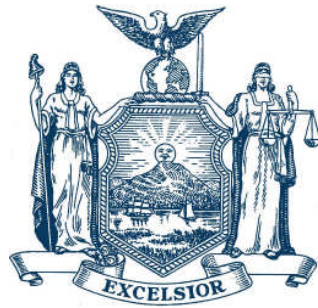


**MANUAL FOR  
ADMINISTRATIVE LAW JUDGES  
AND  
HEARING OFFICERS**



*Andrew M. Cuomo*  
*Governor*

*2011*

## REVISIONS TO MANUAL FOR ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS

### Chapter 8: The Freedom of Information Law (FOIL), p. 177

Note: This section was current as of July 1, 2001. The Freedom of Information Law was materially revised by Chapter 22 of the Laws of 2005. Readers are advised to consult the official compilations of such Law in either printed or electronic format.

### Appendix E: State Administrative Procedure Act, page 325

Note: This section was current as of July 1, 2001 and has been included as a guide for reference purposes only. The State Administrative Procedure Act (SAPA) remains subject to frequent revision. Readers are advised to consult the official compilations of such Act in either printed or electronic format.

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### World Wide Web

Each of the States listed below maintain their own home pages which allow viewers to visit the executive, judicial or legislative branches of government. Many of the States provide a list of agencies on the Web, along with bill tracking features and a search function to locate specific governmental information.

The information, below, was accurate as of July 1, 2001. Web pages are updated frequently; viewers are encouraged to explore State Web sites or utilize the key word search capabilities or popular Internet search engines.

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32. New York, This site provides access to agencies that conduct hearings and to agency regulations. The Division of Administrative Rules of the New York State Department of State also furnishes useful information regarding the State Administrative Procedure Act and rulemaking in New York.

<http://www.state.ny.us/>

<http://www.dos.state.ny.us/>

## ACKNOWLEDGMENT

The New York State Department of Civil Service wishes to extend their many thanks and deep gratitude to the Government Law Center of Albany Law School for their dedication, commitment and exemplary work. The guidance and legal expertise they provided in the review and drafting of this Manual have resulted in a product that will greatly benefit and enhance the role of administrative law judges in New York State. Their efforts exemplify the very best in public service.

Nancy G. Groenwegen, Commissioner  
New York State Department of Civil Service  
Edition last revised-June 2002

The revisions contained in this Manual were jointly funded through the negotiated agreement between the Governor's Office of Employee Relations and the Public Employees Federation, AFL-CIO.  
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## **Foreword**

This manual is the outgrowth of a cooperative project undertaken by the New York State Department of Civil Service, the Public Employees Federation, the Governor's Office of Employee Relations, the Rockefeller College of the State University of New York, and the Government Law Center of Albany Law School. The original manual, published in 1961 and revised once in 1972, was authored entirely by Louis J. Naftalison. Following publication, it was in great demand throughout the State. Hearing Officers, Administrative Law Judges, parties to administrative proceedings, professors and students of administrative law, and those with a general interest in administrative proceedings all sought copies.

Once all the printed copies of the manual had been distributed, photocopies started to circulate, and as late as 1998 the Department of Civil Service—the department that published the original and revised manuals—was still receiving requests for copies. This was true even though the manual was written before the State enacted the State Administrative Procedure Act (SAPA) governing administrative proceedings in many of the State's agencies and departments. In addition, some sections of the

## Foreword

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manual—such as the evidence appendix—had become dated by changes in the law and its application in the administrative adjudicative setting. But many of the passages retained important and valuable information on the proper functioning of the administrative process in New York State. Practical advice and admonitions regarding the proper role of the hearing officer in the process of administrative adjudication and suggestions for addressing many of the issues a hearing officer will likely confront were the reasons the manual continued to be popular.

The current project arose out of the desire to bring the manual up-to-date while maintaining the accessible, best-practices style adopted by Naftalison. Working on the drafting of the new manual itself were Albany Law School professors, staff members of the Government Law Center of Albany Law School, and Albany Law School students. Overseeing the efforts of the new authors was a New York State advisory panel consisting of hearing officers, administrative law judges and counsel from many of the State agencies engaged in the administrative adjudicative process.

Working together, the manual that follows was drafted, reviewed, edited, and finalized. It is to be made available both in a printed hard copy, and in electronic format.

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**Manual For Administrative Law Judges and Hearing Officers**

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This manual is designed to provide a starting point and general reference for administrative law judges and hearing officers. That administrative practitioners, law professors and law students may also find in it some value is a benefit of the manual, but not its primary intent. It is written for the ALJ or hearing officer, and thus suggestions and comments made in it are for the benefit of those persons, and should not be used in asserting that an ALJ or hearing officer has in some way erred.

As for the sophistication of information presented, we have tried to strike a balance between those who have been practicing for some time, and those who are new to the process. Some of the information will be far too basic for some ALJs and hearing officers, while other information may be new or present known theories in a new light. It is our hope that all of those involved in administrative adjudication can find something in the manual that is useful to them and to which they may be able to refer back time and time again.

Regardless of our intentions, however, this manual cannot and does not contain every piece of information relevant to the practice of administrative adjudication. Administrative processes vary from agency to agency, bureau to bureau, and one cannot rely on the information found within this manual without consulting the



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applicable statutes, regulations and guidelines for the particular agency in question. Failure to consult caselaw, agency information, and statutes cannot and should not be excused by this reference to information contained in this manual.

In addition, while it is the Department of Civil Service's intent to maintain this work in electronic format so as to allow for regular updates and changes, the burden is on the user of this manual to verify the continuing accuracy of any and all statements contained within it.

That said, we would like to take the opportunity to thank those who assisted in making this project possible. In addition to the authors and advisory committee members, Albany Law School students James Dayter '99 and Barbara Hancock '00 assisted in developing materials and appendices for the manual. University at Albany student and Government Law Center intern Jennifer Cordes assisted with the editing of the project. Finally, Government Law Center Secretary/Receptionist Lisa Buscini provided administrative support for the manual while it was being developed. GLC Publications Editor Michele Monforte provided an invaluable final edit and review prior to publication (but any remaining errors are mine alone). For their efforts and assistance, we thank them.

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**Manual For Administrative Law Judges and Hearing Officers**

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Our appreciation is also expressed to the members of the New York State/Public Employees Federation, Professional Development Committee for their recognition of the value of this project, their ongoing support and for making funding available through the negotiated agreements between the State of New York and the Public Employees Federation, AFL-CIO.

Robert A. Heverly, Esq.  
Editor/Design & Layout  
2002 Edition

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**Foreword**

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## **Author Biographies**

### **Rose Mary Bailly, Esq.**

Rose Mary Bailly, Esq., is Executive Director of the NYS Law Revision Commission, and is the Coordinator of the Aging Law & Policy Program at the Government Law Center of Albany Law School where her responsibilities include administration of research projects and preparation of reports and studies on options for legal and policy reform in aging law and related areas. She previously served as Associate Attorney to the New York State Law Revision Commission from 1987 to March 1995 where her responsibilities included the development of the Commission's annual legislative program. Most recently Ms. Bailly has taught New York State Administrative Procedure and Practice at Albany Law School. She is a member of board of editors of the New York State Bar Journal, and is a graduate of Fordham University School of Law where she served as a Commentary Editor for the Fordham Law Review.

### **Patrick J. Borchers**

Patrick J. Borchers is Dean of Creighton University School of Law, and formerly was the Associate Dean for Academic

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Affairs and a Professor of Law at Albany Law School of Union University. He has taught administrative law since he began his teaching career, is the author of numerous articles on administrative and constitutional law topics, and is the co-author with Prof. David Markell of the first and second editions of "New York State Administrative Procedure and Practice," published by West Group in 1995 and 1998 respectively. In 1995 he and Prof. Markell were awarded the ABA Section of Administrative Law and Regulatory Policy's Annual Award for Scholarship for the first edition of their book.

### **Robert Freeman, Esq.**

Robert Freeman, Esq., is the Executive Director of the New York State Committee on Open Government. Before becoming Executive Director of the Committee in 1976, Mr. Freeman had been its counsel. He received his law degree from New York University and a B.S. in Foreign Service from Georgetown University in Washington, D.C. In 1982, the New York State Society of Newspaper Editors presented Mr. Freeman with its Friend of the Free Press Award and in 1992 he was given the First Amendment Award by the New York Press Association. The New York City Chapter of the Society of Professional Journalists, the

Deadline Club, presented him with its First Amendment Award in 1994. Most recently, he was presented with the Governor Alfred E. Smith Award by the Empire State Capital Area Chapter of the American Society for Public Administration for outstanding individual service and initiative exemplifying superior management and administration, and was made a Fellow of the State Academy for Public Administration.

**Robert A. Heverly, Esq.**

Robert A. Heverly, Esq., is Assistant Director of the Government Law Center of Albany Law School, where he has worked since September, 1992. Mr. Heverly currently teaches graduate students and undergraduate students at the University at Albany and the College of Saint Rose, and previously taught as an adjunct professor at Siena College and Rensselaer Polytechnic Institute. He has participated in programs on administrative law and practice, including undertaking presentations on technology and technology issues for ALJs. An active member of the American Bar Association, the New York State and Albany County Bar Associations, Mr. Heverly is

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an honors graduate of both the State University College at Oswego and Albany Law School.

### **Michael J. Hutter**

Michael J. Hutter is Professor of Law at Albany Law School of Union University, where he teaches, among other subjects, Evidence. Professor Hutter clerked for Judge Matthew J. Jasen, New York Court of Appeals, and practiced law with a New York law firm involved in antitrust and unfair competition litigation. He is author of a book and numerous articles on antitrust and unfair competition. From 1980 to 1984, Professor Hutter was Executive Director of the NYS Law Revision Commission. He frequently teaches continuing legal education courses on evidence and administrative law.

### **David Markell**

David L. Markell is a Professor of Law at Albany Law School of Union University, where he teaches administrative law, environmental law and land use planning courses. Professor Markell is the co-author (with Patrick Borchers) of an award-winning book on New York State administrative law, *New York State Administrative Procedure and Practice* (West Publishing 1995), and the

author of several articles on administrative law and environmental law topics. He has testified on such topics before Congress and the New York State Legislature. Professor Markell serves on the Executive Committee of the New York State Bar Association's Environmental Law Section and as Associate Editor of the Section's Journal, *The New York Environmental Lawyer*. Before joining the Law School's faculty, Professor Markell served as Director of the New York State Department of Environmental Conservation's Division of Environmental Enforcement. Professor Markell also spent several years practicing law with the U.S. Environmental Protection Agency and the U.S. Department of Justice, and in private practice in Washington, D.C. Professor Markell is a 1979 graduate of the University of Virginia School of Law.

**Patricia E. Salkin, Esq.**

Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School. She teaches courses in government ethics, housing law & policy and planning law at both the Law School and the University at Albany. She is an officer of the American Bar Association's Section of State and Local Government Law, and on the Executive Committee of the New York



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State Bar Association' s Municipal Law Section. She is on the Steering Committee for the international Council on Government Ethics Laws, chairs the ethics committee for the ABA State and Local Government Law Section and is that Section's liaison to the Ethics 2000 Task Force. She frequently writes and lectures in the area of government ethics. Ms. Salkin served for a number of years as the Chair of the State Administrative Law Committee of the ABA's Section on Administrative Law.

**Administrative Law Judge Manual  
Advisory Review Committee**

**Pamela Petric Baldasaro**  
Department of Civil Service

**Tyrone Butler**  
Department of Health

**Lucia A. Ferrara**  
Department of Motor Vehicles

**Herbert Friedman, Jr.**  
NYS Division of Taxation and Finance

**Stephen Fry**  
NYS Department of Health

**Helene Goldberger**  
NYS Department of Environmental Conservation

**Stella Chen Harding**  
NYS Department of Civil Service

**Kary Jablonka**  
Rockefeller College of Public Affairs and Policy  
University at Albany

**Monte Klein**  
NYS Public Employment Relations Board

**Joel A. Linsider**  
NYS Public Service Commission

**Peter Loomis**  
Department of Transportation

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**Robert Lorenzo**

NYS Unemployment Insurance Appeals Board

**Elizabeth A. Lott**

NYS Workers' Compensation Board

**Gerald Lynch**

NYS Public Service Commission

**Peggy Moore-Carter**

Public Employees Federation

**Thomas Pandick**

NYS Workers' Compensation Board

**Henry Pedicone**

NYS Office of Temporary and Disability Assistance

**Onnolee W. Smith**

Governor's Office of Employee Relations

**Andrew S. Weiss**

NYS Workers' Compensation Board

**Thomas Young**

NYS Department of Transportation

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## **Chapter 1: Introduction to Administrative Law**

### **Agency Functions**

Administrative law is an often-misunderstood subject. Although frequently shrouded in a good deal of mystery, administrative law is simply that body of law that defines and describes the behavior of agencies. An important goal of this Manual is to explain the central principles of this body of law as they apply to New York State agencies.

Agencies are governmental entities which, although they affect the rights and duties of persons, are neither courts nor legislatures nor the executive. Agencies come in a huge array of sizes and shapes. Some have thousands of employees; others have much smaller numbers. They have names like "Department," "Board" or "Authority."

Agencies have widely differing missions, goals and organizations. They all share some common features, however. First, all are created by legislation. Every agency has some set of statutes, duly passed by the legislature, that defines its mission, organization and jurisdiction. Second, all agencies are shaped roughly like a pyramid, with some person or group of persons at the top; his, her or their immediate staff below; and then down through the ranks of their subordinates and other

employees of the agency. Third, agencies share a unified mission which is defined by the legislation that creates the agency and is expressed in the most immediate sense by the person or persons who head the agency.

Agencies also challenge our notions about separated governmental authority. In a conventional "civics book" model of government, the legislature is responsible for making laws, the executive for enforcing them, and courts for interpreting them. While this is true as far as it goes, many agencies combine all of these functions (and more) into a single entity.

Agencies may also have heavy enforcement responsibilities. Agencies can investigate potential violations of the law within their jurisdiction. They may make use of a full range of investigative tools, including inspections, tests, recordkeeping and reporting requirements, and others. If agency personnel detect violations of the law, they may be able to take legal action in a manner parallel to that of a prosecutor.

Agencies may also be responsible for the development of legal standards much like legislation. These standards are known alternatively as rules or regulations. Using a formal process that requires publishing notice of the

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proposed rulemaking in *The State Register*, agencies – after taking public comment and following other legally-required steps – may adopt rules that must be filed with the Secretary of State, published in *The State Register*, and eventually assembled in the Official Compilation of Codes, Rules and Regulations of the State of New York. This latter publication is broken down into various volumes, and is often abbreviated "NYCRR." Agencies also make less formal and binding pronouncements in handbooks, memoranda, orders and other guidance documents.

Finally, agencies are responsible for conducting administrative adjudications. In terms of the impact upon the lives of the persons involved, administrative adjudication can be every bit as important, critical and profound as court adjudication. The grocer facing loss of a license to sell beer, the company faced with a potential fine for violating an applicable environmental standard, the disabled person attempting to obtain vocational services – each must appear before an agency in an administrative adjudication in which the stakes are personally quite high.

While administrative adjudication shares some

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## Introduction to Administrative Law

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important features with court adjudication, there are important differences as well. Court adjudication begins before a judge who is constitutionally independent from other branches of government. Administrative adjudication typically begins before an agency employee with the title of "Administrative Law Judge," "Hearing Officer," "Hearing Examiner" or something similar. Throughout this manual, we will use the term "Administrative Law Judge" – or its abbreviation of "ALJ" – to describe these agency employees who conduct administrative adjudications. While ALJs have a legal duty to consider impartially the merits of adjudications, they are not separated from the agency in the same way that judges are separated from the rest of government.

While judges in court adjudication hear a large variety of cases, ALJs consider a much narrower range of matters. This is, in large part, because the creation of an agency reflects a legislative judgment that enforcement and interpretation of the law in that field would benefit from technical expertise. Whether the field is health, environment, taxation, workers' compensation, rent control or some other field in which an agency has jurisdiction, these matters are committed to

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administrative – not court – adjudication precisely so that the matter can be determined by agency employees who are experts. ALJs, by hearing a relatively narrow range of cases, have an opportunity to become expert in a manner that judges hearing court adjudications cannot duplicate.

The relative lack of physical separation of ALJs from agencies also allows ALJs to take advantage of the technical expertise of other agency personnel. While ALJs, like courts, are generally not allowed to consult off-the-record about the specific facts of a case, they are entitled to get informal advice on matters of law and policy from other agency personnel, subject to the restriction that those other agency personnel not be the very personnel presenting the agency's case to the ALJ. Administrative law tolerates this sort of informal consultation because, again, agencies have expertise, and all facets of the agency's expertise should permeate all aspects of the agency's activities—including administrative adjudication.



**Sources of Legal Obligations of Agencies**

*The Constitution*

Agencies, of course, must follow the law; to the extent that agencies overstep legal boundaries, courts have the authority to set aside the agency action. There are many sources of legal obligations on agencies, some of which will be discussed in much more detail in subsequent chapters. But, by way of overview, there are three principal sources of legal restraints on agencies.

The most powerful—although the most general—limitations are set by the United States and the New York Constitutions. The Fourth Amendment to the United States Constitution, for instance, forbids "unreasonable" searches, and this amendment has been held by the United States Supreme Court to apply to agencies.<sup>1</sup> From the standpoint of administrative adjudication, the most important constitutional provisions are those that require "due process of law."<sup>2</sup> The idea of due process cannot, of course, be reduced to any exact formula. It does,

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1. See *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967); See *v. City of Seattle*, 387 U.S. 541 (1967).

2. U.S. Const. Amend. XIV; N.Y. Const. Art. I, § 6.

however, usually require that the agency provide reasonable procedures before making a decision that is significantly adverse to a private party and in which the private party has a significant property right or liberty interest. Thus, for instance, an agency procedure that caused very grave harm to a party on the basis of very little proof, or allowed only a minimal opportunity for affected parties to participate, would violate due process.<sup>3</sup>

\_\_\_\_\_*The State Administrative Procedure Act*

A second set of legal rules that apply to all agencies is statutory. The most significant subset of these statutes is the State Administrative Procedure Act (often abbreviated as "SAPA"), and for that reason we devote the most attention to it here. The original version of SAPA was enacted in 1975, and it is loosely modelled on the Federal Administrative Procedure Act (which was enacted originally in 1946) and the 1961 Model State Administrative Procedure Act. SAPA, though, is unique;

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3. See *Goldberg v. Kelly*, 397 U.S. 254 (1970)(AFDC recipient has a due process right to make an oral presentation before termination of benefits); *Miller v. De Buono*, 90 N.Y.2d 783 (1997)(entry of a nurse's aide's name on registry of suspected patient abusers based solely on the existence of "some credible evidence" of abuse violates due process).

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no other state has an administrative procedure act exactly like it.

The fundamental idea of SAPA is to provide relative consistency and uniformity in agency processes. Agencies, of course, have very different missions and make very different sorts of decisions as among themselves. SAPA requires, however, that all covered agencies follow certain common procedures.

*Article 1 of the State Administrative Procedure Act: Definitions*

SAPA is divided into five articles. Article 1 sets out some general terminology for the Act, some of which is highly relevant for other articles of SAPA. One critical definition, contained in SAPA § 102(1), is the definition of the term "agency." This definition is critical because SAPA only applies to agencies. Governmental entities that do not fit within SAPA's definition of an agency are not subject to SAPA, though they may be subject to other procedural statutes. SAPA defines an agency as:

any department, board, bureau, commission, division, office, council, committee or officer of the state, or a public benefit corporation or public authority at least one of whose members is appointed by the governor, authorized by law to make rules or to make final decisions in adjudicatory proceedings but shall not

include the governor, agencies in the legislative and judicial branches, agencies created by interstate compact or international agreement, the division of the military and naval affairs to the extent it exercises its responsibility for military and naval affairs, the division of state police, the identification and intelligence unit of the division of criminal justice services, the state insurance fund, the unemployment insurance appeals board, and except for the purposes of subdivision one of section two hundred two-d of this chapter, the workers' compensation board and except for article two of this chapter, the state division of parole and the department of correctional services.<sup>4</sup>

This definition tells us several important things about New York State agencies. First, assuming that it otherwise meets the definition, an agency's particular title does not matter. An "agency" in the SAPA sense can be called a board, a commission, a division, an authority or one of many other terms.

Second, in order to qualify as an "agency" in the SAPA sense, the governmental entity must act with the authority of the state. This means that it must either have one or more gubernatorial appointees at its head, or it must be authorized by statute to engage in one of the

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4. See SAPA § 102(1).

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two characteristic activities of an agency: making administrative rules or deciding administrative adjudications. (Most agencies, in fact, meet all three criteria: they are headed by the Governor's appointees, they have the power to make rules and they engage in administrative adjudication.) Governmental entities created by local governments, such as a city or town agency, are not agencies in the SAPA sense because they do not get their power directly from the state.<sup>5</sup> The definition also tells us that the Governor, the courts and the Legislature are not agencies.

Third, some important entities that would otherwise qualify as "agencies" are not covered by SAPA. For instance, the State Insurance Fund, the Workers' Compensation Board and the Unemployment Insurance Appeals Board are completely outside the scope of SAPA. Other entities, such as the Department of Corrections, are considered agencies under SAPA only to the extent that they make administrative rules; in their other functions – including administrative adjudication – they

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5. See, e.g., *Incorporated Village of Great Neck Plaza v. Nassau County Rent Guidelines Board*, 69 A.D.2d 528 (2d Dep't 1979)(county rent control board not an agency in the SAPA sense).

are exempt from SAPA. While these exemptions from SAPA are important, it is also critical to not lose sight of the fact that those entities excluded from SAPA's definition of an agency have a great deal in common with SAPA agencies. Even those state entities that are not covered by SAPA are still subject to the due process requirements mentioned above, the provisions on judicial review discussed below, and other statutes that govern proceedings before them. Workers' compensation and unemployment matters are exempted from SAPA largely because those proceedings are already subject to an extensive set of legally-required procedures that would make SAPA largely superfluous.<sup>6</sup> Thus, even for those entities not directly covered by SAPA, a great deal can be learned by synthesizing the fundamental principles applicable to agencies.

*Article 2 of the State Administrative Procedure Act: Rulemaking*

Article 2 of SAPA governs the procedures by which agencies make administrative rules and regulations. Agency rulemaking can be distinguished from agency

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6. See, *infra*, Hearing Regulations at Appendix C.

adjudication because the former involves the creation of standards that apply in the future to a class of persons or entities.<sup>7</sup> Agency rules are often described as "quasi-legislative" pronouncements because they resemble statutes. Agency adjudication is often referred to as "quasi-judicial" because it involves individualized determinations of the legal rights of particular persons or entities. Thus, for example, an agency's determination that a particular person is disabled and meets the requirements for receiving vocational services is an administrative adjudication because that decision assesses the legal rights of that particular person. The criteria for qualifying as "disabled," however, might well come from an administrative rule, which is applicable to all persons claiming the right to such vocational services.

While the contents of particular administrative rules can be of great importance in administrative adjudications, the process for making them is not generally the concern of ALJs. In broad outline, the process for making administrative rules is more public and political than the process for administrative

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7. See, *People v. Cull*, 10 N.Y.2d 123 (1961).

adjudication. Notice of proposed administrative rules generally must be published in *The State Register*, although there are important exceptions for emergency rules, as well as other kinds of pronouncements that resemble rules, but are merely interpretative or "general policy" statements. Publication of a proposed rule triggers a right of public comment: written comments are always acceptable; sometimes oral comments through public hearing are received as well. After the comment period closes, agencies can adopt final rules that must be filed with the Secretary of State, then published in *The State Register* and eventually compiled in the NYCRR. Agencies often must prepare ancillary documents in the course of rulemakings – regulatory impact statements, flexibility analyses and so on – and Governors have, from time to time, imposed by executive order other requirements on the rulemaking process.

*Article 3 of the State Administrative Procedure Act: Adjudicatory Proceedings*

Article 3 of SAPA is the article of the greatest importance for administrative adjudication. Article 3 covers all "adjudicatory proceedings" conducted by



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agencies covered by SAPA. An "adjudicatory proceeding" is defined by SAPA as:

any activity which is not a rule making proceeding or an employee disciplinary action before an agency, except an administrative tribunal created by statute to hear or determine allegations of traffic infractions which may also be heard in a court of appropriate jurisdiction, in which a determination of the legal rights, duties or privileges or named parties thereto is required by law to be made only on a record and after an opportunity for hearing.<sup>8</sup>

This definition tells us several important things about "adjudicatory proceedings." First, several kinds of proceedings are not covered. Rulemakings, which – as discussed above – are fundamentally different from administrative adjudications, are not subject to the procedures for adjudicatory proceedings. Also excluded are two types of proceedings that might otherwise fit within the definition: employee disciplinary actions and administrative determinations of traffic offenses.

Second, adjudicatory proceedings must involve a determination of the legal rights and duties of specific persons. This, of course, distinguishes adjudication from rulemaking. Rulemaking does not involve named parties –

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8. See SAPA § 102(3).

rather, it involves setting norms for entire classes of persons – and thus falls outside the scope of administrative adjudication.

Third, "adjudicatory proceedings" are those administrative adjudications that are "required by law to be made only on a record and after an opportunity for hearing." The idea of agency adjudications being "on a record" is an administrative law term of art. As we shall see, "on a record" proceedings involve the compilation of a record, but they also involve many other procedural formalities.

SAPA's provision that the adjudicatory proceedings are those in which an "on a record" hearing is "required by law" means that there must be some *provision of law outside SAPA* that requires the record hearing. A voluntary decision by an agency to provide a formal hearing does not mean that the proceeding is converted into an adjudicatory proceeding. Thus, in order for a proceeding to be an "adjudicatory proceeding" under SAPA, there must be some provision – almost always a statute – that requires a "hearing on a record" for that particular type of proceeding. A statute that merely requires an agency to hold a "hearing" or allow an

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"opportunity to be heard" does not call for an adjudicatory proceeding.<sup>9</sup> An exception exists for statutes that call for a "hearing" or an "opportunity to be heard" in connection with a license, permit or similar form of government permission; those statutes, as discussed below, are construed to require an adjudicatory proceeding.<sup>10</sup>

If the proceeding meets SAPA's definition of an adjudicatory proceeding, then the procedures set forth in Article 3 apply. Section 301 requires reasonable notice to the affected parties and sets forth in considerable detail the contents of the notice. Section 302 requires the compilation of a complete record of all adjudicatory proceedings, including the recording of testimony either stenographically or electronically. Section 303 requires that adjudicatory proceedings be conducted either by the head (or one of the heads) of an agency or a properly designated hearing officer, mandates that the proceedings be conducted impartially and describes how the matter is to proceed if the person presiding is disqualified or cannot continue. Section 304 sets forth several significant powers

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9. See *Vector East Realty Corp. v. Abrams*, 89 A.D.2d 453 (1st Dep't 1982).

10. See SAPA § 401.

of the person presiding, including the issuance of subpoenas. Section 305 allows agencies to adopt rules that govern pre-hearing disclosure of information. Section 306 sets forth the evidentiary standards to be followed in adjudicatory proceedings. Section 307 requires a written opinion in any adjudicatory proceeding decided adversely to a private party and also requires the agency to maintain a publicly-available index of final opinions.

Article 3 thus requires a fair degree of formality and deliberation in the course of an adjudicatory proceeding. Although adjudicatory proceedings are more streamlined than court adjudication, adjudicatory proceedings represent the zenith of procedural detail in New York State administrative law.

*Article 4 of the State Administrative Procedure Act: Licensing*

Article 4 consists only of Section 401, which applies solely to "licensing." SAPA defines licensing as "any agency activity respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, recall,

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cancellation or amendment of a license."<sup>11</sup> "License" in turn is "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law."

Once again, the definitions are important. A license is any form of formal permission issued by a state agency. Its designation as a certificate, license, permit or other term is unimportant; all are "licenses" as far as SAPA is concerned. Licensing is any state agency activity that significantly affects a license.

SAPA Section 401 treats licensing matters essentially as adjudicatory proceedings, provided a statute requires a "hearing" or an "opportunity to be heard" on the matter.<sup>12</sup> Thus, routine issuance of individual fishing licenses would not trigger SAPA section 401's requirements in the ordinary circumstance, but more significant kinds of permissions are accompanied by hearing requirements that do bring to bear SAPA's procedural requirements. In contrast to ordinary adjudicatory proceedings, licensing statutes need not specifically refer to a hearing "on a

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11. See SAPA § 102(5).

12. See SAPA § 401(1).

record"; a mere reference to a "hearing" or an "opportunity to be heard" is enough to trigger the procedural requirements of an adjudicatory proceeding in this context.

In addition to the Article 3 provisions that apply to adjudicatory proceedings, Section 401 contains three subdivisions that impose requirements applicable only in licensing matters. First, under subdivision 2, a license holder who makes a timely and sufficient application for a new license is ordinarily entitled to operate under the old license until the agency reaches a decision on the new application and the time for review of the agency's decision has expired. Subsection 3 gives the agency the power to summarily suspend a license in emergency circumstances. Subdivision 4 gives both the agency and the private party the right to make a demand for each others' documentary evidence intended to be introduced at the hearing on the matter.

*Article 5 of the State Administrative Procedure Act: Right to Counsel*

Article 5 is also comprised of a single section; section 501. Section 501 gives all persons appearing before

agencies "the right to be accompanied, represented and advised by counsel." Of course, this does not ordinarily require the agency to provide counsel for persons who are not represented; it simply allows persons appearing before an agency to select and pay for their own counsel. Section 501 does not preclude agencies from allowing non-lawyer representatives to appear on behalf of parties.

Though Section 501 literally speaks of any agency proceeding, it has not been construed so broadly. In cases in which representation would be particularly inappropriate, courts have upheld agency decisions not to allow representation.<sup>13</sup>

*Other Statutes*

There are other procedural statutes that affect agency proceedings. Probably the most important of these is Article 78 of Civil Practice Law and Rules (abbreviated "CPLR"). Article 78 is a statute that allows affected parties to challenge agency actions by filing an action in New York State Supreme Court. In general, an affected party may seek judicial review under Article 78 only after

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13. See, e.g., *Mary M. v. Clark*, 100 A.D.2d 41 (3d Dep't 1984)(no right of counsel at informal university disciplinary proceeding).

the agency proceedings – including any appeals within the agency itself – are completed. Additionally, the party challenging the action must have some significant stake in the agency decision; a person who finds an agency action annoying, but is no more impacted by it than the general public, may not successfully seek judicial review of it.<sup>14</sup>

In general, courts uphold agency decisions as long as they are reasonable. This does not necessarily mean that the agency must reach exactly the same result that the reviewing court would have reached had the matter first been presented to the court. Rather, courts will uphold agency decisions as long as they are factually and legally plausible.<sup>15</sup>

As to factual determinations in adjudicatory proceedings, courts uphold agency determinations as long as there is "substantial evidence" to support the decision. Thus, for instance, if an agency decision is based on the testimony of a witness, courts will uphold

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14. See *Mobil Oil, Co. v. Syracuse Indus. Development Agency*, 76 N.Y.2d 428, 559 N.Y.S.2d 947, 559 N.E.2d 641 (1990).

15. See, Borchers, Patrick J. and David L. Markell, *New York State Administrative Procedure and Practice*, §8.5 (West 1995).



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the agency's factual findings even though there might have been a significant amount of contrary evidence and testimony introduced.<sup>16</sup>

As to legal determinations, courts usually uphold an agency's interpretation of the law as long as it is reasonable. This is particularly so when the agency interprets complex statutes and regulations within the agency's zone of expertise.<sup>17</sup>

Other kinds of agency determinations – such as the appropriate penalty to be imposed if there is a violation – are set aside by reviewing courts only if the agency acts arbitrarily or capriciously, or abuses its discretion. In the context of imposing a penalty, courts often say that they will set aside a penalty only if they find it "shocking."<sup>18</sup> Of course, court deference to the agency judgment brings with it a great responsibility on the part of ALJs and agencies to make the correct determination of matters before them; the agency determination is very likely to be the final word.

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16. See *Stork Restaurant v. Boland*, 282 N.Y. 256, 26 N.E.2d 247 (1940).

17. See, Borchers, Patrick J. and David L. Markell, *New York State Administrative Procedure and Practice*, §8.3 (West 1995).

18. See, *Pell v. Board of Education*, 34 N.Y.2d 222 (1974).

Other statutes affect agency procedures at least tangentially. The Freedom of Information Law and the Open Meetings Law impose some duties of openness on agencies, and these are discussed in much more detail in a later chapter. The Executive Law contains some statutes on the rulemaking process that largely duplicate those in SAPA Article 2. As a practical matter, however, the general statutes of the most procedural significance for agency adjudication are SAPA and Article 78 of the CPLR.

*Agency Specific Statutes and Regulations*

The third primary source of legal obligations on agencies is those statutes and regulations that apply to a specific agency. Agency specific statutes define the agency's jurisdiction, describe the legal duties of regulated parties and generally set the legal parameters for matters that come before ALJs and the agency. Agencies that conduct adjudicatory proceedings have hearing regulations that supplement SAPA's provisions. These regulations may cover such important matters as the availability of prehearing disclosure, the timing of notices, settlement procedures and others. Because

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these sources of law vary from agency to agency, detailed treatment of them is not possible in an introductory chapter, although a critical duty of any ALJ is to become familiar with, and stay current upon, these agency-specific sources of law.

## **Chapter 2: The Administrative Law Judge**

This chapter examines the qualifications necessary for the position of an administrative law judge (ALJ), the position's powers and responsibilities, ethical considerations, and the efficacy of continuing education for ALJs.

### **Qualifications**

#### *General Qualifications*

The ALJ must meet the legal qualifications established by the agency's enabling legislation and agency rules and regulations governing the position. SAPA does not establish any additional qualifications for a presiding officer.

The laws of the various agencies governing ALJs are not uniform. Some require that he or she be chosen from agency staff and, in some instances, satisfy certain additional criteria such as being admitted to practice law in New York State. Others may authorize the agency to borrow a qualified hearing officer from another State agency. Still others may permit the agency to hire a person with certain qualifications outside the agency. In some instances, the governing law requires two or more persons to preside over a case.

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### The Administrative Law Judge

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The agency typically designates who shall be the presiding officer of administrative adjudications.<sup>1</sup> Pursuant to Executive Order No. 131, each agency is required to have an agency adjudication plan that, among other things, identifies who presides over an administrative adjudication.<sup>2</sup> The plans may identify the presiding officer by a variety of official titles, including "administrative law judge," "hearing officer," "*per diem* hearing officer," or "referee."<sup>3</sup>

#### *Administrative Law Judges*

Generally, administrative law judges have the power and authority of a presiding officer or hearing officer as described in SAPA.

#### *Hearing Officer*

A hearing officer is defined in Executive Order No. 131 as "a person designated and empowered by an

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1. See, e.g., SAPA §303.

2. 9 NYCRR §4.131.

3. See Patrick J. Borchers & David L. Markell, *NEW YORK STATE ADMINISTRATIVE PROCEDURE AND PRACTICE* §11.17n2 at 396 (1995)[hereinafter Borchers & Markell].

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agency to conduct adjudicatory proceedings" and includes hearing officers, hearing examiners, and administrative law judges.<sup>4</sup> Many agency regulations refer to a "hearing officer" as the person with authority to hold a hearing.

*Per Diem Hearing Officer*

A *per diem* hearing officer is generally one who is hired on a temporary basis, or hired for a particular matter or series of matters. Some agencies may hire hearing officers on a *per diem* basis, but other agencies may rely exclusively on agency staff.<sup>5</sup>

*Judicial Qualifications*

In addition to the legal qualifications set forth in the agency's governing law, the person who acts as the presiding officer must meet certain criteria appropriate to an individual making decisions on behalf of the agency and New York State.

The characteristics of the presiding officer are set

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4. 9 NYCRR §4.131.

5. See Borchers & Markell, §11.17n.3 at 397.

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forth in Executive Order No. 131. He or she must be "knowledgeable, competent, impartial, objective and free from inappropriate influence."<sup>6</sup>

The ALJ must know the governing rules and regulations of the agency. Although he or she may communicate with other members of the agency about the agency's rules and policies in limited circumstances during the course of a hearing, the ALJ is expected to have sufficient knowledge and expertise to be able to proceed with the hearing independently (see the discussion on *Ex Parte* Communications that follows). He or she must also analyze testimony and other evidence to frame the issues, and determine the credibility of witnesses by assessing their testimony and demeanor.

The ALJ must be patient and tactful and control hearings with dignity and decorum. He or she should articulate necessary questions, points and comments in comprehensible language.

The ALJ should approach the hearing with an open mind, without bias or prejudgment toward the issues. The ALJ must maintain impartiality toward the case and, perhaps most importantly, maintain an

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6. 9 NYCRR §4.131.

appearance of impartiality so that the parties truly believe that the ALJ is not favoring one side over the other.

Finally, the ALJ should exhibit good common sense in handling the matters before the court.

### **Powers and Responsibilities**

#### *General Authority*

Subject to the statutes, and the rules, regulations and procedures governing the particular agency, the ALJ generally has the authority to:

- a. hold hearings within the scope of his or her duties;
- b. administer oaths or affirmations;
- c. issue subpoenas as authorized by statutes, rules, regulations, or procedures;
- d. receive relevant and material evidence, and rule on offers of proof;
- e. take or cause to be taken depositions, as authorized by statute, rule, regulation or procedure;
- f. hold conferences to settle or simplify the issues, or to obtain stipulations as to facts or proof by consent of the parties, as authorized by established procedure; in some instances, mediate disputes between parties as



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authorized by the agency;

g. dispose of procedural requests, including requests for adjournments, in accordance with agency rules, regulations and procedures;

h. direct parties to appear at hearings;

i. regulate and control the course of the hearing;

j. examine witnesses and parties as the case requires;

k. consider and evaluate the facts and evidence on the record as well as arguments and contentions of the parties;

l. determine the credibility and weight of the evidence in making findings of fact and conclusions of law;

m. render written decisions, reports or recommendations as authorized by statutes, rules, regulations or procedures;<sup>7</sup>

n. certify questions of law to a higher administrative tribunal as authorized by statutes, rules, regulations or procedures;

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7. SAPA § 307 requires that in an adjudicatory proceeding findings of fact expressed in statutory language must be accompanied by a statement of the underlying facts that support the findings. If a party submitted proposed findings of fact in accordance with an agency rule, the findings by the presiding officer must include a ruling on each proposed finding.

o. make a complete record of the proceedings including all relevant and material matters and exhibits for a review on appeal by an administrative tribunal or court; and,

p. take any other action in a proceeding necessary to complete the case as authorized by the established procedure of the agency or the hearing process.<sup>8</sup>

*Impartial Hearings*

In an impartial hearing, the ALJ ensures that the issues are clearly defined, receives and considers all relevant and reliable evidence in an orderly manner, and reaches a fair, independent and impartial decision. The ALJ should exercise appropriate judicial demeanor so that the parties have the opportunity for a fair hearing in a neutral atmosphere.

The ALJ can ensure an impartial hearing by being well prepared and by giving his or her full attention to the hearing. Before opening the hearing, he or she should read the pleadings, pre-hearing documents including any pre-filed testimony, and trial briefs. He or she should prepare any pre-hearing statements in advance and read

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8. See SAPA §304.

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them into the record. In a multi-day hearing, he or she should also review the previous day's notes in preparation for the next day's hearing.

During the hearing, the ALJ should follow the testimony closely so that he or she will be able to keep the hearing on course.

#### *Neutrality*

The ALJ's relationship to the agency, and his or her relationship to or preconceived view of the parties, are often concerns for parties at an agency hearing. The ALJ's neutrality, particularly in cases involving a reexamination of an agency's determination, as well as his or her competence and attitude, will inspire public confidence in the ALJ and the fairness of his or her decisions.

Although SAPA does not provide any guidance as to the standard for judging the neutrality or bias of the ALJ, the case law offers some guidance in analyzing the parties' concerns. The ALJ's employment by the agency does not by itself establish bias.<sup>9</sup> However, his or her

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9. See, e.g., *Hirsch v. Corbisiero*, 155 A.D.2d 325, 548 N.Y.S.2d 1 (1<sup>st</sup> Dept. 1989); *Whalen v. Slocum*, 84 AD.2d 956, 446 N.Y.S.2d 727 (4<sup>th</sup> Dept. 1981).

personal stake in the outcome, such as receiving a profit or a personal benefit from the transaction at issue, is a basis for disqualification.<sup>10</sup> Likewise, observations by the ALJ prior to a hearing that the party is guilty would be considered prejudicial.<sup>11</sup>

In analyzing the potential for bias, the ALJ should consider whether he or she has any:

1. personal interest in the outcome of the case;
2. relationship by blood or marriage to any party, witness or representative;
3. present or past association in business affairs or in social matters with any party, witness or representative;
4. prejudice or bias against certain categories of persons or the type of case that is before the court.

Not only should the ALJ be free of any personal interest, bias or prejudice, but he or she must also be free of any reasonable suspicion of such interest.

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10. *New York Public Interest Research Group, Inc., by Walthen v. Williams*, 127 A.D.2d 512, 511 N.Y.S.2d 864 (3d Dept. 1987); *In the Matter of Richard M. Kessel, as Executive Director of the Consumer Protection Board of the State of New York v. Public Service Commission of the State of New York*, 123 A.D.2d 203; 511 N.Y.S.2d 441 (3d Dept. 1987).

11. *See, 1616 Second Avenue Restaurant, Inc. v. New York State Liquor Authority*, 75 N.Y.2d 158, 551 N.Y.S.2d 461, 550 N.E.2d 910 (1990); *Tumminia v. Kuhlmann*, 139 Misc2d 394, 527 N.Y.S.2d 673 (Sup. Ct. N.Y.Co. 1988).

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If the parties believe the ALJ is biased against them, they have the option to make this concern part of the record.<sup>12</sup> When a challenge is made and the ALJ believes that the challenge has merit or that there is the slightest probability of its validity, the ALJ should adjourn the proceedings to allow for the substitution of a new ALJ.<sup>13</sup>

When the challenge clearly lacks merit, is made solely for nuisance value, or is just an attempt to choose another ALJ for matters of personal preference, the presiding ALJ should reject the challenge and state the reasons for doing so on the record.

The parties cannot immediately appeal this determination; it is preserved for review after a determination on the merits of the case.<sup>14</sup>

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12. SAPA §303 provides that: "upon filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case."

13. See, SAPA §303.

14. SAPA §303; See, e.g., *Wesser v. State Dep't of Health, State Bd. Of Professional Medical Conduct*, 60 N.Y.2d 785, 457 N.E.2d 784, 469 N.Y.S.2d 678 (1983).

*Judicial Attitude, Behavior and Demeanor*

Maintaining an air of neutrality is as important as the ALJ's actual impartiality. That can best be established by maintaining civility at the hearing. The ALJ should exercise control over the attorneys and witnesses to ensure that the proceedings move forward without delay. The ALJ should proceed courteously toward counsel even when ruling against them. He or she should not argue or become angry with counsel even in the face of inappropriate behavior.

The ALJ should also avoid fraternizing with the attorneys and the parties.

**Judicial Independence**

*Relations with Administrative Personnel of Agency*

As an employee of a State agency, the ALJ is often on the same payroll as the members of administrative staff who investigate the cases that come before the ALJ. These employees often are called as witnesses at the agency hearings. The fact that the agency combines investigatory, prosecutory and quasi-judicial functions under one roof does not by itself violate due process. Nevertheless, the employer-employee relationship of the

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agency and the ALJ is viewed circumspectly. Agencies are under certain restraints in how they treat the persons in their employ who preside over agency hearings.

