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ALJ Control of the Hearing: What Does an ALJ do About an Unruly Witness or Obstreperous Attorney?

By Prof. Allen Shoenberger*

Most trial judges have enormous advantages in their ability to control hearings. Not only do they sit on raised benches in courtrooms designed to convey the majesty of the law, they wear black robes signifying their state conferred authority.¹ “These are not

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1. The black robe allegedly traces back to the judges donning black robes for the funeral procession of Queen Anne, the last of the Stuarts, in 1714. One version of the origin stems from a well known jest of Chief Baron Pollock that the bar went into mourning at the death of Queen Anne and never came out. Another version attributes it to the mourning dress worn by King William after the death of Queen Mary. THE 1911 EDITION ENCYCLOPEDIA, *available at* <http://72.1911encyclopedia.org/R/RO/ROBES.htm>. Both before and afterwards, English judges wore robes with different colors. Current High Court judges in Britain are required to have five different costumes with government stipends available to defray 6,925 pounds of the cost in 1992 according to a consultation paper issued on behalf of the Lord Chancellor and the Lord Chief Justice. Rozenberg, *What Price Tradition 1* (Aug. 1992) (unpublished manuscript, on file with author). With the exception of our own Chief Justice Rehnquist’s choice to wear a gown reflecting his stint in a Gilbert and Sullivan operata, the black gown has pretty much prevailed in the United States. To be sure, there are reports that a few judges of Irish heritage have been known to don a green gown on St. Patrick’s Day, but such reports are scattered, and it is questionable how significantly such attire lends dignity to the court. The switch to black robes for barristers in England similarly occurred for the funeral procession of Charles II in 1685. *Id.* at 3.

In the United States, the switch is attributed to John Marshall who wore a plain black robe in the republican tradition of the Virginia Court of Appeals when he assumed his seat on the Supreme Court in 1801. The other justices on the Supreme Court at that first sitting were clad either in traditional scarlet and ermine of the King’s Bench or their individual academic gowns. “Marshall preferred simplicity

ordinary mortals, they are JUDGES,” scream out the robes. Many judges have the additional accoutrement of a court clerk, and often uniformed deputy sheriffs who may or may not pack a gun. Trial judges also have the invisible advantage of the power of civil or criminal contempt.² The facility in which such judges sit may even

to pomp, understatement to extravagance.” JEAN E. SMITH, JOHN MARSHALL: DEFINER OF A NATION, 285-86 (1998); *See also* KERMIT L. HALL ET AL., THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 989 (1992).

2. Even witnesses are sometimes threatened with contempt. In one case, a witness the court described as “unruly” was threatened with contempt while testifying, partly because of a statement “I’m getting the f--- out of here.” The prosecutor was also admonished to control his witness. *Edelen v. United States*, 627 A.2d 968, 974, n. 9 (D.C. 1993). Of course, some ALJs have the indirect power to threaten contempt sanctions. For example, a subpoena that is ignored may engender a petition to a court to issue a subpoena such as under Rule 45 of the Federal Rules of Civil Procedure for attendance at an administrative proceeding. The district court can then employ contempt sanctions if its subpoena is not obeyed. *See United States v. Karlen*, 645 F.2d 635, 639 (8th Cir. 1981), *United States v. Van*, 931 F.2d 384, 385 (6th Cir. 1991), *United States v. Florida Azalea Specialists*, 19 F.3d 620, 621, 624 (11th Cir. 1994) (court order obtained enforcing administrative agency subpoena; discussion recognizes that certain other agencies, including the National Labor Relations Board and the EEOC have their own power to issue subpoenas without having to apply to an ALJ for a subpoena). On occasion administrative contempt power of a sort may exist. *See A-Z International v. Phillips*, 179 F.3d 1187(9th Cir. 1999). In this case, however, the sanction (disciplining an employee for filing a fraudulent workers compensation claim, had to be presented to the district court. To be sure, the ALJ’s certification of the facts means that the court “shall thereupon in a summary manner hear the evidence as to the acts complained of, and if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court.” *Id.* at 1191, citing 33 U.S.C. § 927(b). The statutory reference to summary manner suggests a degree of deference to the ALJ’s fact findings. However, the system preserves judicial oversight over administrative contempt proceedings. *See generally* 20 Am.Jur. 2d Courts § 1 (1995) (explaining that historically, “administrative agencies do not have the power to punish contempts...”). 179 F.3d at 192, n.5. However, closer examination of the cited authority indicates a more complex situation. Only one case was cited by Am.Jur., *Hernreich v. Quinn*, 350 Mo. 770, 779, 168 S.W. 2d 1054, 1059 (1943). *Hernreich* does recognize that courts have inherent power to punish contempt. However, it also states that the particular agency before the court, the Board of Adjustment, had no statutory authority to punish for contempt. Other state administrative entities, however, had been granted that power, including county boards of equalization. 350 Mo. at 778, 168 S.W. 2d at 1059. At the federal level there may be article III limits on the authority of Congress to delegate such matters as contempt power. However,

have a lock up. Persons who come into such facilities often go through metal screening machines today, impressing on most of the public that they enter into a different world.

