complex proceedings has barely been tapped. Techniques such as mediation, early neutral evaluation (ENE), the settlement judge, minitrials, and arbitration[187] will become available in various agencies,[188] Ingenuity and innovation will suggest new hybrids. There will be challenges, as in the past, to adapt to changing circumstances. There will also be opportunities once more to demonstrate how versatile and valuable the Administrative Law Judge, as an institution, can be.

V. HEARING

A. Preparation

1. Notice

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

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[187]See *supra*, text at notes 30-80.

[188]See 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).

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

[190] For examples of regulations regarding publication of notice in the Federal Register, see 7 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 §

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

2. Place of Hearing

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

In agencies where field hearings are not fairly routine, the site of the hearing often is an ad hoc matter. Especially in such agencies, another factor to be considered is the nature of

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179.20 (2000) (EPA, Pesticide Programs).

[191] 5 U.S.C. 554 (b) (1994).

[192] See for example, 7 CFR § 47.15(c) (2000) (Department of Agriculture, reparation proceedings; “careful consideration to the convenience of the parties”); 10 CFR § 2.703(b) (2000) (Nuclear Regulatory Commission, domestic licensing proceedings); 14 CFR § 13.55 (2000) (FAA); 29 CFR § 2200.60 (2000) (Occupational Safety & Health Review Commission, "as little inconvenience and expense to the parties as is practicable"; 49 CFR § 821.37 (2000) (NTSB, air safety proceedings).

the parties. For example, if a private party is seeking a lucrative privilege or a benefit such as a license, it may be fair to place the travel burden on him. However, if the agency threatens imposition of a sanction or withdrawal of a license, it may be more equitable to hold the hearing at the place requested by, or convenient to, the respondent.

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

3. Hearing Facilities

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

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[193]*See,* 7 CFR § 900.4 (2000) (Department of Agriculture, proceedings for marketing orders; authorizing Administrator, among other things, to issue press release regarding hearing); 7 CFR § 1200.5 (2000) (Department of Agriculture, proceeding under research, promotion, and education programs); 40 CFR § 142.33(a) (2000) (EPA, drinking water, Federal Register and newspaper of general circulation).

area where the ALJ contemplates holding the hearing.

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

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

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

B. Mechanics of the Hearing

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

A formal administrative hearing should possess substantially the same formality, dignity, and order as a judicial proceeding. It should move as rapidly as possible, consistent with the essentials of fairness, impartiality, and thoroughness.

1. Transcript

Formal proceedings are recorded verbatim[194]. The reporter

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[194] *See*, 5 U.S.C. § 556(e) (1994).

may use shorthand, stenotype, or any other recording device. (In some agencies, the rules may authorize or contemplate tape recording, rather than stenographic reporting.[195])

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

Since an accurate transcript is essential the ALJ should insure faithful reproduction. With an unfamiliar reporter, it may be desirable to have material read back early in the hearing to determine its accuracy. Before opening the hearing the ALJ should supply the reporter with the names of the parties and counsel, their physical location in the hearing room, and any

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[195] *See*, 5 CFR § 1201.53 (2000) (Merit Systems Protection Board); 38 CFR § 20.714 (2000) (Board of Veteran's Appeals; 7 CFR § 11.8(c)(5)(iii) (2000) (Department of Agriculture National Appeals Division Rules of Procedure); 40 CFR § 24.16 (2000) (EPA, certain hearings on corrective action orders).

[196] *See*, 10 CFR § 2.750(a) (2000) (Nuclear Regulatory Commission: http://www.nrc.gov). For examples of agency rules dealing with traditional forms of transcript, see 20 CFR § 416.1565(o) (2000) (Social Security Administration: SSI, payment may be waived "for good cause"); 34 CFR § 81.18(a) (2000) (Department of Education, General Education Provisions Act: transcript available "at a cost not to exceed the actual cost of duplication").

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

[198] For example, see 10 CFR § 2.750(a) (2000) (NRC Public Document Room); 47 CFR § 1.202 (2000)(FCC).

