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.

VII. CONDUCT

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

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

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[274] *E.g.*, American Bar Association, MODEL RULES OF PROFESSIONAL CONDUCT (1995). Developments regarding state administrative law judges will be discussed briefly, below in footnote 286.

[275] See for example, 5 CFR Part 735 (2000). Administrative Law Judges, of course, are subject to laws regulating the partisan political activities of federal employees, e.g., the Hatch Act, 5 U.S.C. §§ 7321-7327 (1994).

[276] *See, e.g.*, 14 CFR § 300.1 (2000)(DOT Aviation Proceedings, "any DOT employee or administrative law judge carrying out DOT's quasi-judicial functions") (DOT Aviation Proceedings); 40 CFR § 164.40 (2000) (EPA Pesticide Proceedings); 43 CFR § 4.1122 (2000) (Department of the Interior Surface Coal Mine Hearings and Appeals).

[277] *E.g.*, 50 CFR § 18.76 (2000) (Department of Interior, Marine Mammals Section 103 Regulations).

[278] *E.g.*, 21 CFR § 12.90 (2000) (FDA, Conduct at oral hearings or conferences).

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

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

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[279] American Bar Association, MODEL CODE OF JUDICIAL CONDUCT 31, n.11 (2000 ed.).

[280] 40 CFR § 164.40 (2000) (EPA Pesticide Programs: "shall conduct the proceeding in . . . manner subject to the precepts of the Canons of Judicial Ethics of the American Bar Association"); 43 CFR § 4.1122 (2000) (Interior Surface Coal Hearings: "Administrative law judges shall adhere to the 'Code of Judicial Conduct.'). See also, 14 CFR § 300.1 (2000) (DoT, "are expected to conduct themselves with the same fidelity to appropriate standards of propriety that characterize a court and its staff"); 43 CFR § 4.27(d) (2000) (Interior General Rules: "shall withdraw from a case if he deems himself disqualified under the recognized canons of judicial ethics").

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

[282] As to Federal ALJs, there is ABA, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Preface at p. 3 (1989); *see also*, Yoder, *Preface, Model Code of Judicial Conduct for Federal Administrative Law Judges*, 10 J. NAALJ

As with the Judicial Code, the federal ALJ Code is not self-enforcing. To be directly controlling or applicable, it must be adopted by the appropriate governmental authority. However, it was endorsed by the Executive Committee of the National Conference of Administrative Law Judges in 1989, and this endorsement was intended to reflect "the considered judgment of the Conference on appropriate provisions" adapting the Model Code of Judicial Conduct for application to Administrative Law Judges.[283]

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

Canon 1

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

Canon 2

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

Canon 3

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

Canon 4

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

Canon 5

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

Canon 6

An Administrative Law Judge Should Limit Compensation Received for Quasi-Judicial and Extra-Judicial Activities.

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131 (1990). As to state ALJs and hearing officers, there is ABA, National Conference of Administrative Law Judges, A MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES, PREFACE (1995)(Endorsed by the Executive Committee, National Conference of Administrative Law Judges, Judicial Administration Division, American Bar Association in 1995.) *Id.*

[283] Yoder, supra note 282, at 132.

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

Canon 7

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

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

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

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

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

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

A. Disciplinary Actions Against ALJs

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

Statutorily, the federal employing agency can take disciplinary action against a ALJ "only for good cause

