VIII. THE DECISION

After receipt of all supplemental material and briefs the ALJ should prepare the decision, the findings of fact and conclusions of law. Agency rules and practice will govern the details of how the ALJ submits the decision to the agency and serves it upon the parties. The notice of decision should provide for filing of exceptions and briefs.

Some agencies have authorized their Administrative Law Judges to make the agency's decision, subject only to discretionary review by the agency[318]. The title page of such a decision should state that it is an agency decision issued pursuant to delegated authority (citing the pertinent rules) and the notice of decision should describe how and when petitions for review may be filed. Any order attached to the decision should include a similar statement of delegated authority and should provide that, absent filing of a petition for discretionary review or review on the agency's own initiative, it will become effective as the final agency order after a specified time. The form for issuance of other decisions is similar, with such changes as are necessary to show that they are not final until affirmed by the agency or the agency review board.

The ALJ's jurisdiction usually ends upon the issuance of the decision, except that errors may be corrected by issuance of an errata sheet[319]. This should be used to correct serious errors of substance only, never to correct obvious typographical mistakes or errors already the subject of exceptions.

A. Oral Decision

In cases involving few parties, limited issues, and short hearings the ALJ may save substantial time by rendering the

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[318]*See* ACUS Recommendation 68-6, Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency, 1 CFR § 305.68-6 (1993). *See also, e.g.,* 29 CFR § 2200.91(2000)(Occupational Safety and Health Review Commission); 17 CFR § 12.101, .106 (2000) (CFTC, reparation cases: "Voluntary Decisional Proceedings"). For an article discussing discretionary review by agencies, see Gilliland, *The Certiorari-Type Review*, 26 ADMIN L. REV. 53 (1974).

[319]Form 14 in Appendix I is a sample errata sheet.

decision orally -- if permitted by agency rules or policies. However, it must be emphasized that agency rules or policies control. The rest of this section is relevant only to the extent that the ALJ has authority, in the first instance, to render an oral decision.[320]

If the ALJ is authorized to issue an oral decision, the parties can be advised before the hearing to prepare for oral argument on the merits at the close of the testimony. After all evidence has been received and any procedural matters disposed of, the ALJ may recess the hearing for a few minutes to give counsel an opportunity to read their notes and prepare for oral argument. After listening to oral argument and rebuttal, the ALJ, perhaps after another short recess, may deliver the decision orally on the record.

This procedure obviously increases the risk of overlooking some material fact or legal precedent, but in a case simple enough to truly warrant an oral decision, that risk is not substantial. There are, moreover, compensating advantages in addition to the time saved. If witness credibility is involved the demeanor and the actual testimony of the witness are fresh in the ALJ's mind.

Some cases involving formal adjudications will be governed by the provision of the APA which entitles the parties to a reasonable opportunity to submit proposed findings or conclusions, and supporting reasons, before a recommended, initial, or tentative decision[321]. Advising the parties before the end of the hearing that an oral decision will be made at the close of the hearing, and that parties desiring to submit proposed findings and conclusions should be prepared to do so orally, probably meets this requirement[322].

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[320]For some cases where the ALJ exceeded any authority to rule orally under agency rules or precedents in force at that time, see Local Union No. 195, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, 237 NLRB 931, 99 LRRM 1098 (1978); Plastic Film Products Corp. and Amalgamated Clothing and Textile Workers Union, AFL-CIO 232 NLRB 722, 97 LRRM 1313 (1977).

[321]5 U.S.C. § 557(c) (1994).

[322] *See*, Charles E. McElroy, 2 NTSB 444, 1973 NTSB Lexis 30 (Order EA-499, Docket No. SE-1772) (1973). However, it should be noted that this opinion seems to focus on compliance with the

Sometimes, agency rules expressly authorize oral decisions. The Rules of Practice of the National Transportation Safety Board, for example, provide that "The law judge may render his initial decision orally at the close of the hearing . . . except as provided in § 821.56(b)."[323]

When an oral decision is issued from the bench the transcript pages upon which the oral decision appears constitute the official decision. No editing except typographical corrections should be made. A footnote should be inserted after the decision stating, in effect: "Issued orally from the bench on _____ in transcript volume _____ at page _____ through page _____ ."[324]

B. Written Decision

Most cases, because of their complexity, the size of the record, the number of parties, or the number of issues, do not lend themselves to oral disposition. The following discussion is directed to the drafting of written opinions, although some of the suggestions may also be applicable to oral decisions.

Ideally, the ALJ starts planning the decision when the case is assigned. Each procedural step, including learning and shaping the issues, determining what evidence is needed, arranging for and obtaining essential material, and conducting the hearing, should be aimed toward producing a clear, concise,

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agency's rules.

[323] 49 CFR § 821.42 (2000). For some other examples of agency rules authorizing the ALJ to render a decision orally, see 7 CFR § 1.142(c) (2000) (Department of Agriculture); 46 CFR § 201.161 (2000) (Maritime Administration, referring to decision "whether oral or in writing").

[324] For examples of agency rules which expressly deal with the transcript of an oral decision, or otherwise reducing an oral decision to writing, see 7 CFR § 1.142(c)(2) (2000) (Agriculture: copy to be excerpted from the transcript and furnished the parties by the Hearing Clerk); 39 CFR § 961.8(g) (2000) (Postal Service: written confirmation of oral decision to be sent to the parties); 49 CFR § 821.42 (d) (2000) (NTSB, copy excerpted from transcript and furnished to parties).

and fair record[325]. Any weakness or delinquency in these earlier steps makes the final task more difficult.

Still, the most difficult writing problem usually occurs when the ALJ, facing an onerous deadline, assembles the transcript, exhibits, notes, and briefs, and starts to put down on paper the findings and conclusions. Each ALJ differs in writing habits, but all ALJs should strive constantly for improvement.