Contrast the Administrative Law Judge's ("ALJ") position. High-ceilinged chambers and raised benches are usually absent. Judicial acolytes such as clerks and armed guards are rarely present. Metal screening devices are at a far lower priority, and likely to be absent. The judge looks less august, virtually none are garbed in black robe. Suits, even an expensive suit for a man, or a dignified suit or dress for a female ALJ, rarely intimidate. A doctor's whites in a hospital may engender more respect from the public. One of the primary advantages of central panel systems may be that hearing facilities, at least in certain locations, look far more like courtrooms. In several decades as a hearing officer for a state agency, I rode the circuit. Hearings were held in dingy conference rooms, in fire halls, in basements of bowling alleys and other recreational facilities, as well as in city hall chambers.³

Noriega-Perez v. United States, 179 F.3d 1166 (9th Cir. 1999) approved administrative assessment of a civil fine of \$98,000 for civil document fraud on the agency, rejecting Article III objections involving separation of powers arguments. (The investigation allegedly cost \$48,000. 179 F.3d at 1169). See also *Lindsey v. Ipock*, 732 F.2d 619 (8th Cir. 1984) (holding that bankruptcy courts do not have the delegation of contempt power to decide Article III violations and declining to reach merits of district court's analysis). Although imposition of a civil fine is not the same as a body attachment, such civil sanctions or the threat of civil sanctions can be quite effective in deterring bad conduct. See *United States v. Century Clinic*, 75 F. Supp. 2d 1127 (D. Nev. 1998) (civil contempt found by ALJ, fine of \$400,000 affirmed by district court). Reported cases of contempt findings by ALJs are rare. See *Cooper Tire & Rubber Co. v. Angell*, 58 S.W.3d 396 (Ark. Ct. App. 2001) (ALJ imposed a \$10,000 fine for contempt; the commission suspended and held the fine in abeyance, contingent upon compliance with commission's past and prospective orders—court declined to reach constitutional objections to fine); *Colorado Comp. Ins. Auth. v. Indus. Claim Appeals Office of Colorado*, 907 P.2d 676 (Colo. App. 1995) (In refusing to consider claim, the ALJ could not exercise contempt power when argument was not raised in petition for review); Bernard Schwartz, *A Decade of Administrative Law: 1987-1996*, 32 TULSA L.J. 493, 513 (1997) (discussing, with disapproval, instances in California and Rhode Island where administrative agencies employed contempt power). Criminal contempt power was employed in Rhode Island. *Morton v. Worker's Comp. Appeals Bd.*, 238 Cal. Rptr. 651 (Ct. App. 1987); *Kennedy v. Kenney Mfg. Co.*, 519 A.2d 585 (R.I. 1987).

3. Perhaps the worst such facility was in a fire hall, not the hall itself, for that

How then does an ALJ control a hearing without many of the standard judicial trappings? Control concerns exist with all of the parties, witnesses, and attorneys. Attorneys may represent the parties, or "the public" in some general sense. Witnesses may be self-selected or be sponsored by a party. Both witnesses and attorneys may lack self control, or demonstrate private agendas. Parties, such as claimants for valuable privileges—be they welfare benefits or zoning changes—may barely be in control of their emotions, and more frequently do not understand the nature of the proceedings they are in. Parties represented by an attorney may be less difficult to deal with—at least procedural problems seldom present at the same level of difficulty. However, even attorneys may not be familiar with either the procedural rules or the substantive law of a specialized area. Many attorneys treat administrative law hearings as if they are before a court; hearsay objections frequently leap from their lips, even in hearings in which hearsay is ordinarily admissible. On occasion astounding ignorance of the law may be displayed. What are some of the ways to deal with this myriad of problems?⁴

Control starts with the ALJ taking charge of the hearing. It is critical to make it known at the beginning of the hearing that we are engaged in serious business. While mild levity may help in the middle of a long hearing, it has no place at the beginning.⁵ Tone is critical. A brief outline of the procedure that will be followed is a good idea—no doubt most ALJs convey that early. The degree to which detailed procedural information must be provided depends both upon the technical nature of the issues and the competence of the persons in the hearing.

room was too small, but the larger room housing the fire engines. One day the engines were called out to respond to a fire and only rapid snatching prevented many of the hearing exhibits from fleeing the hall on the bumper of the fire truck.

4. This article will not consider public demonstrations such as pickets outside, or other potentially violent issues. Such matters are properly within the scope of the police.