Executive Order No. 131 establishes general principles regarding administrative adjudication and requires that each agency establish an "administrative adjudication plan" and organizational blueprint that addresses these principles.

The internal arrangement of the agency should insulate the decision maker from agency influences. The courts have been critical of situations where the decision maker is significantly involved in the administrative process of the agency.<sup>15</sup>

An agency cannot direct the ALJ to reach a certain result in a pending case. If the agency head's ultimate decision conflicts with that of the ALJ, a written explanation must accompany the decision. An agency supervisor can, however, give "advice or guidance" to the ALJ if the supervisor believes such advice is necessary to

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15. For example, the court found a constitutionally unacceptable violation of due process where the general counsel for the agency appeared and represented a complainant before the State Department of Human Rights through one of her assistants and then, as a result of subsequently being appointed as Commissioner, served in her new role as the reviewer of the decision of the ALJ. *General Motors Corp. v. Rosa*, 82 N.Y.2d 183, 604 N.Y.S.2d 14, 624 N. E. 2d 142 (1993).

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"assure quality standards of an agency or to promote consistency in agency decisions."<sup>16</sup> The ALJ should consider agency policies in reaching a determination and, as noted in the discussion regarding *Ex Parte* Communications that follows, can seek advice from employees of the agency regarding issues of law.

An agency cannot exercise "command influence"<sup>17</sup> to manipulate the persons who act as ALJs in agency proceedings by using case quotas or other methods of evaluating whether the ALJ's actions "favor or disfavor the agency or state."<sup>18</sup> In evaluating its ALJs, the agency should be guided by the goal of ensuring competent and fair judges. The agency should consider the ALJ's performance based on his or her objectivity, fairness, productivity, diligence and temperament.

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16. Executive Order No. 131 (9 NYCRR §4.131).

17. Borchers & Markell §3.18 at 61.

18. *Id.*



*Ex Parte Communications*

Additional limits on agency combination of roles come from SAPA and Executive Order No. 131 which limit *ex parte* contacts with ALJs.<sup>19</sup>

*Adjudicatory proceedings*

*Ex parte* communications in adjudicatory proceedings are strictly circumscribed by SAPA §307(2) and Executive Order No. 131.<sup>20</sup> Both apply to adjudicatory proceedings. They do not apply to initial licensing applications of public utilities or "proceedings involving the validity or application of rates, facilities or practices of public utilities or carriers."

With certain exceptions, SAPA applies to members or employees of an agency designated to make a decision or findings of fact and conclusions of law, including a State board acting as a finder of fact under the supervision of an ALJ. With certain exceptions, Executive Order No.131 applies to hearing officers, hearing examiners, and ALJs assigned to conduct

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19. See, SAPA §307(2); 9 NYCRR §4.131.

20. 9 NYCRR §4.131.

adjudicatory proceedings. It does not apply to agency heads or members of a State board or commission.

SAPA §307(2) forbids direct or indirect *ex parte* communications with "any person or party" regarding issues of fact in an adjudicatory hearing and *ex parte* communications with "any party or his representative" regarding issues of law. However, section 307(2) allows the agency member or employee to communicate *ex parte* with other agency members and to seek the advice of agency staff as to matters of law so long as the agency staff has not engaged in the investigation or prosecution of the case or any factually related case.

Executive Order No. 131 forbids direct or indirect *ex parte* communications about the merits of an adjudicatory proceeding with any person but it does permit the presiding officer to communicate *ex parte* about questions of law with supervisors, agency attorneys, or other ALJs not currently or previously involved in the case or factually related cases.<sup>21</sup>

Where *ex parte* communications have significantly affected the process, the courts have voided the

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### The Administrative Law Judge

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proceeding.<sup>22</sup> However, few cases have established bias.

#### *Rulemaking*

Unlike adjudicatory proceedings, the rulemaking process gives wide latitude to *ex parte* communications and the ALJ should be mindful of the distinctions.<sup>23</sup>

#### **Ethics**

An Administrative Law Judge must be neutral and objective, honest, fair, and free from agency or personal bias.

The ALJ must be as independent as possible of the administrative agency, since the ALJ's role is to re-examine and re-appraise the determinations made by the agency. If the agency has erred, it is the ALJ's responsibility to so decide.

Since relatively few decisions are adjudicated further, the ALJ treats each hearing as if it were the

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22. See, e.g., *Signet Constr. Corp. v. Goldin*, 99 A.D.2d 431, 470 N.Y.S.2d 396 (1<sup>st</sup> Dept. 1984).

23. See, e.g., SAPA §307; Executive Order No. 131 (9 NYCRR §4.131)(applicable only to adjudicatory proceedings); see, e.g., *Wesser v. State Dep't of Health, State Bd. Of Professional Medical Conduct*, 60 N.Y.2d 785, 457 N.E.2d 784, 469 N.Y.S.2d 678 (1983); see, generally, Borchers & Markell §4.19 at 115.

parties' last opportunity for a full and fair decision.

The public and agency are well served by the judicious exercise of the ALJ's powers. Assuring a fair hearing inspires public confidence in the ALJ and his or her decisions. It also demonstrates that the agency is performing its functions with impartiality.

In New York State, an ALJ is subject to at least one and often several standards of ethics, depending upon the ALJ's professional and employment status. For example, every ALJ is subject to the New York State Code of Ethics, found in the Public Officers Law. Other ethics provisions that may be applicable to individual ALJs include:

1. The Code of Professional Responsibility, which applies to ALJs who are also attorneys. The Code is printed in the Appendix of the Judiciary Law;

2. The Code of Judicial Conduct, which applies to all ALJs who are also judges within New York's Unified Court System, but may also apply to other ALJs, as explained below. The Code is printed in the Appendix of the Judiciary Law;

3. The Ethics in Government Act contained in the Public Officers Law that applies to public officials, and the regulations adopted thereunder by the New York

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**The Administrative Law Judge**

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State Ethics Commission;

4. Ethics provisions that may be contained within agency regulations in the New York State Official Compilation of Codes, Rules and Regulations (NYCRR), which apply to agency employees; and,

5. The agency's Code of Ethics for ALJs, if one has been adopted. See example from the New York State Board of Workers' Compensation, Appendix C.

Thus, a lawyer ALJ would be subject to: Public Officers Law §74, the Code of Professional Responsibility, and any agency-specific ethics provisions. If he or she is full or part time staff, Public Officers Law §73 also applies.

A non-lawyer ALJ would be subject to: Public Officers Law §74 and the agency's ethics provisions, plus Public Officers Law §73 if he or she is full or part time staff. Generally, these provisions and regulations adopted under them cover activities including conflict of interest, financial disclosure, gifts, outside activities, honoraria, and post-employment restrictions.<sup>24</sup>

Where does an ALJ go with questions about these

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24. The NYS Ethics Commission has published numerous guides and issued formal opinions on all of these issues. They can be found on the World Wide Web at <http://www.dos.state.ny.us/ethc/ethics.html> or by calling 1 (800) 87-ETHICS.

ethics provisions? If a question pertains to either of the two state laws, Public Officers Law §§73 and 74, he or she may seek guidance and an opinion from the NYS Ethics Commission. He or she may also seek guidance from the agency's designated ethics officer. If it pertains to the professional codes which apply to lawyers or court system judges, he or she should inquire of the New York State Bar Association Committee on Professional Ethics or of the New York Advisory Commission on Judicial Ethics, respectively. For other questions, if there is no agency mechanism in place to handle ethics inquiries, an ALJ might approach the agency's chief ALJ or a neutral party for guidance (with the understanding that there may be no duty of confidentiality arising out of the inquiry).

The ALJ's ethics story does not end here, however, because portions of the Code of Judicial Conduct (CJC) may also apply. The Code states, "Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purposes of this Code." Although ALJs are not specifically mentioned in the list of persons for whom compliance is mandatory, ethics opinions in New York have considered the administrative

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adjudicatory system a form of the judicial system to which the CJC may apply.

*The Code of Judicial Conduct*

The New York State Bar Association Committee of Professional Ethics stated in 1991 that an ALJ is subject to Canon 3(c)(1) of the CJC. In that case, an ALJ who served in the Division of Tax Appeals (DTA) was required to recuse himself from hearing cases which were pending during his prior service as staff attorney for the same agency. Canon 3(c)(1) provides, "A judge should disqualify himself in a proceeding in which his impartiality might be reasonably questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter. . ." The Committee said that "ALJs of the DTA should be subject to those provisions of the CJC that impact directly on the integrity of their adjudicatory function. Canon 3(c)(1) is

such a provision."<sup>25</sup>

The Committee looked to the commentary to Canon 3(c)(1)(b), which notes that "a lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should recuse himself in a proceeding if his impartiality might reasonably be questioned because of such association." An ALJ might weigh such factors as the size of the legal office, the scope of his or her former responsibilities within the office, and "the extent to which cases were discussed with lawyers other than those formally assigned to them."<sup>26</sup> The Committee concluded that while there is "no absolute prohibition" against an ALJ hearing a matter in these circumstances, "the ALJ has a duty to recuse himself or herself if his or her impartiality might reasonably be questioned."<sup>27</sup>

Citing Opinion 617, the Appellate Division, Third

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25. N.Y.S. Bar Assn. Comm. Prof. Ethics Op. 617, 2 (1991).

26. *Id.* at 3.

27. *Ibid.*



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Department, said in 1991 that it "appears" that ALJs are subject to the Code of Judicial Conduct. An ALJ who is also a member of a union can avoid possible violation of Canon 7, restricting judges' political activity, by requesting a refund of any portion of dues that would go to political activities of the union.<sup>28</sup>

On the other hand, the New York Advisory Committee on Judicial Ethics said in 1996 that it was not authorized to answer a question about an administrative law judge, because the agency in question had not adopted the Code of Judicial Conduct.<sup>29</sup> A 1988 opinion of the N.Y.S. Bar Association Committee on Professional Ethics said that the CJC should not apply to ALJs in all of its particular provisions. A rigid application of Canon 5(E), prohibiting a judge from acting as an arbitrator or mediator, could "significantly disable an agency from fulfilling its intended purpose, with no countervailing purpose being served . . . Whether any given agency should prohibit its staff from acting as mediators or arbitrators is an issue that ought to be resolved by the

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28. *Crosson v. Newman*, 178 A.D.2d 719, 576 N.Y.S.2d 950 (3rd Dept. 1991).

29. N.Y. Advisory Comm. on Judicial Ethics Op. 96-47 (1996).

agency itself, consistent with substantive law and the needs of the agency."<sup>30</sup>

Because specific provisions of the CJC have been applied to ALJs in certain circumstances, absent a rule or code to the contrary, those who serve as ALJs should follow the provisions of the CJC wherever possible. When compliance might present an unreasonable or disproportionately heavy burden, the ALJ should seek an advisory opinion.

*Codes of Conduct for Administrative Law Judges/Hearing Officers*

Not entirely satisfied with such case-by-case, provision-by-provision application of the CJC to ALJs here as in other states, two national associations of ALJs have proposed model codes of ethics that take into account the special circumstances of state ALJs. For example, unlike judges working within the court system, ALJs serve in both quasi-legislative and quasi-judicial capacities. In addition, state ALJs may work part-time, and their salaries may not justify the same stringent restrictions on personal and professional activities

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30. N.Y.S. Bar Assoc. Comm. Prof. Ethics, Op. 594 (1988).

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### The Administrative Law Judge

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that an appellate judge or a Federal ALJ would expect as part of the job.<sup>31</sup> Both proposed model codes encourage mediation and arbitration, prohibited under Canon 5(e) of the CJC. Both allow an ALJ an outside practice of law, also prohibited by the CJC. In general, the restrictions that both model codes place on extra-judicial activities resemble those that the CJC places on part-time judges.

#### *Adoption of Agency Codes*

The clearest way to provide guidance to agency ALJs and hearing officers on standards of appropriate conduct is through the adoption of codes of conduct specifically for these employees. This may be accomplished on a statewide basis or it may be approached piecemeal agency-by-agency. To date, the Workers' Compensation Board is the only State entity to adopt a code of ethics for its ALJs (the Workers' Compensation Board's code is included in this manual as Appendix D).

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31. See also, NYC Ethics Op. 1994-2.

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*Other Laws Restricting Activities of ALJs and Hearing Officers*

In addition to agency specific ethics codes, some statutes may also impose restrictions on ALJs. For example, the Workers' Compensation Law restricts ALJs from engaging in any other employment except teaching in an institution of higher learning.<sup>32</sup>

**Continuing Education and Training**

The training of an ALJ is an ongoing process. Supervisors should periodically observe hearings held by ALJs and then meet with them to review and evaluate their conduct of hearings. Supervisors should also hold regularly scheduled conferences to discuss problems, consider recent developments in case law, and review techniques for improvement.

When the agency's hearings are held in more than one location, meetings with staff from regional locations will offer an opportunity for exchanging experiences, problems and case law development.

Although New York mandatory continuing legal

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32. Workers' Compensation Law §150.

education requirements currently exempt ALJs,<sup>33</sup> continuing education and training is vital for keeping current with legal developments and ensuring quality in decision making. ALJs should consider participating actively in workshops and training sessions provided by the New York State Governor's Office of Employee Relations and the New York State Public Employees Federation, AFL-CIO, through the Professional Development Program of the Nelson A. Rockefeller College of Public Affairs and Policy and other professional educational programs.

Additionally, ALJs may wish to become active in various programs offered by law schools and local, state and national bar associations and other organizations that promote professional education in administrative law.

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33. 22 NYCRR §1500.5(b)(1)(note that this requirement is currently under review and it appears likely that it will be changed so as to require ALJs to meet MCLE requirements).

## **Chapter 3: Due Process of Law**

### **Introduction**

Both the United States and New York Constitutions guarantee that no person shall be deprived of "life, liberty or property, without due process of law." The concept of due process imposes a fundamental obligation upon all organs of government, including state agencies. At its base, due process means that no person can be subject to an individualized proceeding in which he or she stands to lose one of the protected interests – in the context of administrative law, either property or liberty – without sufficient procedures to ensure that the governmental action is fundamentally fair.

Of course, these are not self-defining terms. The notions of what is an individualized proceeding, what are protected liberty and property interests, and what constitutes acceptably fair procedures have all been the subject of elaborate judicial interpretation. Because of their great importance in agency adjudication, they are covered in detail here.

**Individualized Proceedings**

Procedural due process becomes a governmental obligation only in cases in which the government makes an individualized determination towards a small number of persons or entities. Across-the-board, generalized policy decisions do not implicate a right to procedural due process, though such actions may implicate other rights.

Two early United States Supreme Court cases illustrate this distinction nicely. In *Londoner v. Denver*,<sup>1</sup> the plaintiff was a Denver property owner. A statute allowed the creation of special assessment districts for street repairs, with the total cost of the work to be divided among the property owners, presumably in relation to the benefit to them. *Londoner*, complaining that his assessment did not accurately reflect the benefit to his parcel, sought a hearing before Denver City Council, but was rebuffed. The United States Supreme Court held that *Londoner* had been deprived of his due process rights.

In *Bi-Metallic Investment Co. v. State Board of*

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1. 210 U.S. 373 (1908).

*Equalization*,<sup>2</sup> another Denver property owner—the Bi-Metallic Co.—challenged an order of the State Board of Equalization effectively increasing the valuation of all Denver property by forty percent. The Bi-Metallic Co. requested a hearing and, like Londoner, was rebuffed. This time, however, the United States Supreme Court held that no hearing was constitutionally required.

Both cases involved Denver landowners complaining that their real property taxes or assessments were too high, yet only Londoner had a constitutional right to a hearing. Why? The Supreme Court's answer to this riddle was that only Londoner was the target of an individualized governmental decision; only Londoner could have offered up particularized facts relative to his situation. The Bi-Metallic Co. was understandably unhappy, but its position was no different from any other Denver landowner. A hearing involving Bi-Metallic would have brought forth nothing other than generalized grievances shared by a huge number of other persons and entities.

The protection, then, for persons and entities like the Bi-Metallic Co. is the political process. Unpopular,

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2. 239 U.S. 441 (1915).



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across-the-board decisions are likely to have negative political consequences. But offering an individual hearing to everyone so affected would bring governmental action to a standstill.

Often these individualized determinations are referred to as "quasi-judicial" to contrast them with "quasi-legislative", across-the-board determinations. Quasi-judicial proceedings involve the determination of adjudicative facts, while quasi-legislative proceedings involve the determination of legislative facts and matters of broad policy. Professor K.C. Davis, undoubtedly the most famous writer on administrative law, explained the distinction as follows:

[Adjudicative facts] are intrinsically the kind of facts that ordinarily ought not be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative facts. 2 K.C. Davis, ADMINISTRATIVE LAW TREATISE 412-13 (2d ed. 1979).

This distinction closely tracks the division between Articles 2 and 3 of SAPA.<sup>3</sup> Article 2 is the portion of SAPA that relates to rulemaking proceedings; Article 3 is the portion that relates to adjudicatory proceedings. Adjudicatory proceedings, which involve specific named parties and a particular determination of their rights, are individualized determinations for due process purposes. Rulemakings, on the other hand, usually involve the setting of a standard applicable to a large number of persons or entities, and therefore such proceedings are almost always generalized, non-individualized proceedings that do not trigger a procedural due process inquiry. The one exception is that very narrow, targeted rulemakings which directly affect only a small group – as can occur in ratemakings and similar proceedings – can be treated as individualized proceedings that trigger a procedural due process inquiry.<sup>4</sup>

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3. See, Chapter 1, *supra*, for a discussion.

4. See, *ICC v. Louisville & Nashville RR. Co.*, 227 U.S. 88 (1913)(applying due process principles to a ratemaking proceeding).

**Property Interests**

Due process does not protect individuals from all conceivable negative governmental actions. Rather, it protects against deprivations of life, liberty and property. In the administrative context the two important protected interests are property and liberty.

"Property" in the due process sense has both a traditional and non-traditional usage. In the traditional sense property encompasses well-defined categories of wealth such as money, tangible personal property, real estate and so on. Thus, for example, if an agency is bringing an enforcement proceeding seeking a monetary penalty, the private party indisputably has a property interest at stake which implicates due process principles.

It is the non-traditional sense of the word "property" that calls for closer examination. A large number of persons have or seek relationships with the government that are valuable to them. For example, government employees, holders of government licenses, applicants for and current recipients of social welfare benefits all suffer from a loss of their relationship with the government. The critical question is whether the loss of such a relationship constitutes a deprivation of a property interest for due process purposes.

Once again, two United States Supreme Court cases illustrate the point. In *Board of Regents v. Roth*,<sup>5</sup> the plaintiff Roth was an untenured professor at a public university in Wisconsin. Without explanation, Roth's contract was not renewed for the following year. Roth sued, claiming that the failure to provide him with a hearing before deciding to cease his employment constituted a due process violation. The Supreme Court ruled that Roth had no property interest. While most untenured professors were renewed, Roth could point to no state law entitlement to continued employment because he was expressly made a year-to-year employee. In the course of rejecting Roth's arguments, the Supreme Court offered the following definition of property:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .<sup>6</sup>

The same day as *Roth*, the Supreme Court decided

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5. 408 U.S. 564 (1972).

6. *Roth*, 408 U.S. at 577.

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*Perry v. Sindermann*.<sup>7</sup> *Perry*, like *Roth*, involved a claim brought by a public university professor who had lost his employment. The *Perry* plaintiff, like *Roth*, was not the beneficiary of any formal tenure system. In *Perry*, however, the Court held that the professor might have a property interest. Unlike *Roth*, the *Perry* plaintiff had produced university handbooks and other official publications that arguably created an entitlement to continued employment during satisfactory performance.

*Roth* and *Perry* show that the question of whether the private party has a property interest can turn on very narrow factual distinctions. Property interests can come from a large number of sources, including statutes, regulations, agency handbooks and memoranda, and other official pronouncements. If those official statements create enforceable standards that guide the agency's discretion, then the private party has a property interest that can trigger due process rights. Because this can be a close and difficult question, ALJs and other agency employees are safest when they assume that due process principles do, in fact, apply to the proceeding before them. By treating a proceeding as one in which

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7. 408 U.S. 593 (1972).

due process principles apply, the agency can help diminish the risk that a reviewing court will later overturn the outcome.

### **Liberty Interests**

Liberty interests, like property interests, can be divided into two types. One kind is fundamental liberty interests. Fundamental liberty interests are those that are sufficiently well-recognized that they are protected regardless of how they are defined by state law. Free speech, voting, privacy and other interests that are protected explicitly or implicitly by the Constitution thus trigger a hearing requirement. Fundamental liberty interests also include significant losses of "liberty" as that term is commonly understood. Thus, for instance, a person in the general citizenry could not be committed to a mental hospital against his or her will without some sort of hearing to determine whether he or she meets the standards for commitment.

The other type is non-fundamental – or, as they are sometimes called, "state-created" – liberty interests. These liberty interests take their definition from state law. In this regard, non-fundamental liberty interests closely resemble property interests. In order for a person to

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successfully assert that he has a non-fundamental liberty interest, he or she must be able to point to some statute, regulation, contract or other source of law that creates an entitlement. Non-fundamental liberty interests differ from property interests only in that liberty interests lack a clear monetary value, while property interests have a clear monetary value.

One context in which claims of liberty interests are often raised is prison. Inmates – pointing to prison regulations, handbooks and the like – regularly argue that a loss of a privilege is a liberty deprivation that triggers a due process right to a hearing. In *Sandin v. Conner*,<sup>8</sup> however, the United States Supreme Court ruled that an inmate can successfully raise such a due process claim only if he or she can show that the loss of the privilege is an "atypical and significant hardship." In the *Sandin* case, the Supreme Court held that an inmate's transfer to disciplinary segregation was not such a hardship and that the inmate had not been deprived of due process when the prison transferred him without first conducting a hearing.

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8. 515 U.S. 472 (1995).

Another special context in which liberty interests are raised in administrative matters is reputational injuries. The United States Supreme Court has held that a person does not have a liberty interest in his or her reputation as such. But, an injury to reputation plus some other significant negative consequence is a loss of liberty that triggers due process. Often, this is referred to as the "stigma plus" test: if some governmental action causes a person stigma *plus* some other negative consequence, that person has suffered a deprivation of liberty.

For example, in *Miller v. DeBuono*,<sup>9</sup> a nurse's aide was accused of hitting one of her patients. Under state law, her name was to be placed on a registry maintained by a state agency for the purpose of identifying abusers. The New York Court of Appeals held that the aide had a liberty interest at stake. Placement of her name in the registry called into question her reputation *plus* it had the effect of severely limiting her employment opportunities, as the registry was publicly-available. Because she had a liberty interest at stake, her due process rights were triggered, and the court ruled that she should have

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9. 90 N.Y.2d 783 (1997).



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received extensive procedural protections before being placed on the registry.

As with property interests, the question of whether a party has a liberty interest can turn on very narrow factual inquiries. In close cases it is probably best to assume that the private party has a liberty interest and thus that due process principles apply.

#### Required Procedures

Assuming there is individualized, governmental action at which a private party has a property or liberty interest at stake, the private party's right to "due process of law" is triggered. Of course, this is not a mechanical test, and contemporary notions of the amount of procedure required have evolved over time.

The most famous administrative due process case is the United States Supreme Court's opinion in *Goldberg v. Kelly*.<sup>10</sup> In that case, the Supreme Court ruled that the then-existing procedures for determining eligibility under the Aid to Families with Dependent Children program were inadequate, because those procedures gave the

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10. 397 U.S. 254 (1970).

recipient an insufficient opportunity to contest the reasons for being removed from the eligible list. In ruling that the then-existing procedures were inadequate, the Court held that the following procedures generally must be provided *before* the property or liberty interest is lost: timely and adequate notice of the hearing, confrontation and cross-examination of adverse witnesses, the right to make an oral presentation, the right to hire one's own counsel, an impartial decisionmaker, and a decision based entirely on the relevant legal rules and the evidence adduced at the hearing.

More recently, however, the Supreme Court has articulated a more flexible test. In *Mathews v. Eldridge*,<sup>11</sup> the Supreme Court ruled that the required procedures must be evaluated by balancing three factors. Those factors are the value of the property or liberty interest, the cost to the government in providing more procedure, and the risk of an erroneous decision without more procedure. The more valuable the interest the more procedure is required; the more costly the additional procedure, the less likely it is to be constitutionally required; the greater the chance of an error without

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11. 424 U.S. 319 (1976).

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additional procedures, the more likely such procedures will be constitutionally required. In *Mathews*, the Supreme Court demonstrated that the requirement of a full hearing before the decision is itself flexible. In that case, the Court ruled that an oral hearing before deciding to deny disability benefits to the private party was not necessary, because the question of his disability was mostly a medical question that could be evaluated from x-rays and similar medical tests, making an oral hearing less crucial.

The *Goldberg* list of procedures is similar to the procedures required for adjudicatory proceedings under Article 3 of SAPA.<sup>12</sup> Thus, if the matter is an adjudicatory proceeding under SAPA, careful compliance with SAPA and the agency's hearing regulations should avoid almost all due process problems. For administrative matters that are not adjudicatory proceedings, or otherwise not covered by SAPA, the *Goldberg* list is a good starting point for determining the procedures that the Constitution demands. *Mathews*, however, gives agencies and ALJs considerable flexibility in molding procedures to fit the circumstances, as long as the matter is decided in a

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12. See, Chapter 1 for a discussion of "adjudicatory proceedings".

fundamentally fair and impartial manner. For smaller matters, very informal hearings can suffice. For administrative matters in which much of the evidence is documentary or technical, written submissions can substitute for what otherwise might be lengthy oral hearings. As long as the procedures give all parties concerned a reasonable opportunity to present their case, and the decision is made in a reasoned, fair and impartial manner based upon what the decisionmaker learns at the hearing, due process is generally satisfied.

#### **Specific Procedures**

Some due process questions have recurred with enough frequency that they merit specific mention.

##### *Notice*

Notice to an affected party must provide that party with enough information to respond. Thus, very cryptic notices that provide only a vague sense of the nature of the matter are not sufficient.<sup>13</sup> An administrative notice,

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13. See, e.g., *Alvarado v. State of New York*, 110 A.D.2d 583 (1st Dept. 1985)(notice stating only that hearing would involve "charges that the gloves [of a boxer] were tampered with" is insufficient).

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however, need not provide detailed information such as specific times and dates of allegedly important events.<sup>14</sup>

#### *Right to Counsel*

SAPA § 501 generally requires that a private party be allowed to hire an attorney to represent him or her in agency proceedings. In most circumstances due process also provides a right to counsel. There are some circumstances, however, in which the party might not be afforded a right to counsel. For example, in student disciplinary matters, where providing counsel may be inconsistent with maintaining a non-adversarial approach, the private party need not be afforded a right to counsel.<sup>15</sup> Such cases are the exception. In most circumstances counsel must be allowed, though it is the private party's obligation to pay his own lawyer.

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14. See, e.g., *Block v. Ambach*, 73 N.Y.2d 323 (1988)(administrative notice need not have same level of detail as a criminal indictment).

15. See, e.g., *Mary M. v. Clark*, 100 A.D.2d 41 (3rd Dept. 1984).

*Pre-Hearing Disclosure or Discovery*

Parties often contend that due process requires pre-hearing disclosure or discovery. New York courts have routinely rejected this argument.<sup>16</sup> SAPA § 305 allows agencies to adopt rules allowing for discovery, but unless the agency adopts such a rule, or some other statute requires pre-hearing discovery, parties have no such right.<sup>17</sup>

*Cross-Examination*

Cross-examination of adverse witnesses who appear is generally a due process right.<sup>18</sup> However, the right does not extend to repetitive or entirely collateral examinations of witnesses.<sup>19</sup> Thus, an ALJ may cut off cross-examination that serves no truth-seeking function,

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16. See, e.g., *Sinha v. Ambach*, 91 A.D.2d 703 (3rd Dept. 1982).

17. See, *McBarnette v. Sobol*, 83 N.Y.2d 333 (1994)(statute requires some disclosure); SAPA § 401 (some mandatory exchange of information on request in licensing matters); *Heim v. Regan*, 90 A.D.2d 656 (3rd Dept. 1982)(no discovery right in administrative matters unless agency hearing regulations provide for discovery).

18. See, *Hecht v. Monaghan*, 307 N.Y. 461 (1954).

19. See, *National Basketball Ass'n v. New York State Div. of Human Rights*, 68 N.Y.2d 644 (1986).

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but may not cut off cross-examination where doing so prejudices the rights of a party. In close cases, it is best to allow a party requesting cross-examination lest the denial become a significant issue on judicial review.

*Official Notice*

Parties generally have a due process right to have their matter decided on the evidence adduced at the administrative proceeding. If an ALJ intends to go outside the administrative record – as is permissible to take official notice of facts well known to the ALJ or within the agency's special expertise – the private party has a due process right to notice of this intention. Thus, failure to provide a private party with advance warning of an intention to go outside the record, and failure to provide an opportunity to rebut, is a due process violation.<sup>20</sup>

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20. See, e.g., *Cohen v. Ambach*, 112 A.D.2d 497 (3rd Dept. 1984)(failure to inform pharmacist that agency would take official notice of standards for advertising in the "public interest" requires reversal of penalty).

*Burden of Proof*

The burden of proof is generally placed on the party initiating the proceeding. In the case of enforcement actions against a private party, the burden is on the agency; in matters in which the private party seeks a benefit, the burden is on the private party. SAPA § 306 requires agencies to apply a burden of proof of at least substantial evidence. The Court of Appeals has ruled in *Miller v. DeBuono*,<sup>21</sup> that a private party who stands to lose a substantial liberty interest has a due process right to a standard of proof no lower than preponderance of the evidence. Therefore, ALJs should initially place the burden of proof on the party initiating the proceeding. The party initiating the proceeding should prevail if the facts adduced at the hearing show that the initiating party's position is the more plausible one based upon the evidence.

*Neutral Decisionmaker*

Parties have a due process right to a neutral decisionmaker. Thus, an agency official or ALJ who has

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21. 90 N.Y.2d 783 (1997).



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previously publicly expressed opinions relative to a matter before the agency cannot act as a decisionmaker on that matter.<sup>22</sup> Agency officials who have personally participated in the development of a case against a party, or who have a significant personal stake in the outcome, are also generally prohibited from sitting in judgment on those matters.<sup>23</sup> Substantial, off-the-record conversations by an ALJ or agency official about factual issues in a matter before the agency also preclude that ALJ or agency official from acting as a decisionmaker on that matter.<sup>24</sup>

#### *Delay*

Delay between the time of the underlying incident and the date of the administrative hearing is generally not a violation of a party's due process rights. An agency does, however, have the duty to hold an administrative

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22. See, *1616 Second Avenue Restaurant, Inc. v. New York State Liquor Auth.*, 75 N.Y.2d 158 (1990)(statements in a legislative hearing by agency head require reversal of sanction against license holder).

23. See, *General Motors Corp. v. Rosa*, 82 N.Y.2d 183 (1993)(former general counsel promoted to agency head could not review case prosecuted by her and an assistant).

24. See, *Signet Construction Corp. v. Goldin*, 99 A.D.2d 431 (1st Dept. 1984).

hearing reasonably promptly after the matter has been noticed.<sup>25</sup> A very lengthy delay, which is not attributable to the private party's own actions, can be a due process violation if it manifestly prejudices the private party's ability to present his case.<sup>26</sup>

*Statement of Decision*

A private party who loses before the agency has a due process right to a decision that explains the reasons for the decision. Thus, an ALJ's or agency's opinion must contain enough information to show the reasoning process for the result reached, and to allow a reviewing court to understand the basis for the decision. In very simple cases less explanation is required; in more complex ones a more detailed explanation is necessary. An agency opinion need not be the equivalent of a formal judicial opinion, but it does need to contain enough explanation to show how the result was reached from the evidence presented in the case.<sup>27</sup> Parties also have a

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25. See, *Cortland Nursing Home v. Axelrod*, 66 N.Y.2d 169 (3rd Dept. 1985).

26. See, *Sharma v. Sobol*, 188 A.D.2d 833 (1992).

27. See, *Koelbl v. Whalen*, 63 A.D.2d 408 (3rd Dept. 1978).

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right to an opinion that is consistent with past agency decisions, or explains the reasons for departing from precedent. An opinion that is inexplicably contrary to other agency decisions reached on similar facts is a due process violation.<sup>28</sup>

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28. See, *Charles A. Field Delivery Service v. Roberts*, 66 N.Y.2d 516 (1985).

## **Chapter 4: Pre-hearing Considerations**

### **Introduction**

Before the time scheduled for a hearing to take place, the ALJ should verify completion of the steps and procedures necessary to hold the hearing. Failure to check on pre-hearing considerations can add considerable delay to the proceedings, especially if adjournments are necessary before the case is hearing ready.

This chapter discusses various pre-hearing concerns, including disclosure, pre-hearing conferences, practical aspects of preparing for the hearing itself, and the use of technology in preparing for hearings.

### **Disclosure**

Agencies that conduct hearings are required by SAPA §301(3) to have regulations in place relating to such hearings. Agencies may adopt their own rules of disclosure under SAPA §305, which may or may not include the discovery practices contained within Civil Practice Law & Rules.<sup>1</sup> Absent application of the CPLR's

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1. See *Heim v. Regan*, 90 A.D.2d 656 (3rd Dept. 1982).

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### Pre-hearing Considerations

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civil discovery rules, the ALJ or hearing officer is still authorized by SAPA §304 to provide for depositions and subpoenas.

#### *Subpoenas*

The issuance of subpoenas by ALJs in administrative proceedings is authorized by SAPA §304(2). Agency regulations may also address the subpoena power of the ALJ. Generally, parties may issue their own subpoenas, and need not rely on the ALJ for issuance. If properly requested, however, the ALJ is required to issue the subpoena on behalf of the party.

Subpoenas may require individuals to attend and give testimony at the agency hearing. These are referred to as subpoenas *ad testificandum*. In such a case, failure of the person to attend provides the ALJ with good reason to adjourn the hearing to a later date.

A second type of subpoena is the subpoena *duces tecum*, which requires a party to produce a thing, such as a document or object.

Objections to a subpoena are made by the parties to the ALJ, who must determine the validity of the objection. If the ALJ upholds the objection, he or she is said to

*quash*, or cancel, the subpoena. If a party is dissatisfied with the ALJ's determination of a motion to quash, the party may proceed against the agency in an Article 78 proceeding. As agencies in New York State are without the power to hold people in contempt, enforcement of subpoenas not complied with voluntarily is left to the courts.

Subpoenas may be served either in person or by registered mail, so long as the method of service complies with appropriate agency rules.

*File Inspection*

Inspection of agency files by parties is generally authorized in agency proceedings, even in cases wherein the agency's interests are in direct conflict with the inspecting parties' interests. A complete discussion of the public nature of agency files, as well as the exceptions to this rule, is contained in Chapter 8, *infra*, which addresses the Freedom of Information Law.

**Pre-hearing Conferences**

The pre-hearing conference can be of tremendous value in the administrative process, and is specifically

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authorized by SAPA §304(5). Regularly required by state and federal court judges, the conference presents a number of opportunities for the administrative law judge to assert his or her authority over the process, the matter at hand, and the parties. The pre-hearing conference may help to narrow the issues or identify specific facts that are in dispute and thus expedite the hearing process.

Pre-hearing conferences may also present an administrative law judge with the opportunity to assist the parties in resolving the matter, eliminating the need for a formal hearing. While this is not always possible, especially where statute requires that facts be found through the hearing process and party agreement is not especially relevant, in many cases using the pre-hearing conference to help the parties reach agreement can lessen the ALJ's hearing load.

The ALJ should check agency hearing regulations to determine whether any relevant restrictions or requirements are placed on contact with the parties outside of the formal hearing. Keep in mind that pre-hearing conferences in this context should involve all of the parties together, and should not be an excuse for

otherwise prohibited *ex parte* contact between the hearing officer and one or more of the parties.

### **Preparation for the Hearing**

#### *Physical Aspects:*

- *Time and Place of Hearing*

The time and place for the hearing are likely to be determined by agency practice and procedures. Where the ALJ does play a role in determining the time and place of the hearing, holding the hearing on notice to all parties and in a location accessible to all is critical.

If scheduled to take place at a location that inhibits the administration of the hearing, by way of noise (*e.g.*, from traffic or other outside sources, or from air conditioners, heating systems, etc.), temperature, poor lighting conditions, or other distractions, the ALJ may wish to adjourn the hearing to a time and place that will better facilitate the determination of the matter at hand.

- *Physical Accessibility*

The Americans with Disabilities Act requires that people with disabilities be accommodated by public



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entities. This requirement applies to the administrative hearing process as well as other public processes. Should a party require the assistance of a sign language interpreter, or other assistance related to a disability, the ALJ should be aware of relevant agency personnel who can assist the parties in such matters.

#### *Adjournments*

Adjournments may be granted by an Administrative Law Judge for a number of reasons and under a variety of circumstances. For example, adjournments may be granted to allow for the attendance of witnesses or parties, especially where a scheduling conflict beyond the control of the requesting party has led to the request.

ALJs may also generally grant adjournments on their own motion to facilitate settlement of a matter or to allow for fuller investigation of the issues by the parties. Adjournments should not be granted, however, when it appears to the ALJ that the party requesting the adjournment is trying simply to stall or delay the hearing process.

## Technology

Developments in technology over time are changing the way that administrative law is practiced in New York. It is a significant enough issue in the way government does its business today that New York State has an Office for Technology to address the statewide issues that are arising in relation to it. One of the Office's functions is to develop and promulgate policies on use of E-mail, the Internet, and computers. ALJs interested in including new technologies in their hearing practices should review the various policies and be aware of the effects of their choices on their agencies, the parties who appear before them, and on the administrative process as a whole.

### *Telephones and Conference Calls*

Telephone conference calls may be utilized by the ALJ to arrange meetings with the parties, or even in lieu of in-person meetings. The ability to converse with all of those involved is central to the usefulness of conference calls. The ALJ should make certain that such contact is not prohibited by agency regulations, and should also make certain that all parties are included on the calls so as to

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avoid violating *ex parte* contact rules. If the parties cannot decide amongst themselves who should bear the financial burden of the conference call, the ALJ may require in-person attendance in place of the phone conference. When faced with the need to make a personal appearance, as opposed to appearing by phone, the parties may be more willing to shoulder or share the cost of the phone conference.

*Video-conferencing*

Video-conferencing technology is becoming increasingly popular. As with phone conference technology, video-conferencing allows parties, counsel, and the ALJ to save travel time to and from a conference location or the ALJ's office. It surpasses telephone conferencing, however, in that those involved can see each other and gauge body language, facial expressions, and other signs used to determine credibility and make personal judgments.

Where such conferencing is available, whether through use of dedicated video-conferencing facilities or by desktop computer, care should again be exercised to make certain that parties and their representatives are not

excluded. If everyone involved in a particular proceeding cannot participate due to physical or technological constraints, it is important to remain true to the process and hold conferences or discussions in person, allowing all necessary parties to attend.

*Fax Machines*

Use of the fax machine to communicate prior to the hearing allows for quicker, more efficient communication than can occur by mail, especially in time-pressured proceedings. Fax machines should not, however, be used absent agreement of the parties, and fax notices should be followed with a copy by regular or registered mail.

*E-mail*

Electronic mail, or "E-mail," is one of the most recent technological innovations in communication. When functioning properly, it allows many times for almost instantaneous communication among and between the parties. Absent agency rules to the contrary, the parties may wish to correspond with each other and the assigned ALJ using E-mail. The use of E-mail should, as with fax communications, be agreed upon by the parties.

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E-mail communication is more analogous to written letters than to a phone conversation. As E-mail is saved as a computer file both by the sending computer and the receiving computer(s), it is easily disseminated to others. Agreement on the forwarding or other distribution of E-mail should follow protocols for distribution of written materials, and flippant or off-the-cuff remarks should be avoided at all costs to preclude inappropriate appearances in the administrative process.

A final note on privacy: absent the use of encryption technology to conceal the contents of a message, E-mail can be intercepted illicitly and either copied or redistributed. While the CPLR provides that the attorney-client privilege is not lost solely because information is sent via electronic methods of communication, other statutes relating to privacy may not follow suit. It is thus important to be cautious in determining what information to include in an E-mail message. When in doubt, it is best to send the information by regular mail, possibly with an electronic message stating that it is being sent.

## **Chapter 5: Conduct of the Hearing**

This chapter examines the basic responsibilities of an administrative law judge in conducting the hearing and ensuring an orderly and fair presentation of the evidence and issues to be determined.

### **Generally**

It is the responsibility of the ALJ to conduct the hearing in such a manner so that the issues presented for resolution are determined fairly, according to all parties' full and reasonable opportunity to present such evidence as may be relevant to the issues involved. The ALJ's corollary responsibility is to exercise such control as is necessary for the orderly, effective and reasonably expeditious progress of the hearing.

The ALJ must conduct the hearing so as to give the clear impression that it is not a contest for advantage by the use of technicalities, but rather an informal and searching inquiry into the facts and law of the case. While adjudicatory proceedings are informal, they should be conducted with dignity and decorum. Informality should not be synonymous with chaos or a free-for-all. Informality is not inconsistent with orderliness and only means an absence of unnecessary and time-consuming

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technicalities. It provides flexibility, enabling adjustment to varied conditions and circumstances. The ALJ should create a relaxed and placid atmosphere which is conducive to the free flow of information.

In sum, an adjudicatory proceeding must not only be a fair hearing in fact, but it must also have the appearance of a fair hearing. Assuring such fairness is the goal of the ALJ.

### **Commencement of the Hearing**

#### *Before The Hearing Is Called To Order*

There are some preliminary activities that the ALJ should undertake which will help a hearing move along with reasonable dispatch. Initially, the ALJ should ensure that the hearing room is suitably arranged with tables and chairs for the parties and their attorneys, the stenographer, if any, and the ALJ. Additionally, the ALJ should make sure that the hearing room is physically comfortable, *e.g.*, proper heating, lighting. When a stenographer is being used, the ALJ should provide the stenographer with a brief and basic agenda for the hearing, and assign responsibility for hearing details

such as swearing in of witnesses and the marking of exhibits. If a recording device is being used, the ALJ should ascertain that it is properly working.

Parties, their attorneys and witnesses should be pleasantly received by the ALJ and made to sense the informality of the proceeding. If one party appears early, the ALJ should refrain from engaging in conversation. The concern is that the other party may later claim that the merits of the case had been discussed in the party's absence and that the ALJ was influenced thereby.

*Opening the Hearing*

The hearing should commence promptly at the time fixed in the notice of the hearing. A reasonable leeway may be allowed whenever local transportation, parking or weather conditions may be the possible cause of delay in attending on time.

Failure to start on time causes unnecessary irritation to all concerned. It may prevent the hearing from being concluded in a single day, may cause delay in expediting the day's calendar, and may affect the full disposition of later scheduled cases.

Before opening the hearing, the ALJ should ascertain



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the identities of the parties, their attorneys and witnesses. The ALJ should obtain the correct spelling and pronunciation of their names and also their addresses, and should then have recorded on the minutes of the hearing, as well as in the ALJ's own notes, the name, official title and the interest of each person appearing.

