003)(Department of Justice, civil penalties for possession of certain controlled substances; stating, "Pre-hearing conferences normally shall be conducted by telephone . . . ."). An interesting booklet, which contains not only valuable suggestions, but also a page of additional information sources, is: American Bar Association (Action Commission to Reduce Court Costs and Delay, *Telephone-Conferenced Court Hearings: A How-To Guide for Judges,*

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objectives served by a pre-hearing conference can be achieved by correspondence between the ALJ and the parties,[82] or by the ALJ directing the parties to correspond or confer by telephone with each other.[83] After all, the pre-hearing conference is a tool -- a means to an end, not an end in itself. Pre-hearing conferences are primarily a way to organize the proceedings to achieve optimum productivity and avoid wasting time and effort. An effective pre-hearing conference can be useful in identifying areas of disagreement (and agreement), setting a schedule or agenda for any pre-trial discovery, and taking other steps to lay the groundwork for either: (a) settlement, or (b) an efficient, orderly, and fair hearing. Moreover, a pre-hearing conference usually is not limited to any set form or time. Parties, agencies and ALJs can hold conferences of various types, for various purposes, at different times during a case.

The main point is: whatever form it may take, there should be pre-hearing assessment and preparation which is adequate and appropriate to the case.

Adequacy and appropriateness, however, are not always simple matters. Formal administrative proceedings vary so much in complexity, type and number of issues, length of hearing, or other factors, that special pre-hearing procedures may be necessary. The ALJ may have to devise individually tailored procedures to insure that all parties will receive an equitable and expeditious decision. (This may help explain why there seems to be at least one common thread running through the mind-staggering number and variety of agency procedural regulations dealing with [or mentioning] pre-hearing conferences[84] and procedures. Most of them give considerable discretion, one way or another, to the ALJ or presiding

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Attorneys, and Clerks (1983).

82. *See* 9 C.F.R. § 202.110(b) (2003) (Department of Agriculture, reparations proceedings under Packers and Stockyards Act; 28 C.F.R. § 76.19 (2003) (Department of Justice, civil penalties for possession of certain controlled substances).

83. *See* 19 C.F.R. § 354.11(b) (2003) (Department of Commerce, International Trade Administration; "If a pre-hearing conference is impractical, the presiding official will direct the parties to correspond with each other or to confer by telephone or otherwise to achieve the purposes of such a conference").

84. In response to a search request on the Lexis C.F.R. data base, on August 12, 2003, for the term "pre-hearing conference," Lexis reported 420 documents.

officer.[85])

Sometimes, the issues and facts are so complex or the number or identity of the parties so uncertain that several preliminary steps are necessary before evidence even can be obtained. In such situations, the need for a fairly elaborate and carefully prepared pre-hearing conference is obvious. Furthermore, in such cases exhibits and other direct evidence often cannot be prepared until discovery produces the necessary information or data.[86] Several pre-hearing conferences ultimately may be needed. The ALJ must adapt procedures to each individual case.

Because a pre-hearing conference is one of the most practical and efficient methods of starting a complex, formal proceeding, a detailed discussion of conferences in such cases follows. It should be emphasized, however, many of the tactics, techniques, and concepts described below can be used, or adapted for use, in any type of case. Although many cases will not require all of the steps and tactics described below, efficient management of any proceeding can be enhanced by familiarity with them. Also, it goes without saying that the ALJ always should be alert before, during, and after any conferences—and at all times—to the possibility of aiding the parties to settle the case and to the use of other alternatives to full-scale litigation. However, rather than belabor these points throughout the following discussion of pre-hearing conference procedures, the topics of settlement and alternative dispute resolution will be accorded a separate section in their own right, at the end of this chapter.

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85. For example, the Department of Agriculture's rules of practice governing formal adjudicatory proceedings under various statutes empower the ALJ, upon motion of any party or on the ALJ's own motion, to "direct the parties or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing," if the ALJ finds the proceeding would be expedited by a conference. The rule also refers, in open-ended fashion to "Such other matters as may expedite and aid in the disposition of the proceeding." 7 C.F.R. § 1.140 (2003). For another example, *see* 10 C.F.R. § 1013.19(a) (2003) (Department of Energy, Program Fraud Civil Remedies and Procedures: "The ALJ may schedule pre-hearing conferences as appropriate").

86. For a rule which contemplates a pre-hearing conference before discovery, *see* 10 C.F.R. § 2.740(b)(1) 2003)(NRC, proceeding on application for construction permit or operating license for a production or utilization facility). For an example of a regulation which permits discovery to be initiated before or after pre-hearing conference, *see* 47 C.F.R. § 1.311 (2003) (F.C.C.).

A. *Preparation for Pre-hearing Conference, With Emphasis on Complex, Multiparty Proceedings*

Although a conference serves many purposes, it is almost indispensable as a means of organizing a complex, formal, multiparty administrative proceeding. A conference in such cases permits joint consideration of various procedural matters, such as the need for exchange of information and evidence before the hearing, arrangements for stipulations, and the time and place of hearing. A well-run conference, requiring only a day or two (compared to days or weeks of hearing) will usually ease all succeeding steps. However, preparation for the conference is necessary.

An ALJ always should be familiar with the pleadings and all known facts regarding the case before setting a pre-hearing conference. The ALJ who sets a pre-hearing conference and goes into it ignorant of the pleadings and with no effort to obtain at least some basic information about the case is asking for serious trouble -- and wasted time. Nor should the ALJ allow the parties to come to the conference unprepared. A pre-hearing conference should not be the participants' introduction to a case. To the contrary, all interested persons should prepare for it in advance. The conference can be crucial in shaping the course of the later proceedings. It should serve as the first opportunity to clarify, isolate, and dispose of the problems involved.

However, the ALJ need not, and should not, conduct a personal investigation in order to obtain more information about the case. (Special situations and conditions exist for Social Security Administrative Law Judges, as indicated in cases such as *Burnett v. Commissioner*, 220 F.3d 112, 120 (3d Cir. 2000)). Instead, the ALJ should motivate the parties to provide information.

There may be available at least one important device which can provide information and, at the same time, impel the parties to prepare for the conference. The ALJ may direct interested persons to submit to him and to all known parties proposed statements of issues, proposed stipulations, requests for information, statements of position, proposed procedural dates, and other informational material.[87] This direction may appear in the pre-hearing conference

87. *See, e.g.*, 7 C.F.R. § 1.140 (2003) (Department of Agriculture, material to

notice or in a supplemental letter.

B. *Notice*

In many agencies the ALJ establishes the date and issues the pre-hearing conference notice.[88] For complex, multiparty cases, however, there may be some problems. For instance, there may be questions concerning who is, or can be, a party.[89] Therefore, regardless of minimum legal requirements for notice, such as publication in the Federal Register, the public may be best served in a complex, potentially multi-party case, if actual notice is given to all those with an apparent interest. If particular individuals or associations, few in number, are directly affected, they could be notified directly. If a specific geographic area is involved, it may be appropriate to notify local governmental authorities and civic groups individually. If many persons or groups may be interested, or if the identity of interested persons is not known, news media, including trade journals, might be used. Frequently, trade or professional associations will notify their members through regular or special circulations. The ALJ should use ingenuity to devise ways to notify all interested persons. It must be emphasized, of course, that all of these remarks are relevant only to truly complex, multi-party cases.

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be submitted at or subsequent to the conference); 10 C.F.R. § 820.28(c) (2003) (Department of Energy)(rule itself requires parties to exchange names of expert witnesses, summaries of expected testimony, copies of documents and exhibits); 14 C.F.R. § 16.211(a)(2) (2003) (pre-hearing conference notice may direct parties to exchange proposed witness lists requests for evidence and production of documents, admissions, and other matter prior to the date of the conference).

88. Forms 1-a and 1-b in Appendix I are samples related to notices of a pre-hearing conference.

89. *See* Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) (intervention as party in license renewal proceedings for commercial television broadcaster) and Ecee, Inc. v. Fed. Energy Regulatory Comm'n, 645 F.2d 339 (5th Cir. 1981) (standing in certain F.E.R.C. proceeding). Sometimes, agency rules may deal expressly with party status. For example, 30 C.F.R. § 44.3 (2003) (Mine Safety and Health Administration, petitions for modification of mandatory safety standards); 47 C.F.R. § 1.223 (2003) (F.C.C. general procedures for intervening as a party).

C. *Conference Transcript*

Some ALJs believe that transcribing a conference inhibits frank exchange. Whether or not this is so, it is an expense that may be avoided if the ALJ is authorized simply to record agreements and rulings in notes or by dictation to his secretary or into a recorder.[90] Since the ALJ ordinarily will provide to the parties a report or order summarizing the outcome of the conference, the need for a verbatim transcript may be marginal.[91]

In complex cases, however, any inhibiting effect is usually outweighed by the need to prevent any later dispute about the conference conditions, rulings, and agreements, and it is better to have a verbatim transcript. Some agencies require an official transcript of pre-hearing conferences.[92]

If funds for a verbatim transcript are not available in the agency, major parties may agree to divide the cost. In any event, if a transcript is made, the ALJ should ensure that all interested persons can see the agency's copy at its offices and obtain copies pursuant to agency rules.

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90. For examples of agency regulations which indicate that the ALJ has discretion on whether a transcription of a pre-hearing conference is to be made, *see* 7 C.F.R. § 1.140(b) (2003)(Agriculture: pre-hearing conference will not be stenographically reported unless so directed by the ALJ); 7 C.F.R. § 283.11(d)(1) (2003) (pre-hearing conference will not be stenographically recorded unless directed by ALJ); 10 C.F.R. § 10.104(2003)(Commodities Futures Trading Commission; reference to the record of pre-hearing conference, "if recorded"); 12 C.F.R. § 19.31 (2003)(Comptroller of Currency rules of practice and procedure: "{ALJ]"in his or her discretion may require that a scheduling or pre-hearing conference be recorded by a court reporter."); 16 C.F.R. 3.21(g) (2003) (F.T.C.; ALJ discretion to determine whether pre-hearing conference will be stenographically reported); 40 C.F.R. § 85.1807(k)(2)(2003) (EPA: results of conference, if not transcribed, shall be summarized in writing). However, the ALJ may be required by rule to record or transcribe the pre-hearing conference. For example, 24 C.F.R. § 26.21 (2003)(HUD; pre-hearing conference "shall . . . be recorded or transcribed" at request of any party.)

91. *See, e.g.*, 24 C.F.R. § 26.21(c) (2003) (requiring an order after the pre-hearing conference stating the rulings on matters considered at the conference and any directions to the parties); *see also infra*, text at note 99.

92. *See, e.g.*, 10 C.F.R. § 2.1021(c) (2003) (Nuclear Regulatory Commission); 47 C.F.R. § 1.248(e) (2003) (F.C.C.); 16 C.F.R. § 1025.21(d) (2003) (Consumer Product Safety Commission).

D. *Management of the Conference*

The ALJ should prepare, and may circulate in advance, a conference agenda. Obviously those proposals or suggestions which affect the scope of the proceeding should be scheduled first. Although the conference may be informal, all remarks should be addressed to the ALJ, who should permit reasonable discussion. However, when a subject is fully aired, the ALJ should rule and move on.

Most conferences involve at least the following steps:

1. **Opening Statement**—The ALJ should announce the name of the case, the tentative agenda, conference procedures, the rights of persons to participate in the conference, and other pertinent matters.

2. **Appearances**—(Again, it should be emphasized that complex formal proceedings often have a number of parties, or would-be parties,[93] participating.) Blank appearance sheets should be available, which provide for the name and address of the person appearing and the name and the interest of each person he is representing.[94] The ALJ should direct that each party or interested person notify the reporter, or the ALJ if no transcript is made, of the name and address of one person to whom all documents should be sent. For convenience, oral appearances should also be entered.

3. **Preliminary Matters**—The ALJ should permit each participant to propose additional items and to raise preliminary matters—for example, an inquiry as to the anticipated duration of the conference.

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93. *See* 21 C.F.R. § 12.89(a) (2003) (FDA, participation of "nonparty participant"). For examples of agency rules dealing expressly with obtaining party status, *see* 30 C.F.R. § 44.3 (2003)(Mine Safety and Health Administration, petitions for modification of mandatory safety standards); 47 C.F.R. § 1.223 (F.C.C. general procedures).

94. Form 2 in Appendix I is a sample appearance sheet.

4. **Participation**—The ALJ should rule immediately on requests to participate. Even if final rulings as to the right to participate are made by the agency, the ALJ can frequently make a tentative ruling, based on his knowledge of agency standards, as to each person's right to participate in the conference and in the entire proceeding.

5. **Issues**—If final determination of the issues to be tried has been made before the conference, the conferees may consider the interpretation of the issues as framed. The ALJ should make any necessary rulings.

   If, on the other hand, determination of the scope of the proceeding is still tentative, the participants may submit any proposals for modification, clarification, or limitation. After discussion, the ALJ should rule, for conference-planning purposes, and the conference should continue on that basis. (If the agency should later disagree, a further conference may be necessary.)

6. **Discovery**—In complex cases, an early pre-hearing conference may need to address issues pertaining to discovery. Moreover, the pre-hearing conference itself can serve a discovery role. Each party, including agency staff, may request other parties to submit information, including specially prepared studies. Disposing of such requests and arranging for the preparation and exchange of the evidentiary material are frequently the most difficult conference functions. The ALJ, as well as agency staff, even though well-trained, experienced, and familiar with the subject matter, may not be able to determine whether objections to producing the requested material are induced by its lack of relevance, the burden of producing it, or a party's belief that it will be adverse to its interests. Moreover, even counsel for the party from whom the material is sought may not know the importance of the requested information, its availability, or the difficulty of assembly.

   As difficult as these problems may be, it is preferable to face them at the conference. Otherwise they are merely

delayed and will still have to be dealt with later in requests for subpoenas, depositions, and interrogatories, or by extensive correspondence. It is frequently quicker, easier, and more equitable to decide these questions after a full informal discussion at the conference than it is after formal motions to quash subpoenas or to strike material after it has been supplied. Moreover, if the rulings are made at the conference there may be time to modify them without delaying the proceeding if later developments show that some of the requested material is not necessary or obtainable or cannot be assembled as proposed.

When a party resists requests for necessary information the ALJ should direct that it be submitted. But in considering information requests the ALJ should reduce them to the minimum consistent with obtaining sufficient information to decide the issues. Most parties, including agency staff, tend to ask for the maximum data available so that they will have more from which to choose. The parties may agree to furnish requested material, even though they believe some of the data to be irrelevant or immaterial, because they do not want to antagonize agency staff or other parties or because the information is easily accessible.

The ALJ should not acquiesce in this course of least resistance. The difficulty in striking trivia at the hearing and in sorting out the important facts when deciding the case is compounded if the ALJ has to examine voluminous data that should never have been required or approved at the conference.

The difficulty in determining at the conference what information is needed may be mitigated in several ways: (1) agency rules may require that some or all of the direct evidence be filed with the application or petition;[95] (2) the agency's hearing order may require the parties to prepare and exchange direct, and perhaps rebuttal, evidence before the conference;[96] and (3) the ALJ at a preliminary conference

95. *See, e.g.*, 18 C.F.R. § 157.6 (2003) (F.E.R.C.); 18 C.F.R. § 385.601(c)(2) (2003) (F.E.R.C.)(discretionary with presiding officer).

96. *See, e.g.*, 12 C.F.R. § 19.31(b)(8) (2003) (Comptroller of Currency, typical

may arrange for the exchange of requests for information which, if objected to, will be resolved at a reconvened conference.[97] The feasibility and utility of such devices depend on agency rules, the nature of the case, the number of known parties or interested persons, the extent of divergent interests, and the amount and type of material requested.

7. **Exchange of Information and Proposed Evidence**—Dates for the exchange of information and proposed evidence should be established, with the consent of the parties if possible. The time allowed should depend upon the nature of the material sought, the difficulty of preparation, the complexity of the issues, and the procedural time limits imposed by law or agency regulation.

   Sometimes, in multi-party proceedings, a party or interested person may desire that a document be served on two or more persons in his organization, or he may not require some of the material requested by other parties. Consequently, the ALJ may request each interested person to state what material he needs, the number of copies, and the names and addresses of the persons to be served.

   The ALJ's secretary (assuming the ALJ has a secretary) may compile this information to be circulated to all parties either as a part of the pre-hearing conference report or in a separate document.

8. **Ground Rules**—To supplement the relevant statutes, the

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omnibus authority to address "Such other matters as may aid in the orderly disposition of the proceeding."); 29 C.F.R. § 2200.51 (2003)(Occupational Safety and Health Review Commission, pre-hearing conferences and orders, omnibus provisions re: "any other matter that may expedite the hearing"). For an example of a case, *see* Bluestone Energy Design, Inc., 58 F.E.R.C. 63,025 (1992), where the Commission refers to an earlier hearing order directing parties to exchange narrative summaries of material points, exhibits, etc.

97. *See, e.g.*, 46 C.F.R. § 502.94(c) (2003) (Federal Maritime Commission). The possibility for more than one pre-hearing conference is indicated by the casual reference to "a series of pre-hearing conferences." Ellis v. Director, 1999 U.S. App. Lexis 21638 (4th Cir.) (unreported case).

APA, and agency rules, the ALJ may establish special rules, frequently called "ground rules," for each individual case, covering such matters as order of presentation, motions, and cross-examination. These may be adaptations of rules commonly used by the agency's ALJs or they may be tailor-made for the particular case.[98] Such rules may be unnecessary in relatively simple cases with experienced counsel, or the agency may have standard rules which are adequate for most proceedings.

E. *Conference Report*

A conference report consisting of a list of appearances, agreements reached, the ALJ's rulings, and other matters decided should, and sometimes must, be prepared and served on all persons who entered appearances.[99]

If final determination of the issues to be tried depends on a post conference ruling by the agency itself, then the ALJ's conference report should include his recommendations. If the agency disagrees with the ALJ as to the issues, and modifies them, the ALJ will have to decide whether another conference is necessary. Often the ALJ can rectify the difference in a supplemental report.

Exceptions should be limited to errors of substance. Further argument of a point decided at the conference should not be considered unless there are unusual circumstances. The ALJ should rule in a supplemental report on the exceptions, or make modifications or corrections. This does not necessarily commit the ALJ to the prescribed procedures; they can be modified later if necessary.

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98. Form 3 in Appendix I is a sample set of ground rules.

99. Forms 4-a, 4-b, and 4-c in Appendix I are sample pre-hearing conference reports. For examples of agency regulations pertaining to the ALJ's or presiding officer's duty to prepare a summary reporting what transpired at a conference, *see* 10 C.F.R. § 2.751a(d) (2003) (Nuclear Regulatory Commission, construction permit and operating licensing proceedings; report referred to as an "order"); 14 C.F.R. 302.22(c)(2003)(Department of Transportation; Aviation Proceedings) 49 C.F.R. § 386.55(b)(2003)(DOT, Federal Highway Administration; report referred to as an "order").

F. *Preliminary Motions and Rulings*

All pre-hearing motions that are within the ALJ's jurisdiction should be decided promptly. Unless the ruling is self-explanatory or is the affirmance of a prior ruling, it should include a statement of reasons.[100] Many motions, petitions, and requests can be disposed of without a formal order; a notice or letter to all interested persons is sufficient.

G. *Other Pre-hearing Procedures*

At the risk of being repetitious, it should be emphasized that a full-fledged pre-hearing conference is not always appropriate. If the issues are simple and the parties few, it may be unnecessary; if the proceeding is to be held in the field, it may be inconvenient. Any number of factors and variables may make a full-scale pre-hearing conference uneconomical or otherwise inadvisable.

When a conference is not feasible or desirable, other methods to organize and expedite a proceeding are available. For example, the ALJ may by written notice suggest the type of evidence needed,[101] or may direct the submission prior to the hearing of such material as a list of witnesses, a description of the material to be offered in evidence, and proposed stipulations. However, if a pre-hearing conference is not held, the ALJ should at least consult informally with all parties or their counsel prior to the official opening of the hearing to discuss and decide on hearing procedures.

In addition, a procedure formerly adopted by the U.S. Court of Federal Claims[102] provided for the development of information by the parties before the hearing without a pre-hearing conference.[103]

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100. Form 5 in Appendix I is a sample interlocutory order.

101. Forms 6-a-c in Appendix I are samples of pre-hearing orders and instructions to the parties.

102. Since the first edition of this Manual, this court has been variously referred to as the Court of Claims and as the U.S. Claims Court. In 1992, it was officially designated as the U.S. Court of Federal Claims. P.L. 102-572 (Title IX, § 902(a)), 106 Stat. 4516 (October 29, 1992). This Manual generally will use the 1992 designation, although lapses in usage will be likely.

103. Appendix G of the present Rules of the Court of Federal Claims still provides an excellent model for an ALJ who wants to assure that the parties engage

This procedure, which is described in the Court of Federal Claims forms set forth in Appendix I,[104] appears adaptable to many administrative proceedings.

H. *Settlement Negotiations and ADR Possibilities*

1. Settlements

Settlement by negotiation should be considered at every step and stage of a proceeding. Depending on such variables as the nature of the issues, the parties, and applicable rules, a case might be settled as soon as assigned to an ALJ, shortly afterwards, during any of the usual pre-hearing procedures, during the hearing, at the close of the hearing, before decision by the ALJ, or even between the decision of the ALJ and the decision of the agency. Subject to agency rules, a settlement conference may be organized and conducted by the ALJ, or the ALJ may organize it and turn it over to the parties for action, or the parties may, with or without the ALJ's consent, hold private discussions so long as the rights of other parties or the public are not impaired.

Whenever it seems opportune, the ALJ should suggest settlement discussions. Sometimes, as the hearing proceeds and the parties hear the testimony and learn the facts, they will be more amenable to settlement. This applies not only to a full or partial settlement of the case but also to procedural questions. Frequently the parties may, after conferences, make important factual or procedural agreements.

The extent to which the ALJ should participate in settlement negotiations depends on agency practice and personal judgment. It is not uncommon for an ALJ to take an active role in such negotiation, especially in enforcement cases. However, too much involvement, or too active a role might raise doubts concerning the ALJ's ability to

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in substantial pre-conference development of their cases. Among other things, Appendix G provides for early communication between counsel to identify each party's factual and legal contentions, discuss discovery needs, scheduling, and possible settlement. It also requires a Joint Preliminary Status Report be filed by the parties. This Appendix (G) to the Court of Claims Rules can be found in 28 U.S.C. Appx (1994), among the appendices to the Federal Court of Claims Rules.

104. *See* Forms 18-a through 18-e in Appendix I.

conduct a fair hearing or reach an equitable decision if negotiations fail. In such situations recusal might be appropriate.

As indicated earlier in this Manual,[105] one way to avoid the problems which could arise if the ALJ becomes too active in settlement negotiations is to use a Settlement Judge[106] or some other form of mediator.

More than twenty years ago, a survey of ALJs, including Chiefs, at eleven agencies indicated that, in addition to saving the time, cost, and energy involved in a formal hearing, a settlement can neutralize hostilities that might be aggravated by litigation.[107] Many of the lessons garnered from that survey remain valid today and helped in the development of ADR in federal agencies, so it is worth discussing further at this point.

The principal questions investigated in the survey were how to persuade parties to get together to consider settling their differences (whether substantive or procedural), and, once a meeting is arranged, how to get them to reach some agreement.

The survey suggested several ways of encouraging negotiations. Agencies could assign ALJs who are particularly adept at negotiating to handle settlement discussions. They could arrange training for ALJs in how to encourage negotiations without compromising their judicial independence. Techniques available to individual ALJs

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105. *See supra* notes 47-53.

106. For examples of agency regulations pertaining to settlement judges, *see* 5 C.F.R. § 2423.25(d) (2003) (Federal Labor Relations Authority; unfair labor practice proceedings); 18 C.F.R. § 385.603 (2003) (F.E.R.C.); 24 C.F.R. § 180.445 (2003) (HUD; proceedings for civil rights matters); 29 C.F.R. § 18.9 (2003) (Department of Labor); 29 C.F.R. § 2200.101 (2003) (Occupational Safety & Health Review Commission); 47 C.F.R. § 1.244 (2003) (F.C.C.); 48 C.F.R. § 6302.30 (1991) (DOT Board of Contract Appeals). For a case which refers to the use of a settlement judge, *see* OXY USA, Inc. v. F.E.R.C., 64 F.3d 679, 687 (D.C. Cir. 1995).

107. Coast Guard, Federal Communications Commission, Federal Energy Regulatory Commission, Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, Occupational Safety and Health Review Commission, Securities and Exchange Commission, and the Departments of Health and Human Services, Interior, and Labor. The survey was conducted in 1979 and 1980. *See* G. Lawrence, Settlement Practices of Administrative Law Judges (March 18, 1981). Unpublished paper submitted to the Administrative Conference of the United States.

include the following:

(1) Directing the parties to meet prior to the hearing to discuss settlement.

(2) Issuing discovery orders requiring the exchange of basic facts and documents.

(3) Holding telephone conferences to discuss settlement possibilities. The ALJ can suggest issues that appear amenable to settlement.

(4) Submitting to the parties and interested persons pretrial statements on technical matters at issue, prepared by the ALJ's staff.

(5) Setting early hearing dates to compel immediate consideration of the issues.

(6) Holding *in camera* negotiating sessions immediately prior to the hearing, when the merits of each party's claims and his chance of success have been thoroughly explored.

Of course, the use of settlement techniques depends on the type of issues, the agency rules, and the personality, attitude, and training of the ALJ. Many cases cannot be settled, regardless of agency procedures or the ALJ's ability. But if the case is of the type in which settlement is possible, the ALJ should support all legitimate settlement efforts.[108]

2. ADR

As previously mentioned,[109] federal agency use of ADR increased substantially during the 1980's and culminated in a sense with the ADR Act of 1990. ADR is now -- and for the foreseeable

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108. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES -- NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991), and Roger Fisher & Danny Ertel, GETTING READY TO NEGOTIATE: THE GETTING TO YES WORKBOOK (1995).

109 *See supra* notes 64-80.

future -- a subject of considerable significance to administrative law judges. For that reason, ADR was described and examined in some detail early in this Manual.[110]

Moreover, the specifics of each agency's ADR programs are still being developed.[111] This development probably will be, and certainly should be, an ongoing process. ADR is still at an early stage as far as its use in administrative agencies is concerned. Indeed, as one article regarding ADR in general put it, "[W]e have only begun to identify the kinds of disputes likely to be amenable to the techniques of ADR."[112] One task for administrative law judges will be to aid in realizing the potential of ADR for the administrative process.

III. DISCOVERY

If authorized by statute and agency rule, the ALJ may require the parties to submit to discovery. This may consist of subpoenas *ad testificandum* and *duces tecum*, depositions, written interrogatories, cross-interrogatories, inspections, physical or mental examinations, requests for admissions, production of documents or things, or permission to enter upon land or other property, or the preparation of studies, summaries, forecasts, surveys, polls, or other relevant

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110. *See supra* notes 30-80. Moreover, in some agencies, relevant regulations contemplate the potential for ALJs or other hearing officers themselves to perform an ADR role or to rule on parties' motions. 18 C.F.R. § 385.604(c)(3) (2003) (ALJs may serve as neutrals); 47 C.F.R. § 1.722(d)(1) (2003) (ALJs as mediators in voluntary mediation of damages where liability is clear); and 40 C.F.R. § 22.18 (Presiding Officer to rule on parties' motion for appointment of a neutral).

111. *See e.g.*, 65 FR 38986 (June 22, 2003)(Commodities Futures Trading Commission) (Notice of Proposed Rulemaking; new regulatory framework for multilateral transaction execution facilities, etc.); 65 C.F.R. § 36888 (June 12, 2003)(Department of Commerce, International Trade Administration, Notice Announcing Reopening of Public Comment Period re: ADR for online consumer transactions); 65 FR 31131 (May 16, 2003)(Department of Defense Proposed Rule re: Defense Logistics Agency solicitations); 64 FR 61236, 61237 (November 10, 1999)(Federal Mine Safety and Health Review Commission Notice of Proposed Rulemaking re: procedural rules); 64 FR 40138 (July 23, 1999) (Environmental Protection Agency, Final Rule, consolidated rules of practice for civil penalties, compliance orders, etc.).

112. Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 438 (1986).

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materials.

Discovery rulings may be made if the ALJ finds it necessary to apply compulsion to obtain the necessary information.[113] Supplemental discovery orders may be issued as needed. The ALJ should be attentive, throughout the discovery stage, to the possibility of delay resulting from abuse of the discovery process.

A. *Subpoenas*

In some agencies, the ALJ must issue a subpoena upon request, subject to a motion to quash.[114] In other agencies, the ALJ may refuse to issue a subpoena absent a showing of relevance or related requirements.[115] In either case, to prevent evasion of service, the subpoena usually is granted *ex parte* and its signing is not disclosed until either service has been accomplished or the party who obtained the subpoena chooses to disclose it.

Even if reimbursed for travel expenses and compensated by witness fees, a witness who is required to travel far from home will be inconvenienced at best, and may undergo severe hardship. Furthermore, subpoenas duces tecum may compel the transportation of bulky documents and may deprive a business of records and files needed for its daily operation. These burdens should not be lightly imposed.[116] The ALJ may in appropriate cases, and subject to agency rules, shift some of these burdens to the party seeking documents by permitting inspecting and copying of them on the

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113. Richard T. Freije, *The Use of Discovery Sanctions in Administrative Agency Adjudication*, 59 IND. L.J. 113 (1984); Tomlinson, *Discovery in Agency Adjudication*, Report in Support of Recommendation [70-4], 1 ACUS 37, 571, 577 (1971); 1 C.F.R. § 305.70-4 (1993).

114. *See, e.g.*, 29 C.F.R. § 2200.57 (2003) (Occupational Safety & Health Review Commission).