5. In the middle of a hearing humor may defuse potential confrontational matchups. In one hearing, the attorneys were apparently close to blows. The presiding officer intervened, "Gentlemen, Gentlemen, tomorrow is Thanksgiving. You will go home to your families tonight and tomorrow you can fight with your families. That 's what families are for. Don't fight here." Peace resumed in the hearing.

If the hearing is being tape recorded or transcribed by a court reporter, it is good to instruct the participants that matters which are neither recorded nor transcribed will not be part of the hearing record (exhibits are the only exception). Control of the transcribing, taping, or both is a very significant and practical power of the ALJ. Lengthy, contumacious objections and testimony that is pointless, time consuming, or convoluted and not thought out, may be dealt with by going off the record. In more than a few occasions such a simple expedient has calmed matters down considerably. Sometimes the witnesses or litigants may use such a break to control their own emotions or reconsider what they are actually trying to convey. When the record resumed, it was usually my practice to make a brief statement about events off the record. With a little encouragement, persons representing themselves were often able to condense their testimony to make it more pointed and more direct. Such simple expedients—such as this ALJ "time out"—proved invaluable in many different occasions. However, it is important when going back on the record to keep any statement from the ALJ brief and impartial. If there are any objections to this procedure from an opposing side, let them be put on the record and immediately rule upon them. Again, keep the objections short, as well as the rulings.

One source of problem comes from the potential of multiple cross examinations at certain hearings. Some public hearings may have a half dozen or more attorneys appearing for various parties with the statutory right to cross examinations. On occasion, constitutional requirements may entitle a party to cross examine.⁶ For example, in a recent Illinois Supreme Court decision, the court held that the constitutional commands of due process mandate that interested parties have an opportunity to cross examine witnesses in a special use permit hearing.⁷ When such situations present themselves, it is wise for the hearing officer to establish the order in which any cross examinations will be conducted early in the hearing. Attorneys understand that and will generally abide by it. The trickiest part of such proceedings may come when any of the multiple attorneys

6. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

7. *People ex rel. Klaeren v. Village of Lisle*, 781 N.E.2d 223 (Ill. 2002). The interested parties were neighboring landowners objecting to the special use permit, in this case the clearing of land for a large retail store on a sixty acre lot. *Id.* at 224-25.

object to another attorney's cross examinations. This can be very time consuming; yet attorneys have a right to do so. One tactic that may prove useful is allowing an objection to be fully argued and then ruled upon. Any further, similar objection can be treated as a continuing objection with the same ruling, but without further argument.

Grandstanding by witnesses or attorneys may be a problem on occasions. If the hearing has the character of a public town hall meeting, this becomes a particularly difficult situation. Time limitations help, in addition to a method such as a sign-in sheet to handle the order in which members of the public will make presentations. Most members of the public will be content with a couple of minutes to state their opposition or support for a project. On the other hand, there may be witnesses who wish to present lengthy testimony. My own tendency was to permit such witnesses to go on until it was clear that they became repetitive. When that happens it is usually possible to sense that the audience is growing tired of the presentation. At that point an interruption giving the speaker two minutes to wrap it up usually works well.

Attorneys also may be longwinded or may try to impress particular persons in the hearing including members of the press or local media. Most understand that the media will only broadcast a minute or two, if any, so short speeches will likely accomplish the attorney's "political" agenda. Toleration of a degree of this is usually a good idea. The most difficult problem for the hearing officer comes when an attorney, perhaps a locally elected official, tries to put into evidence what is legally and totally irrelevant. Attorneys on the other side are likely to bring this to the ALJ's attention. It is obviously unwise for an ALJ to insert herself into the middle of some local political dispute. So, some tolerance for such conduct is probably advisable and certainly preferable to lengthy and time-consuming arguments over the matters. In administrative hearings, the words "we will take it for what it is worth" are a very powerful medicine. Alternatively, offers of proof may be employed to shorten the hearing for a matter that is clearly inappropriate.

What about threats or abusive conduct by witnesses or attorneys? Patience is the best reaction, although it may be difficult to do so when personal attacks on the hearing officer may be involved. It may be worthwhile to indicate to the parties involved that any ALJ ruling may be subject to an appeal, but the matter before you is the

completion of this particular hearing in a reasonable time frame. Attorneys who are being paid certainly understand this attitude. If physical attacks are threatened, that is a completely different matter on which local authorities might be most properly summoned.

What about demonstrations in the hearing room, bake sales in the back of the room, and the like? If the room is large enough and the activity unobtrusive enough, there is probably no reason to make an issue of it. Attorneys, of course, may point it out on the record. However, it might well be worth remarking that such activity may ultimately disserve the interests of the proponents of such conduct, for reviewing courts might well consider such activity in ultimate rulings.⁸ The ALJ must refrain from any active support. Most people understand self interest, and temper their activity in the face of such cautions.