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589 (1994); James P. Timony, *Performance Evaluation of Administrative Law Judges,* 7 ADMIN. L. J. AM. U. 629 (1993-94; Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present, and Future*, 19 J. NAALJ 101 (1999); and Ann Marshall Young, Evaluation of Administrative Law Judges: 17 NAALJ 1 (1997). For some works published prior to the 3rd edition of this Manual, see *e.g.*, ABA, *New ACUS Study on Administrative Law Judges*, 17 Administrative Law News 1 (Summer 1992); Cofer, *The Question of Independence Continues: Administrative Law Judges Within the Social Security Administration*, 69 JUDICATURE 228 (Dec. 1985); Holmes, *ALJ Update: A Review of the Current Role, Status, and Demographics of the Corps of Administrative Law Judges*, 38 FED. BAR NEWS & JOURNAL 202 (May, 1991); Levant, *Pointing the Way to ALJ Independence*, 24 JUDGES JOURNAL 36 (Spring, 1985); Levinson, *The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort*, 19 NEW ENGLAND L. REV. 733 (1984); Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICKINSON L. REV.929 (1990); Moss, *Judges Under Fire: ALJ Independence At Issue*, 77 ABA JOURNAL 56 (Nov. 1991); O'Keefe, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591 (1986); Palmer, *The Evolving Role of Administrative Law Judges*, 19 NEW ENGLAND L. REV. 755 (1984); Zankel, *A Unified Corps of Federal Administrative Law Judges Is Not Needed*, 6 WESTERN NEW ENGLAND L. REV. 723 (1984).

established and determined by the Merit Systems Protection Board on the record after opportunity for hearing . . . ."[287] One must look to the cases decided by the Merit Systems Protection Board (MSPB), and the courts, for a gloss on what constitutes "good cause."

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

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

Personal Misconduct Unrelated to Employment. Although there seems to be one, relatively early case that falls purely within

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[287] 5 U.S.C. § 7521 (1994). Disciplinary sanctions can include removal, suspension, a reduction in grade, a reduction in pay, or furlough of 30 days or less. *Id.* In addition, action can be taken against an administrative law judge under 5 U.S.C. § 7532 (1994) (pertaining to national security and related matters), or, by MSPB Special Counsel under 5 U.S.C. §§ 1215, 1216 (1994).

[288] Federal Administrative Judiciary, *supra* note 4 at 1016-19. This figure is consistent with an earlier article on disciplinary proceedings against federal ALJs. Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 NEW ENG. L. REV. 807, n1 and 2 (1984).

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

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

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

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

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[290] McEachern v. Macy, 233 F. Supp. 516 (W.D. S.C. 1964), *aff'd* 341 F. 2d 895 (4th Cir. 1965). See 5 CFR § 2635.809 (2000).

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

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

[293] SSA v. Friedman, 41 MSPR 430 (1989)(cancelling hearings without reason); *In re* Chacallo, 2 M.S.P.B. 20 (1980) (affirmed by unpublished opinions in D.D.C. and D.C. Cir.) (demonstrated

incidents of improper behavior toward fellow employees, such as sexual harassment,[294] and abusive, rude, assaultive, or other seriously improper conduct.[295] In some cases, the disciplinary action is predicated, at least in part, on non-adjudicatory conduct that is work-related, but does not involve fellow employees; for instance, serious or recurring unauthorized

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bias and lack of judicial temperament, in addition to various acts of disobedience and insubordination). *See also*, SSA v. Anyel, Docket No. CB752119009T1 (MSPB, January 16, 1992)(ALJ slip opinion) (upholding charge based on SSA ALJ's treatment of *pro se* claimants, remanded on other grounds, SSA v. Anyel, 58 MSPR 261 (1993) (remanding to ALJ and stating that high rate of substantive errors constituted cause for removal) (case later settled with 90-day suspension, 66 MSPR 328 (1995).