Although the ALJ may well know the personnel who represent the agency, the ALJ should not carry on any conversation not related to the hearing with them, either business or personal, in the presence of parties and their attorneys. The ALJ should always address them at the hearing by their formal names, never by first names or nicknames. As innocent as these acts may appear subjectively, experience has shown that they can give an erroneous and harmful impression. The outsider will frequently claim that the camaraderie or the idle talk between the ALJ and agency personnel, gave obvious proof of favoritism or that the case was "rigged" against the party.

Before taking proof, the ALJ should identify himself/herself by name and official title. The ALJ should make a brief statement indicating that the ALJ is an

impartial adjudicator. The ALJ should then reference the Notice of Hearing, and briefly summarize the purpose of the hearing, the issues involved, the possible consequences of the determination of such issues, the parties' procedural rights and under what law or section thereof or under what rules and regulations, the hearing is being held. If any party or attorney disagrees with this summary, they should be heard, and any necessary modifications made on the record by the ALJ. In some cases, especially protracted ones, it may be useful to outline briefly what procedure will be followed to complete the case.

Such opening statement by the ALJ will help the parties understand the nature of the hearing and its procedure, and will help set the appropriate tone for the hearing. The content of the opening statement will vary according to the parties at the hearing, and the nature of the issues to be resolved. For example, if a party is represented by an attorney, it may not be necessary to give a detailed explanation, and instead give a brief explanation. Where complex issues are presented for determination, a detailed statement may be more appropriate.

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The ALJ should also inquire at this time as to whether the parties intend to offer into evidence any exhibits. If so, the ALJ may consider having them marked at that time, or, if there are numerous exhibits, at the first time when there is a break in the presentation of proof. Such pre-marking of exhibits will make for a more orderly presentation of proof.

#### *Opening Statements*

The ALJ should ask before the taking of proof starts whether the parties wish to make an opening statement. The opening statement gives each party an opportunity to set before the ALJ the "story" which the party's ensuing proof will tell.

Opening statements by the parties should be encouraged, since they summarize the issues and outline the positions of the parties, allowing them to begin their presentation in a more informal, less stressful manner. However, they are not legally necessary and a party may decline to make an opening statement. No adverse inference should be drawn from such a decision.

The order of proof, discussed *infra*, will determine which party has the right to make the first opening

statement. The other party then has the opportunity to make an opening statement. The ALJ has the discretion to permit the responding party to delay making an opening statement until the time the party presents its case. Such discretion should be exercised, however, only for good reasons.

**Non-Appearance Of Party**

If a party fails to appear for the scheduled hearing and a reasonable time has elapsed since the hearing's scheduled starting time with no word from the party, the ALJ has two options. These options, however, may be pre-empted by regulations adopted by the agency.

First, the ALJ may adjourn the case. This option should be considered where there is no substantial inconvenience to the party who appears. A record should be made, noting appearances, the non-appearance of the defaulting party and the reasons for the adjournment.

Second, the ALJ may proceed with the hearing and obtain the testimony of those present. On the basis of such testimony and exhibits admitted, the ALJ may decide the case. Such option may be appropriate where there is substantial inconvenience to the party who

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appears, and/or there is a strong probability that the non-appearance is deliberate and that the party has abandoned his/her case. If the decision of the ALJ is adverse to the non-appearing party, the ALJ may consider granting the party leave to reopen the case within a reasonable time, which application must be supported with a showing of good cause for the non-appearance and merit in the party's case or defense.

### **Presentation Of Proof**

#### *Order of Proof*

In an adjudicatory proceeding, there is no fixed order of proof. Ordinarily, the order of proof should follow the burden of proof. Thus, in the case of enforcement actions against a private party initiated by an agency, the agency will go first in presenting evidence, followed by any private parties upon the completion of the agency's case. Where a private party seeks a benefit from the agency, the private party goes first in presenting evidence, followed by the agency upon the completion of the private party's case.

*Mode of Proof*

The party who goes first in presenting evidence will present the proof, testimonial and/or non-testimonial, that the party believes is necessary for securing the sought-after relief. The order in which witnesses and exhibits are presented is generally left to the parties themselves.

When presenting testimony, the party will conduct a "direct examination" of the party's called witness, eliciting that witness's relevant knowledge. After direct examination, the other party gets a turn to ask questions, this time by "cross-examination." When cross-examination is finished, the calling party may engage in "redirect examination," questioning the witness on matters brought up on the cross-examination. The other party may then engage in "recross-examination," questioning the witness on matters raised on redirect. The parties may then engage in further similar round(s) of questioning, provided the questioning does not become repetitive.

Upon completion of the examination of the initial witness, the party may then call other witnesses, and the same process is engaged in with such other witnesses.

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When the party has finished calling witnesses and introducing exhibits, the party will "rest."

At that time, the other party may then present evidence, testimonial or non-testimonial, on the issues raised by the initiating party or other relevant issues, to show that the initiating party is not entitled to the relief sought. The witnesses called will be subject to the same manner of examination previously described. Once the party has finished calling witnesses and introducing exhibits, the party will rest.

After both parties have put on their case, the party who went first has a "rebuttal" opportunity. Rebuttal is generally limited to denying some affirmative fact that the other party has attempted to prove. It may not be used simply to put in additional proof that could have been presented during the party's initial presentation of proof. Once a rebuttal case is made, the other party has a similar opportunity. The presentation of witnesses during rebuttal is subject to the previously described mode of examination.

It is important to stress that when a party is presenting the party's case, the other party should not be permitted to interrupt for the presentation of the party's

case through the calling of witnesses and/or introduction of non-testimonial proof. The other party must wait until the opposing party rests. The only interruption that is permitted is through cross-examination. By not permitting such interruption, other than by cross-examination, the most effective presentation of each party's case should be assured.

*Stipulations*

During the hearing, it may be expedient to obtain from the parties a stipulation that certain facts or events are to be accepted as true or as having occurred. Stipulations are agreements made between parties as to the existence of certain facts or events. They are useful short-cuts. They save time which would be otherwise consumed by repetitive testimony on matters of fact which are not really in dispute, which therefore add nothing but volume to the hearing.

Entering into a stipulation can be initiated by a party, both parties or the ALJ. The ALJ should not suggest the making of a stipulation unless both sides are represented or unless an unrepresented party fully comprehends its significance and effect. The ALJ should be satisfied that



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both sides fully realize what a stipulation is and the use which will be made of it at the hearing. Caution must be exercised not to force the parties to enter into a stipulation.

Stipulations can be made orally or in writing. If the stipulation is made orally, its contents should be discussed fully off the record, and then incorporated into the record. The written stipulation, too, will become part of the record. Where stipulations are made, the rights of appeal or review of all parties should be preserved and protected.

#### *Variance of Order*

Orderly procedure requires parties and their witnesses to testify in sequence. It is within the discretion of the ALJ to vary this order as the exigencies of a case require. For example, it may be necessary or desirable to break the sequence in order to accommodate the other party's witnesses or to expedite the hearing or to conclude a case more quickly.

### **Subpoenas**

There exists in administrative adjudicatory proceedings a power to subpoena witnesses to testify at a hearing and to subpoena documents to be produced at a hearing. Such subpoena power is conferred by SAPA §304(2) and specific statutes granting agencies such power, as well as CPLR Article 23.

Subpoenas can be issued by an attorney for a party at the hearing. There is no need to request the ALJ to do so before the attorney issues it. Where a subpoena is properly requested by a party, the courts have held that the issuance of a subpoena is a matter of right and not a matter of discretion for the ALJ.

Most statutes governing the issuance of subpoenas by the ALJ, as well as agency regulations, permit the service of issued subpoenas by registered mail. Otherwise, the subpoenas must be served in person upon the person designated therein. In order for the service to be valid, any person subpoenaed must be paid or tendered in advance authorized traveling expenses and one day's witness fee. It is the obligation of the party requesting the issuance of the subpoena to make payment.

When the party subpoenaed fails to respond, either by

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not personally appearing at the hearing or not producing the subpoenaed documents, the ALJ may adjourn the hearing. Enforcement of subpoenas is handled in the courts and not by the ALJ.

### **Receipt of Testimony**

#### *Oaths and Affirmations*

A witness must declare by oath or affirmation that the witness will testify truthfully as a precondition to testifying. The difference between an oath or affirmation is that an oath mentions God and an affirmation mentions perjury. No legal significance attaches to the distinction between an oath or affirmation.

The requirement of an oath or affirmation adds a touch of solemn ceremony and desirable degree of formality and decorum to the hearing. Additionally, the making of an oath or affirmation has a profound effect upon most individuals. It gives some assurance of veracity, acting as a strong deterrent to the falsification or coloring of testimony. It also establishes a legal basis for a criminal perjury prosecution.

It must be recognized that the choice whether to take

an oath or affirmation rests with the witness. Some witnesses, because of religious or other scruples of conscience, will not take an oath because it invokes the name of God. They should affirm their testimony.

The following forms are suggested. For an oath: "Do you solemnly swear that the testimony you will give will be the truth, the whole truth and nothing but the truth, so help you God?" For an affirmation: "Do you solemnly affirm that the testimony you will give will be the truth, the whole truth and nothing but the truth, under penalty of perjury?"

If the witness refuses to take an oath or affirmation, the witness must not be permitted to testify. The ALJ must explain this fact to the recalcitrant witness. If the witness has some objection to the suggested form, it can be modified, provided that the oath or affirmation taken reflects a clear commitment to testifying truthfully.

Each witness should be sworn individually, immediately prior to the giving of testimony. No more than one witness should be sworn at one time. Mass swearing of witnesses is irregular and undesirable. It dissipates the effectiveness and solemnity of the oath or affirmation.

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The administering of the oath or affirmation should not be slurred over quickly but should be done, whether by the ALJ or stenographer, in a solemn, dignified manner, to impress upon the one taking the oath or affirmation, its importance and significance.

Once a witness is sworn, it is not necessary to swear the witness again when the witness resumes testifying, whether after a recess, adjournment or upon recall. The ALJ may note for the record that in such instances the witness is still under oath or affirmation.

It is highly unnecessary and it creates an intimidating atmosphere in the hearing for the ALJ to warn a witness that the taking of an oath or affirmation carries with it the penalties of perjury. That has a criminal connotation which does not belong in an administrative hearing. If a witness has sworn falsely to a material fact, that action should be weighed in evaluating the witness's testimony and may be the subject of comment in the final decision. It is wise to omit any reference to perjury in the course of the hearing or in the decision. The ALJ can achieve the same effect by characterizing false testimony as unworthy of belief.

*Interpreters*

Where a witness is unable to speak or understand the English language, there will be a need to receive the witness's testimony through an interpreter. As far as possible in advance of the hearing, it should be ascertained whether an interpreter will be needed. Arrangements can then be made to utilize the services of a person who has sufficient linguistic ability to be used as an interpreter. The agency involved in the hearing should maintain a list of persons qualified as interpreters in various languages.

It is inadvisable for the ALJ or any agency representative participating in the hearing to act as an interpreter. Such practice provokes criticism and charges of partiality. On the other hand, the party calling that witness may bring an interpreter, and it is proper to use that interpreter. In such instances, the ALJ must be satisfied that the interpreter is able to translate to and from English and the other language.

It is necessary that an oath or affirmation be administered to the interpreter before the interpretation begins (*see, Oaths and Affirmations, supra*). The oath or affirmation will declare that the interpreter is making a

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true translation, *i.e.*, communicating exactly what the witness is expressing in the witness's testimony. For the interpreter, the following form is suggested:

"Do you solemnly swear (or affirm) that you will truthfully and accurately translate all questions put and all answers given, to the best of your ability (so help you God)?"

It may be appropriate for the ALJ to caution the interpreter to listen carefully to the questions in English and then to translate them intelligibly, word for word, to the party or witness and then to translate the answers into English, using the exact, definitive words. The interpreter cannot be allowed to edit the questions or answers. The answers must always use the first person. If the question is "Did you speak to Mr. White?" the answer must be "I did (or did not)" *not* "He did (or did not)."

The interpreter must not use individual concepts of translation to and from the foreign language. Furthermore, the interpreter must not paraphrase, summarize or amplify questions or answers; must not use the cloak of the foreign language to aid or harm the person questioned by changing the questions or answers;

and must translate literally, word for word, including colloquialisms, slang, etc.

If the ALJ is fluently conversant in the foreign language being used, and detects a faulty translation or volunteered statements made by the interpreter, the ALJ should admonish the interpreter on the record, to translate correctly and literally all questions and answers. Any party or attorney or witness present who also knows well the language being used, has the right to object to faulty translations or volunteered statements by the interpreter. The ALJ should then consult the interpreter to ascertain the validity of the objection and then act accordingly.

If the foreign language speaking witness has a little knowledge of English but not sufficient to understand all the questions and give all the answers, such witness should not be allowed to answer some questions in English and some in the witness's native language. This may lead to confusion and create some doubt that there has been full comprehension of the questions in their entirety. In such instances, the foreign language speaking witness should be instructed to await translation of all questions and then answer them in the



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witness's own language.

In instances where the witness is deaf, mute, or suffers from a physical speaking impairment, there will be a need for specialized interpreters who can accommodate the needs of the witness. In such instances, the ALJ should establish that the interpreter can understand and communicate with the witness.

#### *The Taking of Testimony*

The ALJ always controls the taking of testimony. The ALJ can limit the undue extension or repetition of testimony, whether on direct or cross-examination. The ALJ must keep the taking of testimony within reasonable bounds and squarely within the issues. (See, generally, Evidence, Appendix A).

A witness's testimony is taken by the eliciting of answers to questions. Questions should be truly interrogatory and not statements or contentions. Only one question at a time should be asked. If the interrogation consists of multiple questions put at one time, the ALJ should see to it that they are divided into single questions. On direct examination, ordinarily the questions should be non-narrative and non-leading as to

form.

A narrative question is one that asks for a broad recitation of facts without interruption, rather than a single fact. Narrative questions are not favored because they provide too much of an opportunity for irrelevant, repetitive, or unreliable evidence to be adduced. The preference is for short, focused questions which seek a single item of factual information. However, the ALJ has the discretion to permit narrative questions, which is frequently done where the witness has testified on numerous prior occasions.

A question is leading when, as one New York judge has stated, it "puts into a witness's mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get." Leading questions are not preferred because the aim of the direct examination is to elicit what the witness knows, and not what the examiner has knowledge about. Whether the question is leading will turn upon the form of the question, *e.g.*, "isn't it a fact that . . ."; "you know, don't you, that . . ."; as well as the tone of the examiner's voice or body gestures, the content in which the question is asked, and the tenor of the testimony already introduced. While the ALJ has the

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discretion to permit leading questions, such discretion should be used sparingly and only when leading questions are truly necessary to develop the witness's testimony, *e.g.*, witness is infirm or confused. When leading questions are permitted, the ALJ should ensure that the witness's answers are based on the witness's own personal knowledge and that the witness is simply not being told what to say. Ordinarily, as discussed *infra*, leading questions are used on cross-examination.

The ALJ should not permit the bullying or intimidation of witnesses, nor should the ALJ engage in such tactics. The ALJ should put a stop to any harangues, acrimony, altercations or any other form of disorder. The ALJ should not lecture or scold a witness. If explanations or interpretations of the law are required, the ALJ should advise the witnesses personally of what is involved, patiently and calmly. This will insure more accurate and responsive testimony.

Except by the lodging of an objection to testimony, discussed *infra*, the ALJ should not permit the interruption of the testimony of a witness by the opposing party, either by comment or questions. If this occurs, the ALJ should admonish that party and advise that the party

will be heard in due course. The ALJ as well should not interfere with the development of the case by making gratuitous comments or observations, by adverting to collateral and irrelevant matters or by breaking into testimony before an answer is completed.

Frequently, parties or their representatives will request that certain witnesses be excluded from the hearing room while other witnesses are testifying. The grounds of such request may be to test the credibility of witnesses severally, or to keep confidential a certain witness's testimony. It is a matter of discretion with the ALJ to grant or deny the request, depending upon the nature of the case and the circumstances giving rise to the request. Remembering that hearings generally should be open to the public, the ALJ should use sound judgment in passing upon requests to exclude witnesses from the hearing room.

*Cross-Examination*

A reasonable opportunity to test and controvert adverse testimony and evidence is one of the fundamentals of a fair hearing. Cross-examination of adverse parties and witnesses is a traditional and

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### Conduct of the Hearing

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effective means to that end. Most importantly, as stated in Chapter 3, it is a due process right.

The purposes of cross-examination include the following:

1. It tests the veracity and credibility of the witness.
2. It brings out information left untouched by direct examination.
3. It tests the accuracy of a witness's perception of the matters about which the witness testifies.
4. It tests the extent of the witness's opportunity to observe those matters as to which the witness testifies.
5. It tests the accuracy and reliability of the witness's memory of what the witness observed.
6. It tests the accuracy of the witness's narration of facts and events about which the witness testifies.
7. It tests the basis of an expert's opinion.
8. It may elicit from a witness concessions or admissions which will, in effect, remove certain disputed issues from the case.

A cross-examination which has one of the above purposes as its object must be permitted.

However, the right of cross-examination does not include the right to an unlimited cross-examination. The ALJ has the discretion to prevent cross-examination which is becoming repetitious as well as cross-examination that is delving into irrelevant or collateral matters, provided it does not jeopardize the basic fairness of the hearing. In close cases, it may be preferable to permit the questioned cross-examination, lest the denial or limitation thereof become a significant issue on judicial review.

It must be noted that the right of cross-examination extends only to witnesses at the hearing. The right does not extend to persons who have prepared records or documents when those records or documents are admitted into evidence, or to persons whose statements are testified to by others at the hearing. (See, Evidence, Appendix A). Any possible unfairness is ameliorated by SAPA §304(2) which allows parties to request the ALJ to issue a subpoena requiring persons to testify, as discussed in Subpoenas, *supra*.

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## Conduct of the Hearing

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### *Use of Affidavits*

An affidavit is a sworn statement in writing made by a person under oath wherein the person states facts within the person's personal knowledge. It is in some ways the written equivalent of the person testifying at a hearing or trial.

The fact that the affidavit is sworn to does not make it equal in effect to sworn testimony at a hearing, where all testimony is subject to further examination. Instead, the admission into evidence of an affidavit, in lieu of the person testifying as a witness, raises a basic question of fairness. The opposing party cannot cross-examine a piece of paper. Its admission can deprive the opposing party of the right of cross-examination. Furthermore, it may be totally self-serving and detrimental to the position of the opposing party, without giving that party the right to refute it by cross-examination.

Whether an affidavit in lieu of the person making the affidavit testifying as a witness is admissible is subject to the discretion of the ALJ. The discretion should be exercised on the basis of the affidavit's reliability. (*See, Evidence, Appendix A*). Due concern should be given to its self-serving nature as well as the reason why the

maker of the affidavit is not present, testifying as a witness.

In some instances, affidavits can be readily admitted. Thus, if the opposing party has no objection to their introduction, they can be accepted as evidence. Also, affidavits can be received as to collateral matters, not affecting the material issues in a case.

*Questioning by the ALJ*

Ordinarily, a case will be presented and developed by the parties' questioning of witnesses. However, consonant with the ALJ's obligation to assure that the hearing is fair to all parties and to develop all facts necessary for a complete and just decision, the ALJ is permitted in the exercise of discretion to question any witness called by the parties.

The discretion to question should be exercised sparingly. It is not a license to take over questioning merely because the ALJ believes the ALJ can do a better job. Questions by the ALJ should be limited to clarifying confusing testimony of a witness which is not clarified by the questioning of a party, or which is confusing as a



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result of a party's questioning, and to instances when a party fails to elicit vital and necessary information. As to the latter, the ALJ should question to develop such information.

When the ALJ engages in questioning of witnesses, the ALJ must not act as if the ALJ were the advocate for one party or the other party, and avoid any partisan attitude by such questioning. The use of leading questions should only be used as a last resort. In short, the ALJ must always maintain the ALJ's status as an impartial arbiter.

#### *Receipt of Exhibits*

Non-testimonial proof, whether it be documentary evidence, real evidence, or demonstrative evidence, may be offered into evidence as exhibits. Whether the offered exhibits are admitted into evidence is subject to the ALJ's discretion. (See, Evidence, Appendix A).

When an exhibit is offered, it should be marked "for identification," unless the agency's practice is to receive into evidence all exhibits. Preferably such marking for identification can take place before the taking of proof is commenced or during a recess. Upon the ALJ's ruling

that the exhibit is admitted into evidence, the exhibit should then be marked as "received in evidence."

Exhibits should be marked in consecutive order. It is advisable to distinguish the markings of exhibits; for example, all exhibits of the agency marked in Arabic numerals, 1, 2, 3, etc., and all other exhibits marked by letters, A, B, C, etc. This arrangement can be varied, as long as it is consistently used.

The exhibit can be marked by the ALJ or the stenographer. The marking should be done in such place upon the exhibit so that the marking will not obliterate any printing or writing thereon. The reverse side can be used. The marking should indicate the date of the hearing. Exhibit labels should be utilized.

It makes for clarity of the record to read into the record a statement that the exhibit has been marked and received in evidence and also a brief description thereof, such as a "letter from A to B dated . . . . ." or "contract between C and D, dated . . . . ." If the exhibit is a short memorandum or letter or a brief ledger entry, it can be read in its entirety into the record.

If a bulky exhibit such as a book or ledger or a mass of time cards or statistical tables is received in evidence, the

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ALJ should read into the record a general description thereof. If only a certain portion or page is received as an exhibit, it should be described verbatim and the exhibit marking placed on the particular portion or page.

Under SAPA §306(2), all records and documents in the possession of the agency becomes part of the record of the hearing. To prevent confusion later on, such records and documents should also be marked "received in evidence" with the other received exhibits.

If reproduction facilities are readily available to the ALJ, they should be used freely to reproduce exhibits or parts thereof, especially when such exhibits must be returned to parties, or the opposing party needs a copy in order to cross-examine regarding it or otherwise respond to it. This can be done either during the hearing or immediately after.

Exhibits should be retained in the file until the case is completed and the time for possible appeal or judicial review has expired. If necessary, they can be returned thereafter to the parties producing them and appropriate record made of such return on the file and the date thereof. If there is appeal or review, the exhibits go with the file and remain there until final disposition of the

case. Before transmission of the file to the next authority, the exhibits should be arranged in order and checked to assure a complete record.

*Evidentiary Objections and Rulings*

When a party wants to keep the opposing party's evidence out, thereby preventing it from becoming part of the hearing record, it is necessary for the party to make an objection. If no objection is made as to a witness's testimony in whole or in part or to an offered exhibit, the testimony or exhibit is received into evidence. The ALJ may then consider such evidence and give to it the weight the ALJ believes it deserves. Additionally, the failure to object may bar the party against whom the evidence was admitted from arguing on judicial review that the evidence should have been kept out by the ALJ.

Under SAPA §306(1), the ALJ must allow the parties an opportunity to object to offered testimony, and the making of the objection must be noted in the record. There is no required form that the objection must take. Generally, the objection, whether in the form of an objection to a question to a witness or to an offered exhibit, *e.g.*, "I object," or in the form of a motion to strike

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a witness's answer or an admitted evidence, *e.g.*, "I move to strike," must be "timely" made. This means that the objection should be made at the time the question is asked or the exhibit offered, or a motion to strike made promptly after the witness blurts out an answer or the ground for objection becomes apparent. Objections made beyond this time frame need not be entertained by the ALJ. Of course, the ALJ can give to that evidence whatever weight it deserves.

Frequently, the party will provide the basis for the objection. Where the basis is not given, and the ALJ is unsure as the possible reason why the evidence should not be admitted, the ALJ may ask the party the basis for the objection. The ALJ also should ask the party who offered the evidence whether it has any responding argument for admissibility.

As the technical rules of evidence do not apply in adjudicatory proceedings, there is no need for the ALJ to become entangled in legal arguments as to the admissibility of evidence. Indeed, the ALJ should discourage the making of legal arguments or lengthy "speeches" wherein the party spews out all the reasons why the evidence is inadmissible or admissible.

Once the objection is made, and the ALJ understands the basis for the objection and the offering party has an opportunity to respond to the objection, the ALJ must rule on the objection. Except in instances where there are compelling reasons to do so, the ALJ must presently rule on the objection and not defer a ruling to later in the hearing. To delay a ruling may jeopardize the orderly progress of the hearing.

Where the ruling is one that keeps out evidence, the ALJ upon request should provide the party who offered the evidence an opportunity to make an offer of proof regarding the excluded evidence. An offer of proof is the means by which the offering party describes in summary fashion the content and nature of the excluded evidence. It is made for purposes of judicial review, so that the appeals court can determine whether the ruling was prejudicial to the party's case. Such offer of proof is recorded in the transcript of the hearing, but cannot form a basis for the ALJ's decision.

For a discussion on ruling on evidentiary objections, see Appendix A: Evidence.

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## **Conduct of the Hearing**

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### **Maintaining Order and Decorum**

An administrative adjudicatory proceeding, similar to court trials, is often the arena of conflict. The affirmative action of an agency or a party sparks resistance by the opposing side. Parties come to the hearing, prepared to do battle. There may be antagonism and hostility in the air.

The ALJ must have complete control over the hearing and must not let it get out of hand. The ALJ must be above the battle, and should be the calmest person in the hearing room. The ALJ should use a firm hand and set the tone of the hearing through his or her dignified conduct, despite any provocations. Mannerisms suggesting impatience or indicating the lack of time for a full exploration of the facts should be avoided.

When parties, attorneys, or witnesses engage in disruptive acts, such as shouting at the ALJ, opposing party or witness, or openly disregarding or mocking a ruling or request from the ALJ, the ALJ must immediately exercise control. Parties, attorneys, and witnesses must not be permitted to engage in acrimonious exchanges, vulgarities or abuse of each other or the ALJ, nor should they be allowed to make offensive or insulting comments.

Unlike a judge, the ALJ has no power to punish parties for behavior akin to contempt. The ALJ must resort to other reasonable means to control the hearing. At a minimum, the ALJ can set a contrasting example when disorder arises by speaking in natural, low-keyed tones, and by refraining from outshouting the disorderly person.

The very first time a disruptive act is committed, the ALJ should admonish the offending person, reminding the person that such behavior does not contribute to a fair hearing and impedes the orderly disposition of the case. The ALJ should assure the party that they will be given a full opportunity to speak at the appropriate time.

If the offense is repeated and further admonition appears fruitless, the ALJ may exclude from the hearing disorderly person(s), other than the parties and their attorneys. If the ALJ is unable to obtain compliance with reasonable directions or admonitions to parties and their attorneys, the ALJ may, as a last resort, adjourn the hearing. Such adjournment may result in the cooling down of tempers. If resorted to, it should be accompanied with a warning that if such behavior resumes, a default may be entered against the party.



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### Conduct of the Hearing

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In dealing with an attorney, the attorney should be reminded that the standards of conduct required of attorneys appearing before state courts by reason of the Code of Professional Responsibility are equally applicable in hearings in administrative law cases. Ordinarily, there should be no threat made to the attorney that the ALJ will send a copy of the transcript noting the objectionable behavior to the pertinent Grievance Committee. However, if such behavior continues, such a threat can then be placed on the record, and, if the behavior does not then stop, a transmittal to the Grievance Committee may be appropriate.

Ordinarily, losing the case is not an appropriate penalty for the disorderly party's conduct or the offensive conduct of the party's attorney or witness, so long as there is some merit to the party's position or the party has not been fully heard. In the event a party's conduct is so flagrant it may prevent the completion of the case, it may then be tantamount to a default of proof. In that event, the party should be warned of the consequences. Where there is a failure to comply with the admonitions and warnings of the ALJ, the ALJ may close the case. A party may be permitted to reopen the case upon

submitting an offer of proof or argument in orderly fashion. In this kind of difficult situation, the ALJ must exercise extreme patience and tact. An offensive party may have a meritorious case and should not lose it solely because of bad manners.

#### **Dealing With Unrepresented Parties**

When a party appears at the hearing without representation and it is apparent that the party has little understanding as to the nature of the hearing, and lacks familiarity with its procedures, the ALJ must act carefully. On the one hand, the ALJ cannot become the party's advocate. That would cast the ALJ in an adversary role rather than as a neutral. On the other hand, the ALJ cannot just sit back and let the unrepresented party be taken advantage of or lose the hearing merely because the party did not know what to do.

Without favoring the unrepresented party, the ALJ must guide the party through the hearing. It is the ALJ's duty to conduct the hearing so that a full and complete record of all the relevant facts is made. Thus, the ALJ should ask and inquire of the party what the party's

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### **Conduct of the Hearing**

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contentions are and what the party wants to prove. The response can then guide the ALJ as the hearing progresses.

The ALJ may also find it necessary to explain to such party the significance of references to statutes, rules and regulations referred to in the Notice of Hearing and the testimony. The ALJ may have to summarize in simple language the testimony of other witnesses if the ALJ senses that an unrepresented party has not understood its meaning and significance. The most effective way to deal with unrepresented parties is to put simple and short questions to them, making certain that they understand each stage of the hearing before proceeding to the next. By gentle interrogation, the ALJ will make the parties feel at ease and more readily responsive to all questions.

The ALJ may also have the responsibility of questioning the unrepresented party, not only to develop all the facts but also to assist the party in presenting the party's case fully. As to other witnesses called by the party, the ALJ may need to question them, especially when it is obvious the party does not know how to conduct a meaningful examination. This responsibility

also extends to cross-examination of the represented party and that party's witnesses. Additionally, the ALJ may need to protect the party from objectionable cross-examination.

Lastly, it bears repeating that the ALJ must keep in mind the distinction between the limited role of assisting the unrepresented party and the partisan role of advocate for the party.

#### **Recesses and Adjournments**

During the course of the hearing, there may be a need to take brief recesses. It is not expected that the ALJ and the parties can and will work straight through the day without any breaks. Recesses are appropriate as well to await the appearance of a witness or production of a document. Recesses should be called only at an appropriate stage of the proceeding, *e.g.*, lunch time, close of examination of a witness, or at an appropriate time during the examination of a witness. Recesses should not be called at the request of a party when it may give that party a tactical advantage, *e.g.*, disruption of an effective cross-examination of the party's witness.

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### Conduct of the Hearing

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Adjournments of hearings, *e.g.*, scheduling of the continuation of the hearing to another day, should be kept to a minimum, as much as possible. They should be in keeping with a purpose of such hearings, namely, to achieve speedy justice. Unwarranted adjournments delay disposition of cases unreasonably. They should be granted only for good and sufficient reasons.

An adjournment may be directed or granted by the ALJ in the ALJ's discretion, either on the ALJ's own motion or on application of a party. If adjournment is granted, the ALJ should explain to the persons present the reasons therefor.

There are good reasons for adjournments. If new and relevant matters develop in the course of a hearing, which either party is unprepared to meet and surprise is claimed, it is fair to adjourn the hearing to afford opportunity for investigation and preparation. If settlement can be achieved, an adjournment to advance this end is proper.

Adjournments should be granted as a matter of right when a legal excuse is offered. A legal excuse may include illness of a party, attorney or witness; the absence from the jurisdiction for compelling reasons of a

party, attorney or witness or the engagement in court of an attorney for a party; or the failure of a person to respond to a subpoena.

Requests for adjournment which are palpably made for the purposes of delay or harassment should be denied.

#### **Concluding the Hearing**

Once the parties have professed to have offered and entered all their evidence, it has been found most efficacious to have the ALJ ask this final question of each party, "Have you anything else to add?" Experience has demonstrated that the results are most revealing.

Many persons have been conditioned by the dramatics of a stage, movie or television presentation of a court room scene. They may have ingrained within them the belief that all questions must be answered "yes" or "no." They may believe that it is not their responsibility to give vital information affecting the merits of a case unless they are asked a specific question with relation thereto. Further, many parties, inexperienced in testifying, fail while under examination, to develop their cases fully. This question gives each party a welcomed

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### **Conduct of the Hearing**

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opportunity to complete his or her story. Of course, the ALJ must exercise sound judgment and discretion to keep such additional proof within the bounds of the hearing.

When there is no further evidence to present, each party should be given the opportunity to make brief closing statements. Such closing statements are an opportunity for the parties to summarize the evidence presented on the parties' behalf, and to argue why such evidence should be credited and why the opposing party's evidence should be rejected. The order of making the closing statements is subject to the ALJ's discretion, but it should generally be in the reverse order of the opening statements.

After the parties make their closing statements, the ALJ should make a closing statement. It should include a statement that the parties have had full opportunity to present their cases; state the stipulations to which both parties have agreed; arrange for the submission of briefs, when appropriate; announce that the record is closed; and state the time the hearing has concluded.

Decision should be reserved in every case, unless the policy and practice of the agency requires otherwise. The

ALJ should not intimate in any manner what the decision may be. No promises or commitments to the parties as to the decision, its nature, its effect, or when it will be served should be made.

**The Record**

The Record will consist of a transcript of the hearing, whether stenographically made or electronically recorded, and all exhibits entered into evidence, including the contents of the agency's file that are admitted.

*Completeness*

The hearing record must be complete and clear. Upon appeal to an administrative tribunal, or upon judicial review, informed and fair judgment can be rendered only on a complete record. A record's reliability is seriously impaired if there are any gaps therein. Every word spoken in the course of the hearing must be recorded. All exhibits admitted must be included. Nothing can be omitted by direction of or in the discretion of the ALJ, the stenographer or any party or attorney, except as set forth in "Off the Record," *infra*.



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### **Conduct of the Hearing**

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A record must be made at every hearing session, even when there are no appearances at all or where one party has defaulted by failing to appear. In either event, the ALJ should recite into the record the facts that the case was scheduled for a specific time, who appeared and who defaulted, and that the case was either adjourned or closed. If a party requests an adjournment, a record should be made stating that the request was made and the action taken thereon. The history of every case must show what happened at each scheduled hearing and the action taken as to adjournment or disposition of the case.

It must be underscored that the ALJ's decision stands or falls on the record only. When a case is appealed, neither the reviewing administrative tribunal nor the court can reconstruct what happened at each scheduled hearing, except by reference to the record taken. The record must be complete and unambiguous.

#### *Clarifying the Record*

The ALJ should be constantly aware of the fact that the record the ALJ is making may be subject to review, either on an administrative or judicial level. The record must be clear, leaving nothing to doubt or speculation.

The record should always indicate the identity of the

person speaking and of those of whom the witness speaks. Persons referred to in testimony as "he," "you," etc. should be identified on the record immediately. If a witness speaks of a person as a "boss," "supervisor," "foreman," "co-worker," "partner," etc., the person intended should be identified by name. The ALJ should interrupt immediately to have the person being referred to identified. If a witness testifies as to transactions or communications in person with an agency official or employee, the witness should be asked to identify such person. If unable to do so by name and title, the witness should be asked to describe the person intended and the location of the place where the witness made contact with the person.

Whenever a proper name is given in testimony, the ALJ should require it to be spelled out the first time mentioned. The spelling of proper names should not always be assumed. For example, there is more than one way to spell the familiar name of "Smith" and there are many variations in spelling "Cohen."

If dates are relevant in a case, the day, month and year should be given each time an event is mentioned.

Addresses should be clearly recorded in full. If

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### Conduct of the Hearing

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unfamiliar to the ALJ or the stenographer, they should be spelled out.

If form numbers, code numbers, symbols, abbreviations, technical terms, shop jargon, etc. are used in the hearing, the ALJ should have them described in language simple enough for all persons present to understand them and also for the benefit of anyone reading the transcript.

More than one person should not be permitted to speak at the same time. If a stenographic record is being made, the stenographer cannot record testimony accurately under such conditions. If the record is being made by machine, more than one voice speaking will result in an unintelligible jumble of sounds.

Witnesses who reply to questions by shaking their heads or emitting sounds of assent or dissent should be admonished to answer verbally, or in words, so that what they intend to say may be transcribed or recorded.

Whenever an exhibit is referred to in testimony or argument, it should be designated by its exhibit marking or a description thereof. If any other paper, form or document, not an exhibit, is referred to, it should be described briefly. The ALJ may interpose such

identification on the record.

If physical acts take place in the course of a hearing, which are relevant to the record, such as a party, witness or representative coming into the room after the hearing has commenced, or any such person leaving the room with or without being excused therefor, the ALJ should note on the record what happened.

These suggestions are not minor matters. They are vital to make a good, complete and clear record. Exactitude makes for clarity.

*Off the Record*

Going off the record is a familiar device employed in court actions. The judge may do this on the judge's own motion or the judge may grant the request of an attorney or witness to do so. The same practice prevails in administrative hearings. It is a useful tactic and may expedite the hearing.

Ordinarily, going off the record, if not explained, may arouse suspicion and give the impression to those who review the record administratively or judicially, that the record is not complete, that something vital to the case is missing.

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### Conduct of the Hearing

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The practice of going off the record may be resorted to for salutary and useful purposes, *e.g.*, to clarify and simplify the germane issues, to save time, to explain the statute, rule, regulation or procedure involved; to expound the purpose of the hearing if doubt arises, to shorten the record, thus reducing its expense; to avoid confusion or to omit tedious, repetitive testimony or evidence on matters about which there is no serious dispute.

To illustrate, where books, records, audits, detailed accounts or voluminous documents or contracts are the subject matters of interrogation, it is wise to go off the record to identify and pinpoint the pertinent items involved, to mark off such portions thereof which are germane and encompassed by the issues or to extract therefrom only the necessary information. Other examples of the propriety of going off the record are to determine the relevancy or materiality of a certain line of testimony, to keep such testimony within the issues of the case or to discuss whether or not certain evidence is necessary to the case and should be received or to curtail fishing expeditions which add nothing to the case except volume.

However, and this must be heavily underscored, it is vital to the completeness of the record and to do justice to all parties, that on resuming the record, the ALJ should make a statement on the record as to why the ALJ went off the record and briefly summarize what was done, what pertinent information was elicited or the terms of the stipulation made during such interval.

It is important, too, that parties or their attorneys should then be asked by the ALJ to confirm for the record, the summary of the off the record discussion or action. They should have the right to make statements, amending, amplifying or correcting the ALJ's summary.

The ALJ is constantly charged with the responsibility to guard that no relevant matter is omitted from the record and such responsibility extends to the practice of going off the record.

It must be emphasized that *only* the ALJ controls the record. The stenographer must be instructed that no one but the ALJ can direct going off the record. Statements by parties or attorneys that what they are saying is off the record must be ignored by the stenographer. It is only when the ALJ so indicates that the stenographer may abstain from taking notes. The ALJ, in the exercise of

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### Conduct of the Hearing

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discretion, may grant or deny the request of any party to go off the record.

Going off the record should be distinguished from the taking of a recess for a specific purpose during the course of the hearing, such as giving the stenographer relief or permitting telephone calls to be made or awaiting the arrival of a witness or document. The record should indicate the difference. During a recess the hearing process halts completely and nothing should be said or done therein affecting the hearing. All the record need reflect is that a recess was taken and then that the hearing was resumed.

#### *Transcript of Records*

Unless an agency has a particular procedure otherwise, it is not necessary to transcribe the minutes of a hearing, except where there is an appeal or review of the ALJ's decision or unless it is necessary in a protracted, complex or precedent-making case to aid the ALJ in writing the ALJ's decision.

Where the minutes are transcribed, the parties should be given an opportunity to inspect and copy the transcript, as well as the contents of the file. Parties

should also be advised of the right to purchase a copy of the transcript at rates fixed by the agency. Some agencies may furnish such a copy without charge. Notice of the right to inspect and copy minutes should be given to parties, according to the particular procedure of the agency.

Parties should also be given the opportunity to offer corrections to the transcript. Unless the agency has a specified procedure, "settling" the transcript can be accomplished by having the party who seeks the corrections circulate the proposed corrections to the other party and seek that party's consent. Where the parties cannot agree, the ALJ will have to resolve the dispute.



**Conduct of the Hearing**

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## **Chapter 6: The Decision**

### **Generally**

The ALJ's decision or recommended report is the central element in all that has happened prior to its issuance and all that will happen after it is issued. It is the focus of the administrative adjudication or rate-making process, and serves as notice to all involved – agency, party, citizen, the press and public – of the nature of the proceeding, its implications and importance, and its result. In so doing it provides a concrete example of how the agency works in the real world.

The decision often serves as the starting point for judicial review, regardless of whether it is subsequently adopted by the agency, and gives the courts a window into the agency decision making process. Finally, it provides guidance to the agency in reviewing and implementing policy, deciding whether policy changes are needed and, if so, in what areas and to what extent.

ALJs must take seriously the preparation and presentation of decisions. They must be impartial and decide the case solely on the merits, based only on the evidence presented on the record before them. They must not succumb to annoyances or aggravations brought out

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### **The Decision**

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by the hearing process, but instead must write decisions after careful review of the testimony, the evidence, the exhibits, and the file. It is not the number of witnesses, their pleasant demeanor in testifying, or their appearance that should control, but rather the quality and credibility of their relevant testimony. The ideal as exemplified in the blind lady of justice is relevant here. The evidence must be weighed fairly and impartially in order for the administrative process to function correctly. It is this requirement that forms the basis for the writing of decisions in administrative matters.

### **Substantial Evidence**

While ALJs are permitted to receive evidence that might be inadmissible in a court of law, it is their responsibility to exercise considered and informed judgments in appraising the quality of the evidence received and the weight accorded it. Historically, a decision founded on evidence judicially inadmissible as to the merits of the case was reversible by the courts. This was referred to as the "legal residuum" rule, and is no longer the law in New York. This does not mean, however, that deciding cases solely based on judicially

inadmissible evidence will be upheld by the courts. Instead, the courts will apply the substantial evidence test to determine whether the decision is to be upheld.

The substantial evidence test arises from Civil Practice Law and Rules §7803, which allows for judicial review of decisions made by administrative agencies. The Court of Appeals has said that substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact."<sup>1</sup> Thus, it is more than a mere scintilla of evidence, but it is less than evidence that leaves no doubt, or even a preponderance of evidence, the standards used in criminal and civil judicial cases, respectively. Appellate courts in New York are not entitled to simply substitute their judgment for the judgment of the agency or its ALJs, but they are required to review the entire record to make certain that the decision made is supported by substantial evidence.

Findings of fact in administrative proceedings are generally upheld by appellate courts, as they are seen as the province of the fact finders at the administrative level.

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1. *Vega v. Smith*, 66 N.Y.2d 130 (1985).

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## The Decision

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Reviewing courts will not, however, hesitate to dislodge a finding that is not supported by evidence in the record. And while it is not possible to define the concept of substantial evidence with mathematical precision, awareness of its existence and its role in the administrative process can assist the ALJ in writing decisions that withstand judicial-and public-scrutiny.

### Content of the Decision

#### *Overview*

Depending upon the circumstances, decisions issued by hearing officers or ALJs in various state agencies may look very different in form and substance. For example, a decision issued following a hearing mandated by the Workers' Compensation Law would be quite different from a decision issued following a rate making proceeding mandated by the Public Service Law. There are, however, certain tenets of decision writing common to all decision writing.

#### *Decisional Requirements*

The actual elements of the decision and the form of it are dictated by state statute and agency regulation. Of

particular relevance to many agencies is State

Administrative Procedure Act §307, which states:

"A final decision, determination or order adverse to a party in an adjudicatory proceeding shall be in writing or stated in the record and shall include findings of fact and conclusions of law or reasons for the decision, determination or order. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

Given this general requirement (which may or may not apply to a particular agency or hearing, depending on that agency's specific statute and responsibilities), we know a number of things. Decisions must either be written or stated in the record. They must include findings of fact and conclusions of law or reasons for the decision. And finally, if the findings are set forth in "statutory language," an explicit statement of facts must also be included in the decision. By the very language of the statute, all decisions, even those stated in the record, must contain these elements.

