

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 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. PREHEARING 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 filed¹³⁴. 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

¹³²29 U.S.C. §§ 151-68 (1994).

¹³³29 U.S.C. §651 *et seq.* (1994).

¹³⁴ See, e.g., 29 CFR §§ 2200.30 -.41 (2000)
(Occupational Safety & Health Review Commission).

certain provisions of the APA¹³⁵ which are triggered, with certain exceptions, by any statute which requires an adjudication to be determined on the record after 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 prehearing procedures, few exhibits, and a brief prehearing conference over the telephone. Certainly there is no strong need to develop special procedures to shorten the simpler hearing to

¹³⁵ 5 U.S.C. §§ 554, 556, 557 (1994).

¹³⁶ 5 U.S.C. § 554(a) (1994).

save only an hour or two.

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

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.

of complex proceedings can take varied forms. More than 25 years 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 hearing¹³⁹. 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 law¹⁴⁰. 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 to 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 non-lawyers holding advanced degrees in engineering, physics, public health, medicine, or

¹³⁹Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 ABAJ 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.

¹⁴²42 U.S.C. § 2241(a) (1994). Relevant rules of practice governing proceedings before the Atomic Safety and Licensing Boards (and other NRC hearing bodies) are published in 10 CFR Part 2 (2000).

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 reliable record and in advising the panel 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. This they may do 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

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

¹⁴⁴Paris, *Role of the Scientist in NRC Administrative Proceedings*, 20 IDEA, The Journal of Law and Technology 357 (1979). See also U.S. Nuclear Regulatory Commission, *Statement of Policy on Conduct of Licensing Proceedings* (CLI-81-8) (May 20, 1981). Revisor'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.

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 witness in Social Security disability proceedings¹⁴⁶. 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

¹⁴⁵For 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 Ad. L. J. 107 (1987).

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

¹⁴⁷ See text *supra* at notes 30-80.

¹⁴⁸ Ruhlen, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* 22-23 (1982) (citing conversation between Administrative Judge Merritt

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

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)).

¹⁴⁹ 5 U.S. C. § 556(d) (1994). (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. Florida 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 Pennsylvania v. FCC*, 782 F. 2d 182 (D.C. Cir. 1985) ("Cross-examination is therefore not an automatic right conferred by the APA; instead,

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

its necessity must be established under specific circumstances by the party seeking it.")and *Central Freight Lines, Inc. v. United States*, 669 F. 2d 1063 (5th Cir. 1982) (cross-examination not an absolute right under the APA).

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 prehearing procedures in a complex, multi-party proceeding are carefully organized in the manner discussed in Chapter II (Prehearing 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 noticed¹⁵¹. 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 evidence¹⁵². The parties should be directed at the prehearing 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,

¹⁵⁰I. Benkin, *Is it Bigger than a Breadbox? - An Administrative Law Judge Looks at Cross-Examination of Experts*, 21 AIR FORCE LAW REVIEW 365 (1979).

¹⁵¹ For one example, see 14 CFR § 302.24 (g) (2000) (DOT, Aviation Proceedings).

¹⁵² 5 U.S.C. § 556(d) (1994).

subject to objection on other grounds.¹⁵³

D. Intervention and Participation by Non-parties¹⁵⁴

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

¹⁵³ See, e.g., 46 CFR § 201.131(d) (2000) (DOT, Maritime Administration); 42 CFR § 1005.8(c) (2000).

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

¹⁵⁵ See for example 14 CFR § 302.20 (2000) (DOT Aviation Proceedings); 17 CFR § 10.33 (2000) (Commodities Futures Trading Commission).

¹⁵⁶ See for example 17 CFR § 10.34 (2000) (Commodity Futures Trading Commission [CFTC], "Limited Participation"); 47 CFR § 1.223(b) (2000) (FCC); 17 CFR § 10.35 (2000) (CFTC, "Permission to state views"); 17 CFR § 201.210(c) (2000) (SEC: "Parties and limited participation"); 29 CFR § 2200.21(c) (2000) (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."]).

referred to the agency¹⁵⁷. Some agencies have fairly detailed requirements, or list factors to be considered, for intervention.¹⁵⁸ Others have generalized 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.

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

¹⁵⁸ See for example, 14 CFR § 302.20 (2000) (DOT Aviation).

¹⁵⁹ See for example, 24 CFR § 1720.175 (2000) (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 for example, 14 CFR § 13.206(b) (2000) (FAA: "The administrative law judge may determine the extent to which an intervenor may participate in the proceedings."); 16 CFR § 3.14(a) (2000) (FTC: "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 CFR § 2200.21(c) (2000) (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.")

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.

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 case¹⁶¹. 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

¹⁶¹ *Cf.*, 21 CFR § 15.21(c) (2000) (FDA: "Public Hearing Before the Commissioner"). An example of such authority in the agency itself in appeals from ALJs can be found at 29 CFR 2200.95 (2000) (OSHRC).

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 prehearing 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 prehearing conference in a complicated rate or route case or a merger, it may save much time and travel in a simple case with

¹⁶² 47 CFR § 1.248(f) (1991).

¹⁶³ For example, 5 CFR § 24.2324(d) (2000) (Federal Labor Relations Authority); 7 CFR § 1.140 (2000) (Department of Agriculture); 12 CFR § 19.31 (2000) (Comptroller of Currency); 17 CFR § 201.221(2000) (SEC); 29 CFR § 2700.53 (2000) (Federal Mine Safety and Health Review Commission). See also Hanson, Mahoney, Nejelski, and Stuart, *Lady Justice -- Only a Phone Call Away*, 20 Judges' Journal 40 (No. 2, Spring 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 prehearing conference, was conducted by telephone conference, see *Casey v. O'Bannon*, 536 F. Supp. 350 (E.D. Pa. 1982).