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

[295] Carr v. Social Security Administration, 185 F. 3d 1318 (Fed. Cir. 1999) (reckless disregard of personal safety [slamming door and causing injury to employee], profanity, abusive language, sexual harassment), affirming 78 MSPR 313 (1998); Department of Commerce v. Dolan, 39 MSPR 314 (1988) (kicking employee); *In re* Glover, 1 MSPR 660, 663 (1979); SSA v. Dantoni, 77 MSPR 516 (1998), aff'd 173 F. 3d 435 (Fed. Cir. 1998) (decision without published opinion, full text available at 1998 U.S. App. LEXIS 24902)(MSB opinion recounts discharged ALJ's conduct, *inter alia*, harassing Deputy Chief ALJ, forging name of Deputy Chief Administrative Law Judge [DCALJ] to large numbers of mail orders for commercial products and samples, resulting in DCALJ's office receiving 1547 pieces of mail). For a case involving favors or gifts from a party in proceedings before the ALJ, see Hasson v. Hampton, 34 AD. L.. REP. (Pike & Fischer) 19 (D.D.C. 1973), *aff'd mem., D.C. Cir.*, April 20, 1979. For a case involving unauthorized practice of law, see Office of Hearings & Appeals, Social Sec. Admin. v. Whittlesley, 59 MSPR 684 (1993), aff'd w/o opinion, 39 F. 3d 1197 (Fed. Cir. 1994), cert den 514 U.S. 1063(1995)(stating that good cause to remove ALJ was shown by evidence that he violated agency rules and settlement agreement by engaging in unauthorized practice of law)

personal use of government property,[296] or falsifying documents.

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

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

As to the three major categories discussed above, the reported cases are of limited direct value, in an of themselves, as guides for an ALJ's conduct. They are few in number and deal

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[296] SSA v. Givens, 27 MSPR 360, 1985 MSPB Lexis 1130 (1985) (personal use of government car).

[297] For example, SSA v. Boham, 38 MSPR 540 (1988) (refusing to hear case involving overnight travel); SSA v. Brennan, 27 MSPR 242 (1985), *aff'd sub nom.* Brennan v. DHHS, 787 F. 2d 1559(Fed. Cir. 1986) (refusing to follow case proceeding procedures, including routing of mail and us of worksheets); SSA v. Manion, 19 MSPR 298 (1984) (refusing to schedule hearings); SSA v. Arterberry, 15 MSPR 320 (1983), *aff'd in an unpublished opinion,* 732 F. 2d 166 (Fed. Cir. 1984); *In re* Chacallo, 2 MSPR 20 (1980) (among other things, refusing to return case files and conducting a hearing after the case had been removed from the ALJ's jurisdiction), *aff'd by unpublished opinions* in D.C.C. and D.C. Cir.; Office of Hearings and Appeals, SSA v. Whittlesey, 59 MSPR 684 (1993) (unapproved outside practice of law, willful failure to compel with time and attendance requirements), aff'd without officially published opinion 39 F. 3d 1197 (Fed. Cir. 1994), cert den. 115 S. Ct. 1690 (1995).

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

with fact-specific situations. However, they are a worthwhile gloss on the subject of an administrative law judge's conduct. The cases suggest that the ALJ who observes simple courtesy toward subordinates and peers, who displays a veneer of respect for supervisors, and who generally treats others the way the ALJ would like to be treated will go a long way toward satisfying any reasonable standards of conduct.

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

The cases themselves seem to recognize this problem, and consequently might be described as "squinting" both ways. For example, one leading study has described three significant SSA-ALJ "productivity" cases decided by the Merit Systems Protection Board (MSPB) in 1984 as a "pyrrhic victory" for the agency.[299] "The agency won the right to bring low-productivity-based charges against ALJs," but lost before the MSPB, which rejected the agency's statistical evidence.[300] In the first of these cases, the agency had presented evidence that the judge's case dispositions were about half the national average, but the MSPB "opined that SSA cases were not fungible and that SSA's comparative statistics did not take into sufficient account the differences among these types of cases. The same reasoning was later applied to [the] two other pending cases against the SSA ALJs with similar productivity records."[301]

However, in a later case, the MSPB stated that a high rate of significant adjudicatory error can establish good cause for disciplining an administrative law judge.[302] In another line of

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

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

[301] *Id*.

[302] SSA v. Anyel, 58 MSPR 261 (1993) (remanding to ALJ and stating that high rate of substantive errors constituted cause for removal) (case later settled with 90-day suspension, 66 MSPR

cases, the MSPB has made it clear that good cause can include serious and long-term disabilities which prevent the ALJ from performing his or her duties.[303]

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

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328 (1995).