115. *See, e.g.*, 7 C.F.R. § 1.149 n.4 (2003) (Department of Agriculture); 10 C.F.R. § 2.720(a) (2003) (Nuclear Regulatory Commission, domestic licensing proceedings); 12 C.F.R. § 19.26(a) (2003) (Comptroller of the Currency); 16 C.F.R. § 3.34(b) (2003) (F.T.C., rules of practice for adjudicative proceedings). The relevant provision of the APA states: "Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought." 5 U.S.C. § 555(d) (1994).

116. *Cf.* Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 213 (1946).

premises where they are regularly kept. The ALJ also may encourage agreements between the parties providing for the submission of copies of specified material at the hearing, subject to verification procedures agreeable to the parties.

Sometimes subpoenas will be requested for material the ALJ has previously ruled need not be produced. Upon learning of this, the ALJ should deny the request unless it appears that the earlier ruling should be changed. It is not usually worthwhile, however, to search the record of a lengthy pre-hearing conference or other pre-hearing actions to determine whether the matter has already been considered. The subpoenaed witness can always move to quash.

Sooner or later an ALJ will encounter a party who refuses to comply with a subpoena. When that happens, the agency probably will have to file an enforcement action in federal district court.[117] The ensuing litigation can delay the agency's adjudication considerably,[118] but Supreme Court precedents strongly tend toward upholding an agency's subpoenas.[119] Moreover, the APA states, "On contest, the court shall sustain the subpoena or similar process or

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117. For an example of an agency rule pertaining to enforcement of subpoenas, *see* 29 C.F.R. § 2200.57(d) (2003).

118. *See, e.g.*, F.T.C. v. Anderson, 631 F.2d 741 (D.C. Cir. 1979). Although not within the scope of this Manual, agency enforcement of administrative subpoenas can, in addition to creating substantial delays in the proceedings, create serious problems and complications for ALJs in conducting proceedings. For example, there may be serious questions about the ALJ's authority to issue subpoenas, which the ALJ and the agency may need to address in the first instance, a matter which may involve statutory interpretation. For example, although agreeing with the agency, the court in United States v. Fla. Azalea Specialists, 19 F.3d 620, 622-23 (11th Cir. 1994) still addressed the statutory interpretation argument which the subpoenaed party raised.

119. *See* Civil Aeronautics Bd. v. Hermann, 353 U.S. 322 (1957) (production of all books and records covering a period of three years); United States v. Morton Salt Co., 338 U.S. 632 (1950). However, it should be noted that challenges to the agency in actions to enforce agency subpoenas can present complications and problems, which if not handled properly, can lead to delay and even reversal of the agency's position. For example, in N.L.R.B. v. Detroit Newspapers, 185 F.3d 602, 605-06 (6th Cir. 1999), a court ruled that the ultimate authority to decide whether subpoenaed material was privileged from disclosure is a matter for the Article III Judiciary. Of course, an ALJ and the agency will rule on such questions in the first instance, but the ultimate decisional authority would seem to be in the courts, if the party refuses to comply with the agency subpoena.

demand to the extent that it is found to be in accordance with law."[120] Once the agency's statutory authority to issue the challenged subpoenas is established, the subpoena generally will be found to be in accordance with law "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."[121]

B. *Discovery and Confidential Material*

When it is desirable to have an advance written exchange of confidential material, the ALJ should develop appropriate safeguards to assure confidentiality. The ALJ may, for example: (1) obtain the commitment of the parties receiving the material to limit its distribution to specific persons; (2) ask unaffected parties to waive the receipt of certain material; or (3) issue appropriate orders. As an additional safeguard, all copies of such material should bear a prominent legend stating the limitations upon its distribution pursuant to the order of the ALJ.

In some agencies, such as the FCC or FTC, confidential information, particularly material claimed to be proprietary information or trade secrets, may be handled by procedures contained in a protective order issued by the ALJ.[122] The need for such an order often arises during pre-hearing discovery when a party refuses to release material to an adversary party, an intervenor, or the agency staff without provision for confidential treatment. The request for the order is usually grounded on the claim that unrestricted release of the material may result in its misuse, such as unfairly benefiting competitors. To guard against misuse of the information the order should provide the terms and conditions for the release of the material. It should also contain an agreement to be signed by users of the material, and may include procedures for handling the material if

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120. 5 U.S.C. § 555(d) (1994).

121. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

122. *See* Exxon Corp. v. F.T.C., 665 F.2d 1274 (D.C. Cir. 1981). For examples of agency regulations related to various protective orders, *see* 10 C.F.R. § 2.734 (2003) (Nuclear Regulatory Commission; confidential informant); 10 C.F.R. § 501.34(d)(2003) (Department of Energy); 14 C.F.R. § 13.220 (h) (2003) (FAA civil penalty actions); 15 C.F.R. § 25.24 (2003)(Department of Commerce, Program Fraud Civil Remedies); 16 C.F.R. § 3.31(d) (2003) (F.T.C.).

offered in evidence, including, for example, prior notification to the party submitting the material of the intention to offer it as evidence, and provisions for sealing the pertinent portions of the record, briefs, and decisions.[123] In some situations the ALJ may find it easier to allow the parties to draft a proposed order for his signature.

The ALJ must realize that protective order procedures could be inimical to the concept of a proceeding which is a matter of public record. Consequently, extreme care must be exercised in the issuance and application of the order to insure that the integrity of the record is preserved and the rights of the parties and the public are duly considered.

Moreover, the order should make clear that it does not constitute a ruling that any material claimed by a party to be covered is in fact confidential and entitled to be sealed and withheld from examination by the general public.[124]

C. *Testimony of Agency Personnel and Production of Agency Documents*

Testimony of agency personnel and the production of documents in agency custody must sometimes be restricted to protect the agency's investigative or decisional processes.[125] Consequently some agencies provide special procedures applicable to discovery requests for materials in the agency's custody, such as requiring that they be referred to the agency either initially or upon interlocutory appeal by the agency staff.[126] The ALJ should assure that these procedures are

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123. Forms 19-a-d in Appendix I are sample protective orders.

124. For further discussion of confidential material and administrative proceedings, *see infra* notes 242-48.

125. *See* 5 U.S.C. § 552(b) (1994 & Supp. V 1998). The cited statutory provision is part of the Freedom of Information Act (FOIA), which deals with public access to federal government records, rather than discovery by private litigants. FOIA and discovery pertaining to government records sought by private litigants obviously are related. At least some cases indicate that precedents construing one of the FOIA exemptions are not always irrelevant to issues involving discovery. *See*, McClelland v. Andrus, 606 F.2d 1278, 1285, n. 48 (D.C. Cir. 1979), Washington Post Co. v. U.S. Dept. of Health & Human Services, 690 F.2d 252, 258 (1982).

126. *See, e.g.*, 16 C.F.R. §§ 3.23(a), 3.36 (2003).

not used frivolously or for clearly improper purposes.[127]

In *Jencks v. United States* [128] it was held that the defendant in a criminal prosecution has the right to examine all reports in the possession of the prosecution that bear upon the events and activities to which a prosecution witness testifies at trial. This principle has been extended to administrative proceedings in which the agency is an adversary.[129] Some agencies have adopted procedural rules specifically directed to the "Jencks" problem.[130]

In ruling upon such requests, the ALJ does not occupy precisely the same position as did the court in *Jencks*. The Administrative Law Judge is not a court, or the representative of a separate branch of government who is being asked to compel unwilling disclosure by the agency. The Administrative Law Judge is an employee of the agency, who is making the initial decision for the agency itself as to what it shall voluntarily disclose. Accordingly, in the absence of agency policy to the contrary, and within the scope of sound discretion, the ALJ should be guided by agency policies and a sense of fair play rather than by a narrow legal analysis of whether, under *Jencks*, the Constitution would force the agency grudgingly to provide the information requested.

In the absence of good reasons to the contrary, the ALJ should seriously consider requiring production of all relevant and material factual statements, whether or not covered in the witness' testimony. (If nothing else, disclosure could prevent a court from later reversing and remanding the case, with an attendant waste of time for everyone concerned.) In deciding this question the ALJ, to the extent permitted by agency rules, may examine the statements *in camera*.

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127. *See* Domestic Cargo-Mail Serv. Case, 30 C.A.B. 560, 651 (1960).

128. 353 U.S. 657, 672 (1957). The principle of this case, with some modifications, was later codified, 18 U.S.C. § 3500 (1994). This provision is applicable only to criminal cases.

129. Great Lakes Airlines v. Civil Aeronautics Bd. of U.S., 291 F.2d 354, 363-365 (9th Cir. 1961); N.L.R.B. v. Adhesive Prod. Corp., 258 F.2d 403, 408 (2d Cir. 1958); Communist Party of the U.S. v. Subversive Activities Control Bd., 254 F.2d 314, 327-28 (D.C. Cir. 1958).

130. *See, e.g.*, 7 C.F.R. § 1.141 (2003) (Department of Agriculture, providing that production of such documents "shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act"); 17 C.F.R. § 201.231(a) (2003) (SEC).

To avoid delay at the hearing the ALJ may require the parties to submit such statements before the hearing.

D. *Reports, Estimates, Forecasts, and Other Studies*

Although most discovery questions which an Administrative Law Judge may encounter will be fairly analogous to discovery issues confronting courts, there are some situations which have few or no counterparts outside of administrative agency proceedings. For instance, historical data, statistical or technical reports, forecasts, or estimates may have to be prepared, sometimes by more than one party. If so, it is frequently necessary for the ALJ to establish standard bases and time periods. In addition, it is sometimes necessary to specify in some detail the manner of preparation -- by requiring, for example, that the parties use certain specified methods in preparing cost estimates. Use of such procedures should not prevent a party from supplementing its data with similar material in other forms, subject to the ALJ's discretion.

E. *Polls, Surveys, Samples, and Tests*

As with reports, estimates and forecasts, information may be needed about habits, customs, or practices for which little reliable information is available -- for example, the method of loading trucks, the volume of traffic along a particular route, or the percentage of travelers who prefer non-smoking areas. Polls, surveys, samples, or tests may be the most feasible methods of obtaining the needed data. These may have been previously prepared by a party or an independent source for other purposes or they may be prepared specifically for the pending proceeding -- either by one or more of the parties independently or with the consent and knowledge of the ALJ and the other parties as a part of the pre-hearing procedure.[131]

Polls, surveys, samples, and tests frequently raise serious questions of objectivity and reliability, especially if they have been prepared specifically for the proceeding in question. The ALJ should require the methods by which they were produced to be described in

131. *Cf.* 18 C.F.R. § 156.5 (2003) (F.E.R.C., Application for Orders under Section 7(a) of the Natural Gas Act).

sufficient detail to permit a fair evaluation of these factors. If a poll, survey, sample, or test is proposed, and prior approval is requested, the ALJ should seek agreement among the parties on the methods to be used. The ALJ may grant such approval, subject to the parties having an opportunity to raise objections during the course of the hearing.

IV. PRE-HEARING TECHNIQUES FOR EXPEDITING AND SIMPLIFYING THE COMPLEX PROCEEDING

The formal administrative hearing often is quite similar to a trial before an ALJ sitting without a jury. One party may have a claim against another, as in workers' compensation. Or, a government agency may be proceeding against a private party who allegedly has not complied with some law or regulation, as in enforcement proceedings under the National Labor Relations Act,[132] or the Occupational Safety and Health Act,[133] or any of a large number of other laws under which sanctions can be imposed and violations remedied. Then of course there are cases involving claims for benefits or entitlements payable by the government, such as Social Security disability benefits or veterans' benefits. A word often used to describe such proceedings is "quasi-judicial." Typically, these quasi-judicial proceedings are nearly identical to a formal adjudication without a jury. Pleadings of some sort -- complaint, charge, answer, response, etc. -- are filed.[134] There are adverse parties and pre-hearing discovery often is available. Witnesses testify orally on direct and cross-examination. The ALJ or other presiding officer usually disposes of the case by a decision, ruling, or order, with appeal to higher authority generally being available. In fact, the quasi-judicial, formal adjudicative model has been incorporated into administrative law and institutionalized by certain provisions of the APA[135] which are triggered, with certain exceptions, by any statute which requires an adjudication to be determined on the record after

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132. 29 U.S.C. §§ 151-68 (1994).

133. 29 U.S.C. §§ 651, *et seq.* (1994).

134. *See, e.g.*, 29 C.F.R. §§ 2200.30 -.41 (2003) (Occupational Safety & Health Review Commission).

135. 5 U.S.C. §§ 554, 556, 557 (1994).

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134. *See, e.g.*, 29 C.F.R. §§ 2200.30 -.41 (2003) (Occupational Safety & Health Review Commission).

135. 5 U.S.C. §§ 554, 556, 557 (1994).

opportunity for an agency hearing.[136]

Very often, these formal agency adjudications are relatively simple cases. There may be only a few witnesses; the sanctions may be small money penalties; the issues may fairly straightforward; the hearing may last only a few hours, or less.

However, some formal agency adjudications can be much more complicated. Complex issues or several parties with conflicting interests may be very entangled. The resolution of a number of legal questions may be contingent on disputed facts which are the subject of weeks of testimony and volumes of documentary evidence. The substantive statutory law may require the agency to apply open-ended criteria, such as "unfair competition," to decide whether a fabric of calculated ambiguities, enigmatic business strategies, unconventional advertising policies and unusual accounting practices amount to "unfair competition." Moreover, some types of complex cases are not wholly comparable to our usual notions of adjudications. An agency's organic statute may compel the ALJ, and ultimately the agency, to "adjudicate" cases which involve public policy, rather than liabilities for noncompliance with the law or entitlements to benefits. To mention only a few examples, the agency may have to determine which of several competing applicants would better serve "the public interest" in contexts such as granting broadcast licenses, providing electric power service to consumers, or transportation.

Although it would be naive, and misleading, to draw a sharp line between "simple," and "complex" cases, the fact remains that there are some cases which take more of an ALJ's time and effort than others. This Manual, like everything else, is subject to limitations of time and space. As a matter of priorities, a chapter on techniques for expediting and simplifying complex proceedings probably will be more worthwhile than a chapter belaboring the more routine type of cases. There is little need for a chapter focusing on cases which are short (the hearing lasts a day or less), and which involve few issues, few parties, few pre-hearing procedures, few exhibits, and a brief pre-hearing conference over the telephone. Certainly there is no strong need to develop special procedures to shorten the simpler hearing to save only an hour or two.

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136. 5 U.S.C. § 554(a) (1994).

Complex cases are another matter. They may involve hearings lasting from a few days to a month or more, with many parties, many issues, and factual questions of enormous difficulty. Typically, much of the testimony is highly technical and lengthy, and is submitted in written form prior to the hearing. For example, a Federal Energy Regulatory Commission (FERC) adjudication may have scores of separately represented parties taking different positions and presenting evidence. A typical FERC case may involve disputes concerning hundreds of millions of dollars in increased electricity or gas costs. Hearings may last two or three months, with a record well in excess of 10,000 pages.[137]

However, the emphasis in this chapter on complex cases carries no implication that the shorter case requires less technical or judicial skill than the complex one, or that the ALJ, regardless of agency or assignments, can competently perform the judicial function without being qualified for all types of cases, or that the ALJ trying simple cases has an easier task than the ALJ trying complex cases. The simple case frequently includes questions of credibility, the trying of which requires maximum judicial skill and insight. Furthermore, ALJs who hear only complex cases may decide only 10 to 25 cases per year. ALJs hearing simple cases frequently handle many times that number. For example, in 1992, individual Social Security Administration ALJs were handling an average of 450 cases per year.[138]

Still, for the complex case the Judge must try to expedite the proceeding while developing a fair and complete record. To accomplish this, several procedural tools have been developed for simplifying and managing such proceedings. These tools, with minor modifications at different agencies, and for different types of proceedings, have been used successfully for many years. In addition, more recent innovations in ADR devices and techniques offer considerable promise for simplifying the complicated case.

Examples of possible or proposed improvements in the conduct of complex proceedings can take varied forms. More than 25 years

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137. Federal Administrative Judiciary, *supra* note 4, at 849-50.

138. Letter dated May 20, 1992 from Acting Chief Administrative Law Judge Jose A. Anglada, Office of Hearings and Appeals, Social Security Administration, to Morell E. Mullins, principal revisor for the 3rd edition of this Manual.

ago, a leading practitioner advocated techniques for expediting formal proceedings by requiring most of the evidence to be submitted in written form, by making cross-examination subject to the discretion of the hearing officer, and by substituting a conference of lawyers and lay assistants for the formal hearing.[139] This approach does not seem to have been adopted completely by any agency, although it was suggested at the time that the Civil Aeronautics Board, for example, could have done so under then-existing law.[140] From time to time, bills have been introduced to amend the Administrative Procedure Act to broaden the circumstances in which agencies may substitute written procedures for oral testimony.[141]

Another innovative approach to complex cases is found in specialized procedures conducted by the Nuclear Regulatory Commission (NRC). The NRC is statutorily authorized the establish Atomic Safety and Licensing Boards, "each comprised of three members, one of whom [is] qualified in the conduct of administrative proceedings and two of whom . . . have . . . technical or other qualifications . . . to conduct hearings . . . with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this [Act] . . . ."[142] At the end of fiscal year 1990, the NRC had about 30 individuals who served on its Atomic Safety and Licensing Boards, and almost two-thirds of them were nonlawyers holding advanced degrees in engineering, physics, public health, medicine, or environmental science.[143]

When these boards are used, the technically qualified members of the Board contribute technical questions, comments, and observations in the resolution of preliminary or procedural matters and in the examination of technical witnesses. They take the lead in determining whether the Board has met its responsibility to develop a

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139. Westwood, *Administrative Proceedings: Techniques of Presiding,* 50 A.B.A. J. 659 (1964).

140. *Id.* at 662.

141. *Cf.* S. 262, 96th Cong., 2d Sess. (1980). It also should be mentioned that SSA ALJs often decide cases where most of the evidence is in written form, with additional testimony by lay witnesses. Anglada letter, *supra* note 138.

142. 42 U.S.C. § 2241(a) (2003). Relevant rules of practice governing proceedings before the Atomic Safety and Licensing Boards (and other NRC hearing bodies) are published in 10 C.F.R. Part 2 (2003).

143. THE FEDERAL ADMINISTRATIVE JUDICIARY, *supra* note 4, at 850-51.

reliable record and in advising the panel as to when, and what type of, additional evidence is needed. The Board can complete the record by advising the parties to produce additional evidence on a specified matter. Although technical members are not permitted to make a decision based on their personal knowledge of the facts, they have a duty to clarify any contradictory testimony. They may do this by questioning a witness, calling for the production of more testimony, or by calling a Board witness. By the use of a hearing panel of this type, an agency has personnel, specially trained in all facets of its operations, participating continually in each administrative hearing.[144]

Although without legislation other regulatory agencies cannot assign persons not qualified as Administrative Law Judges to preside over the taking of evidence in formal cases, there appear to be several NRC procedures that could be adopted by agencies using Administrative Law Judges. Most agencies either have, or have authority to employ, technical assistants such as accountants and engineers to assist their ALJs. Such assistants, if technically qualified, should be able to provide the ALJ in a technical case the same type of information that technical members of NRC panels provide. A technical assistant might not be permitted to question witnesses and participate directly in the hearing, but attending the hearing and advising the ALJ, on the record, during the hearing should present no problems.[145]

In a similar vein, it is well-established that an Administrative Law Judge can use an independent medical adviser as an expert

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144. Paris, *Role of the Scientist in NRC Administrative Proceedings*, 20 IDEA J. L. & TECH. 357 (1979); *see also* U.S. Nuclear Regulatory Commission, *Statement of Policy on Conduct of Licensing Proceedings* (CLI-81-8) (May 20, 1981).

Reviser's Note: The information in the present text regarding the Nuclear Regulatory Commission procedures, although based on the 1982 edition of this Manual, was slightly revised for the 1993 edition and this edition on the basis of information provided to the revisor by Judge Ivan Smith, Nuclear Regulatory Commission, during a telephone conversation on March 26, 1992. A written summary of the conversation is in the revisor's files.

145. For an article discussing legal and technical assistants to Administrative Law Judges, *see* Mathias, *The Use of Legal and Technical Assistants by Administrative Law Judges in Administrative Proceedings*, 1 ADMIN. L.J. 107 (1987).

witness in Social Security disability proceedings.[146] And certainly, with the passage of the ADR Act, various possibilities, especially the use of expert factfinding and neutral evaluation techniques, immediately should come to mind as devices for possible use in complex agency proceedings.[147]

In addition to using panels, the Nuclear Regulatory Commission developed other procedures to improve the hearing process. A brief summary of some of those which were used by the Atomic Safety and Licensing Board in the *Three Mile Island, Unit 1 Restart Proceeding* follows:

1. ***Lead Intervenor***—The intervenors are required to select a lead intervenor who consolidates the direct cross-examination with the other intervenors and then individually conducts the examination of the witnesses.

2. ***Cross-Examination Plans***—Parties wishing to cross-examine on prefiled direct testimony are required to submit a plan that is kept confidential by the Board until trial of the issue. The plan must be in sufficient detail to inform the Board of the points raised and to assist the Board in regulating cross-examination. It must specify (a) cross-examination objectives, (b) affirmative evidence that the cross-examination is expected to produce, and (c) the direct testimony that the cross-examination is expected to discredit.

3. ***Negotiations***—Negotiations, monitored by the Board, are required on procedural matters and specification of issues.[148]

Although procedures such as those described above may expedite the development of a complete record, efficiency still is not the only

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146. *See* Richardson v. Perales, 402 U.S. 389 (1971).

147. *See supra* notes 30-80.

148. RUHLEN, MANUAL FOR ADMINISTRATIVE LAW JUDGES 22-23 (1982) (citing conversation between Administrative Judge Merritt Ruhlen and Administrative Law Judge Ivan Smith, Nuclear Regulatory Commission, and letter to Judge Ruhlen from Lawrence Brenner, Consulting Legal Counsel, Nuclear Regulatory Commission (December 1, 1980)).

goal. Hearings must be conducted fairly and all interested persons who have something worthwhile to contribute must have an opportunity to participate. Moreover, the most efficient hearing conceivable can be rendered a near-total waste of time if this efficiency leads to prejudicial error and a case is reversed and remanded because of defective, unfair procedures.

The rest of this chapter describes procedures and devices which have been used in various agencies for facilitating the conduct of complex cases.

A. *Written Exhibits in Complex Cases*

In formal adjudications governed by the Administrative Procedure Act:

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.[149]

Preparation and exchange of direct and rebuttal evidence in writing before hearing is usually beneficial in complex cases.

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149. 5 U.S.C. § 556(d) (2003) (emphasis added). Although the Supreme Court has said that the term "hearing" as used in the Administrative Procedure Act "does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decision maker." United States v. Fla. East Coast Ry. Co., 410 U.S. 224, 240 (1973), judges should be extremely cautious about denying parties an opportunity to cross-examine witnesses. *See also* Cellular Mobile System of Pa. v. F.C.C., 782 F.2d 182 (D.C. Cir. 1985) ("Cross-examination is therefore not an automatic right conferred by the APA; instead, its necessity must be established under specific circumstances by the party seeking it.") and Cent. Freight Lines, Inc. v. United States, 669 F.2d 1063, 1068 (5th Cir. 1982) (cross-examination not an absolute right under the APA).

Furthermore, if such exchange of evidence is preceded by an exchange of information, subsequent proceedings are easier and the duration of the hearing is reduced. To obtain the maximum benefit the ALJ must study the proposed testimony before commencing the hearing.

The following pattern for the exchange of material, within reasonable but short time periods, is illustrative: first, each party furnishes information requested by others; second, each party submits its proposed direct evidence; third, each party submits rebuttal evidence; and fourth, each party submits surrebuttal, if any. Usually all parties observe the same exchange dates, though this may vary when appropriate. This pattern gives each party an opportunity (1) to examine information supplied by others before preparing its direct evidence; (2) to study the direct evidence of others before preparing rebuttal; and (3) to prepare cross-examination and procedural motions without interrupting the hearing or having to study the transcript during recesses.

Even when the parties cannot be required to submit all evidence in writing, they often may agree to present most of it in written form. Experienced counsel recognize that the advantages are many and the disadvantages few.

Oral testimony may be necessary if a witness is hostile to the party calling him or is not under his control, or if new evidence is discovered after the exchange of written evidence.

Written evidence is usually prepared in the form of exhibits, which may include narrative statements, testimony in question-and-answer form, tables, charts, or other documentary material. Each exhibit, if not self-explanatory, should contain notes or narrative to explain its meaning or purpose. Each separate document should be given an exhibit number, a symbol identifying the party submitting it, and, perhaps, a symbol identifying its subject. Each volume of exhibits should include a table of contents or index. If an exhibit contains extensive written testimony, it should have a separate index of the subjects covered.

Since the ALJ must rely on such an index or table of contents when preparing the decision or a personal index of the record, the parties should be informed that the titles must aptly and precisely describe the contents. The parties should be particularly admonished to avoid argumentative titles, or "singing titles," as they are

sometimes called.

In complex cases with several parties it is helpful to establish a uniform identification system. For example, in a transportation case involving an application for a new route, all parties may be required to put their historical traffic data in the A series, their traffic projections in the B series, and their revenue and expense estimates in the C series.

B. *Elimination or Curtailment of Hearing Suspensions*

Emergencies, or unexpected occurrences, sometimes require a suspension of the hearing. Counsel or a witness may become ill, an out-of-town witness may be delayed, counsel may have to appear in another forum, or it may be necessary to enforce a *subpoena* or other discovery process, or to prepare rebuttal or cross-examination with respect to newly discovered evidence.

However, the unnecessary or frequent suspension or recessing of hearings for substantial periods should not become a regular practice, even in complicated or multi-party cases. Repeated suspensions, each lasting from a week to several months, can cause a hearing to go on for years.

Protracted or frequent suspensions are usually unnecessary. Requests for suspensions are frequently based on assertions that additional time is needed (1) to prepare cross-examination; (2) to prepare a defensive case or rebuttal after hearing the proponent's case; or (3) to devise defensive strategy after cross-examination of the adversary's witnesses.

If the pre-hearing procedures in a complex, multi-party proceeding are carefully organized in the manner discussed in Chapter II (Pre-hearing Conferences and Settlements), counsel in most cases can complete substantially all of the basic preparation before the hearing commenced. Delay can be reduced and nearly eliminated by such procedures as: (1) requiring inclusion of the direct case with the original petition or application; (2) exchanging direct and rebuttal evidence before hearing; and (3) using rebuttal experts rather than cross-examination to answer expert testimony. The relative merits of cross-examining experts as compared with the

use of rebuttal experts have been discussed in an article by Judge Benkin of the Federal Energy Regulatory Commission.[150]

C. *Stipulations and Official Notice of Documentary Material*

Stipulations and official notice can avoid much factual presentation. Some agencies have provided by rule a list of the documents that will be officially noticed.[151] In the absence of, or in addition to, such a list the agency, the ALJ, or both, may announce that official notice will be taken of certain specific material, subject to the right of any party on timely request to introduce contradictory evidence.[152] The parties should be directed at the pre-hearing conference or by written notice to cite specifically any material of which they request official notice.

Parties frequently agree to stipulate to the existence of certain facts or, even more often, to the reception of certain evidence without oral sponsorship or authentication. In multi-party proceedings the ALJ may have the authority to appoint a continuing committee composed of representatives of the parties to consider and recommend stipulations.

On matters of authenticity of exhibits, the ALJ's instructions or the agency rules concerning exhibits may provide, among other things: (1) if a party wishes an exhibit to be received in evidence without oral sponsorship, he shall submit a written request to the ALJ and all parties, accompanied by the exhibit in question and by a statement signed by the person sponsoring it that it was prepared by him or under his direction and is true and correct; (2) within a specified time prior to the hearing any party desiring to cross-examine with respect to any such material shall give the ALJ and the parties written notice specifying the witness and the exhibit involved and the matters or parts of the exhibit upon which cross-examination is desired; and (3) if no request for cross-examination is received, the exhibit shall be received in evidence without oral sponsorship,

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150. I. Benkin, *Is it Bigger than a Breadbox? - An Administrative Law Judge Looks at Cross-Examination of Experts,* 21 A.F. L. REV. 365 (1979).

151. *See, e.g.,* 14 C.F.R. § 302.24(g) (2003) (DOT, Aviation Proceedings).

152. 5 U.S.C. § 556(d) (2003).

subject to objection on other grounds.[153]

D. *Intervention and Participation by Non-parties* [154]

In some proceedings only the designated parties and the agency take part—for example, proceedings for the revocation or suspension of licenses or permits, or for the imposition of civil money penalties. Other proceedings may attract participation by many people—for example, Nuclear Regulatory Commission plant siting cases and Department of Transportation railroad track abandonment cases (49 U.S.C. § 10903 (Supp. IV 1998)). An agency may provide for different categories of participation: for example, *intervention* by interested persons wishing to become parties to the proceeding, thereby assuming all of the rights and duties of parties;[155] or various forms of *limited participation* by interested persons who have insufficient interest or inadequate resources to assume party status.[156]

Petitions to intervene must be handled expeditiously because persons cannot prepare their cases properly until they know their official status. If the ALJ has authority a ruling should be made promptly; if not, the petitions should be immediately referred to the agency.[157] Some agencies have fairly detailed requirements, or list factors to be considered, for intervention.[158] Others have generalized

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153. *See, e.g.*, 46 C.F.R. § 201.131(d) (2003) (DOT, Maritime Administration); 42 C.F.R. § 1005.8(c) (2003).

154. *See* ACUS Recommendation 71-6, Public Participation in Administrative Hearings, 1 C.F.R. § 305.71-6 (1992).

155. *See, e.g.*, 14 C.F.R. § 302.20 (2003) (DOT Aviation Proceedings); 17 C.F.R. § 10.33 (2003) (Commodities Futures Trading Commission).

156. *See, e.g.*, 17 C.F.R. § 10.34 (2003) (Commodity Futures Trading Commission [C.F.T.C.], "Limited Participation"); 47 C.F.R. § 1.223(b) (2003) (F.C.C.); 17 C.F.R. § 10.35 (2003) (F.T.C., "Permission to state views"); 17 C.F.R. § 201.210(c) (2003) (SEC: "Parties and limited participation"); 29 C.F.R. § 2200.21(c) (2003) (Occupational Safety & Health Review Commission: "Intervention: appearance by non-parties"["The Commission or Judge may grant a petition for intervention to such an extent and upon such terms as the Commission or Judge shall determine."]).