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

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

2. Convening the Hearing

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

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

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

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[199]*See* text *supra* at notes 93-94.

[200]The following oath or affirmation is sufficient: "Do you solemnly swear (or affirm) that the testimony you are about to give is the truth, the whole truth, and nothing but the truth (so help you God)?" In exceptional cases, such as religious objections to both oaths and affirmations, it would appear that no particular form of words is required. A statement indicating that the witness is aware of the duty to tell the truth and understands that he or she can be

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

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

3. Trying the Simple Case

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

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

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

The rules of evidence in formal administrative hearings will be examined in more detail later in this Manual. However, for the purpose of discussing the relatively simple case, it should be noted that in many Federal administrative proceedings the Federal Rules of Evidence do not apply[201]. However, there are exceptions[202]. Moreover, even if the Federal Rules of Evidence

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prosecuted for perjury for failure to do so should be sufficient. See Gordon v. State, 778 F. 2d 1397 (9th Cir. 1985)(involving deposition)

[201] See for example, 10 CFR § 1013.34 (2000) (Department of Energy, Program Fraud Civil Remedies and Procedures).

[202] For one exception, see 29 CFR § 2200.71 (2000) (Occupational Safety & Health Review Commission). However,

are not applicable by agency rule, they may provide guidance for filling in gaps, and in situations where the ALJ has discretion in conducting the hearing. For example, when the witness is friendly and there is a question of credibility, it is may be advisable for the ALJ to hark to the rule restricting leading questions.[203]

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

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

On matters of credibility the ALJ should be alert to prevent both coaching the witness (indicating the answer desired by a nod or other signal) and the interruption of cross-examination by distracting objections or otherwise. On the one hand, the ALJ may permit more wandering, illogical, and perhaps less relevant questioning if counsel is in good faith attempting to trap a recalcitrant or possibly dishonest witness. On the other hand, the ALJ may find it desirable to let objecting counsel know that

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in simplified proceedings (E-Z Trial) before the same agency, the Federal rules of evidence do not apply. 29 CFR § 2200.209(c)(2000).

[203]Fed. R. Evid. 611 (2000).

[204] See for example, 7 CFR § 15.113 (2000) (Department of Agriculture: Nondiscrimination); 28 CFR § 68.43 (2000) (Department of Justice: Unlawful employment of aliens and related employment practices); 29 CFR § 18.47 (2000) (Department of Labor).

frivolous objections are counter-productive, or to defer a recess or to refuse to go off the record. If witnesses are sequestered, it may be necessary to prevent witnesses who have not testified from talking to witnesses who have. This can frequently be accomplished by extending the length of the session to avoid overnight or other lengthy recesses. Also, it goes without saying that the ALJ should be alert to protect a witness, and the record, if the witness is unsophisticated, unfamiliar with courtroom procedure, timid, or suffering from any other personal trait or handicap that would make for vulnerability to the questioning of a clever or forceful lawyer. The ALJ should assure, as much as humanly possible, that the record reflects the witness' actual observations and viewpoints.

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

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

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

d. Miscellaneous. Administrative proceedings conducted under particular statutes, types of regulations, or agency customs may present special problems that call for alertness and ingenuity on the part of the ALJ. For example, in Social Security claims cases the agency is not represented and the claimant may appear without counsel[205]. Although these Social

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[205] It should be noted that the Social Security ALJs operate under a special statutory regimen in disability cases, where they are not presiding over purely adversarial proceedings. In a sense, the Social Security ALJs are under a duty to independently consider the positions of all parties. See Richardson v. Perales, 402 U.S. 389 (1971); see also Rausch v. Gardner 267 F. Supp. 4, 6 (E.D. Wis. 1967)(ALJ wears “three hats.”) Incidentally, the number of cases where a claimant is represented seems to have increased substantially. As of 1992, the rate of claimants represented by an attorney apparently was over 80%. Letter from Acting Chief Administrative Law Judge, dated May 20,

