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# The Role of the Administrative Law Judge

Ronnie A. Yoder\*

The last time I went away from Washington to a judge's conference, the world changed. The conference ended on September 11, 2001, with a national tragedy, a national nightmare, and a changed world. But the *role* of the Administrative Law Judge (ALJ), while evolving, has remained unchanged. We – you and I – are not engaged in what may come to be the longest, most difficult civil and uncivil war in our history. But we are engaged in assuring continuance of the freedom and fairness that we have fought – through many wars – to preserve. There is no higher calling than the preservation of freedom and fairness in the trenches of due process, and we are in those trenches – you and I. That is why I agreed to come today and talk about the role of the ALJ.

What does the law require of you but to do justice, love mercy, and walk humbly?<sup>1</sup> That is the role of the administrative law judge.

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\* This article is an edited version of remarks made by Administrative Law Judge Ronnie A. Yoder at the Annual Meeting of the National Association of Administrative Law Judges (NAALJ) in Austin, Texas on November 7, 2001. Judge Yoder is the Chief Administrative Law Judge of the Department of Transportation, is a former chair of the National Conference of Administrative Law Judges of the ABA (NCALJ) (1994-95), is on the executive committee of the Federal Administrative Law Judges Conference (FALJC), the ALJ summit coordinating committee, the FBA Judiciary Division Leadership Council, the Board of Directors of the FBA DC Chapter, and the Board of Advisors of the NAALJ Journal. The comments are his own and not those of the Department of Transportation or any other organization or entity. Canon Four of the Model Code of Judicial Conduct authorizes and encourages judges to “speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.” MODEL CODE OF JUDICIAL CONDUCT Canon 4 (1990).

1. *Micah* 6:8.

When I spoke to the Social Security Administration Administrative Law Judges at their annual convention in 1997, I told them in somewhat less historic tones that the role of the ALJ was to “be nice, be cool, and just do it,” which was my shorthand way of saying a judge should (1) be personal/personable (i.e., courtesy begets courtesy, so be nice); (2) be judicial and judicious (i.e., be cool/calm and obey, apply and enforce the law); and (3) just do it; that is, be professional, i.e., participate, learn, and do by joining and being active in the National Association of Administrative Law Judges (NAALJ), the FORUM of the United States Administrative Law Judges, the National Conference of Administrative Law Judges (NCALJ) of the American Bar Association’s (ABA) Judicial Division, the Federal Administrative Law Judges Conference (FALJC), the Association of Administrative Law Judges, and the American Judicature Society.

I know that I was your second choice to speak about the role of the administrative law judge. But I do not mind being number two behind Arthur Gladstone. When you are number two you have to try harder. I have always had to try harder. When I was in college I was Phi Beta Kappa, and at Virginia Law School I was twentieth in my class and was on the Law Review. Then I went to Yale Divinity School and they told me that my reading speed and comprehension were not up to their standards. So they made me take an Evelyn Wood-type remedial reading course. Now you understand why I always had to try harder. I was the second son of a Mennonite/Methodist art teacher. Second sons always have to try harder. Mennonites were killed and run out of Europe because they would not baptize babies. Mennonites had to try harder. Teachers’ sons have to try harder. My mother says she never required me to be best; but when the report card came home, she wanted to know what a B was. Mennonites are very closely interrelated. My father was also my fourth, fifth, sixth, and seventh cousin. I am my own fifth, sixth, seventh, and eighth cousin. So I have to do the work of five. I have to try harder. I went to seminary after law school. Now I am a Hindu, Muslim, Christian, Jew. I am the only Mennonite, Methodist, Presbyterian, Baptist, Catholic, Unitarian, card-carrying member of B’nai B’rith. I *have* to try harder. After seminary I worked at Nixon’s law firm. It died several years ago. I have already outlived a 125 year-old firm. Why? Because I have tried harder. When my

children were little, I told them that the only hope for mankind was miscegenation. Now I have seven grandchildren – three Chinese, one Japanese, two English, and an American. We *all* try harder. At the Department of Transportation, I was Acting Chief for two and one half years before I finally became Chief. I just had to try harder. So what is the role of the administrative law judge – you guessed it – you are the one who has to try harder.

When you are number two you have to try harder. ALJs are number two – number two behind constitutional or statutory courts in the judicial branch of federal and state governments, which normally come to mind first when people think of judges. But being number two is a substantial, in fact an infinite, improvement over not being numbered at all. It is a lot better than being a zero, a naught, a cipher, an invisible judiciary. We used to be referred to as the hidden judiciary;<sup>2</sup> but you do not see that phraseology much any more. Frankly, NAALJ, NCALJ, FALJC, AALJ, FORUM and the Federal Bar Association have done a lot to see to it that we are no longer invisible.

So at least we are number two; and, in fact, in terms of the impact on individual Americans, the role of the ALJ is far closer to more people than the constitutional judiciary. Social Security Administration (SSA) alone adjudicates 500,000 ALJ cases in a single year. For the vast majority of those encountering any kind of civil adjudication, the ALJ is the face of justice for the American people. What is the role of one who wears the face of justice? What is the role of the ALJ?