157. Form 9 in Appendix I is a sample order granting, denying, and dismissing various petitions to intervene.

158. *See, e.g.*, 14 C.F.R. § 302.20 (2003) (DOT Aviation).

criteria.[159]

Although it is easier to manage a proceeding if all persons comply with the same rules, there are obvious advantages in providing a mode of limited participation for persons with limited interests that would be less expensive or burdensome than participation as a party. Agencies that allow such limited participation typically give the ALJ substantial discretion as to the scope of activity allowed.[160]

The ALJ should explain the rights of participants to inexperienced or uninformed persons, and should devise ways for them to introduce evidence or state their position with minimal disruption of orderly procedure. Generally, the ALJ may permit any person to appear, present evidence, submit argument, or cross-examine subject to the ALJ's supervision. A reasonable limitation on the number of persons permitted to submit similar evidence or arguments may be imposed. The ALJ may himself call such persons as witnesses and question them to develop facts or their point of view. Or, if there is no conflict of interest, or comparable problem, the ALJ may request agency staff to assist such persons or groups.

In complex, multi-party, multi-issue cases, the ALJ may be authorized to limit the required distribution of documents to those persons who have a direct interest in the pertinent issue -- subject, of course, to the right of any participant to request copies of material distributed to other participants. Interested persons or groups with modest resources may be permitted to file copies of their documents in the agency's public reference room instead of reproducing and mailing them to all parties; or, if the material is extremely brief, it may even be read at the hearing without prior delivery to the parties.

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159. *See, e.g.*, 24 C.F.R. § 1720.175 (2003) (HUD; (1) applicable law; (2) directness and substantiality of petitioner's interest in the proceeding; (3) effect on the proceeding of allowing intervention).

160. *See, e.g.*, 14 C.F.R. § 13.206(b) (2003) (FAA: "The administrative law judge may determine the extent to which an intervenor may participate in the proceedings."); 16 C.F.R. § 3.14(a)(2003)(F.T.C.: "The Administrative Law Judge or the Commission may permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper."); 29 C.F.R. § 2200.21(c) (2003) (Occupational Safety & Health Review Commission: "The Commission or Judge may grant a petition for intervention to such an extent and upon such terms as the Commission or the Judge shall determine").

Another possibility is to permit parties with limited resources to submit written testimony without being subject to cross-examination. This can sometimes be done by stipulation. In any event, subject to agency rules, such procedure may be authorized on the ALJ's own motion. Arrangements can vary with each case, but the ALJ should give each interested person as full and convenient an opportunity to participate as is consistent with that person's needs, the rights of others, and the efficient management of the proceeding.

E. *Joint Presentations*

Persons or groups having the same or similar interests may be encouraged to present part or all of their cases jointly, thereby easing the financial and work burden of each, saving the time of the other parties, and shortening the record. The ALJ may also encourage such persons or groups to select a single counsel to handle their cross-examination.

In cases of extreme complexity, with many parties, the ALJ may be able to *require* parties with the same or similar interests to be represented by a single counsel, or to join together in presenting a particular phase of their case.[161] This may include direct examination, cross-examination, and briefing. The ALJ may permit separate questions or argument about particular matters upon request by any counsel who shows that his position differs from other members of the group, or that his request to develop a point has been denied by the group counsel. Obviously, the ALJ's authority on such matters will depend on the agency's rules, and the ALJ's exercise of such authority must be exercised with careful regard to constitutional requirements related to due process and right to counsel.

F. *Organizing the Complex or Multi-Party Hearing*

Except in the shorter or simpler cases, the order of oral presentation should be established well before the hearing—in the

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161. *Cf.* 21 C.F.R. § 15.21(c) (2003) (FDA: "Public Hearing Before the Commissioner"). An example of such authority in the agency itself in appeals from ALJs can be found at 29 C.F.R. § 2200.95 (2003) (OSHRC).

pre-hearing conference report or by other notice.

The party with the burden of persuasion or proof should usually make the initial presentation, followed first by persons in support, second by persons in opposition, and then by others, if any. This order may be varied to fit the specific case. For example, frequently it is convenient to hear civic or consumer groups or individual participants with comparatively short presentations first. Or such participants may be permitted to appear at a scheduled time even though this interrupts other testimony. In multi-party proceedings each category of parties might be heard in alphabetical order or in any other convenient sequence.

Some parties or interested persons may find it impossible, or extremely inconvenient or expensive, to be represented at all sessions of the hearing. This is particularly true in lengthy and complicated cases with multiple issues, some of which are of no interest to certain participants.

While a party and counsel are responsible for protecting the party's interest at all times, the ALJ should take reasonable action, consistent with adjudicatory responsibilities, to prevent the absence of the party and counsel from prejudicing the party's interest. Any person's scheduling problems may be called to the attention of counsel and counsel may be requested to take reasonable action to keep such persons informed as to the progress of the hearing. Counsel will frequently oblige out of professional courtesy.

Major changes in scheduling, such as recalling a witness or having an additional day of hearings, will often inconvenience other parties. In some instances, however, the ALJ may be able to make minor changes, such as recessing a hearing early and advising counsel to be present at the next session so that counsel can hear the pertinent testimony. The ALJ should encourage reduction of these problems by informal agreement among counsel—for example, agreement that certain issues will not be pursued on certain days or that upon request counsel will advise an absent party when a specific matter will be presented.

G. *Special Committees*

When numerous parties or persons enter appearances it may be possible, and advisable, to designate a representative for each

identifiable group to discuss with the ALJ and other parties interim or emergency procedures. Through a committee of such representatives, the ALJ or any party may communicate with each group to obtain its viewpoint or position. If any person objects to this procedure and does not wish to be represented, it is usually a simple matter to give him personal notice.

H. *Telephone or Videophone Conference*

Conferences can be conducted either by telephone or videophone. Such a procedure was specifically authorized at the Federal Communications Commission as early as 1991,[162] and it has become quite common for the ALJ now to have broad authority to hold conferences by telephone.[163] The benefits of telephone conferences are obvious. They can eliminate the expense and inconvenience of travel or the delay of correspondence. They also are helpful when immediate access to data at a party's home office is desirable.

Although it may not be a practical means of conducting a large conference with many parties or numerous issues, such as a pre-hearing conference in a complicated rate or route case or a merger, it may save much time and travel in a simple case with simple issues or few parties. It may also be helpful and save time in complicated cases when a party has a simple procedural question. For example, when a postponement is requested, a party by a telephone call to the ALJ may initiate a telephone conference with representatives of the principal parties in order to solve a problem that would require weeks of correspondence or numerous telephone calls.

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162. 47 C.F.R. § 1.248(f) (1991).

163. *See, e.g.*, 5 C.F.R. § 24.2324(d) (2003) (Federal Labor Relations Authority); 7 C.F.R. § 1.140 (2003) (Department of Agriculture); 12 C.F.R. § 19.31 (2003) (Comptroller of Currency); 17 C.F.R. § 201.221(2003) (SEC); 29 C.F.R. § 2700.53 (2003) (Federal Mine Safety and Health Review Commission). *See also* Hanson, Mahoney, Nejelski, and Shuart, *Lady Justice -- Only a Phone Call Away,* 20 JUDGES J. 40 (Spr. 1981), and accompanying notes on personal experiences with telephone conferences. For some practical guidance, *see* the ABA's little booklet, *Telephone-Conferenced Hearings: A How-To Guide for Judges, Attorneys, and Clerks* (1983). For a case upholding procedures where the actual hearing, not just the pre-hearing conference, was conducted by telephone conference, *see* Casey v. O'Bannon, 536 F. Supp. 350 (E.D. Pa. 1982).

The earlier generation of videophones seldom was used for conferences. With improved and simplified technology, and the prospect of increasing travel costs, it is probable that the use of videophone conferences will increase.[164] Needless to add, technological developments related to the transmission of live images and voices over the Internet, satellite, or other media, will facilitate, and are likely to revolutionize conferences in the 21st century.

Some things must not change, however. Whatever devices are used to facilitate long-distance or "virtual" conferences, the ALJ is responsible for maintaining a clear record. The ALJ should assure, for example, that each participant is identified or clearly identifiable each time he or she speaks and that all documents referred to be clearly identified.

I. *Additional Conferences*

Additional conferences, if needed, may be called at any time. These serve the same purposes as the original pre-hearing conference, as well as to rectify or revise procedures that have broken down or to cope with new problems. Sometimes an additional conference may be scheduled at the opening of the hearing; but if further pre-hearing preparation is likely to be needed, the conference is best scheduled a reasonable time before the hearing.

J. *Trial Briefs or Opening Statements*

Some cases, particularly complex ones, can be facilitated by pre-trial briefs stating the principal contentions of the parties, the evidence to be presented and the purposes for which it is submitted, the names of the witnesses, and the subjects each witness will discuss. Such briefs may also present the results of research the ALJ has requested on legal or technical problems. The ALJ may instruct each party to include in the brief any procedural motions and requests, such as motions to strike proposed written evidence. In lieu of or in addition to the trial brief, the ALJ may require, or permit, an opening statement by counsel.

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164. Bulkeley, *Eye Contact: The Videophone Era May Finally Be Near, Bringing Big Changes*, WALL. ST. J., March 10, 1992, at 1.

K. *Interlocutory Appeals*

The rules of some agencies prohibit an immediate appeal from an ALJ's interlocutory ruling without the ALJ's permission and a finding that an appeal is necessary to, for example, prevent substantial detriment to the public interest or undue prejudice to any party.[165] Strict application of such a rule prevents unnecessary delay, avoids consumption of the agency's time on minor procedural matters, and saves the time and labor of the persons who would have to participate in the appeal.[166] The ALJ's rulings remain subject to review when the case is before the agency for review on its merits, and the reviewing agency ordinarily has ample authority to correct any problems which may result from a denial of interlocutory appeal.[167] Other agencies, although not always requiring an affirmative finding by the ALJ that an appeal is desirable, may impose such restrictions as to make permission of the ALJ and affirmative findings necessary except in a few specified circumstances.[168]

L. *Mandatory Time Limits*

To speed up administrative proceedings, Congress by statute,[169]

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165. *See, e.g.*, 14 C.F.R. § 13.219(b) (2003) (FAA civil penalty actions; delay on ruling would be detrimental to the public interest or result in undue prejudice to any party. For a provision vesting considerable discretion in the ALJ, *see* 15 C.F.R. § 904.253(a) (2003) (Department of Commerce, National Oceanic and Atmospheric Administration) (interlocutory appeal "if the Judge determines that an immediate appeal therefrom may materially advance the ultimate disposition of the matter." For a similarly worded provision, *see* 43 C.F.R. § 4.1124 (2003) (Department of Interior, surface coal mine hearings and appeals.) *See also* ACUS Recommendation 71-1, Interlocutory Appeal Procedures, 1 C.F.R. § 305.71-1 (1992).

166. Form 7 in Appendix I is a sample submission to the agency of an appeal from an interlocutory ruling.

167. *See* 5 U.S.C. § 557(b) (1994) (reviewing agency has all powers it would have had if it had made the initial decision, subject to agency's own rules or orders).

168. *See, e.g.*, 16 C.F.R. §§ 3.23(a) and (b)(2003) (F.T.C.); 17 C.F.R. § 10.101 (2003)(Commodity Futures Trading Commission).

169. For example, Congress as of 1988 had imposed time limits on certain proceedings pursuant to 19 U.S.C. § 1337 (1988). However, that statute has been

and some agencies by regulation,[170] have sometimes imposed time limits for completion of some or all of the steps in formal administrative proceedings. Rigid time limits often have undesirable consequences, but when imposed they do provide participants early notice of the time available and they also provide the ALJ with authority and support for the imposition and enforcement of deadlines. This authority, of course, can be used to expedite and streamline complex cases.[171]

The Administrative Conference of the United States, long familiar with the delays involved in complex administrative proceedings, considered this problem in 1978.[172] At that time it found that rigid statutory time limits tended to undermine an agency's ability to establish priorities and to control the course of its proceedings, and that such limits enabled outside interests to impose their priorities upon an agency through suit or threat of suit.

The Conference recognized, however, the value of time limits for reducing administrative delay and recommended that time limits should be established by the agencies rather than by statute. It

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amended to eliminate the time limit, substituting for it a provision requiring the agency to establish a target date for its final determination. 19 U.S.C. § 1337(b)(1) (1994)(The amendment was among those contained in P.L. 103-465, Title II, Subtitle B, Part 2, § 261(d)(1)(B)(ii), Title III, Subtitle C, § 321(a), 108 Stat. 4909, 4910, 4943).

170. Since the 3rd edition of this Manual was published, such regulations seem to be on the decline. For example, two regulations cited as examples in the 3rd edition, 17 C.F.R. § 10.84(b)(1992)(CF.T.C.), and 16 C.F.R. § 3.51 (1992) (F.T.C.), have been amended. 17 C.F.R. § 10.84(b) (2003) no longer imposes time limits, and 16 C.F.R. § 3.51 (2003) allows the ALJ to request an extension of time, although the ALJ's decision, with some exceptions, still must be issued within one year.

171. *See, e.g.*, 5 C.F.R. § 1201.173(f)(3) (2003) (Merit Systems Protection Board: "Because of the short statutory time limit for processing these cases, parties must file their submissions by overnight Express Mail . if they file their submissions by mail."); 29 C.F.R. § 525.22 (2003) (Department of Labor, Wage & Hour Division, employment of workers with disabilities under special certificates: "Because of the time constraints imposed by the statute, requests for postponement shall be granted only sparingly and for compelling reasons.").

172. E. Tomlinson, *Report on the Experience of Various Agencies with Statutory Time Limits,* 1978 ACUS Recommendations and Reports 119 ("Time Limits on Agency Actions"); ACUS Recommendation 78-3, 1 C.F.R. § 305.78-3 (1993).

advised, further, that if Congress does enact time limits, it should recognize that special circumstances may justify an agency's failure to act within a predetermined time, and it should require agencies to explain departures from the legislative timetable in current status reports to affected persons or to Congress.[173]

Although statutory time limits may hinder the efficient and fair processing of some cases, and may be impossible to meet in others, the ALJ should, if possible, adopt procedures and rules which meet these deadlines. The ALJ should always keep accurate records of the steps involved and any difficulties encountered that will explain any failure to meet time limits. Such information can be of value to the agency or the Congress in appraising both agency performance and the appropriateness of time limits.

M. *Summary Proceedings*

Delays in the administrative process can be avoided by eliminating or curtailing evidentiary hearings when no genuine issue of material fact exists or when the factual evidence can be submitted in written form.

The Administrative Conference of the United States recommended the adoption of procedures providing for summary judgment or decision.[174] The Conference's recommendation contains a model rule that was adopted nearly verbatim by several agencies, including the Commodity Futures Trading Commission,[175] the Federal Communications Commission[176] and the Federal Trade Commission.[177] Other agencies, including the Consumer Product Safety Commission,[178] the Environmental Protection Agency,[179] and

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173. *Id.*

174. Recommendation 70-3, Summary Decision in Agency Adjudication, 1 C.F.R. § 305.70-3 (1993). As discussed in the Preface to the 2001 Interim Internet edition, and elsewhere in this Manual, funding for the Administrative Conference of the United States (ACUS) ceased in and ACUS is no longer an operative agency of the federal government.

175. 17 C.F.R. §§ 10.91-10.92 (2003).

176. 47 C.F.R. § 1.251 (2003).

177. 16 C.F.R. § 3.24 (2003).

178. 16 C.F.R. § 1025.25 (2003).

179. 40 C.F.R. §§ 164.91, 164.121 (2003). 18 C.F.R. § 511.25 (2003).

the Department of Transportation,[180] have rules that are consistent with the ACUS recommendation. In fact, provision for summary decision is quite common in agency regulations.[181]

Moreover, explicit agency regulations may not be absolutely necessary. Although the Federal Energy Regulatory Commission's rules did not specifically authorize the ALJ to use summary proceedings in 1979, the Commission ruled that under the ALJ's powers to control a proceeding and to dispose of procedural matters he had authority to rule on motions for summary judgment.[182] Thus, the Federal Energy Regulatory Commission's action suggests that, unless specifically forbidden, an ALJ could use this procedure under his general powers to control a formal proceeding.[183]

ALJs handling cases amenable to summary disposition may benefit from consulting the appropriate provisions of the Federal Rules of Civil Procedure and referring to Professor E. Gellhorn's discussion of the summary decision in his report to the Administrative Conference of the United States in support of the Conference's recommendation.[184]

N. *ADR*

It almost goes without saying that ADR and the authority created

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180. *See, e.g.*, 10 C.F.R. § 2.749 (2003) (Nuclear Regulatory Commission); 21 C.F.R. § 12.93 (2003) (FDA); 29 C.F.R. § 1841 (2003) (Department of Labor, Office of Administrative
Law Judges); 29 C.F.R. § 1905.41 (2003) (Department of Labor, variances from safety and health standards); 29 C.F.R. § 2570.67 (2003) (Department of Labor, Pension & Welfare Benefits, assessment of civil penalties).

182. Minn. Power & Light Co., Docket No. ER78-425 (March 26, 1979); Tex. E. Transmission Corp., 10 F.E.R.C. ¶ 63,068 (April 30, 1980).

183. 5 U.S.C. § 554(c) (1994) states that the agency is to give interested parties an opportunity for "the submission and consideration of facts . . . when time, the nature of the proceeding and the public interest permit." (Emphasis added). If facts in a case are essentially uncontroverted or uncontested, it would seem implicit in this provision of the APA that an ALJ would be authorized to resolve the case in summary judgment fashion. In a related vein, courts have recognized that cross-examination is not an absolute right under the APA. Cellular Mobile Sys. of Pa., Inc. v. F.C.C., 782 F.2d 182 (D.C. Cir. 1985).

184. *See* Ernest Gellhorn & William F. Robinson, Jr. *Summary Judgment in Administrative Adjudication,* 84 HARV. L. REV. 612 (1971).

by the ADR Act[185] will offer even more opportunities for ALJs to streamline all sorts of difficult and complex cases. The ALJ now can be authorized, among other things, to hold conferences addressing the use of ADR procedures, to encourage the use of ADR methods, and even to require attendance at conferences by representatives of parties who have the authority to negotiate concerning the resolution of issues in controversy.[186] ADR's potential for expediting and simplifying complex proceedings has barely been tapped. Techniques such as mediation, early neutral evaluation (ENE), the settlement judge, minitrials, and arbitration[187] will become available in various agencies,[188] Ingenuity and innovation will suggest new hybrids. There will be challenges, as in the past, to adapt to changing circumstances. There will also be opportunities once more to demonstrate how versatile and valuable the Administrative Law Judge, as an institution, can be.

V. THE HEARING

A. *Preparation*

1. Notice

A notice of hearing complying with statutory requirements and agency rules should be served upon all parties.[189] In addition, statutory provisions or agency rules may require notice to be published in the Federal Register.[190] Even though responsibility for

185. *See supra* notes 28, 70.

186. *See supra* notes 27-29.

187. *See supra* notes 30-80.

188. *See, e.g.*, 48 C.F.R. § 6302.30 (2003) (DOT Board of Contract Appeals; states that Board has adopted two ADR methods, Settlement Judges and Mini-Trials); 18 C.F.R. § 385.604 (2003)(Department of Energy, alternative dispute resolution includes but is not limited to conciliation, facilitation, mediation, factfinding, minitrials, and arbitration); 14 C.F.R. § 17.33 (FAA, Department of Transportation)(2003); 40 C.F.R. § 22.18 (Environmental Protection Agency; civil penalties, revocation, termination, suspension of permits).

189. Forms 10-a and 10-b in Appendix I are examples of notices of hearing.

190. For examples of regulations regarding publication of notice in the Federal Register, *see* 7 C.F.R. § 1200.5 (2003) (Department of Agriculture) (Rules of Practice regarding proceedings to formulate or amend an order); 10 C.F.R. § 2.104

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notice may fall on agency staff, the ALJ should personally make certain that all legal requirements are complied with and that all persons who participated in the pre-hearing conference or who requested notice receive actual notice.

2. Place of Hearing

The APA, with respect to formal adjudicative hearings, provides expressly that "due regard shall" be paid to the "convenience and necessity of the parties" in fixing the place, and time, of hearings.[191] Accordingly, the ALJ should consider holding the hearing in the field if anyone suggests it. Agency rules and unavailability of travel funds may override the ALJ's willingness to hold field hearings. (However, agency rules quite commonly track the APA with respect to the place of hearing.[192]) In the absence of budget constraints or clearly applicable agency rules, factors to be considered are the convenience of interested persons, the suitability of the hearing facilities involved, and the locations of the parties and witnesses. Sometimes, when several geographical areas are affected or interested persons have different places of business or interest, it may be desirable to hold sessions in two or more places. In some agencies such as the Social Security Administration and the Occupational Safety & Health Review Commission, the problem of travel is reduced by stationing ALJs in the field. Even so, the ALJs of such agencies frequently travel in order to hold hearings at sites convenient to the parties and witnesses.

In agencies where field hearings are not fairly routine, the site of

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(2003) NRC); 14 C.F.R. § 77.49 (2003) (FAA; objects affecting navigable airspace): 16 C.F.R. § 3.72 (2003) (F.T.C., Reopening of certain proceedings); 21 C.F.R. § 1301.43 (2003) (Drug Enforcement Administration, registration of manufacturers, distributors, dispensers of controlled substances); 40 C.F.R. § 179.20 (2003) (EPA, Pesticide Programs).

191. 5 U.S.C. § 554 (b) (1994).

192. *See, e.g.*, 7 C.F.R. § 47.15(c) (2003) (Department of Agriculture, reparation proceedings; "careful consideration to the convenience of the parties"); 10 C.F.R. § 2.703(b) (2003) (Nuclear Regulatory Commission, domestic licensing proceedings); 14 C.F.R. § 13.55 (2003) (FAA); 29 C.F.R. § 2200.60 (2003) (Occupational Safety & Health Review Commission, "as little inconvenience and expense to the parties as is practicable"; 49 C.F.R. § 821.37 (2003) (N.T.S.B., air safety proceedings).

the hearing often is an ad hoc matter. Especially in such agencies, another factor to be considered is the nature of the parties. For example, if a private party is seeking a lucrative privilege or a benefit such as a license, it may be fair to place the travel burden on him. However, if the agency threatens imposition of a sanction or withdrawal of a license, it may be more equitable to hold the hearing at the place requested by, or convenient to, the respondent.

An early determination of the place of the hearing benefits all parties. If a pre-hearing conference is held, the ALJ should announce the time and place of hearing either at the conference or in the conference report. If no conference is held, the announcement is made in the Notice of Hearing. In cases where a field hearing is scheduled, an order should be issued, and the parties notified. Where appropriate, the hearing may be publicized in the local communities affected.[193]

3. Hearing Facilities

Comfortable and functional hearing facilities are of real assistance in developing an accurate record. Most agencies have satisfactory hearing facilities at their home offices. Moreover, the ALJs of agencies which commonly hold field hearings may develop and share an extensive network of contacts with governmental and non-governmental bodies which can provide suitable hearing facilities. However, locating or obtaining such facilities still may be difficult, especially for an ALJ whose agency rarely holds field hearings. There are several potential sources of information about hearing facilities: other federal Administrative Law Judges; the offices of hearings and appeals of various federal agencies; local and regional offices of various federal agencies; state Administrative Law Judges or hearing officers (especially those in agencies such as workers' compensation); and state agencies themselves. These are

193. *See* 7 C.F.R. § 900.4 (2003) (Department of Agriculture, proceedings for marketing orders; authorizing Administrator, among other things, to issue press release regarding hearing); 7 C.F.R. § 1200.5 (2003) (Department of Agriculture, proceeding under research, promotion, and education programs); 40 C.F.R. § 142.33(a) (2003) (EPA, drinking water, Federal Register and newspaper of general circulation).

only some of the sources which may provide information helpful in locating hearing facilities. Another source of information abut hearing facilities is the regional office of the GSA Public Building Service, or the manager of a federal building in the area where the ALJ contemplates holding the hearing.

If all else fails, the ALJ may be able to obtain adequate facilities by making arrangements directly with a local college, school, library, civic association, hotel, or any other public or private organization with satisfactory facilities. Counsel or interested persons in the area may provide assistance. In some agencies the staff arranges for the hearing room subject to the ALJ's approval.

The ALJ should inspect the hearing room a substantial time before opening the hearing, if possible, to check the heating or air conditioning, lighting, furniture arrangement, seating facilities, and the public address system. The furniture should be arranged so that everyone in the room can see and hear the witnesses, and the reporter can see and hear the ALJ, the witnesses, and counsel.

The ALJ is responsible for the hearing room and furniture, and should take care to maintain them in the condition in which they are received. The ALJ should remind participants to refrain from unauthorized use of telephones that may be found in the hearing facilities. Smoking or eating in the hearing room should be prohibited whether or not the hearing is in session. If night or weekend sessions are contemplated the ALJ should make necessary arrangements for opening and closing the room. If parties must leave documents overnight in the hearing room, the ALJ should arrange for overnight security.

B. *Mechanics of the Hearing*

There is no rigid script for a formal administrative hearing, although traditionally the party with the burden of proof makes the first presentation. Still, the organization and form depend upon such factors as agency rules, the type of case, the issues, the number of parties and witnesses, agency custom, and the temperament of the ALJ. The one universal criterion is the development of a fair, adequate, and concise record.

A formal administrative hearing should possess substantially the same formality, dignity, and order as a judicial proceeding. It should

move as rapidly as possible, consistent with the essentials of fairness, impartiality, and thoroughness.

1. Transcript

Formal proceedings are recorded verbatim.[194] The reporter may use shorthand, stenotype, or any other recording device. (In some agencies, the rules may authorize or contemplate tape recording, rather than stenographic reporting.[195])

Agency rules and policies vary considerably when it comes to the cost of transcripts to a party or other interested person. In many agencies, copies of the transcript are made available at rates established by the agency, although some agencies have provisions for furnishing a copy without charge, and with the advent of the Internet, a transcript may be available on an agency website.[196] Daily copy may be available, but at a substantial premium if the reporting is done by a private company. Pursuant to the Federal Advisory Committee Act, an agency, subject to certain exceptions, may be required to make copies of the transcript available to any person at actual cost of reproduction.[197] In addition, agencies can make copies of transcripts available for inspection at the agency offices.[198]

Since an accurate transcript is essential the ALJ should insure faithful reproduction. With an unfamiliar reporter, it may be desirable to have material read back early in the hearing to determine

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194. *See* 5 U.S.C. § 556(e) (1994).

195. *See* 5 C.F.R. § 1201.53 (2003) (Merit Systems Protection Board); 38 C.F.R. § 20.714 (2003) (Board of Veteran's Appeals; 7 C.F.R. § 11.8(c)(5)(iii) (2003) (Department of Agriculture National Appeals Division Rules of Procedure); 40 C.F.R. § 24.16 (2003) (EPA, certain hearings on corrective action orders).

196. *See* 10 C.F.R. § 2.750(a) (2003) (Nuclear Regulatory Commission: http://www.nrc.gov). For examples of agency rules dealing with traditional forms of transcript, *see* 20 C.F.R. § 416.1565(o) (2003) (Social Security Administration: SSI, payment may be waived "for good cause"); 34 C.F.R. § 81.18(a) (2003) (Department of Education, General Education Provisions Act: transcript available "at a cost not to exceed the actual cost of duplication").

197. *See* 5 U.S.C. App. § 11 (1994); *see also* 1 C.F.R. § 305.71-6 (1993) (Administrative Conference Recommendation, Public Participation in Administrative Hearings).

198. *See, e.g.*, 10 C.F.R. § 2.750(a) (2003) (NRC Public Document Room); 47 C.F.R. § 1.202 (2003) (F.C.C.).

its accuracy. Before opening the hearing the ALJ should supply the reporter with the names of the parties and counsel, their physical location in the hearing room, and any other information that will help the reporter identify the participants. The reporter should be stationed where the ALJ, witnesses, and counsel can be easily heard. The reporter should be told to notify the ALJ if there is a need to change tapes, an inability to hear the parties, personal fatigue, or some other difficulty that might interfere with obtaining an accurate transcript. However, the reporter should not interrupt the proceeding except for such reasons.

Upon request and subject to agency rules, counsel may be permitted to record the hearing for his own use, provided the recording is done unobtrusively. However, the transcript is the only official record of the hearing.

2. Convening the Hearing

The ALJ should convene the hearing, announce the title of the case, and, if appropriate, give preliminary instructions concerning decorum, procedure, and hearing hours. The opening should, of course, be adapted to the type of case and the circumstances. When all interested persons are represented by knowledgeable and experienced counsel the opening statement can be brief. But if counsel or interested persons who are not acquainted with the agency's hearing procedure are present, the ALJ should explain in detail what the case is about and the procedures to be followed.

Appearances should be entered in the same manner as at the pre-hearing conference.[199] Ideally, any preliminary motions of substance should have been addressed and decided prior to commencement of the actual hearing. However, where this is not feasible, the ALJ, after appearances are entered, should receive and either dispose of or take under advisement, any preliminary motions. Motions relating to hearing procedures should normally be disposed of immediately.

Each witness should be sworn before testifying.[200] When a

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199. *See supra* notes 93-94.

200. The following oath or affirmation is sufficient: "Do you solemnly swear (or affirm) that the testimony you are about to give is the truth, the whole truth, and nothing but the truth (so help you God)?" In exceptional cases, such as religious

person testifies before being sworn, the oath can be modified to cover testimony previously given.

In a case with few witnesses, all or most of whom are present at the opening of the hearing, it sometimes saves time and is more convenient to swear all potential witnesses in a group at the opening of the hearing. If some do not testify, no harm is done. Witnesses not present at the opening of the hearing can be sworn later.

