

**Dealing With Pro-Se and Non-Attorney Litigants
In New York Administrative Hearings**

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Under N. Y. Administrative Procedure Act (SAPA) Article 5, any person compelled to appear in person or who voluntarily appears before an agency has the right to be accompanied by, represented and advised by counsel. The statute goes on to state:

"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"

In Matter of the Board of Education of the Union-Endicott Central School District v. New York State Public Employment Relations Board, 233 A.D.2d 602, 649 N.Y.S.2d 523 (3rd Dept. 1996), the Appellate Division for the Third Department ruled that such language in Article 5 meant that non-attorneys may represent parties in an administrative proceeding, without violating the proscription against unlawful practice of law that appears at Judiciary Law § 478. Under Judiciary Law § 478, a natural person violates the statute by appearing for a person other than himself or herself in a "court of record". In Union-Endicott, the Appellate Division held that an administrative hearing is not a "court of record", but rather the hearing is an adjudicatory proceeding governed by SAPA § 301 *et seq.*, so that no violation occurs under Judiciary Law § 478 when a non-attorney appears for a party in an administrative hearing. Some agencies have promulgated specific regulations that allow for non-attorney representatives to appear for litigants in administrative hearings before that agency [Title 10 NYCRR Subpart 69-4].

Dealing with non-represented parties (pro-se) and litigants with non-attorney representatives can present problems for Administrative Law Judges (ALJ). Canon 3 of

the New York Code of Judicial conduct requires judges to perform their duties impartially and diligently. The American Bar Association's (ABA) Model Code of Judicial Conduct and the Model Code of Judicial Conduct for State ALJs [<http://www/naalj.org>] each contain a similar Canon 3. Under SAPA § 303, an ALJ must conduct a hearing impartially. Do these Canons and SAPA mean that an ALJ must treat a pro-se party or a non-attorney representative in exactly the same manner and hold those persons to exactly the same standards as an attorney appearing in the hearing? Does an ALJ violate the Canons and SAPA by providing the non-attorney litigants some basic information about the procedures in a hearing and by giving those litigants some leeway in presenting evidence?

Some agencies' hearing regulations contain specific provisions requiring ALJs to ensure a complete record and to provide non-attorney litigants with certain basic information about the hearing process [Title 18 NYCRR § 358-5.6(b)]. In fair hearings for benefits under Title 18, an ALJ must among other things:

- make an opening statement explaining the nature of the proceeding, the issues to be heard and the manner in which a fair hearing will be conducted,
- elicit documents and testimony, including questioning of parties and witnesses, if necessary, particularly where the litigant demonstrates difficulty or inability to question a witness,
- where the ALJ considers independent medical assessment necessary, require that an independent medical assessment be made part of the record when the fair hearing involves medical issues,

- adjourn the hearing when in the ALJ's judgement it would be prejudicial to due process rights of the parties to go forward with the hearing, and,
- where necessary to develop a complete record, issue subpoenas, and/or require the attendance of witnesses and the production of books and records.

Rather than finding such regulations violated SAPA and the Canons on Impartiality, several courts have invalidated fair hearing decisions in which ALJs failed to follow the above regulatory requirements, Blackman v. Perales, 188 A.D.2d 339 (1st Dept. 1992), Schurr v. Perales, 115 A.d.2d 740 (2nd Dept. 1985), Echevarria v. Secretary of Health and Human Services, 685 F.2d 751 (2nd Cir. 1982). In Felix v. Wing, 2/1/2000 N.Y.L.J. 27, col. 1 (Sup.Ct. N.Y.Co., Schlesinger, J), the Court ruled that due process under the Federal and State Constitutions requires that a fair hearing provide a pro se petitioner a meaningful opportunity to understand and participate in a proceeding and to be adequately heard.

Sources outside the Courts have also faulted the fair hearing process within the Department of Family Assistance¹ concerning proceedings with pro se litigants. A 1999 Report by a Special Committee from the New York State Bar Association² criticized the Department for failing to provide litigants information in plain language and recommended that the Department prepare a pamphlet on the fair hearing process. The Special Committee also faulted the Department's ALJ's for their conduct in hearings and recommended that the ALJs be more proactive in eliciting evidence in cases with claimants without representation by counsel³.