Some aspects of decision-writing, like any other form of composition, probably cannot be "taught," at least not in the sense of learning some rote formula or mechanical "rules" which will make the ALJ rival Oliver Wendell Holmes as a wordsmith. All of us probably have harbored mild envy, at one time or another, toward a colleague who seems to have a natural talent for writing. There are ALJs who seem to have a remarkable ability to organize the material, and to use language in a way which converts a thick, jumbled record into a coherent decision where everything falls into place, capturing the essence of what happened and what the case is about, and how it should be decided. Such a decision leaves the reader with a sense of inevitability -- that this was the only way that this particular decision could have been written. Most judicial opinions fall considerably short of such an ideal, but it is a goal worth keeping in mind. Unless the ALJ is simply a genius, however, it takes considerable effort and experience to attain such a state of craftsmanship.[326]

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[325] Form 23 reflects one Judge's innovative effort to keep the record and materials organized by using the ongoing computer revolution. In complex cases, Judge Tidwell, U.S. Claims Court, sometimes issues an order requiring parties to supplement their usual paper filings by providing the court with electronic copies (on floppy disk) of filings which are greater than two pages in length. Using the search capabilities of word processing programs such as WordPerfect, Judge Tidwell is able to locate information and points in the materials much more efficiently than otherwise could be done by trying to visually scan hundreds of pages of material. Letter from Judge Moody R. Tidwell, U.S. Claims Court, dated April 3, 1992, to Morell E. Mullins.

[326] For several articles on this subject, see Borchers, Patrick, *Making Findings of Fact and Preparing a Decision*, 11 J.NAALS 85 (1991)[cited in Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151, 171, n. 7

In the meantime, there are certain approaches, procedures, and tools that may help to make deciding and writing the case easier. Some of these will be the focus of the rest of this chapter.

1. Format

No rigid structure can be prescribed for all written decisions, but some uniformity in basic outline is customary. Every decision should contain certain preliminary material, including a *title page* with the name of the case, the type of decision (e.g. initial decision or recommended decision), the date of issuance, and the name of the ALJ. If the decision is long, there should be a *table of contents* and *headnotes* that summarize the principal issues and the decision. Also, a list of *appearances* should be included, with the names of all persons and organizations who entered an appearance and the persons and organizations represented. The name and address of each person on whom the decision is to be served should be included on a *service sheet*, usually attached at either the beginning or end of the decision.

The form of the text depends largely on the nature of the case, agency practice, and the ALJ's style. The following suggestions may be helpful:

(a) The opening paragraphs should describe succinctly what the case is about. They may include a summary of the prior procedural steps and the applicable constitutional provisions, statutes, and regulations.

(b) Although the relief requested by the parties may be described in the introduction, *detailed contentions should not be recited*. These lengthen the opinion unnecessarily since, if they

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(1997)]; Michael Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151 (1997); Patrick Hugg, *Professional Legal Writing: Declaring Your Independence*, 11 J. NAALS 114 (1991)[cited in Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151, 171, n. 7 (1997)]; Patrick Hugg, *Professional Writing Methodology*, 14 J. NAALJ 165 (1994); Harold H. Kolb, Jr., *Res Ipsa Loquitur: The Writing of Opinions* 12 J. NAALS 53 (1992)[cited in Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151, 171, n. 7 (1997)]; Irvin Stander, *Administrative Decision Writing*, 10 J. NAALJ 149 (1990).

are material and relevant, they must be set forth in detail in discussing the merits. Not observing this proscription is a common failing in opinion writing.

(c) If proposed findings and conclusions have been submitted, the ruling on each of them should be apparent from the decision,[327] so the ALJ does not necessarily need to refer to each of them specifically[328]. Likewise, insignificant or irrelevant issues raised by the parties need not be addressed specifically but can be disposed of with a statement that all other questions raised have been considered and do not justify a change in the result[329]. However, a ALJ must be extremely careful in applying this principle. If the agency or a reviewing court disagrees about the significance of a particular issue, remand may result.[330]

(d) The decision should include specific findings on all the major facts in issue without going into unnecessary detail.[331]

(e) The ALJ should apply the law to the facts and explain the decision. Whether the facts, law, and conclusions should be combined or placed in separate sections of the decision depends on the agency's requirements, the ALJ's style and such other factors as the type of case and the nature of the record.

(f) The decision should end with a summary of the principal findings of fact and conclusions of law. In addition to making specific findings and conclusions, there should be ultimate findings framed in the applicable statutory or regulatory

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[327] *Cf.*,5 U.S.C. § 557(c) (1994).

[328] Transcontinental Coach Type Service Case, 14 CAB 720 (1951). *Cf.*, Michigan Consol. Gas Co. v. FPC, 203 F.2d 895 (3d Cir. 1953).

[329] In Northwest Air Service, Operating Authority, 32 CAB 89, 97-98 (1960), the Board denied a motion requesting a specific ruling by the ALJ on each proposed finding. For a similar holding, *see* Allegheny Segment 3 Renewal Proceeding, 36 CAB 52, 54, n. 3 (1962).

[330] *See, e.g.*, Affiliation of Arizona Indian Centers, Inc. v. Dept. of Labor, 709 F.2d 602 (9th Cir. 1983); P&Z Company, 6 OSHC (BNA) 1189, 1977 OSHD P22,055) (1977).

[331] *See e.g.*, People for Environmental Enlightenment and Responsibility (PEER) v. Minnesota Environmental Quality Council, 266 N.W. 2d 858 (Minn. 1978).

language.[332]

In a case involving many issues or complicated facts, the decision can be divided into labeled sections and subsections, with appropriate titles and subtitles. This will usually make reading, studying, and analysis of the decision easier and quicker. These divisions, with their titles, should be set forth in the table of contents.

Frequently, adopting a framework, or outline, for the decision with appropriate headings before drafting the decision will make organizing the record, deciding the issues, and writing the conclusions easier and clearer. This outline can, and probably should, change as the decision-making progresses.

(g) Footnotes should be used for such material as citations of authority and cross-references, but rarely for substantive discussion. Footnotes on each page are preferable to a numerical listing of notes (endnotes) at the end of the opinion or in an appendix. The latter arrangement is inconvenient for the reader and hinders careful reading of the decision.

(h) Citations must be sufficiently detailed to enable the researcher to find the source without difficulty. This can be assured by using a standard reference work.[333]

(i) Maps, charts, technical data, accounts, financial reports, forecasts, procedural details, and other germane background material too lengthy to be included in the text may be attached as appendices.