I have played Kaspar in Mennotti's opera, *Amahl and the Night Visitors*, several times for the Vienna Light Opera. It is a traditional Christmas-time opera and is probably the most frequently performed opera there is. Kaspar is a crazy king traveling through the desert

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2. See Ronald G. Marquardt and Edward M. Wheat, *Federal Hidden Allocators: Administrative Law Judges and Regulatory Reform*, 2 LAW & POL'Y Q. 472 (1980); Thomas C. Mans, *Selecting the 'Hidden Judiciary': How the Merit Process Works in Choosing Administrative Law Judges (Part I)*, 63 JUDICATURE 60 (1979); Thomas C. Mans, *Selecting the 'Hidden Judiciary': How the Merit Process Works in Choosing Administrative Law Judges (Part II)*, 63 JUDICATURE 130 (1979); Lawrence Mosher, *Here Come the Administrative Law Judges*, NAT'L L.J., July 28, 1979, at 1247; Alice Klement, *The Hidden Judiciary' Fights Back*, NAT'L L.J., Sept. 24, 1979, at 1.

looking for a child to save the world. He carries a box of jewels and magic stones, and he sings about them to a crippled boy who is miraculously cured of a debilitating illness. Maybe the role of the ALJ is to cure the world of a debilitating administrative nightmare, where people come before the power of government and want a fair hearing before an impartial adjudicator. And how does the nightmare end? Do they get a fair hearing before an impartial adjudicator? Or do they get someone who has neither the power, nor the independence, nor the integrity, nor the character, to do justice, love mercy, and walk humbly. *That* is the role of the administrative law judge.

But what *is* an administrative law judge? A federal administrative law judge is an employee of a federal agency who holds hearings for an agency, makes decisions in accordance with its policy, is assured of tenure, decisional independence and freedom from off-the-record agency input, and is generally considered to be subject to the Code of Judicial Conduct in his public and private life. I have written and spoken extensively for twenty-six years about the role of that administrative law judge.

What is the role of the administrative law judge? In *Butz v. Economou*,<sup>3</sup> the Supreme Court said:

There can be little doubt that the *role* of the modern federal hearing examiner or administrative law judge within this framework is “functionally comparable” to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency . . . . Since the securing of fair and competent hearing personnel was viewed as “the heart of formal administrative adjudication,” the

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3. *Butz v. Economou*, 438 U.S. 478 (1978).

Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. When conducting a hearing under § 5 of the APA, a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate . . . .

In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts.<sup>4</sup>

The same rule has been applied to the state administrative judiciary.<sup>5</sup>

One of the great riches of this country is its diversity; one of the singular attributes of the administrative judiciary is its diversity. We come in all shapes and sizes lawyers and non-lawyers, federal and state, central panels and agency employees. That means that there are a lot of different jobs that we perform. I cannot possibly tell you what your job is. However, I would like to suggest three topics for considering the role of the administrative law judge: The Codes of Judicial Conduct and two recent resolutions of the American Bar Association.

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4. *Id.* at 513-14 (citations omitted) (emphasis added).

5. See *Robinson v. Langdon*, 970 S.W.2d 292, 295-6 (Ark. 1998); *Harrison v. Coffman*, 35 F. Supp. 2d 722, 724 (E.D. Ark. 1999).

### A. Codes of Conduct

I know that you had a presentation on Monday about Codes of Conduct for ALJs, and I do not want to repeat that ground. But usually those presentations focus on what a judge should *do*; and I want to stress that the Codes also describe what an ALJ *is*.

Why do I say *Codes*? Because the American Bar Association (ABA) has an official Model Code of Judicial Conduct which can be adapted and adopted, and has been adopted in some form by almost every court of general jurisdiction. The National Conference of Administrative Law Judges of the ABA and NAALJ have endorsed two other Codes: one for federal ALJs and one for state ALJs. At a recent FALJC meeting, a question arose concerning judicial ethics, and I explained that federal ALJs are in the peculiar position of having had no specific code adopted for many of them, and consequently we have to comply with all of them. We have to try harder. You may have the same problem.

Normally, a Code of Conduct applies because it has been adopted by statute or an appropriate adjudicatory body, but you should know that it may also be applied to your proceedings on review by the courts to determine whether due process has been accorded the litigants in the proceedings before you.<sup>6</sup> A Code has never been adopted formally for most federal ALJs, but the Merit Systems Protection Board has applied the Code in determining “good cause” for discipline under the APA.<sup>7</sup> Some may also have disciplinary

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6. See *Marshall v. Jerrico*, 446 U.S. 238 (1980) (“An administrative law judge (ALJ) has the right and duty to ensure due process in administrative proceedings by controlling the conduct of those participating in those proceedings. At the federal level, the Supreme Court has recognized that the ALJ’s ‘impartiality serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime.’”) *Id.* at 250; *Fremont Indem. Co. v. Workers’ Comp. Appeals Bd.*, 153 Cal. App. 3d 965 (1984) (reversing the decision of a “workers’ compensation judge” who instigated *ex parte* communications with a witness in violation of the Code of Judicial Conduct); *Green v. State*, 729 S.W.2d 17 (Ark. 1987) (finding reversible error where the judge, who served as prosecuting attorney at the time a felony conviction was entered, did not disqualify himself under Canon 3 of the Code of Conduct when presiding over a later proceeding to revoke a suspended imposition of the sentence in the earlier case).

