Comments on "The Active Administrative Law Judge: Is There Harm in an ALJ Asking?"

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This comment adds to the remarks made by Professor Allen E. Shoenberger1 in his article, The Active Administrative Law Judge: Is There Any Harm in an ALJ Asking?,2 which defends the practice of Administrative Law Judges (ALJs) asking parties questions during a hearing. I must thank Professor Shoenberger for his review of appellate cases on the problem. The cases support his position and will help to establish this position in arguments with those who disagree.3 I think, however, that there are problems in the area, not discussed in the decisions, and disclosed only by reading the hearing transcripts or by discussion with ALJs. Such a discussion is appropriate here, particularly in consideration of the audience of this Journal that comprises ALJs (from the widest variety of administrative set-ups), practitioners, scholars and judges (hopefully). I think I can be relatively candid about this, partly because I am now retired.4 I wish also, in Part II, to pursue the suggestion in footnote one of Professor Shoenberger’s article that we compare the civil law system’s so called “inquisitorial” system of hearings.5

I. INTRODUCTION

The particular kinds of hearings I am talking about are tax cases.6 In a tax case, the controversy is initiated by an audit, and the formal hearing proceeding is commenced by the taxpayer with a petition. The taxpayer has the burden of proof (he, after all,
knows the facts). The taxpayer (or the taxpayer's principle officer) sometimes appears alone, sometimes with an attorney (who only occasionally is a tax specialist), but most often the taxpayer appears with only a Certified Public Accountant (CPA). The Department appears by an attorney from its Counsel's office. A CPA appearing alone for the party almost always expects the ALJ to conduct the examination. After the hearing, the ALJ has six months to render his determination. Appeals may be taken to the Tax Appeals Tribunal, which is also in our Division.

We would do well to remember the reasons judges do not ask questions during their trials. The attorney presenting a witness should use a sequence of questions that bring out the salient facts in an understandable way while avoiding questions that may produce objectionable testimony. The attorney is supposed to "control" his witness. Often in an ALJ hearing, however, the attorney leaves important gaps in his presentation, either deliberately to avoid troublesome issues or out of ignorance. At the same time, there is no jury present so there is little risk of objectionable testimony. In this situation, the ALJ should ask clarifying questions, to avoid any delay in gathering the information efficiently. It is probably best to do so by first suggesting that the attorney question the witness about the matters omitted. Another suggestion that might reduce the occasion for the ALJ to take the initiative in questioning is to strongly encourage the parties to note for the record that their objections aid a judge in analyzing the evidence. Of course, for better or worse, simply exploratory or naïve questions can flush out facts, creating the basis for additional examination.

Asking questions during a cross-examination is another matter. At least theoretically, a cross-examiner can lay traps for the witness, and back him or her into a corner. A stray question from the ALJ could tip off the witness and undercut any such strategies. (Of course, I seldom saw such a sophisticated cross-examination.) The ALJ will usually hold back and let the attorney continue in the manner the attorney wants. After the cross-examination, the ALJ can pitch in. But, a problem occurs here too. At times I have hit pay dirt but only to have the cross-examiner (the Department attorney) object, sometimes bitterly, because he missed the point

7. Taxpayers have even appeared before me with only a CPA in half-million dollar cases!
8. It is difficult to find published sources on what constitutes a prima facie case in an administrative hearing.
himself and anticipated criticism. This same general problem occurred when I helped out the taxpayer (I am something of a technical specialist). Taxpayer’s attorneys can take umbrage at this.

So let me get to the main point I want to make. There is at least one good reason for the ALJ not to ask questions: The ALJ’s question or even his disposition may be so suggestive that, in effect, he suborns perjury! Typically, in my cases anyway, the taxpayer knows all the facts and the Department knows none of the facts. Some of the taxpayer’s are swift enough to tailor their testimony in their favor. This problem is exacerbated by the fact that the Department does nothing to protect itself nor does it use its subpoena power. Usually, only the taxpayer’s CPA, and not the taxpayer, appears at the prior conference. It is routine practice to have an auditor interview the taxpayer and even outsiders without obtaining written statements. (Imagine an auto insurance adjuster doing that!) Any credibility problem with the witness is compounded by a credibility problem with the auditor.

Of course, credibility is the bane of the ALJs job. We try to avoid it by making our substantive rules depend on more objective factors either directly or through presumptions. (These are not only not printed anywhere but are often “made up as we go along,” which is an entirely different problem.)

A “withering cross-examination” is the counter to a credibility problem. However, I have seen this only once. In this instance, the young attorney for the Department, in his first case, had great sixth sense and did everything right, except he suggested near the end that “the taxpayer’s credibility is in issue.” The young attorney won his case. I later learned that my superior, not an attorney, banned him from future hearings. My superior suggested that the young attorney was not a “gentleman” and did not treat taxpayer’s with the proper respect. Thus the credibility issue still remains, and of course, the ALJ himself is supposed to be a “gentleman.”

