

## II. PREHEARING 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<sup>81</sup> and a brief conference report summarizing the matters which were agreed upon. Sometimes, the objectives served by a prehearing conference can be achieved by correspondence between the ALJ and the parties,<sup>82</sup> or by the ALJ directing the parties to correspond or confer by telephone with each other<sup>83</sup>.

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<sup>81</sup> 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 (March 1, 1987). For examples of federal regulations authorizing telephone prehearing conferences, see 5 CFR § 2434.24(d) (2000) (Federal Labor Relations Authority, unfair labor practice proceedings); 9 CFR 202.110(b) (2000) (Department of Agriculture, proceedings applicable to reparations proceedings under Packers and Stockyards Act); 28 CFR § 76.19(2000) (Department of Justice, civil penalties for possession of certain controlled substances; stating, "Prehearing 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, Attorneys, and Clerks (1983).

<sup>82</sup> See, 9 CFR § 202.110(b) (2000) (Department of Agriculture, reparations proceedings under Packers and Stockyards Act; 28 CFR § 76.19(2000) (Department of Justice, civil penalties for possession of certain controlled substances).

<sup>83</sup> See, 19 CFR § 354.11(b) (2000) (Department of Commerce, International Trade Administration; "If a

After all, the prehearing conference is a tool -- a means to an end, not an end in itself. Prehearing conferences are primarily a way to organize the proceedings to achieve optimum productivity and avoid wasting time and effort. An effective prehearing 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 prehearing 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 prehearing 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 prehearing 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] prehearing conferences<sup>84</sup> and procedures. Most of them give considerable discretion, one way or another, to the ALJ or presiding officer.<sup>85</sup>)

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prehearing 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.").

<sup>84</sup> In response to a search request on the Lexis CFR data base, on August 12, 2000, for the term "prehearing conference," Lexis reported 420 documents.

<sup>85</sup> 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

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 prehearing conference is obvious. Furthermore, in such cases exhibits and other direct evidence often cannot be prepared until discovery produces the necessary information or data<sup>86</sup>. Several prehearing conferences ultimately may be needed. The ALJ must adapt procedures to each individual case.

Because a prehearing 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 prehearing 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.

**A. Preparation for Prehearing 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,

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may expedite and aid in the disposition of the proceeding." 7 CFR § 1.140(a) (2000). For another example, see 10 CFR § 1013.19(a) (2000) (Department of Energy, Program Fraud Civil Remedies and Procedures: "The ALJ may schedule prehearing conferences as appropriate.")

<sup>86</sup> For a rule which contemplates a prehearing conference before discovery, see 10 CFR § 2.740(b) (1) (2000) (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 prehearing conference, see 47 CFR § 1.311 (2000) (FCC).

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 prehearing conference. The ALJ who sets a prehearing 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 prehearing 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.<sup>87</sup> This direction may appear in

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<sup>87</sup> For example, see 7 CFR § 1.140 (2000) (Department of Agriculture, material to be submitted at or subsequent to the conference); 10 CFR § 820.28(c) (2000) (Department of Energy) (rule itself requires parties to exchange names of expert witnesses, summaries of expected testimony, copies of documents and exhibits); 14 CFR §16.211(a) (2) (2000) (prehearing 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).

the prehearing conference notice or in a supplemental letter.

### **B. Notice**

In many agencies the ALJ establishes the date and issues the prehearing conference notice<sup>88</sup>. For complex, multiparty cases, however, there may be some problems. For instance, there may be questions concerning who is, or can be, a party<sup>89</sup>. 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.

### **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

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<sup>88</sup>Forms 1-a and 1-b in Appendix I are samples related to notices of a prehearing conference.

<sup>89</sup> See, *Office of Communication v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (intervention as party in license renewal proceedings for commercial television broadcaster) and *ECEE v. FERC*, 645 F. 2d 339 (5th Cir. 1981) (standing in certain FERC proceeding). Sometimes, agency rules may deal expressly with party status. For example, 30 CFR § 44.3 (2000) (Mine Safety and Health Administration, petitions for modification of mandatory safety standards); 47 CFR § 1.223 (2000) (FCC general procedures for intervening as a party).

or into a recorder<sup>90</sup>. Since the ALJ ordinarily will provide to the parties a report or order summarizing the outcome of the conference,<sup>91</sup> the need for a verbatim transcript may be marginal.