*Preparing to Write the Decision*

There is some debate in the administrative adjudication arena as to whether the record in the hearing must be closed before the ALJ begins actually

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drafting the decision.

Whether to begin putting pen to paper prior to the close of evidence is likely to depend on the particular ALJ's desire to address evidentiary issues while they remain fresh in his or her mind. Where the issues are complex and the proceeding lengthy, writing or outlining draft findings and conclusions on issues on which proof has been concluded may be appropriate. If it is necessary to begin writing prior to the close of evidence, the ALJ must maintain objectivity and not reach conclusions prematurely.

While it may be necessary in complex cases, drafting findings or conclusions prior to the close of evidence in less complex cases is generally discouraged, as it may make it seem as though the ALJ has pre-judged the issues.

In preparing to write a decision, begin by reviewing the file, the transcript (if available), and any exhibits offered as evidence. If briefs or memoranda have been submitted following the hearing, those should be included in the final, pre-draft review as well.

Prior to actually preparing the decision, take time to both think about and outline the decision. Writing benefits greatly from forethought and consideration, and

outlining often allows the ALJ to consider alternative treatments of the facts and conclusions without taking the time to put them into narrative form.

*Writing Well and Good Writing*

Critical to decision writing is that the decision accomplish that which it intended. Basic, formal rules of grammar and usage are thus central to the decision writing process. A distinction should be made here between writing well, which is a question of correct grammar and usage, and good writing, which is a result not only of writing well but also of writing style.

Basic rules for writing decisions are driven by the audience to whom the decision is addressed. For example, a decision written for a regulated utility company will vary greatly in its presentation, style, and complexity from a decision written revoking the driver's license of an independent truck driver. Thus, the first rule of decision writing is to write for your audience.

Extensive use of legal terminology or complex terms can lead to a communication breakdown, while failing to properly use terms of art and accepted phrasing can lead to misunderstanding by the parties and their attorneys. Balancing the interest in effecting clear, concise, efficient



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communication with the need for writing in understandable terms and phrases is something ALJs must do based on their experience and their knowledge of their audience.

In addition, drafters must be aware of the over use of statutory or regulatory short-hand. An ALJ may only hear "Section 8" hearings, but citizens involved in their first "Section 8" hearing may not even know to what that section pertains. Instead of using such shorthand, adopt a phrase that quickly but accurately describes the nature of the section. Use legal sections by number only where actually citing to the law or regulation itself unless all the parties know the nature and content of the sections cited. This, again, comes from knowing for whom the decision is written.

Write concisely. The addition of unnecessary words or phrases inappropriately lengthens sentences and paragraphs, complicating as opposed to clarifying meaning. If a word can be taken out, or a sentence reworded to use fewer words, do so.

The need for conciseness, however, should not lead to sheer repetition. Do not start each finding or conclusion with the same word or phrase. Doing so leads to dry and essentially unreadable decisions. Again, striking the

appropriate balance is essential to obtaining a well written decision.

Decisions should be candid, but not necessarily outspoken. Criticism of the parties or actions of the agency should be omitted unless for some reason they are essential to the resolution of the matter at hand. Personal reflections on or criticisms of the parties or the witnesses should not be made. If the credibility of a witness is at issue, the reasons for believing or disbelieving a particular witness should be factual, based on the record at hand. Showing respect for those who appear at a hearing, even those who may not have earned that respect, is critical to the judicial temperament required of an ALJ and should be reflected in the written decision.

One way to avoid complications or criticisms in this area is to keep the decision factual, based on the record, without embellishing events or testimony with unnecessary or extraneous descriptive terms. If adjectives are used, avoid condescending, insulting, or otherwise inappropriate usage. In addition, avoid at all costs using sexist, racist, or otherwise derogatory terms in the decision. Failure to follow this last piece of advice will likely lead to a loss of respect and prestige both among

## **The Decision**

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your colleagues and those who appear before you.

Write for others, not for oneself, is one example. The decision is a means to communicate the outcome of a proceeding and the reasons thereof to those involved and those not involved. Keeping to the main point, or thrust, of the case will also help the decision accomplish its purpose. Using accepted conventions of grammar and typography will help to ensure that the decision is easily understood.

Finally, while it is possible to become overly concerned with issues of being politically correct in your writing, it is just as possible to be ignorant of or unconcerned with the implications of language. For example, the choice of the appropriate pronoun for use in a sentence may be dictated by the facts. If the party appearing in the proceeding is a man, it is entirely appropriate to use the pronoun "he" in writing the decision. If however, the decision includes a review of the law or otherwise requires the ALJ to refer to unknown persons, there are a number of methods available to avoid always using "he" or "she" to form such sentences.<sup>2</sup>

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2. One such way is to switch to the plural form, but this choice requires that the entire sentence match. Instead of saying, "The law requires a brick layer to observe reasonable care, and will not forgive his reckless disregard for the safety of others," try, "The law requires brick layers to observe reasonable care, and will not forgive their reckless disregard for the safety of others." Saying, "The

*Elements of the Decision*

The structure of the decision can either help or hinder its communicative purpose. If adaptable to a particular situation, given the agency's statute, rules, regulations or guidelines, administrative decisions should consist of the following elements, included in the following order:

1. An introductory procedural statement that a hearing was held, the parties who appeared, their representatives (noting professional nature, such as attorney or accountant where appropriate), the witnesses, if any, and that testimony was taken and evidence accepted.
2. An introductory substantive statement that briefly outlines the issue heard and the conclusion reached.
3. A clear, concise but thorough statement of the issues involved.
4. The findings of fact, based upon the entire record, including consideration of testimony, exhibits, official documents, and any other items within the record.
5. The conclusions of law or reasons for the decision, based upon the material facts found and the applicable law, making clear where conclusions are based upon the

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law requires a brick layer to observe reasonable care, and will not forgive their reckless disregard for the safety of others," is entirely incorrect because there is use of both singular and plural forms when referring to the same subject.

To avoid this difficulty, it is possible instead to use an article instead of a pronoun. For example, instead of saying, "To purchase the product, he should send a check," write "To purchase the product, send a check." It is also possible to use "you" in place of the pronoun, or use both "he or she" together. This last possibility can add to the verbosity and complexity of sentences, and thus should be reserved as the final option when no other options appear appropriate.

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lawful exercise of discretion.

6. The conclusion(s), based upon the findings of fact and the conclusions of law or reasons, indicating the final statement of the ALJ in deciding or recommending on the matter, and including where appropriate the relief, if any, that results from the conclusion(s).

The first two of these elements can be combined into one heading labeled the introductory paragraph, but numbers three through six should each be set out separately to allow for a well structure, organized and understandable decision.

Narrative decisions can be made more reader friendly if they are organized into sub-sections with appropriate headings. Such a technique allows the reader to follow the progression of the decision and its analysis, while providing the ALJ with a point of reference within each of the decision's parts.

#### *Introductory Procedural Statement*

The introductory procedural statement should state all of the procedural background of the case leading up to the decision, including the ALJ hearing the case, parties appearing, the witnesses testifying, the date or dates of the hearings and adjournments, if any, and a statement as to whether testimony and evidence were taken at the

hearings. This statement may be combined, for organizational purposes, with the introductory substantive statement, below.

This portion of the decision is rather simple to develop by referring to the case file. Exercise caution in transferring the names of the parties, their representatives, and their witnesses to the decision, as there is no need to offend those involved in the proceeding by making errors in this portion of the decision. The procedural introduction also lends itself to using a standard form or format, so that all that is required is the filling in of the details themselves. If a form is used, it is important that it be reviewed prior to finalizing the decision to make certain that mistakes or errors due to the use of the form have not slipped by.

*Introductory Substantive Statement*

The introductory substantive statement, or the substantive introduction, should be more concise than any other portion of the decision. It should reflect only two elements: a brief statement of the issues raised in the proceeding, and short description of how those issues have been resolved.

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This statement should appear at the beginning of the decision, not the end, because it definitively sets the tone for the decision. It is also the reason most people are reading the decision. While reviewing authorities, attorneys, courts and judges will be genuinely interested in the whole of the decision, often times parties are interested most in the what, or the outcome, and not the why.

Placing the conclusion after the statement of facts and reasoning simply forces the reader to turn to the last page of the decision in an attempt to locate the outcome. By moving this critical piece of information to the beginning of the document, the ALJ has preempted the need to read the ending first, and in doing so retains better control over how the reader is introduced to the rationale.

ALJs may want to combine this statement with the procedural statement described above, and may even want to consider placing the information from the substantive statement first, followed by the procedural statement. The actual order of these preliminary items is largely a matter of taste, and ALJs must make their own determination as to which method is most appropriate for individual circumstances.

*Statement of Issues*

The issues statement is the foundation upon which the remainder of the administrative decision is built. All of the findings of fact, conclusions or reasons should relate in one way or another to the issues presented. Facts, conclusions or reasons not relevant in light of the issues are extraneous, and should not be included. The purpose of the statement of issues is to show the nature of the controversy in question. It is not necessary to cite the controlling or guiding law extensively; instead, excerpts of the law or paraphrases of it should be used to generate an acceptable statement.

It may be helpful to set the issues apart from the text with bullets or numbers, or to use separate, indented paragraphs. This is not essential, but is helpful in cases with complex or multiple issues.

Keep in mind also that the issue or issues may have changed, either subtly or overtly, during the course of the hearing. The final statement of issues should reflect these changes so as to accurately represent the discussion that follows in the findings and conclusions or reasons.



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## The Decision

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### *Findings of Fact and Conclusions of Law/Reasons: An Introduction*

If the issues are the foundation of the administrative decision, findings of fact and conclusions of law/reasons are the walls supporting the ceiling that is the conclusion reached in the proceeding. However, as many opinions demonstrate, the terms evidence, findings of fact, and conclusions of law are easy to confuse.

Evidence is "any species of proof," and may include testimony, records, documents, and exhibits. It is presented before the ALJ and is made a part of the record for purposes of reaching a decision. Evidence may be accepted or excluded from the record, depending upon the rules of evidence or other considerations. If a hearing was centered around an automobile accident, evidence might include the testimony from Ms. Doe, an automobile owner, that her car was hit by another car. Her testimony to that effect would be offered as evidence.

Findings of fact are *based upon* the evidence; they are deduced or inferred from the evidence. In the hypothetical noted above, the ALJ could reasonably adopt a finding of fact that reads, "Ms. Doe's car was hit by another car," based upon the driver's testimony as to

being hit by the other car.

The conclusions of law or reasons for the decision are, in turn, based on the findings of fact and to which relevant statutes, regulations and case law are applied. In our hypothetical example, Ms. Doe testified that her car was hit by another, and we defined that as evidence in the record. The ALJ adopted a finding that stated that Ms. Doe's car was hit by another. Assuming state law exempts a person whose car is hit by another from liability (not at all the case in real life), a proper conclusion of law might be that Ms. Doe is not liable for any damages for being hit by the car (because state law exempts her from liability).

One of the difficulties in writing findings and conclusions is that the findings and conclusions method lends itself to stilted prose, repetition, and disjointed structure. This is even more the case where decisions must have paragraph numbers and ALJs place one discrete finding or conclusion in each paragraph. To overcome this utilitarian limitation, two methods can be used.

The first involves including integrated elements, whether findings or conclusions, in narrative, numbered paragraphs. Making the numbered items paragraphs,

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instead of single sentences, ties the relevant findings or conclusions together. Be mindful of placing only related elements together, however, so that the purpose of numbering is not undermined.

The second strategy is to use orientation paragraphs. These paragraphs may not contain either findings or conclusions, but are used to remind the reader of why it is that the findings or conclusions that follow are important or relevant.

#### *Findings of Fact*

The making of findings of fact is a critical part of the administrative process as this may be the only time at which fact finding is undertaken. The facts as found in an administrative decision, absent an abuse of discretion or other serious failing on the part of the ALJ, will likely remain in place throughout the remainder of the proceeding and any appeals therefrom.

Findings should only be made based on evidence contained within the record. The ALJ's own knowledge – whether it is of agency practice, a particular person or thing, or any other item outside of the record – cannot be included in the findings of fact.

The findings should explain why evidence has or has

not been accepted for the purpose for which it was offered. The ALJ has a responsibility to set out in the findings only those facts that are accepted as true and credible. This requires that the ALJ pass on the credibility of witnesses explicitly; if two witnesses contradicted each other, the choice of one over the other must be explicit, with the reasons that led to the finding set out expressly in the decision.

There is some disagreement as to whether findings relating to credibility of witnesses or evidence belong with the findings of fact or with the conclusions and decision. Given that credibility determinations usually do not turn on questions of law, but rather on the evidence as adduced at the hearing, some argue they should be placed within the findings of fact. Given also that findings of fact are generally provided at least some deference on judicial review, placing credibility determinations within this section may allow the courts to note the factual nature of such determinations.

There are many, however, who steadfastly believe that discussions of credibility are just that: discussions. As such, they belong in the section that involves discussion of issues and conclusions. Which method is adopted in any situation should be based upon agency practice and

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the judgment of the decision writer. In any case, should a particular credibility determination revolve around an issue of law – such as whether someone is an appropriate expert – the ALJ may wish to resolve that issue in the conclusions of law or reasons section of the decision.

The ALJ must also make findings as to the remaining evidence. Only the final facts as found by the ALJ should be included in the decision. If it is necessary to discuss the evidence presented on particularly contentious factual issues, make certain that the finding – which should directly follow the discussion of the evidence as presented by the parties – is clearly noted as such, so that there is no confusion between the discussion and the finding itself.

Findings must also be factual, and not conclusory. Conclusions may mask themselves as factual findings, so it is important to pay close attention to the intricacies of each. Statements such as "the applicant was not qualified" or that a "violation occurred" are conclusory, while a statement such as "the applicant held a high school degree" is factual. Each belongs in the appropriate part of the decision.

*Conclusions of Law or Reasons for Decision*

The conclusions of law, or the reasons for the decision, are a vital part of the building of the decision. Often referred to as "the reasoning," which may be foreshadowed by the findings of fact, it must be set out fully and explicitly here. This section of the decision allows the reader to understand why the ALJ has decided the way he or she has. The reasoning bridges the gap between the findings of fact and the ultimate conclusion.

The conclusions are based upon the findings of fact, the controlling law, the exercise of discretion (where allowed), and the ALJ's judgment. Where questions of credibility or conflicting evidence remain unresolved following the findings of fact, they should be resolved decisively in this section of the decision.

Understanding the uses to which the reasoning section of the decision are put is essential to being prepared to draft the reasoning. The reasoning may be used by reviewing authorities within the agency or by the courts. It will provide the agency, the parties, and the public with guidance in future proceedings and actions, and may even be used to create training materials for new ALJs.

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The reasoning should be based only on the findings of fact set out in the opinion, which can only be based on evidence in the record. Statements not relating directly to the case – often referred to as *dicta* – should be avoided, as they can mislead those reading the decision into thinking that an issue has been decided that was not present.

Words of finality and judgment should be used in this section, and the reasoning should be decisive and conclusive. Equivocating is not an appropriate method for dealing with conclusions of law or reasons, and should be avoided at all costs.

Each issue raised in the proceeding must be addressed in the ALJ's reasoning. Failure to address all the issues could lead to an appeal and either reversal or remand to consider the issue. It is much easier for all involved to address the relevant matters initially, rather than requiring a return trip or appellate challenge to the decision.

If the decision involves the determination of questions of law, the ALJ should make clear the legal grounds for his or her decision, including stating explicitly the statutes, regulations or precedent upon which the ALJ relied. If authority argued by the parties is rejected by the ALJ, an explicit statement as to why it is rejected – such

as that the current case is distinguishable from the cited law or that the law has changed since the argued decision was issued – should be included.

Remember, reviewing authorities and courts will be looking to see why decisions were made as to facts and law. While ALJs do not necessarily receive the same deference in respect to their interpretation of the law as they do in finding the facts, having a clear and concise exposition of the law as it applies to the case at hand can only help on review, and thus should be the goal of the ALJ in writing his or her decision.

*Conclusion(s)*

The final section of the decision should again set out the conclusion announced at the beginning of the decision, albeit in greater detail. Recommendations or statements of actions to be taken should be included here, using where possible the language of the statute. The conclusion must be explicit and unequivocal. It must be expressed in definite and simple terms, so that all parties will have a clear understanding of the outcome of the hearing. It should be so decisive that there is no need for further inquiry as to whether or not a party won or lost the case. Each separate issue in the case must be



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### **The Decision**

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dealt with and disposed of in the conclusion.

#### **Notice of Decision**

Included with the decision, or attached to it, should be a notice of the date on which the decision was rendered and filed with the agency or department. The ALJ should be fully aware of any agency regulations dictating the form and substance of this notice.

The notice and its filing and delivery are particularly important to the time for appeal or request for further agency review. The notice may include a statement as to what steps parties may take or what other results may flow from the issuance of the decision. Particular statutory provisions may also provide parties with particular remedies or opportunities for review which may be included in the notice as well, especially in proceedings where parties appear without the benefit of attorney representation.

The notice must be sent or delivered to all parties in the proceeding and their representatives or attorneys of record.

### **Pre-release Review of Decisions**

Agencies may require – either by regulation or by practice – that decisions issued by ALJs or hearing officers be reviewed internally prior to release to or service on the parties. Such review will likely take place within the adjudication unit of the agency or department, and will generally focus on grammar, structure and other form-related elements of the decision. The agency itself has a stake in ensuring decisions are well written, and providing for in-house review prior to release is one way in which its interest may be protected.

Review of non-draft decisions might also involve review for consistency with agency policy, agency and court precedent, and state and federal law. In such a case, discussions between a supervisor or other reviewing authority may take place, hopefully ending with agreement between the supervisor and the decision's author.

Not all hearing officers or ALJs are responsible for actually issuing administrative decisions. The ALJ may draft a recommended order or report, may only make findings of fact, or may act in some other more limited fashion. Where the ALJ is not the final issuer of the decision, review is likely and appropriately much more

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### **The Decision**

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substantive in relation to the findings of fact, conclusions of law, and remedies provided for in the decision. In such a case, the initial decision can accurately be described as a draft opinion, subject to review and adoption by the final authority.

### **Revised Decisions**

Regardless of the best efforts of hearing officers, ALJs, and administrative and agency staff, the heavy workload under which many adjudicative units are pressed can lead to clerical or typographical errors. The ALJ responsible for a particular decision should be careful to follow applicable agency procedures should the occasion for revision arise.

This category of revision for an administrative reason such as a typographical error must be distinguished from revision for a substantive reason or revision based on a reopening of the proof in the case. Administrative revision is not the appropriate time to incorporate new findings of fact or conclusions of law.

Revised decisions should be filed and served according to agency procedures and in the same manner

as the original decision, including service on all parties and their representatives.

### **Uniformity**

Whenever possible, uniformity and consistency to administrative decisions within an agency is desirable. Where facts and circumstances are similar, similar results should – and most likely are – to be expected. Where an ALJ departs from agency precedent on a particular matter, such departure should be well reasoned and the reasons for the departure explicitly set forth. Absent facts or circumstances supporting the departure, reversal on administrative or judicial review may be required.

### **Reopening of Cases**

There are certain circumstances that may require that a case be reopened following the issuance of a decision. As with many other aspects of the administrative process, there should be agency regulations, policies or guidelines relating to such issues. In the absence of agency requirements, the ALJ may be required to determine whether and under what circumstances cases should be reopened.

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### *Reopening on Default*

If a party has failed to attend a hearing for good cause, it may be appropriate to reopen the case. Good cause may include failure to receive the notice due to a change of address, illness, absence from the jurisdiction, inability to be released from employment responsibilities, and serious family or domestic problems.

Absent specific relevant guiding authority, such as agency rule or regulation, liberal discretion is provided to the ALJ on such matters. Determining whether to reopen the case and provide the defaulting party with his or her "day in court" should be grounded in precepts of fairness, justice, and common sense. Attempts to remedy repeated defaults may indicate that the party does not take the proceeding or the rules governing it seriously, while a first-time attempt to reopen may be seen as the result of a simple and forgivable error on the part of the party.

Reopening defaults burdens the administrative process by rescheduling and reactivating previously decided matters and, absent controlling authority to the contrary, a hearing officer or administrative law judge should exercise his or her considered discretion in addressing applications to reopen on default.

*Reopening on the Merits of the Case*

A much more difficult question arises when a party seeks to reopen a case on the merits. If not specifically prohibited by statute, rule or regulation, there should be a procedure for allowing parties to seek to reopen and reconsider cases even after they have been decided on the merits.

Some statutes, rules and regulations specifically allow such applications to be made by any party in interest, including the agency. The power to grant a reopening may be vested in the ALJ, or may be reserved to another part of the agency (such as the appellate tribunal within an agency).

Where not covered by specific statute, rule or regulation, the application to reopen a case on the merits may be made at any time, even after time to appeal has expired. This does not mean that timing is irrelevant to a decision to allow a case to be reopened, or that the application will necessarily be granted. It means only that there is no hard and fast time limitation on making an application.

An application to reopen is generally granted only when the moving party shows serious error, omission,

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misconstruction of applicable law, or the discovery of new evidence. If the application is granted, the case should be heard again on the merits and a new decision rendered following the hearing.

Applications to reopen should not be granted lightly. A party seeking to reopen a proceeding should generally show: valid and substantial reasons for making the application; merit to the contentions asserted as justifying the reopening; no unreasonable delay between discovery of the grounds for the application and the making of the application; and, that the application is not an attempt to unduly delay implementation of the previously issued decision.

Failure to persuade on any one of these items should leave the decision-maker with real questions as to the validity of the application. A decision to grant such an application must balance the objective of avoiding unnecessary appeals against the need for finality in administrative proceedings once a decision is issued.

## **Chapter 7: Alternative Dispute Resolution**

### **Introduction**

Alternative Dispute Resolution or "ADR" refers to techniques for the resolution of disputes outside full-blown court proceedings. Over the years, numerous types of ADR have developed – arbitration, appraisal, conciliation, convening, early neutral evaluation, evaluative mediation, facilitation, fact-finding, med-arb, mediation, mini-trial, moderated settlement conference, negotiation, ombuds, partnering, special master, summary jury trial, and rent-a-judge, among others. This chapter focuses on two of them – mediation and arbitration – and addresses some basic issues for ADR programs within administrative law settings: qualifications and training of "neutrals," confidentiality of proceedings, and scheduling. Although a couple of agencies have begun to use mediation in the administrative hearing process, *see* Appendix B: Integrating Mediation into the Hearing Process, what follows includes a basic introduction to the topic for the uninitiated.

Dispute resolution is often described as a spectrum varying by who controls the outcome, with negotiation (result entirely due to parties' efforts on their



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### Alternative Dispute Resolution

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own behalf) on one end, and litigation (result determined by an outside party) on the other. Mediation (assisted negotiation) falls on the negotiation side of the spectrum, and arbitration, employing a third party decision-maker, falls near the litigation end. Each named process occupies an indefinite band on the spectrum: just as "blue" describes numerous gradations on a theme, so does "mediation," creating potential confusion for those who seek precise definition. Generally, most forms of ADR promote voluntary settlement by encouraging negotiations among the parties. ADR processes also lend themselves to great flexibility in constructing a program: casual, structured, mixed, matched, or modified to suit a time, place, or case.

#### **Mediation**

Mediation is negotiation assisted by a neutral third party. The neutral's role is to help the parties reach a mutually satisfactory agreement, not to act as decision-maker. The mediator's approach can vary considerably. "Facilitative mediation" helps the parties build consensus and focus on their underlying interests. "Evaluative

mediation" helps the parties understand the strengths and weaknesses of their cases.

Mediation is informal and flexible; both the process and the result may be crafted and fine-tuned on the spot as needed. Resolutions of mediated disputes are unlikely to be of the winner-take-all variety. They may also address underlying non-legal issues. Mediation is ultimately voluntary. Even when a tribunal orders one or more initial sessions, it cannot command agreement; thus either or both parties may end mediation.

Mediation works best when the parties are willing to make compromises and reach a meaningful agreement. The parties or their representatives should have the authority to make such decisions. No one is anxious to see a carefully negotiated settlement summarily overturned by the boss or the board.

Mediation is particularly appropriate when the parties have an ongoing relationship and thus must continue to coexist. It can also work well when the case is complex with many possible resolutions, or when poor communication between the parties has caused the dispute.

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### **Alternative Dispute Resolution**

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Mediation begins with a joint conference of the parties and the mediator. The mediator explains the process, hears brief presentations from the parties, and asks questions in order to clarify issues. The mediator may then meet privately with each party and may use "shuttle diplomacy" to help the parties reach a resolution. The process concludes with (or without) a settlement agreement. Often mediation may succeed in resolving a number of issues in a dispute, leaving the balance for later litigation.

#### **Arbitration**

In arbitration, the parties submit their dispute to a neutral decision-maker whom they have selected. Decisions may be binding or non-binding. Binding arbitration is generally final, with limited grounds for appeal. However, when a judge mandates arbitration, the result is non-binding unless the parties agree otherwise. Arbitration may be required by statute, or it may be elected by the parties. An agreement to arbitrate, like any contract, lets the parties determine the questions to be arbitrated and the remedies the arbitrator may administer.

Arbitration may be appropriate when the decision-maker should have subject-matter expertise, or when a large number of cases with relatively low stakes will produce no decision of vital importance to any one party.

Arbitration is conducted like an informal judicial trial, but it dispenses with the formal rules of civil procedure and evidence and the full-bore discovery that draw out the time and expense of most litigation. As in a trial, the neutral hears arguments and reviews evidence. However, the arbitrator may determine procedure for the hearing, and his or her decision need not include facts or reasons underlying the award.

**Neutrals: Qualifications and Training**

Neutrals are as varied as the contexts in which they serve and the disputants who select them. They may come from within the agency or they may be outsiders. An insider who is familiar with the peculiarities of an environment may be able to focus as readily as the disputants on the issues at hand. On the other hand, an outsider's independence may free him or her of any hint of institutional bias. Substantive expertise may be essential in understanding the parties' positions when

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### Alternative Dispute Resolution

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the subject matter of the dispute calls for it. Legal expertise may be essential when important legal rights are at stake, as in a divorce, but so is a non-legal viewpoint, to help focus on underlying non-legal issues, so even a divorce dispute may be co-mediated by an attorney and a non-attorney.

Basic ADR training commonly consists of a 25- to 40-hour course of classroom instruction followed by practice or apprenticeship with an experienced co-mediator. In New York State, Community Dispute Resolution Centers (CDRCs) provide 25 hours of training toward certification in ADR that is required of its own volunteer neutrals. Some agencies, such as the Department of Public Service, pair all or some of the CDRC training with their own in-house ADR training for administrative law judges. The Government Law Center at Albany Law School has conducted ADR workshops and training for the Department of Environmental Conservation, the Department of Public Service, and other agencies, including hearing officers and lawyers. Because some states require 40 hours of training before neutrals may be certified to practice there, the National Association of Administrative Law Judges, the National

Conference of Administrative Law Judges, and the American Bar Association offer a 40-hour ADR course specifically for ALJs every few months in different areas of the country.

New York State's CDRCs provide several types of mediation training: basic training for mediators, continuing education for community mediators, and special issue and advanced mediation training, which may be offered in conjunction with other state and local agencies. Basic training, required for its own all-volunteer mediator corps under Section 849-b(4)(b) of the Judiciary Law, includes 25 hours of classroom training by a Unified Court System certified trainer with a state-approved curriculum and training manual. Class work is followed by observation and apprenticeship in order to earn initial certification by the local CDRC director. To maintain certification, each year a mediator must complete six hours of in-service training. The New York State Dispute Resolution Association and the Unified Court System hold training sessions and conferences for CDRC staff and volunteer mediators, including in-depth seminars and workshops. The mediator must also lead or co-

mediate at least three mediations per year to maintain certification.

**Confidentiality**

Mediation works through open discussion. The mediator, having no coercive power to command candor, works instead to facilitate it. Because people will not reveal information, strategy, or business or personal secrets if they fear they will be used against them, part of the mediator's job is to assure confidentiality of the proceedings through promises by all present.

Legal protection of confidentiality is also important, lest a party be confronted with its own secrets at trial after a failed mediation. An agency may adopt rules of confidentiality, as the New York State Department of Public Service has done with regard to settlement discussions. Chief Judge Judith Kaye's ADR Task Force proposed in 1996 that the confidentiality rules it had recommended for the Uniform Court System serve as a guide for a future statute applicable to ADR broadly within the state. That report states:

(g) Confidentiality in mediation. (1) Except as otherwise expressly provided by law or court rule, all materials of the mediator are confidential and not

subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the mediation made during the mediation session by any participant, mediator, or any other person present at the mediation session shall be a confidential communication.

(2) If this subdivision conflicts with other laws or public policies compelling disclosure of materials or communications, the issue of confidentiality may be presented to the court to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order, or whether the communications or materials are subject to disclosure. In making such a determination, there shall be a strong presumption by the court in favor of confidentiality. The mediator shall not be called as a witness at trial.

#### **Intersection of ADR and Litigation Scheduling**

An example of ADR's flexibility is the variety of ways that it may intersect with a hearing on the merits. Mediation and its siblings (negotiation and settlement conference) may turn up at any point in a dispute—before the case is officially filed, later at the courthouse steps or even well into litigation. There may be reasons to delay the proceeding for mediation: when an issue in a case in



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progress depends on the outcome of a negotiation; when all parties request a delay; when experience with similar cases indicates a high probability for settlement; or due to calendar pressures, such as when other cases contend for limited administrative resources. Some tribunals set a calendar when the case is filed – a window of opportunity for mediation, with a deadline to meet before the hearing on the matter begins. Others like the NYS Department of Public Service opt for maximum flexibility to avoid procedural impediments to good faith negotiation. Still others do not delay the hearing.

In an administrative agency context, confidentiality issues may arise where one ALJ serves both as mediator and as presiding judge. Thus, if negotiations should fail on an issue that was peeled off for mediation with a particular judge, the same issue could soon reappear before the same judge in a litigation context. Agencies have devised various approaches, among them, assignment of separate judges to ADR and litigation tracks in the first place, and waiver of confidentiality by the parties when agreeing to one judge for both tracks.

**Conclusion**

Policy, resources, environment, history, or other considerations can influence nearly every aspect of ADR program design and implementation, allowing the creation of a program that corresponds to general or even unique needs. However, certain aspects of ADR are edging toward standardization. Guidelines emerging in the areas of confidentiality and training or certification of neutrals bear watching amid the continued growth of ADR in a multitude of contexts. State agencies use ADR in many ways; for two examples, see Appendix C.

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## **Chapter 8: The Freedom of Information Law (FOIL)**

All records maintained by or for units of state and local government, including those kept by or in conjunction with the duties performed by hearing officers and administrative law judges, fall within the requirements of the FOIL.

By way of background, that statute pertains to agency records, and §86(3) defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Section 86(4) defines "record" to include:

"any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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Based on those definitions, information kept by or for any entity of state or local government, whether on paper or electronic media, would constitute an agency record that falls within the coverage of the FOIL.

#### **FOIL in Relation to the CPLR**

In a case involving a request made under the FOIL by a person involved in litigation against an agency, the Court of Appeals described the relationship between the FOIL and discovery under the CPLR, as follows: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency."<sup>1</sup> Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant."<sup>2</sup> The Court in *Farbman*, discussed the

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1. *Farbman v. NYC Health and Hospitals Corporation*, 62 NY 2d 75, 78 (1984).

2. *Matter of John P. v. Whalen*, 54 NY 2d 89, 99 (1980).

distinction between the use of the FOIL as opposed to the use of discovery in Article 31 of the CPLR and found that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request."

"CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action.'"

Based upon the foregoing, the pendency of litigation or an administrative proceeding does not affect either the rights of the public or a party under the FOIL.

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As general matter, the FOIL is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Although §3101(c) and (d) of the CPLR authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation, those kinds of records remain confidential only so long as they are not disclosed to an adversary or filed with an agency, for example.

#### **Openness of Proceedings**

Prior to considering the specifics of the FOIL, it is important to note that the Court of Appeals has considered the issue of "whether there is any basis for setting aside the strong public policy in this State of public access to judicial and administrative proceedings,"<sup>3</sup> and held that "[a]n unemployment

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3. *Herald Co. v. Weisenberg*, 59 NY 2d 378, 381 (1983).

insurance hearing is presumed to be open, and may not be closed to the public unless there is demonstrated a compelling reason for closure and only after the affected members of the news media are given an opportunity to be heard." One of the questions before the Court involved the impact of §537 of the Labor Law, which requires that certain records be kept confidential and states in relevant part that:

"[i]nformation acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law."

The court determined that "[s]ection 537 does not require closure of hearings at which claimants present their cases for unemployment benefits," and that "section 537 concerns only disclosure of information acquired through the reporting requirements of article 18, and not closure of hearings. . . ." Since the hearing was erroneously closed, the court found that the petitioner "is entitled to a transcript of the hearing," specifying that "[i]nasmuch as no examination was conducted at the time into the



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reasons for barring public to specific portions of the testimony, however, the affected parties should be given an opportunity to make such a showing, if they so desire."

In conjunction with the foregoing, the Court found that portions of a hearing may be closed when there are "compelling reasons" to do so, as in cases involving intimate personal details, and held that:

"To the extent that such compelling reasons may exist for making certain information confidential, however, less drastic remedies than closing a hearing in its entirety exist. Although an unemployment compensation hearing is not a criminal judicial proceeding, the procedures outlined with respect to such proceedings are apt (see *Matter of Westchester Rockland Newspapers v. Leggett*, 48 NY2d 430, 442, *supra*). When a claimant or employer requests closure of an unemployment compensation hearing during the presentation of certain evidence, he or she must demonstrate that a compelling reason exists for such closure. The court does not have occasion here to catalogue the possible reasons justifying closure, other than to note that a presumption of open hearings does not provide a license to publicize the intimate details of claimants' private lives. If the administrative law judge does find a compelling reason for closure, such reason shall be stated on the public record in as much detail as would be consistent with the reason for closure. And,

equally important, no hearing should be closed before affected members of the news media are given an opportunity to be heard 'in a preliminary proceeding adequate to determine the magnitude of any genuine public interest' in the matter."

In most instances, there is no statute that specifies that hearings or quasi-judicial proceedings must be open or closed. If there is no such provision, it would appear that the holding in *Herald* would be applicable to those proceedings. If indeed *Herald* does apply, the public and the news media would have a presumptive right to attend those proceedings, and the testimony and records or exhibits submitted as evidence would be accessible to the public, unless portions of the proceedings were properly closed. In that event, a transcript or recording of testimony, for example, involving a portion of the hearing that was closed could be withheld.

Although factually different, an analogy might be made to a situation in which a request was made for records, i.e., statements of witnesses in a criminal investigation, that could ordinarily be withheld under the FOIL but which were submitted into evidence in a public judicial proceeding. In that case, it was found that "once

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the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public."<sup>4</sup> In the context of administrative and quasi-judicial proceedings, while records pertinent to those might ordinarily be withheld under the FOIL, once information is disclosed in a public proceeding, it becomes a matter of public record. The fact that no member of the public or news media is present at a public proceeding is of no moment; many judicial proceedings, although open to the public, are not attended by any member of the public other than the parties. If the public had the right to have been present, unless otherwise exempted from disclosure, the record of a proceeding would be accessible to the public.

In sum, if members of the public and the news media may properly be excluded from a proceeding, and if the holding in *Herald* is inapplicable, the records of or pertaining to the proceeding would be available or deniable, in whole or in part, in accordance with the direction provided by the FOIL. On the other hand, if the hearings are generally open to the public, or if the holding in *Herald* applies, records of those proceedings

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4. Moore v. Santucci, 151 AD 2d 677,679 (1989).

must be disclosed in a manner consistent with the direction provided in that decision.

\_\_\_\_\_ In situations in which there is no public right to attend a hearing, the FOIL would govern rights of access to records of administrative or quasi-judicial proceedings. Under those circumstances, several of the grounds for denial would be pertinent to an analysis of rights of access.

#### **Statutory Exemptions from Disclosure**

As indicated earlier, §87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." In considering that provision, the Court of Appeals has indicated that it has "never held that a State statute must expressly state that it is intended to establish a FOIL exemption,"<sup>5</sup> but stressed that there must be "a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection." Assuming that there is legislative history suggesting an intent to ensure confidentiality, the records of a proceeding will be

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5. *Capital Newspapers v. Burns*, 67 NY2d 562, 567 (1986).

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exempted from public disclosure. When a statute exempts a class of records from disclosure, the records are confidential in their entirety, and there is no requirement to delete personal details, for example, and provide access to the remainder of the records.<sup>6</sup>

For purposes of exempting records from disclosure under §87(2)(a), a "statute" would be an enactment of the State Legislature or Congress, and it has been held that an agency's regulations or the provisions of an administrative code or ordinance do not constitute a "statute."<sup>7</sup>

#### **Protection of Personal Privacy**

Also pertinent is §87(2)(b), which permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." The Court of Appeals has held that "the essence of the exemption" involves the ability of the government to

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6. *Short v. Board of Managers of Nassau County Medical Center*, 57 NY2d 399 (1982).

7. See e.g., *Morris v. Martin, Chairman of the State Board of Equalization and Assessment*, 440 NYS 2d 365, 82 AD 965, reversed 55 NY 2d 1026 (1982); *Zuckerman v. NYS Board of Parole*, 385 NYS 2d 811 53 AD 405 (1976); *Sheehan v. City of Syracuse*, 521 NYS 2d 207 (1987).

protect against disclosures "that would ordinarily and reasonably be regarded as intimate, private information."<sup>8</sup>

As the privacy exception relates to records pertaining to public employees, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy.<sup>9</sup> Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy.<sup>10</sup>

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8. *Hanig v. Department of Motor Vehicles*, 79 NY2d 106, 112 (1992).

9. See e.g., *Farrell v. Village Board of Trustees*, 372 NYS 2d 905 (1975); *Gannett Co. v. County of Monroe*, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); *Sinicropi v. County of Nassau*, 76 AD 2d 832 (1980); *Geneva Printing Co. and Donald C. Hadley v. Village of Lyons*, Sup. Ct., Wayne Cty., March 25, 1981; *Montes v. State*, 406 NYS 2d 664 (Court of Claims, 1978); *Powhida v. City of Albany*, 147 AD 2d 236 (1989); *Scaccia v. NYS Division of State Police*, 530 NYS 2d 309, 138 AD 2d 50 (1988); *Capital Newspapers v. Bums*, 67 NY 2d 562 (1986).

10. See e.g., *Matter of Wool*, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977.

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Several of the decisions cited above<sup>11</sup> dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy.<sup>12</sup>

**Determinations and Recommendations**

The remaining provision of likely significance, §87(2)(g), states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or

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11. See, e.g., *Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida*.

12. See e.g., *Herald Company v. School District of City of Syracuse*, 430 NYS 2d 460 (1980).

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

The language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like may be withheld.

\_\_\_\_\_ In considering the foregoing, a key issue involves the function of a hearing officer. If that person has the authority to render a final and binding decision, the decision would constitute a "final agency determination" that would generally be available under §87(2)(g)(iii). If the hearing officer has only the authority to recommend, the recommendations may be withheld, at least for a time.

In a case dealing with recommendations offered by



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a "hearing panel" to an agency decision maker, it was found that they could be withheld. In considering the issue of disclosure, the court stated that:

"Petitioner contends that the subject documents represent the application of agency policy and rules to a specific case and that to deny disclosure would allow appellants to perpetuate their tradition of maintaining a body of 'secret agency law' in this area. Appellants, on the other hand, contend that the subject documents represent precisely the kind of predecisional information which is prepared in order to assist the decision-making process and, hence, exempt from disclosure. We agree with appellants. The hearing panel documents or report sought are not final agency determinations or policy. Rather, they are predecisional material, prepared to assist an agency decision maker (here, the Chancellor) in arriving at his decision. Only the latter has the legal authority to decide whether the rating should stand. The panel's recommendations and reasoning are not binding upon him and there is no evidence that he adopts its reasoning as his own when he adopts its conclusion..."<sup>13</sup>

If, however, it is clear that a hearing officer's

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13. *McAulay v. Board of Education*, 61 AD 2d 1048, aff'd 48 NY 2d 659 (1978).

recommendations are adopted by the decision maker, the recommendations become the final agency determination, which would be accessible. In *Miller v. Hewlett-Woodmere Union Free School District # 14*<sup>14</sup> the court wrote:

"On the totality of circumstances surrounding the Superintendent's decision, as present in the record before the Court, the Court finds that petitioner is entitled to disclosure. It is apparent that the Superintendent unreservedly endorsed the recommendation of the Term [sic; published as is], adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting 'the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers' (*Matter of Sea Crest Construction Corp. v. Stubing*, 82 A.D.2d 546, 549 [2d Dept. 1981]), but the Court bears equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intra-agency views, when deliberation has ceased and the consensus arrived it represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of government decision making."

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14. Supreme Court, Nassau County, NYLJ, May 16, 1990.

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**Presumption of Access**

It is emphasized that the courts have consistently interpreted the FOIL in a manner that fosters maximum access. In a decision rendered by the Court of Appeals, it was held that:

"Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access".<sup>15</sup>

**Fees for Copies**

When copies of records are made available under the FOIL, unless a statute authorizes a different fee, an agency may charge up to twenty-five cents per photocopy, or if records cannot be photocopied (i.e., in the case of tape recordings or computer disks), it may charge based on the actual cost of reproduction.<sup>16</sup> If a record of a

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15. *Capital Newspapers v. Burns*, *supra*; see also, *Farbman & Sons v. New York City*, *supra*; and *Fink v. Lefkowitz*, 47 NY 2d 567, 571 (1979).

16. FOIL §87(1)(b)(iii).

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proceeding is prepared under the State Administrative Procedure Act, §302(3) provides that "the agency is authorized to charge not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or the rate specified in the contract between the agency and a contractor if prepared by a private contractor."

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**APPENDIX A**  
**EVIDENCE**

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**Appendix A: Evidence**

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## **Appendix A: Evidence**

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### **Part One: Application of The Rules of Evidence in Adjudicatory Proceedings**

#### **Observance of Rules of Evidence Not Required**

A hallmark of administrative law is that compliance with the technical rules of evidence applicable in civil and criminal actions is not required in adjudicatory proceedings. SAPA §306(1), which governs the evidentiary standards for adjudicatory proceedings, provides that "agencies need not observe the rules of evidence observed by the courts, but shall give effect to the rules of privilege recognized by law." While SAPA §306(1) also authorizes an agency to adopt a rule providing for the application of the rules of evidence in an agency adjudication proceeding, no agency has promulgated a rule to such effect. Additionally, the courts have not required as an essential element of a fair adjudicatory proceeding that an ALJ is bound by the rules of evidence.

The refusal to mandate compliance with the rules of evidence, other than preserving the recognized common law, statutory and constitutional privileges, takes into



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account the major differences between judicial and administrative adjudication. In that regard, the rules of evidence have as a goal to ensure that a jury verdict is based on logic and rationality. Thus, there are many evidentiary rules, with numerous exceptions, that prohibit the admissibility of certain offered evidence because it is believed that individual jurors are unable to evaluate such evidence properly, perhaps by giving it too much weight or by using it for punitive purposes. Furthermore, such rules are difficult to understand in every detail and difficult to apply; experienced judges will often disagree as to whether offered evidence is admissible.