3. Trying the Simple Case

Again, the distinctions between simple and complex cases often are matters of degree. However, such distinctions provide a framework for organizing a discussion. The following remarks are addressed to the relatively simple case.

a. ***Opening Statement.*** Before the parties present their direct cases, the ALJ should give counsel an opportunity to make an opening statement setting forth the relief requested, a short description of the evidence to be submitted, and a short summary of other relevant matters. The ALJ may require all statements to be made at the opening of the hearing, or may permit each counsel to make a statement when presenting his direct case. Opening statements should not be subject to questioning except for clarification.

b. ***Direct Presentation.*** The ALJ should call upon each party to present its case in a predetermined order. In two-party cases it is customary to call on the party having the affirmative, if such distinction exists, to present his case first.

The rules of evidence in formal administrative hearings will be examined in more detail later in this Manual. However, for the purpose of discussing the relatively simple case, it should be noted that in many Federal administrative

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objections to both oaths and affirmations, it would appear that no particular form of words is required. A statement indicating that the witness is aware of the duty to tell the truth and understands that he or she can be prosecuted for perjury for failure to do so should be sufficient. *See* Gordon v. Idaho, 778 F.2d 1397 (9th Cir. 1985).

proceedings the Federal Rules of Evidence do not apply.[201] However, there are exceptions.[202] Moreover, even if the Federal Rules of Evidence are not applicable by agency rule, they may provide guidance for filling in gaps, and in situations where the ALJ has discretion in conducting the hearing. For example, when the witness is friendly and there is a question of credibility, it is may be advisable for the ALJ to hark to the rule restricting leading questions.[203]

Some of the procedures for admission of exhibits which are discussed later, in connection with the complex case, may not be applicable in a simple case. Still, reference to that section may be helpful in addressing some of the difficult questions pertaining to the presentation and receipt of evidence. For present purposes, it should be noted that even in a "simple" case the ALJ should use pre-hearing conferences or other devices to lay the groundwork for smooth, professional handling of exhibits and other evidence. Agency rules may provide expressly for exchange of proposed exhibits prior to the hearing or similar procedures.[204] Moreover, when problems of authenticity are involved, and agency rules are not dispositive, the ALJ may be able to give substantial weight to Federal Rules 901-903.

c. ***Cross-examination.*** In proceedings involving more than two parties it is frequently advantageous to permit that party who has the most substantial adverse interest to cross-examine first. Otherwise the order of cross-examination may be prearranged at the ALJ's discretion.

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201. *See, e.g.*, 10 C.F.R. § 1013.34 (2003) (Department of Energy, Program Fraud Civil Remedies and Procedures).

202. For one exception, *see* 29 C.F.R. § 2200.71 (2003) (Occupational Safety & Health Review Commission). However, in simplified proceedings (E-Z Trial) before the same agency, the Federal rules of evidence do not apply. 29 C.F.R. § 2200.209(c) (2003).

203. FED. R. EVID. 611.

204. *See, e.g.*, 7 C.F.R. § 15.113 (2003) (Department of Agriculture: Nondiscrimination); 28 C.F.R. § 68.43 (2003) (Department of Justice: Unlawful employment of aliens and related employment practices); 29 C.F.R. § 18.47 (2003) (Department of Labor).

On matters of credibility the ALJ should be alert to prevent both coaching the witness (indicating the answer desired by a nod or other signal) and the interruption of cross-examination by distracting objections or otherwise. On the one hand, the ALJ may permit more wandering, illogical, and perhaps less relevant questioning if counsel is in good faith attempting to trap a recalcitrant or possibly dishonest witness. On the other hand, the ALJ may find it desirable to let objecting counsel know that frivolous objections are counter-productive, or to defer a recess or to refuse to go off the record. If witnesses are sequestered, it may be necessary to prevent witnesses who have not testified from talking to witnesses who have. This can frequently be accomplished by extending the length of the session to avoid overnight or other lengthy recesses. Also, it goes without saying that the ALJ should be alert to protect a witness, and the record, if the witness is unsophisticated, unfamiliar with courtroom procedure, timid, or suffering from any other personal trait or handicap that would make for vulnerability to the questioning of a clever or forceful lawyer. The ALJ should assure, as much as humanly possible, that the record reflects the witness' actual observations and viewpoints.

When cross-examination by all adverse parties is concluded, the ALJ should permit redirect examination on matters brought out on cross-examination.

If there is more than one party in an otherwise simple case, each party in turn should try its case in the manner outlined above except that each party should, during or at the conclusion of its direct presentation, rebut the case of any party that has previously presented its direct case. Each party should be permitted to rebut the cases of those parties that followed it in making their direct presentations.

The ALJ should usually excuse a witness when his testimony is concluded, subject to recall pending later developments at the hearing.

d. ***Miscellaneous.*** Administrative proceedings conducted under particular statutes, types of regulations, or agency customs may present special problems that call for alertness and

ingenuity on the part of the ALJ. For example, in Social Security claims cases the agency is not represented and the claimant may appear without counsel.[205] Although these Social Security cases are not normally considered adversary proceedings, they do require a delicate sense of fairness and an extra effort by the ALJ to insure that the record is fully developed and that the claimant is fully aware that the ALJ is treating both the agency and the claimant fairly and impartially. Indeed, courts have remanded cases for further hearing when Administrative Law Judges have not met their special obligations in cases involving unrepresented claimants.[206]

The unrepresented party is more likely to be encountered in the "simple" cases. The ALJ often needs a high order of skill to deal with the inexperienced *pro se* party, especially in proceedings which structurally are more adversarial than Social Security disability cases. The *pro se* party may never have been in a hearing room or courtroom before. The ALJ sometimes is whipsawed between complying with the

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205. It should be noted that the Social Security ALJs operate under a special statutory regimen in disability cases, where they are not presiding over purely adversarial proceedings. In a sense, the Social Security ALJs are under a duty to independently consider the positions of all parties. *See* Richardson v. Perales, 402 U.S. 389 (1971); *see also* Rausch v. Gardner 267 F. Supp. 4, 6 (E.D. Wis. 1967) (ALJ wears "three hats.") Incidentally, the number of cases where a claimant is represented seems to have increased substantially. As of 1992, the rate of claimants represented by an attorney apparently was over 80%. Letter from Acting Chief Administrative Law Judge, dated May 20, 1992, to Morell E. Mullins, principal revisor of the 1993 edition of this Manual. Moreover, it is not beyond the realm of possibility that the agency may seek, directly by legislation or indirectly by other means, to have legal representation at some hearings. *Cf.* Salling v. Bowen, 641 F. Supp. 1046 (W.D. Va. 1986).

206. The Ninth Circuit has stated that: "When a claimant is not represented by counsel, the administrative law judge has an important duty to scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts and he must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited." Cruz v. Schweiker, 645 F.2d 812, 813 (9th Cir. 1981) (citation omitted). *See also* Sims v. Harris, 631 F.2d 26, 28 (4th Cir. 1980). Another typical case follows a similar philosophy, referring to the ALJ's duty to probe and explore relevant facts if a claimant is unrepresented by counsel and disabled. Poulin v. Bowen, 817 F.2d 865, 872 (D.C. Cir. 1987).

mandate of reviewing courts -- take the unrepresented party's circumstances into consideration -- and the simple fact that the unrepresented party may be difficult to control. This party may present the volatile combination of a weak case and strong feelings about the righteousness of his or her cause. Furthermore, *pro se* cases occasionally involve conflicting claims and personal animosity. A relatively small amount of benefits or penalty sometimes generates more ill-will and hard feelings than larger sums. Also, the ALJ sometimes must make special efforts to calm witnesses who are frightened, confused, or angry and must be prepared to cope with intemperate outbursts and, if worse comes to worse, even physical violence.

In enforcement cases brought by federal agencies, the problems may be particularly acute. The *pro se* party who is the subject of civil penalty or other proceedings brought by an agency, such as the Occupational Safety and Health Administration, may be quite angry. Even worse, the *pro se* party may have a yen to "play lawyer," but is handicapped by misunderstanding, fostered by the distortions of the popular media, about what lawyers do, and how they do it.

Other problems may arise in the "simple" case, even when a party is represented by counsel. For example, in enforcement cases, there is often a real need for an agency to protect sources of information, to develop evidence from hostile sources, and to prevent possible fabrication of rebuttal testimony. Use of some of the procedural devices previously discussed, such as pre-hearing discovery, may be modified or curtailed in such agencies, such as the National Labor Relations Board. In cases of this nature, devices similar to some of those described below, such as *in camera* inspection of documents,[207] may be helpful.

4. Trying the Complex Case

In addition to the suggestions set out under *Convening the*

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207. *See infra* notes 246-48.

Hearing and *Trying the Simple Case,*[208] there are several techniques that the ALJ handling a complex case may find useful for developing a relatively concise, but complete and fair record. Applicability will depend on such variables as the type of case, the issues, the number (and possible grouping) of parties, and the place of hearing. Each case requires tailoring. A boiler-plate script or customary format may not be possible or desirable because of the great variety of types of cases heard by Administrative Law Judges in different programs and different agencies.

Nevertheless, the following discussion may be useful for arranging and organizing a hearing in a complex case. This discussion assumes that written testimony, both direct and rebuttal, has been exchanged a substantial period of time before the hearing commences.[209] Agency rules, or other considerations, may limit the ALJ's authority in this respect, of course.

a. *Direct Presentation*

In complex cases, the ALJ by pre-hearing order (or the agency rules) may have laid the groundwork for introduction of exhibits. If not, it may be desirable to hold a preliminary admissions conference, before the hearing, at which the parties identify their proposed exhibits, objections of opposing counsel are received, and the ALJ rules on the admissibility of challenged portions.

If written testimony has been exchanged as part of the pre-hearing development of a case, each party should be called upon in a

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208. *See supra* notes 199-206.

209. For examples of agency rules which contemplate exchange of written testimony or summaries, *see* 12 C.F.R. § 308.106 (2003)(FDIC, General Rules of Procedure; ALJ may order parties to present part or all of their case in chief in the form of written statements and exhibits); 14 C.F.R. § 16.223 (2003) (FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings; subject to certain exceptions, "party's direct and rebuttal evidence shall be submitted in written form in advance of the oral hearing pursuant to the schedule established in the hearing officer's pre-hearing conference report"); 15 C.F.R. § 971.901 (2003) (National Oceanographic and Atmospheric Administration, Deep Seabed Mining; "judges will have the power to . . . require the submission of part or all of the evidence in written form"); 18 C.F.R. § 385.601(c) (2003) (F.E.R.C., Rules of Practice and Procedure; authorizing presiding officer to order exchange of exhibits and testimony in advance of the hearing).

predetermined order to present its entire case, including all rebuttal evidence. Counsel may be required or permitted to make an opening statement. This is not subject to cross-examination, though the ALJ and counsel may ask questions.

Normally counsel should present any exhibits for identification, and should specify which exhibits will be sponsored by each witness and the order of presentation. He should then call his first witness, qualify him, have him sponsor or authenticate his exhibits,[210] (if needed) and commence direct examination. Testimony regarding exhibits may be confined primarily to the correction and clarification of exhibits and to matters that have occurred since the exhibits were prepared. Exhibit material should not be summarized, repeated, or read. Following direct examination, counsel should offer the witness' exhibits in evidence before the witness is released for cross-examination.

In the event that cross-examination on any exhibits has been waived, counsel, following their identification, may simply offer them in evidence.[211] They should be received, subject at any time to any objection other than lack of oral sponsorship.

b. *Receipt of Exhibits*

When exhibits are offered, the ALJ should consider motions to strike. The ALJ should take careful note of the material objected to and the basis of objection. When all objections have been received, the ALJ should announce what testimony (not otherwise objected to) is deemed improper, giving his reasons. Counsel for the witness

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210. The sponsoring question may be phrased as follows: "Were exhibits _____ prepared by you or under your control and supervision, and are they true and correct to the best of your knowledge and belief?" For examples of some regulations pertaining to sponsorship or authentication, *see* 24 C.F.R. § 180.645 (2003)(Housing and Urban Development; civil rights matters); 46 C.F.R. § 201.131 (2003) (Maritime Administration); 7 C.F.R. § 15.113 (2003) (Department of Agriculture, civil rights, authenticity of documents deemed admitted unless time written objection filed).

211. For examples of agency rules contemplating the pre-hearing development of questions such as authenticity, *see* 7 C.F.R. § 15.113 (2003) (Department of Agriculture, Hearings under Civil Rights Act of 1964); 17 C.F.R. § 201.221(c)(3) (2003)(SEC); 29 C.F.R. § 18.50 (2003) (Department of Labor).

should be permitted to reply. The ALJ should weigh the arguments, perhaps during a short recess, and rule on the admissibility of all challenged portions.

Factual exhibits are sometimes interlaced with argumentative, redundant, and inconsequential material. Rather than take the time to go through the procedures outlined above and to examine the exhibits word by word or line by line to strike such matter, it is frequently quicker, easier, and more satisfactory for the ALJ to announce that he will not consider such material, and that if anyone attempts to cross-examine on it, it will be stricken. Unless the exhibit is substantially lacking in relevant material or is so argumentative as to obfuscate the record, opposing counsel will usually acquiesce.

The primary advantage of considering motions to strike at the outset is that it eliminates cross-examination on inadmissible evidence. Objectionable material, if admitted, frequently generates the most cross and redirect examination. Additional motions to strike may be entertained at any time based on further developments at the hearing.

The reporter should mark each exhibit "Received" or "Rejected" pursuant to the ALJ's ruling. Ordinarily, excluded material should not be physically removed but should accompany the record with the notation "Rejected". This material is not a part of the record and cannot be considered by the agency except to rule on the validity of its exclusion. Counsel should be directed to delineate stricken portions on all copies of the exhibit submitted for the record.

c. *Cross-examination*

Rules concerning cross-examination usually are an important part of the ground rules that are established by the ALJ at the pre-hearing conference and included in the conference report.[212] Whether by ground rules or otherwise, the ALJ should establish that order of cross-examination which will develop the most concise and clear record. This frequently cannot be determined until the direct examination has been completed. Ordinarily priority is given to that party likely to have the most extensive cross-examination or who has the greatest interest in the direct testimony.

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212. *See supra* notes 98-99, and Appendix I, Form 3, ¶ 8.

Unless witness credibility is involved, cross-examination is frequently confined to clarifying the exhibits, determining the source of the material, and testing the basis for the witness' conclusions. As stated previously, one writer has suggested that the major rebuttal of expert opinion testimony should take place not by cross-examination but by submission, prior to the hearing, of rebuttal testimony prepared by the opponent's experts.[213] In any event, when cross-examination with respect to opinion testimony is needed in an attempt to demonstrate inconsistencies or improbabilities, the ALJ should not let the examination degenerate into mere rhetoric. The ALJ also may find it helpful to gently remind counsel that there is no jury present.

Cross-examination should be limited to matters covered on direct unless there are special reasons for further questions. A departure may be justified, for example, if a party is seeking to elicit from the witness information that cannot readily be obtained in any other way, or if limiting the testimony would result in the witness being recalled later.

Although usually only those parties adversely affected by a witness' testimony should be permitted to cross-examine, special circumstances may make it appropriate to deviate from this practice. For example, counsel representing a community which favors an application should be permitted to cross-examine an applicant's witnesses if the applicant shows only mild interest in, and makes a weak factual presentation in support of, an application in which the affected community has an important interest.

Generally, counsel should not be permitted to interject questions during cross-examination by other counsel. However, like all general principles, this is subject to exception, especially where counsel is intervening in good faith for the sake of clarification and the clarification would clearly save substantial time.

d. *Rebuttal Testimony*

As previously stated, rebuttal testimony ideally could be included in the party's original presentation, especially where parties had

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213. *See supra* note 150 (Benkin).

originally exchanged written testimony. However, the ideal is not always possible. For example, agency rules may not allow a ALJ to require full exchange of written testimony prior to the hearing. Or, the case may be of a type which is not susceptible to that kind of approach. Moreover, additional rebuttal evidence may become available after the hearing begins. If rebuttal evidence later becomes available, or if another party later presents new material that requires some response, additional rebuttal, either oral or written, certainly may be permitted. If the rebuttal is extensive, a short suspension of the hearing or a temporary withdrawal of the witness may be necessary to permit counsel to prepare for cross-examination.

e. *Redirect*

Following cross-examination, redirect should be permitted, although confined to matters brought out on cross-examination. A short conference between counsel and his witness may be allowed.

f. *Multiple Witness Testimony*

Sometimes the testimony can be clarified, expedited, and simplified by placing more than one witness on the stand at the same time.[214] A panel of two or more witnesses is called to the stand. Counsel for the witnesses qualifies them individually, and may question them individually or collectively depending on the material covered and the circumstances. Following direct examination the panel may be cross-examined. Questions may be directed to the panel and answered by the witness or witnesses having the pertinent information, or the witnesses may be questioned individually, with counsel choosing the witness he prefers to answer the question. The possibilities are numerous. Following cross-examination, the panel may be subjected to redirect examination.

At the former Civil Aeronautics Board the ALJs used this device for many years.[215] Technical information was presented by a panel

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214. P. Nejelski and K. Shuart, *Trial Balloon -- Is Multiple Witness Testimony Worth a Try?,* 7 LIT. MAG. 3 (Winter 1981).

215. RUHLEN, MANUAL FOR ADMINISTRATIVE LAW JUDGES 47 (Administrative Conference, 1982).

of two or more witnesses, each qualified on a different aspect of the evidence. Cross-examining counsel, uncertain about whom to direct a particular question to, would ask the question, and the witness having the pertinent information would answer. This procedure proved quicker and made a cleaner record than examining the witnesses seriatim with the frequent necessity of repeating previously unanswered questions and for recalling an earlier witness.

Similar procedures have been used by the Federal Energy Regulatory Commission, which used panels of witnesses for technical cases involving rates and licensing,[216] and the Nuclear Regulatory Commission.[217]

Although testimony by multiple witnesses can be used to advantage in many types of cases and circumstances, it would seem particularly adapted to cases involving cross-examination on highly technical evidence submitted before the hearing in written form where there is no substantial question of credibility of witnesses. Multiple witness testimony may also be used to advantage when it is necessary to have several witnesses testify as to a procedure in which they all participated or when the operation of a technical piece of equipment can best be explained by two or more experts. The feasibility and benefits of using this procedure will frequently depend on the ingenuity and resourcefulness of the ALJ and counsel.

The mechanics of eliciting such testimony are simple. Usually,

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216. P. Nejelski and K. Shuart, *supra* note 214, at 3. In a telephone conversation during 1992 with Morell E. Mullins, revisor for the 1993 edition of this Manual, Chief Administrative Judge Curtis Wagner, F.E.R.C., reported that he still used this technique.

217. For example, NRC rules regarding hearings on license transfer applications provide for panels of witnesses. 10 C.F.R. § 2.1323(e) (2003). Details on witness panel testimony were provided in a telephone conversation, March 26, 1992, between Judge Ivan Smith, Nuclear Regulatory Commission, and Morell E. Mullins, principal revisor, 1993 edition of this Manual. Judge Smith indicated that he had used the multiple witness technique in the 3-Mile Island case. For some reported NRC cases which refer to witness panels, *see* In the Matter of Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), 30 NRC 331, 1989 NRC Lexis 69 (Docket Nos. 50-443-OL; 50-444-OL (Offsite Emergency Planning Issues, 1989); In the Matter of Florida Power and Light Co. (Turkey Point Plant, Units 3 & 4), 27 NRC 387, 1988 NRC Lexis 29 (Docket Nos. 50-250-OLA-2, 50-251-OLA-2, ASLBP No. 84-504-07-LA (Spent Fuel Pool Expansion), LBP-88-9A (1988)).

two or more witnesses would be seated where they could be observed by the reporter, the ALJ, and counsel. Counsel directs questions to one or more specific witnesses or to the panel as he chooses, or as previously arranged. Each counsel cross-examines in the agreed-upon order. The procedure can be changed according to circumstances so long as it deprives no party of substantive rights.

Nevertheless, problems may arise with the use of multiple witness panels. Some of those problems can best be resolved at a pre-hearing conference or at a conference during the course of the hearing, where the ALJ and counsel can arrange for the specific questions to be considered and the procedures to be followed. For example, they may agree as to whether questions are to be directed to the panel as a whole or to individual witnesses. Furthermore, whether this procedure will be used or permitted may affect how testimony is to be prepared. The ALJ should also be alert to possible confusion if two or more witnesses start talking at the same time, if the witnesses start arguing, or if it is not clear what the question is or which witness is qualified to answer it. Another problem is that indexing the transcript by witness or subject may become more difficult.

Obviously, multiple witness testimony may not be feasible or desirable in many situations. For example, it may have little, if any, use when credibility of witnesses is at issue, when witnesses are sequestered, or the factual questions are to be covered by only one witness.

However, we are so accustomed to the seriatim testimony of one witness after another that we may have neglected too long a device which holds considerable potential for the complex case involving high-tech factual disputes. The use of multiple witness testimony or panels, on its face, seems quite compatible with due process and could enhance the truth-finding function of the ALJ. At least some agencies by rule explicitly allow, or at some time have allowed, multiple witness testimony or panels.[218]

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218. 10 C.F.R. § 110.107(f) (2003) (NRC, Export & Import of nuclear equipment and material: "Participants and witnesses will be questioned orally or in writing and only by the presiding officer. Questions may be addressed to individuals or to panels of participants or witnesses."). For a provision which has since been repealed, *see* 40 C.F.R. § 124.85 (1991) (EPA, evidentiary hearings for

g. *Questions by the ALJ*

The ALJ certainly may question a witness if there is good reason to do so. However, in an adversary proceeding where parties are represented by counsel, the ALJ should be very circumspect in exercising this power. Prudence should be the ALJ's watchword. For example, the ALJ ordinarily should not question a witness initially, before the parties have their opportunity to ask their own questions. However, on rare occasions, an ALJ might do so if it seems absolutely necessary for such purposes as: (1) preventing reversible error; (2) protecting the record against the inclusion of seriously misleading, obfuscating, or confusing testimony; or (3) avoiding serious waste of time by forestalling extensive, useless, or irrelevant examination by counsel who is incompetent, or worse. Within reason, and with due regard for the need to maintain both the fact and appearance of impartiality, the ALJ also may need to interrupt when the witness and counsel are at cross purposes, when the record may not reflect with clarity what the witness intends to convey, or when for some other reason assistance is needed to assure orderly development of the subject matter. At the close of cross-examination or redirect, the Judge may question the witness to clarify any confusing or ambiguous testimony or to develop additional facts. When the testimony of the parties' experts is inconclusive, or when no expert witnesses are presented, the Judge sometimes may find it necessary to call an expert as his own witness.[219] Indeed, the ALJ is not necessarily limited to calling expert witnesses. Where necessary, and subject to any agency or statutory constraints, the ALJ usually

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EPA-issued NPDES permits and EPA-terminated RCRA permits: authorizing hearing officer to "[p]rovide for the testimony of opposing witnesses to be heard simultaneously or for such witnesses to meet outside the hearing to resolve or isolate issues or conflicts.")(This section was removed, *see* 65 FR 30886 (May 15, 2003)).

219. Form 11 in Appendix I is a sample request for an expert to serve as an ALJ's witness; *see also* Federal Administrative Judiciary, *supra* note 4, at 82-83. It should be emphasized that special circumstances exist, and even put a responsibility on, Social Security Administration Administrative Law Judges to be more active in questioning witnesses in that agency's non-adversarial proceedings; *see supra* note 206.

can call witnesses or adduce evidence on any crucial issue.[220]

h. *Closing the Presentation*

When written evidence has been exchanged before the hearing, all of a party's witnesses, including rebuttal witnesses, should normally be called and examined before the witnesses for the next party are called. When his testimony is completed, a witness should be excused subject to recall at the ALJ's discretion.

5. Rules of Evidence

Few legal concepts have become more deeply entrenched than the postulate that the strict common law rules of evidence do not apply, by their own force, to administrative proceedings. The reasons for this are fairly plain. To the extent that traditional common law rules of evidence were developed to insulate jurors from certain kinds of information, they are not very relevant to the administrative proceeding, where there is no jury. Even before the APA, the inapplicability of the strict rules of evidence was well-established. For instance, Judge Learned Hand, in an opinion regarding the admission of hearsay in an NLRB proceeding, had approved a less rigorous standard, referring to "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."[221]

However, this does not necessarily mean that the rules of evidence prevailing in the courts can never be applied in agency proceedings. As usual, much depends on the organic statute governing the agency, and the agency's own rules. Statutorily, a legislature may require an agency to apply nearly any set of

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220. *See* 29 C.F.R. § 2200.67(j) (2003) (Occupational Safety & Health Review Commission: authorizing ALJ to "[c]all and examine witnesses and to introduce into the record documentary or other evidence"). For recent articles discussing this issue, *see* Allen E. Schoenberger, The Active Administrative Law Judge: Is There Harm in an ALJ Asking?, 18 J. NAALJ 399 (1998); Jeffrey Wolfe and Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L. J. 293 (1997).

221. N.L.R.B. v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938).

evidentiary rules. The statutory provisions governing unfair labor practice hearings before the NLRB, for instance, require that those proceedings, "so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . . ."[222] The variations are numerous. For example, one agency provides that the Federal Rules of Evidence (FRE) will be employed as general guidelines, but that all relevant and material evidence shall be received.[223] Another provides that the FRE shall apply unless provided otherwise by statute, and, additionally, that the presiding officer may relax the rules if the ends of justice "will be better served by so doing".[224]

Still, the APA provides something of a guide, or statutory norm: any oral or documentary evidence may be received, but the agency as a matter of policy must provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.[225] Many agencies include provisions similar to the APA in their Rules of Practice.[226] However, some follow a different drummer and do apply the Federal Rules of Evidence.[227]

At any rate, the Federal Rules of Evidence are not controlling in administrative proceedings unless made so by statute or agency

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222. 29 U.S.C. § 160(b) (1994).

223. 49 C.F.R. § 209.15 (2003) (Department of Transportation, Federal Railroad Administration, Railroad Safety Enforcement Proceedings). For an NRC case, *see* Duke Power Co., 15 NRC 453, 475 (1982) (FRE not directly applicable, but Commission looks to them for guidance).

224. 16 C.F.R. § 1025.43(a) (2003) (Consumer Product Safety Commission, Rules of Practice for Adjudicative Proceedings).

225. 5 U.S.C. § 556(d) (1994).

226 *See, e.g.*, 10 C.F.R. § 2.743(c) (2003); 12 C.F.R. § 622.8 (2003) (Farm Credit Administration); 14 C.F.R. 13.222 (2003)(b) (2003) (FAA; civil penalty actions); 16 C.F.R. § 3.43(b) (2003) (F.T.C.); 18 C.F.R. § 385.509 (2003) (F.E.R.C.); 45 C.F.R. § 81.78 (2003) (Health & Human Services, Part 80 proceedings).

227. *See* 29 C.F.R. § 2200.71 (2003) (Occupational Safety & Health Review Commission). The Consumer Produce Safety Commission also makes the Federal Rules applicable, but with loopholes. "Unless otherwise provided by statute or these rules, the Federal Rules of Evidence shall apply to all proceedings held pursuant to these Rules. However, the Federal Rules of Evidence may be relaxed by the Presiding Officer if the ends of justice will better served by so doing." 16 C.F.R. § 1025.43(a) (2003) (rules of practice for adjudicative proceedings).

rule.[228] It is worthwhile, however, for the ALJ to be familiar with these rules. They can furnish guidance and insights which can help resolve evidentiary problems.

While technical rules of evidence often are not applicable in administrative proceedings, sound judgment concerning the probative value of proffered evidence is crucial. Relaxed rules of evidence may lull counsel into sloppiness, or tempt them to engage in deliberate tactics aimed at clouding the record with chaff. The ALJ must remain alert, and should strike, upon objection or upon his own motion, evidence so confusing, misleading, prejudicial, time wasting, repetitious, or cumulative that its pernicious influence outweighs its probative value. Marginally relevant evidence is not merely useless; it is positively harmful because it inflates the record which the parties, the ALJ, and the agency must examine.[229]

a. Hearsay

Any rigid rule about hearsay is unsuited to the varied inquiries conducted by administrative agencies. Unless statute or agency rule dictates otherwise, hearsay should be admitted if it appears reliable and is not otherwise improper. It should be admitted if the nature of the information and the state of the particular record persuade the ALJ that it is useful.[230]

b. Best Evidence

Counsel sometimes offers a copy of a document without a proffer of the original. The accuracy and authenticity of the document may

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228. For a significant article on the Federal Rules of Evidence and administrative law, *see* Richard J. Pierce, *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1 (1987). For a relevant Administrative Conference Recommendation, *see* 1 C.F.R. § 305.86-2, Use of the Federal Rules of Evidence in Agency Adjudications (1993).

229. *See* Union Stock Yard & Transit Co. of Chicago v. United States, 308 U.S. 213, 223-24 (1939); United States v. Bowe, 360 F.2d 1, 7 (2d Cir. 1966); FED. R. EVID. 401-03; and Gardner, *Shrinking the Big Case*, 16 ADMIN. L. REV. 5 (1963).

230. *See* Richardson v. Perales, 402 U.S. 389 (1971).

be assumed unless questioned. The agency rules[231] or the procedural ground rules adopted by the ALJ[232] may provide that the authenticity of proffered documents shall be deemed admitted unless written objections are filed within a specified time. The pre-hearing proceedings will frequently produce stipulations concerning the principal documents at issue and the facts they contain.

6. Offers of Proof

When documents offered in evidence are rejected, they may, if requested by counsel, serve as offers of proof of the facts stated. When an objection to the receipt of oral testimony is sustained, counsel should be permitted, as an offer of proof, to state orally the substance of the evidence to be offered; or if the offer is lengthy, the ALJ may require a written submission.[233]

Counsel may argue that permitting a rejected exhibit to accompany the record as an offer of proof will not save any time unless cross-examination is permitted. Nevertheless, cross-examination on an offer of proof should not be allowed -- absent agency rules or other overriding mandates -- because it would defeat the purpose of the exclusion.