[303] SSA v. Mills, 73 MSPR 463 (1996); Department of Health and Human Services v. Underwood, 68 MSPR 24 (1995).

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

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

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

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

B. Confidentiality

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

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

On a matter related to duties of a more recent vintage, the ALJ must become especially sensitive to the need for confidentiality in certain phases and kinds of alternative dispute resolution proceedings. A prime example here, of course, is the confidentiality customarily accorded mediation efforts,[306] including mediation by Settlement Judges.[307]

C. Ex Parte Communications

Ex parte communications should be avoided. Communications between the ALJ and one party, without the presence of the other party/parties, are always suspect. In formal adjudications

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

[307] See for example, 29 CFR § 18.9 (2000) (Department of Labor, Office of Administrative Law Judges); 2200.101(c) (2000) (Occupational Safety & Health Review Commission).

governed by the APA, the ground rules are fairly clear and quite explicit. "Except to the extent required for the disposition of ex parte matters as authorized by law, [the ALJ] may not -- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate . . . ."[308]

> [E]xcept to the extent required for the disposition of ex parte matters as authorized by law --
>
> (A) no interested person outside the agency shall make or knowingly cause to be made to any . . . administrative law judge, or other employee who is or may reasonably may be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;
>
> (B) no . . . administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;
>
> (C) a[n] . . . administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process . . . who receives or who makes . . . a communication prohibited by this subsection shall place on the public record of the proceeding:
>
> (i) all such written communications;
>
> (ii) memoranda stating the substance of all such oral communications; and
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> (iii) all written responses, and memoranda stating the substance of all oral responses described in . . . this subparagraph . . . .[309]

Moreover, the APA further provides that if a prohibited ex parte communication is knowingly made, the ALJ or other presiding officer, may (subject to agency policies and regulations) require the party making the communication to show cause why he should not be dismissed as a party or otherwise sanctioned because of

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[308] 5 U.S.C. 554(d) (1994) (emphasis added).

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

that violation[310]. The agency itself may be authorized to decide the whole case adversely to the offending party[311]. Furthermore, many agencies have their own regulations relating to the handling of ex parte communications, which the ALJ should rigorously observe.[312]

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

Even for proceedings not covered by the APA, and even if the agency rules on ex parte contacts do not extend to the particular proceedings, an ALJ who has received ex parte communications on the merits probably should, in any event, make them part of the record. It is usually best to do one's utmost to remove any doubt about the proprieties of the matter.

D. Bias and Recusal

Another sensitive and special matter concerning the conduct of ALJs involves bias. "[A]n impartial decision maker is essential."[313] Of course, no one is totally free from all possible forms of bias or prejudice. But the ALJ must conscientiously strive to set aside preconceptions and rule as objectively as possible on the basis of the evidence in the record. In addition, and despite an ALJ's subjective good faith, an ALJ who has a financial interest (even if small or diluted) in the outcome of a case should not decide that case[314]. If grounds

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[310] 5 U.S.C. § 557(d)(1)(D) (1994).

[311] 5 U.S.C. § 556(d) (1994).

[312] *See, e.g.*, 14 CFR § 300.2 (2000) (DOT, Aviation Proceedings); 16 CFR § 4.7 (2000) (FTC).

[313] Goldberg v. Kelly, 397 U.S. 254, 271 (1970). For an excellent discussion of bias, see FEDERAL ADMINISTRATIVE JUDICIARY, *supra* note 4 at 967-974.

[314] *See*, Ward v. Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

for finding bias truly exist, then recusing oneself[315] is preferable to courting a later reversal and jeopardizing the validity of the whole proceedings.