(j) In many cases the ALJ issues an order or proposed order. In some cases other actions are appropriate. For example, in franchise cases, a certificate must sometimes be issued or amended. Such documents should usually be added as

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[332] Expressly setting out "ultimate" findings in words which track the statutory language or criteria is a precaution which is strongly advisable because there are older Supreme Court cases which suggest that such findings cannot be inferred from the decision's other findings and conclusions. *See*, Yonkers v. United States, 320 U.S. 685 (1944); Wichita Railroad v. Public Utilities Commission, 260 U.S. 48 (1922). *But see*, Penn Central Merger Cases, 389 U.S. 486 (1968).

[333] *E.g.*, A UNIFORM SYSTEM OF CITATION (17th ed. 2000), commonly referred to as the "Harvard Blue Book." A recent competitor to the Harvard Blue Book is Association of Legal Writing Directors & Darby Dickerson, *ALWD Citation Manual* (Aspen L. & Bus. 2000). The latter publication is updated at www.alwd.org

supplements to the decision.

2. Research

The ALJ must study the record and make an independent analysis of the facts and contentions. This requires careful examination of legal and policy precedents of the agency and of the courts.

In some agencies technical assistants may be available to Administrative Law Judges to help analyze and cross-index detailed or complicated data. At other agencies law clerks are available to provide this help.[334]

In researching agency decisions the ALJ should cover those not yet published in the bound volumes of the official reports. Many agencies have a section charged with indexing and digesting decisions and orders; the ALJ should enlist its help in finding relevant agency authority. Some agencies maintain a list of all their cases appealed to the courts and supply their ALJs with current copies.[335]

The ALJ may also seek the advice of the senior ALJs of the agency, who may recall a relevant case that has escaped the attention of other researchers. Of course the standard research texts should also be used -- notably the commercial services, texts, and law reviews. Moreover, the ALJ must take advantage of the on-going revolution in electronic data bases and computer-based electronic research. Today's commercially available services, such as Lexis® and Westlaw®, and websites maintained by agencies themselves, enable a user to conduct legal, and other, research in ways which simply would not have been feasible for a decision-writer laboring under a heavy caseload and time deadlines ten years ago. For example, an ALJ using computerized legal research literally could have at the fingertips every case decided by a particular agency, if the agency's cases are in the relevant data base. Every case "in the computer" mentioning a particular regulation can be retrieved with a few strokes on a keyboard. Or, an ALJ could locate almost every reference in the

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[334] For an article dealing with legal and technical assistants, see Mathias, *The Use of Legal and Technical Assistants by Administrative Law Judges in Administrative Proceedings*, 1 ADMIN. L.J. 107 (1987).

[335] *See, e.g.,* cases collected by the now-defunct CAB, in its Compilation of Court Cases of the Civil Aeronautics Board.

CFR (except perhaps the changes which have only been recently published) to a term like "in camera." Research that took hours, or simply could not have been done without poring for days over printed materials, can be finished in minutes, using computerized legal research. The main problem, of course, is that the cases or other materials for which the ALJ is searching must first be in the particular data base. Although noncommercial Internet research tools are becoming increasingly available, their data bases generally do not go back as far, and are not as complete as, the commercial data bases.

Another convenient source of information about relevant facts, policy, and law is the briefs of the parties. Proposed findings of fact and conclusions of law, if reliable, can save the ALJ time and effort. Of course, the ALJ must consider the reliability of counsel or the party, or both. But it is certainly acceptable to make proper and careful use of proposed findings and conclusions.[336]

Although this use of counsel's briefs and arguments is beneficial, the ALJ alone is responsible for the decision. The ALJ must use the utmost care to be sure that findings of fact are supported by the record and the conclusions of law by reliable precedent. This may require study of the legislative history of relevant statutes or review of the law of another agency which regulates a similar industry or activity.

3. The Decisional Process

The cornerstone of the formal administrative process is the principle that the decision of the Administrative Law Judge is an independent intellectual judgment, based solely upon the applicable law (including agency regulations and precedent) and the facts contained in the record. This has several consequences.

Unless the material is properly entered into the record of the case, the ALJ should not consider public or private statements of agency members, Congressmen, congressional committees, or administration officials. Other than statements that are considered part of the legislative history of the relevant statute, the only non-record pronouncements of government officials relevant to the decision are *official* and *operative* pronouncements -- agency rules and decisions, but not policy statements by the agency members; current Executive Orders, but not speeches by administration officials; statutes and relevant legislative history, but not newspaper interviews of

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[336] *See, e.g.*, Schwerman Trucking Co. v. Gartland Steamship Co., 496 F.2d 466, 475 (7th Cir. 1974).

Congressmen.

Such statements, however high the source, are normally made without benefit of the facts and arguments developed in the hearing process. Still more important, in many cases the APA would prohibit the use of matters which are not on the record. "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title."[337] Even if the proceedings are not controlled by the APA's statutory limitations, it is still the better part of judging to avoid basing a decision on anything extraneous to the record.[338]

A few words are necessary concerning the relationship which the decision should bear to the established policies of the agency. It is the ALJ's duty to decide all cases in accordance with agency policy.[339]

This duty can be especially perplexing in at least two types of situations. First, court decisions (other than those of the Supreme Court) may have found the agency's policy or view to be erroneous, but the agency disagrees, and announces its "nonacquiescence," at least outside the circuit where the unfavorable decision was rendered. In this case, the agency takes

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[337] 5 U.S.C. § 556(e) (1994). This section also provides for official notice.

[338] *See*, Home Box Office, Inc., v. FCC, 567 F.2d 9 (D.C. Cir. 1977) (rulemaking). *But see*, Action for Children's Television v. FCC, 564 F.2d 468 (D.C. Cir. 1977) (rulemaking); Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (rulemaking). While the cases cited here involved rulemaking of one sort or another, and (in the main) ex parte contacts at agency head level, the point in the text remains the same. The administrative law judge's use of extra-record materials is likely to provide colorable grounds for appeal, at the very least.