7. Constitutional Privileges: Self-Incriminating Testimony, Search and Seizure, and Suppression of Evidence

The Fifth Amendment privilege against self-incrimination, if invoked in an administrative proceeding, raises some complex and delicate issues. On the one hand, the privilege against self-incrimination is applicable to testimony in administrative proceedings. However, there are at least two important refinements which should be noted in this regard. First, the privilege against self-

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231. *See, e.g.,* 16 C.F.R. § 3.32(b) (2003) (F.T.C.); 47 C.F.R. § 1.246 (2003) (F.C.C.).

232. *See supra* note 98, and Appendix I, Form 3.

233. For some examples of agency rules dealing with offers of proof, *see* 7 C.F.R. § 1.141(h)(7) (2003) (Department of Agriculture); 14 C.F.R. § 13.225 (2003) (FAA); 29 C.F.R. § 2200.72(b) (2003) (Occupational Safety and Health Review Commission); 49 C.F.R. § 511.43(g) (2003) (National Highway Traffic Safety Administration).

incrimination is personal and testimonial in nature, so ordinarily it does not apply to corporations,[234] other entities,[235] business records, and most records required by valid law or regulation to be kept.[236] Consequently, for documents, materials, and testimony which are not protected by the Fifth Amendment, it would seem that production or testimony may be compelled in accordance with the agency's usual procedures for requiring the production of evidence and testimony, which ordinarily require resort to the courts to enforce administrative subpoenas and orders Second, failure to assert this protection constitutes a waiver.[237]

In addition, if Fifth Amendment self-incrimination protections do apply, there are procedures under which a witness can be granted immunity and required to testify. Once a witness has claimed the privilege, the ALJ should refer any request to compel the witness to testify to the agency for determination pursuant to the relevant statute.[238]

The agency may, with the approval of the Attorney General, issue an order requiring an individual to provide testimony or other

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234. U.S. v. White, 322 U.S. 694, 699 (1944).

235. *See* Bellis v. U.S., 417 U.S. 85 (1974); U.S. v. Greenleaf, 546 F.2d 123 (5th Cir. 1977).

236. Shapiro v. U.S., 335 U.S. 1 (1948). *But see* Marchetti v. United States, 390 U.S. 39 (1968). To qualify as a record "required" to be kept the record must satisfy a three-part test: (1) the purposes for which it is kept must be essentially regulatory, (2) it must be the kind of record which the regulated party has customarily kept, and (3) it must have assumed "public aspects" which renders it analogous to public documents. Grosso v. United States, 390 U.S. 62, 67-68 (1968). In a later, and somewhat confused opinion, the Supreme Court ruled, in the context of a grand jury subpoena action, that the contents of certain business records were not privileged, but that, under the facts of that case, the act of complying with the subpoena was within the privilege against self-incrimination. United States v. Doe, 465 U.S. 605 (1984).

Perhaps more basically, as the Supreme Court stated in Hoffman v. United States, 341 U.S. 479, 486-87 (1951), a contempt case stemming from grand jury proceedings, "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself -- his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . ., and to require him to answer if it clearly appears to the court that he is mistaken." (Citations and quotation marks omitted)

237. United States v. Kordel, 397 U.S. 1, 10 (1970).

238. *See* 18 U.S.C. §§ 6001-6005 (1994 & Supp. IV 1998).

information which is withheld on the basis of the privilege against self-incrimination, but only if the agency concludes that the testimony or other information from the individual may be necessary to the public interest and that the individual has refused or is likely to refuse to testify or provide such information. If such an order is issued, the individual is immunized from any criminal prosecution based on his testimony or information.[239]

Application of the Fourth Amendment's provisions regarding search and seizure likewise can be quite complex, even abstruse. Some issues, such as the agency's basic authority to inspect commercial premises without a warrant, are likely to be heard in the judicial branch.[240] The Administrative Law Judge perhaps is most likely to encounter Fourth Amendment issues in the context of efforts to exclude or suppress evidence allegedly obtained illegally, in violation of this, or other, constitutional rights. Thusfar, the key Supreme Court decision is *I.N.S. v. Lopez-Mendoza,*[241] which candidly resorted to balancing the likely social benefits of excluding unlawfully seized evidence against the likely costs of excluding it.

8. Argument on Motions and Objections

The ALJ may permit oral argument in support of or in opposition to motions and objections. If he finds it desirable, and not unduly delaying, he may request written memoranda upon disputed points. Whether or not oral argument is requested, exceptions to unfavorable rulings should be deemed automatic; there is no need for a constant chorus of "Exception" from counsel to preserve counsel's exceptions.

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239. 18 U.S.C. §§ 6002, 6004 (1994 & Supp. IV 1998). For some agency rules regarding this process, *see* 14 C.F.R. § 13.119 (2003) (FAA); 16 C.F.R. § 3.39 (2003) (F.T.C.); 16 C.F.R. § 1025.39 (2003) (Consumer Produce Safety Commission; Flammable Fabrics Act).

240. *See, e.g.*, New York v. Burger, 482 U.S. 691 (1987); Dow Chem. Co. v. U.S., 476 U.S. 227 (1986); Donovan v. Dewey, 452 U.S. 594 (1981); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

241. 468 U.S. 1032 (1984). For examples of cases where ALJs have been asked to resolve Fourth Amendment search issues, *see* Globe Contractors, Inc. v. Herman, 132 F.3d 367 (7th Cir. 1998) (OSHA); First Ala. Bank of Montgomery v. Donovan, 692 F.2d 714 (11th Cir. 1982) (Compliance review under E.O. 11246, prohibiting discrimination by government contractors).

9. Confidential Information

a. *Methods of Handling Confidential Material*

When it is desirable to prevent competitors from obtaining information about specific trade relationships, it is sometimes possible to substitute symbols for names and to receive the information at the public hearing without an *in camera* session. When similar statements or reports from several individuals are involved, counsel may agree to identify, and cross-examine, a number of representative reports and to receive the others without cross-examination and with no public identification other than symbols.[242] Alternatively, the parties may agree to submit data on a confidential basis to a neutral expert for preparation of summaries or averages. It is sometimes desirable to hold separate *in camera* sessions for different parties, with competitors excluded from each session. This may require the consent of the parties involved.

When it is desirable to have an advance written exchange of confidential material, the ALJ should develop appropriate safeguards to assure confidentiality. The ALJ may, for example, obtain the commitment of the parties receiving the material to limit its distribution to specific persons; or he may ask unaffected parties to waive the receipt of certain material. All copies of such material should bear a prominent legend stating the limitations upon its distribution pursuant to the order of the ALJ.

In some agencies, such as the FCC or FTC, confidential information, particularly material claimed to be proprietary information or trade secrets, may be handled by procedures contained in a protective order issued by the ALJ.[243] Such an order often is issued during pre-hearing discovery, as a result of a party's refusal to release material to an adversary party, an intervenor, or the agency staff without provision for confidential treatment. The request for the

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242. *Cf.* N. Atl. Tourist Comm'n, 16 C.A.B. 225, 227, 228, 234, 235 (1952).

243. *See, e.g.*, Exxon Corp. v. F.T.C., 665 F.2d 1274 (D.C. Cir. 1981). Some examples of agency rules pertaining to protective orders include: 10 C.F.R. § 2.740 (2003)(NRC); 15 C.F.R. § 25.24 (1991) (Office of the Secretary of Commerce, Program Civil Fraud Remedies); 16 C.F.R. § 3.31(c) (2003) (F.T.C.); 16 C.F.R. § 1025.31(d) (2003) (Consumer Product Safety Commission); 18 C.F.R. § 385.410 (2003) (F.E.R.C.); 29 C.F.R. § 18.15, (2003) (Department of Labor).

order is usually grounded on the claim that unrestricted release of the material may result in its misuse, such as unfairly benefitting competitors. To guard against misuse of the information the order should provide the terms and conditions for the release of the material. It should also contain an agreement to be signed by users of the material, and may include procedures for handling the material if offered into evidence, including, for example, prior notification to the party submitting the material of the intention to offer it as evidence, and provisions for sealing the pertinent portions of the record, briefs, and decisions.[244] In some situations the ALJ may find it easier to allow the parties to draft a proposed order for his consideration.

The ALJ must recognize that the use of protective order procedures could be inimical to the concept of a public hearing. Consequently, extreme care must be exercised in the issuance and application of the order to insure that the integrity of the record is preserved and the rights of the parties and the public are given due consideration.

At the hearing, if material covered by the pre-hearing order is offered in evidence, the ALJ must decide whether the material should be admitted, rejected, or admitted with special protection.[245] To do this, the ALJ should examine the material, hear arguments, and make rulings *in camera*. If the ALJ rules that the material is not covered by the order and a request to appeal the ruling is made, the request should usually be granted if interlocutory appeal on this issue is permitted by agency rules. Further action with respect to the material then would be deferred until the appeal is decided.

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244. Forms 19-a to -d in Appendix I are sample protective orders.

245. *See* 16 C.F.R. § 3.45 (2003) (F.T.C.); 49 C.F.R. § 511.45 (2003) (DOT, National Highway Traffic Safety Administration).

b. *In Camera or Closed Sessions*[246]

Hopefully, any issues involving confidential, privileged, or similar matter will have been raised and resolved during the pre-hearing stage of a case. However, much of what is discussed here would apply equally to handling the problems of confidential material during discovery and other pre-hearing proceedings.

By specific rule or under the general authority to regulate the course and conduct of the hearing, an ALJ not only may consider documents *in camera*, but also may hold *in camera* (i.e., closed) sessions to receive confidential material. However, closed sessions or *in camera* proceedings should be discouraged because they often create serious practical problems in the conduct of the hearing, in the preparation of briefs, and upon administrative and judicial review. However, they may prove unavoidable from time to time, especially in agencies which regularly deal with sensitive governmental, technical, or commercial information.

An *in camera* session is a part of the formal proceeding, however the testimony, documents, and exhibits received are not included in the public record.[247] This permits confidential receipt of evidence that may be, among other things, exempt from disclosure under the Freedom of Information Act (FOIA), especially "matters that are . . .

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246. The 1982 edition of this Manual used the term "executive session" to refer to those parts of an administrative hearing closed by the ALJ, in order to consider confidential material and similar matters. However, trolling through the C.F.R. and Lexis, the revisor in 1992 noticed a tendency for the term "executive session" to be used mainly in the context of non-public proceedings of the agency or board itself. *See, e.g.*, 16 C.F.R. § 4.15 (2003) (F.T.C.). A Lexis search for "executive session" disclosed the use of that term in connection with ALJs or other hearing officers mainly in a few EPA regulations, such as 40 C.F.R. § 85.1807(n)(3) (2003) (referring, apparently indiscriminately, to both *in camera* testimony and executive session); 40 C.F.R. § 86.614-84(n)(3) (2003). The more commonly used term in the C.F.R. seems to be *in camera. See, e.g.*, 16 C.F.R. § 3.45(b) (2003) (F.T.C.); 16 C.F.R. § 1025.45 (2003) (Consumer Product Safety Commission); 40 C.F.R. § 86.614-84(n)(2)(ii) (2003) (EPA: referring to "in camera proceeding"). Accordingly, for whatever difference it may make, the term "executive session" will not be used here.

247. *See, e.g.*, 16 C.F.R. § 3.45(2003) (F.T.C.); 16 C.F.R. § 1025.45 (2003) (Consumer Product Safety Commission); 19 C.F.R. § 210.*39* (2003) (International Trade Commission); 49 C.F.R. § 511.45 (2003) (National Highway Traffic Safety Administration).

specifically authorized . . . to be kept secret in the interest of national defense or foreign policy . . ." or "trade secrets and commercial or financial information [which are] privileged or confidential."[248]

Subject to agency rules, an *in camera* session may be held when a witness, an attorney representing a party, or any other person objects to the public disclosure of any privileged or confidential information. Before granting an *in camera* session the ALJ should be sure that the evidence in question may qualify for protection pursuant to agency rule or statute. If the information to be received is classified, the ALJ should determine whether he and all of the participants have the required security clearance.

An *in camera* or closed session is justifiable only when the law or orderly development of the record and the needs of the parties require it. When this occurs during the hearing, the ALJ should announce that the public session is in recess, that an *in camera* or closed session will be held, and, if possible, that the public session will resume at a stated time. If the session is to be conducted at the end of the hearing, the ALJ should announce that the public session is closed and that an *in camera* or closed session will follow.

The *in camera* session should be attended only by the ALJ, the official stenographer, and such representatives of parties or interested persons as the ALJ designates, or the agency rules may require. The names of all persons present must be recorded by the official stenographer. After the hearing room is cleared of all others, the

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248. 5 U.S.C. §§ 552(b)(1), (4) (1994, Supp. IV 1998). These provisions are part of FOIA. 5 U.S.C § 552 (1994, Supp. IV 1998.) An *in camera* session is not required merely because evidence arguably within FOIA may be involved. In fact, requests under FOIA for documents in the possession of federal agencies are generally dealt with under entirely separate regulations. However, the ALJ should be alert to the possibility that matters subject to discovery and *in camera* proceedings might be exempt from disclosure under FOIA. Agency hearing rules regarding material or evidence taken *in camera* sometimes overlap, or should be coordinated with, FOIA-type disclosure rules. Examples of regulations which make some effort in this direction are found in 16 C.F.R. § 3.36(a) (2003) (F.T.C.), 18 C.F.R. § 385.410 (2003) (F.E.R.C.), 49 C.F.R. § 511.45 (2003) (National Highway Traffic Safety Administration). At least one agency rule tries to distinguish between FOIA and discovery, 29 C.F.R. § 2201.1 (2003) (Occupational Safety and Health Review Commission, rules pertaining to FOIA, which state, "This part does not affect discovery in adversary proceedings before the Commission. Discovery is governed by the Commission's Rules of Procedure . . . .").

session may be opened as follows:

> This is an *in camera* [or closed] session. I direct the reporter to keep the transcript of this session confidential until released by the agency; to record the names of the persons present and the fact that they were sworn to secrecy; to make only one transcription of the proceedings and immediately thereafter to place the typed record, together with the stenographic notes and any papers or exhibits received in evidence, in an envelope; to seal the envelope and deliver it to me (or such other agency official as is appropriate).

Before proceeding the ALJ should administer an oath or affirmation such as the following to *all* persons present, including himself:

> Do you solemnly swear (or affirm) that you will hold secret and will not divulge in any manner whatsoever to any person any of the evidence or information which is adduced at this session until such time as the agency may by order indicate that the public interest does not require the continued withholding of such evidence or information, (so help you God)?

When the reason for secrecy is the desire to withhold information for competitive purposes and not national defense, the parties may modify their agreement about confidentiality in any manner they choose.

10. Supplemental Data

During the hearing counsel may request or the ALJ may require supplemental information. The ALJ may direct its submission during or after the close of the hearing. If submitted during the hearing, unless stipulated, a sponsoring or authenticating witness should be made available. If it is to be submitted after the close of the hearing, the ALJ should establish the date for submission, request a waiver of cross-examination, and set the date for filing objections. Even if

waiver of cross-examination cannot be obtained in advance, it may be obtained after the parties have received the supplemental material. Otherwise it may be the basis for an objection. The ALJ should identify, by mark or otherwise, the information submitted and rule on all objections.

If the basis of an objection is the need for cross-examination, it should be accompanied by a statement of the specific purposes of such questioning. If it does not appear that cross-examination is "required for a full and true disclosure of the facts,"[249] or if the material is in any event subject to official notice, the objection should be overruled. Relevant statutory provisions and agency rules governing official notice must, of course, be followed. If the supplemental information is necessary and cross-examination is required, the ALJ should reconvene the hearing.

Sometimes the parties may stipulate that certain reports or other documents (such as production, income, or cost data), whether or not regularly scheduled, will be received in evidence when released, up to an agreed-upon time no later than final agency decision.

11. Mechanical Handling of Exhibits

As each exhibit is introduced, the reporter should be supplied with the number of copies specified in the rules (usually two). The ALJ should be supplied with one copy. All copies submitted must be legible. If corrections are required later, all copies should be manually corrected by the party submitting them or revised copies should be submitted. The reporter should transmit the exhibits to the agency's docket section with the pertinent parts of the transcript.

When sufficient copies of an exhibit are not available at the hearing, the original may be consigned to counsel with the understanding that it will be reproduced and returned to the ALJ, with copies to all parties. This action should be reflected on the record.

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249. 5 U.S.C. § 556(d) (1994).

C. *Concluding the Hearing*

1. Oral Argument

Subject to agency rules, the ALJ, on his own motion or on request, may permit or require oral argument on the merits of the entire case or on specific issues at the close of the hearing or at such other time as he directs.

The Administrative Procedure Act (APA) requires that parties be afforded a reasonable opportunity to submit proposed findings and conclusions to the ALJ.[250] Although the APA does not literally require that the proposed findings and conclusions be in writing, this is customary, and may be required by agency rules. The ALJ who wishes to substitute oral argument for briefs should tell the parties at the earliest opportunity, preferably before convening the hearing. If that is not feasible, the ALJ may permit a short recess at the close of the hearing to give the parties time to prepare oral argument. The latter procedure may be inconvenient and may offer no advantages over written briefs if the argument is not made the day the hearing ends.

2. Conferences

At the close of the hearing, after the parties have presented their cases and heard the testimony of all parties, they may find it advantageous to settle some or all of the substantive issues, or to enter into procedural stipulations. If requested, or if the ALJ believes that it might eliminate, expedite, or simplify some procedural steps, he may suggest or order a conference to consider such matters.

3. Briefs

Subject to agency rules, the ALJ should establish dates for submission of briefs. The ALJ may also authorize reply briefs. Briefs should conform in length and form to agency rule and to the ALJ's instructions. They should contain precise citations to the record and to the authorities relied upon. Counsel are sometimes

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250. 5 U.S.C. § 557(c) (1994).

careless about citation form, referring to cases without adequate identification. The ALJ may avoid this by requiring reasonable adherence to *A Uniform System of Citation* or any other standard citation system.[251] The ALJ should require a table of authorities and, if the brief exceeds a stated number of pages, a table of contents or an index. The ALJ may require research on legal or technical issues and may require the parties to brief specific issues.[252]

4. Notice of Subsequent Procedural Steps

The ALJ should insure that all parties and interested persons who appeared at the hearing are notified of the dates fixed for submission of briefs and for other procedural steps.

5. Closing the Record

After receipt of all supplemental data, the ALJ may announce by order the closing of the record. For extraordinary reasons, such as newly discovered evidence, and subject to agency rules, the record may be reopened for additional hearing or to stipulate additional material.

6. Correcting the Transcript

If the agency rules prescribe no procedure for correcting prejudicial errors in the transcript, the ALJ should set them. These should specify the period of time after receipt of the transcript during which changes may be requested. Requests in writing should be made to the ALJ, with copies to all parties, and should set forth the specific changes desired. If no objections are received within a specified time, and if the ALJ does not find the proposed corrections inaccurate, the transcript should be corrected accordingly. If any

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251. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2003) (often called the "Bluebook"). For a recent competitor, *see* ASSOCIATION OF LEGAL WRITING DIRECTORS & DARBY DICKERSON, ALWD CITATION MANUAL (Aspen L. & Bus. 2003). The latter publication is updated at www.alwd.org.

252. Form 12 in Appendix I is a sample request for the briefing of certain issues.

party or the ALJ objects to the proposed correction, it should be submitted to the official reporter for comparison with the stenographic record. After receipt of the reporter's reply the ALJ should rule on the request.[253]

The ALJ should propose corrections on his own initiative if he discovers substantial errors. He should notify all parties of the changes he proposes and advise them that unless objections are received within a specified time the record will be corrected accordingly.

D. *Retention of Case Files*

The ALJ should not dispose of his personal case file after issuing the decision. Copies of official documents should be retained until the case is finally resolved, either by action of the agency or the courts. Either may remand the case to the ALJ for further hearing, reconsideration, or both. It will be inconvenient if the ALJ's own record has been destroyed, and may make the task of reconstructing the record extremely difficult if any part of the agency record has been misplaced, damaged, or lost.

VI. Techniques of Presiding

As to those aspects of technique touching on matters purely of style, this or any other general Manual will be of limited value. There probably is no single "right" personal style, when it comes to presiding over a case. Every ALJ has, and develops, an individual style of presiding.

Judges—like managers, mediators, and other professionals whose job is to exert control over a situation—can differ in basic personal style and still be effective. An ALJ can be extroverted or introverted, aggressive or diffident, pragmatic or idealistic, empathetic or detached, formal or informal, gregarious or reserved. Every ALJ has a personal temperament shaped by years of experience, and that temperament does not change instantly upon appointment as an Administrative Law Judge. The most important personal quality

253. Form 13 in Appendix I is a sample order correcting the transcript when the motion to correct is opposed.

party or the ALJ objects to the proposed correction, it should be submitted to the official reporter for comparison with the stenographic record. After receipt of the reporter's reply the ALJ should rule on the request.[253]

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253. Form 13 in Appendix I is a sample order correcting the transcript when the motion to correct is opposed.

relative to presiding is probably the capacity for insight or introspection into one's own basic temperament. This is a necessary precondition to learning how to control any personal quirks or characteristics—such as a quick temper at one extreme, or timidity at the other—which might detract from judicial professionalism.

As to other aspects of judging, the proper techniques and methods of presiding depend upon the nature of the case, the number and character of the parties, the issues, the personality of the ALJ and counsel, and many other variables. Methods and procedures helpful to one ALJ may be detrimental to another; techniques fair and reasonable in one situation may be arbitrary and inequitable in another. Nevertheless, over the years, Administrative Law Judges have developed certain approaches, customs, and practices which help develop a fair and adequate record in minimal time.

A. *Preparation and Concentration*

The ALJ must know the case. It is forgivable for an ALJ to be less than brilliant and even imperfect. It is not forgivable for an ALJ, in case after case, to be unprepared. Before opening the hearing, the ALJ should study the pleadings, the evidence, the pre-hearing filings, and the trial briefs. The ALJ also should analyze any anticipated legal, policy, or procedural problems. The experience of fellow ALJs can be a source of general information and advice.

At the opening of the hearing—and at other times during the proceedings—if the ALJ needs to make a lengthy statement, the statement should, whenever possible, be prepared in advance and read into the record. It is more likely to be accurate, and it will be easier to understand. (Some lawyers may still remember their first transcript, where the reporter's faithful transcription of the lawyer's extemporaneous or unprepared remarks showed that the lawyer's unprepared remarks were gobbledygook.)

On a par with preparation is concentration. It is easy to suffer lapses in this department. Fortunately for ALJs, a lapse in concentration may not be quite as fatal as it could be for a trial lawyer whose inattention results in failure to make timely objection or in a waiver of the client's rights. However, the ALJ still must concentrate. During the hearing, the ALJ should follow the testimony closely, not only to prepare for writing a decision, but to

keep the hearing on course.

In a related vein, it is wise to skim the previous day's notes, exhibits, and transcript before convening the hearing each day. This procedure has dual benefits. The ALJ who is fully familiar with the case and the record will be better equipped to exclude unnecessary questions and testimony and keep the hearing moving, and it will be easier to rule promptly. Furthermore, notes made concurrently with the transcript may be of incalculable value when he is searching the record while drafting the decision.

B. *Judicial Attitude, Demeanor, and Behavior*

The ALJ should be in control, but considerate of counsel, witnesses, and others in attendance. Each witness should be called by name and thanked when he is excused from the stand. Informal reprimands when necessary should ordinarily be delivered privately during recesses or otherwise off the record; they should be entirely avoided if possible.

The ALJ should not argue with counsel. The ALJ should listen to counsel's point at reasonable length, make a ruling, and proceed. The ALJ courteously should tell any counsel who continues to argue about the ruling to proceed with the examination. If necessary, the ALJ may use any other courteous admonition to close the discussion.

Some aspects of judicial authority and trial protocol should be suspended as soon as a recess or an adjournment is announced. If counsel has been recalcitrant, evasive, or even antagonistic, the ALJ should harbor no resentment upon leaving the bench. One who bears a grudge cannot preside effectively.

The experience, training, and background of participants should always be considered. If an experienced or professional witness is verbose, evasive, or irrelevant, the ALJ should either stop the testimony or lead it back to relevant territory. When there is any question of a witness' veracity or forthrightness, the cross-examining counsel should be permitted maximum latitude.

However, a witness may be comparatively inexperienced, unacquainted with judicial procedures, frightened, or nervous. In that case, the ALJ should tactfully put such witnesses at ease, protect them from improper questioning of counsel, interrupt when necessary to simplify or clarify questions, permit a certain amount of wandering

and meandering testimony, and review with the witness any testimony that has become confused.

C. *Controlling the Hearing*

The ALJ must control the hearing. As soon as the subject under inquiry is exhausted or fully developed, the ALJ should stop counsel or the witness and direct him to go to other matters. If a question or an answer is irrelevant or improper, the ALJ should strike it without necessarily waiting for an objection.

On the other hand, if counsel is usefully developing a significant matter, the ALJ should let him proceed regardless of tedium or ennui. Every veteran ALJ ruefully recalls searching the record for an important item, only to discover that at the hearing a question seeking that information had been prohibited.

Prompt rulings are essential. If sure about the ruling, the ALJ should limit argument. If the proponent's argument is not persuasive, the ALJ should deny the motion or objection without hearing opposing counsel. In multi-party cases, the ALJ does not necessarily need to hear argument from all counsel for every party. It may be feasible to hear argument only from one counsel for each side. Also, in such situations, rebuttal should rarely be permitted.

If the reason for a ruling is obvious, the ALJ need not waste time explaining. If the issue is more doubtful, reasons should be stated.

An ALJ should correct an unsound ruling. If, however, making the correction will cause great inconvenience, such as substantial repetition of testimony, the ALJ should consider whether the error was so prejudicial as to justify such a burden or whether it might be rendered harmless in some other fashion.[254] Counsel will often cooperate in working out a satisfactory solution.

Sometimes counsel will repeat the same line of questioning when inquiring into similar factual situations. The ALJ may shorten this type of examination by questioning the witness as follows: "If counsel asked you the same questions with reference to your testimony on B, C, and D as he did with reference to A, would your answers be the same?"

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254. *See* 5 U.S.C. § 706 (1966) (mentioning that, on judicial review, due account shall be taken of the rule of prejudicial error).

Occasionally one party or a group with the same interests will have several counsel in attendance. The ALJ normally should allow only one counsel to examine each witness and require the ALJ's permission before co-counsel may take over the examination. In appropriate circumstances, the ALJ may insist that only lead counsel state the position of the group.

Although the ALJ should expedite the hearing and prevent unnecessary testimony, arbitrary time limits should be avoided: for example, allotting counsel one day to present his case or thirty minutes for cross-examination. It is seldom possible to determine in advance how much time will be needed, and an arbitrary cutoff can be seriously prejudicial. The object is to make the hearing as short as the subject requires—not to fit it into a predetermined time frame.

Although the record will presumably be cleaner and easier to understand if the planned order of presentation is strictly followed, circumstances such as the illness or unforeseen unavailability or serious inconvenience of a witness often interfere. Rather than adjourning the hearing until the witness is available, it is usually preferable to rearrange the schedule after informal discussions with counsel. Similarly, if essential material is offered after the time fixed for its presentation has expired, the schedule should be revised, if no one is prejudiced, to permit its receipt. If the parties need time to prepare cross-examination or rebuttal, the original order of presentation can be resumed until cross-examination or rebuttal is prepared. If this is not feasible a brief recess may be called.

D. *Some Common Problems*

An important aspect of the judicial duty is to maintain control of the proceedings. A proper tone should be set to deter counsel who would try to dominate or manage a hearing. The ALJ must be alert to detect and restrain such counsel, whose tactics take many forms. They may stall on cross-examination until the noon or evening recess to get time to think of more questions. They may use questionable or even counterproductive tactics to contest the ALJ's rulings: for example, by incessant argument or by repeated inconsequential changes in the form of a stricken question. They may inject themselves into matters of no interest to their clients. They may fail to have their witnesses present when they are scheduled to testify. If

these tactics are successful, they may produce in opposing counsel not only animosity but emulation. The resulting record is unmanageable.

If one or more of the parties is engaged or interested in a related administrative or judicial proceeding, counsel may attempt to develop evidence only peripherally relevant in order to use it in the other proceeding. The ALJ must stop such attempts or end up with a record containing vast amounts of useless material.[255]

If tempers become short and an altercation threatens to disrupt the hearing, the ALJ must restore order. In some cases a recess may be useful. If counsel, a witness, or any person in the hearing room becomes unruly or offensive in remarks or manner, the ALJ should assert control, express disapproval of the opprobrious conduct and warn against a repetition.

The ALJ might also consider directing that the objectionable remarks be stricken physically from the record,[256] but this power should rarely be used. The sensibilities of agencies are not easily offended. No matter how offensive, obscene, slanderous, or vile, the questionable remarks may be relevant to a later charge concerning the credibility or other actions of the person making the remarks. Generally, material should be stricken physically only with the consent of all parties and only where the material has no conceivable relevance to the merits, or to an adequate record of the case.

A final resort is to exclude counsel from further participation in the case, to take prejudicial action against the client if authorized by statute or rule, or to recommend disciplinary action by the agency.

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255. *See, e.g.,* 5 U.S.C. § 556(d) (1994) (stating that agencies are to provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence). For an early case which provides an example of the point made above in the text, *see* Toolco-Northeast Control Case, 36 C.A.B. 280, 283, 285, 302, 307, 308 (1962).

256. Stricken material is included in the transcript with an annotation of the ALJ's ruling. Physically stricken material does not appear in the transcript. *Cf.* Larter & Sons v. Dinkler Hotels Co., 199 F.2d 854 (5th Cir. 1952); Ramsey v. United States, 448 F. Supp. 1264 (N.D. Ill. 1978); Midwest Helicopter Airways, Inc., 2 N.T.S.B. 623 (Order EA-532, Docket SE-1765, 1973), *aff'd*, Midwest Helicopter Airways, Inc. v. Butterfield, Civil No. 74-1147 (7th Cir., filed Jan. 6, 1975).

