

3-15-1997

## Yoder - Hardwicke Dialogue: Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence, Due Process or Ex Parte Prohibitions?

Ronnie A. Yoder

John Hardwicke

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#), and the [Judges Commons](#)

---

### Recommended Citation

Ronnie A. Yoder and John Hardwicke, *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. (1997)  
available at <http://digitalcommons.pepperdine.edu/naalj/vol17/iss1/2>

This Panel Discussion is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

**YODER - HARDWICKE DIALOGUE: DOES MANDATORY  
QUALITY ASSURANCE OVERSIGHT OF ALJ DECISIONS  
VIOLATE ALJ DECISIONAL INDEPENDENCE, DUE  
PROCESS OR EX PARTE PROHIBITIONS?**

**Ronnie A. Yoder\***  
**John Hardwicke\*\***

**Ronnie A. Yoder:**

You have had read to you the topic that we will discuss--"does mandatory quality assurance oversight violate either ALJ decision-making independence, due process, or *ex parte* provisions?" The answer to that, of course, is--it depends. And what it depends on is whether you are in essence in an administrative setting with a judicial administrative decision-making model or a bureaucratic administrative decision-making model.

I will be addressing this question in the context of whether the concept being presented is consistent with the Code of Judicial Conduct as we have come to know it--as a general model code, and more specifically, as a model code which the federal administrative law judges have recognized as a federal model. More recently state administrative law judges have recognized the code as an appropriate model for state administrative law judges. If you ask the question in that context, the answer is very clear.

"We hold these truths to be self-evident, that all trial judges are created equal, that they are endowed by their office with certain unalienable rights, that among these rights are the right and the duty to make and issue decisions without mandatory preissuance review by anyone."

Now if you look at the question of mandatory preissuance review from the standpoint of the Code of Judicial Conduct, you wind up with a question of, not only is this a judicial model or a bureaucratic

---

\* Administrative Law Judge, U.S. Dept. Of Transportation, Past Chairman, ABA National Conference of Admin. Law Judges

My remarks are my own and not those of the Department of Transportation.

\*\* Chief Judge, Maryland Office of Administrative Hearings, President NAALJ.

model, but whether the people who function within that model are in fact judges within the contemplation of the Code of Judicial Conduct or are they merely called judges.

“Judge” is defined in the Webster's New Collegiate Dictionary as “a public official authorized to decide questions.” In a more general sense, “judge” can mean anyone who hears and decides anything, including dog shows, baking, dancing and athletic contests.

There are over 2200 non-ALJ federal hearing officers. Most of them are want-a-be's who would like to be ALJs. There are 5500 state hearing officers with varying degrees of independence and qualifications. Being called a hearing officer or even an ALJ at any level does not automatically confer judicial or decisional independence.

I should hasten to point out that my message here is not a critique or a criticism of any particular state or the way it handles its administrative adjudications. I recognize that there are political and budgetary and other reasons why it be essential to establish what in essence is a bureaucratic administrative adjudicative model rather than a judicial adjudicative model. But if you are looking at a judicial system, the judicial system depends on the independence, intelligence, and integrity of the individual judge, not on bureaucratic review prior to the issuance of the decision.

You might say these three eyes are the three I's of judgeship-- Independence, Intelligence, and Integrity. And if the judge has three eyes, he has two to look out, one to look inward, and one to look over his shoulder at an SMS ( subject matter specialist).<sup>1</sup> When Solomon said, “Cut the baby in half,” he didn't ask a man or a committee whether that decision was logical or consistent with precedent. He was a judge with independence as contemplated by the Code of Judicial Conduct.

In a judicial system, the quality of the decision and the quality of justice depend on the quality of the judge. A bureaucratic system depends on the quality of supervision and internal bureaucratic review. I am concerned that an SMS system that is not consistent with the Code of Judicial Conduct is not a judicial system. And if that is the fact, then the public should be told.

---

<sup>1</sup>A Maryland term.