7. *In re Chocallo*, 2 M.S.P.B. 23 (1978), *aff’d*, 2 M.S.P.B. 20 (1980), and *aff’d in part, vacated and remanded in part on other grounds sub nom. Chocallo v.*

boards or proceedings where codes of conduct may be applied in determining whether your conduct is satisfactory or appropriate.

So it is important for you to know about codes of conduct in order to know what conduct is expected of you. It is also important to know codes of conduct in order to understand the role of the administrative law judge, and to know who you are. What does the Model Code of Judicial Conduct say about the role of the administrative law judge?<sup>8</sup> Let's look at just three concepts and Canons:

1. An ALJ is an independent decision-maker.<sup>9</sup>
2. An ALJ is a role model.<sup>10</sup>
3. An ALJ balances his public and private roles to maintain his independence and demonstrate his role as role model.<sup>11</sup>

### 1. Independent Decisionmaking (Canon 1)

Canon 1 of the ABA Model Code of Judicial Conduct provides: "A Judge Shall Uphold the Integrity and Independence of the Judiciary."<sup>12</sup>

The role of a judge is to be an independent decision-maker. Recently that role has received reinforcement from the federal courts, which have held that even an at-will state hearing officer is entitled to constitutional protection of her decisional independence.<sup>13</sup> In *Harrison*, Judge Sachs issued a virtual emancipation proclamation for every administrative judge, holding that a state at-will hearing officer has a First Amendment free-speech right to decisional independence protected by the U.S. Constitution.<sup>14</sup> Judge Sachs

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Prokop, 673 F.2d 551 (D.C. Cir. 1982) (unpublished decision), *and cert. denied*, 459 U.S. 857 (1982).

8. MODEL CODE OF JUDICIAL CONDUCT Canons 1, 2, 4 (1990).

9. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990).

10. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

11. MODEL CODE OF JUDICIAL CONDUCT Canon 4 (1990).

12. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990).

13. *Harrison v. Coffman*, 35 F. Supp. 2d 722 (E.D. Ark. 1999).

14. *Id.* at 725-26.



recognized that his holding was probably a case of first impression, but he concluded that:

[C]onstitutional protection of decisional independence . . . does seem logically and historically compelled under the expansive view of the First Amendment that covers academic freedom and is evidenced in other major rulings of the Supreme Court during the past thirty years.

. . . If grading practices of teachers may sometimes merit First Amendment analysis, it seems almost certain that opinion-writing by both traditional judges and administrative law judges properly claims First Amendment protection.

I am satisfied that since ALJs enjoy absolute immunity for their quasi-judicial work product, that work product has the same First Amendment protection from retaliation against the authors as is enjoyed by similar works produced in the judicial branch.<sup>15</sup>

Harrison was a state ALJ who decided workers' compensation claims under Arkansas law.<sup>16</sup> "Her employment was at will, but she contend[ed that] it could not be terminated on grounds violating the United States Constitution."<sup>17</sup> She alleged a violation of her First Amendment rights when she was fired by the Workers' Compensation Commission, because "she exercised her free speech right to independently and impartially decide cases before her in a competent manner within a range of reason and without imposed or required prejudgment, partiality or ideological bias."<sup>18</sup> "In effect she alleg[ed] that her exercise of quasi-judicial independence and impartiality, as reflected in her written opinions, caused her to be discharged."<sup>19</sup> Judge Sachs concluded:

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15. *Id.* at 725-26 & n.6.

16. *Id.* at 723.

17. *Id.*

18. *Id.* at 724.

19. *Id.*

Although plaintiff may have been employed in the Executive Branch of State government, this does not preclude treating her work as judicial or quasi-judicial, for federal constitutional analysis . . .

. . . .

Defendants . . . argue . . . that unidentified opinions of an ALJ should not be classified as matters of "public concern," as is supposedly universally required for protection of employee speech . . . .

In the present case, it is clear that rulings by an ALJ are not of parochial concern; they involve more than the personal wishes or well-being of the author...

This case, as alleged, plainly involves quasi-judicial "decisional independence." . . .

Whether or not constitutional protection of decisional independence can be soundly advocated as a matter of "good government" . . . it does seem logically and historically compelled under the expansive view of the First Amendment that covers academic freedom and is evidenced in other major rulings of the Supreme Court during the past thirty years. The protection of classroom expression within definable limits seems on a par with constitutionally appropriate protection of decisional independence . . .

. . . .

Although further development of the issues may show that this case does not ultimately turn on whether there is a First Amendment right to decisional independence, I am presently prepared to recognize such a right in ruling [on] the motion to dismiss. This may well be the first decision so holding. I am fairly sure, given the First Amendment rights of teachers, that judges enjoy the protection asserted by plaintiff.<sup>20</sup>

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20. *Id.* at 724-26 (citations omitted).