E. *Off-the-Record Discussions*

The reporter should be instructed to make a verbatim transcript of the proceeding unless directed by the ALJ to go off the record. The ALJ should seldom go off the record, however. True enough, off-the-record discussions sometimes can be helpful in considering mechanical details of the hearing, such as procedural dates or the order of presentation of witnesses. They may also be appropriate in handling emergency situations such as the sudden illness of a witness.

They may also help to clear up substantive matters without cluttering the record. For example, counsel and the witness may so confuse each other that the record makes little or no sense. A short discussion off the record will clear up the problem and make the resulting record easier to understand. Similarly, counsel and witness may basically agree but their ideas of how to record the matter may differ. A few minutes off the record may result in a succinct and accurate statement that may save substantial time and make a cleaner record.

This device must not, however, be overused. In fact, it should be used very sparingly. Requests for off-the-record discussions should be denied unless a verbatim transcript is clearly unnecessary or will serve no apparent purpose. Even when discussions are held off the record, decisions or agreements that result should be summarized for the record and confirmed by counsel to prevent later misunderstanding.

F. *Hearing Hours and Recesses*

In complex, multiparty cases, some Administrative Law Judges customarily hold hearings for approximately five hours per day -- for example, 10 A.M. to 12:30 P.M. and 2 P.M. to 4:30 P.M. There is nothing magical about these hours, but such a schedule has several advantages. It allows time for the ALJ, counsel, and the parties to review, during the evening, the day's hearing and prepare for the next. Without adequate preparation counsel's examination may be disorganized, rambling, and ineffective. Second, counsel, especially those from small offices, often need a few business hours each day to handle other matters. Finally, the concentration and constant attention

required while a hearing is in session is mentally fatiguing. After approximately five hours, counsel's examination is likely to become less articulate and concise, and the risk of confusing, ambiguous, and mistaken questions and answers is increased.

The ALJ should extend or shorten the regularly scheduled sessions as the situation requires. For example, an afternoon session may be extended to permit an out-of-town witness to finish his testimony and return home. If the hearing is drawing to a close on Friday afternoon, an evening session may be appropriate. Moreover, where it appears possible to complete the hearing in a single day, the ALJ, after consultation with counsel, may begin the hearing earlier and shorten the luncheon recess.

The ALJ should insist, of course, that five minute recesses do not drag into fifteen and that participants appear after recesses or intermissions at the appointed time.

G. *Audio-Visual Coverage*

Historically, the courts and the American Bar Association have tended to disapprove of photographing and telecasting courtroom proceedings. There was a time when Canon 3A(7) of the American Bar Association's Code of Judicial Conduct stated that such procedures should not be permitted.[257] Similar blanket proscriptions were adopted by the bar and courts of many states. However, the United States Supreme Court held in a landmark criminal case that

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage.[258]

In 1972 the Administrative Conference of the United States adopted its Recommendation 72-1, which encouraged audio-visual coverage of certain proceedings, with safeguards to prevent

257. Ruhlen, MANUAL FOR ADMINISTRATIVE LAW JUDGES 66 (1982).
258. Chandler v. Florida, 449 U.S. 560, 574-75 (1981).

disruption, and subject to the right of any witness to exclude coverage of his testimony.[259]

At the time this recommendation was adopted, broadcasting of agency proceedings was very limited. The Atomic Energy Commission and the Social Security Administration denied such coverage, and other agencies, although some more equivocally than others, usually discouraged it. The Federal Communications Commission authorized television coverage at the discretion of its ALJs. Most agencies, however, at that time discouraged such coverage.[260]

The Administrative Conference of the United States reviewed agency action upon its recommendation in 1977.[261] This review disclosed that only the Department of Labor,[262] the Federal Communications Commission, and the Consumer Product Safety Commission were in substantial conformity. Fourteen other agencies had partially complied.[263]

In the 1990's, opposition to live or videotaped media coverage of trials and hearings decreased, but remained substantial in some quarters. However, support for such coverage grew to the point where a channel on cable TV featured the telecasting of trials.[264]

On the administrative front, the overall picture remains mixed. For example, the Social Security Administration takes the position that Social Security hearings involve private claims. Accordingly, the hearing is not public in the usual sense. Outside observers, and this presumably includes the media, may not be present unless all claimants to the hearing consent and the ALJ finds that the outsider's

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259. Broadcast of Agency Proceedings, 1 C.F.R. § 305.72-1 (1993). *See also* R. Bennett, *Broadcast Coverage of Administrative Proceedings*, 2 ACUS 625, 67 NW. L. REV. 528 (1972).

260. RUHLEN, MANUAL FOR ADMINISTRATIVE LAW JUDGES 66 (1982).

261. *Id.* at 67, citing Recommendation Implementation Summary, 8/29/77, 72-1.

262. *Id.* citing 29 C.F.R. §§ 2.10-2.16 (1981) for Department of Labor regulations.

263. *Id.* also stating at n. 129, "The Commodity Futures Trading Commission indicated that it had no formal policies on this subject. The Federal Power Commission (now the Federal Energy Regulatory Commission) indicated disapproval."

264. *E.g.*, Goodman, *The Wheels of Justice, Live on C.A.B.le*, N.Y. TIMES, July 3, 1991, at C17.

presence would not disrupt the hearing.[265] Among the agencies presently having regulations concerning, or mentioning, media coverage are such varied organizations as the Comptroller of the Currency,[266] the Department of Housing and Urban Development,[267] the Surface Transportation Board of the Department of Transportation,[268] the Department of the Interior's Fish and Wildlife Service,[269] and the FDA.[270]

The question for ALJs in many agencies therefore is no longer whether it is within their authority to permit audio-visual coverage of formal hearings. The question is one of following agency rules, and where agency rules give them discretion, the questions then may multiply. Should any live or videotaped coverage be allowed? If so, in what form? Can a fair hearing can be assured in the presence of such coverage, and, if so, what precautionary measures can and should be imposed?

For dealing with such questions, the ALJ should consider a number of factors and policies. For one thing, the free press educates and informs citizens about public affairs, and as a by-product helps induce honesty and integrity in our government. Moreover, government officials and government employees are servants of the public. We sometimes forget that the "public" is a shorthand term for that inchoate conglomerate of all U.S. citizens -- who are the true "owners" of all government property, including information generated and being generated by the "government." Nevertheless, although all information, with certain limited exceptions such as national security, should be revealed to the public, this does not necessarily imply the right to use any particular method to obtain such information. To determine the extent to which audio-visual coverage should be permitted, it is worthwhile to consider the most frequent objections.

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265. Social Security Administration, Office of Hearings and Appeals, HEARINGS, APPEALS, LITIGATION AND LAW MANUAL (HALLEX), I-2-650(1990).

266. 12 C.F.R. § 19.5(b)(10) (2003) (authority of the Administrative Law Judge).

267. 12 C.F.R. § 1780.5(b)(15) (2003)(authority of the Administrative law Judge).

268. 49 C.F.R. § 1113.3 (2003).

269. 50 C.F.R. § 18.76(b)(8) (2003).

270. 21 C.F.R. §§ 10.200, *et seq.* (2003).

1. Physical Interference

The lights, cameras, microphones, and wires which frequently accompany broadcasting (particularly television), can physically interfere with the hearing. Unrestricted deployment of broadcast equipment, personnel, and glaring lights throughout the hearing room may be seriously disruptive.[271] However, with modern broadcasting equipment, physical disruption is not now an inevitable consequence of telecasting. Television broadcasting can now take place with inconspicuous and distant cameras using non-irritating lights. Simple videotaping can be even less intrusive.

Requests for coverage by several stations may also cause problems. However, if more than one station wants to cover a proceeding they can all be limited to one set of microphones and one set of cameras.

2. Interference with the Dignity of Proceedings

The presence of cameras, microphones, lights, and wires is sometimes said to detract from the dignity of formal proceedings. This may be merely another way of describing the physical disruption problem. There may be some, however, who feel that even unobtrusive recording equipment is undignified as a matter of aesthetics.

Any such concern probably is too insubstantial to justify exclusion. With reference to trial publicity, the Supreme Court has said "where there was `no threat or menace to the integrity of the trial' . . . we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism."[272] Similarly, unless there is a more tangible basis for exclusion than dignity, the interest in acquiring information directly must prevail.

3. Psychological Distraction

The presence of electronic media may present a risk of psychological distraction. The knowledge that electronic media are

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271. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 611-12 (1965).
272. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

present may convey to the parties, witnesses, and attorneys the feeling that their actions are taking place on a stage, rather than in a hearing room. This may lead some to withdraw in shyness and others to play up to that larger audience. In either event it will distort conduct.

This concern is greatly exaggerated. Television has been used in dozens of federal administrative proceedings without undue consequences.[273] As its use becomes more common, the psychological effect will be minimized. Moreover, this is a problem that can be handled by the ALJ, who can ensure the preservation of decorum and fair play by instructing representatives of the news media and others as to permissible activities in the hearing room, by the equitable assignment of seats to news media representatives and others, and by such other action as may be necessary. Audio-visual coverage should be permitted only so long as it is conducted unobtrusively and does not interfere with the orderly conduct of the proceeding.

H. *Taking Notes*

The extent to which the ALJ should take notes depends on personal temperament and work habits. Some ALJs take no notes, feeling that it distracts from the immediate task of controlling the hearing. Others prepare a simple topical index. Still others take detailed notes of the testimony of each witness, which a secretary may later type, possibly with transcript references. Such notes should be considered the personal property of the ALJ. They should not be made available to counsel under any circumstances.

Some ALJs make notations on the written exhibits and testimony that are later keyed to the transcript by a secretary or law clerk. This makes searching the record substantially easier when the ALJ is writing the decision.

In a protracted hearing involving numerous exhibits and requests for supplemental data the ALJ should at least note the identification of each exhibit, in order to verify that it has been offered and received in evidence before the sponsoring witness is excused. The ALJ should note the details of any arrangement for submission of

273. RUHLEN, MANUAL FOR ADMINISTRATIVE LAW JUDGES 68 (1982).

supplemental material. At the opening of the hearing each day the ALJ should consult his notes and inquire of counsel whether the material requested for that day is available. If anything is to be submitted after the close of the hearing, the ALJ should review his notes on the final hearing day and remind counsel of the material to be submitted and the submission date.

VII. CONDUCT

A federal Administrative Law Judge is subject to several different, but overlapping, standards of behavior. As a lawyer, the federal ALJ is subject generally to the ethical canons of the bar.[274] As a federal employee, the federal ALJ must comply with the laws and regulations generally applicable to employees of the Federal Government.[275] As the employee of a particular federal agency, the ALJ is responsible for following that agency's rules. Some federal agencies' rules in fact specifically address Administrative Law Judges,[276] presiding officers,[277] or the conduct of those involved in proceedings before the agency.[278]

However, the federal ALJ is not automatically governed by professional codes applicable to the judiciary. For instance, the Model Code of Judicial Conduct states, "Applicability of this Code to administrative law judges should be determined by each adopting jurisdiction . . . . [E]ach adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions

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274. *E.g.*, MODEL RULES OF PROF'L CONDUCT (1995). Developments regarding state administrative law judges will be discussed briefly, below in footnote 286.

275. *See, e.g.*, 5 C.F.R. §§ 735, *et seq.* (2003). Administrative Law Judges, of course, are subject to laws regulating the partisan political activities of federal employees, e.g., the Hatch Act, 5 U.S.C. §§ 7321-7327 (1994).

276. *See, e.g.*, 14 C.F.R. § 300.1 (2003) (DOT Aviation Proceedings, "any DOT employee or administrative law judge carrying out DOT's quasi-judicial functions") (DOT Aviation Proceedings); 40 C.F.R. § 164.40 (2003) (EPA Pesticide Proceedings); 43 C.F.R. § 4.1122 (2003) (Department of the Interior Surface Coal Mine Hearings and Appeals).

277. *E.g.*, 50 C.F.R. § 18.76 (2003) (Department of Interior, Marine Mammals Section 103 Regulations).

278. *E.g.*, 21 C.F.R. § 12.90 (2003) (FDA, Conduct at oral hearings or conferences).

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278. *E.g.*, 21 C.F.R. § 12.90 (2003) (FDA, Conduct at oral hearings or conferences).

in adopting and adapting the Code for administrative law judges."[279] Therefore the Model Code of Judicial Conduct (Judicial Code) is not directly applicable to a federal Administrative Law Judge unless or until it is adopted by the ALJ's employing agency, or by the federal government as a whole.

Nevertheless, the Judicial Code remains relevant to the federal ALJ. If nothing else, some federal agencies, in their rules, still incorporate by reference the judicial "canons" of ethics or code.[280] It also provides, indirectly, a source of guidelines by which to assess the propriety of a ALJ's behavior.[281] Finally, the Judicial Code has provided the basis for Model Codes specifically developed for Administrative Law Judges—the Model Code of Judicial Conduct for Federal Administrative Law Judges (federal ALJ Code) and the Model Code of Judicial Conduct for State Administrative Law Judges.[282]

As with the Judicial Code, the federal ALJ Code is not self-

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279. AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT 31, n.11 (2003 ed.).

280. 40 C.F.R. § 164.40 (2003) (EPA Pesticide Programs: "shall conduct the proceeding in a . . . manner subject to the precepts of the Canons of Judicial Ethics of the American Bar Association"); 43 C.F.R. § 4.1122 (2003) (Interior Surface Coal Hearings: "Administrative law judges shall adhere to the 'Code of Judicial Conduct.'). *See also* 14 C.F.R. § 300.1 (2003) (DoT, "are expected to conduct themselves with the same fidelity to appropriate standards of propriety that characterize a court and its staff"); 43 C.F.R. § 4.27(c) (2003) (Interior General Rules: "shall withdraw from a case if he deems himself disqualified under the recognized canons of judicial ethics").

281. For a discussion of the Code of Judicial Conduct as a source of guidelines and analogies, *see* Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929, 949-50 (1990) (citing a Merit System Protection Board case, *In re* Chocallo, 2 M.S.P.B. 23, *aff'd* 2 M.S.P.B. 20 (1980), and ABA Informal Opinions of the Committee on Ethics and Professional Responsibility).

282. As to Federal ALJs, there is ABA, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Preface at p. 3 (1989); *see also*, Yoder, *Preface, Model Code of Judicial Conduct for Federal Administrative Law Judges*, 10 J. NAALJ 131 (1990). As to state ALJs and hearing officers, there is ABA, NATIONAL CONFERENCE OF ADMINISTRATIVE LAW JUDGES, A MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES, PREFACE (1995)(Endorsed by the Executive Committee, National Conference of Administrative Law Judges, Judicial Administration Division, American Bar Association in 1995.) *Id.*

enforcing. To be directly controlling or applicable, it must be adopted by the appropriate governmental authority. However, it was endorsed by the Executive Committee of the National Conference of Administrative Law Judges in 1989, and this endorsement was intended to reflect "the considered judgment of the Conference on appropriate provisions" adapting the Model Code of Judicial Conduct for application to Administrative Law Judges.[283]

The federal ALJ Code contains seven numbered canons, with explanations and commentary.[284] Omitting the explanations and commentary, the canons themselves are:

Canon 1

An Administrative Law Judge Should Uphold the Integrity and Independence of the Administrative Judiciary.

Canon 2

An Administrative Law Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities.

Canon 3

An Administrative Law Judge Should Perform the Duties of the Office Impartially and Diligently.

Canon 4

An Administrative Law Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.

Canon 5

An Administrative Law Judge Should Regulate His or Her Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties.

Canon 6

An Administrative Law Judge Should Limit Compensation

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283. Yoder, *supra* note 282, at 132.

284. American Bar Association, federal ALJ Code, *supra* note 282, at 6-24; Yoder, *supra* note 282, at 134-48.

Received for Quasi-Judicial and Extra-Judicial Activities.

Canon 7

An Administrative Law Judge Should Refrain from Political Activity Inappropriate to the Judicial Office.[285]

In some respects, the federal ALJ Code is only part of a larger set of considerations involving the conduct of Administrative Law Judges. These considerations revolve around a tension between independence and accountability. On the one hand, it is crucial to preserve the Judges' independence -- insulating them from improper agency pressures with respect to the substance of their decisions. On the other hand, it is also crucial to assure that the Judges are accountable for improper conduct and unprofessional, inadequate performance.

These tensions have helped stimulate important developments and a growing body of studies, articles, and proposals regarding the status and conduct of Administrative Law Judges, both state and federal.[286] Such studies, articles, and proposals will undoubtedly lead

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285. ABA, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES (1989).

286. During the 1990's, there were so many major developments and significant articles that it is impossible to do justice to all of them. However, as already indicated, notable institutional developments included a model code of conduct for state administrative law judges: AMERICAN BAR ASSOCIATION, NATIONAL CONFERENCE OF ADMINISTRATIVE LAW JUDGES, A MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES (1995). In no small part, this code reflected the growth and growing influence of organizations such as the National Association of Administrative Law Judges, the National Conference of Administrative Law Judges, and the Federal Administrative Law Judges' Conference. This growth also has led to the expansion of professional journals such as the Journal of the National Association of Administrative Law Judges, and an important flow of relevant articles. Among the articles dealing with the status and conduct of administrative law judges during this period, and to name only a few: Edwin L. Felter, Jr., *Maintaining the Balance Between Judicial Independence and Judicial Accountability in Administrative Law*, 17 J. NAALJ 89 (1997); John Hardwicke and Ronnie A. Yoder, *Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence: Due Process or Ex Parte Prohibitions?* 17 J. NAALJ 75 (1997); Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluations for ALJs*, 7 ADMIN. L.J. AM. U. 589 (Winter 1994); James P. Timony,

to new changes and developments in the future. Exactly what those changes will be and where they will lead remains an open question. In the meantime, however, there are several topics pertaining to professional conduct which should be discussed in this Manual.

A. *Disciplinary Actions Against ALJs*

Although not an ideal source of guidance, some notion at least of minimal standards of acceptable conduct can be garnered from examining the law and case precedents pertaining to disciplinary action against federal administrative law judges. (Needless to add, the situation with respect to state administrative law judges and other hearing officers is even more complex and difficult).

Statutorily, the federal employing agency can take disciplinary action against a ALJ "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing . . . ."[287] One must look to the cases decided

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Performance Evaluation of Federal Administrative Law Judges, 7 ADMIN. L. J. AM. U. 629 (1993-94); Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present, and Future*, 19 J. NAALJ 101 (1999); and Ann Marshall Young, *Evaluation of Administrative Law Judges*, 17 NAALJ 1 (1997). For some works published prior to the 3rd edition of this Manual, *see e.g.*, ABA, *New ACUS Study on Administrative Law Judges*, 17 ADMIN. L. NEWS 1 (Summer 1992); Cofer, *The Question of Independence Continues: Administrative Law Judges Within the Social Security Administration*, 69 JUDICATURE 228 (Dec. 1985); John C. Holmes, *ALJ Update: A Review of the Current Role, Status, and Demographics of the Corps of Administrative Law Judges*, 38 FED. B. NEWS & J. 202 (May 1991); Levant, *Pointing the Way to ALJ Independence*, 24 JUDGES J. 36 (Spr. 1985); Levinson, *The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort*, 19 NEW ENG. L. REV. 733 (1984); Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929 (1990); Debra C. Moss, *Judges Under Fire: ALJ Independence At Issue*, 77 A.B.A. J. 56 (Nov. 1991); L. Hope O'Keefe, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591 (1986); Victor W. Palmer, *The Evolving Role of Administrative Law Judges*, 19 NEW ENG. L. REV. 755 (1984); Norman Zankel, *A Unified Corps of Federal Administrative Law Judges Is Not Needed*, 6 W. NEW ENG. L. REV. 723 (Winter 1984).

287. 5 U.S.C. § 7521(b) (2003). Disciplinary sanctions can include removal, suspension, a reduction in grade, a reduction in pay, or furlough of 30 days or less. *Id.* In addition, action can be taken against an administrative law judge under 5

by the Merit Systems Protection Board (MSPB), and the courts, for a gloss on what constitutes "good cause."

A study published in 1992 indicated that there had been about two dozen reported cases since 1946 involving discipline or removal of ALJs "for good cause" under 5 U.S.C. § 7521.[288] Five of these cases apparently resulted in removal.[289] (The reported cases, of course, do not reflect resignations or adjustments that may have been reached without formal proceedings.) Some cases which have been decided since the 3rd Edition of this Manual was published have been added to footnotes in the discussion which follows.

Because the reported cases are relatively few in number, their value is somewhat limited as a source of guidance. However, some consideration of them still may be instructive. The grounds for "good cause" reflected in these cases seem to fall, for the most part, roughly into four categories: (1) personal conduct that is unrelated (or remotely related) to employment or professional duties; (2) misconduct, other than insubordination, related to the individual's behavior as a federal employee or judge (or both); (3) insubordination, with or without other misconduct; and (4) professional incompetence, *i.e.*, generally matters of productivity and the quality of the judge's adjudications. Some cases, of course, fall into more than one category.

Personal Misconduct Unrelated to Employment. Although there seems to be one, relatively early case that falls purely within the "personal conduct" category, this case is enough to serve as a warning that a judge's purely personal life could furnish "good cause" for disciplinary action. In this case, financial irresponsibility in the form of failure to make any effort toward paying admitted debts was upheld as a sufficient ground for disciplinary action and removal.[290]

U.S.C. § 7532 (2003) (pertaining to national security and related matters), or, by MSPB Special Counsel under 5 U.S.C. §§ 1215, 1216 (2003).

288. Federal Administrative Judiciary, *supra* note 4, at 1016 19. This figure is consistent with an earlier article on disciplinary proceedings against federal ALJs. James P. Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 NEW ENG. L. REV. 807, n.1-2 (1984).

289. Federal Administrative Judiciary, *supra* note 4, at 1231.

290. McEachern v. Macy, 233 F. Supp. 516 (W.D. S.C. 1964);

Unfortunately, a single case does not provide much guidance regarding exactly how far an agency could reach into an ALJ's private life to support a "for good cause" sanction or dismissal. The fact that there has been only one reported case clearly on point after nearly 50 years suggests that a "good cause" proceeding would not lightly be brought on the basis solely of an ALJ's private life or personal lifestyle. However, the existence of even one precedent for disciplinary action based on purely personal conduct (or misconduct) remains troublesome. An agency certainly might attempt to argue that an ALJ occupies an especially sensitive position, and that therefore purely personal, off-duty misbehavior might compromise the ALJ's effectiveness as an adjudicator. As always, there is language to be found in the cases that could support this (or almost any other) position. For example, "Honesty, integrity, and other essential attributes of good moral character are foremost among the qualities that lawyers, and especially judges, ought to possess if public confidence in the legal profession and the judiciary is to be promoted and preserved."[291]

Misconduct (Other Than Insubordination). In the category of misconduct, other than insubordination, the reported cases cover a fairly wide range of matters related to the ALJ's duties or at-work behavior. Involved here are serious improprieties by an ALJ, including, but not limited to, accepting gifts or favors from a party,[292] and serious improprieties in the actual conduct of adjudications.[293] Cases involving non-adjudcative actions include incidents of improper behavior toward fellow employees, such as sexual

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see also 5 C.F.R. § 2635.809 (2003).

291. *In re* Spielman, 1 MSPB 51, 56 (1979).

292. Hasson v. Hampton, 34 AD. L. REP. 2d (P&F) 19 (D.D.C. 1773), *aff'd mem.*, D.C. Cir. (April 20, 1976).

293. SSA v. Friedman, 41 M.S.P.R. 430 (1989) (canceling hearings without reason); *In re* Chacallo, 2 M.S.P.B. 20 (1980) (affirmed by unpublished opinions in D.D.C. and D.C. Cir.) (demonstrated bias and lack of judicial temperament, in addition to various acts of disobedience and insubordination). *See also*, SSA v. Anyel, Docket No. CB752119009T1 (MSPB, January 16, 1992)(ALJ slip opinion) (upholding charge based on SSA ALJ's treatment of *pro se* claimants, remanded on other grounds, SSA v. Anyel, 58 M.S.P.R. 261 (1993) (remanding to ALJ and stating that high rate of substantive errors constituted cause for removal) (case later settled with 90-day suspension, 66 M.S.P.R. 328 (1995).

harassment,[294] and abusive, rude, assaultive, or other seriously improper conduct.[295] In some cases, the disciplinary action is predicated, at least in part, on nonadjudicatory conduct that is work-related, but does not involve fellow employees; for instance, serious or recurring unauthorized personal use of government property,[296] or falsifying documents.

Insubordination. This category of insubordination likewise covers a fairly wide range of specific factual incidents, but these incidents of course concern the ALJ's conduct towards supervisors or superiors. The cases generally fall into one of two categories. First there is insubordination in the form of deliberate disobedience of valid orders or directives—refusals to comply with instructions, procedures, or case assignments.[297]

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294. SSA v. Davis, 19 M.S.P.R. 279 (1984), *aff'd,* 758 F.2d 661 (Fed. Cir. 1984)(unpublished opinion) (lewd and lascivious remarks to employees); SSA v. Carter, 35 M.S.P.R. 485 ((18987) (sexual harassment).

295. Carr v. Social Security Administration, 185 F.3d 1318 (Fed. Cir. 1999) (reckless disregard of personal safety [slamming door and causing injury to employee], profanity, abusive language, sexual harassment), affirming 78 M.S.P.R. 313 (1998); Department of Commerce v. Dolan, 39 M.S.P.R. 314 (1988) (kicking employee); *In re* Glover, 1 M.S.P.R. 660, 663 (1979); SSA v. Dantoni, 77 M.S.P.R. 516 (1998), *aff'd,* 173 F.3d 435 (Fed. Cir. 1998) (decision without published opinion, full text available at 1998 U.S. App. LEXIS 24902)(MSB opinion recounts discharged ALJ's conduct, *inter alia*, harassing Deputy Chief ALJ, forging name of Deputy Chief Administrative Law Judge [DCALJ] to large numbers of mail orders for commercial products and samples, resulting in DCALJ's office receiving 1547 pieces of mail). For a case involving favors or gifts from a party in proceedings before the ALJ, *see* Hasson v. Hampton, 34 AD. L.. REP. (Pike & Fischer) 19 (D.D.C. 1973), *aff'd mem., D.C. Cir.*, April 20, 1979. For a case involving unauthorized practice of law, *see* Office of Hearings & Appeals, Social Sec. Admin. v. Whittlesley, 59 M.S.P.R. 684 (1993), *aff'd w/o opinion*, 39 F.3d 1197 (Fed. Cir. 1994) (stating that good cause to remove ALJ was shown by evidence that he violated agency rules and settlement agreement by engaging in unauthorized practice of law)

296. SSA v. Givens, 27 M.S.P.R. 360 (1985) (personal use of government car).

297. For example, SSA v. Boham, 38 M.S.P.R. 540 (1988) (refusing to hear case involving overnight travel); SSA v. Brennan, 27 M.S.P.R. 242 (1985), *aff'd sub nom.* Brennan v. DHHS, 787 F.2d 1559(Fed. Cir. 1986) (refusing to follow case proceeding procedures, including routing of mail and us of worksheets); SSA v. Manion, 19 M.S.P.R. 298 (1984) (refusing to schedule hearings); SSA v. Arterberry, 15 M.S.P.R. 320 (1983), *aff'd in an unpublished opinion,* 732 F.2d 166 (Fed. Cir. 1984); *In re* Chacallo, 2 M.S.P.R. 20 (1980) (among other things,

Second, there is insubordination in the form of rude or abusive behavior toward as supervisor or other superior. Cases in this subcategory, of course, may involve both disobedience and abusive behavior, as well as other misconduct.[298]

As to the three major categories discussed above, the reported cases are of limited direct value, in and of themselves, as guides for an ALJ's conduct. They are few in number and deal with fact-specific situations. However, they are a worthwhile gloss on the subject of an administrative law judge's conduct. The cases suggest that the ALJ who observes simple courtesy toward subordinates and peers, who displays a veneer of respect for supervisors, and who generally treats others the way the ALJ would like to be treated will go a long way toward satisfying any reasonable standards of conduct.

Professional Incompetence & Productivity/Quality. There remains the troublesome issue of professional competence and its relation to "for good cause," in particular, matters of productivity and quality of adjudication. The problems, of course, orbit around mainly the need to reconcile accountability with adjudicative independence.

The cases themselves seem to recognize this problem, and consequently might be described as "squinting" both ways. For example, one leading study has described three significant SSA-ALJ "productivity" cases decided by the Merit Systems Protection Board (MSPB) in 1984 as a "pyrrhic victory" for the agency.[299] "The

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refusing to return case files and conducting a hearing after the case had been removed from the ALJ's jurisdiction), *aff'd by unpublished opinions* in D.C.C. and D.C Cir.; Office of Hearings and Appeals, SSA v. Whittlesey, 59 M.S.P.R. 684 (1993) (unapproved outside practice of law, wilfull failure to compel with time and attendance requirements), aff'd without officially published opinion 39 F.3d 1197 (Fed. Cir. 1994).

298. For example, SSA v. Burris, 38 M.S.P.R. 51 (1988), *aff'd* 878 Fed. Cir. 1989) (unpublished opinion) (insubordination with travel vouchers, office disruptions, attempts to undermine supervisor's authority by countermanding his instructions, ridiculing him, and unreasonably refusing to deal directly with him.); SSA v. Glover, 23 M.S.P.R. 57 (1984) (vulgarity toward supervisor, throwing files).