The background of this discussion that John and I have been having for three years was set forth in an article in the NCALJ <sup>2</sup> Newsletter sometime ago, VII Administrative Judiciary News & Journal, 3 (Winter 1994). I'd hoped that was going to be in your materials. I think it didn't make it into the materials, but essentially it arose in 1994 quite by accident when someone described the fact that there were SMS reviews in some of the central panel states. And at that time, I suggested that mandatory preissuance review is antiethical to the concept of judicial independence, and raises serious questions concerning *ex parte* communications.

Now we printed an article in the NCALJ Newsletter and John submitted a response to that article in which he pointed out, among other things, that he didn't think *ex parte* communication was a problem here because the communications are not with a party. *Id.* at 4. Now I didn't understand that at the time, but I've come to understand it better since. The fact is that under the Maryland APA, the only kind of *ex parte* communication that are prohibited are those with a party. And John helped to draft that provision in the Maryland APA, so he knew that very well.

However, if you look at it from the standpoint of the Code of Judicial Conduct, there are two problems with that response. Firstly, under the Code of Judicial Conduct, which we have put in your papers, *ex parte* communications clearly relate to those other than those to parties. And secondly, the response with respect to *ex parte* communications does not address the decisional independence problem.

If you'll look at Canon 1, you'll find that the judge is committed to sustain an independent and honorable judiciary. He should participate in establishing, maintaining and enforcing high standards, and personally observe those standards, so that the integrity and independence of the judiciary may be preserved. In a commentary, it notes that the independence and integrity of judges depends in turn upon their acting without fear or favor. Canon 2 says that in addition to being independent, you need the appearance of being independent. So in addition to being proper, you have to appear to be proper.

---

<sup>2</sup>National Conference of Administrative Law Judges of the Judicial Administration Division of the ABA.

In Canon 3, it talks about *ex parte* communications, and it says that a judge shall hear and decide matters assigned to him. In 3(B)(7), it says that you shouldn't have *ex parte* communications except in certain enumerated circumstances. Under subsection (b) you can communicate with an expert in the law if you tell the parties that you've done that. Under subsection (c) you can communicate with court personnel and other judges, and under subsection (e) you can communicate with other persons where expressly authorized by law.

There are just four quick points that I want to make with respect to *ex parte* contacts. Firstly, the Code of Conduct makes it clear that *ex parte* prohibitions apply to anybody, not just to parties. The only people you can talk with are the people that the Code says you can talk with.

So what are the exceptions to not talking with anybody? One of the exceptions is that you can do it if it's authorized by law or statute. Well the problem is, that in most cases, SMS review situation is not authorized by law or statute, it is done by administrative determination without any publication of the procedures that pertain to it.

Secondly, a judge can talk to experts, but he has to notify the parties. One of the ABA informal opinions--1346 in 1975--said that a judge could not talk to a law school legal information center off the record. And in that opinion, they said that "it is our view, [interpreting the Code of Judicial Conduct] that the court personnel referred to in the quoted Commentary refers only to immediate employees of the court whose function is to aid the judge . . . and over whose activities the judge exercises supervision,"<sup>3</sup> which is not consistent with the concept of SMS.

Thirdly, it says that the judge may communicate with other judges. Prior to the 1990 amendments to the Code of Judicial Conduct, there were a lot of judges across the country concerned with whether they could even talk to other judges, because the Code itself did not specifically say that. The commentary said that, but the Code did not, so they amended the Code to specifically permit such discussions.

---

<sup>3</sup>ABA Informal Op. 1346 (1975) Available on Westlaw ABA-ETHOP Database.

In the article published by Steve Lubet,<sup>4</sup> he says, among other things, "These *ex parte* communications violated Canon 3(A)(4), notwithstanding the fact that the principal purpose was to soothe the feelings of a fellow judge. If anything, their tendency was to impede, if not abrogate, both judges' adjudicative responsibilities."<sup>5</sup> These were communications between judges that were unsolicited. The Tennessee Judicial Ethics Committee, in opinion 92-9, holds that a superior supervising judge cannot attempt to influence the decision of a subordinate, and in doing so, violates both *ex parte* and independence provisions.