On the other hand, the ALJ has the knowledge and ability to assess properly offered evidence and does not need the protection that the rules of evidence are designed to provide for jurors. The application of the technical rules of evidence and the necessary, and surely frequent, determination of questions regarding their application would be "inconsistent with the objectives of dispatch, elasticity, and simplicity which the

administrative process is designed to promote."<sup>1</sup> Thus, it has long been regarded as appropriate not to insist on adherence to the rules of evidence in adjudicatory proceedings.

Accordingly, the ALJ does not, and should not, conduct a hearing through a rigid application of the technical rules of evidence. Rather, the ALJ may allow evidence to be admitted even though such evidence would be inadmissible at a civil or criminal trial. Thus, hearsay, single level or double level, may be received by the administrative law judge.<sup>2</sup> Similarly, written reports may be received.<sup>3</sup> Additionally, statistical evidence may

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1. Administrative Procedure in Government Agencies: Report of the Attorney General's Committee on Administrative Procedure (Washington, D.C. 1941).

2. See, e.g., *A.J. & Taylor Restaurant, Inc. v. State Liquor Authority*, 214 AD2d 727, 625 NYS2d 623 (2<sup>nd</sup> Dep't 1995) (statement from person absent from hearing regarding the purchase of alcohol by minors, although hearsay, is admissible); *Matter of Ribya "BB"*, 243 AD2d 1013, 663 NYS2d 417 (3<sup>rd</sup> Dep't 1997) (statement from person absent from hearing regarding what someone else told her about the minor's treatment, although double-level hearsay, is admissible).

3. See, e.g., *Gray v. Adduci*, 73 NY2d 741, 536 NYS2d 40 (1988) (arresting officer's written report concerning person's conduct, although hearsay, is admissible); *Andersen v. Department of Motor Vehicles*, 227 AD2d 617, 643 NYS2d 598 (2<sup>nd</sup> Dep't 1996) (report of officer's safety inspection, although hearsay, is admissible).

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be received,<sup>4</sup> as well as copies of documents, or documents that have been altered,<sup>5</sup> even though such evidence might not be admissible at a trial.

When the ALJ receives evidence, even though the receipt of such evidence would be barred in a court of law, the important and practical question for the ALJ to determine is what weight, if any, should be given to it. The weight of evidence on a disputed issue is on that side of the issue on which the evidence is more probative. In determining how much weight to give to evidence, a common sense approach must be used.

### **Discretion to Admit or Exclude Offered Evidence**

Although the ALJ is free to receive any offered oral or non-testimonial evidence, unless barred by an applicable privilege, it does not necessarily follow that the ALJ should receive any and all offered evidence. To admit any

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4. See, e.g., *Enrico v. Bane*, 213 AD2d 784, 623 NYS2d 25 (3<sup>rd</sup> Dep't 1995); *Sunset Taxi Co. v. Blum*, 73 AD2d 691, 423 NYS2d 231 (2<sup>nd</sup> Dep't 1979).

5. See, e.g., *R&D Equipment Leasing Company, Inc. v. Adduci*, 220 AD2d 900, 632 NYS2d 332 (3<sup>rd</sup> Dep't 1995) ("best evidence" rule does not bar admissibility of a copy of document); *Swick v. New York State and Local Employees' Retirement System*, 213 AD2d 934, 623 NYS2d 960 (3<sup>rd</sup> Dep't 1995) (altered document may still be admissible).

and all evidence that may be offered, however remote from the issues to be determined and however unreliable or untrustworthy, means not only delay but also results in intolerably long and confused records. Additionally, erroneous determinations could be reached as a result.

Consequently, SAPA §301 provides for, and the courts authorize, the exercise of discretion by an ALJ as to whether or not offered evidence should be admitted.<sup>6</sup> If the offered evidence is irrelevant or cumulative or is without any demonstrable reliability, it may be excluded.<sup>7</sup>

For instance, an ALJ may exclude offered evidence on the ground that it is irrelevant,<sup>8</sup>

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6. See, *Sowa v. Looney*, 23 NY2d 329, 333, 296 NYS2d 760, 764 (1968).

7. SAPA §306(1); *Sowa v. Looney*, 23 NY2d at 333-334, 296 NYS2d at 764-765, *supra*.

8. See, e.g., *Flynn v. Coombe*, 239 AD2d 725, 657 NYS2d 494 (3rd Dep't 1997) (testimony of proposed witnesses was properly excluded as they had no personal knowledge of the incident in issue, rendering their testimony irrelevant); *Amato v. Department of Health*, 229 AD2d 752, 645 NYS2d 600 (3rd Dep't 1996) (in OPMC proceedings to revoke physician's license for negligent and incompetent treatment of five obstetrical patients, testimony of other patients regarding their treatment by physician properly excluded as irrelevant); *Goomar v. Ambach*, 136 AD2d 774, 523 NYS2d 238 (3rd Dep't 1988) (exclusion of grand jury no bill against physician on ground of irrelevancy proper as such evidence did not prove/disprove physician's alleged conduct).

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or cumulative.<sup>9</sup> Similarly, irrelevant or repetitious cross-examination can be excluded.<sup>10</sup> The ALJ may also exclude offered evidence on the ground that it is hearsay.<sup>11</sup>

The ALJ must exercise intelligent judgment as to whether offered evidence should be excluded because it is either irrelevant or unreliable. As in determining how much weight, if any, should be accorded to admitted evidence, a common sense approach must be used in assessing relevancy and reliability. However, where the ALJ has some doubt as to the evidence's relevancy or reliability, the evidence should be received and appropriate weight given to it in arriving at a decision.

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9. See, e.g., *McKinley v. Stinson*, 237 AD2d 815, 655 NYS2d 669 (3<sup>rd</sup> Dep't 1997) (in view of fact that 4 witnesses testified on behalf of petitioner, exclusion of additional witnesses who would testify similarly was properly excluded as cumulative); *Gonzalez v. Department of Health*, 232 AD2d 886, 648 NYS2d 827 (3<sup>rd</sup> Dep't 1996) (exclusion of exhibits was proper as their subject matter was fully addressed by expert witnesses).

10. See, e.g., *Gonzalez v. Department of Health*, *supra*; *Amato v. Department of Health*, *supra*.

11. See, e.g., *Achatz v. New York State and Local Police and Fire Retirement System*, 239 AD2d 857, 657 NYS2d 521 (3<sup>rd</sup> Dep't 1997) (medical progress reports of petitioner's nontestifying treating physician properly excluded as hearsay as counsel for respondent would have been denied opportunity to cross-examine physician regarding key findings therein); *Gross v. DeBuono*, 223 AD2d 789, 636 NYS2d 147 (3<sup>rd</sup> Dep't 1996) (ALJ did not err in precluding petitioner physician's expert from testifying as to petitioner's description of his examination of patients, as petitioner elected not to testify and he was simply trying to introduce his own self-serving statements through another witness).

When in doubt, it is better to have a complete record, rather than a possibly incomplete one.

### **Certain Evidentiary Rules Are to Be Given Effect**

#### *Privileges*

SAPA §306(1) specifically provides that the privileges recognized in law are to be given effect in adjudicatory proceedings. Thus, New York State law privileges whether created under statutory enactment or the common law, as well as constitutional privileges, whether federal or state, are to be applied by the ALJ. A fuller discussion of the privileges is provided *infra*.

#### *Official Notice*

The practice in New York in adjudicatory proceedings has traditionally been to permit agencies to take judicial notice of everything of which courts could take judicial notice and to take official notice of matters within the specialized expertise of the involved agency.<sup>12</sup> SAPA

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12. See, Borchers and Markell, New York State Administrative Procedure and Practice (2d ed) §3.9.

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§306(4) codifies this dual practice for adjudicatory proceedings, provided that notice and opportunity to respond when a matter within its specialized expertise is officially noticed, and calls it "official notice."

The concept of judicial notice, as developed by the courts, allows only clearly indisputable facts to be the subject of judicial notice. Examples are such facts as are so generally known or of such common notoriety that they cannot be reasonably the subject of dispute, and specific facts and propositions of widely known and generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.

Additionally, taking judicial notice of records found in standard almanacs, official government weather reports, the contents of standard dictionaries, the wording of statutes and constitutions are classic instances where official notice can be taken. Thus, matters of fact used as historical events; the course and laws of nature; mortality tables; intoxicating nature of beverages; geographical facts; census statistics; meteorological data on a certain day; official weather reports; existence of departments and political subdivisions of government; public officers,

past and present; and meaning of words, phrases and abbreviations can be judicially noticed. Matters of law, such as statutes of state; acts of congress; regulations; court procedures; authority of public officers; laws of other states; and laws of foreign countries, if a party requests it and furnishes the court with sufficient information to enable it to comply with the request, can be judicially noticed.<sup>13</sup>

As to matters that are within the specialized knowledge of the agency, the case law gives a broad freedom to which matters can be noticed, so long as the requisite notice is given.<sup>14</sup> Thus, official notice can be taken of earlier agency proceedings<sup>15</sup> and matters that would otherwise be the subject of expert testimony.<sup>16</sup>

When an ALJ intends to take official notice of a matter pursuant to SAPA §306(1), it is the ALJ's duty to state on the record the matters of which he/she intends to take

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13. See, CPLR § 4511.

14. See, e.g., *Cohen v. Ambach*, 112 AD2d 497, 490 NYS2d 908 (3<sup>rd</sup> Dep't 1985).

15. See, e.g., *Bracken v. Axelrod*, 93 AD2d 913, 461 NYS2d 922 (3<sup>rd</sup> Dep't 1983).

16. See, e.g., *Cohen v. Ambach*, *supra*.



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official notice and to afford parties the opportunity to argue, comment upon, controvert or distinguish the propriety of taking such notice or to limit the extent and contents of the matter to be noticed. They may not succeed but they have the right to know everything that is being considered.

The taking of official notice by an ALJ is discretionary. As the taking official notice at the request of an agency may work an unfair advantage to an adverse party, especially where the parties are not represented, it should be exercised with caution.

### *Specific Statute*

In specific instances, the Legislature may provide that certain evidence shall or shall not be received in adjudicatory proceedings.<sup>17</sup> Where such statutes are applicable to an adjudicatory proceeding, they must be given effect.

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17. See, e.g., N.Y. Publ. Health L. §10(2) (written reports of investigators concerning alleged violations and investigations "shall be received" in all "courts and places").

*Unlawfully Obtained Evidence*

Issues of admissibility also arise when evidence that is offered has been obtained in violation of a statute or an exclusionary rule based on a violation of a constitutional provision. For example, CPLR §4506 prohibits the use of evidence obtained through the use of an illegal wire tap at an adjudicatory proceeding as well as a civil or criminal action.<sup>18</sup> With respect to evidence seized in violation of a constitutional provision, *e.g.*, illegal search or seizure in violation of the Fourth Amendment, such evidence is inadmissible at an adjudicatory proceeding if the person who committed the violation was an employee of the agency conducting the proceedings, or a police officer acting as an agent of the agency.<sup>19</sup>

Where the evidence was obtained unlawfully by police officers, but they were not at the time the evidence was seized agents of the agency conducting the proceeding, a "deterrence analysis" is employed to determine the

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18. See, *LaPenta v. State Liq. Auth.*, 24 NY2d 647, 659-661, 301 NYS2d 584, 591-593 (1969).

19. See, *Finn's Liq. Shop v. State Liq. Auth.*, 24 NY2d 647, 658-659, 301 NY2d 584, 589-592 (1969) (employee); *Malik v. State Liq. Auth.*, 24 NY2d 647, 661-663, 301 NYS2d 584, 593-596 (1969) (police officer).

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evidence's admissibility at the proceeding.<sup>20</sup> This analysis considers whether the police officers could have foreseen when they engaged in the conduct constituting the violation that the person involved would be subject to an adjudicatory proceeding as a result. If they could not have foreseen such result, the evidence is admissible, and if they could, it is inadmissible.<sup>21</sup>

#### The ALJ and the Rules of Evidence

From the above discussions it can be seen that the ALJ is neither obligated to apply the rules of evidence nor obligated to ignore them, except for privileges. As a practical matter, the admission or exclusion of offered evidence is committed to the sound discretion of the ALJ. So long as the ALJ admits only relevant or reliable evidence, and excludes irrelevant or unreliable evidence regardless of the evidence's admissibility under the rules of evidence, the ALJ will assure a fair, as well as an expeditious hearing.

While the practice in adjudicatory proceedings is not

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20. See, *Boyd v. Constantine*, 81 NY2d 189, 597 NYS2d 605 (1993).

21. *Id.*

to require the rules of evidence to be followed, knowledge of the rules of evidence and their underlying policies, and an understanding of how they would apply to offered evidence is important. Such knowledge and understanding will be most helpful to the ALJ in determining not only whether the offered evidence has relevance or demonstrable reliability, but also how much weight, if any, should be given to evidence when it is received. Thus, knowledge that offered evidence would be excluded or admissible by application of the rules of evidence and why such a result occurs would certainly be a great aid in making rulings or deciding cases.

What follows in Part Two is a rather truncated discussion of the basic evidentiary rules. It is intended as an introduction and guide to the rules which the ALJ will most frequently encounter at adjudicatory proceedings, and hopefully will assist the ALJ in making his/her rulings on evidentiary matters.

## Part Two: Application of the Rules of Evidence in Adjudicatory Proceedings

### Definitions

#### *Generally*

**Evidence** is the legal term which covers all of the information and facts adduced in a case, be it testimony of witnesses, or documents or other objects identified by witnesses, or otherwise admissible and presented to the court to prove or disapprove the facts in issue. Evidence is the medium of proof.

**Proof** is the effect or result of evidence in convincing the mind or the trier of the facts. It is the conclusion arrived at by a consideration of the evidence.

**Facts and Circumstances.** A *fact* is what a witness has seen, heard, smelled, felt or tasted. *Circumstances* are collections of facts.

**Inferences** may be drawn from facts and circumstances. Inferences are reasonable deductions or conclusions flowing logically from facts which have been proved.

**Opinions** are statements a witness makes and believes what occurred or did not occur. They may be

based on two or more separate facts.

A **presumption** is a rule of law requiring that if one (the "basic") fact or set of facts is established, the trier of fact must find that another (the "presumed") fact also exists unless the trier of fact is persuaded that the latter does not exist. The standard of persuasion is generally a preponderance of evidence, unless a higher burden is required by law.

**Testimony** is the oral part of evidence consisting of the statements of witnesses made under oath.

**Non-testimonial** evidence is evidence which is not testimonial in nature and is admitted into evidence as exhibits. It includes:

**Documentary Evidence** consists of writings, instruments, records and documents of all kinds, including computerized records.

**Real Evidence** is evidence of which the trier of the facts acquires knowledge by personal observation and inspection of a thing or object to which the testimony refers. It may be a physical object, inspection of premises or exhibition of parts of the body.

**Demonstrative Evidence** is evidence which illustrates for the trier of fact

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testimony or non-testimonial evidence that is presented to the trier of fact, and helps the trier of fact understand such other evidence. It includes photographs, maps, sketches, diagrams, motion pictures, video tapes, x-rays, computer generated animations and experiments.

### *Kinds of Evidence*

**Direct Evidence** is proof of the facts in issue, communicated to the trier of the facts by witnesses, having actual knowledge of them by means of their senses. It is that evidence which, without interference or evidence of any other facts, tends to establish directly a fact in issue.

**Circumstantial Evidence** is proof of collateral facts, where circumstances are shown, from which the inference may be drawn that the principal or essential facts are true and existed, in such a way that the proof is irreconcilable with any other theory that can be present.

**Substantive Evidence** or **Evidence-in-Chief** is evidence that is adduced for the purpose of proving a fact in issue, thus enabling the party offering the evidence to meet its burden of production on a fact in issue.

**Impeaching Evidence** is evidence that is adduced for

the purpose of discrediting a witness on documentary evidence. It does not help a party in meeting its burden of production.

*Evidentiary Worth*

**Probative Value of Evidence** refers to the tendency, if any, of evidence to make a fact of consequence in the action more or less probable than it would be without the evidence.

**Weight of Evidence** refers to how much probative value admitted evidence should be accorded, taking into account credibility, and logic and reason, by the trier of fact.

**Sufficiency of the Evidence** refers to whether the evidence admitted on behalf of a party is sufficient to satisfy the party's burden of production.

**Presumptions**

*Generally*

A presumption is a rule of law requiring that if one (the "basic") fact or set of facts is established, the trier of fact must find that another (the "presumed") fact also



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exists unless the trier of fact is persuaded that the latter does not exist. A presumption differs from an inference in that an inference permits, but does not require as does a presumption, a trier of fact to conclude that another fact has been established. Presumptions, the source of which is the common law and legislative enactments, are recognized for policy reasons, generally because they reflect natural probabilities based on logic and experience.

Generally, once the basic facts are proven and accepted by the trier of facts, the presumption arises. At that point, if the party against whom the presumption works does not establish by a preponderance of evidence that the presumed fact does not exist, the jury must find that the fact exists. If the party rebuts the presumption, the presumption leaves the case entirely. All that remains of the presumption is the possibility that the jury may draw an inference from the basic facts that the presumed fact exists. However, it must be noted that many of the numerous presumptions recognized in the law have their own set of rules which differs from this view of the general operation of presumptions. As a result, each one that is in issue should be scrutinized.

*Specific Presumptions*

It is impossible to enumerate all the presumptions recognized in the law. Some of the more common ones are:

It is presumed that a public official, a fiduciary, an officer or director of a corporation will not do anything contrary to his/her official duty or fail to do anything which his/her official duty requires him/her to do;

It is presumed that a death was not brought about by suicide.

For joint accounts it is presumed that the account is the property of those named.

It is presumed that a public employee who stays out of work during a strike is engaged in striking.

It is presumed that a person died at the end of five years of unexplained absence.

Knowledge of the contents of their books is presumed when members of a firm have access to them and an opportunity to know how their accounts were kept.

Mailing of letters: It is presumed that a properly addressed and stamped envelope, deposited in a post office or regularly maintained post box, reaches its destination. If the proof is that such mailing was in a

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course of business or office practice, it raises the presumption that it was in fact mailed. However, there must be a foundation laid showing that the letter was placed in the usual office receptacle for outgoing mail and the person whose duty it is to mail such letters testifies that he/she always mails such letters placed in such receptacle, and what procedure he/she follows.

Proof of ownership of a motor vehicle creates a presumption that the person operating it, did so with the owner's permission.

Where alleged services are rendered by a relative or close friend, it is presumed in the absence of agreement, that they were rendered voluntarily, gratuitously and without expectation of pay therefor.

*Application At The Adjudicatory Proceeding*

Whether to apply an otherwise applicable presumption is in the discretion of the ALJ. Unless there is some good reason not to give effect to the presumption, it should be applied.

**Relevancy**

*Generally*

The linchpin of all evidence law is the rule that only relevant evidence is admissible and irrelevant evidence is excluded. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. This definition recognizes that relevancy is not an inherent characteristic of an item of evidence but exists only as a relation between an item of evidence and a fact that may be properly proved in an action.

Under the definition, to be relevant, the evidence must tend to prove a fact that is of consequence to the litigation. What is of consequence to the litigation will necessarily turn upon the applicable substantive law within the framework of the pleadings and the theory of the action. The fact to which the evidence is directed need not be an ultimate fact or a vital fact, or be in dispute. It suffices that the fact is of some consequence to the disposition of the litigation.

The definition further provides that relevancy also

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depends upon whether the evidence has "any tendency to make the existence" of the fact of consequence "more probable than it would be without the evidence." When the evidence has such tendency it is considered to have probative value. It is not necessary that the evidence by itself proves the fact for which it is offered or makes the fact more probable than not. A minimal probative tendency is all that is required.

With respect to the tendency element, the test is essentially one of logic and reason. The ALJ or hearing officer, drawing upon his or her own experience, knowledge and common sense, asks whether some logical, rational relationship exists between the offered evidence and the fact to be proven. If such relationship exists, the evidence is relevant, and, if not barred by some other evidentiary rule, admissible. If there is no such relationship, the evidence is irrelevant and excluded. Once the evidence is admitted, it is for the trier of fact to determine how much weight is to be accorded to it.

Even though evidence is relevant, the hearing officer possesses the discretion to exclude it. In that regard, the court may exclude relevant evidence which may have a

tendency to cause undue prejudice, confuse the issues, would be cumulative, or unduly consume time, when it is determined that the evidence's probative value is substantially outweighed by one or more of these factors. Under this standard, where probative value is slight, and the danger of undue prejudice, etc., is great, exclusion of the evidence would be warranted, and where the probative value is high and the danger of undue prejudice, etc., is slight, exclusion would not be warranted.

*Special Relevancy Rules*

Based on experience and policy, the courts and the Legislature have developed special relevancy rules governing specific situations. Some of these rules are as follows:

• *Failure To Produce Witnesses and Documents*

A party's failure to produce a witness or document when the circumstances indicate it would be logical to do so gives rise to an inference that the witness or document was not produced because the witness or document

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would have provided facts unfavorable to the party. As a result, the other party may comment on the failure to produce and obtain an adverse inference charge, which permits the trier of fact to consider as relevant evidence the inference and, further, draw the strongest inference against the party.

To obtain such an adverse inference, it must be established that the missing witness or document would be expected to testify favorably or be favorable on behalf of the party who has not called him/her or produced the document; that such testimony or document would be non-cumulative; and that the witness or document is available to the party who has not called him/her or produced the document.

The rule is applicable in civil and criminal cases, but as the defendant in a criminal case has a constitutional right not to testify, it is a violation of that constitutional right to comment on an exercise of that right.

• *Destruction Of Evidence*

Similar to the inference that may arise when a party fails to produce a witness or document, a party's destruction of relevant evidence gives rise to an inference

that the destroyed evidence would have not supported, or would have been adverse to, the party's case.

• *Invocation Of Privileges*

When a party in a civil or criminal case asserts a privilege to prevent disclosure of testimony or documents, comment upon such invocation of the privilege and an adverse inference from the invocation is permitted. The adverse inference to be drawn is similar to the adverse inference permitted as the result of a failure to call a witness or produce a document. The inference is permitted to be drawn even when the Fifth Amendment privilege against self-incrimination is invoked, except when the defendant invokes it.

• *Habit Or Custom*

Evidence of a person's habit or proof of business, professional or other institutional practice or custom is admissible as proof that the habit, or practice or custom, was or would have been followed under the same set of circumstances on a specific occasion. Thus, evidence that a person had the habit of engaging in certain



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conduct is admissible to prove that the person engaged in that conduct at another time. Similarly, evidence that an institution's practice was to have an employee perform a certain task is admissible to prove that a certain employee performed that task on a given occasion.

• *Similar Accidents Or Events*

Evidence that tends to establish that a person has been negligent on prior occasions is inadmissible to prove that the person was negligent on another occasion. Similarly, evidence that prior accidents have occurred involving a party's product or property is inadmissible to establish that the party was negligent on another occasion with respect to the product or property. However, evidence of such prior events or accidents may be admissible to establish other facts, such as existence of a dangerous condition or notice.

• *Character*

Evidence of a person's character, i.e., a person's disposition or propensity to engage or not engage in various kinds of conduct, whether consisting of

reputation evidence or evidence of prior acts, is inadmissible to prove that the person acted in conformity or in accordance with his character on a particular occasion. Thus, in an automobile accident action, a plaintiff may not show that defendant has a record of numerous traffic infractions or accidents to prove defendant was driving negligently at the time of the accident, nor may the defendant offer evidence of an excellent driving record, *i.e.*, no tickets or accidents, to show defendant was driving carefully at the time of the accident. In a criminal action, the prosecutor may not show that the defendant has a lengthy criminal record to establish that the defendant is guilty of the crime charged.

While such character evidence may have probative value, it is excluded on policy grounds. The view is that such evidence may distract the trier of fact from the main issue of what occurred on the particular occasions, and induce the trier of fact to punish a "bad" person or reward a "good" person because of his/her character, regardless of the evidence in the case.

However, where the evidence of prior acts is relevant for a purpose other than to show conformity or

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propensity, the evidence is admissible with respect to that person, even though it reveals or suggests a conformity or propensity inference. Such other purposes includes motive, intent or accident, establishment of identity, negate mistake and establishment of a common plan or scheme. A court may nevertheless exercise its discretion and exclude the evidence if it concludes that the evidence's probative value is substantially outweighed by the danger of unfair prejudice, etc.

• *"Dead Man's" Statute*

As provided by CPLR §4519, a person is barred from giving testimony, albeit relevant, where the person, who is interested in a transaction with a decedent, desires to testify against the estate of the decedent as to a transaction with the decedent. The statute is complex and can be parsed as follows:

**Generally** upon a trial or proceeding, a party or person interested in the event, or a person, from, through, or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness in his/her own behalf or interest, or in behalf of the party

succeeding to his/her title or interest; **Against** the executor, administrator or survivor of a deceased person or a person deriving his title or interest from through, or under a deceased person, by assignment or otherwise; **Concerning** a personal transaction or communication between the witness and the deceased person; **Except** where the executor, administrator or survivor so deriving title or interest is examined in his/her own behalf or the testimony of a deceased person is given in evidence concerning the same transaction or communication. However, the personal representative of the deceased may **waive** the privilege by a failure to object on the proper ground, or by calling the survivor to the transaction or communication as a witness; but the testimony is confined strictly to the same transaction or communication.

*Application In Adjudicatory Proceedings*

SAPA §306(l) provides that the ALJ may admit relevant evidence, and exclude irrelevant evidence, as well as unduly repetitious evidence. Practicality also suggests that the ALJs apply the basic relevancy rule; otherwise proceedings could last for an intolerably long

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time. Whether evidence is relevant is a judgment call for the ALJ, committed to the ALJ's common sense. To the extent a liberal view of relevancy is taken, the question then becomes how much weight the admitted evidence is to be accorded.

With respect to the special relevancy rules, to the extent they are inclusive in nature, they suggest that they ordinarily should be applied in an adjudicative proceeding.<sup>22</sup> To the extent the special relevancy rules are exclusionary, they can, but not mandatorily, be applied.<sup>23</sup> In the end, admissibility is committed to the discretion of the ALJ.

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22. See, *Jean-Baptiste v. Sobol*, 209 AD2d 823, 619 NYS2d 355 (3<sup>rd</sup> Dep't 1994) (adverse inference from party's failure to testify at hearing may be drawn); *DeBonis v. Corbisiero*, 155 AD2d 299, 547 NYS2d 274 (1<sup>st</sup> Dep't 1989) (party's invocation of Fifth Amendment privilege against self-incrimination may form basis of an evidence inference at a hearing).

23. Compare, *Amato v. Department of Health*, 229 AD2d 752, 645 NYS2d 600 (3<sup>rd</sup> Dep't 1996), (character evidence, testimony of two of petitioner's patients, that they received excellent care admitted in proceeding involving petitioner's other patients) with *Freyman v. Board of Regents*, 102 AD2d 912, 477 NYS2d 494 (3<sup>rd</sup> Dep't 1984) (petitioner's prior disciplinary conviction properly admitted; character evidence rule is not applicable in adjudicatory proceedings).

## Hearsay

### *Generally*

The hearsay rule is actually two separate rules, namely, evidence which is hearsay is inadmissible unless there is an exception which is applicable. The rule is premised on a recognition that hearsay evidence itself lacks sufficient reliability or trustworthiness to be admissible, but there are instances in which the circumstances surrounding the making of the hearsay statement assure sufficient reliability or trustworthiness to warrant its admissibility.

Hearsay may be defined as a statement - an oral or written assertion, or non-verbal conduct intended as an assertion - made by a person other than while testifying at a trial or proceeding which is offered in evidence to prove the truth of the matter asserted. Expressed another way, it is evidence which seeks to establish the existence of a fact based not upon the witness's own personal knowledge or observation but on what someone else said. An example is: W, a witness, testifies as to what B said to W about D, a defendant at the trial, namely that B, who is not present to testify, saw D steal a

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car. This testimony is being offered to establish that D stole the car, the crime for which D is being tried. Such testimony would be barred by the hearsay rule.

The critical aspect of this testimony to D is what B allegedly saw. D will certainly want to know if B actually observed what is alleged he saw. How good was B's eyesight and how close was B to D when he observed the alleged conduct? How good was B's recollection of the observed conduct when he spoke to W? Does B harbor any bias or prejudice towards D? Is B a credible person? B, of course, is not available for cross-examination to test the possible problems raised, which go to B's perception, memory and veracity. Additionally, B's statements were not made under oath, and the jury cannot assess his demeanor. Permitting W to testify as to what B said would deprive D of an opportunity to test B's alleged observation.

Barring hearsay evidence expresses the common law preference that proof in civil and criminal actions be elicited under conditions where the witness is physically present before the trier of fact and subject to cross-examination by the party against whom the proof is being offered. Observance of these conditions permits the party

affected by the testimony to test before the trier of fact the trustworthiness of the witness's testimony, which includes the witness's perception, memory, narration, and more generally his veracity, i.e., is the witness telling the truth?

However, when circumstances surrounding the making of the hearsay statement tend to indicate that the hearsay is reliable or trustworthy, the statement may be admissible under an exception to the hearsay rule. The common law and legislative enactments recognize many exceptions in differing circumstances. Generally speaking, these exceptions recognize that when those requirements of the exceptions are met, it is unnecessary to cross-examine the person who made the statement or have the person take an oath in the presence of a jury. Compliance with the exceptions' requirements dispenses with the need for cross-examination and oath, as such requirements establish equivalent guarantees of reliability or trustworthiness.



*Hearsay Rule*

• *Hearsay*

Hearsay, as discussed above, has three distinct elements, namely (a) an oral or written assertion, or non-verbal conduct intended as an assertion; (b) made or done by a person other than a testifying witness, and (c) which is offered in evidence to prove the truth of the matter asserted. These elements are stated in the conjunctive.

As a result, the hearsay rule does not render inadmissible every statement repeated by a witness as made by another person. Where the mere fact that a statement was made or a conversation was had is independently relevant, regardless of its truth or falsity, such evidence is not deemed hearsay, and is otherwise admissible.

It is, therefore, important to determine the purpose for which the evidence is being offered. If the evidence is being offered to establish the truth of the matter asserted therein, it is hearsay. Where the evidence is offered for a non-truth purpose, it is not hearsay, and so long as the non-truth purpose is relevant, it may be admissible.

Some examples may be given. X said to D, "Watch out for the hole in the roadway." When offered, not to prove there was a hole in the roadway, but to prove that D was put on notice of the possible existence of a hole such evidence would not be hearsay, and would be admissible if D's notice is relevant. D said to X, "I am the Pope." When offered to prove that D is mentally unsound, and such status is relevant, the evidence is not hearsay and is admissible. In this situation, the words indicate circumstantially the state of mind of the speaker, D. Additionally, certain words, *e.g.*, the words of a libel or slander, of an offer, of an acceptance, of a bribe, when spoken, have independent legal significance. When spoken, they create legal rights and liabilities. Thus, in an action for slander, where the plaintiff alleges that the defendant called him a thief, a witness who heard the defendant make that statement may testify to it. Obviously, a statement offered for that purpose is not offered for its truth, but rather to establish the essence of the slander claim.

In these instances where the evidence is being offered to prove that a statement was made, and the making of the statement is relevant, the inability to cross-examine

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the maker of the statement is not all that significant. The reason is that the witness who said he/she heard the statement is present for cross-examination, and whether the statement was actually made can be tested through that witness.

- *Exceptions*

There are many hearsay exceptions that are recognized in New York law. They are recognized in the common law, contained in Article 45 of the CPLR as well as various statutes in the consolidated laws. A few significant ones will be mentioned here.

It is important to stress that if the evidence is hearsay, it is inadmissible, unless it satisfies one of the exceptions. Furthermore, if there are several links in the chain of hearsay (*e.g.*, A told B, who repeated it to C, who then passed it on to D), each link will have to be independently justified under an exception.

- *Admissions*

An admission is a statement or act which amounts to the affirmance of some relevant fact, where such

affirmance operates against the interest of the party making it or doing it. It is receivable only against the party who made it. A witness may testify to a party's admissions because it is generally regarded that such admission is reliable, i.e., a party would not say things about himself/herself unless they were true.

Where the act or statement of a party is received as an admission, the party against whom it is admitted has the right to offer an explanation. The weight of an admission is for the trier of fact. Thus, the party may testify that the statement was made through mistake, or that it was made without any personal knowledge, and the trier of fact may credit that testimony.

An admission may be by silence when the person hears and fully comprehends the force and effect of the words spoken and when he/she is at full liberty to reply thereto and would naturally be expected to deny it if he/she considered it false. No presumption of acquiescence would arise if the person at the time of the statement was asleep, intoxicated, deaf, unable to fully understand the language used, or incapacitated or in any way deprived of the freedom or opportunity to reply.

There are also judicial admissions, formal or informal.

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Examples of a formal judicial admission are admitting the genuineness of a paper or photograph; admission under an agreed state of facts or a stipulation (unless relieved therefrom by the court); and, facts admitted by the pleadings (complaint, answer, reply). Such admissions are conclusive of the facts admitted in the action in which they are made, unless a court orders otherwise. An informal judicial admission may be facts incidentally admitted in the course of a trial in the same or another case or facts admitted in a deposition or affidavit. Such admissions are not conclusive.

Statements made by a party's employee or agent are receivable against the party as the party's admission only if they were made within the scope of the employee's or agent's authority, i.e., when the statement was authorized to be made by the employer, expressly or impliedly.

### ■ *Business Records*

Under New York's business records exception, which is codified in CPLR 4518, any writing or record, entry, memorandum or any act, transaction, occurrence or event is admissible in evidence as proof of said act,

occurrence or event, if it was made in the regular course of any business, profession, occupation or calling of any kind and it was the regular course of such business, to make such memorandum or record at the same time of such act, transaction, occurrence or event, or within a reasonable time thereafter. It is emphasized that this exception to the hearsay rule embraces only those entries which are made systematically in the regular routine and usual course of the business, etc. It does not embrace entries made as isolated transactions or incidents or for a specific purpose which is the subject of the litigation or hearing.

Under this exception, a record in any form that describes acts, events, conditions, opinions, or diagnoses is admissible as an exception to the hearsay rule if four requirements are met. First, the record must be "made at or near the time" of the event or opinion being recorded. Second, the maker of the record must either himself/herself have personal knowledge of the matter being recorded and a duty to record it, or must have received the data from others with personal knowledge and under a duty to transmit the information. Third, the record must be kept in the course of a regularly

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conducted business activity. Finally, it must be shown that it was the regular practice of the business to make the record. The requirements of the exception guarantee trustworthiness since business records are customarily checked; the regularity and continuity of such entries produce habits of precision; the business activity functions in reliance on the records; and employees of the entity are charged with recording and reporting accurately as part of their job.

It must be recognized that this paragraph does not by itself encompass entries which, although recorded in the regular course of business, contain information supplied by an outsider not under a business duty to report. This is not, however, to say that an entry based upon information supplied by an outside volunteer can never be admitted. If the outsider's statement satisfies the requirements of another hearsay exception, the statement may be admissible.

Examples of records that may be admissible as business records are books of account; written memoranda of public officers; and, hospital records covering diagnosis, prognosis, treatment and certified bills.

■ *Public Records and Documents*

Under the common law and various specific statutory provisions, books, documents and records of a public nature required to be kept are admissible under the public records exception. Thus, birth, marriage and death certificates are specifically made admissible. Additionally, public records in general may be admissible under the business records exception.

Under recent judicial decisions, an exception has been recognized for public investigative reports as to their findings and conditions.<sup>24</sup> Such reports are presumptively reliable, but the courts have broad discretion in determining their relevancy and reliability.

■ *Prior Testimony*

Under CPLR 4517 prior testimony by a witness in an action who is now unavailable to testify is admissible provided such prior testimony was under oath and

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24. See, e.g., *Cramer v. Kuhns*, 213 AD2d 131, 630 NYS2d 128 (3<sup>rd</sup> Dep't 1995) (NHTSA report concerning kick stands on motorcycles); *Bogdan v. Peekskill Community Hospital*, 168 Misc2d 856, 642 NYS2d 478 (Sup. Ct. 1996) (OPMC findings).



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subject to cross-examination and was on the same subject matter in a prior proceeding involving the same parties. Deposition testimony of a witness is not admissible under this statute but will usually be admissible under CPLR 3117. Interestingly, testimony taken at administrative proceedings is not covered by CPLR 4517.<sup>25</sup>

■ *Excited Utterances*

New York recognizes the "excited utterance" exception. The requirements of admissibility under this exception are: (1) the occurrence of an event or condition sufficiently startling; (2) a statement brought about by the event or condition and relating to it; and (3) the absence of time to fabricate. There is no requirement that the declarant be a participant in the event or condition. Thus, the statement may be made by a bystander who observes the startling event.

Such statements are deemed to have a high degree of reliability because they are the impulsive and unreflective responses to an event, which militates against their being

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25. See, *Fleury v. Edwards*, 14 NY2d 334, 251 NYS2d 647 (1964).

made after thought and deliberation.

*Application in the Adjudicatory Proceeding*

Hearsay may be received, or it may be rejected by the ALJ in the ALJ's discretion. How should an ALJ exercise his/her discretion on hearsay objections?

The policies underlying hearsay and its exceptions give some guidance. In that regard, the hearsay rule is not a rule that operates against common sense, and when the evidence is clearly reliable, albeit hearsay, the ALJ can admit and give the evidence the weight it deserves. The indicia of reliability include—corroboration of the statement's content, in whole or in part, by other evidence; the lack of any basis from which it can be said there is a reason to falsify; and the existence of facts and circumstances which show that a hearsay exception is available. The hearsay statement may also be discounted when there appears to be no legitimate reason why the person who made the statement is not testifying. In short, the ALJ is asking whether the statement "rings true." If it does, it can be admitted, and if it does not, it can be excluded.

It should also be kept in mind that if the opposing

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party has no objection to the introduction of hearsay statements, they can be recognized as evidence. The question then becomes one of how much weight should be given to it, which is answerable by considering the above-stated factors.

Additionally, hearsay statements, such as affidavits attesting to certain facts, can be received as to collateral issues, ones not affecting the relevant issues in the proceeding.

### **Privileges**

#### *Generally*

New York law recognizes numerous evidentiary privileges. Privileges have been recognized in order to protect or encourage a specific relationship or interest as a matter of public policy. In that regard, privileges foster relationships and interests that are deemed to be of sufficient social importance so that nondisclosure of the privileged communication or matter is accepted even though the cost of doing so is to keep relevant and reliable evidence from a jury.

There are several sources of privileges. Article 45 of

the CPLR contains the principal privileges: spousal,<sup>26</sup> attorney-client,<sup>27</sup> physician-patient,<sup>28</sup> clergy-penitent,<sup>29</sup> psychologist-client,<sup>30</sup> social worker-client,<sup>31</sup> library records (CPLR 4509), and rape crisis counselor-client.<sup>32</sup> There are also many privileges throughout the consolidated laws.<sup>33</sup> Additionally, several privileges have been judicially developed: parent-child, trade secrets, official information.

As a general proposition, these privileges protect confidential communications made during the course of the protected relationships, or records or documents

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26. CPLR 4502.

27. CPLR 4503.

28. CPLR 4504.

29. CPLR 4505.

30. CPLR 4507.

31. CPLR 4508.

32. CPLR 4510.

33. See e.g., Civ. Rts. Law §79-h (professional journalists and newscasters); Civ. Rts. Law § 79-j (medical records in computer-based multi-state information system); DRL §114 (adoption records); PHL §2301(3) (records of persons with sexually transmitted diseases); PHL §3371 (certain records relating to controlled substances); Soc. Serv. L §136(2) (records of public assistance recipients).

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made that record certain information. Confidential communications are statements, oral, written or non-verbal, made in the absence of a third-party and that are not intended to be disclosed to parties outside the relationship. When a privilege is applicable, a person can refuse to disclose a communication or record, and prevent others from doing so. Even when a privilege is applicable, there are limited circumstances when the confidential communication or document can be ordered disclosed, or a person may have waived the protection of the privilege.

There is also recognized a self-incrimination privilege, under the Fifth Amendment of the United States Constitution, Art. I, §6 of the New York State Constitution, and CPLR 4502. Unlike the other mentioned privileges, the self-incrimination privilege is intended to strike a balance between the government and the individual in criminal proceedings. This privilege recognizes that a person is not required to give an answer to a question which will tend to incriminate the person or expose the person to a penalty or forfeiture.

Understanding privileges completely is a difficult task. As observed by a leading treatise, current privileges, "are

incomplete, inconsistent, undecided on significant questions, and virtually impenetrable to all except the most experienced counsel."<sup>34</sup> What follows is not intended to be a complete discussion of privileges but rather a brief introduction to the principal privileges.

*Principal Privileges*

• *Attorney-Client*

Under the attorney-client privilege, an attorney may not disclose a confidential communication made to him/her by a client for the purpose of obtaining or providing legal assistance for the client. The client, too, may refuse to make such disclosure. Only the client may waive the privilege, and upon the client's death, only a limited right of disclosure that relates to wills is permitted. The privilege does not, however, extend to communications with an attorney consulted for the purpose of committing what the client knew or reasonably should have known to be a crime or fraud.

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34. Martin, Capra and Rossi, *New York Evidence Handbook* (1997), §5.12, at pp. 303-304.

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• *Spousal*

Under the spousal privilege, neither spouse may testify to a confidential communication made by one to the other during the marriage. The communication must have been made in reliance upon the intimacy of the marital relation. Routine exchanges of business information are not within the privilege. One spouse may not waive the privilege and volunteer to disclose the confidential communication without the consent of the other spouse. After death, the surviving spouse may testify to the confidential communication, but cannot be compelled to do so.

• *Physician-Patient*

Under the physician-patient privilege, a physician, dentist, podiatrist, chiropractor, and nurse may not disclose information which was acquired during the course of treating a patient and which was necessary for treatment. Such information includes confidential communications from the patient and the health-care provider's observations of the patient. Only the patient may waive the privilege.

If the patient has died, the health-care provider must disclose the otherwise privileged information, except that which disgraces the patient's memory, where the personal representative or next of kin of the patient waives the privilege or there is no objection by any party. There are several statutory exceptions to the privilege.<sup>35</sup>

• *Psychologist-Patient*

Under the psychologist-patient privilege, a psychologist may not disclose a confidential communication made to him / her by a patient. The client, too, may refuse to make such disclosure. Only the client may waive the privilege. There are statutory exceptions.<sup>36</sup>

• *Social Worker-Client*

Under the social worker-client privilege, a social

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35. See, e.g., CPLR 4504(b) (dentists are required to disclose information necessary to identify a patient, and health-care providers must disclose information that a patient under the age of sixteen has been the victim of a crime); PHL §§3372, 3373 (reporting requirement with respect to narcotic substance abuse).

36. See, e.g., Soc. Serv. Law §§413, 415 (written reports of child abuse or maltreatment are admissible in any proceeding relating to child abuse or maltreatment).



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worker may not disclose confidential communications made to him/her by a client in the course of giving advice or planning a program for the client, or any advice given to the client. The client may waive the privilege. The exceptions to the privilege are provided: when the communication by the client "reveals the contemplation of a crime or harmful act;"<sup>37</sup> when "the client is a child under the age of sixteen and the information acquired ... indicates that the client has been the victim or subject of a crime . . .";<sup>38</sup> and when "the client waives the privilege by bringing charges against the certified social worker" which involve confidential communications.<sup>39</sup>

• *Trade Secrets*

The common law recognizes a privilege which allows the owner of a trade secret to refuse to disclose and prevent others from disclosing his/her trade secret.<sup>40</sup> A

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37. CPLR 4508(a)(2).