[339] "Once the agency has ruled on a given matter, [moreover,] it is not open to reargument by the administrative law judge; . . . although an administrative law judge on occasion may privately disagree with the agency's treatment of a given problem, it is not his proper function to express such disagreement in his published rulings or decisions." *Iran Air v. Kugelman, 996 F. 2d 1253, 1260 (D.C. Cir. 1993)*,(opinion by Judge Ruth B. Ginsburg), quoting Joseph Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 ADMIN. L. REV. 9, 12-13 (1973).

the position that the ALJ is bound to apply the agency view if the agency has authoritatively declared nonacquiescence[340]. Nonacquiescense has been strongly criticized by some reviewing courts.[341]

Second, the ALJ may have to decide a case under statutory criteria which are open-ended, such as "public interest," and the

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[340] *See* Insurance Agents International Union, 119 NLRB 768 (1957). As described in an article in 1998, "Non-acquiescence is a policy of federal administrative agencies in which the agency, rather than appealing a court decision which is unfavorable to the agency, chooses to ignore it. In the context of Social Security disability claims, this has been a bone of contention for many years." Joyce Krutlick Barlow, *Alcoholism as a Disability Under the Social Security Act - An Analysis of the History, and Proposals for Change*, 18 J. NAALJ 273, 290, n. 97 (1998).

[341] Ithaca College v. NLRB, 623 F.2d 224 (2d Cir. 1980). More recent cases continue to criticize non-acquiescence. See for example, Rogers v. Chater, 118 F. 3d 600, 602 (8th Cir. 1997) ("The Commissioner's policy of non-acquiescence is flagrantly unlawful.") (dicta). For a case which recognizes that the ALJ is somewhat whipsawed if an agency is "nonacquiescent," see Hillhouse v. Harris, 547 F. Supp. 88, 93 (W.D. Ark. 1982), aff'd, 715 F.2d 428 (8th Cir. 1983) (referring to ALJ being in the position of trying to serve two masters, the courts and the Secretary of Health and Human Services). "Nonacquiescence" has generated a substantial number of law review articles, among them, Diller & Morowetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Estreicher & Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990); Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); *Figler, Executive Agency Nonacquiescence to Judicial Opinions, 61 GEO. WASH. L. REV. 1664 (1993);* J. Schwartz, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989) Weis, *Agency Non-Acquiescence: Respectful Lawlessness or Legitimate Disagreement?*, 48 U. PITT. L. REV. 845 (1987); Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985).

agency's decisional precedents are policy-intensive, rather than strictly legalistic. On the one hand, if the ALJ operating under such a regime can discern the agency policy, then the ALJ's decision must adhere to that policy. On the other hand, if the parties have introduced evidence or arguments not previously considered by the agency, or if there are facts or circumstances indicating that reconsideration of established agency policy may be necessary, the ALJ has not only a right but a duty to consider such matters and rule accordingly.

Moreover, although the ALJ should follow agency policy and the law, the ALJ' decision may be the last opportunity to call the attention of the agency (or the courts if the agency denies review) to an important problem of law or policy. An ALJ, while adhering to agency policies may well have a duty to the agency itself to include in his or her written opinion a temperate, careful discussion or analysis calling attention to a serious legal problem with present agency policies. The agency can ignore, or even criticize, an ALJ who is wrong , but if the agency concludes that the ALJ has identified a serious problem, the ALJ who is correct may prevent substantial inequity and injustice. Such action by an ALJ cannot be undertaken lightly but must reflect long and careful research and analysis. The ALJ's facts and reasoning, based on the record and the law, should be so clearly set forth that the agency will know exactly what has been done and why.

Turning to another delicate subject, the ALJ also must preserve the integrity of the decisional process in ways that are less obvious. For instance, the ALJ should never write a decision motivated by a desire to curry favor with the current heads of the agency, or based on considerations of the result which the ALJ thinks the current agency heads subjectively want. An ALJ's responsibility is to follow agency policy, or where necessary in a case of first impression, establish a policy consistent with existing agency policy. Attempting merely to predict future agency positions would be an abdication of this role. The whole purpose of the ALJ's decision is to give the agency the benefit of a considered decision after a proceeding specifically designed to elicit the truth. Nothing whatever is gained, and a lot can be lost, if an ALJ's decision seeks to set before the agency members only a mirror of their own thoughts, no matter how obtained.

It follows that the ALJ should not be swayed by any tentative finding of fact or tentative conclusion of law or policy contained in an order of investigation, an order to show cause, or any other action by which the agency has indicated how it may be thinking. Such premature findings may be based on

staff recommendations and, although necessary for procedural reasons, are not, cannot be, and are not intended to be, the agency's final decision. Indeed, to attribute that kind of finality to preliminary agency determinations would be to flirt with violations of procedural due process.[342]

Agency staff's views should be subjected to the same impartial scrutiny as the views of any other interested persons. The staff position is not automatically correct merely because it is put forward as an objective, untainted furthering of the public interest. It is the ALJ's responsibility to decide where the public interest lies, and the theory of the system presumes that this is best achieved by an impartial weighing of all facts and arguments.

Turning to more mechanical aspects of decision-making, the ALJ sometimes must exercise discretion in determining which issues in a complex case to consider first -- but once an issue that is determinative has been decided, the ALJ usually should proceed no further. It may be argued that if the agency disagrees as to the single decisive issue it will not have the benefit of the ALJ's independent analysis and recommendation on alternative issues. However, in a complex case the major issues may be so numerous that to decide all of them in their various combinations could be a waste of time and generate an unreasonably long and complicated decision. It will likely be quicker and easier for the agency (if it disagrees with the ALJ) to develop one alternative dispositive issue than it is for the ALJ to develop a dozen alternatives initially. Nevertheless, in a case where the decision is close on either of two determinative issues, or where two important policy or legal issues are raised, it may be advisable to decide both.

The ALJ should not uncritically accept the parties' contentions as to which issues are decisive. The parties' lack of skill, abundance of cunning, or excessive zeal, may cause them to make contentions which are incorrect as a matter of fact or law. After analyzing the record and reading the briefs the ALJ should make an independent determination of the decisive issues and focus the decision on those issues, regardless of the parties' emphasis.

A decision must not, however, rest upon a point which has not been raised at the hearing, in briefs, or in oral argument. Thorough preparation and proper management of the earlier stages of the proceeding should avoid this problem; but if, after the proceeding has been concluded, the ALJ finds an unexplored issue

[342] *See*, Withrow v. Larkin, 421 U.S. 35 (1975).

which may be dispositive, supplementary briefs or memoranda, at a minimum, should be requested.