299. FEDERAL ADMINISTRATIVE JUDICIARY, *supra* note 4, at 1020. The cases were SSA v. Goodman, 19 M.S.P.R. 321 (1984); SSA v. Brennan, 19 M.S.P.R. 335, *opinion clarified*, 20 M.S.P.R. 34 (1984), and SSA v. Balaban, 20 M.S.P.R. 675 (1984).

agency won the right to bring low-productivity-based charges against ALJs," but lost before the MSPB, which rejected the agency's statistical evidence.[300] In the first of these cases, the agency had presented evidence that the judge's case dispositions were about half the national average, but the MSPB "opined that SSA cases were not fungible and that SSA's comparative statistics did not take into sufficient account the differences among these types of cases. The same reasoning was later applied to [the] two other pending cases against the SSA ALJs with similar productivity records."[301]

However, in a later case, the MSPB stated that a high rate of significant adjudicatory error can establish good cause for disciplining an administrative law judge.[302] In another line of cases, the MSPB has made it clear that good cause can include serious and long-term disabilities which prevent the ALJ from performing his or her duties.[303]

In a line of cases that did *not* directly involve the MSPB, some ALJ challenges to certain agency-management initiatives regarding productivity and uniformity have resulted in similar examples of judicial reasoning. One significant judicial opinion said, at one point, that an SSA "goal" of 338 decisions annually per ALJ was reasonable, and that policies "designed to ensure a reasonable degree of uniformity among ALJ decisions are not only within the bound of legitimate agency supervision but are to be enouraged."[304] But the same opinion also warned, "To coerce ALJs into lowering reversal rates . . . would, if shown, constitute . . . 'a clear infringement of judicial independence.'"[305]

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300. FEDERAL ADMINISTRATIVE JUDICIARY, *supra* note 4, at 156-57.

301. *Id.*

302. SSA v. Anyel, 58 M.S.P.R. 261 (1993) (remanding to ALJ and stating that high rate of substantive errors constituted cause for removal) (case later settled with 90-day suspension, 66 M.S.P.R. 328 (1995).

303. SSA v. Mills, 73 M.S.P.R. 463 (1996); Dep't of Health & Human Servs. v. Underwood, 68 M.S.P.R. 24 (1995).

304. Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989).

305. *Id.* at 681. For another example of an opinion which seemed distinctly ambivalent, *see* Ass'n of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D. DC. 1984) (criticizing aspects of SSA management program, but refusing to issue injunction because ameliorative changes had been made to the program in the meantime).

The tension between maintaining judicial independence and at the same

About all this Manual can do is conclude that, in theory, the power of an agency to bring "good cause" actions against unproductive or incompetent ALJs certainly exists. So far, the MSPB appears to have been cautious in the actual application of that theory. This is understandable, and justified, because such actions could raise serious problems related to reconciling the need for professional competence with the need for adjudicative independence. Those problems are likely to be with us for the foreseeable future. In the meantime, it is probably safe to say that no ALJ should want to be the subject of a future case that tests an agency's power to discharge "for good cause" on grounds of demonstrably slack productivity.

B. *Confidentiality*

Although the ALJ presides over a hearing which in most agencies is open to the public, and compiles what will usually be a public record, there are aspects of the ALJ's duties which require confidentiality. When confidentiality is required, the ALJ should be above reproach.

For example, there is the matter of the ALJ's decision. Until the decision is finally issued or published the ALJ should in no way reveal it to the parties, the agency, the agency staff, or anyone else except his own staff and associates (who are themselves subject to the same rules). Maintaining this secrecy requires constant circumspection.

On a matter related to duties of a more recent vintage, the ALJ must become especially sensitive to the need for confidentiality in

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time assuring accountability continues to be subject of significant articles and studies. *See, e.g.*, Edwin L. Felter, Jr., *Maintaining the Balance Between Judicial Independence and Judicial Accountability in Administrative Law*, 17 J. NAALJ 89 (1997); John Hardwicke and Ronnie A. Yoder, *Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence: Due Process or Ex Parte Prohibitions*? 17 J. NAALJ 75 (1997); Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluations for ALJs*, 7 ADMIN. L.J. AM. U. 589 (1994); James P. Timony, *Performance Evaluation of Administrative Law Judges*, 7 ADMIN. L. J. AM. U. 629 (1993-94); Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present, and Future*, 19 J. NAALJ 101 (1999); and Ann Marshall Young, *Evaluation of Administrative Law Judges*, 17 NAALJ 1 (1997).

certain phases and kinds of alternative dispute resolution proceedings. A prime example here, of course, is the confidentiality customarily accorded mediation efforts,[306] including mediation by Settlement Judges.[307]

C. *Ex Parte Communications*

Ex parte communications should be avoided. Communications between the ALJ and one party, without the presence of the other party/parties, are always suspect. In formal adjudications governed by the APA, the ground rules are fairly clear and quite explicit. "Except to the extent required for the disposition of ex parte matters as authorized by law, [the ALJ] may not -- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate . . . ."[308]

> [E]xcept to the extent required for the disposition of ex parte matters as authorized by law—
>
> (A) no interested person outside the agency shall make or knowingly cause to be made to any . . . administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the

306. *See, e.g.*, Administrative Conference of the U.S., ENCOURAGING SETTLEMENTS BY PROTECTING MEDIATOR CONFIDENTIALITY, RECOMMENDATION NO. 88-11, 1 C.F.R. § 305.88-11 (1993).

307. *See, e.g.*, 29 C.F.R. § 18.9 (2003) (Department of Labor, Office of Administrative Law Judges); 29 C.F.R. 2200.101(c) (2003) (Occupational Safety & Health Review Commission).

308. 5 U.S.C. § 554(d) (2003) (emphasis added).

proceeding;

(B) no . . . administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a[n] . . . administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process . . . who receives or who makes . . . a communication prohibited by this subsection shall place on the public record of the proceeding:

i. all such written communications;
ii. memoranda stating the substance of all such oral communications; and
iii. all written responses, and memoranda stating the substance of all oral responses described in . . . this subparagraph . . . .[309]

Moreover, the APA further provides that if a prohibited ex parte communication is knowingly made, the ALJ or other presiding officer, may (subject to agency policies and regulations) require the party making the communication to show cause why he should not be dismissed as a party or otherwise sanctioned because of that violation.[310] The agency itself may be authorized to decide the whole case adversely to the offending party.[311] Furthermore, many agencies have their own regulations relating to the handling of ex parte communications, which the ALJ should rigorously observe.[312]

Some ex parte conversations are innocent in the sense that the

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309. 5 U.S.C. § 557(d) (1994) (emphasis added).

310. 5 U.S.C. § 557(d)(1)(D) (2003).

311. 5 U.S.C. § 556(d) (1994).

312. *See, e.g.*, 14 C.F.R. § 300.2 (2003) (DOT, Aviation Proceedings); 16 C.F.R. § 4.7 (2003) (F.T.C.).

person approaching the ALJ is unaware that this action is improper. When such an incident occurs, the ALJ, in proceedings governed by the above-quoted provisions of the APA, must prepare a written memorandum describing the conversation and file it in the public record in the docket section. This also must be done when another common type of innocent ex parte communication occurs—letters to the ALJ relating to the merits of the case.

Even for proceedings not covered by the APA, and even if the agency rules on ex parte contacts do not extend to the particular proceedings, an ALJ who has received ex parte communications on the merits probably should, in any event, make them part of the record. It is usually best to do one's utmost to remove any doubt about the proprieties of the matter.

D. *Bias and Recusal*

Another sensitive and special matter concerning the conduct of ALJs involves bias. "[A]n impartial decision maker is essential."[313] Of course, no one is totally free from all possible forms of bias or prejudice. But the ALJ must conscientiously strive to set aside preconceptions and rule as objectively as possible on the basis of the evidence in the record. In addition, and despite an ALJ's subjective good faith, an ALJ who has a financial interest (even if small or diluted) in the outcome of a case should not decide that case.[314] If grounds for finding bias truly exist, then recusing oneself is preferable to courting a later reversal and jeopardizing the validity of the whole proceedings.[315]

E. *Fraternization*

In a related vein, conduct which creates an appearance of favoritism or bias also should be avoided. Public attitudes about

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313. Goldberg v. Kelly, 397 U.S. 254, 271 (1970). For an excellent discussion of bias, *see* FEDERAL ADMINISTRATIVE JUDICIARY, *supra* note 4 at 967-74.

314. *See* Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

315. 5 U.S.C. § 556(b) (2003). For an ALR Annotation relevant to this topic, *see* 51 ALR Fed. 400.

judicial conduct have become stricter in recent years, and ALJs should be sensitive to this change. An ALJ should limit social activities with friends or colleagues if there is any likelihood of their being involved in matters coming before the ALJ. It is not enough merely to avoid discussing pending matters; an ALJ should shun situations that might lead anxious litigants or worried lawyers to think that the ALJ might favor or accept the views of friends more readily than those of unknown parties. The same considerations argue against social contacts with agency staff; any indication that the ALJ and staff are members of one happy family should be avoided.

One approach is for ALJs to maintain their personal ties but disqualify themselves in any case in which a friend appears. If the bar is small this may be unfair to counsel and their clients, and impractical as well. An alternative course is to describe publicly the relationships whenever a friend or associate is involved and offer to disqualify oneself if so requested. However, this places an unfair burden on objecting counsel, who is put in the position of implying publicly that the ALJ may be biased. Also, if done frequently, this approach may seem to be avoidance of the ALJ's own responsibility.

In any event, an ALJ must avoid the appearance of impropriety. Thus the ALJ should not regularly play bridge or golf or dine with lawyers whose firms may appear before him. Nor should the ALJ actively participate in politics or political meetings.[316]

Judges must accept a certain amount of loneliness. They needn't become recluses, but they should realize they are no longer "one of the gang."

F. *Individual Requests for Information*

The ALJ will often receive requests for information from interested persons. Frequently the material sought will be confidential -- such as which party will prevail, when the decision will be issued, and what effect it might have on the community. The ALJ should make every effort to explain courteously any refusals to answer. Sometimes, it may be possible, and appropriate, to deflect

316. Federal Administrative Law Judges are, of course, subject to the Hatch Act, 5 U.S.C. §§ 7321-27 (1994, Supp. V 1999).

the inquiry with a suggestion that the person might be able to obtain additional information, and views, from sources not subject to judicial restraints, such as agency staff or private parties involved in the proceeding.

G. *Interaction with Other Independent Officers*

While there is little case law on the subject, at least one case, *U.S. Navy-Marine Corps Court of Military Review v. Carlucci,* has raised the issue concerning the extent to which independent adjudicative officers must cooperate with investigations of officials such as a military Inspector General.[317] While generally acknowledging the statutory right of IGs to investigate a military judge's misappropriation of funds, fraudulent claims, or other abuses of appointment, *Carlucci* addresses the issue of an allegation of impermissible use of *ex parte* information during a judge's deliberations. This raises a question concerning the judge's duty under Judicial Canons to uphold the independence and integrity of the court when an IG seeks to investigate matters involved in judicial deliberations even after the case has closed and a final decision has been rendered. Agencies can provide appropriate procedural rules to handle such issues within their adjudicative divisions to preclude such problems from arising.

H. *The Media*

The persistence of the press in a major or newsworthy case may be annoying at times, but the Administrative Law Judge should cooperate, to the extent permitted by ethics and agency rules, in the circulation of public information about the proceeding. Questions about non-confidential, public matters can be answered, so long as this does not interfere with the orderly conduct of the hearing. For example, the ALJ certainly may respond to queries about the place or

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317. U.S. Navy-Marine Corps. Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988), especially at 337-43. This case was discussed in Joseph H. Baum and Kevin J. Barry, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*, 36 FED. B. NEWS & J. 242 (June 1989).

time of the hearing or the length of a recess. The merits of the case, however, must be off-limits, both directly and by implication. The ALJ should not be interviewed under circumstances likely to lead to questions relating to the merits.

Likewise, the ALJ should not give off-the-record or not-for-attribution interviews. If the material is not confidential, quotation should be permitted; if it is confidential, it should not be revealed in the first place.

VIII. THE DECISION

After receipt of all supplemental material and briefs, the ALJ should prepare the decision, the findings of fact and conclusions of law. Agency rules and practice will govern the details of how the ALJ submits the decision to the agency and serves it upon the parties. The notice of decision should provide for filing of exceptions and briefs.

Some agencies have authorized their Administrative Law Judges to make the agency's decision, subject only to discretionary review by the agency.[318] The title page of such a decision should state that it is an agency decision issued pursuant to delegated authority (citing the pertinent rules) and the notice of decision should describe how and when petitions for review may be filed. Any order attached to the decision should include a similar statement of delegated authority and should provide that, absent filing of a petition for discretionary review or review on the agency's own initiative, it will become effective as the final agency order after a specified time. The form for issuance of other decisions is similar, with such changes as are necessary to show that they are not final until affirmed by the agency or the agency review board.

The ALJ's jurisdiction usually ends upon the issuance of the

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318. *See* ACUS Recommendation 68-6, Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency, 1 C.F.R. § 305.68-6 (1993); *see also* 29 C.F.R. § 2200.91 (2003) (Occupational Safety and Health Review Commission); 17 C.F.R. § 12.101, .106 (2003) (CF.T.C., reparation cases: Voluntary Decisional Proceedings). For an article discussing discretionary review by agencies, *see* Gilliland, *The Certiorari-Type Review*, 26 ADMIN L. REV. 53 (1974).

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decision, except that errors may be corrected by issuance of an errata sheet.[319] This should be used to correct serious errors of substance only, never to correct obvious typographical mistakes or errors already the subject of exceptions.

A. *Oral Decision*

In cases involving few parties, limited issues, and short hearings, the ALJ may save substantial time by rendering the decision orally -- if permitted by agency rules or policies. However, it must be emphasized that agency rules or policies control. The rest of this section is relevant only to the extent that the ALJ has authority, in the first instance, to render an oral decision.[320]

If the ALJ is authorized to issue an oral decision, the parties can be advised before the hearing to prepare for oral argument on the merits at the close of the testimony. After all evidence has been received and any procedural matters disposed of, the ALJ may recess the hearing for a few minutes to give counsel an opportunity to read their notes and prepare for oral argument. After listening to oral argument and rebuttal, the ALJ, perhaps after another short recess, may deliver the decision orally on the record.

This procedure obviously increases the risk of overlooking some material fact or legal precedent, but in a case simple enough to truly warrant an oral decision, that risk is not substantial. There are, moreover, compensating advantages in addition to the time saved. If witness credibility is involved, then the demeanor and the actual testimony of the witness are fresh in the ALJ's mind.

Some cases involving formal adjudications will be governed by the provision of the APA which entitles the parties to a reasonable opportunity to submit proposed findings or conclusions, and supporting reasons, before a recommended, initial, or tentative

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319. Form 14 in Appendix I is a sample errata sheet.

320. For some cases where the ALJ exceeded any authority to rule orally under agency rules or precedents in force at that time, *see* Local Union No. 195, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. of the U.S. & Canada, AFL-CIO & Tanner, 237 N.L.R.B. 931 (1978); Plastic Film Prod. Corp. & Amalgamated Clothing and Textile Workers Union, AFL-CIO, 232 N.L.R.B. 722 (1977).

decision.[321] Advising the parties before the end of the hearing that an oral decision will be made at the close of the hearing, and that parties desiring to submit proposed findings and conclusions should be prepared to do so orally, probably meets this requirement.[322]

Sometimes, agency rules expressly authorize oral decisions. The Rules of Practice of the National Transportation Safety Board, for example, provide that "The law judge may render his initial decision orally at the close of the hearing . . . except as provided . . . in § 821.56(c)."[323]

When an oral decision is issued from the bench the transcript pages upon which the oral decision appears constitute the official decision. No editing except typographical corrections should be made. A footnote should be inserted after the decision stating, in effect: "Issued orally from the bench on _____ in transcript volume _____ at page _____ through page _____."[324]

B. *Written Decision*

Most cases, because of their complexity, the size of the record, the number of parties, or the number of issues, do not lend themselves to oral disposition. The following discussion is directed to the drafting of written opinions, although some of the suggestions may also be applicable to oral decisions.

Ideally, the ALJ starts planning the decision when the case is assigned. Each procedural step, including learning and shaping the

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321. 5 U.S.C. § 557(c) (2003).

322. *See* Charles E. McElroy, 2 N.T.S.B. 444 (Order EA-499, Docket No. SE-1772) (1973). However, it should be noted that this opinion seems to focus on compliance with the agency's rules.

323. 49 C.F.R. § 821.42 (2003). For some other examples of agency rules authorizing the ALJ to render a decision orally, *see* 7 C.F.R. § 1.142(c) (2003) (Department of Agriculture); 46 C.F.R. § 201.161 (2003) (Maritime Administration, referring to decision "whether oral or in writing").

324. For examples of agency rules which expressly deal with the transcript of an oral decision, or otherwise reducing an oral decision to writing, *see* 7 C.F.R. § 1.142(c)(2) (2003) (Agriculture: copy to be excerpted from the transcript and furnished the parties by the Hearing Clerk); 39 C.F.R. § 961.8(g) (2003) (Postal Service: written confirmation of oral decision to be sent to the parties); 49 C.F.R. § 821.42(d) (2003) (N.T.S.B., copy excerpted from transcript and furnished to parties).

issues, determining what evidence is needed, arranging for and obtaining essential material, and conducting the hearing, should be aimed toward producing a clear, concise, and fair record.[325] Any weakness or delinquency in these earlier steps makes the final task more difficult.

Still, the most difficult writing problem usually occurs when the ALJ, facing an onerous deadline, assembles the transcript, exhibits, notes, and briefs, and starts to put down on paper the findings and conclusions. Each ALJ differs in writing habits, but all ALJs should strive constantly for improvement.

Some aspects of decision-writing, like any other form of composition, probably cannot be "taught," at least not in the sense of learning some rote formula or mechanical "rules" which will make the ALJ rival Oliver Wendell Holmes as a wordsmith. All of us probably have harbored mild envy, at one time or another, toward a colleague who seems to have a natural talent for writing. There are ALJs who seem to have a remarkable ability to organize the material, and to use language in a way which converts a thick, jumbled record into a coherent decision where everything falls into place, capturing the essence of what happened and what the case is about, and how it should be decided. Such a decision leaves the reader with a sense of inevitability -- that this was the only way that this particular decision could have been written. Most judicial opinions fall considerably short of such an ideal, but it is a goal worth keeping in mind. Unless the ALJ is simply a genius, however, it takes considerable effort and experience to attain such a state of craftsmanship.[326]

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325. Form 23 reflects one judge's innovative effort to keep the record and materials organized by using the ongoing computer revolution. In complex cases, Judge Tidwell, U.S. Claims Court, sometimes issues an order requiring parties to supplement their usual paper filings by providing the court with electronic copies (on floppy disk) of filings which are greater than two pages in length. Using the search capabilities of word processing programs such as WordPerfect, Judge Tidwell is able to locate information and points in the materials much more efficiently than otherwise could be done by trying to visually scan hundreds of pages of material. Letter from Judge Moody R. Tidwell, U.S. Claims Court to Morell E. Mullins (Apr. 3, 1992).

326. For several articles on this subject, *see* Borchers, Patrick, *Making Findings of Fact and Preparing a Decision*, 11 J.NAALJ 85 (1991)[cited in Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151, 171, n. 7 (1997)]; Michael

In the meantime, there are certain approaches, procedures, and tools that may help to make deciding and writing the case easier. Some of these will be the focus of the rest of this chapter.

1. Format

No rigid structure can be prescribed for all written decisions, but some uniformity in basic outline is customary. Every decision should contain certain preliminary material, including a title page with the name of the case, the type of decision (e.g. initial decision or recommended decision), the date of issuance, and the name of the ALJ. If the decision is long, there should be a table of contents and headnotes that summarize the principal issues and the decision. Also, a list of appearances should be included, with the names of all persons and organizations who entered an appearance and the persons and organizations represented. The name and address of each person on whom the decision is to be served should be included on a service sheet, usually attached at either the beginning or end of the decision.

The form of the text depends largely on the nature of the case, agency practice, and the ALJ's style. The following suggestions may be helpful:

(a) The opening paragraphs should describe succinctly what the case is about. They may include a summary of the prior procedural steps and the applicable constitutional provisions, statutes, and regulations.

Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151 (1997); Patrick Hugg, *Professional Legal Writing: Declaring Your Independence*, 11 J. NAALJ 114 (1991)[cited in Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151, 171, n. 7 (1997)]; Patrick Hugg, *Professional Writing Methodology*, 14 J. NAALJ 165 (1994); Harold H. Kolb, Jr., *Res Ipsa Loquitur: The Writing of Opinions* 12 J. NAALJ 53 (1992)[cited in Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151, 171, n. 7 (1997)]; Irvin Stander, *Administrative Decision Writing*, 10 J. NAALJ 149 (1990).

(b) Although the relief requested by the parties may be described in the introduction, *detailed contentions should not be recited.* These lengthen the opinion unnecessarily since, if they are material and relevant, they must be set forth in detail in discussing the merits. Not observing this proscription is a common failing in opinion writing.

(c) If proposed findings and conclusions have been submitted, the ruling on each of them should be apparent from the decision,[327] so the ALJ does not necessarily need to refer to each of them specifically.[328] Likewise, insignificant or irrelevant issues raised by the parties need not be addressed specifically but can be disposed of with a statement that all other questions raised have been considered and do not justify a change in the result.[329] However, an ALJ must be extremely careful in applying this principle. If the agency or a reviewing court disagrees about the significance of a particular issue, remand may result.[330]

(d) The decision should include specific findings on all the major facts in issue without going into unnecessary detail.[331]

(e) The ALJ should apply the law to the facts and explain the decision. Whether the facts, law, and conclusions should be combined or placed in separate sections of the decision depends on the agency's requirements, the ALJ's style and such other factors as the type of case and the nature of the record.

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327. *Cf.* 5 U.S.C. § 557(c) (2003).

328. Transcontinental Coach Type Service Case, 14 C.A.B. 720 (1951); *cf.* Mich. Consol. Gas Co. v. Fed. Power Comm'n, 203 F.2d 895 (3d Cir. 1953).

329. In Northwest Air Service, Operating Authority, 32 C.A.B. 89, 97-98 (1960), the Board denied a motion requesting a specific ruling by the ALJ on each proposed finding. For a similar holding, *see* Allegheny Segment 3 Renewal Proceeding, 36 C.A.B. 52, 54, n.3 (1962).

330. *See, e.g.*, Affiliation of Ariz. Indian Ctrs., Inc. v. Dep't of Labor, 709 F.2d 602 (9th Cir. 1983); P&Z Company, 6 OSHC (BNA) 1189 (1977).

331. *See e.g.*, People for Envtl. Enlightenment & Responsibility (PEER) v. Minn. Envtl. Quality Council, 266 N.W.2d 858 (Minn. 1978).

(f) The decision should end with a summary of the principal findings of fact and conclusions of law. In addition to making specific findings and conclusions, there should be ultimate findings framed in the applicable statutory or regulatory language.[332]

In a case involving many issues or complicated facts, the decision can be divided into labeled sections and subsections, with appropriate titles and subtitles. This will usually make reading, studying, and analysis of the decision easier and quicker. These divisions, with their titles, should be set forth in the table of contents.

Frequently, adopting a framework, or outline, for the decision with appropriate headings before drafting the decision will make organizing the record, deciding the issues, and writing the conclusions easier and clearer. This outline can, and probably should, change as the decisionmaking progresses.

(g) Footnotes should be used for such material as citations of authority and cross-references, but rarely for substantive discussion. Footnotes on each page are preferable to a numerical listing of notes (endnotes) at the end of the opinion or in an appendix. The latter arrangement is inconvenient for the reader and hinders careful reading of the decision.

(h) Citations must be sufficiently detailed to enable the researcher to find the source without difficulty. This can be assured by using a standard reference work.[333]

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332. Expressly setting out "ultimate" findings in words which track the statutory language or criteria is a precaution which is strongly advisable because there are older Supreme Court cases which suggest that such findings cannot be inferred from the decision's other findings and conclusions. *See* Yonkers v. United States, 320 U.S. 685 (1944); Wichita R.R. & Light Co. v. Pub. Utils. Comm'n of Kansas, 260 U.S. 48 (1922). *But see* Penn-Central Merger & N.W. Inclusion Cases, 389 U.S. 486 (1968).

333. *E.g.*, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2003); A recent competitor to the Harvard Blue Book is Association of Legal Writing Directors & Darby Dickerson, ALWD CITATION MANUAL (Aspen L. & Bus. 2003). The latter publication is updated at

(i) Maps, charts, technical data, accounts, financial reports, forecasts, procedural details, and other germane background material too lengthy to be included in the text may be attached as appendices.

(j) In many cases the ALJ issues an order or proposed order. In some cases other actions are appropriate. For example, in franchise cases, a certificate must sometimes be issued or amended. Such documents should usually be added as supplements to the decision.

2. Research

The ALJ must study the record and make an independent analysis of the facts and contentions. This requires careful examination of legal and policy precedents of the agency and of the courts.

In some agencies technical assistants may be available to Administrative Law Judges to help analyze and cross-index detailed or complicated data. At other agencies law clerks are available to provide this help.[334]

In researching agency decisions the ALJ should cover those not yet published in the bound volumes of the official reports. Many agencies have a section charged with indexing and digesting decisions and orders; the ALJ should enlist its help in finding relevant agency authority. Some agencies maintain a list of all their cases appealed to the courts and supply their ALJs with current copies.[335]

The ALJ may also seek the advice of the senior ALJs of the agency, who may recall a relevant case that has escaped the attention of other researchers. Of course the standard research texts should also be used—notably the commercial services, texts, and law reviews. Moreover, the ALJ must take advantage of the on-going

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www.alwd.org.

334. For an article dealing with legal and technical assistants, *see* John J. Mathias, *The Use of Legal and Technical Assistants by Administrative Law Judges in Administrative Proceedings*, 1 ADMIN. L.J. 107 (1987).

335. *See, e.g.*, cases collected by the now-defunct C.A.B., in its Compilation of Court Cases of the Civil Aeronautics Board.

revolution in electronic data bases and computer-based electronic research. Today's commercially available services, such as Lexis® and Westlaw®, and websites maintained by agencies themselves, enable a user to conduct legal, and other, research in ways which simply would not have been feasible for a decision-writer laboring under a heavy caseload and time deadlines ten years ago. For example, an ALJ using computerized legal research literally could have at the fingertips every case decided by a particular agency, if the agency's cases are in the relevant data base. Every case "in the computer" mentioning a particular regulation can be retrieved with a few strokes on a keyboard. Or, an ALJ could locate almost every reference in the CFR (except perhaps the changes which have only been recently published) to a term like "in camera." Research that took hours, or simply could not have been done without poring for days over printed materials, can be finished in minutes, using computerized legal research. The main problem, of course, is that the cases or other materials for which the ALJ is searching must first be in the particular data base. Although noncommercial Internet research tools are becoming increasingly available, their data bases generally do not go back as far, and are not as complete as, the commercial data bases.

Another convenient source of information about relevant facts, policy, and law is the briefs of the parties. Proposed findings of fact and conclusions of law, if reliable, can save the ALJ time and effort. Of course, the ALJ must consider the reliability of counsel or the party, or both. But it is certainly acceptable to make proper and careful use of proposed findings and conclusions.[336]

Although this use of counsel's briefs and arguments is beneficial, the ALJ alone is responsible for the decision. The ALJ must use the utmost care to be sure that findings of fact are supported by the record and the conclusions of law by reliable precedent. This may require study of the legislative history of relevant statutes or review of the law of another agency which regulates a similar industry or activity.

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336. *See, e.g.*, Schwerman Trucking Co. v. Gartland S.S. Co., 496 F.2d 466, 475 (7th Cir. 1974).

3. The Decisional Process

The cornerstone of the formal administrative process is the principle that the decision of the Administrative Law Judge is an independent intellectual judgment, based solely upon the applicable law (including agency regulations and precedent) and the facts contained in the record. This has several consequences.

Unless the material is properly entered into the record of the case, the ALJ should not consider public or private statements of agency members, Congressmen, congressional committees, or administration officials. Other than statements that are considered part of the legislative history of the relevant statute, the only non-record pronouncements of government officials relevant to the decision are *official* and *operative* pronouncements—agency rules and decisions, but not policy statements by the agency members; current Executive Orders, but not speeches by administration officials; statutes and relevant legislative history, but not newspaper interviews of Congressmen.

Such statements, however high the source, are normally made without benefit of the facts and arguments developed in the hearing process. Still more important, in many cases the APA would prohibit the use of matters which are not on the record. "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title . . . ."[337] Even if the proceedings are not controlled by the APA's statutory limitations, it is still the better part of judging to avoid basing a decision on anything extraneous to the record.[338]

A few words are necessary concerning the relationship which the decision should bear to the established policies of the agency. It is

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337. 5 U.S.C. § 556(e) (2003) (emphasis added). This section also provides for official notice.

338. *See* Home Box Office, Inc., v. F.C.C., 567 F.2d 9 (D.C. Cir. 1977) (rulemaking). *But see* Action for Children's Television v. F.C.C., 564 F.2d 468 (D.C. Cir. 1977) (rulemaking); Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (rulemaking). While the cases cited here involved rulemaking of one sort or another, and (in the main) ex parte contacts at agency head level, the point in the text remains the same. The administrative law judge's use of extra-record materials is likely to provide colorable grounds for appeal, at the very least.

the ALJ's duty to decide all cases in accordance with agency policy.[339]

This duty can be especially perplexing in at least two types of situations. First, court decisions (other than those of the Supreme Court) may have found the agency's policy or view to be erroneous, but the agency disagrees, and announces its "nonacquiescence," at least outside the circuit where the unfavorable decision was rendered. In this case, the agency takes the position that the ALJ is bound to apply the agency view if the agency has authoritatively declared nonacquiescence.[340] Nonacquiescense has been strongly criticized by some reviewing courts.[341]

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339. "[O]nce the agency has ruled on a given matter, [moreover,] it is not open to reargument by the administrative law judge; ... although an administrative law judge on occasion may privately disagree with the agency's treatment of a given problem, it is not his proper function to express such disagreement in his published rulings or decisions." Iran Air v. Kugelman, 996 F.2d 1253, 1260 (D.C. Cir. 1993).