Security cases are not normally considered adversary proceedings, they do require a delicate sense of fairness and an extra effort by the ALJ to insure that the record is fully developed and that the claimant is fully aware that the ALJ is treating both the agency and the claimant fairly and impartially. Indeed, courts have remanded cases for further hearing when Administrative Law Judges have not met their special obligations in cases involving unrepresented claimants.[206]

The unrepresented party is more likely to be encountered in the "simple" cases. The ALJ often needs a high order of skill to deal with the inexperienced *pro se* party, especially in proceedings which structurally are more adversarial than Social Security disability cases. The *pro se* party may never have been in a hearing room or courtroom before. The ALJ sometimes is whipsawed between complying with the mandate of reviewing courts -- take the unrepresented party's circumstances into consideration -- and the simple fact that the unrepresented party may be difficult to control. This party may present the volatile combination of a weak case and strong feelings about the righteousness of his or her cause. Furthermore, *pro se* cases occasionally involve conflicting claims and personal animosity. A relatively small amount of benefits or penalty sometimes generates more ill-will and hard feelings than larger sums. Also, the ALJ sometimes must make special efforts to calm witnesses who are frightened, confused, or angry and must be

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1992, to Morell E. Mullins, principal revisor of the 1993 edition of this Manual. Moreover, it is not beyond the realm of possibility that the agency may seek, directly by legislation or indirectly by other means, to have legal representation at some hearings. *Cf.*, Salling v. Bowen, 641 F. Supp. 1046 (W.D. W. Va. 1986).

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

prepared to cope with intemperate outbursts and, if worse comes to worse, even physical violence.

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

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

4. Trying the Complex Case

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

Nevertheless, the following discussion may be useful for arranging and organizing a hearing in a complex case. This discussion assumes that written testimony, both direct and rebuttal, has been exchanged a substantial period of time before

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[207] See text *infra*, at notes 246-48.

[208] *See* text and text at notes *supra* 199-206.

the hearing commences.[209] Agency rules, or other considerations, may limit the ALJ's authority in this respect, of course.

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

If written testimony has been exchanged as part of the prehearing development of a case, each party should be called upon in a predetermined order to present its entire case, including all rebuttal evidence. Counsel may be required or permitted to make an opening statement. This is not subject to cross-examination, though the ALJ and counsel may ask questions.

Normally counsel should present any exhibits for identification, and should specify which exhibits will be sponsored by each witness and the order of presentation. He should then call his first witness, qualify him, have him sponsor or authenticate his exhibits,[210] (if needed) and commence direct

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[209] For examples of agency rules which contemplate exchange of written testimony or summaries, see 12 CFR § 308.106 (2000)(FDIC, General Rules of Procedure; ALJ may order parties to present part or all of their case in chief in the form of written statements and exhibits); 14 CFR § 16.223 (2000) (FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings; subject to certain exceptions, "party's direct and rebuttal evidence shall be submitted in written form in advance of the oral hearing pursuant to the schedule established in the hearing officer's prehearing conference report"); 15 CFR § 971.901 (2000) (National Oceanographic and Atmospheric Administration, Deep Seabed Mining; "judges will have the power to . . . require the submission of part or all of the evidence in written form"); 18 CFR § 385.601(c) (2000) (FERC, Rules of Practice and Procedure; authorizing presiding officer to order exchange of exhibits and testimony in advance of the hearing).

[210] The sponsoring question may be phrased as follows: "Were exhibits ______ prepared by you or under your control and supervision, and are they true and correct to the best of your knowledge and belief?" For examples of some

examination. Testimony regarding exhibits may be confined primarily to the correction and clarification of exhibits and to matters that have occurred since the exhibits were prepared. Exhibit material should not be summarized, repeated, or read. Following direct examination, counsel should offer the witness' exhibits in evidence before the witness is released for cross-examination.

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

b. Receipt of Exhibits. When exhibits are offered, the ALJ should consider motions to strike. The ALJ should take careful note of the material objected to and the basis of objection. When all objections have been received, the ALJ should announce what testimony (not otherwise objected to) is deemed improper, giving his reasons. Counsel for the witness should be permitted to reply. The ALJ should weigh the arguments, perhaps during a short recess, and rule on the admissibility of all challenged portions.