The ALJ should decide all the issues necessary to dispose of the case unless circumstances indicate that some or all should be deferred. A decision may be deferred, for example, if it would be affected by the outcome of an appeal pending before the agency,[343] or before the Supreme Court[344]. However, there may be countervailing constraints, such as statutory time limits within which to issue a decision. These can limit the ALJ's authority to defer rendering a decision.

If in the course of hearing and deciding the case the ALJ discovers facts that indicate agency action may be necessary on other issues, recommendations for institution of another proceeding may be appropriate. For example, in a case involving the desirability of extending weekend family air fares to other days of the week, the ALJ realized that the legality of all family fares should be investigated, and recommended that the agency start such a proceeding[345]. The agency did so.[346]

If the parties timely raise new procedural questions after the close of the hearing, such as a motion to strike all or part of a brief, the ALJ should rule on them in his decision if practicable. However, when the question must be ruled upon before decision, such as a motion to receive newly discovered evidence, the ALJ should rule upon it promptly, deferring issuance of the decision if necessary. But if the parties merely renew procedural motions or objections made and disposed of at the hearing, the ALJ should let the record speak for itself unless new matters are presented that require further action or discussion.

4. Style

Administrative cases sometimes involve complicated technical

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[343] *See* Flying Tiger-Additional Points Case, 58 CAB, 319, 322, 364, 365 (1971).

[344] This practice is, of course, common among the lower federal courts. *See, e.g.*, U.S. v. Hayles. 492 F.2d 125 (5th Cir. 1974).

[345] Capital Family Plan Case, 26 CAB 8, 9 (1957).

[346] Family Excursion Fares E-11867 (CAB, Oct. 11, 1957).

matters, statistical concepts, intricate details and abstract ideas. The ALJ should strive to present these in a fashion that a layman can understand. Technical or abstruse words should be avoided if possible; if not, they should be explained in a footnote.

Decisions should be as brief as the subject matter permits. Complicated statistical, financial, and scientific questions frequently require detailed analysis, computations, or calculations. If these are included in the text, the opinion may become unnecessarily complicated, difficult to comprehend, and unreasonably long. It is frequently preferable to include only the basic findings in the text and place the detailed material in appendices.

Sometimes factual findings should be supported by specific citations to the record. If, for example, a factual determination is based on a single item of evidence, the transcript reference should be given; or if in a rate case the ALJ makes independent cost computations from the conflicting bases and theories of different parties, citations to the record should be included, showing the derivation of each computation. However, a determination on a major factual question frequently results from consideration of numerous items of testimony of varying weight. In such circumstances, excessive references to the record can be misleading to the reader. The substance of the decision must be anchored in the record, but the number and selection of citations to the record in some respects is a matter of style.

If the evidence is conflicting, but a finding is essential, the ALJ may be tempted to compromise by using weak phrases such as "it appears" or "it seems." The ALJ should not try to evade responsibility in this fashion. A finding must be positive.

It may occasionally be desirable to quote directly from the transcript of the oral testimony. This device can be effective for emphasis, but should be used carefully. Long verbatim excerpts from the transcript may be unclear and prolix, and editing them for the opinion may lead to charges of selective quotation.

With respect to a sometimes-overlooked resource which is available to the ALJ, it is frequently advantageous to borrow directly from a brief -- a document which is, after all, part of the record. If counsel has submitted an objective finding of fact or an articulate statement of law or policy with which the ALJ entirely agrees, it is wasted effort to recast it in the ALJ’s own words. However, wholesale incorporation by reference of a party's entire brief and proposed findings, of course, ordinarily should be avoided.

It may sometimes be necessary for the decision to contain derogatory findings about a particular individual. If, for example, the testimony of a certain witness contradicts one of the findings, the ALJ may have to explain why the witness was not competent or credible. This should be avoided if possible without weakening the opinion; but if and when it is necessary, the explanation should be as temperate as the integrity of the decision will permit. Similarly, if it is necessary to correct an error or refute an absurd argument, the name of the person responsible should be omitted if that will not impair the coherence of the decision. Although the ALJ should not needlessly offend or insult any person, the decision should be scrupulous in stating the facts accurately and clearly.

Where credibility is in issue the reviewing authority may look to the ALJ's demeanor findings on the theory that the ALJ observed the witness and therefore was in the best position to evaluate the witness' credibility. Consequently, the ALJ should exercise extreme care in such findings, and avoid conclusory statements such as "from the witness' demeanor it is concluded that he cannot be believed." Instead, credibility findings should be supported by specific conduct or observations. For instance, a witness may be talkative and comfortable in response to all questions, except those addressing the issue on which credibility is doubtful, but whenever the questioning turns to that issue, the witness becomes evasive and starts looking away from the ALJ and toward counsel, as if for signals. At any rate, to the extent possible, findings grounded on witness demeanor should have some reference point in observed behavior, such as evasiveness, hesitancy, or discomfort under questioning. (For an article addressing this topic, see James P. Timony, *Demeanor Credibility*, 49 CATHOLIC U. L. REV. 903 (2000))

C. Writing the Decision

The ability to conduct a hearing and decide a case fairly and accurately is crucial, but an inability to clearly and concisely explain the resulting decision impairs the value of all other aspects of the ALJ's performance. Writing is a difficult art, and despite high qualifications, writing experience, and training, an ALJ may have difficulty putting findings and thoughts on paper. Except for the fortunate few endowed with exceptional writing ability, each ALJ must constantly work on maintaining and improving this skill.

The inferior quality of much legal writing has inspired corrective action by many schools, writers, teachers, and

critics. Some federal agencies have attempted to improve their written materials. A recent example is National Labor Relations Board, NLRB STYLE MANUAL: A GUIDE FOR LEGAL WRITING IN PLAIN ENGLISH (Revised, January 2000).

In addition, there are numerous excellent books on style and writing simple English. Some of special relevance to lawyers and ALJs are set out in Appendix III.

Legal writing need not be complex or confusing. Judge John M. Woolsey's opinion in the *Ulysses Case*,[347] familiar to many judges, is an example of clear judicial writing:

II. I have read 'Ulysses' once in its entirety and I have read those passages of which the Government particularly complains several times. In fact, for many weeks, my spare time has been devoted to the consideration of the decision which my duty would require me to make in this matter.