Now, if we look at the question of independence, the question arises--what is judicial independence? I started with the Declaration of Independence because it reminds us of what it means to be free and independent. In addition to that, if you look at the question of independence, imagine what would happen if a federal district judge or a federal ALJ or a state court judge who was either elected or appointed was told that he had to submit his decision to someone else before it could be issued. It wouldn't happen. And if it didn't happen, what could they do to him. Nothing.

There was a reference to SSA decisions in the materials that were submitted by John noting that there is some kind of review after ALJ decisions within the SSA system. I would just like to point out that the federal courts have recognized the independence of federal ALJs. One of the indicia of recognizing that independence is the fact that those judges are protected by statute as being independent, and consequently, they are comparable to the federal judiciary in that regard.<sup>6</sup> In a series of SSA cases in the federal courts, they have pointed out that the SSA job description for federal ALJs specifically prohibits preissuance review of ALJ decisions.<sup>7</sup> And they have recognized that as one of the indicia in their own decisions on the independence of federal ALJs. Thank you.

---

<sup>4</sup>*Ex parte* communications: an issue in judicial conduct, 74 *Judicature* 96 (August - September, 1990).

<sup>5</sup>Lubet, *supra* note 3 at 100.

<sup>6</sup>*Butz v. Ecoumou*, 438 U.S. 478, 513 (1978).

<sup>7</sup>*Ass'n of Administrative Law Judges Inc. v. Heckler*, 594 F. Supp. 1132, 1146 (D.D.C. 1984); *Brennan v. Department of Health and Human Services*, 787 F.2d 1559, 1562 n.3 (Fed. Cir. 1986), cert. denied, 479 U.S. 985 (1986).

## ALJ John Hardwicke:

Thank you, Stan. I welcome this opportunity to discuss this subject with Judge Yoder, and in the presence of all of you. Unfortunately for Judge Yoder's position, it's not in accordance with the law. And I will start by giving you cases, and you can jot these down because the cases deal with the subject under discussion. And, unfortunately for Judge Yoder, he can cite no cases, zero cases, which hold that *ex parte* communications include judges of a peer level discussing any legal or judicial matter except those cases where one of the discussing judges has a personal interest in the subject matter. Otherwise, there is no law on the subject favorable to his position.

Now let me give you the law that is contrary to his position. The best case on judicial discussion is *People v. Hernandez*, 206 Cal. Rptr. 843 ( Cal. App. 5 Dist. 1984), where there was a discussion between two judges off the record by telephone. The court held that that was not a denial of due process. The court says there is a presumption of the honesty and integrity of judicial officers under the principles cited in *Withrow v. Larkin*, 421 U.S. 35 (1975), (cited in *Hernandez*, at 855) a major Supreme Court decision on prejudice and bias within the judiciary. The court went on to indicate there is an issue of fairness, but a discussion among judges is good and necessary.

In another case, *U.S. v. Greenough*, 782 F.2d 1556, (11th Cir. 1986), the question was propriety of a state judge discussing a pending case with a federal judge. The state case was a criminal matter in which the state court held off until it was tried by that federal judge. The question was a discussion between those two judges. The court said, "[I]n the states of this circuit informal dialogue between state and federal judges concerning matters of interest in both court systems. . . is affirmatively encouraged." 782 F.2d at 1559.

In the case of *Cheeves v. Southern Clays, Inc.*, 797 F.Supp. 1570, at 1581, (M.D.Ga. 1992), discovery was sought of certain judges in that district court system who had been in communication with the chief judge about a pending case. And in this case, the district court. "[P]laintiffs persist in referring to the pertinent oral and written exchanges between Judge Fitzpatrick and Chief Judge Owens as improper *ex parte* communications. . . . One problem with this assertion is that the term 'ex parte communication' is an ethical concept the definition of which, [in the Canon] expressly excludes consultation with other judges." *Id.* And they cite Canon 3(A)(4) for the proposition that judges may discuss among themselves--where they have no

personal interest--questions of the meaning and significance of issues in a case.