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

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regulations pertaining to sponsorship or authentication, see 24 CFR § 180.645 (2000)(Housing and Urban Development; civil rights matters); 46 CFR § 201.131 (2000) (Maritime Administration); 7 CFR § 15.113 (2000) (Department of Agriculture, civil rights, authenticity of documents deemed admitted unless time written objection filed).

[211] For examples of agency rules contemplating the prehearing development of questions such as authenticity, see 7 CFR § 15.113 (2000) (Department of Agriculture, Hearings under Civil Rights Act of 1964); 17 CFR § 201.221(c)(3) (2000)(SEC); 29 CFR § 18.50 (2000) (Department of Labor).

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

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

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

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

Cross-examination should be limited to matters covered on direct unless there are special reasons for further questions. A

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

[213] *See* text *supra* at note 150 (Benkin).

departure may be justified, for example, if a party is seeking to elicit from the witness information that cannot readily be obtained in any other way, or if limiting the testimony would result in the witness being recalled later.

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

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

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

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

f. Multiple Witness Testimony. Sometimes the testimony can be clarified, expedited, and simplified by placing more than one

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

At the former Civil Aeronautics Board the ALJs used this device for many years[215]. Technical information was presented by a panel of two or more witnesses, each qualified on a different aspect of the evidence. Cross-examining counsel, uncertain about whom to direct a particular question to, would ask the question, and the witness having the pertinent information would answer. This procedure proved quicker and made a cleaner record than examining the witnesses seriatim with the frequent necessity of repeating previously unanswered questions and for recalling an earlier witness.

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

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

[215] Ruhlen, MANUAL FOR ADMINISTRATIVE LAW JUDGES 47 (Administrative Conference, 1982).

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

[217] For example, NRC rules regarding hearings on license transfer applications provide for panels of witnesses. 10 CFR § 2.1323(e) (2000).

Details on witness panel testimony were provided in a telephone conversation, March 26, 1992, between Judge Ivan Smith, Nuclear Regulatory Commission, and Morell E. Mullins,

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

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

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

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principal revisor, 1993 edition of this Manual. Judge Smith indicated that he had used the multiple witness technique in the 3-Mile Island case. For some reported NRC cases which refer to witness panels, see In the Matter of Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), 30 NRC 331, 1989 NRC Lexis 69 (Docket Nos. 50-443-OL; 50-444-OL (Offsite Emergency Planning Issues, 1989); In the Matter of Florida Power and Light Co. (Turkey Point Plant, Units 3 & 4), 27 NRC 387, 1988 NRC Lexis 29 (Docket Nos. 50-250-OLA-2, 50-251-OLA-2, ASLBP No. 84-504-07-LA (Spent Fuel Pool Expansion), LBP-88-9A (1988)).

transcript by witness or subject may become more difficult.

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

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

g. Questions by the ALJ. The ALJ certainly may question a witness if there is good reason to do so. However, in an adversary proceeding where parties are represented by counsel, the ALJ should be very circumspect in exercising this power. Prudence should be the ALJ's watchword. For example, the ALJ ordinarily should not question a witness initially, before the parties have their opportunity to ask their own questions. However, on rare occasions, an ALJ might do so if it seems absolutely necessary for such purposes as: (1) preventing reversible error; (2) protecting the record against the inclusion of seriously misleading, obfuscating, or confusing testimony; or (3) avoiding serious waste of time by forestalling extensive, useless, or irrelevant examination by counsel who is incompetent, or worse. Within reason, and with due regard for the need to maintain both the fact and appearance of impartiality, the ALJ also may need to interrupt when the witness and counsel are at