`Ulysses' is not an easy book to read or to understand. But there has been much written about it, and in order properly to approach the consideration of it it is advisable to read a number of other books which have now become its satellites. The study of `Ulysses' is, therefore, a heavy task.

III. The reputation of `Ulysses' in the literary world, however, warranted my taking such time as was necessary to enable me to satisfy myself as to the intent with which the book was written, for, of course, in any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called, according to the usual phrase, pornographic -- that is, written for the purpose of exploiting obscenity.

If the conclusion is that the book is pornographic that is the end of the inquiry and forfeiture must follow.

But in `Ulysses,' in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist. I hold, therefore, that it is not pornographic.

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[347]United States v. One Book Called Ulysses, 5 F. Supp. 182 (S.D.N.Y. 1933).

In writing on a difficult legal question involving a book written in an unconventional manner, Judge Woolsey's use of "I" is particularly striking. For a case of this type involving somewhat subjective standards, the use of the first person makes his thinking clear. It emphasizes that this decision, the law, and the book, *Ulysses*, deal with human beings. The only legal words in the excerpt quoted are "I hold, therefore." The language used is clear and simple English, and it tells clearly what he did personally to reach his decision. The decision is four pages long. The complete opinion contains a few unusual words and several long ones, but the entire opinion and the reasons for Judge Woolsey's action are easily understood by a layman.

Most Judges do not write with the elegance of Judge Woolsey. Sometimes, they simply do not have enough time to revise and rewrite. Nevertheless, they at least should strive to write simply enough so that anyone can understand them. Plain, simple English is more likely to convey a Judge's findings to the reader than complicated legalistic phrasing.

Nothing suggested in this book will be sufficient to give any ALJ the smooth and clear legal writing ability to which all judges aspire. Nevertheless, there are certain customs and patterns, which, if followed, can make the ALJ's decision shorter and easier to read.

Set out below, therefore, are several areas in which improvement is frequently needed. Study of this material can serve as a starting point for an ALJ seeking greater skill. No attempt is made to give a mini-course in writing or a review of grammar. This discussion deals primarily with matters of brevity, clarity, and stylistic quirks. Thorough discussions of these subjects and related matters of style and grammar will be found in books cited in Appendix III.

1. Brevity

a. Needless Words. Strunk and White's *The Elements of Style* is a good place to start. This book of only 85 pages is filled with clear suggestions for making writing more readable. The authors, emphasizing that one should omit needless words, say: "A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in

outline, but that every word tell."[348]

b. Short Simple Words. Long, cumbersome, and confusing words and phrases are used frequently by professional and business people including judges, lawyers, and teachers. There are, no doubt, numerous reasons for this tendency, such as a desire for precision, a desire to impress a client, or the tendency to use highly technical words even though one is writing for the layman.

Sometimes, the longer word or phrase is merely a short word lengthened unnecessarily -- a kind of inflation. A classic example is substitution of *utilize* for *use*. Unfortunately, the tendency to *utilize*, rather than *use*, remains prevalent. A few examples of the "longer word" problem follow, but their number is legion.

Long	*Short*
finalize	finish, complete
effectuate	effect
preplan, plan ahead, plan in advance	plan
point in time	time
at the present writing	now
are bound to be in agreement	agree
in the not too distant future	soon
have duly noted the contents of	have read
to the fullest possible extent	fully
along the lines of	like
regardless of the fact that	although
under circumstances in which	when
in reference to	about
in the event that	if

Use the longer words or phrases only if the shorter ones will not do.

c. Redundant Phrases. Lawyers habitually group two or more words meaning the same thing, such as *null and void; last will and testament; rest, residue, and remainder; transfer, convey, and pay over*; or *alter, change, or modify*. If a lawyer is trying to impress a client, well-known redundant phrases may be helpful, but even that is doubtful. Probably more clients are annoyed by needlessly repetitious language than are impressed by the use of stock phrases.

A judge needs only to explain to his readers -- the parties and their attorneys, the agency, the interested public, and

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[348] Strunk & White, *The Elements of Style* 23 (3d ed. 1979).

perhaps a reviewing court -- what was done and why. A reader does not like words that confuse or words that are used for display. A reader wants only to learn with minimum time and effort what the judge said.

d. Short Sentences. Long sentences are hard to understand. A timeless motto for writers is, "Short sentences can be read; long sentences must be studied."[349] The Judge should state facts and reasons in terms easily understood by the layman as well as by the lawyer. By the use of a few connecting words with short sentences it is frequently easy to make the story flow evenly. Even if the use of simple words and short sentences in an opinion results in a little jerkiness that a stylist might avoid, little is lost so long as the meaning is clear.

Tests over a seven year period show that the average sentence length in popular magazines has been kept between twelve and fifteen words[350]. Although a Judge may argue that a legal decision is more important and deals with deeper subjects than those in popular magazine articles, ease of reading and comprehension is surely as important in the documents that rule our lives as in those that entertain us.

Long sentences make writing hard to understand. The reader, either consciously or subconsciously, needs a break -- a rest. Furthermore, one thought per sentence is easy to understand.

Therefore, break up long sentences. Aim to keep average sentence length below twenty-five words. Try to separate a long compound sentence into two or more shorter sentences. A related problem is the questionable connection of two sentences by the word *however*:

> He was driving only 30 miles per hour, however, this was too fast.

One way to revise such a sentence:

> He was driving 30 miles per hour. This was too fast.

Occasionally thoughts are so interrelated that one sentence with several clauses and phrases may seem essential. However, if no matter how arranged it is still difficult to understand, then break up the sentence into three or four parts. Clarity is more

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[349] The revisor of the 1992 edition and the present edition cannot recall the source of this quotation, but reluctantly disclaims authorship.

[350] R. Gunning, *Technique of Clear Writing* 34 (1968).

important than stylish beauty.

Sometimes even breaking up a sentence or rewriting it does not clarify the meaning. The reason may be that the thinking is not sound or the facts are inconsistent. This applies not only to sentences but to paragraphs and even entire decisions. As Dean Landis said:

> Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons on which they depend. . . .[351]

If a thought does not look right on paper, consider backing up for a rethinking or an entirely new approach. What you believe initially to be stylistic problems in expressing the idea or point actually may be symptoms of more basic defects in the substance of the idea or point.

e. Paragraphs. Although a paragraph is used to group thoughts, there is no rigid rule for length of a paragraph. A paragraph may vary in length from a one word sentence to many sentences of substantial length and complexity.