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 prehearing conferences.<sup>92</sup>

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

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<sup>90</sup> For examples of agency regulations which indicate that the ALJ has discretion on whether a transcription of a prehearing conference is to be made, see 7 CFR § 1.140(b) (2000) (Agriculture: prehearing conference will not be stenographically reported unless so directed by the ALJ); 7 CFR § 283.11(d) (1) (2000) (prehearing conference will not be stenographically recorded unless directed by ALJ); 10 CFR § 10.104(2000) (Commodities Futures Trading Commission; reference to the record of prehearing conference, "if recorded"); 12 CFR § 19.31 (2000) (Comptroller of Currency rules of practice and procedure: "{ALJ}" in his or her discretion may require that a scheduling or prehearing conference be recorded by a court reporter."); 16 CFR 3.21(g) (2000) (FTC; ALJ discretion to determine whether prehearing conference will be stenographically reported); 40 CFR § 85.1807(k) (2) (2000) (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 prehearing conference. For example, 24 CFR § 26.21 (2000) (HUD; prehearing conference "shall . . . be recorded or transcribed" at request of any party.)

<sup>91</sup> See for example 24 CFR § 26.21(c) (2000) (requiring an order after the prehearing conference stating the rulings on matters considered at the conference and any directions to the parties). Also see *infra*, text at note 99.

<sup>92</sup> See for example, 10 CFR § 2.1021(c) (2000) (Nuclear Regulatory Commission); 47 CFR § 1.248(e) (2000) (FCC); 16 CFR § 1025.21(d) (2000) (Consumer Product Safety Commission).

obtain copies pursuant to agency rules.

#### **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,<sup>93</sup> 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<sup>94</sup>. 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.

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.

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<sup>93</sup> See, 21 CFR § 12.89(a) (2000) (FDA, participation of "nonparty participant"). For examples of agency rules dealing expressly with obtaining party status, see 30 CFR § 44.3 (2000) (Mine Safety and Health Administration, petitions for modification of mandatory safety standards); 47 CFR § 1.223 (FCC general procedures)

<sup>94</sup> Form 2 in Appendix I is a sample appearance sheet.

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 prehearing conference may need to address issues pertaining to discovery. Moreover, the prehearing 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;<sup>95</sup> (2) the agency's hearing order may require the parties to prepare and exchange direct, and perhaps rebuttal, evidence before the conference;<sup>96</sup> and (3) the ALJ at a preliminary conference may arrange for the exchange of requests for information which, if objected to, will be resolved at a reconvened conference<sup>97</sup>. 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

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<sup>95</sup>See for example 18 CFR § 157.6 (2000) (FERC); 18 CFR § 385.601(c) (2) (2000) (FERC) (discretionary with presiding officer).

<sup>96</sup>See for example 12 CFR § 19.31(b) (8) (2000) (Comptroller of Currency, typical omnibus authority to address "Such other matters as may aid in the orderly disposition of the proceeding."); 29 CFR § 2200.51 (2000) (Occupational Safety and Health Review Commission, prehearing 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.

<sup>97</sup> See for example 46 CFR § 502.94(c) (2000) (Federal Maritime Commission). The possibility for more than one prehearing conference is indicated by the casual reference to "a series of prehearing conferences." *Ellis v. Director*, 1999 U.S. App. Lexis 21638 (4th Cir.) ("unreported" case)

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 prehearing conference report or in a separate document.

8. **Ground Rules** -- To supplement the relevant statutes, the 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<sup>98</sup>. 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.<sup>99</sup>

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<sup>98</sup>Form 3 in Appendix I is a sample set of ground rules.

<sup>99</sup>Forms 4-a, 4-b, and 4-c in Appendix I are sample prehearing 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 CFR § 2.751a(d) (2000) (Nuclear Regulatory Commission, construction permit and operating licensing proceedings; report referred to as an "order"); 14 CFR 302.22(c) (2000) (Department of Transportation; Aviation Proceedings) 49 CFR § 386.55(b) (2000) (DoT, Federal Highway

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.