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[218]10 CFR § 110.107(f) (2000) (NRC, Export & Import of nuclear equipment and material: "Participants and witnesses will be questioned orally or in writing and only by the presiding officer. Questions may be addressed to individuals or to panels of participants or witnesses."). For a provision which has since been repealed, see 40 CFR § 124.85 (1991) (EPA, evidentiary hearings for EPA-issued NPDES permits and EPA-terminated RCRA permits: authorizing hearing officer to "[p]rovide for the testimony of opposing witnesses to be heard simultaneously or for such witnesses to meet outside the hearing to resolve or isolate issues or conflicts.")(This section was removed, see 65 FR 30886 (May 15, 2000).

cross purposes, when the record may not reflect with clarity what the witness intends to convey, or when for some other reason assistance is needed to assure orderly development of the subject matter. At the close of cross-examination or redirect, the Judge may question the witness to clarify any confusing or ambiguous testimony or to develop additional facts. When the testimony of the parties' experts is inconclusive, or when no expert witnesses are presented, the Judge sometimes may find it necessary to call an expert as his own witness[219]. Indeed, the ALJ is not necessarily limited to calling expert witnesses. Where necessary, and subject to any agency or statutory constraints, the ALJ usually can call witnesses or adduce evidence on any crucial issue.[220]

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

5. Rules of Evidence

Few legal concepts have become more deeply entrenched than the postulate that the strict common law rules of evidence do not apply, by their own force, to administrative proceedings. The

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

[220] *See* 29 CFR § 2200.67(j) (2000) (Occupational Safety & Health Review Commission: authorizing ALJ to "[c]all and examine witnesses and to introduce into the record documentary or other evidence"). For recent articles discussing this issue, see Allen E. Schoenberger, The Active Administrative Law Judge: Is There Harm in an ALJ Asking?, 18 J. NAALJ 399 (1998); Jeffrey Wolfe and Lisa B. Prussic, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 Tulsa L. J. 293 (1997).

reasons for this are fairly plain. To the extent that traditional common law rules of evidence were developed to insulate jurors from certain kinds of information, they are not very relevant to the administrative proceeding, where there is no jury. Even before the APA, the inapplicability of the strict rules of evidence was well-established. For instance, Judge Learned Hand, in an opinion regarding the admission of hearsay in an NLRB proceeding, had approved a less rigorous standard, referring to "the kind of evidence on which responsible people are accustomed to rely in serious affairs."[221]

However, this does not necessarily mean that the rules of evidence prevailing in the courts can never be applied in agency proceedings. As usual, much depends on the organic statute governing the agency, and the agency's own rules. Statutorily, a legislature may require an agency to apply nearly any set of evidentiary rules. The statutory provisions governing unfair labor practice hearings before the NLRB, for instance, require that those proceedings, "so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States. . . ."[222] The variations are numerous. For example, one agency provides that the Federal Rules of Evidence (FIRE) will be employed as general guidelines, but that all relevant and material evidence shall be received.[223] Another provides that the FIRE shall apply unless provided otherwise by statute, and, additionally, that the presiding officer may relax the rules if the ends of justice "will be better served by so doing".[224]

Still, the APA provides something of a guide, or statutory norm: any oral or documentary evidence may be received, but the agency as a matter of policy must provide for the exclusion of

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[221] NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir.), *cert. den.*, 304 U.S. 576 (1938).

[222] 29 U.S.C. § 160(b) (1994).

[223] 49 CFR § 209.15 (2000) (Department of Transportation, Federal Railroad Administration, Railroad Safety Enforcement Proceedings). For an NRC case, see Duke Power Co., 15 NRC 453, 475 (1982) (FIRE not directly applicable, but Commission looks to them for guidance).

[224] 16 CFR § 1025.43(a) (2000) (Consumer Product Safety Commission, Rules of Practice for Adjudicative Proceedings).

irrelevant, immaterial, or unduly repetitious evidence[225]. Many agencies include provisions similar to the APA in their Rules of Practice[226]. However, some follow a different drummer and do apply the Federal Rules of Evidence.[227]

At any rate, the Federal Rules of Evidence are not controlling in administrative proceedings unless made so by statute or agency rule[228]. It is worthwhile, however, for the ALJ to be familiar with these rules. They can furnish guidance and insights which can help resolve evidentiary problems.