Thirteen years before *Harrison*, the ABA Standing Committee on Ethics issued the opinion that federal ALJs were judges within the meaning of the Code of Judicial Conduct, but that the status of state ALJs would need to be examined on a case-by-case basis.<sup>21</sup> Judge Sachs in *Harrison* made no such nice distinctions. For Judge Sachs, if you are held out as a judge in an adjudicative proceeding, you are entitled to – and obliged to exercise – decisional independence as a matter of U.S. constitutional law.<sup>22</sup>

It remains to be seen what will come of that precedent. But in *Perry v. McGinnis*, the Sixth Circuit Court of Appeals, without citing *Harrison*, held that a Michigan Administrative Law Examiner's decisions in inmate discipline cases are protected free speech under the First Amendment, barring the judge's dismissal for failure to maintain a ninety (90) percent guilty rate in decided cases.<sup>23</sup> The court said in *Perry*:

As a threshold matter, we must determine whether Perry's decisions made in inmate disciplinary hearings constitute expression as protected by the First Amendment. We find that they do. The Supreme Court has long held that communicative action is protected by the First Amendment.

This Circuit has done the same – most notably and relevantly in *Parate v. Isibor*. *Parate* involved an engineering professor at Tennessee State University, Natthu Parate, who refused to alter his evaluation of a student and was subsequently subjected to discipline and threats of termination. Parate assigned the student a “B” while the Dean of Tennessee State's School of Engineering and Technology – whom the Court suggests had a particular affinity for the student involved because of a shared national heritage – insisted that the student receive an “A”. When Parate

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21. ABA Comm. On Ethics and Prof'l Responsibility, Informal Op. 1522 (1986).

22. See *Harrison*, 35 F. Supp. 2d at 726.

23. *Perry v. McGinnis*, 209 F.3d 597, 603 (6th Cir. 2000).

refused, the Dean disciplined Parate and threatened to fire him.

The Court explained that because “the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act” falls within the bounds of the First Amendment. The Court then held that the Dean's act of forcing Parate to choose between changing the grade against his professional judgment and keeping his job “unconstitutionally compelled Parate's speech.”<sup>24</sup>

So what about an administrative law judge? The court said:

Although *Parate* and the instant case involve different sectors of the state's machinery—an educational institution and a correctional institution—the cases involve nearly identical communicative acts protected by the First Amendment. In the instant case, as in *Parate*, the state entrusted one of its employees with the task of reviewing facts, evaluating a set of circumstances, and making a decision. In *Parate*, the decision was handed down in the form of a letter grade. In the case at bar, the decisions came in the form of guilty/not-guilty determinations. Perry's decisions, like Parate's, are communicative acts—acts aimed squarely at the inmates in question with the goal of reemphasizing the parameters of acceptable behavior in prison.

In *Parate*, this Court decided that the attempt to pervert the communicative acts with discipline and threatened termination was the essence of coerced expression. Such compulsion in the academic realm is certainly of concern. It is, however, particularly unsettling in the instant case because, here, the interference results in the heavy hand of the state's disciplinary authority being brought to bear on

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24. *Id.* at 603-04 (citations omitted).

inmates who may have done nothing to deserve the invocation of that authority.

We find that a disciplinary hearing decision, like the assignment of a letter grade, is a communicative act entitled to First Amendment protection.<sup>25</sup>

In *Perry*, the Sixth Circuit reversed and remanded the District Court's dismissal of the hearing officer's complaint, directing a trial court to determine whether the State's interest in disciplining Perry outweighed Perry's free speech rights:

It is well established that a government employer cannot "condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." . . . As a logical consequence, retaliation by a government employer against an individual who exercises his First Amendment rights constitutes a First Amendment violation. . . . This is the case even if the employee could have been terminated for any reason.

The Supreme Court has established a three-pronged test for determining whether a plaintiff can prevail on a First Amendment retaliatory discharge claim. Under the test, commonly called the *Pickering* test, the plaintiff must set forth three elements: 1) the speech involved a matter of public concern, 2) the interest of the employee "as a citizen, in commenting upon matters of public concern," outweighs the employer's interest "in promoting the efficiency of the public services it performs through its employees," and 3) the speech was a substantial or motivating factor in the denial of the benefit that was sought. If the employee satisfies this test, he has established a *prima facie* case.<sup>26</sup>

In *Perry*, the ALJ "argue[d] that he was fair and impartial in his disposition of disciplinary cases, and that each of his decisions was a communicative act protected by the First Amendment. He further

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25. *Id.* at 604.

26. *Id.* (citations omitted); accord *Harrison*, 35 F. Supp. 2d 722.

argue[d] that in disciplining and terminating him for that expression, the MDOC infringed upon his freedom of expression.”<sup>27</sup> The Court noted:

The district court assumed, *arguendo*, that Perry's decisions in inmate disciplinary hearings constituted matters of public concern, and then proceeded to base its disposition of the case on prong two of the *Pickering* test—the balancing prong. When fleshed out, it is clear that Perry's insistence through his decisions that he be impartial and operate within the confines of constitutional law, constitutes speech on a matter of public concern. When Perry conducts hearings, he is doing so at the behest of the Michigan legislature and is making decisions that can result in a greater or lesser period of incarceration for an inmate. These are intensely public matters . . . .