E. Fraternization

In a related vein, conduct which creates an appearance of favoritism or bias also should be avoided. Public attitudes about judicial conduct have become stricter in recent years, and ALJs should be sensitive to this change. An ALJ should limit social activities with friends or colleagues if there is any likelihood of their being involved in matters coming before the ALJ. It is not enough merely to avoid discussing pending matters; an ALJ should shun situations that might lead anxious litigants or worried lawyers to think that the ALJ might favor or accept the views of friends more readily than those of unknown parties. The same considerations argue against social contacts with agency staff; any indication that the ALJ and staff are members of one happy family should be avoided.

One approach is for ALJs to maintain their personal ties but disqualify themselves in any case in which a friend appears. If the bar is small this may be unfair to counsel and their clients, and impractical as well. An alternative course is to describe publicly the relationships whenever a friend or associate is involved and offer to disqualify oneself if so requested. However, this places an unfair burden on objecting counsel, who is put in the position of implying publicly that the ALJ may be biased. Also, if done frequently, this approach may seem to be avoidance of the ALJ's own responsibility.

In any event, an ALJ must avoid the appearance of impropriety. Thus the ALJ should not regularly play bridge or golf or dine with lawyers whose firms may appear before him. Nor should the ALJ actively participate in politics or political meetings.[316]

Judges must accept a certain amount of loneliness. They needn't become recluses, but they should realize they are no longer "one of the gang."

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[315] 5 U.S.C. §556(b)(1994). For an ALR Annotation relevant to this topic, see 51 ALR Fed. 400.

[316] Federal Administrative Law Judges are, of course, subject to the Hatch Act, 5 U.S.C. §§ 7321-7327 (1994, Supp. V 1999).

F. Individual Requests for Information

The Judge will often receive requests for information from interested persons. Frequently the material sought will be confidential -- such as which party will prevail, when the decision will be issued, and what effect it might have on the community. The Judge should make every effort to explain courteously any refusals to answer. Sometimes, it may be possible, and appropriate, to deflect the inquiry with a suggestion that the person might be able to obtain additional information, and views, from sources not subject to judicial restraints, such as agency staff or private parties involved in the proceeding.

G. Interaction with Other Independent Officers

While there is little case law on the subject, at least one case, *U.S. Navy-Marine Corps Court of Military Review v. Carlucci,* has raised the issue concerning the extent to which independent adjudicative officers must cooperate with investigations of officials such as a military Inspector General[317]. While generally acknowledging the statutory right of IGs to investigate a military judge's misappropriation of funds, fraudulent claims, or other abuses of appointment, the *Carlucci* case addresses the issue of an allegation of impermissible use of *ex parte* information during a judge's deliberations. This raises a question concerning the judge's duty under Judicial Canons to uphold the independence and integrity of the court when an IG seeks to investigate matters involved in judicial deliberations even after the case has closed and a final decision has been rendered. Agencies can provide appropriate procedural rules to handle such issues within their adjudicative divisions to preclude such problems from arising.

H. The Media

[317] United States Navy-Marine Corps Court of Military review v. Carlucci, 26 M.J. 328 (C.M.A. 1988), especially at 337-43 This case was discussed in Joseph H. Baum and Kevin J. Barry, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*, FEDERAL BAR NEWS AND JOURNAL, Vol, 36, No. 5, June 1989, 242-248.

The persistence of the press in a major or newsworthy case may be annoying at times, but the Administrative Law Judge should cooperate, to the extent permitted by ethics and agency rules, in the circulation of public information about the proceeding. Questions about non-confidential, public matters can be answered, so long as this does not interfere with the orderly conduct of the hearing. For example, the ALJ certainly may respond to queries about the place or time of the hearing or the length of a recess. The merits of the case, however, must be off-limits, both directly and by implication. The ALJ should not be interviewed under circumstances likely to lead to questions relating to the merits.

Likewise, the ALJ should not give off-the-record or not-for-attribution interviews. If the material is not confidential, quotation should be permitted; if it is confidential, it should not be revealed in the first place.