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

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[225] 5 U.S.C. § 556(d) (1994).

[226] See for example, 10 CFR § 2.743(c) (2000); 12 CFR § 622.8 (2000) (Farm Credit Administration); 14 CFR 13.222 (2000)(b) (2000) (FAA; civil penalty actions); 16 CFR § 3.43(b) (2000) (FTC); 18 CFR § 385.509 (2000) (FERC); 45 CFR § 81.78 (2000) (Health & Human Services, Part 80 proceedings).

[227] *See*, 29 CFR § 2200.71 (2000) (Occupational Safety & Health Review Commission). The Consumer Product Safety Commission also makes the Federal Rules applicable, but with loopholes. "Unless otherwise provided by statute or these rules, the Federal Rules of Evidence shall apply to all proceedings held pursuant to these Rules. However, the Federal Rules of Evidence may be relaxed by the Presiding Officer if the ends of justice will better served by so doing." 16 CFR § 1025.43(a) (2000) (rules of practice for adjudicative proceedings).

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

Marginally relevant evidence is not merely useless; it is positively harmful because it inflates the record which the parties, the ALJ, and the agency must examine.[229]

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

b. Best Evidence. Counsel sometimes offer a copy of a document without a proffer of the original. The accuracy and authenticity of the document may be assumed unless questioned. The agency rules[231] or the procedural ground rules adopted by the ALJ[232] may provide that the authenticity of proffered documents shall be deemed admitted unless written objections are filed within a specified time. The prehearing proceedings will frequently produce stipulations concerning the principal documents at issue and the facts they contain.

6. Offers of Proof

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

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[229]*See* Union Stockyard Co. v. United States, 308 U.S. 213, 223-24 (1939); United States v. Bows, 360 F.2d 1, 7 (2d Cir. 1966), *cert. denied,* 385 U.S. 961 (1966); Fed. R. Enid. 401-403; and Gardner, *Shrinking the Big Case*, 16 Admin. L. Rev. 5 (1963).

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

[231] *See, e.g.,* 16 CFR § 3.32(b) (2000) (FTC); 47 CFR § 1.246 (2000) (FCC).

[232] *See* text at note 98, *supra*, and Appendix I, Form 3.

the offer is lengthy, the ALJ may require a written submission.[233]

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

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

The Fifth Amendment privilege against self-incrimination, if invoked in an administrative proceeding, raises some complex and delicate issues. On the one hand, the privilege against self-incrimination is applicable to testimony in administrative proceedings. However, there are at least two important refinements which should be noted in this regard. First, the privilege against self-incrimination is personal and testimonial in nature, so ordinarily it does not apply to corporations,[234] other entities,[235] business records, and most records required by valid law or regulation to be kept.[236] Consequently, for

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[233] For some examples of agency rules dealing with offers of proof, see 7 CFR § 1.141(h)(7) (2000) (Department of Agriculture); 14 CFR § 13.225 (2000) (FAA); 29 CFR § 2200.72(b) (2000) (Occupational Safety and Health Review Commission); 49 CFR § 511.43(g) (2000) (National Highway Traffic Safety Administration).

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

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

[236] Shapiro v. U.S., 335 U.S. 1 (1948). *But see*, Marchetti v. U.S., 390 U.S. 39 (1968). To qualify as a record "required" to be kept the record must satisfy a three-part test: (1) the purposes for which it is kept must be essentially regulatory, (2) it must be the kind of record which the regulated party has customarily kept, and (3) it must have assumed "public aspects" which renders it analogous to public documents. Grosso v. United States, 390 U.S. 62, 67-68 (1968). In a later, and somewhat confused opinion, the Supreme Court ruled, in the context of a grand jury subpoena action, that the contents of certain business

documents, materials, and testimony which are not protected by the Fifth Amendment, it would seem that production or testimony may be compelled in accordance with the agency's usual procedures for requiring the production of evidence and testimony, which ordinarily require resort to the courts to enforce administrative subpoenas and orders Second, failure to assert this protection constitutes a waiver.[237]

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

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

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records were not privileged, but that, under the facts of that case, the act of complying with the subpoena was within the privilege against self-incrimination. United States v. Doe, 465 U.S. 605 (1984).