Public interest is certainly near its zenith here. In 1974, in the case of *Wolff v. McDonnell*, the Supreme Court mandated the establishment of prison disciplinary hearings, demanding that inmates be afforded due process before being disciplined for major misconduct . . . . “The touchstone of due process is protection of the individual against arbitrary action of government.”<sup>28</sup>

*That is the role of the ALJ. Your role and your independence are tied to the assurance of due process. That process is not “due,” if you are pressured in your decision making. As noted in Perry:*

Here, Perry asserts that pursuant to the Supreme Court's mandate in *Wolff*, he acted non-arbitrarily and as an impartial and independent fact finder. He further asserts that through his disciplinary hearing decisions, made with an eye toward justice and impartiality, he was ensuring—at least to the extent of the cases for which he was responsible—that the MDOC was

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27. *Perry*, 209 F.3d at 605.

28. *Id.* at 605-06 (citations omitted).

operating in accordance with the law as established by *Wolff*.<sup>29</sup>

“Perry allege[d] that the MDOC, however, was contravening the law by demanding that ALEs find ninety percent of inmates appearing before them guilty.”<sup>30</sup> The Court held:

If hearing officers focus on finding 90% of the defendants before them guilty, as the evidence adduced thus far suggests, they cannot possibly be impartial, as is required by *Wolff*. The prisoner whose case merits a not-guilty finding, but whose case would result in the eleventh not-guilty finding in one hundred decisions, is sunk. His fate is sealed before his file is opened. Such a system reeks of arbitrary justice, which can only be injustice.

Because Perry's speech served to ensure that the MDOC, an arm of the state, was operating in accordance with the law as established in *Wolff*, it concerns the most public of matters.<sup>31</sup>

Nevertheless, the district court dismissed Perry's complaint:

[C]oncluding that the MDOC's interest in disciplining ALEs outweighed Perry's right to speak on a matter of public concern. In concluding as such, the court erred.

....

The court based its decision on the proposition that the MDOC must be able to discipline its hearing officers for their decisions in order to prevent all ALEs from being insulated from accountability. Nothing in the pleadings could have led the court to such a conclusion. Such a conclusion required the finding of facts. The district court, however, decided against proceeding to the fact-finding stage of the trial. It erred in doing so.

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29. *Perry*, 209 F.3d at 606.

30. *Id.*

31. *Id.*

Moreover, the district court struck the balance in an impermissible manner . . . .

. . . .

The district court asserted that “[t]he MDOC has to be able to discipline its hearing officers for findings and credibility determinations made in prison misconduct hearing reports; otherwise all ALEs would be insulated from accountability for any statements made in that context.” Thus, the district court determined that the organizational interest at stake was the MDOC’s interest in maintaining accountability among hearing officers. We acknowledge that maintaining accountability is a legitimate interest. Whether the government’s interest in maintaining accountability led to Perry’s disciplining and ultimate termination, however, is far less clear. Perry had produced substantial evidence suggesting that the MDOC implores its hearing officers to find no less than 90% of the defendant’s before them guilty, and he insists that he was disciplined and terminated because of the MDOC’s interest in ensuring guilty findings for no less than 90% of defendants. . . . Insistence upon a 90% guilty rate flies in the face of due process as mandated by *Wolff*, and is thus not a legitimate organizational interest.

At the very least, the record is not thorough enough to determine whether the MDOC’s interest in impairing Perry’s First Amendment right through discipline and termination was based on a desire to maintain accountability or a desire to maintain a 90% guilty rate. As such, the district court erred in determining that the *Pickering* balance could only favor the prison officials and in consequently granting the prison officials’ motion to dismiss. Therefore, the



issue is remanded to the district court for further consideration in line with this opinion.<sup>32</sup>

I've quoted a lot from *Harrison* and *Perry*. Why? Because every word is a proclamation of your role, your rights, your freedom, and your responsibility.

Now each case is different; and each judge here may have a somewhat different statutory and regulatory situation, but the new federal cases affirming a constitutional free-speech First-Amendment right to decisional independence are the most exciting new precedents in administrative adjudication since *Butz v. Economou* in 1978.<sup>33</sup> They should warm the heart of any hearing officer or ALJ seeking to fulfill the mandate of Canon 1 of the Code of Judicial Conduct—to “uphold the integrity and independence of the judiciary.”<sup>34</sup>

There are many different interpretations of what the “independence of the judiciary” means. Some may recall a spirited debate between my good friend John Hardwicke and I on the subject of whether mandatory prepublication review of a judicial decision is appropriate. I am not going to reargue that here. However, you can read about it in *Subject Matter Specialists – Yoder-Hardwicke Dialogue: Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence, Due Process or Ex Parte Prohibitions?*, which was published in the *Journal of the National Association of Administrative Law Judges*.<sup>35</sup> Also read *Harrison* and *Perry*, both of which were decided after that debate and article. Nevertheless, Canon 1 of the Model Code of Judicial Conduct provides that the role of the administrative law judge is to be an independent decision-maker.<sup>36</sup> Now the federal courts are indicating a willingness to protect that decisional independence as a constitutional right of the ALJ.

