

A VIEW OF ADMINISTRATIVE ADJUDICATION IN NEW YORK STATE

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I. Introduction: The Ethical Dilemma for Administrative Adjudicators

What are the ethical considerations that are applicable to an administrative adjudicator in New York State? Does anyone know? Is there a single source, procedural or substantive, from which the ALJ in the field can garner guidance or solace? The responsibilities of an administrative law judge are fairness, objectivity and a controlled hearing forum. There are no ethical codes directly addressed to each and every administrative law judge, hearing officer, referee, etc... who may preside at an administrative fair hearing in New York State. The various agencies do promulgate rules governing the procedures of their hearings and the conduct of their assigned adjudicatory staff and the State Administrative Procedure Act provides some generic guidance but there is no overall statewide uniform code governing the ethical conduct of all of the state's administrative adjudicators as a single body.

Administrative adjudicators who are admitted attorneys are responsible to a professional code of conduct governing admitted practitioners of the profession and there are several model codes of conduct for administrative adjudication promulgated by the various national and specialty bar associations. However, these model codes have not been adopted into law in New York State and, therefore, are not binding upon the various

state administrative entities that employ administrative adjudicators. Where does this leave the practitioner in the field who is dedicated to maintaining the integrity of his or her forum? What rules apply? Where does one go for guidance?

Until New York States adopts a model code of ethical guidelines specifically directed to individuals, lawyers and non-lawyers alike, we who are engaged in conducting fair hearings, for the many state administrative agencies that are mandated by law to conduct fair hearings, must refer to a simpler process to determine how a hearing officer can perform ethically, fairly and effectively, this can be accomplished by learning and mastering the art of judging.

II. Ethical Demeanor

If, in the course of presiding at an adversarial administrative hearing if the presiding officer behaves with the proper judicial demeanor, remains fair and objective and controls the forum, he or she is not likely to violate any concepts of ethical behavior or project the appearance of impropriety. It is the prime responsibility of the presiding officer to guarantee that the parties have notice, a right to be heard and the right to confrontation; this is the essence of a fair hearing. Further, the administrative adjudicator must not engage in any conduct that could result in an unfair advantage to either party.

III. Physical and Psychological Concerns of the Administrative Adjudicator

The following is a laundry list of some of the points and concerns that should be considered by the working administrative law judge when they approach the daunting task of conducting a fair hearing in an administrative forum.

First, we must consider the circumstances under which administrative hearings are conducted in New York State. Most agency administrative adjudicatory staff must travel around the state in order to conduct proceedings in locations that are convenient to the litigating parties and witnesses. To describe the facilities where most of these hearings are conducted as less than adequate, from a judicial point of view, would be an understatement. Unlike judges who sit in traditional courtrooms and are surrounded by all the official trappings of the judiciary: black robes, wood paneling, bailiffs and the powers of contempt, not to mention the luxury of permanence, administrative law judges must officiate without these props and still function effectively armed with only their wits, experience and will.

How can you be effective using only your wits, experience and will? The following should offer some insight into how to not become overwhelmed by the administrative adjudicatory process and the attendant responsibility of providing a fair hearing and performing ethically under adverse and diverse conditions.

There are two basic concepts that should be considered: first is judicial demeanor and second is fairness. These categories as identified are deliberately overbroad. Judicial demeanor and fairness are broad abstract concepts that consist of many smaller complex

ideas. I will attempt address some of the aspects of the practice, however, this discussion is not all inclusive and I know that many of you who practice in this arena will be able to furnish many additional examples not covered in this chapter.

A. Judicial Demeanor

Judicial demeanor is that perception that others will form of you as you perform your duties of hearing the evidence, gleaning the facts and controlling the forum. Judging is an art and like many artistic endeavors, prior thought, planning and faultless execution makes for excellence. It is an art form that can be learned and mastered through practice and introspection.