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

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

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

information.[239]

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

8. Argument on Motions and Objections

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

9. Confidential Information

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[239] 18 U.S.C. §§ 6002, 6004 (1994 & Supp. IV 1998). For some agency rules regarding this process, see 14 CFR § 13.119 (2000) (FAA); 16 CFR § 3.39 (2000) (FTC); 16 CFR § 1025.39 (2000) (Consumer Produce Safety Commission; Flammable Fabrics Act).

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

[241] 468 U.S. 1032 (1984). For examples of cases where ALJs have been asked to resolve 4th Amendment search issues, see Globe Contractors, Inc. v. Herman, 132 F. 3d 367 (7th Cir. 1998) (OSHA); First Alabama Bank of Montgomery v. Donovan, 692 F. 2d 714 (11th Cir. 1982) (Compliance review under E.O. 11246, prohibiting discrimination by government contractors).

a. Methods of Handling Confidential Material.

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

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

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

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[242]*Cf.* North Atlantic Tourist Commission, 16 CAB 225, 227, 228, 234, 235 (1952).

[243] *See e.g.*, Exxon Corp. v. Federal Trade Commission, 665 F.2d 1274 (D.C. Cir. 1981). Some examples of agency rules pertaining to protective orders include: 10 CFR § 2.740 (2000)(NRC); 15 CFR § 25.24 (1991) (Department of Commerce, Program Civil Fraud Remedies); 16 CFR § 3.31(c) (2000) (FTC); 16 CFR § 1025.31(d) (2000) (Consumer Product Safety Commission); 18 CFR § 385.410 (2000) (FERC); 29 CFR § 18.15, (2000) (Department of Labor).

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

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

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

b. In Camera or Closed Sessions[246]. Hopefully, any issues

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

[245]*See,* 16 CFR § 3.45 (2000) (FTC); 49 CFR § 511.45 (2000) (DoT, National Highway Traffic Safety Administration).

[246]The 1982 edition of this Manual used the term "executive session" to refer to those parts of an administrative hearing closed by the ALJ, in order to consider confidential material and similar matters. However, trolling through the CFR and Lexis, the revisor in 1992 noticed a tendency for the term "executive session" to be used mainly in the context of non-public proceedings of the agency or board itself. See for example, 16 CFR § 4.15

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

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

An *in camera* session is a part of the formal proceeding, but the testimony, documents, and exhibits received are not included in the public record[247]. This permits confidential receipt of evidence that may be, among other things, exempt from disclosure under the Freedom of Information Act (FOIA), especially "matters that are . . . specifically authorized . . . to be kept secret in the interest of national defense or foreign policy . . .” or "trade secrets and commercial or financial information [which

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(2000) (FTC). A Lexis search for "executive session" disclosed the use of that term in connection with ALJs or other hearing officers mainly in a few EPA regulations, such as 40 CFR § 85.1807(n)(3) (2000) (referring, apparently indiscriminately, to both *in camera* testimony and executive session); 40 CFR § 86.614-84(n)(3) (2000). The more commonly used term in the CFR seems to be "in camera." See for example, 16 CFR § 3.45(b) (2000) (FTC); 16 CFR § 1025.45 (2000) (Consumer Product Safety Commission); 40 CFR § 86.614-84(n)(2)(ii) (2000) (EPA: referring to "in camera proceeding"). Accordingly, for whatever difference it may make, the term "executive session" will not be used here.