38. CPLR 4508(a)(3).

39. CPLR 4508(a)(4).

40. See, *Drake v. Heiman*, 261 NY 414, 185 NE 685 (1933).

trade secret is defined as a formula, pattern, device, or compilation of information which is not known by others and gives the owner a competitive advantage over others who do not know it.

The privilege is not an absolute one as a court upon a sufficient showing of need can disclose it to another person. Such disclosure, however, must be conditioned upon the presence of safeguards which will prevent the information from being used by the other party or from becoming available to persons other than the parties involved.

• *Official Information*

Under the common law, confidential communications exist "between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged."<sup>41</sup> A balancing approach is used to determine if disclosure is warranted.<sup>42</sup>

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41. *Cirale v. 80 Pine St. Corp.*, 35 NY2d 113, 117, 359 NYS2d 1, 4 (1974).

42. See, *World Trade Center Bombing Litigation Steering Com. v. Port Auth. of N.Y. and N.J.*, 93 N.Y.2d 1 (1999).

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However, the Freedom of Information Law (FOIL)<sup>43</sup> supersedes this privilege to the extent that records that FOIL requires to be disclosed cannot be protected from disclosure under the privilege.<sup>44</sup>

• *Self-Incrimination*

Under the self-incrimination privilege, a witness is not required to give an answer to a question which will tend to incriminate the witness or expose the witness to a penalty or forfeiture. A witness must invoke the privilege personally, but a party may invoke the privilege through the party's attorney. The privilege extends to the witness's books and papers. However, a person who holds books and records in a custodial capacity may be compelled to surrender them, even though they tend to incriminate the person. If the witness's testimony would tend to incriminate his/her employer, but not him/her personally, the witness cannot refuse to testify.

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43. N.Y. Pub. Off. Law §84.

44. See, *Doolan v. Board of Coop Educ. Serv.*, 48 NY2d 341, 422 NYS2d 927 (1979).

*Application At The Adjudicatory Proceeding*

SAPA §306(l) compels the ALJ to give effect to privileges. When an objection to offered evidence is made on the basis of a privilege, the ALJ must determine whether the cited privilege encompasses the testimony or document, and if so, whether there has been a waiver of the privilege. If the privilege is applicable and there has been no waiver, the ALJ must sustain the objection.

**Opinions**

*Generally*

As a general proposition a witness may testify only to the facts that he/she perceived. Opinions or conclusions, based on reasoning from those facts, may not be given. Recognizing that opinion testimony can be helpful to the trier of fact in resolving issues fairly and expeditiously, the common law has provided that in certain instances lay witnesses and expert witnesses may give opinion testimony.

*Opinion Rule*

• *Lay Witnesses*

A lay witness may give his/her opinion, based upon facts that the witness has personal knowledge of, provided that such opinion is based upon common ordinary knowledge, without special skill or background, and it is unreasonable to expect the witness to describe all the facts which would permit the trier of fact to draw the conclusion. The rule is liberally construed, and lay witnesses may give their opinion on a wide variety of subjects.

They include:

■ **Observations** - A lay witness may give his/her opinion as to such matters as color, weight, distance, size, quantity, state of emotion, apparent physical condition, identity and likeness, estimated age, rational or irrational conduct, handwriting.

■ **Sensations** - A lay witness may describe his/her own sensory experiences, such as taste, smell and touch. He/she may testify as to heat or cold or electric shock.

■ **Emotions** - A lay witness may give his/her opinion of another person's display of emotion. He/she may state, for example, that one person's contact with another was friendly or hostile.

■ **Intention** - Where the actual performance of an act is not disputed, but its effect or genuineness depends upon the intent with which it was done, the one who did it may testify as to what his/her intention was at the time. However, a lay witness may not testify to another person's unexpressed intent.

■ **Physical or Mental Condition** - A lay witness may describe another person's apparent physical condition, such as general strength, vigor, illness or any other characteristics that anyone can see; or whether a person appeared to be intoxicated. The necessary foundation for an expression of opinion as to apparent intoxication of another may include testimony that the person in question smelled of alcohol, was incoherent in speech, his/her eyes were glassy or bloodshot, he/she could not stand or walk without assistance, etc. He/she may also testify as to

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rational and irrational conduct of a person.

■ **Speed** - A lay witness may testify that a vehicle was moving rapidly or slowly. However, if he/she testifies as to the rate of speed, he/she must first show that he/she had some experience in observing the rate of travel of vehicles or give some other satisfactory reason or basis for his/her opinion.

■ **Age** - A lay witness may give his/her estimate of another person's apparent age. However, the facts and circumstances upon which his/her opinion is based must be given and the witness should first describe the person's appearance and only then give his/her own opinion as to his/her age.

■ **Identification** - The identification by a lay witness of someone whom he/she knows or has seen before, or of an object, is proper, even though it may not be positive and absolutely certain. Although the identification need not be beyond any doubt, it must, nevertheless, be based upon some convincing and reliable sensory impression, the description of which raises the likelihood that it is the same person or object.

■ **Identification of Voice** - A lay witness may identify the voice of another person who is heard but is out of sight, provided there is some basis for the identification, *e.g.*, that the witness heard the person speak or another occasion, prior or subsequent, and, for this reason, recognized the voice at the time in question.

■ **Identification of Handwriting** - A lay witness may identify the handwriting of another person, provided there is basic showing of some familiarity with the handwriting, *e.g.*, that the witness has observed in person writing, or that the witness has received other writings from the person in circumstances where it is clear that the person made those other writings.

• *Expert Witness*

A witness qualified as an expert may be permitted to give an opinion within that area of qualification where the



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underlying subject matter of the opinion is beyond the understanding of the ordinary juror or outside lay comprehension. The subject matter calling for expert testimony may be in the fields of science, engineering, technology, mechanics, medicine, business or other matters requiring specialized knowledge.

To ensure that there is relevancy and reliability in expert opinions, the New York courts permit a witness to testify as an expert and give an opinion where four basic conditions are met. First, as stated before, the underlying subject matter of the opinion involves an area which is beyond the ken and understanding of the average juror. Second, the witness must be qualified as an expert to give an opinion within that subject matter. Third, the basis of the opinion must be facts known to the witness or accepted by similar experts in the field as reliable in forming an opinion, and the methodology utilized must be generally accepted within the expert's field. Fourth, the witness must have reasonable certainty as to his/her opinion.

As to the first requirement, there is not always a clear line separating matters within a layperson's comprehension from those which only an expert can

understand. In essence, the resolution turns upon the need for the testimony, *i.e.*, whether the expert opinion will supply jurors with knowledge they do not have. Resolution is in the court's discretion.

With respect to qualifications, it must be shown that the witness by reason of his/her education or practical experience possesses special knowledge or skill that pertains to the subject matter of his/her testimony. It must be emphasized that the witness may qualify as an expert by formal training or education, *i.e.*, medical school, or through on the job work and training, *e.g.*, mechanic. Whether the witness is qualified to testify as an expert is a question for the court to determine in the exercise of its discretion.

The third requirement demands a showing that the witness is basing his/her expert opinion upon an acceptable basis and is employing an acceptable methodology in reaching a conclusion from that basis. As to the former, it can be satisfied by a showing that the witness is basing his/her opinion upon personal knowledge of facts, *e.g.*, physician who examines a patient may testify as to what his/her observations reveal, or facts presented at trial; or, upon facts presented

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at trial and made known to the witness, *e.g.*, witness attends trial and perceives the evidence presented, or information is conveyed by means of a hypothetical question, which takes into account evidence presented at the trial; or upon facts and data presented to the witness outside of court, provided evidence is presented which establishes the reliability of such out-of-court material, and that experts in the field rely on such material as a basis for opinion.

With respect to methodology, when the opinion is derived with the use of novel scientific theories or techniques, there is a need for a showing that such theories or techniques are generally accepted in the relevant scientific community. In that regard, New York follows the rule of *Frye v. United States*,<sup>45</sup> as enunciated by recent court decisions.<sup>46</sup> Under this approach, the trial court determines whether most scientists in the relevant community believe that the theory or technique produces or leads to reliable results, and not whether the theory or technique is actually reliable. The New York

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45. 293 F. 1013 (D.C. Cir. 1923).

46. See, *e.g.*, *People v. Wesley*, 83 NY2d 417, 611 NYS2d 97 (1994) (DNA evidence).

rule differs from the federal rule, as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>47</sup> As noted in a leading New York treatise, the *Frye* standard has been applied by the New York courts:

"to a wide range of scientific evidence including DNA profiling, rape trauma syndrome, hypnotically restored testimony, polygraph test results, bite mark identification, hair analysis to discover cocaine use, voice spectrographica analysis, and expertise on the unreliability of eyewitness identification.

Some methodologies, such as DNA profiling, rape trauma syndrome, and bite mark identification, have been found generally accepted as reliable by the relevant scientific community and hence admissible under *Frye*. Others, such as polygraph test results and hypnotically refreshed testimony, have been found wanting."<sup>48</sup>

With respect to the fourth requirement, it is intended to ensure that the opinion is not based on speculation. An expert is no more entitled to speculate than a layperson.

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47. 113 S. Ct. 2786 (1993).

48. Martin, Capra and Rossi, New York Evidence Handbook §7.23, at pp. 645-646.

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### *Application At The Adjudicatory Proceeding*

Opinion evidence is admissible at the discretion of the ALJ. Where the opinion is helpful to the resolution of the issues, it should be admitted especially expert.<sup>49</sup> On the other hand, where the opinion is not helpful, speculative or otherwise lacks a rational basis, it may be excluded.

### **Impeachment**

#### *Generally*

A witness's credibility, i.e., whether the witness's testimony is believable or unbelievable, will depend upon two considerations: the accuracy of what the witness says, i.e., the witness's opportunity and capacity to perceive, together with the capacity to recollect and communicate, and the truthfulness of the witness, i.e., the witness's veracity. The proper scope of cross-

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49. See, e.g., *City of Schenectady v. McCall*, 245 AD2d 708, 666 NYS2d 754 (3<sup>rd</sup> Dept. 1997) (expert testimony by both parties regarding whether alleged injury permanently disabled one from employment); *Romanello v. Adduci*, 234 AD2d 299, 651 NYS2d 64 (2<sup>nd</sup> Dep't 1996) (expert testimony that licensed repair shop performed nonquality work); *Enu v. Sobol*, 171 AD2d 302, 576 NYS2d 378 (3d Dep't 1991) (general surgeon may testify regarding urologist's treatment of patients); *Sheehan v. Passidomo*, 122 AD2d 869, 505 NYS2d 915 (2<sup>nd</sup> Dept. 1986) (DMV automotive facilities inspector's opinion admissible).

examination covers matters affecting the witness's credibility on both considerations.

Impeachment is the particular form of cross-examination whose purpose is to attack the witness's credibility and persuade the trier of fact that the witness's testimony should not be credited. Generally, any matter that has tendency in reason to discredit the witness's credibility may be brought to the attention of the trier of fact. There are six principal modes of impeachment recognized by the New York courts.

*Modes of Impeachment*

• *Capacity Defects*

Defects or limits in sensory or mental capacities of a witness at the time of the relevant event bear on the witness's credibility. Accordingly, when there is a good faith basis to do so, the witness can be cross-examined as to weakness of vision or hearing, influence of drugs or alcohol, physical or mental illness, and other matters that may affect the witness's ability to perceive and remember accurately the matters about which he/she testified. Additionally, such matters can be established by

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testimony from other witnesses or documents. The extent to which this mode of impeachment can be used rests in the discretion of the court.

• *Partiality*

The fact that the witness may not be impartial, but rather harbors a partiality to the party calling the witness, is generally viewed as bearing on the witness's credibility. Matters that show bias, intent, or hostility can be inquired into on cross-examination provided there is a good faith basis to do so. Among such matters are personal relationships between the party and the witness; employment between the party and the witness; a financial stake in the outcome of the action; enmity between the witness and the other party; and corrupt pressure placed upon the witness by the party calling him/her. Such impartiality can be shown by other witnesses or documents. The extent to which a party uses this mode is subject to the trial court's discretion.

• *Conviction Of A Crime*

It is generally regarded under New York law that a

person who has been convicted of a crime may be less credible than a person who has not been convicted of a crime. Thus, the fact that a witness had previously been convicted of a crime either by eliciting an admission of such conviction on cross-examination or by introduction of a certificate of such conviction may be inquired into.<sup>50</sup> It must be stressed that only convictions may be inquired into and only convictions of crimes. Thus, questioning as to an arrest or indictment is not permitted, nor is questioning as to traffic infractions, offenses (except in criminal cases), juvenile delinquency and youthful offender convictions permitted. It is also important to note that any conviction for a crime can be inquired into, even though it does not directly go to veracity, i.e., murder, robbery. However, the court in its discretion may bar the examination where it finds that the conviction due to its remoteness or nature lacks substantial probative value, or is unduly prejudicial to a party.

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50. See, CPLR 4513.



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• *Misconduct*

New York law has long recognized that a witness may be cross-examined, upon a good faith basis, about any immoral, vicious or criminal act engaged in by the witness if the act evidences moral turpitude. It is not necessary that such acts be the subject of a criminal conviction or that they relate directly to veracity, as engaging in such acts itself suggests a willingness to lie. Such acts include use of aliases; use of drugs; use of disrespectful language to a superior officer; and criminal activity. As with criminal convictions, the court has the discretion to prohibit such examination, especially where the questioning is an attack on character in general.<sup>51</sup> Additionally, when the witness denies engaging in the charged conduct, the cross-examination may not show otherwise by the introduction of other testimony or documents.

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51. See, e.g., *Gutierrez v. City of New York*, 205 AD2d 425, 613, NYS2d 627 (1<sup>st</sup> Dep't 1994) (cross-examination about receipt of public assistance, legitimacy of children and immigration status improper); *Catalan v. Empire Storage Warehouse, Inc.*, 213 AD2d 366, 623 NYS2d 311 (2<sup>nd</sup> Dep't 1995) (cross-examination about personal bankruptcy improper).

• *Reputation For Truth*

The witness may be shown to have a bad reputation for veracity. This is done by calling a witness who can testify that he/she is familiar with the witness's reputation for veracity, and that the witness has a reputation for being an untruthful person. Such reputation witness may not refer to specific acts committed by the attacked witness, nor may the reputation witness give his/her own personal opinion of the attacked witness's lack of veracity. However, the reputation witness can state that he/she would not believe the attacked witness under oath.

• *Prior Inconsistent Statements*

If the witness has made a statement prior to the trial which is inconsistent with his/her trial testimony, the making of this inconsistent statement can be shown. The theory is that when a witness has given conflicting accounts of the same matter or event, the witness's testimony is not credible, either because the witness may be lying or because the witness is careless or has an uncertain memory. The making of the prior inconsistent

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statement can be explored on cross-examination. If the making of the prior inconsistent statement is denied, it may be proven by the introduction of other evidence, provided it is relevant to an issue in the case or relates to bias or capacity defects.

*Application At The Adjudicatory Proceeding*

Whether to allow the use of one of the modes of impeachment and/or to place limits thereon is committed to the discretion of the ALJ. Where the cross-examination will involve excursions into matters which do not have any real bearing upon credibility, such cross-examination can be prohibited or limited.<sup>52</sup> However, where the questioning goes to expose partiality, it should not be barred, but it can be limited.<sup>53</sup>

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52. See, e.g., *Gross v. DeBuono*, 223 AD2d 789, 636 NYS2d 147 (3<sup>rd</sup> Dept. 1996) (ALJ acted well within his discretion in limiting petitioner's cross-examination with regard to matters such as the witness's marital status, sexual history, prior injuries and legal proceedings); *Matter of Epstein v. Cort Watch Co.*, 7 AD2d 663, (3<sup>rd</sup> Dep't 1958) (ALJ did not act improperly in not requiring witness to answer questions regarding her personal history and relationship with decedent, whose widow was seeking death benefits).

53. See, e.g., *Davis v. Alaska*, 94 S. Ct. 1105 (1974).

### **Authentication**

#### *Generally*

Authentication refers to the requirement that before any relevancy can be ascribed to an offer of evidence, it must be established that the evidence, be it documentary evidence, real evidence or demonstrative evidence, or a conversation, or a test result, is what the offer or the evidence claims it to be. To illustrate, a purported letter of a party is not relevant unless it is properly shown that the party who signed the letter actually wrote the letter, nor is a telephone conversation offered to show knowledge on the part of a speaker relevant unless the person speaking is sufficiently identified. In both cases, relevance is conditioned upon the fulfillment of a condition of fact, in the former establishing the party as the author of the letter, in the latter the identification of the speaker.

Whether the offered evidence is what it purports to be can be established by other evidence sufficient to sustain a finding of its genuineness or by reason of a statutory procedure which may make specified evidence "authenticated" upon certain conditions being complied

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with. Once the offered evidence is found by the court to be what it purports to be, the evidence shall be admitted for consideration by the trier of fact. The fact that the court permits the evidence to be admitted does not necessarily establish the genuineness of the evidence and does not preclude an opposing party from introducing contradictory evidence. All that the court has determined is that there has been a sufficient showing of the genuineness of the evidence to permit the trier of fact to find that it is genuine. The trier of fact independently determines the question of genuineness, and, if the trier of fact does not believe the evidence of genuineness, it may find that the evidence is not genuine, despite the fact that the court has determined that it was "authenticated" or "identified."

### *Specific Applications Of Authentication*

- *Government Records and Certain Private Records*

Government records are admissible by having a copy of the record certified in compliance with CPLR 4540, which certification attests to the authenticity of the copy of the record and that such copy is an accurate copy of

the original record. Certain private documents such as hospital records or commercial documents can be authenticated by similar certification, as established by specific statutory enactments.

• *Documentary, Real and Demonstrative Evidence*

Generally, documentary evidence, such as letters and records, can be authenticated by testimony from a witness who saw the document executed or is familiar with the signature or handwriting on the document, or by expert testimony. Real evidence, such as the murder weapon, can be authenticated by testimony from a witness with personal knowledge concerning the item that the offered item is in fact the murder weapon. Demonstrative evidence, such as a photograph or a diagram, can be authenticated by testimony from a witness with knowledge concerning the scene or event depicted in the photograph or diagram that it is a fair and accurate representation of that scene or event.

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- *Telephone Conversations and Audio Recordings*

Oral statements or conversations, like written communications, are only relevant if the person who purportedly made the oral statement or engaged in the conversation, was in fact the person who made such oral communication. Authentication problems arise when the witness who heard the oral communication was not physically present with the alleged speaker, a situation which will arise with telephone conversations and audio recordings. Authentication can be established by testimony from a witness who is familiar with the voice based on prior dealings with the alleged speaker, or by expert testimony.

- *Mechanical Test Results*

The results generated by mechanical tests or devices, such as Breathalyzer tests, blood-alcohol concentration (BAC) tests, Enzyme Multiplied Immunvassay Test (EMIT), blood grouping tests, and the Alco-Sensor Breath Screening test, are admissible so long as it is shown that the results produced are accurate. This authentication process will involve three steps. First, the reliability of

the principles underlying the machine or device and that they are capable of producing accurate results must be demonstrated, which can be shown by the taking of judicial notice, *e.g.*, the reliability of radar principles has been judicially noticed, or by independent proof. Where the machine involves novel scientific theories, the *Frye* principle becomes involved. Second, it must be shown that the machine or device was working properly when the result was obtained, and third, that the machine or device was properly used or administered.

• *Application To Adjudicatory Proceedings*

Since authentication is an aspect of relevancy, the ALJ should follow the basic authentication evidentiary rules, with an objective view as to whether the requirement is met. With respect to test results, the courts have cautioned that where there is an absence of proof that the machine or device producing the result produces accurate results or that their underlying theories are not generally accepted by the relevant



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scientific community, the test results should not be admitted.<sup>54</sup>

**Best Evidence**

*Generally*

The best evidence rule requires that when a party seeks to prove the contents of a writing, recording or photograph, the party must produce the original of the writing, recording or photograph or explain its absence before other evidence establishing its contents may be admitted. The underlying principle of this rule is intended to prevent fraud, fabrication, or mistake and to eliminate uncertainties that may result from faulty memories.

Thus, when a party offers oral testimony of the contents of a record, the best evidence rule will require that the original record be produced. If the original is not produced, a valid legal reason must be given to account for the fact that the original cannot be produced. A

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54. See, e.g., *Sowa v. Looney*, 23 NY2d 329, 296 NYS2d 760 (1968) (polygraph test result should not have been received into evidence at the police disciplinary hearing as there is a lack of general scientific recognition of the efficacy of polygraph tests); *Lahey v. Kelly*, 71 NY2d 135, 524 NYS2d 30 (1987) (EMIT drug test results shown to be reliable and properly admitted into evidence by ALJ).

proper foundation must be laid for the receipt of the oral evidence, such as showing that the original record has been destroyed or lost; or that it is unobtainable because it is out of the jurisdiction; or that it is in the adverse party's possession or control and he has refused to produce it. The oral evidence of the contents of a record may not be given until its absence is satisfactorily explained.

When the offered evidence is a photographic copy of a writing or a copy made by a similar process that accurately reproduces the original, CPLR 4539(a) provides that such copies if made in the regular course of business are as admissible as the original. Additionally, there are numerous statutory provisions which provide for the admissibility of copies of public records provided they are certified to be accurate copies of the original, a subject discussed in the authentication section of this appendix.

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## Appendix A: Evidence

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### *Application In Adjudication Proceedings*

The application of the best evidence rule is committed to the discretion of the ALJ.<sup>55</sup> Where there is little or no doubt as to the accuracy of a copy, or the oral summary of the contents of a writing, the best evidence rule need not be strictly followed. However, where there is doubt as to the accuracy of the copy of the orally recited contents, insistence upon the following of the best evidence rule may be appropriate.

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55. See, e.g., *R&D Equipment Leasing Company, Inc. v. Adduci*, 220 AD2d 900, 632 NYS2d 332 (3<sup>rd</sup> Dep't 1995) (photocopies of weight certification documents admitted).

**Appendix B:**

**Integrating Mediation into the Administrative Process**

**Appendix B: Integrating Mediation into the Administrative Process**

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## Appendix B: Integrating Mediation into the Administrative Process

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### Introduction

Government agencies have found a multitude of ways to put ADR to work for them. What follows are two examples:

- two New York agencies, one of them an old hand at ADR (the **Department of Public Service**, which has used it since the late 1970's), and one newcomer (the **Department of Environmental Conservation**, which launched its ADR program in 1996).

### Department of Public Service<sup>1</sup>

The Department of Public Service (DPS) regulates the rates and services of public utilities that provide electricity, gas, telecommunications, steam, water, and cable. It aims "to ensure that New Yorkers have access to competitively priced, high quality utility services provided safely, cleanly, and with maximum consumer choice," in the words of its mission statement. The governing board is the Public Service Commission (PSC).

The PSC issued its first procedural guidelines for settlements in 1983 after a number of successful

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1. Administrative Law Judge Jaclyn A. Brillling of the Department of Public Service generously assisted with this section.

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**Appendix B: Integrating Mediation into the Administrative Process**

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settlement agreements had emerged in the course of various Commission proceedings. Parties had developed an increasing preference for such settlements as a way of avoiding unnecessary litigation. When the Commission reviewed the guidelines in 1990, it determined a need to balance the flexibility of these guidelines with formal regulations relating to notification and confidentiality in settlement proceedings, in order to protect the rights of parties and "preserve the integrity of the negotiating process."<sup>2</sup> Reluctant to convert the guidelines into regulations that would inhibit flexibility and innovation in future negotiations, the Commission opted to maintain separate guidelines, but modified them to specify how the Commission could comment on issues and identify concerns to consider in negotiations, and to set up a procedure to follow when the Commission rejected all or part of a settlement.

Therefore, the regulations adopted in 1992<sup>3</sup> address utilities' and the Commission's responsibilities in assuring that all appropriate parties will be notified in

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2. Op. 92-2, Pub. Serv. Comm. (1992 WL 487888 (N.Y.P.S.C.)).

3. 16 NYCRR Part 3.9.

impending negotiations, and the confidentiality of settlement discussions. The modified guidelines adopted at the same time address the following issues: what supporting documentation must accompany proposed settlements when submitted to the Commission for approval; when notice is *not* required (*e.g.*, for caucuses among parties of common interest); the role and responsibilities of the ALJ; the scope of settlements; the responsibilities of the parties to develop the record; the Commission's standards of review of proposed settlements, and procedure for remand or commentary in the event that the Commission modifies or rejects a settlement.

*Type of Case*

Among the types of cases in which these guidelines have worked effectively are those stemming from deregulation of utilities, where a competitor utility seeks access to channels that are currently under the control of an incumbent utility; cases between a utility and the PSC, as with an enforcement case or when a utility files a new rate tariff with the Commission; or cases stemming from a suit filed by one or more consumer groups.



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**Appendix B: Integrating Mediation into the Administrative Process**

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Generally there are multiple interested parties or intervenors are also involved, such as the NYS Consumer Protection Board, the Attorney General, or the Public Utility Law Project of New York. At least 80% of the cases that come before the DPS involve some sort of ADR.

*Scheduling*

The process begins when a case is filed with the Department and an ALJ assigned by the Chief ALJ. In pre-conference telephone calls and at conference, the ALJ and the parties identify issues susceptible to resolution through negotiation. It is estimated that about 60% of the time the initiative comes from the parties themselves. If, as is often the case, the dispute involves numerous issues and/or many parties, it will follow parallel tracks of litigation (or arbitration, for cases occurring under the Telecommunications Act of 1996) and ADR.

Issues severed from litigation are assigned a time frame for resolution. There are no hard and fast rules whether ADR will proceed concurrent with litigation or proceed in alternating steps. It has been handled both ways, depending on the case. When an issue in litigation is dependent on the outcome of a negotiated issue, there are

several choices: decide all other litigated issues, wait for settlement, or start another proceeding. When issues move into ADR, the parties are given the opportunity to request a different Administrative Law Judge for ADR proceedings. The form of ADR to be used is determined by the ALJ with the input and agreement of the parties.

The ALJ may require periodic progress reports on negotiations and will relay to the parties any specific concerns that the Commission wishes to be addressed. When a proposed settlement has been reached, the parties have the burden of proving to the Commission that the settlement is in the public interest, and must provide the Commission with a complete record in support, including details of the agreement, the underlying rationale, and how the settlement differs from their original litigation positions. The Commission may provide guidance on what information is necessary for its review of the settlement. The ALJ prepares an independent review on the issues to help the parties determine their settlement and litigation risks. Parties not participating in the settlement may oppose it by developing their positions through cross-examination and affirmative testimony before the PSC.

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**Appendix B: Integrating Mediation into the Administrative Process**

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The Commission's standard of review for a settlement requires that the terms of such a settlement must be in the public interest:

"A desirable settlement should strive for a balance among (1) protection of the ratepayers, (2) fairness to investors, and (3) the long-term viability of the utility; should be consistent with sound environmental, social, economic policies of the Agency and the State, and should produce results that were within the range of reasonable results that would likely have arisen from a Commission decision in a litigated proceeding.... The Commission shall give weight to the fact that a settlement reflects the agreement by normally adversarial parties."<sup>4</sup>

In the event that the Commission modifies or rejects a settlement, the proceeding is remanded. When remand is not possible, the settling parties "will generally be given an opportunity to comment on whether [the Commission's] intended resolution alters their positions on the settlement."<sup>5</sup>

*Confidentiality*

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4. Procedural Guidelines for Settlements, Op. 92-2, Pub. Serv. Comm. (1992 WL487888 (N.Y.P.S.C.)).

5. *Id.*

The Public Service Commission has adopted regulations assuring confidentiality of settlement negotiations at 16 NYCRR §3.9(d):

Confidentiality of settlement discussions. No discussion, admission, concession or offer to stipulate or settle, whether oral or written, made during any negotiation session concerning a stipulation or settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties, their representatives and other persons attending settlement negotiations shall hold confidential such discussions, admissions, concessions, and offers to settle and shall not disclose them outside the negotiations except to their principals, who shall also be bound by the confidentiality requirement, without the consent of the parties participating in the negotiations. The Administrative Law Judge assigned to the case, or the director of the appropriate division if no judge has been assigned, may impose appropriate sanctions for the violation of this subdivision which may include exclusion from the settlement process.

*Training*

Every ALJ at the Department of Public Service is trained in ADR to varying degrees. The basic requirement is for 40 hours of training. The DPS offers its own ADR

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**Appendix B: Integrating Mediation into the Administrative Process**

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courses, with a focus on mediation and associated topics such as facilitative mediation. The course is 60 to 70% agency-specific. ALJs may be sent out for training to the Community Dispute Resolution Centers, where they enter at the level of observer, and move into mentored mediation. Through service as volunteer neutrals for the Community Dispute Resolution Centers (CDRCs), ALJs gain continuous training. The skills developed at the CDRCs may be used at the DPS, and vice-versa, because DPS judges' experience with multi-party mediation is helpful to the CDRCs as they are increasingly called upon to do more in this area.

**Department of Environmental Conservation<sup>6</sup>**

The Department of Environmental Conservation (DEC) launched its environmental dispute resolution process in 1996, underscoring its commitment to the initiative by adding "and Mediation Services" to the title of its Office of Hearings. The intent was to shift emphasis away from strict enforcement toward helping the regulated community comply with environmental regulations. Increased interest

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6. Thank you to Administrative Law Judge Daniel E. Louis of the Department of Environmental Conservation for his assistance with this section.

in the carrot rather than the stick brought along an interest in cultivating the ground within the permit and enforcement processes – communicating, problem-solving, negotiating – without losing sight of the absolute requirements for compliance and environmental quality.

Corollary to the shift in emphasis toward compliance was a re-thinking of how to measure success. Is success commensurate with cases brought or settled, or with reduction of adverse environmental impact? A penalty, "success" in terms of the first, needs more if it is to satisfy the second.

Enter ADR as a complement to traditional adjudicatory processes and unassisted negotiations. Because mediation emphasizes underlying interests (often non-legal) rather than "rights," requires parties to talk to each other, and helps them forge a mutually acceptable solution, it may bring flexibility to parties' negotiation strategies and help produce an agreement that accommodates both the public interest and the private interest.

Getting an ADR initiative actually launched at the DEC involved: identifying internal and external "customers" and their needs, designing an ADR mechanism that best

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responded to such parties and needs, constructing a handbook for mediators, creating informational materials for the public, and marketing the program. The DEC's Office of Hearings and Mediation Services (OHMS) assembled a guidance team of key players inside and outside the DEC to provide advice on the work plan. These included representatives of DEC executive and program areas, the environmental community, and the regulated business and commercial community. OHMS took to the road, visiting the nine regions of the State to promote ADR and seek ideas on how to put it to use – and encountered unexpected enthusiasm among technical staff, who have frequent opportunities to negotiate technical issues in the course of their duties. The OHMS team posted its work on the DEC's Intranet web site. ALJs and selected DEC staff underwent ADR training.

A key feature of the DEC's ADR program is its method of case selection. Rather than place certain categories of cases into mandatory mediation or a mediation screening track, DEC allows its regional attorneys broad discretion

on when to proceed with mediation, so that ADR case selection reflects regional values and culture. What works in New York City might not work in the Adirondacks.

The OHMS ADR program primarily employs mediation, as its name suggests, although OHMS staff is prepared to conduct any form of ADR as circumstances require, including early neutral evaluation, and use of an ombudsperson. Although growth of the ADR program was still slow, the 85% settlement rate to date was highly encouraging.

The OHMS is optimistic about ADR's applications to environmental problem-solving. ADR is flexible and creative and makes room for ideas from multiple interests. ADR can facilitate compliance through an interdisciplinary approach, when technical, legal, environmental, and public policy concerns jostle for recognition, and whether in permit (developmental) or enforcement actions.

*Type of Case*

In referring cases to ADR, OHMS suggests considering four broad attributes:



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**Appendix B: Integrating Mediation into the Administrative Process**

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1. "Those that cannot be tried," involving "many parties with conflicting interests and positions", the prospect of years of litigation "with no real 'winners,'...[p]olicy questions...[and/or] novel issues";
2. "Those that do not absolutely require an attorney," where "technical staff ...[can] exercise its program responsibilities through use of mediation";
3. "Those where 'one last chance' is offered," such as those involving "uncollectible judgments, insufficient resources to remedy the problem in a way satisfactory to DEC, or where the action is too small to warrant use of litigation, or where a personality conflict between the respondent and staff has brought matters to a stalemate or impasse"; and
4. "Those that would benefit from long-term relationships by using a non-litigious option," where "disputants need or have an ongoing long-term relationship that requires understanding each other's business."<sup>7</sup>

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7. N.Y.S. DEPT. OF ENVIRONMENTAL CONSERVATION, OFFICE OF HEARINGS AND MEDIATION SERVICES, THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN DEC 15 (1997), <http://www.dec.state.ny.us/ohms>.

Among the types of cases that the OHMS suggests to the public may be suitable to ADR are:

1. environmental enforcement, characterized by a limited number of parties, negotiation of remedial actions to be taken, and amount of penalty to be paid;
2. resource or pollutant allocations, where a finite amount must be divided among the parties;
3. permit applications, which often involve engineering and scientific factors whose application must be realistic and enforceable; and
4. nuisance issues, balancing such factors as operating hours, truck routes, dust and noise control concerns.<sup>8</sup>

*Neutrals*

Most ADR is conducted by staff ALJs, although in some cases, technical staff trained in ADR may use it, as explained above. Parties may provide an outside mediator by mutual agreement and at their own expense; however, few do so. Depending upon the issue, general and/or technical subject matter expertise may be necessary so that the neutral may be most effective in helping the

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8. N.Y.S. DEPT. OF ENVIRONMENTAL CONSERVATION, DEC'S ENVIRONMENTAL DISPUTE RESOLUTION PROGRAM, <http://www.dec.state.ny.us/ohms/dec-adr.htm>

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parties establish priorities and ensuring that all possible avenues are fully explored.

ADR training conducted by the Government Law Center at Albany Law School included 25 hours of basic environmental mediation, followed by 25 hours of advanced training. Supplemental training has been provided to DEC ALJs.

*Confidentiality*

Evidence arising out of settlement discussions (and mediation, considered a variety of settlement discussion) may not be admitted in subsequent administrative or court proceedings without permission, unless the material is otherwise discoverable. Confidentiality is unlikely to pose a problem with regard to documents, as a considerable amount of documentation often accumulates prior to the time the case is filed. Much pertinent information is thus discoverable from sources outside of mediation.

With the consent of all parties, the presiding ALJ may also mediate.

*Scheduling*

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The proceeding is usually delayed for ADR; however, the DEC prefers to begin ADR earlier in the case, before there is any question of delaying other proceedings.

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**Appendix C:**  
**List of Agency Hearing Regulations**

**Appendix C: List of Agency Hearing Regulations**

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## **Appendix C: List of Agency Hearing Regulations**

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The following list was developed to assist ALJs in locating primary authority relevant to hearings held in their agencies. It includes citation to hearing related regulations as found in the New York Codes, Rules and Regulations volume, as well as statutory citations, where applicable. The subject matter of the regulations referenced is noted where not apparent from the name of the agency itself, and comments on the regulations or other hearing related matters within the agency are noted.

### **Adirondack Park Agency**

**NYCRR Citation:** 9 NYCRR Part 581

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:** most hearings are permit hearings;  
DEC's ALJs sit at public hearings and review proposals



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**Appendix C: List of Agency Hearing Regulations**

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**Agriculture, Department of**

**NYCRR Citation:** 1 NYCRR Part 367

**Statutory Citation (if any):**

**Subject Matter:** food processing

**Comments:** shares outside hearing officers with DEC and State; otherwise deputy attorneys handle simple food processing hearings

**Alcohol & Substance Abuse Services, Office of**

**NYCRR Citation:** 14 NYCRR Part 8

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:** administrative hearings are rare

**Alcoholic Beverage Control, Division of**

**NYCRR Citation:** 9 NYCRR Parts 52 and 54

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:**

**Audit & Control, Office of**

**NYCRR Citation:** 2 NYCRR Part 317

**Statutory Citation (if any):** Soc Security Law §§ 74; 374

**Subject Matter:** retirement

**Comments:**

**Banking, Department of**

**NYCRR Citation:** 3 NYCRR Sup Proc G 111

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:** outside hearing officers; staff attys do small matters in-house; ethics - recusal per CJC at G 111.2(b)(2)

**Comptroller, Office of**

**NYCRR Citation:** 2 NYCRR Part 118 et seq

**Statutory Citation (if any):**

**Subject Matter:** Unclaimed Funds and Property

**Comments:** Hearings are rare

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**Appendix C: List of Agency Hearing Regulations**

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**Correctional Services, Department of**

**NYCRR Citation:** 7 NYCRR Part 253 et seq

**Statutory Citation (if any):**

**Subject Matter:** inmate discipline

**Comments:**

**Court Administration, Office of**

**NYCRR Citation:** 22 NYCRR §§ 25.29, 205

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:** no statutory hearings: former 25.29 hearings  
are now contract hearings

**Crime Victims Board**

**NYCRR Citation:** 9 NYCRR Part 525

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:**

**Education, Department of**

**NYCRR Citation:** 8 NYCRR §§17, 3.3

**Statutory Citation (if any):** Education Law §6510

**Subject Matter:** office of professional discipline

**Comments:**

**Education, Department of**

**NYCRR Citation:** 8 NYCRR §§279.1 et seq, 200.5

**Statutory Citation (if any):** Education Law §4404

**Subject Matter:** special education

**Comments:**

**Education, Department of**

**NYCRR Citation:** 8 NYCRR Part 82

**Statutory Citation (if any):** Education Law §3020-a

**Subject Matter:** tenured school employee discipline

**Comments:** source of hearing officers: American Arbitration Association

**Education, Department of**

**NYCRR Citation:** 8 NYCRR Part 83

**Statutory Citation (if any):**

**Subject Matter:** teacher certification (moral fitness)

**Comments:**

**Elections, Board of**

**NYCRR Citation:** 9 NYCRR Part 6201 et seq

**Statutory Citation (if any):** Election Law §3-106

**Subject Matter:** fair campaign code, petition challenges

**Comments:**

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**Environmental Conservation, Department of**

**NYCRR Citation:** 6 NYCRR Parts 621 and 622 and 624

**Statutory Citation (if any):** Environmental Conservation  
Law Articles 3, 70, and 71

**Subject Matter:**

**Comments:** 2 pamphlets on file: guide to DEC  
enforcement and permit hearings

**Ethics Commission**

**NYCRR Citation:** 19 NYCRR Part 941

**Statutory Citation (if any):**

**Subject Matter:** Exec branch - revolving door/financial  
disclosure

**Comments:**

**Health, Department of**

**NYCRR Citation:** 10 NYCRR Part 51

**Statutory Citation (if any):** Public Health Law §230

**Subject Matter:** medical professional misconduct

**Comments:**

**Health, Department of**

**NYCRR Citation:** 10 NYCRR Parts 51 and 60-1 and 69-4

**Statutory Citation (if any):**

**Subject Matter:** 60-1:WIC; 69-4: Early Intervention

**Comments:**

**Health, Department of**

**NYCRR Citation:** 18 NYCRR Part 493

**Statutory Citation (if any):** Social Services Law §460-d

**Subject Matter:** Licensure/Supervision of Adult Care  
Facilities

**Comments:**

**Health, Department of**

**NYCRR Citation:** 18 NYCRR Part 519

**Statutory Citation (if any):**

**Subject Matter:** Medicaid Provider Audits & Sanctions

**Comments:**

**Health, Department of**

**NYCRR Citation:** 9 NYCRR Parts 9740 and 9840

**Statutory Citation (if any):**

**Subject Matter:** Elderly Pharmaceutical Ins Coverage

**Comments:**

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**Housing and Community Renewal, Division of**

**NYCRR Citation:** 9 NYCRR Part 2051

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:** Naftalison manual cited at §2051.3(d)(2)(I)

**Human Rights, Division of**

**NYCRR Citation:** 9 NYCRR Part 465

**Statutory Citation (if any):** Executive Law §297

**Subject Matter:**

**Comments:**

**Industrial Board of Appeals**

**NYCRR Citation:** 12 NYCRR Part 65 et seq

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:**

**Insurance, Department of**

**NYCRR Citation:** 11 NYCRR Part 4

**Statutory Citation (if any):** Insurance Law §303 et seq

**Subject Matter:**

**Comments:**

**Labor, Department of**

**NYCRR Citation:** 12 NYCRR Part 701

**Statutory Citation (if any):**

**Subject Matter:** public works, asbestos control

**Comments:** also covered: Workforce Development  
(hearings in this area are rare)

**Mental Health, Office of**

**NYCRR Citation:** 14 NYCRR Part 503

**Statutory Citation (if any):** Mental Hygiene Law §9.17

**Subject Matter:**

**Comments:**

**Mental Retardation & Devel. Disab., Office of**

**NYCRR Citation:** 14 NYCRR Part 602

**Statutory Citation (if any):** Mental Hygiene Law §16.17

**Subject Matter:**

**Comments:**

**Motor Vehicles, Department of**

**NYCRR Citation:** 15 NYCRR Parts 121 and 127

**Statutory Citation (if any):** Vehicle & Traffic Law §225 et  
seq

**Subject Matter:** traffic violations, safety hearings

**Comments:** also on file: commissioner's regulations.



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**Motor Vehicles, Department of**

**NYCRR Citation:** 15 NYCRR Part 155

**Statutory Citation (if any):** Vehicle and Traffic Law §260

**Subject Matter:** appeals

**Comments:**

**Motor Vehicles, Department of**

**NYCRR Citation:** 15 NYCRR Part 82

**Statutory Citation (if any):** Vehicle and Traffic Law  
§398-f

**Subject Matter:** repair shops

**Comments:**

**Public Employment Relations Board**

**NYCRR Citation:** 4 NYCRR Part 200 et seq

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:**

**Public Service, Department of**

**NYCRR Citation:** 16 NYCRR Part 1 et seq

**Statutory Citation (if any):** Pub Service Law §§4&8

**Subject Matter:** electric, gas, water, steam, telecom, cable television

**Comments:** ethics: Public Service Law §15; Also refer to Public Officers Law; Federal ALJ model code; SAPA.

**Racing and Wagering Board**

**NYCRR Citation:** 9 NYCRR Part 5402

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:**

**Real Property Services, Board of**

**NYCRR Citation:** 9 NYCRR Part 187

**Statutory Citation (if any):**

**Subject Matter:** assessor certification

**Comments:** uses Naftalison book as internal manual

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**Appendix C: List of Agency Hearing Regulations**

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**Social Services, Department of**

**NYCRR Citation:** 18 NYCRR Parts 358 and 359

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:** other regs: 18 NYCRR Parts 359.7  
(supersedes 399); 403; 414 et seq - child day care;  
434 - child protective services; 519 - providers

**State Police**

**NYCRR Citation:**

**Statutory Citation (if any):**

**Subject Matter:** disciplinary hearings

**Comments:**

**State, Department of**

**NYCRR Citation:** 19 NYCRR Parts 400 and 700

**Statutory Citation (if any):** Gen Bus Law §§390, 403 &  
433.

**Subject Matter:** barbers, brokers

**Comments:**

**Taxation and Finance, Department of**

**NYCRR Citation:** 20 NYCRR Part 3000 et seq

**Statutory Citation (if any):** Tax Law §2004 et seq

**Subject Matter:**

**Comments:**

**Temporary & Disability Assistance, Office of**

**NYCRR Citation:** 18 NYCRR Part 358

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:**

**Transportation, Department of**

**NYCRR Citation:** 17 NYCRR Parts 501 and 503 et seq

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:**

**Unemployment Insurance Appeals Board**

**NYCRR Citation:** 12 NYCRR Part 460 et seq

**Statutory Citation (if any):** Labor Law §622 et seq

**Subject Matter:**

**Comments:**

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**Vocational & Educational Services, Office of**

**NYCRR Citation:** 8 NYCRR Part 247

**Statutory Citation (if any):**

**Subject Matter:**

**Comments:**

**Workers' Compensation Board**

**NYCRR Citation:** 12 NYCRR Part 300

**Statutory Citation (if any):** WCL§§117, 141, 142

**Subject Matter:**

**Comments:** code of ethics adopted August 1997

**Appendix D:**  
**Agency Codes of Ethics for ALJs**

**Appendix D: Agency Codes of Ethics for ALJs**

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## **Appendix D: Agency Codes of Ethics for ALJs**

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### **Workers' Compensation Board Administrative Law Judge Code of Judicial Conduct**

*Adopted by the Chairman of the Workers' Compensation  
Board August 19, 1997*

#### **A Law Judge Should Uphold the Integrity and Independence of the Workers' Compensation Board and its Law Judges Bureau**

An independent and honorable Law Judges Bureau is indispensable to the just adjudication of claims within New York State's workers' compensation system. A law judge should participate in establishing, maintaining, and enforcing, and should observe, high standards of conduct so that the integrity and independence of the Workers' Compensation Board and its Law Judges Bureau may be preserved. The provisions of this Code should be construed and applied to further that objective.