¹ The Former Department of Social Services

² New York State Bar Association, Report of the Special Committee on Administrative Adjudication, page 53 (1999).

³ Id. at 62.

Some Court Systems have adopted special rules or recognized the need to provide leeway in dealing with pro se litigants.⁴ The State of Minnesota developed a "Suggested Protocol for Domestic Abuse and Harassment Hearings With Pro Se Litigants". The protocols included suggestions such as:

- Verify the Party is not an attorney, understands that he or she is entitled to an attorney, and chooses to proceed without an attorney;
- Explain the process;
- Explain elements of the type of claim,
- Explain that the party bringing the action has the burden to present evidence in support of the relief sought;
- Explain the types of evidence that may be considered;
- Explain the limits on the kind of evidence that may be presented;
- Ask both parties whether they understand the process and procedure; and,
- Direct Judge's questions at obtaining general information and avoiding the appearance of advocacy.⁵

In Haines v. Kerner, 404 U.S. 519 (1972), the United States Supreme Court held that a self-represented litigant's complaint must be held to less stringent standards than the formal pleadings that attorneys would draft.

These Court decisions, the Minnesota protocols, the Social Services regulations and the Bar Report indicate that SAPA and the Canons on Impartiality in no way require ALJs to remain passive in hearings involving a non-attorney litigant. Some cases suggested that a passive ALJ may deny a pro-se litigant due process. Absent any statute or

⁴ Goldschmit, Mahoney, Solomon and Green, *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers*, page 14, American Judicature Society (1998).

⁵ *Id.*

regulation [such as Title 18 NYCRR § 358-5.6(b)] requiring the ALJ to take certain steps in hearings with non-attorney litigants, the question remains how far an ALJ can go to assure fairness, without crossing the line to advocacy for the non-attorney litigant.

The specific provisions in the regulation at § 358-5.6(b) and the Minnesota Protocols suggest steps that ALJs may take to assure a fair hearing and ensure a complete record without stepping over the line into advocacy. In a recent court decision in Santiago v. Apfel, No 98 Civ. 9042 HB., 2000 WL 488467, 68 Soc. §. Rep. Ser. 383 (S.D.N.Y. 2000), a U. S. District Court found that a U.S. Social Security ALJ had taken sufficient steps during a hearing to assure that a non-attorney litigant knowingly waived her right to counsel and to ensure developing an adequate record. The Court went into detail about the steps the ALJ took, including quoting the hearing record from the ALJ's questioning of the litigant about her waiver of counsel. The Santiago case suggests further steps an ALJ may take in providing a pro se litigant a fair and complete hearing without stepping over the line between impartiality and advocacy.

If an ALJ does choose to provide some basic information to a non-attorney litigant, a question remains as to when the ALJ should do so. The ALJ should provide whatever information to a litigant only on notice to both parties to avoid violating the ban on ex parte communications that appears at SAPA § 307(2). The ALJ should also make a record of the information the ALJ provides and the steps the ALJ took to assure the fair hearing. Note that in the Santiago case, despite what the steps that ALJ took to assure a fair hearing, the litigant still challenged the ALJ's Determination on the grounds that the ALJ failed to develop the record adequately and failed to provide information about the right to counsel. The hearing record, however, proved otherwise. The beginning of the

hearing provides a good time to provide the litigants with information about what will happen at the hearing, as the discussion would take place in both parties' presence and on the record. Waiting until the hearing's commencement to provide such information could, however, cause a delay in the hearing. A non-attorney litigant could fail to bring certain evidence or fail to secure the appearance by witnesses, because the litigant lacked knowledge about permissible evidence or about the availability of a subpoena that the ALJ could issue. In these situations, an ALJ could extend the hearing past the initial date to receive additional evidence. To avoid delays, the ALJ could also provide some basic information prior to the hearing in a pre-hearing conference on the record or by teleconference with both parties. Following the teleconference, the ALJ can make a record by sending a letter to the parties summarizing the teleconference. At the hearing's commencement, the ALJ can then place the letter in evidence and ask the parties if they took exception to the letter's summary of the teleconference. The ALJ could also prepare a form letter to send to the parties containing basic information and then enter the letter in evidence at each hearing.

Whether the ALJ provides information verbally or in writing, the ALJ should direct the information to all the parties and ask if all the parties understand the information, to avoid appearing partial toward the non-attorney litigant.