There is an extensive discussion of this topic by Andrew Kaufman, in *Judicial Ethics, The Less-Often Asked Questions*, 64 Wash. L. Rev. 851 (1989). Professor Kaufman had conducted a seminar symposium among 9th Circuit judges, with a broad range of ethical topics. Much of that discussion centered on the *Hernandez* case, which considered the extent to which judges may discuss the merits among themselves. Professor Kaufman stated, "[T]he hardest questions relate to federal judges consulting with other federal judges on the same court." *Id.* at 857. He considers both a narrow and a broader viewpoint. Prof. Kaufman concludes that even the most narrow view that you cannot discuss among other judges questions before your court, view is overcome by "a reasonable assurance that the judge with responsibility is the one deciding the matter." *Id.* at 857.

And I would like to point out that our authority, Kenneth Culp Davis, who still is most authoritative in the field, raises this question on page 302 of his treatise. He says, "May...[ an ALJ] talk over the problem [in a specific case] with a fellow ALJ? If he has doubts on any kind of problem, may he consult with the chief ALJ? May he have a supervisor or an editor look over his report and criticize it for both substance and form?" Davis says, "The operating answer to all of these questions is, 'Yes.'" 3 Davis, *Administrative Law Treatise* 302 (2d ed. 1980).

So, ladies and gentlemen, you know of course that we have opinions contrary to what the courts have held, and I must tell you that my respect and subservience to the law is through the courts and through the common law system.

In my judgement, the best discussion of what a judge is, is found in *Freytag v. The Commissioner of Internal Revenue*, 501 U.S. 868 (1991), and I recommend this reading to all of you because there's a wonderful opinion of the court, with a concurring opinion by Scalia. This 1991 decision defines a "judge" what a judge is, when is a judge not a judge, and the extent to which an Article III judge is the only judge permitted in the system. And I'll read you briefly from Scalia, in the concurring opinion. He says, "Today the federal government has a corps of administrative law judges numbering more one thousand" [--of course, it's up to almost 1400 now--]"whose principal statutory function is the conduct of adjudication under the Administrative Procedure Act." They are all executive officers. 'Adjudication,' in

other words, is no more an 'inherently' judicial function than the promulgation of rules governing primary conduct is an 'inherently' legislative one.... It is true that Congress may commit the sorts of matters that administrative judges and other executive adjudicators now handle to Article III courts—just as some of the matters now in Article III courts could instead be committed to executive adjudicators.” 501 U.S. at 910. Scalia goes on to conclude that the only true independent adjudicator is one who possesses life tenure and a permanent salary. Scalia suggests if you have anything less than a permanent salary, you are not an independent adjudicator.

And so since none of us here has life tenure or a permanent salary, none of us is a true “independent adjudicator.” Consequently, ladies and gentlemen, the question before the house is the extent of which our independence can and should be, indeed must be curtailed. Independent hearing agency adjudicators, whose sole function is to administer due process, may have reasonable limits placed upon their work by persons who are equally dedicated to providing due process. That is a reasonable limitation. And that in substance is the conclusion of the matter.

Appraisal is not only desirable, it is necessary. One illiterate opinion from your agency, one opinion which is contrary to common sense, law and justice, will do more harm to the adjudicatory process than you can imagine. And it also does more harm to the functions of our work than anything else. But that doesn't mean that we can curtail the freedom of judges to do what is right, nor deny their freedom to make a fair conclusion to their case.

One morning in 1991, the phone rang in my office and I answered it, and it was the governor of the State of Maryland. The governor didn't say, Good morning, John, he didn't say, How are you doing, he said, “One of your goddamn judges made a decision yesterday which cost the State of Maryland 5 million dollars.” That was the high point of the conversation. I had read that decision of that judge. I did not agree with it. It was, in my opinion, however, a well-reasoned decision. The case went on to the Maryland Court of Appeals and the Court of Appeals reversed the decision. To this very day, that judge does not know that the governor discussed the decision with me.

