

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 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 a ALJ, in case after case, to be unprepared. Before opening the hearing the ALJ should study the pleadings, the evidence, the prehearing 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; 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 have 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 always should 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, cross-examining counsel should be permitted maximum latitude.

However, a witness may be comparatively inexperienced, unacquainted with judicial procedures, frightened, or nervous. 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 fashion²⁵⁴ 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?"

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

²⁵⁴ See, 5 U.S.C. § 706 (1994) (mentioning that, on judicial review, due account shall be taken of the rule of prejudicial error).

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

²⁵⁵See, 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 CAB 280, 283, 285, 302, 307, 308 (1962).

²⁵⁶Stricken material is included in the transcript with an annotation of the ALJ's ruling. Physically stricken

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.

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

material does not appear in the transcript. *Cf.*, *Larter & Sons v. Dinkler Hotels Co., Inc.*, 199 F.2d 854 (5th Cir. 1952); *Ramsey v. United States*, 448 F. Supp. 1264 (N.D. Ill. 1978); *Midwest Helicopter Airways, Inc.*, 2 NTSB 623, 1973 NTSB Lexis 3 (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).

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 permitted²⁵⁷. Similar blanket

²⁵⁷Ruhlen, MANUAL FOR ADMINISTRATIVE LAW JUDGES 66 (1982).

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, prejudiced 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 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 1977²⁶¹. This review disclosed that only the Department of Labor,²⁶² the Federal

²⁵⁸Chandler v. Florida, 449 U.S. 560, 574-75 (1981).

²⁵⁹Broadcast of Agency Proceedings, 1 CFR § 305.72-1 (1993). See also R. Bennett, Broadcast Coverage of Administrative Proceedings, 2 ACUS 625, 67 Nw. L. Rev. 528 (1972).

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

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

²⁶²*Id.*, citing 29 CFR §§ 2.10-2.16 (1981) for Department of Labor regulations.

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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 presence would not disrupt the hearing²⁶⁵. 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

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 Cable*, New York Times, Section C, p. 17, col. 1 (July 3, 1991).

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

²⁶⁶ 12 CFR § 19.5(b)(10) (2000) (authority of the Administrative Law Judge).

²⁶⁷ 12 CFR § 1780.5(b)(15) (2000) (authority of the Administrative law Judge).

²⁶⁸ 49 CFR § 1113.3 (2000).

²⁶⁹ 50 CFR § 18.76(b)(8) (2000) (Marine Mammals, hearings on Section 103 Regulations).

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.

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 disruptive²⁷¹. 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

²⁷⁰ 21 CFR § 10.200, *et seq.* (2000).

²⁷¹ See, e.g., *Estes v. Texas*, 381 U.S. 532 (1965).

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 constantly 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 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 consequences²⁷³. 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

²⁷²Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

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

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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 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.