Paragraph length should depend on what the writer is trying to communicate. Still, the writer needs to seek a balance between extremes. On the one hand, large blocks of print scare the reader. On the other hand, several short paragraphs in succession may be annoying. Most good paragraphs have between two and ten sentences. If a paragraph seems too long, it is usually possible to divide it into two or more paragraphs without disturbing or distracting the reader.

2. Punctuation

Punctuation is the simplest device for making things easier to read. It is also an important road sign to the reader: i.e., making it easier to understand the intended meaning of a passage.

Punctuation is frequently left to a stenographer. This is a mistake. Even a stenographer who knows how to punctuate may not know precisely what you want to say. Punctuation can be used to emphasize, to clarify, and to simplify. Commas, semi-colons, periods, hyphens, dashes, and all the other punctuation symbols have specific purposes. If used correctly they will simplify

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[351]J. Landis, *The Administrative Process* 105 (1938).

writing and make your writing easier to read. Useful rules can be found in the U.S. Government Printing Office Style Manual,[352] and other grammar and style manuals. Rules vary somewhat, but reliance on any standard work should suffice to keep meanings clear and easy to understand.

3. Active or Passive Voice

Use of the active voice rather than the passive voice is frequently preferable for two reasons. First, it saves words:

The convict was sentenced by Judge Jones.
Judge Jones sentenced the convict.

Second, it is more likely to reveal who the actor is:

Drivers' licenses will be issued.
The clerk will issue drivers' licenses.

In addition, the active voice is normally more direct and vigorous. The subject of the active-voice sentence is acting or doing something. Consequently, the active voice should be used in the absence of a good reason for using the passive.

This does not mean that the passive voice always should be avoided. To the contrary, passive may be preferable when the thing done is important and who did it is not, or when the actor is unknown or indefinite. The passive voice can also be used for emphasis, or when detached abstraction is desired.

4. Ambiguity

Avoid the ambiguous. Like much advice, this is easier said than done. Often we do not realize that what we have said or written could be susceptible to more than one meaning. "This brief reads like a first draft dictated to a stenographer needing improvement." Sometimes we even refuse to see the ambiguity in our words when it is pointed out. At any rate, ambiguity slows and confuses the reader. It may even be used as a deliberate way to deceive.

Ambiguity may be especially likely when the writer uses a word with two meanings or two words with the same meaning near each other. For example, a lawyer or a judge should not use "exception," meaning an exclusion, in, or near, a sentence containing "exception" used as a legal term meaning a formal

[352]U.S. Government Printing Office (2000).

objection. (If this shortcoming occurs frequently in a piece of writing, it may be a clue that the piece is a first draft, possibly dictated to a machine or stenographer.)

When a writer deliberately uses, for the sake of "variety," two words meaning the same thing, the potential for ambiguity is no less. Problems resulting from deliberately using different words meaning the same thing, especially in the same passage of a decision or document, are discussed in the section on Elegant Variation.

In related vein, some people cannot bear to repeat a name or proper noun anywhere near its original use. They feel somehow that they must use a pronoun. But sometimes the antecedent of a pronoun is not clear. If so, do not hesitate to strike the pronoun and use the name of the individual or object. Minor stylistic awkwardness is a small price to pay for major misunderstandings. A lapse in stylistic elegance is not as bad as creating the impression among your readers that you were completely oblivious to the meaning of what you have written.

After writing and rewriting a decision, an ALJ frequently becomes so familiar with its contents that it is difficult to detect ambiguous passages. It always helps to turn it over to a law clerk or an associate for a fresh look.

5. Stylistic Quirks

Avoid stylistic quirks. These small distractions divert the reader's attention from what is being said to how it is being said. The reader has enough distractions without the writer increasing them by efforts to be verbally eccentric or cute.

a. Elegant Variation[353]. Elegant variation is the use of variety for its own sake -- changing words and structure to hold the reader's attention and to avoid boredom. The following is an example:

> The first *case* was *settled* for $2,000, and the second *piece of litigation* was *disposed of out of court* for $3,000, while the price of *amicable accord* reached in the third *suit* was $5,000.[354]

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[353]H. Fowler, *A Dictionary of Modern Usage* 148-151 (2d ed. E. Gowers 1965).

[354]R. Wydick, *Plain English for Lawyers* 57 (1979).

But what has happened? The reader may wonder whether distinctions were intended between *case*, *piece of litigation*, and *suit*, and between *settled*, *disposed of out of court*, and *amicable accord*.

(Some writers have real difficulty avoiding elegant variation. These poor souls may be the by-product of high school and college English teachers' otherwise appropriate efforts to make their students use synonyms and produce "lively" writing. However, to any judge who is writing a decision, clear communication is primary, and liveliness is secondary.)

There are at least two ways, stylistically, to handle an elegant variation: (1) Repeat the same words or phrases. It is better to bore the reader than to confuse him. (2) Sometimes it is possible to put the repetitious material in an opening clause followed by two or more phrases or clauses that implicitly refer back to the opening clause. For example, the sample sentence could be reworded as follows:

"The first case was settled for $2000, the second for $3000, and the third for $5000."

Although breaking a document, or passage, into lettered or numbered divisions may sometimes confuse the reader, this procedure, used carefully, can frequently assist the reader. "The complainant has: (1) not filed a response to respondent's motion to suppress; (2) ignored repeated admonitions to conclude discovery by the agreed-upon date; (3) been late in every filing required by the agency's rules . . . ."

b. Litotes. Some judges use litotes, affirmative statements expressed by denying the contrary, either as false courtesy to spare someone's feelings or to express a doubtful finding. Avoid litotes unless they are clearly needed. Use *kindly* rather than *not unkindly*, *naturally* rather than *not unnaturally*. George Orwell recommended inoculation against using litotes by memorizing this sentence: "A not unblack dog was chasing a not unsmall rabbit across a not ungreen field."[355]

c. Genderless English. Avoiding the appearance of gender-bias in writing is worthwhile, but requires some effort. Moreover, the effort can be overdone, especially if the writer resorts to creating new words, like substituting "personhole" for "manhole." However, a little good faith effort often can avoid

[355]G. Orwell, *Politics and the English Language*, in SHOOTING AN ELEPHANT AND OTHER ESSAYS 90 (1950).

passages like "the writer should know that his failure to demonstrate his sensitivity to gender-bias can result in his leaving an impression that he is totally ignorant about the way language conditions his behavior." Nevertheless, the writer is in a sometimes-difficult situation. If you use *his* for any pronoun, you may be criticized. *His or her* frequently sounds awkward, and substituting *their* may obscure the meaning.