One of the first considerations of judicial demeanor is the appearance of the adjudicator. I cannot say enough about the personal appearance of the administrative law judge. Our breatheran in the constitutional courts have the luxury of being authorized to wear black robes which makes any concerns about what they're wearing underneath moot. Not so the administrative law judge who must present in the outfit of his or her choosing; I suggest that you choose wisely. Your appearance will make the first impression that the parties form upon entering your room and this impression will carry over to everything you do, from the moment that the record is opened to the conclusion of the hearing. There is no need to overdress but jacket and tie are mandatory for male adjudicators; for female adjudicators, the uniform should be conservative business attire. You should do everything possible to enhance the impression that you are wise, all

knowing and fair. The impression communicated should be one of self-confidence and knowledge. The adjudicator should appear neat, well pressed and conservative. The choice of coordinating shirt or blouse, and suit tie, are important. I do not profess to offer a full-proof formula of how one should appear, but we know how an impressive judge should look when we see him or her. Take time at the start of your day to look in a mirror, scrutinize your appearance and make the necessary adjustments.

B. The Physical Plant

The next consideration is the layout of the forum or room in which you will be presiding. Some of us are lucky enough to have permanent hearing facilities, some of which provide the necessary judicial ambiance. The majority of us, however, must work in agency conference rooms, hotel meeting rooms and, from time to time in accommodations that are not in any respect suited to the conduct of an administrative hearing where the substantive rights of parties will be decided. If possible, arrive early and inspect the premises. Are the seating arrangements to your satisfaction? Are you seated in a prominent position in the room ? Are you able to see, and be seen by, all parties? Test the acoustics. Can everyone hear you and each other clearly? Will the stenographic reporter and/or tape recorder, pickup all of the testimony clearly? These are just a few of the items to think about before the hearing begins, and an early trip to the forum to reconnoiter and familiarize yourself with the arrangements will enhance your ability to perform in the optimum.

C. How Do I Appear To the Parties ?

Many administrative adjudicators have not had the luxury of seeing themselves on video or film in the act of presiding at a hearing. There is a major factor to consider, how do I appear to the parties? An administrative adjudicator should be acutely aware of his or her unconscious behavior while presiding at a hearing. The avoidance of broadcasting your personal feelings regarding what is taking place before you is of the utmost importance. The parties will be looking to you to discern whether you are taking sides during the course of the proceedings or if you have already made up your mind before all of the evidence is presented. If you take notes during the testimony, be as diligent in making notations regardless of which side is testifying. Be aware of any tendency that you may have to express, non-verbally or through other body language, your reaction to the evidence being offered. If you are going to ask questions be sure to phrase them in such a manner as to not appear to be cross-examining the witness or taking sides in the dispute. Always remember that your job is to elicit the facts, not to make the case for either side. I know that this next point is pretty obvious, but try to stay awake and appear alert. Sometimes the subject matter of a hearing may be of such a nature that it can become boring and monotonous. In these instances, be conscious of your appearance of attentiveness and call for a brief recess if you are beginning to feel languorous.

D. How Do I Sound To the Parties ?

Voice control is another manner in which the adjudicator can project the necessary appearance of fairness and build confidence in the parties for the administrative process. It is fairly obvious that displays of emotion, both verbal and physical, are absolutely destructive to the process and all you are trying to accomplish. In many instances, one or both of the parties will attempt to bait the hearing officer into a verbal confrontation in order to manipulate the proceedings. You should immediately recognize when this ploy is being utilized and immediately put a stop to it. Methods of regaining control of the forum and dealing with this kind of tactic will be discussed later when I talk about control of the forum. Suffice to say that your response to certain negative adversarial tactics will reflect upon your ability to maintain a proper judicial demeanor.

Considering all that has been said about judicial demeanor, in a nutshell the administrative adjudicator should present with a neat professional businesslike appearance, remain calm, exercise self-control, be aware of his or her non-verbal responses to what is taking place and control the litigants as the hearing progresses. These are rather simple concepts and may very well be defined as common sense but how many of us actually methodically go over these points and remain aware of them before we enter the forum to preside and continue to remain vigilant as the hearing progresses?

III. Control of the Forum

After we have mastered our art and we are satisfied that we have perfected our judicial demeanor, the next aspect of what we must do concerns the control of the forum. This equates to control of the room and the participants, in that we must move the case while giving both sides a fair hearing. We must be concerned for the safety of the witnesses, the litigating parties, and ourselves. We must be diligent in the creation of a useful cogent record on which to base our final decision and that will reflect accurately what transpired in the event that the matter goes to appeal.