[247] See for example, 16 CFR § 3.45(2000) (FTC); 16 CFR § 1025.45 (2000) (Consumer Product Safety Commission); 19 CFR § 210.*39* (2000) (International Trade Commission); 49 CFR § 511.45 (2000) (National Highway Traffic Safety Administration).

are] privileged or confidential."[248]

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

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

The *in camera* session should be attended only by the ALJ, the official stenographer, and such representatives of parties or interested persons as the ALJ designates, or the agency rules may

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[248] 5 U.S.C. §§ 552(b)(1), (4) (1994, Supp. IV 1998). These provisions are part of the Freedom of Information Act (FOIA). 5 U.S.C. § 552 (1994, Supp. IV 1998.) An *in camera* session is not required merely because evidence arguably within FOIA may be involved. In fact, requests under FOIA for documents in the possession of federal agencies are generally dealt with under entirely separate regulations. However, the ALJ should be alert to the possibility that matters subject to discovery and *in camera* proceedings might be exempt from disclosure under FOIA. Agency hearing rules regarding material or evidence taken *in camera* sometimes overlap, or should be coordinated with, FOIA-type disclosure rules. Examples of regulations which make some effort in this direction are found in 16 CFR § 3.36(a) (2000) (FTC), 18 CFR § 385.410 (2000) (FERC), 49 CFR 511.45 (2000) (National Highway Traffic Safety Administration). At least one agency rule tries to distinguish between FOIA and discovery, 29 CFR § 2201.1 (2000) (Occupational Safety and Health Review Commission, rules pertaining to FOIA, which state, "This part does not affect discovery in adversary proceedings before the Commission. Discovery is governed by the Commission's Rules of Procedure . . . .").

require. The names of all persons present must be recorded by the official stenographer. After the hearing room is cleared of all others, the session may be opened as follows:

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

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

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

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

10. Supplemental Data

During the hearing counsel may request or the ALJ may require supplemental information. The ALJ may direct its submission during or after the close of the hearing. If submitted during the hearing, unless stipulated, a sponsoring or authenticating witness should be made available. If it is to be submitted after the close of the hearing, the ALJ should establish the date for submission, request a waiver of cross-examination, and set the date for filing objections. Even if waiver of cross-examination cannot be obtained in advance, it may be obtained after the parties have received the supplemental material. Otherwise it may be the basis for an objection. The ALJ should identify, by mark or otherwise, the information submitted and rule on all objections.

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

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

11. Mechanical Handling of Exhibits

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

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

C. Concluding the Hearing

1. Oral Argument

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

The Administrative Procedure Act (APA) requires that parties be afforded a reasonable opportunity to submit proposed findings

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[249] 5 U.S.C. § 556(d) (1994).

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

2. Conferences

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

3. Briefs

Subject to agency rules, the ALJ should establish dates for submission of briefs. The ALJ may also authorize reply briefs. Briefs should conform in length and form to agency rule and to the ALJ's instructions. They should contain precise citations to the record and to the authorities relied upon. Counsel are sometimes careless about citation form, referring to cases without adequate identification. The ALJ may avoid this by requiring reasonable adherence to the *Uniform System of Citation* or any other standard citation system[251]. The ALJ should require a table of authorities and, if the brief exceeds a stated number of pages, a table of contents or an index. The ALJ may require research on legal or technical issues and may require the parties

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[250] 5 U.S.C. § 557(c)(1994).

[251] A Uniform System of Citation (17th ed. 2000) (often called the "Bluebook"). For a recent competitor, see Association of Legal Writing Directors & Darby Dickerson, *ALWD Citation Manual* (Aspen L. & Bus. 2000). The latter publication is updated at www.alwd.org

to brief specific issues.[252]

4. Notice of Subsequent Procedural Steps

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

5. Closing the Record

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

6. Correcting the Transcript

If the agency rules prescribe no procedure for correcting prejudicial errors in the transcript, the ALJ should set them. These should specify the period of time after receipt of the transcript during which changes may be requested. Requests in writing should be made to the ALJ, with copies to all parties, and should set forth the specific changes desired. If no objections are received within a specified time, and if the ALJ does not find the proposed corrections inaccurate, the transcript should be corrected accordingly. If any party or the ALJ does object to the proposed correction, it should be submitted to the official reporter for comparison with the stenographic record. After receipt of the reporter's reply the ALJ should rule on the request.[253]

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

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

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

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.