#### **A Law Judge Should Avoid Impropriety and the Appearance of Impropriety in All His or Her Activities**

A law judge shall not have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation



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**Appendix D: Agency Codes of Ethics for ALJs**

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of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

A law judge's actions and affiliations must be above reproach, even if no actual conflict of interest is present. Any associations that give rise to the suspicion or perception of favoritism, self-dealing or personal private gain by law judges may erode the public's confidence.

(A) A law judge should endeavor to pursue a course of conduct which will not raise suspicion among the public that he or she is likely to be engaged in acts that are in violation of his or her trust.

(B) A law judge should not by his or her conduct give reasonable basis for the impression that any person can improperly influence the law judge or unduly enjoy his or her favor in the performance of the law judge's official duties, or that he or she is affected by the kinship, rank, position or influence of any party or person.

*Authority Cited: Ethics Commission Advisory Opinion No. 95-21, POL Section 74 (3)(f), (3)(h)*

**A Law Judge Shall Perform the Duties of His or Her Office Impartially and Diligently**

The adjudicatory duties of a law judge take precedence over all his or her other activities. Adjudicative duties include all the duties of his or her office prescribed by the

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**Manual For Administrative Law Judges and Hearing Officers**

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Workers' Compensation Law and the Public Officers Law and rules pertinent thereto. In the performance of these duties, the following standards apply:

*(A) Adjudicative and Administrative Responsibilities.*

(1) A law judge shall be faithful to the law and maintain professional competence in it. A law judge shall be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A law judge shall conduct hearings in an orderly manner.

(3) A law judge shall be patient, dignified, and courteous to claimants, witnesses, lawyers, licensed representatives and others with whom he or she deals in his or her official capacity, and should require similar conduct of lawyers, licensed representatives, Board officials, and others subject to his or her direction and control.

(4) A law judge shall perform adjudicative duties without bias or prejudice.

(5) A law judge shall dispose of adjudicative matters promptly, efficiently and fairly.

(6) A law judge shall not disclose confidential information acquired in the course of his or her official duties nor use such information to further his or her personal interests.

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**Appendix D: Agency Codes of Ethics for ALJs**

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(7) A law judge shall not use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others.

(8) A law judge shall diligently discharge his or her administrative responsibilities without bias or prejudice and shall maintain professional competence in judicial administration, and shall cooperate with other law judges, the Supervising and Senior Law Judges, and Board officials in the administration of Board business.

(9) A law judge shall file a registration statement with the Office of Court Administration biennially in accordance with Section 468-a of the Judiciary Law and the Rules of the Chief Administrator of the Courts. No fee shall be required from an attorney who certifies that he or she has retired from the practice of law. For the purposes of Section 468-a of the Judiciary Law a full-time law judge shall be deemed "retired" from the practice of law.

*Authority Cited: Code of Judicial Conduct, POL Section 74 (3)(c), (3)(d); 12 NYCRR Section 300.9; 22 NYCRR Section 100.3 (B)(4), (B)(7), (C)(1); 22 NYCRR Section 118.1(g); Judiciary Law Section 468-a*

*(B) Disqualification.*

(1) A law judge shall recuse himself or herself on any ground a judge may be disqualified pursuant to section fourteen of the Judiciary Law, as described herein:

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(a) a law judge shall not sit as such in, or take any part in the decision of, any claim, matter, motion or proceeding to which he or she is a party;

(b) or in which he or she has been attorney or counsel;

(c) or in which he or she is interested;

(d) or if he or she is related by consanguinity or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the law judge to the common ancestor, descending to the party, counting a degree for each person in both lines, including the law judge and party, and excluding the common ancestor (i.e., the sixth degree of consanguinity shall include the children of a law judge's second cousin).

(e) No law judge shall be disqualified in any claim, matter, motion or proceeding in which an insurance company is a party or is interested by reason of his or her being a policyholder therein.

(2) A law judge shall disqualify himself or herself in a proceeding in which the law judge has a personal bias or prejudice or familiar relationship concerning a party or witness, or personal knowledge of disputed evidentiary facts concerning the proceeding.

(3) A law judge shall disqualify himself or herself in a proceeding that the law judge, individually or as

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a fiduciary, or his or her spouse or minor child residing in the law judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

(4) A law judge shall keep informed about his or her personal, fiduciary and beneficial economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the law judge's household.

*Authority Cited: Code of Judicial Conduct, Judiciary Law Section 14; WCL Section 20(3)*

**A Judge Shall Regulate His or Her Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties**

A law judge shall conduct all of his or her extrajudicial activities so that they do not cast reasonable doubt on the law judge's capacity to act impartially as a judge, demean the Board's judicial office, or interfere with the proper performance of his or her judicial duties.

*(A) Avocational Activities.*

(1) A law judge shall not engage in any private employment or in a profession or business except teaching in an institution of higher education. Such law judge may receive the ordinary compensation for teaching a regular course of study at any college or university if the teaching

does not conflict with the proper performance of the duties of his or her office and is not inconsistent with the Public Officers Law.

(2) A law judge must obtain prior approval from the Board Ethics Officer and the State Ethics Commission prior to accepting a teaching position at a college or university.

(3) A law judge shall not accept a teaching position which will impair the law judge's independence of judgment in the exercise of his or her official duties.

(4) A law judge shall not accept a teaching position which will require the law judge to disclose confidential information which he or she has gained by reason of the law judge's official position or authority.

(5) A law judge may not directly or indirectly engage in any activity related to, or have any affiliation with, an insurance company which is authorized to write coverage under the Workers' Compensation Law, Disability Benefits Law, Volunteer Firefighters' Benefit Law or Workers' Compensation Act for Civil Defense Volunteers; or an insurance company authorized to pay health service charges under the Comprehensive Automobile Insurance Act.

(6) A law judge shall not serve as a director or officer of a for-profit corporation or institution without, in each case, obtaining prior approval from the State Ethics Commission.

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(7) Nothing in this provision shall prohibit a law judge from participating in the organized militia or reserve components of the armed forces of the United States and receiving pay and allowances for such duty.

*Authority Cited: WCL Section 150; POL Section 74(3)(a), (b); 19 NYCRR Section 932.3(b), (c), (e); WCB Subject No. 410-12; Military Law Section 210, 242*

*(B) Civic and Charitable Activities.*

A law judge may not provide services outside of his or her official Board duties in any way related to the laws administered by the Chair or the Board, to any employer group, or any employee group or union, or any attorney, physician or hospital, or any other parties who have business with the Board. This shall in no way preclude a law judge from participating in or serving as a representative of an employee organization or union.

*Authority Cited: Subject No. 410-12*

*(C) Financial Activities.*

(1) A law judge may not accept any gift, including money, service, loan, travel, entertainment, hospitality, thing or promise, from anyone who has direct or indirect interest in any matter arising under the laws administered by the Chair or the

Board, or from anyone acting on his or her behalf, under circumstances in which it could reasonably be inferred that the gift was intended to influence, or could reasonably be expected to influence, the law judge in the performance of his or her official duties or was intended as a reward for any official action on his or her part. Except that a law judge may accept the following:

(a) a gift from a relative, in the form of a travel payment;

(b) a payment, fee, travel payment or other compensation from the law judge's union for providing services for or acting on behalf of the union;

(c) a payment or travel payment made to the State of New York by a non-governmental source as remuneration or honorarium for services rendered by a law judge on official duty.

(2) A law judge may not engage in any transaction as a representative or agent of the state with any business entity in which the law judge has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his or her official duties.

(3) A law judge should abstain from making personal investments in enterprises which he or she has reason to believe may be directly involved in decisions to be made by the law judge or which will otherwise create substantial conflict between



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duties in the public interest and his or her private interest.

(4) No law judge, nor any firm or association of which a law judge is a member nor corporation a substantial portion of the stock of which is owned or controlled directly or indirectly by a law judge, shall sell goods or services to any person, firm, corporation or association which is licensed or whose rates are fixed by the Workers' Compensation Board.

(5) Nothing contained in this provision shall prohibit a law judge from conducting internal research or from discussing a matter.

(6) Nothing contained in this provision shall prohibit a law judge from appearing before a state agency in a representative capacity on behalf of an employee organization in any matter where such appearance is duly authorized by an employee organization.

(7) A law judge who is a member, associate, retired member, of counsel to, or shareholder of any firm, association or corporation which is appearing or rendering services in connection with any case, proceeding, application or other matter, shall not orally communicate, with or without compensation, as to the merits of such case with an officer or an employee of the agency concerned with the matter.  
*Authority Cited: POL Section 73 (7)(a), (7)(e), (7)(g), (12); POL Section 74 (3)(g), (3)(i), (3)(j); 19 NYCRR Section 930.2(c)(3); WCB Subject No. 410-12*

**Financial Disclosure for Honorariums and other Payments  
Received in Connection with Quasi-Judicial and Extra-Judicial  
Activities**

(A) A law judge shall file an annual statement of financial disclosure containing the information and in the form set forth in subdivision three of section 73-a of the Public Officers Law.

(B) A law judge must comply with all rules and regulations pertaining to honorariums and travel reimbursements as set forth in Title 19 NYCRR Part 930 and Workers' Compensation Board Subject No. 410-3.2. A law judge shall obtain approval for or report to the Chair or Executive Director in accordance with the guidelines in Subject No. 410-3.2 whenever a law judge receives a payment, fee or other compensation. This includes payments made to the individual directly or to the provider of lodging and/or transportation; and payments made as a gratuity, award or honorarium, whether or not these services were performed in connection with the law judge's official duties. This does not include pay and allowances received for militia or reserve duty.

(C) A law judge may accept the following, which are not considered to be honorariums:

(1) a travel payment in the form of a gift from a relative;

(2) a payment in lieu of an honorarium made to the State or a travel payment provided by non-governmental sources for activities related to a covered individual's official duties;

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(3) compensation in the nature of salary, wages or fees for services for non-State related work performed or travel payment provided by nongovernmental sources for activities related to a law judge's teaching in an institution of higher education;

(4) a payment, fee, travel payment or other compensation provided to a law judge who provides services for or acts on behalf of an employee organization certified or recognized under article 14 of the Civil Service Law to represent such covered individual;

(5) pay and allowances as prescribed in the Military Law Section 210 for militia or reserve duty.

(D) A law judge shall not accept an honorarium or travel reimbursement from an individual or an organization (or its officers or board of directors) that:

(1) is regulated by, regularly negotiates with, appears before the Workers' Compensation Board for anything other than a strict administrative purpose, does business with or has a contract with the Board or the law judge in his or her official capacity;

(2) attempts to lobby or to influence the Board's or the law judge's action or position on legislation, rules, regulations or rate making;

(3) is involved with pending legal action against the Board or the law judge in his or her official capacity;

(4) has received or applied for funds from the Board within the one year period immediately prior to and including the date the honorarium was to be received.

(E) A law judge must report any honorarium or travel reimbursement from every source totaling more than \$1,000, regardless of whether approval for its receipt is or is not required under Public Officers Law Section 73-a and Subject No. 410-3.2.  
*Authority Cited: POL Section 73-a; Military Law Section 210; 19 NYCRR Section 930.2(c)(3); WCB Subject No. 410-3.2*

**Restrictions on Law Judges from Engaging in Inappropriate Political Activity**

(A) No law judge shall engage in any outside activity which interferes or is in conflict with the proper and effective discharge of such individual's official duties or responsibilities.

(B) No law judge shall serve as an officer of any political party or political organization.

(C) No law judge shall serve as a member of any political party committee including political party district leader (however designated) or member of the national committee of a political party.

*Authority Cited: 19 NYCRR Section 932.2(a), (b); 19 NYCRR Section 932.3(a)*

**Compliance with the Code of Judicial Conduct**

(A) Anyone, whether or not a lawyer, who is an officer or employee of the Workers' Compensation Board performing duties as a law judge, whether temporary or permanent, full or part-time, or acting referees pursuant to Workers' Compensation Law 150(c), shall comply with this Code.

(B) The General Counsel to the Workers' Compensation Board shall serve as a Board Ethics Officer who shall:

(1) assist law judges who have specific questions concerning application of this Code of Judicial Conduct;

(2) determine whether law judges are in compliance with this Code, on a case by case basis;

(3) assess the effectiveness of this Code and recommend changes to the Chair;

(4) take appropriate steps in cases of possible violation of the Workers' Compensation Law, the Public Officers Law, or this Code; and

(5) assume other related responsibilities the Chair may wish to assign.

(C) The terms used in this Code shall be construed in accordance with similar provisions set forth in the Code of Judicial Conduct adopted by the New York State Bar Association and Title 22 NYCRR Part 100.

To the extent that any provision of this Code is

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inconsistent with any rule, opinion or subject number applicable to the conduct of law judges heretofore issued by the New York State Ethics Commission or the Workers' Compensation Board, the rules of such Commission or Board shall prevail.

*Authority Cited: WCL Section 150; WCB Subject No. 410-12*

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**Appendix E:**

**State Administrative Procedure Act**



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## **Appendix E: State Administrative Procedure Act**

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Note: This section is current as of July 1, 2001 and is included for ease of reference only. Please ensure that no changes have been made before relying on the text in this appendix.

### **Article I General Provisions**

*Section 100. Legislative intent.*

*101. Short title.*

*102. Definitions.*

*103. Construction; severability*

*104. Access to studies and data*

§ 100. Legislative intent.

The legislature hereby finds and declares that the administrative rulemaking, adjudicatory and licensing processes among the agencies of state government are inconsistent, lack uniformity and create misunderstanding by the public. In order to provide the people with simple, uniform administrative procedures, an administrative procedure act is hereby enacted. This act guarantees that the actions of administrative agencies conform with sound standards developed in this state and nation since their founding through constitutional, statutory and case law. It insures that equitable practices will be provided to meet

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the public interest. It is further found that in the public interest it is desirable for state agencies to meet the requirements imposed by the administrative procedure act. Those agencies which will not have to conform to this act have been exempted from the act, either specifically by name or impliedly by definition.

§ 101. Short title. This chapter shall be known and may be cited as the "State Administrative Procedure Act."

§ 102. Definitions.

As used in this chapter,

1. "Agency" means any department, board, bureau, commission, division, office, council, committee or officer of the state, or a public benefit corporation or public authority at least one of whose members is appointed by the governor, authorized by law to make rules or to make final decisions in adjudicatory proceedings but shall not include the governor, agencies in the legislative and judicial branches, agencies created by interstate compact or international agreement, the division of military and naval affairs to the extent it exercises its responsibility for

military and naval affairs, the division of state police, the identification and intelligence unit of the division of criminal justice services, the state insurance fund, the unemployment insurance appeal board, and except for purposes of subdivision one of section two hundred two-d of this chapter, the workers` compensation board and except for purposes of article two of this chapter, the state division of parole and the department of correctional services.

2. (a) "Rule" means (i) the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and (ii) the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability.

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(b) Not included within paragraph (a) of this subdivision are:

(i) rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public;

(ii) rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals;

(iii) rulings issued under section two hundred four or two hundred five of this chapter;

(iv) forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory;

(v) rules promulgated to implement agreements pursuant to article fourteen of the civil service law;

(vi) rates of interest prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law;

(vii) rules relating to the approval or disapproval of subscriber rates contained in an application to the public service commission, after public hearing and approval by the applicable municipality for a certificate of confirmation or an amendment to a franchise agreement;

(viii) state equalization rates, class ratios, special equalization rates and special equalization ratios

established pursuant to the real property tax law;

(ix) rates subject to prior approval by the superintendent of insurance or to section two thousand three hundred forty-four of the insurance law;

(x) any regulation promulgating an interim price and any final marketing order made by the commissioner of agriculture and markets pursuant to section two hundred fifty-eight-m of the agriculture and markets law;

(xi) any fee which is:

(1) set by statute;

(2) less than one hundred dollars;

(3) one hundred dollars or more and can reasonably be expected to result in an annual aggregate collection of not more than one thousand dollars;

(4) established through negotiation, written agreement or competitive bidding, including, but not limited to, contracts, leases, charges, permits for space use, prices, royalties or commissions; or

(5) a charge or assessment levied by an agency upon another agency or by an agency upon another unit of state government.

(xii) changes in a schedule filed by a telephone corporation subject to the jurisdiction of the public service commission;

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(xiii) rules relating to requests for authority by a telephone corporation subject to the jurisdiction of the public service commission under sections ninety-nine, one hundred and one hundred one of the public service law and by a public utility subject to the jurisdiction of the public service commission under section one hundred seven of the public service law;

3. "Adjudicatory proceeding" means any activity which is not a rule making proceeding or an employee disciplinary action before an agency, except an administrative tribunal created by statute to hear or determine allegations of traffic infractions which may also be heard in a court of appropriate jurisdiction, in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing.

4. "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.

5. "Licensing" includes any agency activity respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, recall, cancellation or amendment of a license.

6. "Person" means any individual, partnership, corporation, association, or public or private organization of any character other than an agency engaged in the particular rule making, declaratory ruling, or adjudication.

7. "Party" means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

8. "Small business" means any business which is resident in this state, independently owned and operated, and employs one hundred or less individuals.

9. "Substantial revision" means any addition, deletion or other change in the text of a rule proposed for adoption, which materially alters its purpose, meaning or effect, but shall not include any change which merely defines or clarifies such text and does not materially alter its purpose, meaning or effect. To determine if the revised text of a proposed rule contains a substantial revision, the revised text shall be compared to the text of the rule for which a notice of proposed rule making was published in the state register; provided, however, if a notice of revised



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rule making was previously published in the state register, the revised text shall be compared to the revised text for which the most recent notice of revised rule making was published.

10. "Rural area" means those portions of the state so defined by subdivision seven of section four hundred eighty-one of the executive law.

11. "Consensus rule" means a rule proposed by an agency for adoption on an expedited basis pursuant to the expectation that no person is likely to object to its adoption because it merely (a) repeals regulatory provisions which are no longer applicable to any person, (b) implements or conforms to non-discretionary statutory provisions, or (c) makes technical changes or is otherwise non-controversial.

12. [repealed]

13. "Data" means written information or material, including, but not limited to, statistics or measurements used as the basis for reasoning, calculations or conclusions in a study.

§ 103. Construction; severability.

1. (a) Except with respect to the provisions of paragraph (c) of this subdivision, or of paragraph (b) of subdivision one and subdivision six of section two hundred two of this chapter, the provisions of this chapter shall not be construed to limit or repeal additional requirements imposed by statute or otherwise.

(b) The provisions of section two hundred two of this chapter shall not relieve any agency from compliance with any statute requiring that its rules be filed with or approved by designated persons or bodies before such rules become effective.

(c) Notwithstanding the requirements of any statute, when adopting a consensus rule as defined in this chapter, an agency may in its discretion dispense with any statutory requirement for public hearing or publication of a notice in any newspaper or publication other than the state register, unless such requirement is explicitly directed at the rule which is being adopted.

2. The provisions of this chapter shall not be deemed to repeal section six hundred fifty-nine of the labor law.

3. The provisions of this chapter shall apply only to rule making, adjudicatory and licensing proceedings

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commencing on or after the effective date of this chapter.

4. If any provision of this chapter or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the chapter or the application thereof to other persons and circumstances.

§ 104. Access to studies and data.

1. An agency, upon request, shall, within thirty days, make available for inspection and copying any scientific or statistical study, report or analysis, including any such study, report or analysis prepared by a person or entity pursuant to a contract with the agency or funded in whole or in part through a grant from the agency that is used as the basis of a proposed rule and any supporting data; provided, however, that the agency shall provide for inspection only of any such study, report or analysis due to copyright restrictions.

2. An agency that contracts with a person or entity for the performance of a study or awards a grant for such purpose shall require as a condition or term of such contract or grant that the person or entity shall provide to

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the agency the study, any data supporting the study, and identity of the principal person or persons who performed such study for disclosure in accordance with the provisions of this section and of article six of the public officers law.

**Article 2**  
**Rule Making**

- Section 201. Adoption of procedures; plain language.*  
*201-a. Job impact.*  
*202. Rule making procedure.*  
*202-a. Regulatory impact.*  
*202-b. Regulatory flexibility for small businesses.*  
*202-bb. Rural area flexibility analysis.*  
*202-d. Regulatory agenda.*  
*203. Filing; effective date.*  
*204. Declaratory rulings by agencies.*  
*205. Right to judicial review of rules.*  
*206. Overlapping regulations; compliance determinations.*  
*207. Review of existing rules.*

§ 201. Adoption of procedures; plain language. This article establishes minimum procedures for all agencies, provided, however, an agency may adopt by rule additional procedures not inconsistent with statute. Each agency shall strive to ensure that, to the maximum extent practical, its rules, regulations and related documents are written in a clear and coherent manner, using words with common and everyday meanings.

§ 201-a. Job impact.

1. In developing a rule, an agency shall strive to accomplish the objectives of applicable statutes in a manner which minimizes any unnecessary adverse

impacts on existing jobs and promotes the development of new employment opportunities, including opportunities for self-employment, for the residents of the state.

2. Before proposing a rule for adoption or adopting a rule on an emergency basis, an agency shall evaluate the potential impact of the rule on jobs and employment opportunities.

(a) When it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities, the agency shall include in the notice of proposed rule making or the notice of emergency adoption a statement that the agency has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities; provided, however, that, where appropriate, such statement shall indicate that the agency has determined the rule will have a positive impact on jobs and employment opportunities, or will have no impact on jobs and employment opportunities. Except where it is evident from the subject matter of the rule that the rule could only have a positive impact or no impact on jobs and

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employment opportunities, the agency shall include in the statement prepared pursuant to this paragraph a summary of the information and methodology underlying its determination.

(b) When it is apparent from the nature and purpose of the rule that it may have a substantial adverse impact on jobs or employment opportunities, the agency shall issue a job impact statement which contains information on:

(i) the nature of the impact the rule will have on jobs and employment opportunities;

(ii) the categories of jobs or employment opportunities affected by the rule;

(iii) the approximate number of jobs or employment opportunities affected in each category;

(iv) any region of the state where the rule would have a disproportionate adverse impact on jobs or employment opportunities; and

(v) any measures which the agency has taken to minimize any unnecessary adverse impacts on existing jobs and to promote the development of new employment opportunities.

(c) When the information available to an agency is

insufficient to enable it to determine whether a rule will have a substantial adverse impact on jobs or employment opportunities, or to prepare a job impact statement pursuant to paragraph (b) of this subdivision, the agency shall issue a statement indicating the information which it needs to complete a job impact statement and requesting the assistance of other state agencies and the public in obtaining such information.

(d) An agency shall issue a revised job impact statement when:

- (i) the information presented in the statement is inadequate or incomplete;
- (ii) the proposed rule contains any substantial revisions which necessitate that such statement be modified; or
- (iii) the agency has issued a statement pursuant to paragraph (c) of this subdivision, and has received information from other state agencies or the public which enable it to provide a more complete evaluation of the potential impact of the rule on jobs and employment opportunities.

(e) If, after requesting the assistance of other state agencies and the public pursuant to paragraph (c) of this



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subdivision, an agency is still unable to determine whether the rule will have a substantial adverse impact on jobs and employment opportunities, it may adopt the rule. When adopting a rule pursuant to this paragraph, the agency shall issue a revised job impact statement which includes information on the measures the agency took to evaluate the potential impact of the rule on jobs and employment opportunities.

(f) When adopting a rule on an emergency basis, an agency may defer the issuance of any statement pursuant to this section, provided that the statement is published in the state register within thirty days of the effective date of the emergency rule.

(g) When any statement issued pursuant to this section exceeds two thousand words, the agency shall prepare a summary of such statement in less than two thousand words.

(h) An agency may consider a series of closely related and simultaneously proposed rules as one rule for the purpose of submitting a consolidated job impact statement.

(i) Where a rule would have a measurable impact on opportunities for self-employment, the agency shall

include a discussion of such impact in any statement prepared pursuant to this section.

3. (a) The commissioner of labor and the commissioner of economic development may review any statement issued pursuant to this section, and may consult informally with any agency preparing such a statement and advise it on the potential impact of a rule on jobs and employment opportunities.

(b) When the commissioner of labor and the commissioner of economic development concur in a determination that additional evaluation of the potential impact of a proposed rule on jobs and employment opportunities is needed to assist in the minimization of any unnecessary adverse impacts of the rule on jobs or employment opportunities, they shall issue a statement of concurrence and transmit a copy of such statement to the agency and to the secretary of state for publication in the state register. The statement of concurrence shall:

(i) identify each proposed rule which is the subject of the statement of concurrence;

(ii) set forth the basis for the determination that additional evaluation of the potential impact of the rule is

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needed to assist in the minimization of any unnecessary adverse impacts on jobs or employment opportunities, and, where relevant, identify each aspect of the job impact statement which is incomplete or deficient;

(iii) include appropriate recommendations for additional evaluation of the impact of the rule or of any measures which the agency should consider to minimize any adverse impacts of the rule on jobs or employment opportunities; and

(iv) specify a time period of not more than ninety days for the agency to perform such additional evaluation or consider such recommendations.

(c) An agency shall strive to perform such additional evaluation or consider such measures as are recommended in a statement of concurrence within the time period set forth therein. No agency shall adopt the rule which is the subject of the statement of concurrence until:

(i) the agency has performed the additional evaluation or considered the measures recommended in the statement of concurrence, and has issued a revised job impact statement, which is acceptable to the commissioners of economic development and labor, setting forth any

changes which it will make to the rule to minimize any adverse impacts on jobs or employment opportunities; or

(ii) after the expiration of the time period set forth in the statement of concurrence.

(d) The statement of concurrence shall be considered public comment for the purpose of this article and shall be summarized and analyzed in any assessment of public comment.

4. Nothing in this section shall be construed as preventing an agency from adopting a rule on an emergency basis at any time.

5. Copies of any statement prepared pursuant to this section, including any statement of concurrence, shall be distributed as provided in subdivision six-a of section two hundred two of this article.

6. For the purposes of this section:

(a) "rule" shall mean any rule proposed or any rule adopted on an emergency basis pursuant to this article, except for:

(i) any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this article;

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(ii) any rule defined in subdivisions ten, eleven or twelve of section one hundred two of this article; or

(iii) any rule proposed or adopted by the state comptroller or the attorney general.

(b) "impact on jobs or employment opportunities" shall mean a change in the number of jobs and employment opportunities, including opportunities for self-employment, primarily attributable to the adoption of a rule, which would otherwise be available to the residents of the state in the two-year period commencing on the date the rule takes effect.

(c) "substantial adverse impact on jobs or employment opportunities" shall mean a decrease of more than one hundred full-time annual jobs and employment opportunities, including opportunities for self-employment, in the state, or the equivalent in part-time or seasonal employment, which would otherwise be available to the residents of the state in the two-year period commencing on the date the rule takes effect.

§ 202. Rule making procedure.

1. Notice of proposed rule making.

(a) Prior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule. Unless a different time is specified by statute, the notice of proposed rule making must appear in the state register at least forty-five days prior to either

- (i) the addition, amendment or repeal of a rule for which statute does not require that a public hearing be held prior to adoption, or
- (ii) the first public hearing on a proposed rule for which such hearing is so required.

The notice of proposed rule making shall indicate the last date for submission of comments on the proposed rule, which, unless a different time is specified in statute, shall be not less than forty-five days after the date of publication of such notice, or, if statute requires that a public hearing be held prior to adoption, not less than five days after the date of the last public hearing scheduled to be held on the proposed rule.

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(b) (i) When an agency submits a notice of proposed rule making as provided in paragraph (a) of this subdivision solely for the purpose of proposing a consensus rule for adoption, the agency may dispense with any requirement for public hearing and the requirements of subparagraphs (ii), (iii), (iv), (vi) and (vii) of paragraph (f) of this subdivision; provided, however, that such notice shall include a statement setting forth a clear and concise explanation of the basis for the agency's determination that no person is likely to object to the adoption of the rule as written.

(ii) If any public comment is received on the rule which contains any objection to adoption of a consensus rule, the agency must withdraw the notice of proposed rule making for the consensus rule and may submit a notice of proposed rule making for such rule making which complies with all of the relevant provisions of this subdivision.

(iii) Unless otherwise provided by law, a rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter may be adopted as a consensus rule in accordance with the provisions of this paragraph; provided, however, that for

the purposes of paragraph (c) of subdivision one of section one hundred three of this chapter, any public hearing required by law to be held on any such rule shall be deemed to be explicitly directed at such rule. No such rule which is defined by the public service law as a "major change" may be adopted as a consensus rule.

(c) When appropriate in the judgment of the agency, a notice may also be published in newspapers of general circulation and in trade, industry or professional publications as the agency may select.

(d) The requirement for publication of a notice of proposed rule making in the state register shall not preclude the initiation of a public hearing with respect to the proposal of any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter where notice otherwise consistent with the provisions of this subdivision has been given, provided, however, in all situations notice must be published within a reasonable time prior to the hearing.

(e) When an agency submits a notice of proposed rule making for a rule which was proposed for adoption as a consensus rule and subsequently withdrawn pursuant to



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paragraph (b) of this subdivision, such notice shall identify the prior notice of proposed rule making and shall briefly describe the objection or objections which caused the prior notice of proposed rule making to be withdrawn.

(f) The notice of proposed rule making shall:

(i) cite the statutory authority, including particular sections and subdivisions, under which the rule is proposed for adoption;

(ii) give the date, time and place of any public hearing or hearings which are scheduled;

(iii) state whether or not the place of any public hearing or hearings shall be reasonably accessible to persons with a mobility impairment; for purposes hereof, "persons with a mobility impairment" shall mean those persons with a physical impairment which is permanent and severely limits that person's mobility, or a person who is unable to ambulate without the aid of a wheelchair or other prosthetic device; provided, however, that the failure of such accessibility in accordance herewith, upon diligent effort to have provided same, shall have no effect upon any actions or proceedings taken at any such subject hearings;

(iv) include a statement that interpreter services shall be made available to deaf persons, at no charge, upon written request to such agency representative as shall be designated pursuant to subparagraph

(viii) of this paragraph within a reasonable time prior to any scheduled public hearing or hearings. If interpreter services are requested, the agency conducting the rule making proceeding in all instances shall appoint a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to, and the testimony of, such deaf person. Such agency shall determine a reasonable fee for all such interpreting services which shall be a charge upon the agency;

(v) contain the complete text of the proposed rule, provided, however, if such text exceeds two thousand words, the notice shall contain only a description of the subject, purpose and substance of such rule in less than two thousand words;

(vi) include a regulatory impact statement prepared pursuant to section two hundred two-a of this chapter, provided, however, if such statement exceeds two thousand words, the notice shall include only a summary

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of such statement in less than two thousand words;

(vii) include a regulatory flexibility analysis and a rural area flexibility analysis prepared pursuant to sections two hundred two-b and two hundred two-bb of this chapter, provided, however, if an analysis exceeds two thousand words, the notice shall include only a summary of such analysis in less than two thousand words;

(viii) give the name, public office address and telephone number of an agency representative, who is knowledgeable on the proposed rule, from whom the complete text of such rule and any scientific or statistical study, report and analysis that served as the basis for the rule and any supporting data, the regulatory impact statement, the regulatory flexibility analysis, and the rural area flexibility analysis may be obtained; from whom information about any public hearing may be obtained; and to whom written data, views and arguments may be submitted; and

(ix) include any additional matter required by statute.

2. Expiration of notice of proposed rule making; notice of expiration.

(a) Except with respect to any notice of proposed rule making concerning a rule defined in subparagraph (ii) of

paragraph (a) of subdivision two of section one hundred two of this chapter, a notice of proposed rule making shall expire and be ineffective for the purposes of this section, unless the proposed rule is adopted by the agency and filed with the secretary of state in the manner prescribed by law, within one hundred eighty days after the latter of:

(i) the publication in the state register of a notice of proposed rule making for the rule; or

(ii) the date of the last public hearing announced in a notice of proposed rule making for the rule.

(b) When a notice so expires, the secretary of state shall publish a notice of expiration in the state register. Such notice shall contain such information as is determined, in the discretion of the secretary of state, to serve the public interest.

3. Continuation of notice of proposed rule making; notice of continuation.

(a) A notice of proposed rule making shall not expire if, prior to the expiration date of the notice, a notice of continuation appears in the state register. A notice of continuation shall extend the expiration date of a notice of proposed rule making for an additional one hundred

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eighty-five days. No notice of proposed rule making may be continued more than once. The notice of continuation may not be submitted for publication in the state register until at least one hundred twenty days after the later of (i) the date the notice of proposed rule making for the rule appeared in the state register, or (ii) the date on which the last public hearing announced in the notice of proposed rule making was held on the rule.

(b) A notice of continuation shall contain:

(i) a description of the subject, purpose and substance of the proposed rule; and

(ii) a description of any changes in the proposed rule which the agency has made.

(c) A notice of revised rule making, prepared pursuant to subdivision four-a of this section, may also serve as a notice of continuation.

(d) If, within ninety days of the date on which a rule for which a notice of continuation has been previously submitted will expire, (i) an agency submits a notice of revised rule making for the rule, or (ii) the office of business permits and regulatory assistance issues a notification pursuant to subdivision five or seven of section two hundred two-c of this article for a rule for

which a notice of revised rule making has been submitted, the rule making will be continued for an additional ninety days beyond the date on which it would have expired.

4. Withdrawal of notice of proposed rule making; notice of withdrawal. An agency may withdraw a notice of proposed rule making and terminate a rule making proceeding by submitting a notice of withdrawal to the secretary of state for publication in the state register.

4-a. Notice of revised rule making. (a) Except with respect to any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter, prior to the adoption of a rule, an agency shall submit a notice of revised rule making to the secretary of state for publication in the state register for any proposed rule which contains a substantial revision. The public shall be afforded an opportunity to submit comments on the revised text of a proposed rule. Unless a different time is specified in statute, the notice of revised rule making must appear in the state register at least thirty days prior to the adoption of the rule. The notice of revised rule making shall indicate the last date for submission of comments on the revised text of the proposed rule, which,

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unless a different time is specified in statute, shall be not less than thirty days after the date of publication of such notice.

(b) Each agency shall publish and make available to the public an assessment of public comment for a rule revised pursuant to this subdivision. Such assessment shall be based upon any written comments submitted to the agency and any comments presented at any public hearing held on the proposed rule by the agency. The assessment shall contain: (i) a summary and an analysis of the issues raised and significant alternatives suggested by any such comments; (ii) a statement of the reasons why any significant alternatives were not incorporated into the rule; and (iii) a description of any changes made in the rule as a result of such comments. If no comments have been received, the notice of revised rule making shall state that no comments were received by the agency. Any subsequent assessment published pursuant to this paragraph or paragraph (b) of subdivision five of this section need only include comments not addressed in any previously published assessment of public comment for the rule; provided, however, that the notice of revised rule

making or adoption shall contain the date any previous notice of revised rule making containing an assessment of public comment was published in the state register.

\* (c) The notice of revised rule making shall:

(i) cite the statutory authority, including particular sections and subdivisions, under which the rule is proposed for adoption;

(ii) contain the complete revised text of the proposed rule, provided, however, if such text exceeds two thousand words, the notice may contain only a description of the subject, purpose and substance of such rule in less than two thousand words;

(iii) identify the substantial revisions to the text of the rule;

(iv) give the date, time and place of any public hearing or hearings on the rule which are to be held subsequent to the publication of the notice;

(v) include a revised regulatory impact statement, when required by the provisions of subparagraph (ii) of paragraph (a) of subdivision six of section two hundred two-a of this chapter, provided, however, if such statement exceeds two thousand words, the notice shall



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include only a summary of such statement in less than two thousand words;

(vi) include a revised regulatory flexibility analysis and a rural area flexibility analysis, when required by the provisions of subparagraph (ii) of paragraph (a) of subdivision seven of section two hundred two-b and paragraph (b) of subdivision eight of section two hundred two-bb of this chapter, provided, however, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;

(vii) give the name, address and telephone number of an agency representative knowledgeable on the rule, from whom the complete revised text of such rule, any revised regulatory impact statement any revised regulatory flexibility analysis and any revised rural area flexibility analysis may be obtained; from whom information about any additional public hearing may be obtained; and to whom written data, views and arguments may be submitted;

(viii) state whether the notice shall also constitute a notice of continuation for the purposes of subdivision three of this section;

(ix) include the assessment of public comment, prepared pursuant to paragraph (b) of this subdivision provided, however, that, if such assessment exceeds two thousand words, the notice shall include only a summary of such assessment in less than two thousand words; and

(x) include any additional matter required by statute.

\* NB There are 2 paragraphs (c)

(c) An agency may not submit a notice of revised rule making for a rule which has been proposed as a consensus rule.

\* NB There are 2 paragraphs (c)

5. Notice of adoption. (a) When an agency files a rule with the secretary of state, such agency shall also submit a notice of adoption to the secretary of state for publication in the state register. Except as provided in subdivision six of this section, an agency may not file a rule with, or submit a notice of adoption to, the secretary of state unless the agency has previously submitted a notice of proposed rule making and complied with the provisions of this section.

(b) Except with respect to any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of

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section one hundred two of this chapter, each agency shall publish and make available to the public an assessment of public comment for a rule adopted pursuant to this subdivision or paragraph (e) of subdivision six of this section. Such assessment shall be based upon any written comments submitted to the agency and any comments presented at any public hearing held on the proposed rule by the agency. The assessment shall contain: (i) a summary and an analysis of the issues raised and significant alternatives suggested by any such comments, (ii) a statement of the reasons why any significant alternatives were not incorporated into the rule and (iii) a description of any changes made in the rule as a result of such comments. If any comments included estimates of projected costs of the proposed rule to the state, local governments or regulated persons, which differed significantly from those presented by the agency in its regulatory impact statement, regulatory flexibility analysis, or rural area flexibility analysis, the assessment shall also summarize the agency's assessment of such estimates. If no comments have been received, the notice of adoption shall state that no comments were received by

the agency. Comments submitted or presented to the agency by a legislative committee or commission or by a member or members of the senate or assembly shall be considered public comment and shall be summarized and analyzed in the assessment.

(c) The notice of adoption shall:

(i) cite the statutory authority, including particular sections and subdivisions, under which the rule is adopted;

(ii) contain the complete text of the rule as adopted, provided, however, if such text exceeds two thousand words, the notice shall contain only a description of the subject, purpose and substance of such rule in less than two thousand words;

(iii) state whether there have been any changes in the text of the rule as adopted when compared with the text of the latest published version of the proposed rule, and if such changes have occurred, cite the particular sections, subdivisions and paragraphs so changed;

(iv) give the effective date of the rule;

(v) include a revised regulatory impact statement, when required by the provisions of subparagraph (ii) of paragraph (a) of subdivision six of section two hundred

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two-a of this chapter, provided, however, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;

(vi) include a revised regulatory flexibility analysis and rural area flexibility analysis, when required by the provisions of subparagraph (ii) of paragraph (a) of subdivision seven of section two hundred two-b and paragraph (b) of subdivision eight of section two hundred two-bb of this chapter, provided, however, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;

(vii) include the assessment of public comment, prepared pursuant to paragraph (b) of this subdivision, provided, however, if such assessment exceeds two thousand words, the notice shall include only a summary of such assessment in less than two thousand words;

(viii) give the name, public office address and telephone number of an agency representative from whom the complete text of the rule and any revised regulatory impact statement, revised regulatory flexibility analysis, rural

area flexibility analysis or assessment of comments may be obtained; and

(ix) state whether any notice of revised rule making had been submitted for such rule making and specify the date or dates that such notice or notices appeared in the state register; and

(x) include any additional matter required by statute.

6. Notice of emergency adoption.

(a) Notwithstanding any other provision of law, if an agency finds that the immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare and that compliance with the requirements of subdivision one of this section would be contrary to the public interest, the agency may dispense with all or part of such requirements and adopt the rule on an emergency basis.

(b) Unless otherwise provided by law, such emergency rule shall not remain in effect for longer than ninety days after being filed with the secretary of state unless within such time the agency complies with the requirements of subdivision one of this section and adopts the rule pursuant to the provisions of subdivision five of this section, provided, however, if such emergency rule is

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readopted prior to the expiration of such ninety day period such re Adoption and any subsequent readoptions shall remain in effect for no longer than sixty days.

(c) An emergency rule which is in regard to security authorizations, corporate or financial structures or reorganization thereof, and for which statute does not require that a public hearing be held prior to adoption, shall not expire pursuant to the provisions of paragraph (b) of this subdivision if the agency finds that the purpose of the rule would be frustrated if subsequent notice procedures were required.

(d) A notice of emergency adoption shall:

(i) cite the statutory authority, including particular sections and subdivisions, under which the rule is adopted;

(ii) state whether the notice shall also constitute a notice of proposed rule making for the purposes of subdivision one of this section, and if so, give the date, time and place of any public hearing or hearings which are scheduled;

(iii) state whether the notice shall also constitute a notice of revised rule making for the purposes of subdivision

four-a of this section, and if so, include all information required by such subdivision; and

(iv) contain the findings required by paragraphs (a) and (c) of this subdivision and include a statement fully describing the specific reasons for such findings and the facts and circumstances on which such findings are based. Such statement shall include, at a minimum, a description of the nature and, if applicable, location of the public health, safety or general welfare need requiring adoption of the rule on an emergency basis; a description of the cause, consequences, and expected duration of such need; an explanation of why compliance with the requirements of subdivision one of this section would be contrary to the public interest; and an explanation of why the current circumstance necessitates that the public and interested parties be given less than the minimum period for notice and comment provided for in subdivision one of this section;

(v) give the effective date of the rule;

(vi) state the specific date the emergency rule will expire;

(vii) contain the complete text of the rule as adopted, provided, however, if such text exceeds two thousand words, the notice shall contain only a description of the



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subject, purpose and substance of such rule in less than two thousand words;

(viii) include a regulatory impact statement prepared pursuant to section two hundred two-a of this chapter or a statement setting forth that the regulatory impact statement will appear in the state register within thirty days of the effective date of the emergency rule, provided, however, if either statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;

(ix) include a regulatory flexibility analysis prepared pursuant to section two hundred two-b and a rural area flexibility analysis pursuant to section two hundred two-bb of this chapter or a statement that the regulatory flexibility analysis and/or rural area flexibility analysis will appear in the state register within thirty days of the effective date of the emergency rule, provided, however, if such analysis or statement exceeds two thousand words, the notice shall include only a summary of such analysis or statement in less than two thousand words;

(x) give the name, public office address and telephone number of an agency representative, knowledgeable on

the rule, from whom a complete text of such rule, the regulatory impact statement, regulatory flexibility analysis, and the rural area flexibility analysis may be obtained; from whom information about any public hearing may be obtained; and to whom written data, views and arguments may be submitted; and

(xi) include any additional matter required by statute.