Control of the forum is established by setting out your personal rules directing how the hearing will progress and advising the parties beforehand how to conduct themselves in your forum.

A. The Appearance of Impropriety

In many agencies the prosecuting attorneys may be assigned to the same legal sub-bureau that also contains the staff responsible for the administrative adjudication function. The overall supervisor in most cases is probably the General Counsel or a Deputy Commissioner. Over the passage of time the administrative adjudicator may become familiar with the prosecutors appearing in front of him or her. During the course of the hearing the adjudicator and the prosecutor must address each other formally using terms such as: "Mr.", "Ms.", "Counselor" and "Judge". The appearance of objectivity of the law judge is severely damaged when he or she displays undue familiarity with either of the litigating parties. In fact, this could damage the adjudicator's ability to control the

forum as the offended counsel might seize upon this *faux pas* to voice unnecessary objections and become unruly. In any event the credibility and efficiency of the process will suffer from any deviation from the formalities of judicial conduct and undue disruptions.

B. Prior Misconceptions of the Parties

It is not unusual to discover that counsel appearing before the law judge has some preconceived notions about the fairness of the process and the adjudicator's alliances to the agency. In other words, the law judge is presumed to be biased because he or she is in the employ of the agency bringing or defending the action. This misconception must be addressed and put to rest at the earliest possible moment. The law judge has to act with deliberate even-handedness when dealing with the litigants.

C. Ex-Parte Communications

The most unforgivable error in the conduct of administrative hearings is to violate the rule against *ex-parte* communications. Issues that arise during the hearing should be addressed to both parties simultaneously and on the record when necessary. There is no excuse for going outside the record or discussing matters with one side of the dispute without the knowledge of the other. I cannot emphasize enough the importance of this concept. Nothing can damage the credibility of the process or of the law judge as much as the violation of this rule.

D. Unruly Parties

At outset of the hearing disorderly or discourteous behavior must be dealt with at the first occurrence. I suggest that in the first instance of unruly behavior of either of the parties, the law judge should call a recess and call attention to the offending act in the presence of both parties off the record. In the event of a repeat of the unacceptable behavior the law judge should note it on the record. The tactful handling of these events will do a great deal towards controlling the forum and moving the hearing. Some of the events to be aware of are: *ad homonym* statements, not relevant to the hearing, directed at opposing counsel, the witness or the law judge; constant disregard of the law judge's rulings; unnecessary asides; disruptive non-verbal behavior; any behavior or event that displays disregard or disrespect for the forum or the adjudication process.

E. The Safety of the Participants

The safety of all of the parties to the hearing should be a major concern for the administrative adjudicator. The utilization of recesses should be employed to defuse litigants who appear to be getting overly emotional during some phase of the hearing. The law judge should be vigilant in observing litigants who appear to be irrational in their actions and reactions to what is transpiring. A request to have some sort of security in place, in those instances where it appears that one of the parties may be likely to cause physical harm to himself or herself or a participant, is not an unreasonable action. Arranging the hearing room in such a manner as to afford the law judge a quick exit,

where possible, should be a consideration. However, if the adjudicator establishes his or her position as controller of the proceedings in the first instance and exhibits fairness towards the parties, it is probably unlikely that matters will become unwieldy.

IV. Conclusion

The concepts of judicial demeanor and control of the forum are essential to the conduct of fair and impartial administrative adjudication in New York State. Because there are so many varied jurisdictions as there are state agencies that have the responsibility to grant fair hearings, standardization of the process is nearly impossible. Unfortunately New York has not enacted central panel legislation, which not only would centralize the process, but it would allow for standardization of rules governing the hearing procedure, administrative law judge training, an ethical code that would apply to most adjudicators and adjudications falling under the panels jurisdiction.

More New Yorkers are liable to become subject to some kind of administrative adjudication than would be likely to have reason to resort to either the criminal or civil courts. To these individuals, administrative adjudication represents our system of justice. They expect to have their day in court and be treated fairly as guaranteed by our system of government. Therefore it is imperative that we who practice in this arena do so ethically with attention to the responsibility that we have to our profession and our fellow citizens.