#### **F. Preliminary Motions and Rulings**

All prehearing 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<sup>100</sup>. 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 Prehearing Procedures**

At the risk of being repetitious, it should be emphasized that a full-fledged prehearing 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 prehearing 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

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Administration; report referred to as an "order").

<sup>100</sup>Form 5 in Appendix I is a sample interlocutory order.

evidence needed,<sup>101</sup> 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 prehearing 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<sup>102</sup> provided for the development of information by the parties before the hearing without a prehearing conference<sup>103</sup>. This procedure, which is described in the Court of Federal Claims forms set forth in Appendix I,<sup>104</sup> 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

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<sup>101</sup>Forms 6-a-c in Appendix I are samples of prehearing orders and instructions to the parties.

<sup>102</sup> 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.

<sup>103</sup> 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 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.

<sup>104</sup>See Forms 18-a through 18-e in Appendix I.

applicable rules, a case might be settled as soon as assigned to an ALJ, shortly afterwards, during any of the usual prehearing 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 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,<sup>105</sup> one way to avoid the problems which could arise if the ALJ becomes too active in settlement negotiations is to use a Settlement Judge<sup>106</sup> 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

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<sup>105</sup> See *supra*, text at notes 47-53.

<sup>106</sup> For examples of agency regulations pertaining to settlement judges, see 5 CFR § 2423.25(d) (2000) (Federal Labor Relations Authority; unfair labor practice proceedings); 18 CFR § 385.603 (2000) (FERC); 24 CFR §180.445 (2000) (HUD; proceedings for civil rights matters); 29 CFR 18.9 (2000) (Department of Labor); 29 CFR § 2200.101 (2000) (Occupational Safety & Health Review Commission); 47 CFR § 1.244 (2000) (FCC); 48 CFR § 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. FERC*, 64 F. 3d 679, 687 (D.C., 1995).

the time, cost, and energy involved in a formal hearing, a settlement can neutralize hostilities that might be aggravated by litigation<sup>107</sup>. 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 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,

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<sup>107</sup>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.

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.<sup>108</sup>

2. **ADR.** As previously mentioned,<sup>109</sup> 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 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.<sup>110</sup>

Moreover, the specifics of each agency's ADR programs are still being developed<sup>111</sup>. This development probably will be, and

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<sup>108</sup>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).

<sup>109</sup> See *supra*, text at notes 64-80.

<sup>110</sup> See text *supra* at 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 CFR § 385.604(c) (3) (2000) (ALJs may serve as neutrals); 47 CFR § 1.722(d) (1) (2000) (ALJs as mediators in voluntary mediation of damages where liability is clear); and 40 CFR § 22.18 (Presiding Officer to rule on parties' motion for appointment of a neutral).

<sup>111</sup> See for example 65 FR 38986, 39003 (June 22, 2000) (Commodities Futures Trading Commission) (Notice of Proposed Rulemaking; new regulatory framework for multilateral transaction execution facilities, etc.); 65 CFR 36888 (June 12, 2000) (Department of Commerce, International Trade Administration, Notice Announcing Reopening of Public Comment Period re: ADR for online consumer transactions); 65 FR 31131 (May 16, 2000) (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, 40158 (July 23, 1999) (Environmental Protection Agency, Final Rule, consolidated rules of practice for civil penalties, compliance orders, etc.).

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."<sup>112</sup> 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 materials.

Discovery rulings may be made if the ALJ finds it necessary to apply compulsion to obtain the necessary information<sup>113</sup>. 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<sup>114</sup>. In other agencies, the ALJ may refuse to issue a subpoena absent a showing of relevance

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<sup>112</sup> Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 438 (1986).

<sup>113</sup> See, Freije, *The Use of Discovery Sanctions in Administrative Agency Adjudication*, 59 IND. L. J. 113 (1983); Tomlinson, *Discovery in Agency Adjudication*, Report in Support of Recommendation [70-4], 1 ACUS 37, 571, 577 (1971); 1 CFR § 305.70-4 (1993).

<sup>114</sup> See for example 29 CFR § 2200.57 (2000) (Occupational Safety & Health Review Commission).