My whole point, ladies and gentlemen, is that the beauty of a central hearing agency is that when we institutionalize the due process function, and take it out of the agency, the ability fairly to oversee is greater. Consequently, there is a vast difference between what you can do when you're outside of the agency, when you're outside of the

prosecutor, when you're separated from the person who has some ax to grind, when the only purpose in looking over the decision is to see that due process was afforded, than when you are an employee of the agency. There are reasonable limits. Thank you.

Moderator:

Judge Yoder has a five minute response.

**Judge Yoder:**

First of all, I'm pleased to observe that John and I really don't have a dispute with respect to *ex parte*. Everything he said about the cases which he cited referred to voluntary communications between judges relating to decisions. The Code of Judicial Conduct specifically says that's okay. The question is whether you can mandate that you get approval or clearance before you issue a decision.

And in that regard, I don't want to load you up with cites, but if you look at *Association of Administrative Law Judges, Inc. v. Heckler*, 594 F.Supp. 1132 (D.D.C. 1984), it says, "The Social Security and Administrative Procedure Acts prohibit substantive review and supervision of the administrative law judge in the performance of his quasi-judicial functions. His decisions may not be reviewed before publication.... "(594 F. Supp. at 1146).

In a series of cases in the court martial arena, *U.S. v. Mabe*, 33 M.J. 200 (C.M.A. 1991), the U.S. Court of Military Appeals has made it very clear that it's not proper for superiors to try to influence or review the decisions by subordinates in courts martial. The court stated, "We unequivocally reject this admittedly 'personal' view of the military justice system and its concomitant undermining of the independence of the military judge. . . . This coercion results from the well-recognized effect of fitness-report evaluations on military lawyer's service advancement and security." 33 M.J. at 205.

As stated in the Foreword to "Judicial Conduct & Ethics" (1991) by Shaman, Lubet and Alfini, "[T]he essence of being a good judge is, after all, the ability to decide the case on the facts and law without any extraneous influences, and without fear that a reviewing court, the siblings on the bench, the neighbors, the electorate or the media are going to dislike the decision." I want to direct your attention just briefly to the materials in your packet that describe the way SMS

review is done in Maryland.<sup>8</sup> As an adjudicative bureaucratic model, it's fine. I understand why John has it, because he has political problems that he has to address. But it says that this SMS person is first of all going to get a draft, not get a decision, he's going to get a draft and review it. Then at the end of it, he's either going to say, you can issue the revised draft after I've reviewed it, or he's going to say, even if you revise it the way I've told you, you still can't issue it. He's going to look at three things, and if the three things are okay, then he can issue it. If the "applicable law" is identified and "logically applied" to the facts, it doesn't matter if the SMS agrees with the "bottom line," it has to be issued.

Well, what is "applicable law?" I sometimes think constitutional questions are applicable in civil penalty cases, but other judges don't. What if I think the Declaration of Independence and the constitutional right to free speech are relevant to the issue of predecisional review and you don't? Does the inclusion of such an issue change the quality of the decision? As an SMS, could I require an ALJ to consider the propriety of the SMS system?

"Logical." What if the judge thinks his decision is logical, but the SMS disagrees? Was *Brown v. Board of Education* 347 U.S. 483 (1954) logical? Was *Plessy v. Ferguson*, 163 U.S. 537 (1896) logical? Was my reversal of thirty years of CAB precedent in the *Orbis* case when I first started twenty years ago logical?<sup>9</sup> My associate chief judge didn't think so. But the CAB eventually did. Would an SMS think it was logical? I gather that the memorandum in your packet from John's attorney argues that my position here is not logical. Does that mean that I couldn't issue a decision against the SMS system as a Maryland ALJ? And I challenge any of you who are in this kind of a system--try reviewing the question of whether SMS review in your system is legal or consistent with the Code of Judicial Conduct. See if it gets out.