At the very least, be aware of the problem. And certainly, be consistent in referring to males and females. If you refer to men by their last names or first names do the same with women. Try to omit irrelevant references to physical characteristics of either sex. Avoid patronizing and stereotypes. Do not say *fair sex, weaker sex,* or *the ladies;* say *women*. If you use *Esquire* on a service sheet, use it for all lawyers regardless of sex. Bias implicit in such phrases as *a manly effort* or *a weak sister* should be avoided. But don't overdo it by neutering everything in sight.

There are not always clear-cut answers to problems of gender and language, but so long as sex is irrelevant the judge should word the decision carefully to avoid any sexual bias.

6. Miscellaneous

a. Names. If referring to a person or organization, it generally is appropriate to set out the name in full the first time it is mentioned, followed parentheses containing a shorter version of the name such as a word, abbreviation, or shortened title. Thereafter the word, abbreviation, or shortened title can be used throughout the decision. In most situations, do not assume that the reader is already acquainted with the NLRB or AAA. (In fact, there could be several groups with the "AAA" initials.) Write out "National Labor Relations Board (NLRB)" the first time it is mentioned; treat the American Automobile Association similarly. If the names of persons or things are similar or confusing, the ALJ should devise short easily distinguishable names or descriptions (with parenthetical explanations, if necessary).

Personal honorific titles such as Doctor, Professor, or General ordinarily should not be used if they are irrelevant. A party may infer that the ALJ is assigning some weight to the title.

b. Technical Terms. Technical terms are frequently necessary when dealing with many subjects. An ALJ who is familiar with the subject may tend to use complex and technical language incomprehensible to many persons interested in his decision. The ALJ should resist this tendency and, if possible, use words and expressions comprehensible to a lay reader. If that is

impossible, unusual words and phrases should be defined. This can be done in a footnote or a special section for definitions. Alternatively, the ALJ may summarize in the main text and put the technical details and computations in an appendix.

***c.* Attribution.** Excessive or needless attribution wastes a great deal of space, especially in judicial writing. As a consequence of realizing that anything in the written decision may have legal effect, the ALJ is tempted to overreact by repeating the source of every bit of information. There are several convenient devices for avoiding this problem. The ALJ may only need to state:

"Mr. X testified as follows:"

and continue with indirect quotations for a sentence, paragraph, or page without repeating the attribution.

The ALJ may place a summary of the testimony or statements of each witness under separate subheadings such as *Green's testimony* or *Smith's statement*.

Provided the result is clear, the ALJ may attribute the testimony early in the passage with no further reference until the last sentence, then say: "Mr. Jones concluded his testimony by stating that. . . ."

d. Speech Tags. These are journalistic expressions such as *he said*, used to attribute direct quotations. Ordinarily, speech tags should not be placed in the middle of a sentence. Also, a speech tag need not be repeated even for a long quotation. Once is usually enough.

e. Ellipsis. Ellipsis is the omission of a word or words that the reader will, by inference, understand or apply. It is frequently an easy way to avoid needless and boring repetition.

"X bank has $9 million in negotiable municipal bonds, Y bank $7 million, and Z bank $4 million."

Ellipsis is also used to shorten quotations by inserting three periods (four if the sentence is ended) for the omitted material.

f. Latin Terms. *Et al.,* an abbreviation for *et alii,* is Latin for *and others. Etc.,* an abbreviation for *et cetera,* is Latin for *and other things. And etc.* is redundant. *Et al.* may be useful in legal instruments to indicate persons whose names are not known, or for the names of parties too numerous to mention.

Sic is Latin for *so* or *thus*. It should be used only to assure the reader that what is immediately preceding is correctly quoted when on its face it appears doubtful. It should never be used to criticize grammatical errors, to call attention to jokes, or (in place of quotation marks) to indicate an ironical use of a word. *Sic* may be used to indicate that a misspelling in quoted

material appears in the original.

g. Write It Down. Although this point is not directly related to the actual writing of opinions, the ALJ should cultivate the habit of marking such details as dates, names, addresses, telephone numbers, and even the time of day, on relevant documents. The ALJ should also record such matters in office appointment books, calendars, and professional diaries. This suggestion will not directly improve an ALJ's writing, but it will save time and effort in writing opinions. All judges realize the necessity for written records and exact dates, but many waste hours looking for and attempting to verify details.

7. Being Clever

Dr. Samuel Johnson reportedly said: "Read over your composition, and when you meet with a passage that you think is particularly fine, strike it out." Although there are plenty of exceptions to this dictum, it contains some wisdom. Attempting to shine with cleverness is a good way to look foolish, and egocentric.

Once more, cleverness is NOT the first priority of decision-writing. Judges, like all writers, on occasion will have an inspiration or perform a brilliant bit of stylistic acrobatics on some obscure point, that viewed a few days no longer seems very brilliant.

The ideal is not to demonstrate your own brilliance. The ideal lies in the opposite direction. The ideal is a decision which takes so little effort to read and understand that the reader becomes unaware of the writer.

8. Rewriting

The preceding suggestions of how any judge, ALJ or otherwise, can simplify and clarify the written decision should be helpful. Judges may find that a good way to ensure clarity and sound reasoning is to have an able colleague review, edit, and criticize the decision.

Finally, all judges know that the only way to write any document is to assemble the relevant material and the dictionary, thesaurus, stylebook, and guide to citations, and to write. Then rewrite, rewrite, and rewrite.[356]

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[356] For an excellent book which concentrates on the much-neglected topic of <u>how</u> to revise one's writing, see Ede, WORK IN PROGRESS: A GUIDE TO WRITING AND REVISING (St. Mary's Press, 1989).