There is another reason for a failure to conduct a strong cross-examination. In this situation, the attorney for the Department conducts only a very cursory cross-examination because he believes the witness is telling the truth, and fears that a strong cross-examination will re-enforce the testimony. (An Assistant District Attorney I once knew thought that this presented ethical problems for a prosecuting attorney and felt it his duty to cross-examine the witness because that is what the system expects, but I suppose that
is another question.) Obviously the ALJ has to decide what to do in this situation. I usually examine, but a less motivated ALJ may not examine.

There are two other points that can affect the decision of an ALJ to be active or passive. Many people classify these as, to use a current term, dysfunctional. If I were to discuss specific situations in a hearing I would just dance around these points.

First, during the hearings, the ALJ is often ignorant of the specific law involved in the case. For example, tax law and regulations include parts that are very complex and are not commonly encountered. The ALJ does not see the file ahead of time because the Department asserts it could prejudice the ALJ. The pleadings are at best pro forma and state as little as possible. The Department’s attorney is frequently unprepared and cites no authority or precedent for the Department’s argument. (The attorney feels that the ALJ is paid more so he should do his own work.) Indeed, one fairly new and fairly good ALJ told me that he seldom knew the issues even after the hearing ended. The admonition of our supervisors is to go along with this and not make the Department’s attorney look bad. I think, however, the ALJ must ask as many questions as possible, regardless of the feelings of the Department’s attorney.

The other dysfunctional factor is the supervisory pressure. An ALJs decision is reviewed, edited and even revised by the supervisors prior to being sent out. (At times the decisions are completely reversed without the ALJs knowledge.) Both supervisors have only a very limited knowledge of legal proceedings (in fact, the chief ALJ never participated in or presided over a judicial or administrative hearing). Both believe that credibility is a conclusion of law and take more license to comment on conclusions of law. They are usually very pro Department. Prior cases, in favor of the taxpayer are routinely overlooked or ignored. Furthermore, for the ALJ to have to argue with the supervisors can be anywhere from tedious to futile. To prevent this, the ALJs chat up the case with them before preparing the decision. An ALJ, with all this in mind, tends to adopt a completely adversarial posture and ask as few questions as possible.

Incidentally, while the ALJ is in the hearing room, I recommend staying on the record at all times even for the simplest things. For example, if someone wants to go off the record, the ALJ should
leave the room and have the reporter note that fact. This can prevent later arguments.

Professor Shoenberger offers a list of suggestions at the end of his article that should be considered.9

II. INQUISITORIAL SYSTEM V. COMMON LAW SYSTEM

Professor Shoenberger, in footnote two, invites the reader to compare the passive style of the common-law judge with the “inquisitorial style” of the civil law jurisdictions.10 I am delighted that Professor Shoenberger refers to the inquisitorial system with apparent approval. I frequently experienced supervisors who used the term with derision to oppose any change from purported adversarial rules. This part suggests some leads to find out more about the inquisitorial system.

Perhaps the fastest and most direct way to learn about the civil law system is an article by Professor John Langbein of Chicago Law School.11 The article argues that while the parties can be adversarial in their arguments and suggestions to the judge, it is the judge who develops the facts of the case from the very beginning of the case.12 There is no separate pre-trial phase where the parties spend time trying to anticipate issues that might never emerge.13 This allows the judge to focus on the most decisive issues. Furthermore, the attorneys cannot meet with or prompt witnesses.14 (I can’t see American lawyers abiding by such a rule.)

I would especially recommend to people interested in civil law proceedings to read the works of Mirjan Damaska, specifically, The Faces of Justice and State Authority.15 Damaska compares the common-law and civil law systems according to whether the structure of the system is hierarchical or coordinate (single-level), and whether the purpose of the system is conflict-resolution or policy

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10. See id. at 399.
12. See id.
13. See id.
14. See id. at 826. A more comprehensive treatment of civil law procedures appears in Ordinary Proceedings in First Instance, XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 6; see also History of European Civil Procedure, XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 2.
This conceptual structure provokes observations that are not often made. For instance, it is the coordinate system of the common law, where many jurors and others must get together at the same time, that necessitates that a trial occur all at one time. Under a hierarchical system, the proceedings can take place in installments. That, of course, is ideal for a judge whose primary duty is to develop the facts of a case. The best defense against perjury is not cross-examination, though that is allowed, but rather a simple adjournment and re-investigation. Furthermore, in a conflict resolution system, a party can trade away or ignorantly waive the party's rights, while in a policy implementation system, accuracy is everything and the judge must inquire. Another reason for reading Damaska is that his language is fresh, often based on historical or literal meanings, which can be, in itself, arresting and illuminating. It is an interesting read.

One result of reading the Damaska book for me was that I started thinking about trying to develop a conceptual scheme with which to compare our various forms of administrative hearings. The factors I would want to take into account include the adequacy of the pleadings and the degree of expertise in substantive law expected of the ALJ (especially compared to the Department's knowledge). Other ALJs, I am sure, would have their own ideas. I would like to encourage this examination. It might lead to more pragmatic, efficient, and fair ways of conducting ALJ proceedings.

16. See id.
17. If these points are too obvious, I think I can assure you that other points would not be; in fact, you may even disagree with some things Damaska says.