340. *See* Ins. Agents Int'l Union, AFL-CIO & The Prudential Ins. Co. of Am., 119 N.L.R.B. 768 (1957). As described in an article in 1998, "Non-acquiescence is a policy of federal administrative agencies in which the agency, rather than appealing a court decision which is unfavorable to the agency, chooses to ignore it. In the context of Social Security disability claims, this has been a bone of contention for many years." Joyce Krutlick Barlow, *Alcoholism as a Disability Under the Social Security Act An Analysis of the History, and Proposals for Change*, 18 J. NAALJ 273, 290, n.97 (1998).

341. Ithaca College v. N.L.R.B., 623 F.2d 224 (2d Cir. 1980). More recent cases continue to criticize non-acquiescence. *See, e.g.*, Rogers v. Chater, 118 F.3d 600, 602 (8th Cir. 1997) ("The Commissioner's policy of non-acquiescence is flagrantly unlawful."). For a case which recognizes that the ALJ is somewhat whipsawed if an agency is "nonacquiescent," *see* Hillhouse v. Harris, 547 F. Supp. 88, 93 (W.D. Ark. 1982)(referring to ALJ being in the position of trying to serve two masters, the courts and the Secretary of Health and Human Services). "Nonacquiescence" has generated a substantial number of law review articles, among them, Matthew Diller & Nancy Morowetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Samuel Estreicher & Richard Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence*, 99 YALE L.J. 831 (1990); Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Samuel Figler, *Executive Agency Nonacquiescence to Judicial Opinions*, 61 GEO. WASH. L. REV. 1664 (1993); Joshua I. Schwartz, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989) Joseph F. Weis, Jr., *Agency Non-Acquiescence: Respectful Lawlessness or Legitimate Disagreement?*, 48 U. PITT. L. REV. 845 (1987); William Wade Buzbee, Note, *Administrative Agency Intracircuit Nonacquiescence*,

Second, the ALJ may have to decide a case under statutory criteria which are open-ended, such as "public interest," and the agency's decisional precedents are policy-intensive, rather than strictly legalistic. On the one hand, if the ALJ operating under such a regime can discern the agency policy, then the ALJ's decision must adhere to that policy. On the other hand, if the parties have introduced evidence or arguments not previously considered by the agency, or if there are facts or circumstances indicating that reconsideration of established agency policy may be necessary, the ALJ has not only a right but a duty to consider such matters and rule accordingly.

Moreover, although the ALJ should follow agency policy and the law, the ALJ's decision may be the last opportunity to call the attention of the agency (or the courts if the agency denies review) to an important problem of law or policy. An ALJ, while adhering to agency policies may well have a duty to the agency itself to include in his or her written opinion a temperate, careful discussion or analysis calling attention to a serious legal problem with present agency policies. The agency can ignore, or even criticize, an ALJ who is wrong, but if the agency concludes that the ALJ has identified a serious problem, the ALJ who is correct may prevent substantial inequity and injustice. Such action by an ALJ cannot be undertaken lightly but must reflect long and careful research and analysis. The ALJ's facts and reasoning, based on the record and the law, should be so clearly set forth that the agency will know exactly what has been done and why.

Turning to another delicate subject, the ALJ also must preserve the integrity of the decisional process in ways that are less obvious. For instance, the ALJ should never write a decision motivated by a desire to curry favor with the current heads of the agency, or based on considerations of the result which the ALJ thinks the current agency heads subjectively want. An ALJ's responsibility is to follow agency policy, or where necessary in a case of first impression, establish a policy consistent with existing agency policy. Attempting merely to predict future agency positions would be an abdication of this role. The whole purpose of the ALJ's decision is to give the agency the benefit of a considered decision after a proceeding

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85 COLUM. L. REV. 582 (1985).

specifically designed to elicit the truth. Nothing whatsoever is gained, and a lot can be lost, if an ALJ's decision seeks to set before the agency members only a mirror of their own thoughts, no matter how obtained.

It follows that the ALJ should not be swayed by any tentative finding of fact or tentative conclusion of law or policy contained in an order of investigation, an order to show cause, or any other action by which the agency has indicated how it may be thinking. Such premature findings may be based on staff recommendations and, although necessary for procedural reasons, are not, cannot be, and are not intended to be, the agency's final decision. Indeed, to attribute that kind of finality to preliminary agency determinations would be to flirt with violations of procedural due process.[342]

Agency staff's views should be subjected to the same impartial scrutiny as the views of any other interested persons. The staff position is not automatically correct merely because it is put forward as an objective, untainted furthering of the public interest. It is the ALJ's responsibility to decide where the public interest lies, and the theory of the system presumes that this is best achieved by an impartial weighing of all facts and arguments.

Turning to more mechanical aspects of decisionmaking, the ALJ sometimes must exercise discretion in determining which issue in a complex case to consider first -- but once an issue that is determinative has been decided, the ALJ usually should proceed no further. It may be argued that if the agency disagrees as to the single decisive issue it will not have the benefit of the ALJ's independent analysis and recommendation on alternative issues. However, in a complex case the major issues may be so numerous that to decide all of them in their various combinations could be a waste of time and generate an unreasonably long and complicated decision. It will likely be quicker and easier for the agency (if it disagrees with the ALJ) to develop one alternative dispositive issue than it is for the ALJ to develop a dozen alternatives initially. Nevertheless, in a case where the decision is close on either of two determinative issues, or where two important policy or legal issues are raised, it may be advisable to decide both.

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342. *See* Withrow v. Larkin, 421 U.S. 35 (1975).

The ALJ should not uncritically accept the parties' contentions as to which issues are decisive. The parties' lack of skill, abundance of cunning, or excessive zeal, may cause them to make contentions which are incorrect as a matter of fact or law. After analyzing the record and reading the briefs the ALJ should make an independent determination of the decisive issues and focus the decision on those issues, regardless of the parties' emphasis.

A decision must not, however, rest upon a point which has not been raised at the hearing, in briefs, or in oral argument. Thorough preparation and proper management of the earlier stages of the proceeding should avoid this problem; but if, after the proceeding has been concluded, the ALJ finds an unexplored issue which may be dispositive, supplementary briefs or memoranda, at a minimum, should be requested.

The ALJ should decide all the issues necessary to dispose of the case unless circumstances indicate that some or all should be deferred. A decision may be deferred, for example, if it would be affected by the outcome of an appeal pending before the agency,[343] or before the Supreme Court.[344] However, there may be countervailing constraints, such as statutory time limits within which to issue a decision. These can limit the ALJ's authority to defer rendering a decision.

If, in the course of hearing and deciding the case, the ALJ discovers facts that indicate that agency action may be necessary on other issues, recommendations for institution of another proceeding may be appropriate. For example, in a case involving the desirability of extending weekend family air fares to other days of the week, the ALJ realized that the legality of all family fares should be investigated, and recommended that the agency start such a proceeding.[345] The agency did so.[346]

If the parties timely raise new procedural questions after the close of the hearing, such as a motion to strike all or part of a brief, the

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343. *See* Flying Tiger-Additional Points Case, 58 C.A.B. 319, 322, 364, 365 (1971).

344. This practice is, of course, common among the lower federal courts. *See, e.g.*, U.S. v. Hayles, 492 F.2d 125 (5th Cir. 1974).

345. Capital Family Plan Case, 26 C.A.B. 8, 9 (1957).

346. Family Excursion Fares E-11867 (C.A.B., Oct. 11, 1957).

ALJ should rule on them in his decision if practicable. However, when the question must be ruled upon before decision, such as a motion to receive newly discovered evidence, the ALJ should rule upon it promptly, deferring issuance of the decision if necessary. But if the parties merely renew procedural motions or objections made and disposed of at the hearing, the ALJ should let the record speak for itself unless new matters are presented that require further action or discussion.

4. Style

Administrative cases sometimes involve complicated technical matters, statistical concepts, intricate details and abstract ideas. The ALJ should strive to present these in a fashion that a layman can understand. Technical or abstruse words should be avoided if possible; if not, they should be explained in a footnote.

Decisions should be as brief as the subject matter permits. Complicated statistical, financial, and scientific questions frequently require detailed analysis, computations, or calculations. If these are included in the text, the opinion may become unnecessarily complicated, difficult to comprehend, and unreasonably long. It is frequently preferable to include only the basic findings in the text and place the detailed material in appendices.

Sometimes factual findings should be supported by specific citations to the record. If, for example, a factual determination is based on a single item of evidence, the transcript reference should be given; or if in a rate case the ALJ makes independent cost computations from the conflicting bases and theories of different parties, citations to the record should be included, showing the derivation of each computation. However, a determination on a major factual question frequently results from consideration of numerous items of testimony of varying weight. In such circumstances, excessive references to the record can be misleading to the reader. The substance of the decision must be anchored in the record, but the number and selection of citations to the record in some respects is a matter of style.

If the evidence is conflicting, but a finding is essential, the ALJ may be tempted to compromise by using weak phrases such as "it appears" or "it seems." The ALJ should not try to evade

responsibility in this fashion. A finding must be positive.

It may occasionally be desirable to quote directly from the transcript of the oral testimony. This device can be effective for emphasis, but should be used carefully. Long verbatim excerpts from the transcript may be unclear and prolix, and editing them for the opinion may lead to charges of selective quotation.

With respect to a sometimes-overlooked resource which is available to the ALJ, it is frequently advantageous to borrow directly from a brief -- a document which is, after all, part of the record. If counsel has submitted an objective finding of fact or an articulate statement of law or policy with which the ALJ entirely agrees, it is wasted effort to recast it in the ALJ's own words. However, wholesale incorporation by reference of a party's entire brief and proposed findings, of course, ordinarily should be avoided.

It may sometimes be necessary for the decision to contain derogatory findings about a particular individual. If, for example, the testimony of a certain witness contradicts one of the findings, the ALJ may have to explain why the witness was not competent or credible. This should be avoided if possible without weakening the opinion; but if and when it is necessary, the explanation should be as temperate as the integrity of the decision will permit. Similarly, if it is necessary to correct an error or refute an absurd argument, the name of the person responsible should be omitted if that will not impair the coherence of the decision. Although the ALJ should not needlessly offend or insult any person, the decision should be scrupulous in stating the facts accurately and clearly.

Where credibility is in issue, the reviewing authority may look to the ALJ's demeanor findings on the theory that the ALJ observed the witness and therefore was in the best position to evaluate the witness' credibility. Consequently, the ALJ should exercise extreme care in such findings, and avoid conclusory statements such as "from the witness's demeanor it is concluded that he cannot be believed." Instead, credibility findings should be supported by specific conduct or observations. For instance, a witness may be talkative and comfortable in response to all questions, except those addressing the issue on which credibility is doubtful, but whenever the questioning turns to that issue, the witness becomes evasive and starts looking away from the ALJ and toward counsel, as if for signals. At any rate, to the extent possible, findings grounded on witness demeanor should

have some reference point in observed behavior, such as evasiveness, hesitancy, or discomfort under questioning.[347]

C. *Writing the Decision*

The ability to conduct a hearing and decide a case fairly and accurately is crucial, but an inability to clearly and concisely explain the resulting decision impairs the value of all other aspects of the ALJ's performance. Writing is a difficult art, and despite high qualifications, writing experience, and training, an ALJ may have difficulty putting findings and thoughts on paper. Except for the fortunate few endowed with exceptional writing ability, each ALJ must constantly work on maintaining and improving this skill.

The inferior quality of much legal writing has inspired corrective action by many schools, writers, teachers, and critics. Some federal agencies have attempted to improve their written materials.[348]

In addition, there are numerous excellent books on style and writing simple English. Some of special relevance to lawyers and ALJs are set out in Appendix III.

Legal writing need not be complex or confusing. Judge John M. Woolsey's opinion in the *Ulysses Case*,[349] familiar to many judges, is an example of clear judicial writing:

> II. I have read 'Ulysses' once in its entirety and I have read those passages of which the government particularly complains several times. In fact, for many weeks, my spare time has been devoted to the consideration of the decision which my duty would require me to make in this matter.

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347. *See* James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903 (2000).

348. A recent example is National Labor Relations Board, NLRB STYLE MANUAL: A GUIDE FOR LEGAL WRITING IN PLAIN ENGLISH (Revised, January 2000).

349. United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933).

> 'Ulysses' is not an easy book to read or to understand. But there has been much written about it, and in order properly to approach the consideration of it it is advisable to read a number of other books which have now become its satellites. The study of 'Ulysses' is, therefore, a heavy task.
>
> III. The reputation of 'Ulysses' in the literary world, however, warranted my taking such time as was necessary to enable me to satisfy myself as to the intent with which the book was written, for, of course, in any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called, according to the usual phrase, pornographic, that is, written for the purpose of exploiting obscenity.
>
> If the conclusion is that the book is pornographic that is the end of the inquiry and forfeiture must follow.
>
> But in 'Ulysses,' in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist. I hold, therefore, that it is not pornographic.[350]

In writing on a difficult legal question involving a book written in an unconventional manner, Judge Woolsey's use of "I" is particularly striking. For a case of this type involving somewhat subjective standards, the use of the first person makes his thinking clear. It emphasizes that this decision, the law, and the book, *Ulysses*, deal with human beings. The only legal words in the excerpt quoted are "I hold, therefore." The language used is clear and simple English, and it tells clearly what he did personally to reach his decision. The decision is four pages long. The complete opinion contains a few unusual words and several long ones, but the entire opinion and the reasons for Judge Woolsey's action are easily understood by a

350. *Id.* at 183.

layman.

Most judges do not write with the elegance of Judge Woolsey. Sometimes, they simply do not have enough time to revise and rewrite. Nevertheless, they at least should strive to write simply enough so that anyone can understand them. Plain, simple English is more likely to convey a judge's findings to the reader than complicated legalistic phrasing.

Nothing suggested in this book will be sufficient to give any ALJ the smooth and clear legal writing ability to which all judges aspire. Nevertheless, there are certain customs and patterns, which, if followed, can make the ALJ's decision shorter and easier to read.

Set out below, therefore, are several areas in which improvement is frequently needed. Study of this material can serve as a starting point for an ALJ seeking greater skill. No attempt is made to give a mini-course in writing or a review of grammar. This discussion deals primarily with matters of brevity, clarity, and stylistic quirks. Thorough discussions of these subjects and related matters of style and grammar will be found in books cited in Appendix III.

1. Brevity

a. *Needless Words*

Strunk and White's *The Elements of Style* is a good place to start. This book of only 85 pages is filled with clear suggestions for making writing more readable. The authors, emphasizing that one should omit needless words, say:

> A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell.[351]

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351. Strunk & White, *The Elements of Style* 23 (3d ed. 1979).

b. *Short Simple Words*

Long, cumbersome, and confusing words and phrases are used frequently by professional and business people including judges, lawyers, and teachers. There are, no doubt, numerous reasons for this tendency, such as a desire for precision, a desire to impress a client, or the tendency to use highly technical words even though one is writing for the layman.

Sometimes, the longer word or phrase is merely a short word lengthened unnecessarily -- a kind of inflation. A classic example is substitution of *utilize* for *use*. Unfortunately, the tendency to *utilize*, rather than *use*, remains prevalent. A few examples of the "longer word" problem follow, but their number is legion.

Long	Short
finalize	finish, complete
effectuate	effect
preplan, plan ahead, plan in advance	plan
point in time	time
at the present writing	now
are bound to be in agreement	agree
in the not too distant future	soon
have duly noted the contents of	have read
to the fullest possible extent	fully
along the lines of	like
regardless of the fact that	although
under circumstances in which	when
in reference to	about
in the event that	if

Use the longer words or phrases only if the shorter ones will not do.

c. *Redundant Phrases*

Lawyers habitually group two or more words meaning the same thing, such as *null and void; last will and testament; rest, residue, and remainder; transfer, convey, and pay over*; or *alter, change, or*

modify. If a lawyer is trying to impress a client, well-known redundant phrases may be helpful, but even that is doubtful. Probably more clients are annoyed by needlessly repetitious language than are impressed by the use of stock phrases.

A judge needs only to explain to his readers—the parties and their attorneys, the agency, the interested public, and perhaps a reviewing court—what was done and why. A reader does not like words that confuse or words that are used for display. A reader wants only to learn with minimum time and effort what the judge said.

d. *Short Sentences*

Long sentences are hard to understand. A timeless motto for writers is, "Short sentences can be read; long sentences must be studied."[352] The judge should state facts and reasons in terms easily understood by the layman as well as by the lawyer. By the use of a few connecting words with short sentences it is frequently easy to make the story flow evenly. Even if the use of simple words and short sentences in an opinion results in a little jerkiness that a stylist might avoid, little is lost so long as the meaning is clear.

Tests over a seven year period show that the average sentence length in popular magazines has been kept between twelve and fifteen words.[353] Although a Judge may argue that a legal decision is more important and deals with deeper subjects than those in popular magazine articles, ease of reading and comprehension is surely as important in the documents that rule our lives as in those that entertain us.

Long sentences make writing hard to understand. The reader, either consciously or subconsciously, needs a break -- a rest. Furthermore, one thought per sentence is easy to understand.

Therefore, break up long sentences. Aim to keep average

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352. The revisor of the 1992 edition and the present edition cannot recall the source of this quotation, but reluctantly disclaims authorship.

353. R. Gunning, *Technique of Clear Writing* 34 (1968).

sentence length below twenty-five words. Try to separate a long compound sentence into two or more shorter sentences. A related problem is the questionable connection of two sentences by the word *however*:

> He was driving only 30 miles per hour, however, this was too fast.

One way to revise such a sentence:

> He was driving 30 miles per hour. This was too fast.

Occasionally thoughts are so interrelated that one sentence with several clauses and phrases may seem essential. However, if no matter how arranged it is still difficult to understand, then break up the sentence into three or four parts. Clarity is more important than stylish beauty.

Sometimes even breaking up a sentence or rewriting it does not clarify the meaning. The reason may be that the thinking is not sound or the facts are inconsistent. This applies not only to sentences but to paragraphs and even entire decisions. As Dean Landis said:

> Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons on which they depend. . . .[354]

If a thought does not look right on paper, consider backing up for a rethinking or an entirely new approach. What you believe initially to be stylistic problems in expressing the idea or point actually may be symptoms of more basic defects in the substance of the idea or point.

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354. J. Landis, *The Administrative Process* 105 (1938).

e. *Paragraphs*

Although a paragraph is used to group thoughts, there is no rigid rule for length of a paragraph. A paragraph may vary in length from a one word sentence to many sentences of substantial length and complexity.

Paragraph length should depend on what the writer is trying to communicate. Still, the writer needs to seek a balance between extremes. On the one hand, large blocks of print scare the reader. On the other hand, several short paragraphs in succession may be annoying. Most good paragraphs have between two and ten sentences. If a paragraph seems too long, it is usually possible to divide it into two or more paragraphs without disturbing or distracting the reader.

2. Punctuation

Punctuation is the simplest device for making things easier to read. It is also an important road sign to the reader: i.e., making it easier to understand the intended meaning of a passage.

Punctuation is frequently left to a stenographer. This is a mistake. Even a stenographer who knows how to punctuate may not know precisely what you want to say. Punctuation can be used to emphasize, to clarify, and to simplify. Commas, semi-colons, periods, hyphens, dashes, and all the other punctuation symbols have specific purposes. If used correctly they will simplify writing and make your writing easier to read. Useful rules can be found in the U.S. Government Printing Office Style Manual,[355] and other grammar and style manuals. Rules vary somewhat, but reliance on any standard work should suffice to keep meanings clear and easy to understand.

3. Active or Passive Voice

Use of the active voice rather than the passive voice is frequently preferable for two reasons. First, it saves words:

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355. U.S. Government Printing Office (2003).

The convict was sentenced by Judge Jones.
Judge Jones sentenced the convict.

Second, it is more likely to reveal who the actor is:

Drivers' licenses will be issued.
The clerk will issue drivers' licenses.

In addition, the active voice is normally more direct and vigorous. The subject of the active-voice sentence is acting or doing something. Consequently, the active voice should be used in the absence of a good reason for using the passive.

This does not mean that the passive voice always should be avoided. To the contrary, passive may be preferable when the thing done is important and who did it is not, or when the actor is unknown or indefinite. The passive voice can also be used for emphasis, or when detached abstraction is desired.

4. Ambiguity

Avoid the ambiguous. Like much advice, this is easier said than done. Often we do not realize that what we have said or written could be susceptible to more than one meaning. "This brief reads like a first draft dictated to a stenographer needing improvement." Sometimes we even refuse to see the ambiguity in our words when it is pointed out. At any rate, ambiguity slows and confuses the reader. It may even be used as a deliberate way to deceive.

Ambiguity may be especially likely when the writer uses a word with two meanings or two words with the same meaning near each other. For example, a lawyer or a judge should not use "exception," meaning an exclusion, in, or near, a sentence containing "exception" used as a legal term meaning a formal objection. (If this shortcoming occurs frequently in a piece of writing, it may be a clue that the piece is a first draft, possibly dictated to a machine or stenographer.)

When a writer deliberately uses, for the sake of "variety," two words meaning the same thing, the potential for ambiguity is no less. Problems resulting from deliberately using different words meaning the same thing, especially in the same passage of a decision or

document, are discussed in the section on Elegant Variation.

In related vein, some people cannot bear to repeat a name or proper noun anywhere near its original use. They feel somehow that they must use a pronoun. But sometimes the antecedent of a pronoun is not clear. If so, do not hesitate to strike the pronoun and use the name of the individual or object. Minor stylistic awkwardness is a small price to pay for major misunderstandings. A lapse in stylistic elegance is not as bad as creating the impression among your readers that you were completely oblivious to the meaning of what you have written.

After writing and rewriting a decision, an ALJ frequently becomes so familiar with its contents that it is difficult to detect ambiguous passages. It always helps to turn it over to a law clerk or an associate for a fresh look.

5. Stylistic Quirks

Avoid stylistic quirks. These small distractions divert the reader's attention from what is being said to how it is being said. The reader has enough distractions without the writer increasing them by efforts to be verbally eccentric or cute.

a. *Elegant Variation*[356]

Elegant variation is the use of variety for its own sake—changing words and structure to hold the reader's attention and to avoid boredom. The following is an example:

> The first *case* was *settled* for $2,000, and the second *piece of litigation* was *disposed of out of court* for $3,000, while the price of *amicable accord* reached in

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356. H. Fowler, *A Dictionary of Modern Usage* 148-151 (2d ed. E. Gowers 1965).

the third *suit* was $5,000.[357]

But what has happened? The reader may wonder whether distinctions were intended between *case, piece of litigation*, and *suit*, and between *settled, disposed of out of court,* and *amicable accord.*

(Some writers have real difficulty avoiding elegant variation. These poor souls may be the by-product of high school and college English teachers' otherwise appropriate efforts to make their students use synonyms and produce "lively" writing. However, to any judge who is writing a decision, clear communication is primary, and liveliness is secondary.)

There are at least two ways, stylistically, to handle an elegant variation: (1) Repeat the same words or phrases. It is better to bore the reader than to confuse him. (2) Sometimes it is possible to put the repetitious material in an opening clause followed by two or more phrases or clauses that implicitly refer back to the opening clause. For example, the sample sentence could be reworded as follows:

> "The first case was settled for $2000, the second for $3000, and the third for $5000."

Although breaking a document, or passage, into lettered or numbered divisions may sometimes confuse the reader, this procedure, used carefully, can frequently assist the reader. "The complainant has: (1) not filed a response to respondent's motion to suppress; (2) ignored repeated admonitions to conclude discovery by the agreed-upon date; (3) been late in every filing required by the agency's rules . . . ."

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357. R. Wydick, *Plain English for Lawyers* 57 (1979).

b. *Litotes*

Some judges use litotes, affirmative statements expressed by denying the contrary, either as false courtesy to spare someone's feelings or to express a doubtful finding. Avoid litotes unless they are clearly needed. Use *kindly* rather than *not unkindly, naturally* rather than *not unnaturally.* George Orwell recommended inoculation against using litotes by memorizing this sentence: "A not unblack dog was chasing a not unsmall rabbit across a not ungreen field."[358]

c. *Genderless English*

Avoiding the appearance of gender-bias in writing is worthwhile, but requires some effort. Moreover, the effort can be overdone, especially if the writer resorts to creating new words, like substituting "personhole" for "manhole." However, a little good faith effort often can avoid passages like "the writer should know that his failure to demonstrate his sensitivity to gender-bias can result in his leaving an impression that he is totally ignorant about the way language conditions his behavior." Nevertheless, the writer is in a sometimes-difficult situation. If you use *his* for any pronoun, you may be criticized. *His or her* frequently sounds awkward, and substituting *their* may obscure the meaning.

At the very least, be aware of the problem. And certainly, be consistent in referring to males and females. If you refer to men by their last names or first names do the same with women. Try to omit irrelevant references to physical characteristics of either sex. Avoid patronizing and stereotypes. Do not say *fair sex, weaker sex,* or *the ladies*; say *women.* If you use *Esquire* on a service sheet, use it for all lawyers regardless of sex. Bias implicit in such phrases as *a manly effort* or *a weak sister* should be avoided. But don't overdo it by neutering everything in sight.

There are not always clearcut answers to problems of gender and language, but so long as sex is irrelevant the judge should word the

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358. George Orwell, *Politics and the English Language*, in SHOOTING AN ELEPHANT AND OTHER ESSAYS 90 (1950).

decision carefully to avoid any sexual bias.

6. Miscellaneous

a. *Names*

If referring to a person or organization, it generally is appropriate to set out the name in full the first time it is mentioned, followed parentheses containing a shorter version of the name – such as a word, abbreviation, or shortened title. Thereafter the word, abbreviation, or shortened title can be used throughout the decision. In most situations, do not assume that the reader is already acquainted with the NLRB or AAA. (In fact, there could be several groups with the "AAA" initials.) Write out "National Labor Relations Board (NLRB)" the first time it is mentioned; treat the American Automobile Association similarly. If the names of persons or things are similar or confusing, the ALJ should devise short easily distinguishable names or descriptions (with parenthetical explanations, if necessary).

Personal honorific titles such as Doctor, Professor, or General ordinarily should not be used if they are irrelevant. A party may infer that the ALJ is assigning some weight to the title.

b. *Technical Terms*

Technical terms are frequently necessary when dealing with many subjects. An ALJ who is familiar with the subject may tend to use complex and technical language incomprehensible to many persons interested in his decision. The ALJ should resist this tendency and, if possible, use words and expressions comprehensible to a lay reader. If that is impossible, unusual words and phrases should be defined. This can be done in a footnote or a special section for definitions. Alternatively, the ALJ may summarize in the main text and put the technical details and computations in an appendix.

c. *Attribution*

Excessive or needless attribution wastes a great deal of space,

especially in judicial writing. As a consequence of realizing that anything in the written decision may have legal effect, the ALJ is tempted to overreact by repeating the source of every bit of information. There are several convenient devices for avoiding this problem. The ALJ may only need to state:

"Mr. X testified as follows:"

and continue with indirect quotations for a sentence, paragraph, or page without repeating the attribution.

The ALJ may place a summary of the testimony or statements of each witness under separate subheadings such as *Green's testimony* or *Smith's statement.*

Provided the result is clear, the ALJ may attribute the testimony early in the passage with no further reference until the last sentence, then say: "Mr. Jones concluded his testimony by stating that . . . ."

d. *Speech Tags*

These are journalistic expressions such as *he said,* used to attribute direct quotations. Ordinarily, speech tags should not be placed in the middle of a sentence. Also, a speech tag need not be repeated even for a long quotation. Once is usually enough.

e. *Ellipsis*

Ellipsis is the omission of a word or words that the reader will, by inference, understand or apply. It is frequently an easy way to avoid needless and boring repetition.

"X bank has $9 million in negotiable municipal bonds,
Y bank $7 million, and Z bank $4 million."

Ellipsis is also used to shorten quotations by inserting three periods (four if the sentence is ended) for the omitted material.

f. *Latin Terms*

Et al., an abbreviation for *et alii,* is Latin for *and others. Etc.,* an

abbreviation for *et cetera,* is Latin for *and other things. And etc.* is redundant. *Et al.* may be useful in legal instruments to indicate persons whose names are not known, or for the names of parties too numerous to mention.

Sic is Latin for *so* or *thus.* It should be used only to assure the reader that what is immediately preceeding is correctly quoted when on its face it appears doubtful. It should never be used to criticize grammatical errors, to call attention to jokes, or (in place of quotation marks) to indicate an ironical use of a word. *Sic* may be used to indicate that a misspelling in quoted material appears in the original.

g. *Write It Down*

Although this point is not directly related to the actual writing of opinions, the ALJ should cultivate the habit of marking such details as dates, names, addresses, telephone numbers, and even the time of day, on relevant documents. The ALJ should also record such matters in office appointment books, calendars, and professional diaries. This suggestion will not directly improve an ALJ's writing, but it will save time and effort in writing opinions. All judges realize the necessity for written records and exact dates, but many waste hours looking for and attempting to verify details.

7. Being Clever

Dr. Samuel Johnson reportedly said: "Read over your composition, and when you meet with a passage that you think is particularly fine, strike it out." Although there are plenty of exceptions to this dictum, it contains some wisdom. Attempting to shine with cleverness is a good way to look foolish, and egocentric.

Once more, cleverness is NOT the first priority of decision-writing. Judges, like all writers, on occasion will have an inspiration or perform a brilliant bit of stylistic acrobatics on some obscure point, that viewed a few days no longer seems very brilliant.

The ideal is not to demonstrate your own brilliance. The ideal lies in the opposite direction. The ideal is a decision which takes so little effort to read and understand that the reader becomes unaware of the writer.

8. Rewriting

The preceding suggestions of how any judge, ALJ or otherwise, can simplify and clarify the written decision should be helpful. Judges may find that a good way to ensure clarity and sound reasoning is to have an able colleague review, edit, and criticize the decision.

Finally, all judges know that the only way to write any document is to assemble the relevant material and the dictionary, thesaurus, stylebook, and guide to citations, and to write. Then rewrite, rewrite, and rewrite.[359]

359. For an excellent book which concentrates on the much-neglected topic of how to revise one's writing, *see* Ede, WORK IN PROGRESS: A GUIDE TO WRITING AND REVISING (St. Mary's Press, 1989).

APPENDICES