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32. *Id.* at 606-08.

33. *Butz v. Economou*, 438 U.S. 478 (1978).

34. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990).

35. Ronnie A. Yoder & John Hardwicke, *Subject Matter Specialists – Yoder-Hardwicke Dialogue: Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence, Due Process or Ex Parte Prohibitions?*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 75 (Spring 1997).

36. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990).

## 2. ALJ's Role as Role Model (Canon 2)

Canon 2 of the Model Code of Judicial Conduct is titled: "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities."<sup>37</sup> It provides that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."<sup>38</sup> Canon 2's commentary states:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge.<sup>39</sup>

So what is the role of the ALJ? To be a paragon of virtue. You are supposed to be holier than Caesar's wife; and in the context of some of them, that may not be especially difficult or challenging. This includes activities in the office – judicial demeanor, civility, diligence, scholarship and accuracy – and activities outside the office. With regard to civility toward attorneys and other judges, consider the *Standards for Civility in Professional Conduct* set forth in the *D.C. Bar Report*, which was based on the Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit:

The organized bar and the judiciary, in partnership with each other, have a responsibility to promote civility in the practice of law and the administration of justice. Uncivil conduct of lawyers or judges impedes the fundamental goal of resolving disputes rationally,

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37. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

38. *Id.*

39. MODEL CODE OF JUDICIAL CONDUCT Canon 2 cmt. (1990).

peacefully and efficiently. Such conduct may delay or deny justice and diminish the respect for law, which is a cornerstone of our society and our profession.<sup>40</sup>

The Seventh Circuit and the D.C. Bar set forth their commitment to what the role of the judge requires (i.e., to be nice):

Judges' Duties to Lawyers:

34. We will be courteous, respectful, and civil to lawyers, parties, and witnesses . . . .
35. We will not employ hostile, demeaning, or humiliating words in opinions or written or oral communications with lawyers, parties, or witnesses.
36. We will be punctual in convening hearings, meetings, and conferences; if delayed, we will notify counsel as promptly as possible.
37. In scheduling hearings, meetings, and conferences, we will be considerate of time schedules of lawyers, parties, and witnesses and of other courts and tribunals.

. . . .

40. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

Judges' Duties to Each Other:

43. We will treat other judges with courtesy and respect.
44. In written opinions and oral remarks, we will refrain from personally attacking, disparaging, or demeaning other judges.<sup>41</sup>

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40. *Standards for Civility in Professional Conduct*, D.C. B. REP., June 1992, at 8-9.

41. *Id.*

But the activities where your role requires exemplary conduct are not just activities in the office. They cover an array of out-of-office activities. In order to underscore those additional requirements, in 1998 the SSA ALJs Association asked me to present a talk on sexual conduct, which I called "Ethics and the Single Judge or Single-Minded Judge."<sup>42</sup>

The role of the ALJ is to be the face of justice and an example of good conduct in public and private life. Therefore, be a paragon of virtue.

### 3. An ALJ Must Balance His Public and Private Roles (Canon 4)

To underscore the dual role of judge as decisionmaker and paragon of virtue, Canon 4 of the Model Code is titled: "A Judge Shall So Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations."<sup>43</sup> For the most part, you can be a leader, but not a lobbyist; a teacher, but not a trustee; a judge, but not an arbitrator, mediator, or lawyer.<sup>44</sup>

Canon 4 of the Model Code provides:

#### A. Extra-Judicial Activities in General.

A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.<sup>45</sup>

Canon 3 directs the judge to "perform the duties of judicial office impartially and diligently."<sup>46</sup> This means that:

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42. Ronnie A. Yoder, Speech at the Seventh National Educational Conference for Social Security Administrative Law Judges (July 16, 1998).

43. MODEL CODE OF JUDICIAL CONDUCT Canon 4 (1990).

44. *Id.*

45. *Id.*

46. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990).

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties[:] . . .

. . . .

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity . . . .

### *Commentary*

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

. . . .

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.<sup>47</sup>

So you have to do your job, but at the same time Canon 4 says you should:

[S]peak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal

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47. MODEL CODE OF JUDICIAL CONDUCT Canon 3, 3 cmt. (1990) (citations omitted).

system, the administration of justice and non-legal subjects . . . .

### *Commentary*

As a judicial officer and [a] person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.<sup>48</sup>

So do your job; do your civic duty; be a paragon of virtue. Do justice; love mercy; walk humbly. That is all – that is your role.

In short, it is not easy to be a judge, but it is worth it. And it is still the best job in the world.