"Bottom line." What about the thousands of decisions that are not the bottom line? Some people who read my decisions regularly say they always read the footnotes first, because that's where I put the good stuff. That's often where I incidently make more policy. Is every ruling on a motion to discover evidence, bar evidence, grant summary

---

<sup>8</sup>Harwicke, *The Central Hearing Agency: Theory And Implementation* In Maryland, XIV J.N.A.A.L.J. 5 (Spring 1994).

<sup>9</sup>Tourist Enterprise Corp. "ORBIS," CAB Docket 27914, Order 76-6-18 served June 7, 1976, p.8, n.9, aff'd, Order 76-7-98, served July 28, 1976, p. 3, n.5; Order 76-9-71 served Sept. 17, 1976; Order 76-12-140, served December 30, 1976; Recommended Decision, served Oct. 7, 1977, p. 6, aff'd., Order 76-5-11, settled May 8, 1978.

judgment or extend time a bottom line?

I'm sure the intent of mandatory predecisional review is to assure quality in the decisional process, not manipulate free thought and independent expression. Freedom is not necessarily neat and tidy or without mistakes. Democracy is not a neat, tidy political system. It's just better than any other. The Soviet Union tried for 75 years to manage freedom. It didn't work. Mandatory predecisional review may be able to work, but only as part of an administrative bureaucratic system, not as part of an administrative judicial system.

I've been a federal ALJ for twenty years. During all that time, I've supported growth and professionalism of state ALJs and state central panels. I understand the need for a political compromise in administrative management. I know central panel systems are evolving; but I hope they'll evolve toward reliance on individual intelligence, independence, and integrity, toward an administrative judicial model rather than an administrative bureaucratic model— or at least tell the public. Thank you.

And now for the final word--Judge John Hardwicke.

**Judge John Hardwicke:**

Isn't this great? I love this guy. I haven't done this in a long time--a long, long time.

Let's sort out the questions. As I see it, there are two questions. First there is the ethical question. That's the *ex parte* question as is embodied in Canon 3. The second question is the due process question, and I think that involves an independent judgment. That is the judgment of the courts that have looked at the question. Judicial discussion, where there is no private interest of the discussing judge, is not an *ex parte* question but may be a due process question. The cites, I think, concur on that. *Ex parte* traditionally, correctly, according to such simple things as Black's Law Dictionary, Words and Phrases and so forth, means a discussion with one of the parties or in preference to that party in the case. I have no doubt as to the correctness of that legal position. That is an ethical question.

As for due process, you have to be careful because the comments confuse an independent judiciary with an independent adjudicator. Now first of all, the independent judiciary as an institution must be, and is, totally, completely, and inherently independent, with no encroachments. The kind of encroachment we saw this morning through Justice White is the kind of problem that our society and our

civilization is faced with.

The second question is, that of the independent adjudicator. There is no such thing as a truly independent adjudicator. Even the Supreme Court watches the election returns, as Will Rogers once said. Every adjudicator is limited as to income, position, parking space, and all of the things that can be brought about to impinge upon his true independence. Even the Scalia independent adjudicator with life tenure and no salary controls has to have some constraint.

Is a judge free to be wrong? The answer is yes. But is a judge free to be biased? Is a judge free to ignore the law? You say, well, those are questions for a reviewing appellate court. There's no question that those are for the reviewing appellate court. But it is awfully good to try to get it right the first time, because the appellate reviewing court gets into the action only at considerable expense and delay to the system. Now I don't suggest at any extreme position one way or the other. Nor do I think Judge Yoder does. I don't believe that anyone in this room would say that a judge is totally free to send out any decision and opinion that occurs to him or her. None of us would take that position.

There must be some kind of constraint. There's the constraint of reason, there's the constraint of logic, there's the constraint of law, there's the constraint of reasonableness, and of literacy. All of these things are built-in constraints, constraints on everything we do. So it is entirely proper for a judge, a reviewer charged with the duty of due process, to take a look at the work of other judges. Mandatory review is something that Judge Yoder hits hard. He objects to the word "mandatory." My experience has been that the judges who do not like to be reviewed are the very judges who must be reviewed. Without a mandatory system, the review would be meaningless. Thank you.