(e) If, prior to the expiration of a rule adopted pursuant to paragraph (a) of this subdivision, the agency finds that the readoption of such rule on an emergency basis is necessary for the preservation of the public health, safety or general welfare, the agency may readopt the rule on an emergency basis. No readoption shall be filed with the secretary of state unless the agency has submitted a notice of proposed rule making pursuant to subdivision one of this section. No second or subsequent readoption shall be filed with the secretary of state unless the agency at the same time submits an assessment of public comments prepared pursuant to paragraph (b) of subdivision five of this section.

6-a. Distribution of rule making information.

(a) An agency shall transmit a copy of any rule making notice prepared pursuant to this article to the governor,

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the temporary president of the senate, the speaker of the assembly, the administrative regulations review commission and the office of regulatory and management assistance at the time such notice is submitted to the secretary of state for publication in the state register. Such transmittal shall include the complete rule text, regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis, or revisions thereof, and any other information submitted to the secretary of state pursuant to this article.

(b) An agency shall make a copy of the complete text of any proposed, adopted or emergency rule, regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis, or revisions thereof available to the public at the time such documents are submitted to the secretary of state for publication in the state register and shall send to any person a copy of such text upon written request.

(c) An agency shall notify every person who has submitted a written request to be notified of all proposed, revised, emergency and/or adopted rules which may affect such person. Such requests shall expire annually on the thirty-first day of December with renewals for the

succeeding year to be accepted on or after December first. Notices issued pursuant to such requests shall be sent in writing to the last address specified by the person. An agency may charge any person requesting such notice a fee consisting of the cost of preparation, handling and postage.

7. Rule text requirements. (a) Except with respect to any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter, the complete text of any proposed or adopted rule shall identify new language by underscoring or italics, enclose in brackets any words which are to be deleted, and give the citation of any rule which is to be repealed.

(b) Notwithstanding any provision herein to the contrary, an agency may:

(i) with regard to a notice published in the state register concerning a rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter, elect to include either the complete text of the proposed or adopted rule in two thousand words or less, or a description of the subject, purpose and substance of such rule in less than two thousand words; and

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(ii) with regard to a notice published in any newspaper or publication other than the state register, elect to include either the complete text or a description of the subject, purpose and substance of the proposed or adopted rule.

(c) For the purposes of determining if the length of the text of a rule to be published pursuant to this section exceeds two thousand words, such text shall exclude any previously published portion of the rule which is precisely identified in the text thereof pursuant to paragraph c of subdivision one of section one hundred two of the executive law;

8. Judicial review. A proceeding may be commenced to contest a rule on the grounds of noncompliance with the procedural requirements of this section, section two hundred two-a and section two hundred two-b of this chapter, provided, however, such proceeding must be commenced within four months from the effective date of such rule. Each rule shall be promulgated in substantial compliance with the provisions of such sections, provided, however, the inadvertent failure to send notice to any person shall not serve to invalidate any rule promulgated

hereunder.

9. Secretary of state. The secretary of state shall:

- (i) prescribe standard forms to be used by agencies when submitting for publication in the state register the notices required by this section;
- (ii) promptly review each notice submitted by an agency for such publication;
- (iii) reject those notices which are not in substantial compliance with the provisions of this section, give prompt notice of such rejection to the agency, and advise such agency on the corrective action required; and
- (iv) publish all notices and statements, required by this section and section two hundred one-a of this chapter, in the state register as soon as practicable.

§ 202-a. Regulatory impact.

1. In developing a rule, an agency shall, to the extent consistent with the objectives of applicable statutes, consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons, including persons residing in New York state`s rural areas, directly

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or indirectly affected by it or upon the economy or administration of state or local governmental agencies. Such approaches shall include, but not be limited to, the specification of performance standards rather than design standards.

2. Each agency shall, except as provided in subdivision five of this section, issue a regulatory impact statement for a rule proposed for adoption or a rule adopted on an emergency basis.

3. Each regulatory impact statement shall contain:

(a) Statutory authority. A statement analyzing the statutory authority for the rule, including but not limited to the agency's interpretation of the legislative objectives of such authority;

(b) Needs and benefits. A statement setting forth the purpose of, necessity for, and benefits derived from the rule, a citation for and summary, not to exceed five hundred words, of each scientific or statistical study, report or analysis that served as the basis for the rule, an explanation of how it was used to determine the necessity for and benefits derived from the rule, and the name of the person that produced each study, report or analysis;

(c) Costs. A statement detailing the projected costs of the

rule, which shall indicate:

(i) the costs for the implementation of, and continuing compliance with, the rule to regulated persons;

(ii) the costs for the implementation of, and continued administration of, the rule to the agency and to the state and its local governments; and

(iii) the information, including the source or sources of such information, and methodology upon which the cost analysis is based; or

(iv) where an agency finds that it cannot fully provide a statement of such costs, a statement setting forth its best estimate, which shall indicate the information and methodology upon which such best estimate is based and the reason or reasons why a complete cost statement cannot be provided;

(d) Paperwork. A statement describing the need for any reporting requirements, including forms and other paperwork, which would be required as a result of the rule;

(e) Local government mandates. A statement describing any program, service, duty or responsibility imposed by the rule upon any county, city, town, village, school district, fire district or other special district;



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(f) Duplication. A statement identifying relevant rules and other legal requirements of the state and federal governments, including those which may duplicate, overlap or conflict with the rule. If the statement indicates that the rule would duplicate, overlap or conflict with any other relevant rule or legal requirement, the statement should also identify all efforts which the agency has or will undertake to resolve, or minimize the impact of, such duplication, overlap or conflict on regulated persons, including, but not limited to, seeking waivers of or exemptions from such other rules or legal requirements, seeking amendment of such other rules or legal requirements, or entering into a memorandum of understanding or other agreement concerning such other rules or legal requirements;

(g) Alternative approaches. A statement indicating whether any significant alternatives to the rule were considered by the agency, including a discussion of such alternatives and the reasons why they were not incorporated into the rule;

(h) Federal standards. A statement identifying whether the rule exceeds any minimum standards of the federal

government for the same or similar subject areas and, if so, an explanation of why the rule exceeds such standards; and

(i) Compliance schedule. A statement indicating the estimated period of time necessary to enable regulated persons to achieve compliance with the rule.

4. To reduce paperwork on the agencies, an agency may:

(a) Consider a series of closely related and simultaneously proposed rules as one rule for the purpose of submitting a consolidated regulatory impact statement; and

(b) Submit a consolidated regulatory impact statement for any series of virtually identical rules proposed in the same year.

5. (a) An agency may claim an exemption from the requirements of this section for a rule that involves only a technical amendment, provided, however, the agency shall state in the notice, prepared pursuant to section two hundred two of this chapter, the reason or reasons for claiming such exemption.

(b) A rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter shall be exempt from the requirements of this

section.

(c) A rule determined by an agency to be a consensus rule and proposed pursuant to subparagraph (i) of paragraph (b) of subdivision one of section two hundred two of this article shall be exempt from the requirements of this section.

6. Each agency shall issue a revised regulatory impact statement when:

(i) the information presented in the statement is inadequate or incomplete, provided, however, such revised statement shall be submitted as soon as practicable to the secretary of state for publication in the state register, provided, further, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;

(ii) a proposed rule contains any substantial revisions and such revisions necessitate that such statement be modified. A revised statement shall describe the reasons for such changes and shall include any modifications in the regulatory impact statement that are necessary as a result of such changes; or

(iii) there are no substantial revisions in the proposed

rule but there are changes in the text of the rule as adopted when compared with the text of the latest published version of the proposed rule and such changes would necessitate that such statement be modified. A revised statement shall describe the reasons for such changes and shall include any modifications in the regulatory impact statement that are necessary as a result of such changes.

§ 202-b. Regulatory flexibility for small businesses.

1. In developing a rule, the agency shall consider utilizing approaches that will accomplish the objectives of applicable statutes while minimizing any adverse economic impact of the rule on small businesses and local governments. Consistent with the objectives of applicable statutes, the agency shall consider such approaches as:

(a) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small businesses and local governments;

(b) the use of performance rather than design standards;  
and

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(c) an exemption from coverage by the rule, or by any part thereof, for small businesses and local governments so long as the public health, safety or general welfare is not endangered.

2. In proposing a rule for adoption or in adopting a rule on an emergency basis, the agency shall issue a regulatory flexibility analysis regarding the rule being proposed for adoption or the emergency rule being adopted. A copy of such analysis and any finding, and reasons for such finding, pursuant to subdivision three of this section, shall be submitted to the governor, the temporary president of the senate, the speaker of the assembly, the office of business permits and regulatory assistance and the administrative regulations review commission at the time such analysis is submitted to the secretary of state for publication and, upon written request, a copy shall be sent to any other person. Each regulatory flexibility analysis shall contain:

(a) a description of the types and an estimate of the number of small businesses and local governments to which the rule will apply;

(b) a description of (i) the reporting, recordkeeping and other compliance requirements of the rule, and (ii) the

kinds of professional services that a small business or local government is likely to need in order to comply with such requirements;

(c) an estimate of the initial capital costs and an estimate of the annual cost of complying with the rule, with an indication of any likely variation in such costs for small businesses or local governments of different types and of differing sizes;

(d) an assessment of the economic and technological feasibility of compliance with such rule by small businesses and local governments;

(e) an indication of how the rule is designed to minimize any adverse economic impact of such rule on small businesses and local governments, including information regarding whether the approaches suggested in subdivision one of this section or other similar approaches were considered; and

(f) a statement indicating how the agency complied with subdivision six of this section.

3. (a) This section shall not apply to any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter, nor shall it apply to any rule which does not impose an adverse

economic impact on small businesses or local governments and which the agency finds would not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments. The agency's finding and the reasons upon which the finding was made, including what measures the agency took to ascertain that the rule would not impose such compliance requirements, or adverse economic impact on small businesses or local governments, shall be included in the rule making notice as required by section two hundred two of this chapter.

(b) A rule determined by an agency to be a consensus rule and proposed pursuant to subparagraph (i) of paragraph (b) of subdivision one of section two hundred two of this article shall be exempt from the requirements of this section.

4. In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purpose of complying with subdivision two of this section.

5. In complying with the provisions of subdivision two of this section, an agency may provide either a quantifiable

or numerical description of the effects of a rule or more general descriptive statements if quantification is not practicable or reliable.

6. When any rule is proposed for which a regulatory flexibility analysis is required, the agency shall assure that small businesses and local governments have been given an opportunity to participate in the rule making through such activities as:

(a) the publication of a general notice for the proposed rule making in publications likely to be obtained by small businesses and local governments of the types affected by the proposed rule;

(b) the direct notification of interested small businesses and local governments affected by the proposed rule;

(c) the conduct of special open conferences concerning the proposed rule for small businesses and local governments affected by the rule; and

(d) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rule making by small businesses and local governments.

7. Each agency shall issue a revised regulatory flexibility analysis when:



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(i) the information presented in the analysis submitted pursuant to this section is inadequate or incomplete, provided, however, such revised analysis shall be submitted as soon as practicable to the secretary of state for publication in the state register, provided, further, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;

(ii) a proposed rule contains any substantial revisions and such revisions necessitate that such analysis be modified; or

(iii) there are no substantial revisions in the proposed rule but there are changes in the text of the rule as adopted when compared with the text of the latest published version of the proposed rule and such changes would necessitate that such analysis be modified.

§ 202-bb. Rural area flexibility analysis.

1. Intent. The legislature hereby finds, determines and declares that:

(a) The capacity of public and private sector interests in rural areas to respond to state agency regulations is often constrained by an operating environment distinctly

different from that found in suburban and metropolitan areas of the state;

(b) Factors such as population sparsity, small community size, limited access to financial and technical assistance, undeveloped services delivery systems, lack of economies of scale and extensive reliance on part-time and volunteer services providers inhibits rural ability to effectively address increasingly complex and stringent regulatory requirements;

(c) In order to maximize sensitivity to rural strengths and limitations, the state must continue to promote a framework which enhances state and local cooperation in meeting rural needs; and

(d) Enhancement of this chapter to include a more thorough assessment of regulatory impact and alternatives for rural areas can provide an improved dialogue on critical issues, while fostering a more cohesive and effective state/local partnership.

2. Authorization. (a) In addition to, and consistent with, the provisions of sections two hundred two-a and two hundred two-b of this article, agencies shall seek approaches that allow them to address their statutory responsibilities while considering the impact of their

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actions on public and private sector interests located in rural areas of the state.

(b) In developing a rule, the agency shall consider utilizing approaches that will accomplish the objectives of applicable statutes while minimizing any adverse impact of the rule on public and private sector interests in rural areas. Consistent with the objectives of applicable statutes, the agency shall consider such approaches as:

(i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to rural areas;

(ii) increased use of performance or outcome standards rather than design or input standards; and

(iii) an exemption from coverage by the rule, or by any part thereof, so long as the public health, safety or general welfare is not endangered.

3. In proposing a rule for adoption or in adopting a rule on an emergency basis, the agency shall issue a rural area flexibility analysis regarding the rule being proposed for adoption or the emergency rule being adopted. A copy of such analysis and any finding, and reasons for such finding, pursuant to this section, shall be submitted to the

governor, the temporary president of the senate, the speaker of the assembly, the office for regulatory and management assistance and the administrative regulations review commission at the time such analysis is submitted to the secretary of state for publication and, upon written request, a copy shall be sent to any other person. Each rural area flexibility analysis shall contain:

- (a) A description of the types and an estimate of the number of rural areas to which the rule will apply;
- (b) A description of (i) the reporting, recordkeeping and other compliance requirements of the rule, and (ii) the kinds of professional services that are likely to be needed in a rural area in order to comply with such requirements;
- (c) An estimate of the initial capital costs and an estimate of the annual cost of complying with the rule, with an indication of any likely variation in such costs for different types of public and private entities in rural areas;
- (d) An indication of how the rule is designed to minimize any adverse impact of such rule on rural areas, including information regarding whether the approaches suggested in subdivision two of this section

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or other similar approaches were considered; and

(e) A statement indicating how the agency complied with subdivision seven of this section.

4. (a) This section shall not apply to any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter, nor shall it apply to any rule which does not impose an adverse impact on rural areas and which the agency finds would not impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The agency's finding and the reasons upon which the finding was made, including what measures the agency took to ascertain that the rule would not impose such compliance requirements or adverse impact, shall be included in the rule making notice as required by section two hundred two of this chapter.

(b) A rule determined by an agency to be a consensus rule and proposed pursuant to subparagraph (i) of paragraph (b) of subdivision one of section two hundred two of this article shall be exempt from the requirements of this section.

5. In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for

the purpose of complying with subdivision three of this section.

6. In complying with the provisions of subdivision three of this section, an agency may provide either a quantifiable or numerical description of the effects of a rule or more general descriptive statements if quantification is not practicable or reliable.

7. When any rule is proposed for which a rural area flexibility analysis is required, the agency shall assure that public and private interests in rural areas have been given an opportunity to participate in the rule making through such activities as:

- (i) the publication of a general notice of the proposed rule making;
- (ii) notification of public and private interests in rural areas directly affected by the proposed rule;
- (iii) the conduct of special public hearings or meetings concerning the proposed rule for those public and private interests affected by the rule; and
- (iv) the adoption or modification of agency procedural rules that will minimize the cost or complexity of participation in the rule making.

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8. Each agency shall issue a revised rural area flexibility analysis when:

(a) the information presented in the analysis submitted pursuant to this section is inadequate or incomplete, provided, however, such revised analysis shall be submitted as soon as practicable to the secretary of state for publication in the state register, provided, further, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;

(b) a proposed rule contains any substantial revisions and such revisions necessitate that such analysis be modified; or

(c) there are no substantial revisions in the proposed rule but there are changes in the text of the rule as adopted when compared with the text of the latest published version of the proposed rule and such changes would necessitate that such analysis be modified.

§ 202-d. Regulatory agenda.

\* 1. The departments of health, education, insurance, environmental conservation, labor, banking, agriculture

and markets, the offices of children and family services and temporary and disability assistance, and the division of housing and community renewal and the workers' compensation board and any other department specified by the governor or his designee shall, and any other agency may, in its discretion, submit to the secretary of state, for publication in the first regular issue of the state register published during the month of January and the last regular issue of the state register published in June, a regulatory agenda to afford the agency an opportunity to solicit comments concerning any rule which the agency is considering proposing, but for which no notice of proposed rule making has been submitted pursuant to subdivision one of section two hundred two of this article. A regulatory agenda shall be comprised of a list and brief description of subject matter being considered for rule making and the name, public office, address and telephone number of the agency representative, knowledgeable on such regulatory agenda, from whom any information may be obtained and to whom written comments may be submitted concerning such regulatory agenda. Such agencies shall publish the regulatory agendas on their respective websites whenever feasible.



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\* NB Effective until December 31, 2002

\* 1. An agency may, in its discretion, submit to the secretary of state, for publication in the first regular issue of the state register published during the months of January, May and September, a regulatory agenda to afford the agency an opportunity to solicit comments concerning any rule which the agency is considering proposing, but for which no notice of proposed rule making has been submitted pursuant to subdivision one of section two hundred two of this chapter. A regulatory agenda shall be comprised of summaries of such rules. Each summary shall, in less than two thousand words, contain, in so far as practicable:

(a) a description of the rule which the agency is considering;

(b) a citation to the statutory authority, including particular sections and subdivisions, which authorizes the rule;

(c) a schedule of the dates for hearings, meetings or other opportunities for public participation in the development of the rule, if any;

(d) the probable date on which the agency anticipates

submitting, pursuant to section two hundred two of this chapter, a notice of proposed rule making for such rule if known;

(e) the name, public office, address and telephone number of the agency representative, knowledgeable on such rule, from whom any information may be obtained and to whom written comments may be submitted concerning such rule; and

(f) any other information which the agency determines will serve the public interest.

\* NB Effective December 31, 2002

\* 2. Nothing in this section shall:

(a) preclude an agency from adopting a rule for which a summary has not appeared in a regulatory agenda or from adopting a rule different than one summarized in a regulatory agenda; provided, however, that if a rule is proposed by an agency required to submit a regulatory agenda pursuant to subdivision one of this section on a matter not included in a regulatory agenda, the proposing agency shall indicate in the notice of proposed rule making that the rule was not under consideration at the time the regulatory agenda was submitted for publication; or

(b) require an agency to adopt a rule for which a

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summary has appeared in a regulatory agenda.

\* NB Effective until December 31, 2002

\* 2. Nothing in this section shall:

(a) preclude an agency from adopting a rule for which a summary has not appeared in a regulatory agenda or from adopting a rule different than one summarized in a regulatory agenda; or

(b) require an agency to adopt a rule for which a summary has appeared in a regulatory agenda.

\* NB Effective December 31, 2002

3. The secretary of state shall adopt rules necessary for the publication of regulatory agendas, including but not limited to standard forms to be used for the submission of regulatory agendas, a schedule prescribing when such agendas must be submitted for publication, and any identification number system.

§ 203. Filing; effective date.

1. Except as provided in subdivision two of this section, no rule shall become effective until it is filed with the secretary of state and the notice of adoption is published in the state register pursuant to subdivision five of section two hundred two of this article, unless: (i) a later date is

required by statute or is specified in the rule, (ii) adopted as an emergency rule pursuant to subdivision six of section two hundred two of this article, or (iii) defined as a rule in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter. Each rule submitted for filing shall have attached thereto the certificate required under subdivision two of section one hundred two of the executive law.

2. (a) An agency may, after a rule is filed with the secretary of state pursuant to subdivision one of this section and prior to the effective date of such rule, amend, suspend or repeal such rule prior to the effective date without complying with the provisions of subdivision one of section two hundred two of this article. If an agency amends, suspends or repeals a rule pursuant to this subdivision, such agency shall file a notice of adoption pursuant to subdivision five of section two hundred two of this article, provided, however, that such notice of adoption shall identify the rule which is being amended, suspended or repealed pursuant to this subdivision, provided, further, for the purposes of compliance with subparagraphs (iii), (v) and (vi) of paragraph (c) of subdivision five of such section two hundred two, the text

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of the rule as adopted pursuant to subdivision one of this section shall be compared with the text of the rule being amended, suspended or repealed pursuant to this subdivision.

(b) An agency may not amend, suspend or repeal a rule pursuant to this subdivision if such action would constitute a substantial revision of the rule as adopted. To determine if such action constitutes a substantial revision of the adopted rule, such amendment, suspension or repeal shall be compared with the text of the rule which was filed with the secretary of state pursuant to subdivision one of this section. The provisions of this paragraph shall not apply if such amendment, suspension or repeal only delays the effective date of such rule.

3. The secretary of state shall reject any rule submitted for filing by an agency where the notice of proposed rule making for such rule has expired pursuant to the provisions of section two hundred two of this chapter.

4. If a rule requires a regulated party to develop a written plan or compliance document which must be submitted to or retained for inspection by the agency, the agency is required to, upon request of one or more regulated parties, prepare a model of such a written plan or compliance

document to provide guidance as to the content and form of such written plan or compliance document and the minimum elements which such written plan or compliance document should contain. The availability of any such model plan or document shall be communicated to regulated parties through publication in the state register and by any other means which the agency determines to be efficient and effective, and shall be made available to regulated parties and the public within the time frame established for submission of the written plan or compliance documents. Unless otherwise prohibited by law, when an agency has prepared a model plan or document pursuant to this subdivision, it may extend the final date for submitting a written plan or compliance document for an additional period, not to exceed ninety days, if such an extension is deemed necessary to permit regulated parties to use the model plan as guidance in developing their written plans or compliance documents. Whenever a model plan is prepared, the agency shall cause a notice to be published in the state register indicating that it has prepared a model plan and identifying the written plan or compliance document for which the model plan or document has been prepared.

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Such notice shall also indicate whether the final date for submitting a written plan or compliance document has been extended pursuant to this subdivision, and, if so, shall set forth the new final date for submission.

§ 204. Declaratory rulings by agencies.

1. On petition of any person, an agency may issue a declaratory ruling with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should be taken pursuant to a rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. A declaratory ruling shall be binding upon the agency unless it is altered or set aside by a court. The agency may not retroactively change a valid declaratory ruling, but nothing in this section shall prevent an agency from prospectively changing any declaratory ruling. A declaratory ruling shall be made available to the public. A declaratory ruling shall be subject to review in the manner provided for in article seventy-eight of the civil practice law and rules.

2. (a) Within thirty days of receipt of a petition with

respect to paragraph (ii) of subdivision one of this section, an agency shall issue either a declaratory ruling or a statement declining to issue a declaratory ruling, unless the agency's rules provide for a different time period not to exceed sixty days from receipt of such petition.

(b) [expired]

(c) Notwithstanding any inconsistent provision of law, a person may submit a petition in the manner provided for in article seventy-eight of the civil practice law and rules without first applying for a declaratory ruling pursuant to paragraph (ii) of subdivision one of this section, or to the office for an advisory opinion pursuant to this subdivision. A person may concurrently petition the court pursuant to article seventy-eight of the civil practice law and rules and petition the agency and the office pursuant to this subdivision.

§ 205. Right to judicial review of rules.

Unless an exclusive procedure or remedy is provided by law, judicial review of rules may be had upon petition presented under article seventy-eight of the civil practice law and rules, or in an action for a declaratory judgment



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where applicable and proper. The agency shall be made a party to the proceedings. Such a special proceeding or action may not be maintained unless the petitioner has first requested the agency to pass upon the validity or applicability of the rule in question and action has been taken upon such a request or more than thirty days has elapsed since such request has been filed and no final action has been taken thereon or the agency has not provided for the issuance of such declaratory rulings under section two hundred four. Unless the agency acts upon such request within thirty days of its filing, such request shall be deemed to have been denied. Nothing in this section shall be construed to grant or deny to any person standing to petition under article seventy-eight of the civil practice law and rules or to bring an action for a declaratory judgment or to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is properly asserted.

§ 206. Overlapping regulations; compliance determinations.

1. It is the declared policy of this state to protect and encourage jobs, investment and economic activity and to promote the public health, safety and welfare by administering all regulatory requirements imposed by the state in a fair and reasonable manner.

2. Any person subject to a requirement imposed by a state statute or rule and to a similar requirement imposed by the federal government, may pursuant to section two hundred four of this chapter, petition the agency administering the state requirement for a declaratory ruling as to whether compliance with the federal requirement will be accepted as compliance with the state requirement. Upon receipt of such petition, the agency shall submit a copy thereof to the office of business permits and regulatory assistance.

3. If the agency determines that compliance with the federal requirement would not satisfy the purposes or relevant provisions of the state statute involved, the agency shall so inform the petitioner in writing stating the reasons therefor and may issue a declaratory ruling to that effect. A copy of such written statement of reasons and any such declaratory ruling shall be submitted by

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the agency to the office of business permits and regulatory assistance.

4. If the agency determines that compliance with the federal requirement would satisfy the purposes and relevant provisions of the state statute involved but that it would not satisfy the relevant provisions of the state rule involved, the agency shall so inform the petitioner and the office of business permits and regulatory assistance and may initiate a rulemaking proceeding in accordance with this chapter to consider revising such rule to accept compliance with such federal requirement in a manner that is consistent with the requirements and purposes of the state statute.

5. If the agency determines that compliance with the federal requirement would satisfy the purposes and relevant provisions of the state statute involved, and that it would satisfy the relevant provisions of the state rule involved, the agency shall issue a declaratory ruling indicating its intention to accept compliance with the federal requirement as compliance with the state requirement, and the terms and conditions under which it intends to do so. A copy of such declaratory ruling shall be

submitted by the agency to the office of business permits and regulatory assistance.

6. The office of business permits and regulatory assistance may consider agency compliance with this section when performing its review function under section two hundred two-c of this chapter.

§ 207. Review of existing rules.

1. Unless the contrary is specifically provided by another law, any rule which is adopted on or after the effective date of this section shall be reviewed after five years, and, thereafter, at five-year intervals.

2. An agency shall submit for publication in the regulatory agenda published in January pursuant to section two hundred two-d of this article a list of the rules which must be reviewed pursuant to subdivision one of this section in the ensuing calendar year. In addition to the information required by such section two hundred two-d, for each rule so listed the agency shall provide an analysis of the need for and legal basis of such rule and shall invite public comment on the continuation or modification of the rule.

3. If an agency determines that a rule subject to the

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provisions of this section should be modified, it shall publish a notice of proposed rule making for such rule, which, in addition to the information otherwise required by this article, shall include a statement setting forth a reasoned justification for modification of the rule and an assessment of public comments, prepared in accordance with subdivision four-a of section two hundred two of this article, which were submitted to the agency in response to the listing of the rule in the regulatory agenda. Where appropriate, the agency shall also include in its statement a discussion of the degree to which changes in technology, economic conditions or other factors in the area affected by the rule necessitate changes in the rule.

4. If an agency determines that a rule subject to the provisions of this section should continue without modification, it shall publish a notice to that effect, which shall identify the rule and the statutory authority for the rule, and include a statement setting forth a reasoned justification for continuation of the rule without modification and an assessment of public comments, prepared in accordance with subdivision four-a of section two hundred two of this chapter, which were submitted to

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the agency in response to the listing of the rule in the regulatory agenda.

5. This section shall not apply to any rule which is a minor, obsolete or invalid rule, or to a rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter.

**Article 3  
Adjudicatory Proceedings**

- Section 301. Hearings.*  
*302. Record.*  
*303. Presiding officers.*  
*304. Powers of presiding officers.*  
*305. Disclosure.*  
*306. Evidence.*  
*307. Decisions, determinations and orders.*

§ 301. Hearings.

1. In an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time.
2. All parties shall be given reasonable notice of such hearing, which notice shall include (a) a statement of the time, place, and nature of the hearing; (b) a statement of the legal authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and rules involved, where possible; (d) a short and plain statement of matters asserted; and (e) a statement that interpreter services shall be made available to deaf persons, at no charge, pursuant to this section. Upon application of any party, a more definite and detailed statement shall be furnished whenever the agency finds that the statement is not

sufficiently definite or not sufficiently detailed. The finding of the agency as to the sufficiency of definiteness or detail of the statement or its failure or refusal to furnish a more definite or detailed statement shall not be subject to judicial review. Any statement furnished shall be deemed, in all respects, to be a part of the notice of hearing.

3. Agencies shall adopt rules governing the procedures on adjudicatory proceedings and appeals, in accordance with provisions of article two of this chapter, and shall prepare a summary of such procedures in plain language. Agencies shall make such summaries available to the public upon request, and a copy of such summary shall be provided to any party cited by the agency for violation of the laws, rules or orders enforced by the agency.

4. All parties shall be afforded an opportunity to present written argument on issues of law and an opportunity to present evidence and such argument on issues of fact, provided however that nothing contained herein shall be construed to prohibit an agency from allowing parties to present oral argument within a reasonable time. In fixing the time and place for hearings and oral argument, due regard shall be had for the convenience of the parties.



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5. Unless precluded by statute, disposition may be made of any adjudicatory proceeding by stipulation, agreed settlement, consent order, default, or other informal method.

6. Whenever any deaf person is a party to an adjudicatory proceeding before an agency, or a witness therein, such agency in all instances shall appoint a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to, and the testimony of, such deaf person. The agency conducting the adjudicatory proceeding shall determine a reasonable fee for all such interpreting services which shall be a charge upon the agency.

§ 302. Record.

1. The record in an adjudicatory proceeding shall include: (a) all notices, pleadings, motions, intermediate rulings; (b) evidence presented; (c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; (d) questions and offers of proof, objections thereto, and

rulings thereon; (e) proposed findings and exceptions, if any; (f) any findings of fact, conclusions of law or other recommendations made by a presiding officer; and (g) any decision, determination, opinion, order or report rendered.

2. The agency shall make a complete record of all adjudicatory proceedings conducted before it. For this purpose, unless otherwise required by statute, the agency may use whatever means it deems appropriate, including but not limited to the use of stenographic transcriptions or electronic recording devices. Upon request made by any party upon the agency within a reasonable time, but prior to the time for commencement of judicial review, of its giving notice of its decision, determination, opinion or order, the agency shall prepare the record together with any transcript of proceedings within a reasonable time and shall furnish a copy of the record and transcript or any part thereof to any party as he may request. Except when any statute provides otherwise, the agency is authorized to charge not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or the rate specified in the contract between the agency and a

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contractor if prepared by a private contractor.

3. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

§ 303. Presiding officers.

Except as otherwise provided by statute, the agency, one or more members of the agency, or one or more hearing officers designated and empowered by the agency to conduct hearings shall be presiding officers. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding. Whenever a presiding officer is disqualified or it becomes impractical for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

§ 304. Powers of presiding officers.

Except as otherwise provided by statute, presiding officers are authorized to:

1. Administer oaths and affirmations.
2. Sign and issue subpoenas in the name of the agency, at the request of any party, requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence and said subpoenas shall be regulated by the civil practice law and rules. Nothing herein contained shall affect the authority of an attorney for a party to issue such subpoenas under the provisions of the civil practice law and rules.
3. Provide for the taking of testimony by deposition.
4. Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.
5. Direct the parties to appear and confer to consider the simplification of the issues by consent of the parties.
6. Recommend to the agency that a stay be granted in accordance with section three hundred four, three hundred six or three hundred seven of the military law.

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§ 305. Disclosure.

Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

§ 306. Evidence.

1. Irrelevant or unduly repetitious evidence or cross-examination may be excluded. Except as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding. No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence. Unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, an agency may, for the purpose of expediting hearings, and when the interests of parties will

not be substantially prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

2. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. In case of incorporation by reference, the materials so incorporated shall be available for examination by the parties before being received in evidence.

3. A party shall have the right of cross-examination.

4. Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to decision to dispute the fact or its materiality.

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§ 307. Decisions, determinations and orders.

1. A final decision, determination or order adverse to a party in an adjudicatory proceeding shall be in writing or stated in the record and shall include findings of fact and conclusions of law or reasons for the decision, determination or order. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision, determination or order shall include a ruling upon each proposed finding. A copy of the decision, determination or order shall be delivered or mailed forthwith to each party and to his attorney of record.

2. Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. Any such agency

member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case.

This subdivision does not apply (a) in determining applications for initial licenses for public utilities or carriers; or (b) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.

3. (a) Each agency shall maintain an index by name and subject of all written final decisions, determinations and orders rendered by the agency in adjudicatory proceedings. For purposes of this subdivision, such index shall also include by name and subject all written final decisions, determinations and orders rendered by the agency pursuant to a statute providing any party an opportunity to be heard, other than a rule making. Such index and the text of any such written final decision, determination or order shall be available for public inspection and copying. Each decision, determination and order shall be indexed within sixty days after having been rendered.



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(b) An agency may delete from any such index, decision, determination or order any information that, if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of the public officers law and may also delete at the request of any person all references to trade secrets that, if disclosed, would cause substantial injury to the competitive position of such person. Information which would reveal confidential material protected by federal or state statute, shall be deleted from any such index, decision, determination or order.

**Article 4**  
**Licenses**

*Section 401. Licenses.*

§ 401. Licenses.

1. When licensing is required by law to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning adjudicatory proceedings apply.

For purposes of this act, statutes providing an opportunity for hearing shall be deemed to include statutes providing an opportunity to be heard.

2. When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court, provided that this subdivision shall not affect any valid agency action then in effect summarily suspending such license.

3. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and

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incorporates a finding to that effect in its order, summary suspension of a license may be ordered, effective on the date specified in such order or upon service of a certified copy of such order on the licensee, whichever shall be later, pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

4. When the hearing seeks the revocation of a license or permit previously granted by the agency, either party shall, upon demand and at least seven days prior to the hearing, disclose the evidence that the party intends to introduce at the hearing, including documentary evidence and identification of witnesses, provided, however, the provisions of this subdivision shall not be deemed to require the disclosure of information or material otherwise protected by law from disclosure, including information and material protected because of privilege or confidentiality. If, after such disclosure, a party determines to rely upon other witnesses or information, the party shall, as soon as practicable, supplement its disclosure by providing the names of such witnesses or the additional documents.

**Article 5  
Representation**

*Section 501. Representation.*

§ 501. Representation.

Any person compelled to appear in person or who voluntarily appears before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel. In a proceeding before an agency, every party or person shall be accorded the right to appear in person or by or with counsel. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency.

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**Appendix F:**

**Bibliography of Books, Reports, Articles  
and World Wide Web Sites on  
Administrative Law**

**Appendix F: Bibliography of Books, Reports, Articles  
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### World Wide Web

Each of the States listed below have their own home page which allows viewers to visit either the executive, judicial or legislative branch of government. Many of the states provide a list of agencies on the web, bill tracking and a search engine to allow viewers to locate specific information.

#### *State Resources*

1. Alabama, The search engine allows viewers to locate agency rules, codes, publications and forms, which can be downloaded from the web.

<http://www.state.al.us/2K1>

2. Alaska, The search engine provides viewers with publications and general information regarding each agency.

<http://www.state.ak.us/local/akdir.htm>

<http://www.state.ak.us/local/akpages/admin/ota/ho/meota.htm>

3. Arizona, The Office of Administrative Hearings provides viewers with forms, a calendar of upcoming

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hearings and a list of procedures/rules which would be helpful to a defendant.

<http://www.azoah.com/>

<http://www.state.az.us/>

4. Arkansas, The search engine allows viewers to locate general information regarding administrative law judges and calendars of upcoming hearings for selected agencies.

<http://www.state.ar.us/>

5. California, The Office of Administrative Hearings and the Office of Administrative Law maintain their own web sites which contain rules, statutes, forms, publications and instructional information for those who are approaching a hearing.

<http://www.dgs.ca.gov/oah/>

<http://www.oal.ca.gov/>

6. Colorado, Their central hearing office contains actual cases, schedules, rules and instructional information for future defendants.

<http://www.colorado.gov>

[http://www.state.co.us/gov\\_dir/gss/doah/index.htm](http://www.state.co.us/gov_dir/gss/doah/index.htm)

7. Connecticut, The search engine allows viewers to locate agency rules and selected outlines of various agency procedures.

<http://www.state.ct.us/index.asp>

8. Delaware, This site provides general information of executive agencies.

<http://www.delaware.gov/>

9. Florida, The State of Florida Division of Administrative Hearings allows visitors to view hearings, rules and calendars of future hearings.

<http://www.doah.state.fl.us/>

10. Georgia, This site contains a list of rules, procedures and rights of individual defendants.

<http://www.state.ga.us/index/state.cgi>



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11. Hawaii, The search engine allows viewers to locate specific agency hearings and rules.

<http://www.state.hi.us>

12. Idaho, These sites provide a statewide rules index, which directly links to each of the state's agencies.

<http://www.accessidaho.org/>

13. Illinois, The Department of Administrative Hearings provides viewers with rules, procedures and information.

<http://www100.state.il.us/>

<http://www.state.il.us/search/>

[http://www.sos.state.il.us/depts/adm\\_hear/adm\\_home.html](http://www.sos.state.il.us/depts/adm_hear/adm_home.html)

14. Indiana, The search engine locates agency ethics, codes, rules, procedures and hearings.

<http://www.ai.org/ai/gov/agencycomplete.html>

15. Iowa, The Department of Inspections and Appeals contains general information.

<http://www.state.ia.us/>

<http://www.state.ia.us/government/dia/index.html>

16. Kansas, A subscription is required in order to enter

this site. It contains administrative regulations.

<http://www.accesskansas.org/>

17. Kentucky, This web site provides viewers with rules, procedures and cases of selected agencies.

<http://www.kydirect.net/>

18. Louisiana, The search engine allows viewers to locate administrative codes and the state register.

<http://www.state.la.us/>

<http://www.state.la.us/search.htm>

19. Maine, This site lists agencies that conduct hearings and provides viewers with instructional information.

<http://www.state.me.us/>

20. Maryland, The Office of Administrative Hearings publishes a statement of purpose. Visitors can locate the rules and regulations of selected agencies.

<http://www.mdarchives.state.md.us/msa/mdmanual/25ind/html/01adminf.html/>

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21. Massachusetts, The web site allows viewers to locate legislation, policies, regulations and rules of various agencies.

<http://www.magnet.state.ma.us/>

22. Michigan, The search engine locates the codes, rules and regulations of selected agencies.

<http://www.michigan.gov>

23. Minnesota, The Office of Administrative Hearings provides viewers with instructional information.

<http://www.state.mn.us/>

<http://www.oah.state.mn.us/>

24. Mississippi, These web sites list all agencies codes and regulations.

<http://www.ms.gov>

<http://www.mslawyer.com/statedept/lncmac.htm>

25. Missouri, These web sites provide calendars for hearings and bills relating to administration.

<http://www.state.mo.us/>

<http://www.state.mo.us/server.shtml>

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26. Montana, This site contains a list of agency hearings and procedures for selected agencies.

<http://www.discoveringmontana.com/css/default.asp>

27. Nebraska, The search engine allows viewers to locate statutes and schedules of upcoming hearings.

<http://www.state.ne.us/>

28. Nevada, This site provides codes and statutes of selected agencies.

<http://www.state.nv.us/>

29. New Hampshire, The web site provides regulations and instructional information for selected agencies.

<http://www.state.nh.us/>

30. New Jersey, This site contains a list of various regulations and rules.

<http://www.state.nj.us/>

31. New Mexico, There are a few agencies that have listed their regulations, publications and reports.

<http://www.state.nm.us/>

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32. New York, This site provides access to agencies that conduct hearings and to agency regulations.

<http://www.state.ny.us/>

33. North Carolina, The Office of Administrative Hearings contains rules, regulations, procedures, forms, decisions and instructions.

<http://www.ncgov.com/>

34. North Dakota, The Central Personnel Administration provides a list of rules and procedures. Other agency information can be obtained through its search engine.

<http://www.discovernd.com/>

35. Ohio, The web site provides rules and forms for selected agencies.

<http://www.ohio.gov/>

36. Oklahoma, These sites contain rules, procedures, due process information and instructions.

<http://www.oklaosf.state.ok.us/>

<http://www.oesc.state.ok.us/ui/appeals-hd.htm>

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37. Oregon, The search engine allows visitors to review hearings, summaries, rules, procedures and instructional information.

<http://www.oregon.gov>

38. Pennsylvania, The search engine locates texts, reports and hearings of various agencies.

<http://www.state.pa.us/papower/>

39. Rhode Island, Selected agencies provide publications and briefs for viewing.

<http://www.doa.state.ri.us/>

40. South Carolina, The search engine allows viewers to locate administrative codes and rules.

<http://www.myscgov.com>

41. South Dakota, These sites provide a list of administrative rules. The Office of Hearing Examiners contains general information.

<http://www.state.sd.us/>

<http://www.state.sd.us/state/executive/boa/ohe.htm>

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42. Tennessee, This site contains general information and instructions.

<http://www.state.tn.us/>

43. Texas, The State Office of Administrative Hearings contains a list of rules and regulations.

<http://www.texas.gov/>

<http://www.soah.state.tx.us/>

44. Utah, The search engine locates codes and procedures of particular agencies.

<http://www.utah.gov>

<http://www.rules.state.ut.us/>

45. Vermont, The search engine locates codes and procedures of particular agencies.

<http://www.state.vt.us/>

46. Virginia, Virginia's Administrative Law Advisory committee publishes an annual study.

<http://www.state.va.us/>

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47. Washington, This site contains an index of hearings and decisions.

<http://www.access.wa.gov>

48. West Virginia, The search engine allows visitors to view decisions, rules, procedures and an administrative rules index.

<http://www.state.wv.us/>

49. Wisconsin, A regulatory digest is published on this web site.

<http://www.wisconsin.gov/state/home>

50. Wyoming, The Office of Administrative Hearings provides a list of cited authorities.

<http://www.state.wy.us/>

*General Resource*

"Search Engine" provides a detailed listing of city, county, state, multi-state, Federal and National web sites.

<http://www.statelocalgov.net/index.cfm>



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*Federal Government*

<http://www.house.gov/>

<http://www.senate.gov/>

<http://www.whitehouse.gov/>

*National Resources*

1) ABA/FSU, The web site provides Federal Administrative information through cross-links to news, agency, statutes, Thomas, case web sites. State information is also provided through cross-links to individual state statute web sites.

<http://www.law.fsu.edu/library/admin/index.html>

2) Cornell's web site allows visitors to view administrative codes for selected states.

<http://www.law.cornell.edu/index.html>

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*News*

1) N.Y. Law Journal contains articles directly concerning N.Y.S. Administrative Adjudication.

<http://www.law.com/ny/>

2) N.Y.S. Bar Association's search engine locates articles concerning Administrative Adjudication.

<http://www.nysba.org/>

3) Admin. Reg. Law News provides national and New York Administrative Adjudication information.

<http://www.abanet.org/adminlaw/news/>

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