#### 4. One Final Word on the Application of the Code of Judicial Conduct

You may be thinking, “Well, I am not even a lawyer, so that does not apply to me.” Wrong. The Model Code provides:

Anyone, whether or not a lawyer, who is an officer of a judicial system . . . and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges

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48. MODEL CODE OF JUDICIAL CONDUCT Canon 4, 4 cmt. (1990) (citations omitted).

shall comply with this Code except as provided below by the Code.<sup>49</sup>

In regards to “a judicial system,” the Code states that the:

Applicability of this Code to administrative law judges should be determined by each adopting jurisdiction. Administrative law judges generally are affiliated with the executive branch of government rather than the judicial branch and each adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions in adopting and adapting the code for administrative law judges.<sup>50</sup>

But *Harrison* and *Perry* say it does not matter.<sup>51</sup> It all applies to you.

### *B. ABA Resolutions*

I promised not to spell out the details of conduct required by the Code of Judicial Conduct, but planned merely to stress that the role of the ALJ is defined by the Model Code. Moreover, it is impossible to separate that role from the dictates and definitions of the Code of Judicial Conduct—to be an independent decision-maker and an example of good conduct in public and private life. You may not be surprised to find that the two ABA resolutions address some of these same concerns.

In July 2000 and August 2001 the American Bar Association adopted two resolutions, which bear directly on the role of the administrative law judge. The first, Resolution 113, relates to federal ALJs and notes that there is a proliferation of hearing officers at the federal level who hold hearings for federal agencies and are not ALJs.<sup>52</sup> The Resolution further states that there is no rational distinction made by the Congress in deciding when to use federal

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49. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990) (citations omitted).

50. MODEL CODE OF JUDICIAL CONDUCT Canon 5, n.3 (1990) (citations omitted).

51. *Harrison*, 35 F. Supp. 2d at 724; *Perry*, 209 F.3d at 604.

52. ABA Comm. on Ethics and Prof'l Responsibility, Resolution 113 (2000).

ALJs and when to use other types of hearing officers.<sup>53</sup> The Resolution calls on the Congress to consider certain key factors in deciding when to invoke the highest level of administrative due process and provide for ALJ hearings in future statutes calling for a hearing. That Resolution stated that Congress should consider mandating APA hearings where:

A. The adjudication is likely to involve (a) substantial impact on personal liberties or freedom; (b) orders that involve a finding of criminal-like culpability; (c) imposition of sanctions with substantial economic effect on a party or interested person; or (d) determination of discrimination under civil rights or analogous laws.

B. The adjudication would be similar to, or the functional equivalent of, a current type of adjudication in which an administrative law judge presides.

C. The adjudication would be one in which adjudicators ought to be lawyers.<sup>54</sup>

The Resolution also urged Congress to adopt a statute requiring APA hearings in future statutes providing for hearings, in the absence of a congressional determination to the contrary.<sup>55</sup>

Those of you in state systems may wonder about the applicability of that Resolution to you. But the question of determining the type of administrative adjudication at the state level is very much alive: whether to require a hearing, whether to require a hearing before a hearing officer, whether the hearing officer should be an attorney, whether there should be a central panel, and/or whether the particular case should go to a central panel or stay within the agency? The number of central panels in states has grown from only eight in 1981 to twenty-six in 2000, largely due to the work of the NAALJ and the State Central Panel directors in promoting that development.<sup>56</sup> In each case in the state system, the choice of the type of hearing, the type of hearing officers, and the type of hearing forum presents the same questions

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53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*



presented in the ABA Resolution, and its rationale supporting a rational basis for decision. So when those questions arise about the type of adjudication and adjudicator to use in the state, keep ABA Resolution 113 in mind. I don't mean use the same criteria necessarily, but use rational criteria.

The second resolution, adopted in August 2001, calls on Congress and the States to recognize the need for decisional independence of administrative adjudicators and to protect that independence by assuring that they cannot be removed from office without a hearing under the applicable administrative procedure act.<sup>57</sup> The resolution urges "federal, state, local, and territorial governments to enact and adopt measures to protect the public interest in independent, impartial, and responsible decision-making in the administrative adjudication process."<sup>58</sup> It provided:

- (1) that members of the administrative judiciary be held accountable under appropriate ethical standards adapted from the *ABA Model Code of Judicial Conduct* (1990) in light of the unique characteristics of particular positions in the administrative judiciary; and
- (2) that any individualized removal or discipline of a member of the administrative judiciary occur only after an opportunity for a hearing under the federal or a state administrative procedure act before an independent tribunal, with full right of appeal.

For purposes of this recommendation, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in a judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head.<sup>59</sup>

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57. Summary of Action Taken by the House of Delegates of the American Bar Association, 2001 A.B.A. SEC. 48.

58. *Id.*

59. *Id.*

The resolution presents three primary points to consider in assessing the role of the administrative law judge:

1. The decisional independence of the ALJ defines his role.
2. The ALJ should comply with the Code of Judicial Conduct.
3. In order to assure the ALJ's independence, the ALJ should be subject to discipline or removal only after a hearing on the record before an independent ALJ.<sup>60</sup>

The judiciary has a high sensitivity to the independence of the administrative judiciary, as shown by the recent decisions in *Harrison* and *Perry*. Federal administrative law judges are very concerned about preserving their independence and have been working hard to do that for more than twenty-five years. The second ABA resolution reflects the growing awareness of the state administrative judiciary of the need to establish and preserve its independence.<sup>61</sup>

I have talked to a number of Congressional staffers about the first resolution; and have found there is concern about the fact that government agencies make rules and policies without sufficient input from, or protection for, affected citizens. Congresspersons, as well as local and state officials, want constituents protected, because they want to be reelected. Our job: protect them. How can we do that? How can we fulfill the role of the administrative law judge?