**REMARKS OF PROFESSOR HAROLD LEVINSON,<sup>10</sup> FOLLOWING YODER-HARDWICKE DIALOGUE, PROVIDING LEGAL BACKDROP TO DISCUSSION OF ETHICS PANEL ON THE SUBJECT: "DUE PROCESS, EX PARTE COMMUNICATIONS, AND THE TENSION BETWEEN INDEPENDENT DECISION-MAKING AND ADMINISTRATIVE CONCERNS"**

**Professor Levinson:**

Intuitively, it seems obvious to all of us that a judge should

---

<sup>10</sup>Professor, Vanderbilt University, School of Law.

decide each case on the basis of evidence, legal authority and argument, which are submitted to the judge in the physical presence of the parties, or in documents which are served on all parties. Our sense of fundamental fairness is offended if the judge receives communications about the case from anybody, whether a party or not, behind the backs of one or more parties. These intuitive notions provide the basis of the law on *ex parte* communications. Inevitably, however, the matter has become as complicated as any other area of the law.

There are three major headings for our subject: First, what is the source of law? Second, what type of communication is prohibited under that law? (Note *ex parte* means *out of the presence of the parties*, not *by* or *for* a party.) Third, what kinds of remedies are available after a prohibited communication has been received? The answer to each of these questions varies depending upon which jurisdiction you are in. The only constant is federal due process. Even state due process varies, depending on the state constitution.

### Source of Law

On the question of the source of law, we start off with the federal due process clause, which is only occasionally cited in the cases. Why? Because most jurisdictions have in addition other provisions, more specific, more detailed, which are more useful to cite than the rather vague federal due process clause. The leading due process case in recent U. S. Supreme Court history is *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Goldberg* said that one of the basic ingredients of due process is a decision based on the record before the deciding officer, which implies "and in the presence of all the parties." But that case was basically legislation, which was speculating on what a future proceeding should look like, and it does not help us very much with the messy details.

Each state has its own due process clause. Again, the state courts seldom use due process as a measure of whether an *ex parte* communication is proper or not.

After the due process clauses come statutes, such as the administrative procedure acts, which deal with *ex parte* communications; statutes creating central hearing offices; and statutes addressed to specific agencies or programs.

Codes of judicial conduct provide another source. The immediate question is, do they apply to us as administrative law judges? The answer is, in some states they do, in other states they do

not. In most states, a code of judicial conduct, based more or less on the ABA model code, is promulgated by the state supreme court, for the judicial branch of government. In most states, the supreme court has no authority to impose a code of judicial conduct on administrative judges. In some states, the legislature has done so by reference to the judicial code. In other states, the director of the central panel has done so, by administrative regulation. And some agency regulations themselves pick up the code of judicial conduct.

The next source of law is case law interpretation of the above. Furthermore, there are persuasive authorities, such as ABA codes, which only are persuasive until adopted by a particular state organ of government. There are ethics opinions of the ABA and of the states. There is the law of other jurisdictions, persuasive but not controlling, and of course there are scholarly and professional commentaries.

### Types of Communications Prohibited

This varies depending on what jurisdiction's law applies. Generally speaking, the prohibition against *ex parte* communications applies to any communication about the merits of the proceeding—not about the time of day, or the room in which it will be held, of course. The prohibition obviously applies to communications with the parties or their representatives. It does not so obviously apply to communications between judges, as we heard in the debate.

One possible solution to the debate between Judge Yoder and Judge Hardwicke is this: Does it depend on who initiates the communication, and whether that person is expected to initiate it as part of the climate or ambiance of the office?

### What Kinds of Remedies After a Prohibited Ex Parte Communication has been Received?

One possibility: Put the communication on the record and let each party respond.

Second possibility: Disqualify the judge.

Third possibility: Enter a default order against the offending party, available under the federal APA and under the laws of some states.

Fourth: Initiate discipline against the offending party.

Fifth: Initiate discipline against the judge who presumes to receive and consider an *ex parte* communication.