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.

The earlier generation of videophones have seldom been 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 increase¹⁶⁴. 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 prehearing 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 prehearing 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

¹⁶⁴ Bulkeley, *Eye Contact: The Videophone Era May Finally Be Near, Bringing Big Changes*, Wall. St. J., March 10, 1992, at 1, col.6.

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.

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 party¹⁶⁵. 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 appeal¹⁶⁶. 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 appeal¹⁶⁷. 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

¹⁶⁵ For an example, see 14 CFR § 13.219(b) (2000) (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 CFR § 904.253(a) (2000) (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 CFR § 4.1124 (2000) (Department of Interior, surface coal mine hearings and appeals.) See also ACUS Recommendation 71-1, Interlocutory Appeal Procedures, 1 CFR § 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).

except in a few specified circumstances.¹⁶⁸

I. Mandatory Time Limits

To speed up administrative proceedings, Congress by statute,¹⁶⁹ 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

¹⁶⁸ See for example, 16 CFR § 3.23(a) and (b) (2000) (FTC); 17 CFR § 10.101 (2000) (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 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 CFR § 10.84(b) (1992) (CFTC), and 16 CFR § 3.51 (1992) (FTC), have been amended. 17 CFR § 10.84(b) (2000) no longer imposes time limits, and 16 CFR § 3.51 (2000) 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 for example, 5 CFR § 1201.73(f) (3) (2000) (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 CFR § 525.22 (2000) (Department of Labor, Wage & Hour Division, employment of workers with disabilities under special certificates:

The Administrative Conference of the United States, long familiar with the delays involved in complex administrative proceedings, considered this problem in 1978¹⁷². 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 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

"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 CFR § 305.78-3 (1993).

¹⁷³ *Id.*

submitted in written form.

The Administrative Conference of the United States recommended the adoption of procedures providing for summary judgment or decision¹⁷⁴. The Conference's recommendation contains a model rule that was adopted nearly verbatim by several agencies, including the Commodity Futures Trading Commission,¹⁷⁵ and the Federal Communications Commission¹⁷⁶ and the Federal Trade Commission¹⁷⁷. Other agencies, including the Consumer Product Safety Commission,¹⁷⁸ the Environmental Protection Agency,¹⁷⁹ and 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

¹⁷⁴ Recommendation 70-3, Summary Decision in Agency Adjudication, 1 CFR § 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 CFR §§ 10.91-10.92 (2000).

¹⁷⁶ 47 CFR § 1.251 (2000).

¹⁷⁷ 16 CFR § 3.24 (2000).

¹⁷⁸ 16 CFR § 1025.25 (2000).

¹⁷⁹ 40 CFR §§ 164.91, 164.121 (2000).

¹⁸⁰ 49 CFR § 511.25 (2000).

¹⁸¹ See for example, 10 CFR § 2.749 (2000) (Nuclear Regulatory Commission); 21 CFR § 12.93 (2000) (FDA); 29 CFR § 1841 (2000) (Department of Labor, Office of Administrative Law Judges); 29 CFR § 1905.41 (2000) (Department of Labor, variances from safety and health standards); 29 CFR § 2570.67 (2000) (Department of Labor, Pension & Welfare Benefits, assessment of civil penalties).

judgment¹⁸². 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 by the ADR Act¹⁸⁵ 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 controversy¹⁸⁶. ADR's potential for expediting and simplifying

¹⁸²Minnesota Power & Light Company, Docket No. ER78-425 (March 26, 1979); and Texas Eastern Transmission Corporation, 10 FERC ¶63,068 (April 30, 1980).

¹⁸³5 U.S.C. § 554(c) (1994), for example, 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 Systems of Pa., Inc. v. FCC, 782 F. 2d 182 (D.C. Cir. 1985).

¹⁸⁴See E. Gellhorn and W. Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971).

¹⁸⁵See text *supra*, accompanying notes 28, 70.

¹⁸⁶See text *supra* at notes 27-29.

complex proceedings has barely been tapped. Techniques such as mediation, early neutral evaluation (ENE), the settlement judge, minitrials, and arbitration¹⁸⁷ 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. HEARING

A. Preparation

1. Notice

A notice of hearing complying with statutory requirements and agency rules should be served upon all parties¹⁸⁹. In addition, statutory provisions or agency rules may require notice to be published in the Federal Register¹⁹⁰. Even though

¹⁸⁷See *supra*, text at notes 30-80.

¹⁸⁸See for example, 48 CFR § 6302.30 (2000) (DOT Board of Contract Appeals; states that Board has adopted two ADR methods, Settlement Judges and Mini-Trials); 18 CFR § 385.604 (2000) (Department of Energy, alternative dispute resolution includes but is not limited to conciliation, facilitation, mediation, factfinding, minitrials, and arbitration); 14 CFR § 17.33 (FAA, Department of Transportation) (2000); 40 CFR § 22.18 (Environmental Protection Agency; civil penalties, revocation, termination, suspension of permits).

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

¹⁹⁰For examples of regulations regarding publication of notice in the Federal Register, see 7 CFR § 1200.5 (2000) (Department of Agriculture) (Rules of Practice regarding proceedings to formulate or amend an order); 10 CFR § 2.104 (2000) (NRC); 14 CFR § 77.49 (2000) (FAA; objects affecting navigable airspace); 16 CFR § 3.72 (2000) (FTC, Reopening of certain proceedings); 21 CFR § 1301.43 (2000) (Drug Enforcement Administration, registration of manufacturers, distributors, dispensers of controlled substances); 40 CFR §