1. Know the Code of Judicial Conduct and fulfill it. If you cannot, do not call yourself an administrative law judge. Call yourself an administrative hearing officer, or a presider, or even a hearing examiner, which was the old name for ALJs under the federal APA. However, do not call yourself a judge if you do not want to be, or they will not let you be. Nonetheless, it does not matter what they call you. If you are an ALJ, be a judge and comply with the Code.
2. Teach. The Codes say we have to, if we can. Recently, I spoke to three different groups of lawyers (the NTSB Bar, the Federal Motor Carrier Safety Administration

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60. *Id.*

61. *Id.*

lawyers, and the DOT attorneys in the Transportation Law Network). I gave them some general guides to help them understand the role of the ALJ. You might pass these along to the people who appear before you:

- a. Pretend the judge deserves respect and do not let him know you are pretending.
  - b. When the judge is speaking, do not talk. He can't hear you and would probably rather hear himself talk anyway.
  - c. When the judge gives you a win, do not continue to argue. You may convince him to change his mind.
  - d. Argue *before* the Judge; do not argue *with* the Judge.
  - e. Be prepared—assume the judge will be. Assume that if you miss something, the judge will not. Assume that you should know all the facts and law.
  - f. Do not expect the judge's law clerk to try your case, do your research, or practice law—substantive inquiries or substantive procedural inquiries will be referred to the Judge. Do not call the clerk and ask him not to tell the Judge. He will. Remember, he is subject to the same Code of Conduct provisions as the Judge.
2. Study. If you do not feel the call to teach, look at the available books on the role of the ALJ. Start with *Manual on Administrative Law Judges*<sup>62</sup> and see my cites in footnotes 282-84. If you are concerned about the peculiar problems of ALJs in dealing with misconduct by parties and lawyers, look at *Judicial Response to Misconduct in Administrative Adjudication* published by

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62. MORELL E. MULLINS, *MANUEL ON ADMINISTRATIVE LAW JUDGES* (3d. ed. 1993).

the Center for Professional Responsibility in 1995.<sup>63</sup> Look at Chapter VIII, which deals specifically with “The Judicial Role in Identifying and Referring Misconduct in Administrative Proceedings.”<sup>64</sup> Above all, read *Harrison*<sup>65</sup> and *Perry*.<sup>66</sup>

3. Meet with Congress and local and state officials to promote adoption of the ABA resolutions and other provisions promoting the independence of the administrative judiciary.
4. Monitor new legislation. Every day there seems to be a new legal challenge to the status and independence of the administrative judiciary. I’ve been an ALJ for twenty-six years, and there has never been a time when I have not had to defend the APA process. When I started in 1976, the Civil Service Reform Act proposed to take away ALJs’ unlimited terms and subject them to evaluation.<sup>67</sup> We stopped those proposals, but they were again reflected in the study of *The Federal Administrative Judiciary* by the Administrative Conference of the United States in 1992.<sup>68</sup> There were a lot of negative things in the ACUS study about the role of the federal ALJ.<sup>69</sup> Some even suggest that those negatives may have contributed to its untimely and early demise. But that was also the genesis of the rationalizing-ALJ-use resolution; and it only took a decade to get it adopted by ABA.
5. You can be a part of the march toward administrative justice. You can join NAALJ and keep up the wonderful work that it has been doing to advance the

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63. AMERICAN BAR ASSOCIATION, THE JUDICIAL RESPONSE TO MISCONDUCT (1995).

64. *Id.* at 114.

65. *Harrison*, 35 F. Supp. 2d 722.

66. *Perry*, 209 F.3d 597.

67. *See generally*, Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered section of 5 U.S.C.).

68. Recommendation 92-7: The Federal Administrative Judiciary, 1992 ACUS 28.

69. *See id.*

cause of the administrative judiciary. If you are an attorney, you can self-certify financial ability, and join the ABA for \$25. You can join the Judicial Division and either the National Conference of Administrative Law Judges, the Special Court Judges Conference, or the Lawyers Conference.

6. Look to the long term. Everything takes a decade. The Model Code of Judicial Conduct for Federal ALJs took a decade. The ABA resolution on rationalizing ALJ use took a decade. And the work on the ALJ independence resolution took nearly that long.
7. Remember we are number two; we have to try harder, but it is good to be number two. We're doing a great job, both the federal and state administrative judiciary, because we try harder.

What is the price of freedom? What is the price of independence? Eternal vigilance. What is the role of the administrative law judge? That role is to protect and defend the independence of the administrative judiciary and the integrity of the administrative adjudication process.

So do justice, love mercy, and walk humbly. Be nice, be cool, just do it. Do what? Try harder! Be independent. Be a paragon of virtue. Be the face of justice and of legality for the public. Why? Because you are administrative law judges, and *that* is your *role*.