The media and the press present their own problems. In the rare case when the public interest is so high that it justifies the presence of the media, one of the more frequent requests is for the media to be instructed in the procedures after the hearing is over. It is important to let the media know what the procedures are. Briefing schedules may already be on the record. The media may know whether the ALJ or another body makes the initial decision. What is not known is the time frame, whether it be a week or a month. Letting the media know about procedural points is quite proper. However, discussion of substantive matter, such as impressions of witnesses, obviously is not. Take firm control on any contact with the media—let them know the limits of what you will discuss or answer questions about, and stick firmly to those limits. Filming or tape recording of the hearing by outside media presents other problems. Such activity may of course be prohibited by local statute or rule. However, if no rule exists, so long as the hearing is not seriously impacted, there may be

8. It is not a good idea for a decision maker to wear a button in the public allying themselves with one side of the controversy. In *City of Rockford v. Winnebago County Bd.*, four members of a county board were disqualified from voting on a remand because they each wore a STL button (save the land - an anti landfill slogan). *City of Rockford v. Winnebago County Bd.*, PCB 87-92, Illinois Pollution Control Board (Nov. 19, 1987). One PCB member dissented and suggested that by taking off the buttons after five minutes, the board members “cured” the problem. *Id.* Anderson dissent, p.5, unpublished opinion, but available at <http://www.ipcb.state.il.us>. Better the buttons were never touched in the first place.

no reason to bar it. The media often tapes for a short time, allowing various parties to display some clear grandstanding, and then is likely to leave for other venues.

SUGGESTIONS

The following suggestions may be appropriate for particular challenges in hearings:

1. Your demeanor as a hearing officer is critical. Calm, unruffled exterior coupled with an air of impartiality is likely to sooth some of the most upset witnesses and litigants. This is serious business we are about, and that tone must be set early.
2. An early road map to the procedure of the hearing is worthwhile. If public witnesses appear to be many, consider using a sign up sheet, and announcing at an early time that public statements may be limited to only a few minutes. Discourage repetitious remarks.
3. If the ALJ decides the result of the hearing, there is an obvious “implicit” sanction from misconduct by either of the sides. However, that “implicit” sanction should be left implicit unless there is explicit statutory or regulatory authorization of contempt sanctions. Allowing the appearance of bias in the hearing, even if well deserved by outrageous conduct, may be the subject of later appeals.
4. Take control of the hearing early. There are both macro and micro ways in which this can be done. Control of the record is quite important. Turn off the tape recorder or instruct the court reporter not to transcribe remarks by saying “we are off the record.” Such simple actions appear to sober up the most uncontrolled witnesses and attorneys.
5. Avoid direct argumentative confrontations with witnesses and attorneys. If you need to make a ruling, do so, without hesitation, but then proceed with the hearing. Let the participants know that you are not going to reconsider your

rulings, but there is always an appeal. Make liberal use of continuing objections in contentious hearings. It saves time as well as emotional energy and produces a much simpler record.

6. Particularly when a party is represented by an attorney, ask a minor question early on to clarify a point that has been made by a question to a witness. By doing so, the ALJ establishes firm control over the proceeding and sends an overt message to all sides that you have to persuade the ALJ with clear testimony and that lack of precision will not help.⁹
7. When there are several sides represented by attorneys, ask questions to clarify matters when both sides are questioning witnesses. This conveys an appearance of impartiality and mitigates personal attacks upon the ALJ.
8. Monitor your own tones for appearances of anger, hostility, or contempt. The appearance of impartiality is of prime importance.
9. Violence or threats of violence are not something that you as an ALJ should be dealing with. As a law professor, a psychiatrist once told me, if you become fearful of a person who appears in front of you, trust your feelings and do something. Adjourn the hearing, and reconvene only with appropriate protective assistance. It is a sad but unfortunate fact that judges themselves have on occasion been the targets of shootings and other aggressive behavior.
10. Be patient. A party wishes to have their day in court. Public witnesses in "town hall meeting like" settings want to say their piece. Tolerate some repetition, but set firm limits. If you are going to cut off a witness, allow a last minute or two to sum up their position or testimony. In hearings with

9. Some of these suggestions appeared in an earlier article, Allen E. Shoenberger, *The Active Administrative Law Judge: Is There Harm in an ALJ Asking?*, 18 J. NAALJ 395, 410 (1998).

hundreds of interested public attending, all with the “right to testify,” typically only a dozen actually do so, and very rarely do such witnesses take much time. The appearance of unfairness is what must be avoided. Statements such as: “You have made your point,” “you are repeating yourself,” and “can you conclude with your major points in two minutes,” may be very useful. Such non-judgmental and efficiency oriented interventions are likely to be received with particular approval of large audiences.