National Association of Hearing Officials

SESSION 14B
Professional Responsibility Issues in Administrative Hearings

Responding to challenging moments in hearings while maintaining our own professional responsibilities.

Your Presenter . . .

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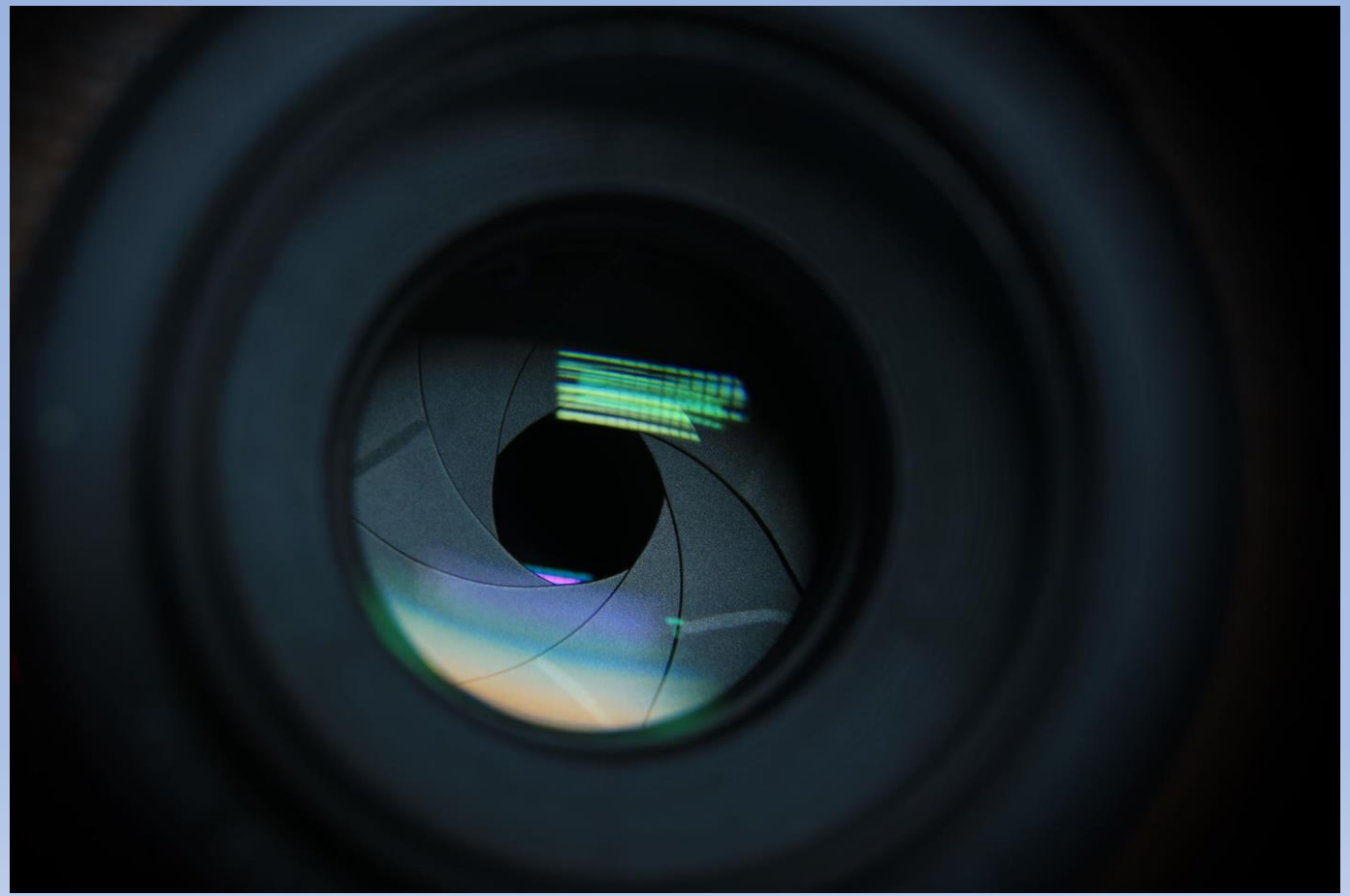
Objectives



- Identify applicable Codes of Professional Responsibility
- Discuss ALJ/HO responsibility for establishing and maintaining decorum
- Explore responses that will promote best practices
- Tar Pits to avoid

Which Code Governs?

- There are codes of conduct for **attorneys**
  - In Illinois, there is the Attorney Registration and Disciplinary Commission
    - Illinois Supreme Court Rules on Admission and Discipline of Attorneys
    - Illinois Rules of Professional Conduct
    - 1990 Rules of Professional Conduct (replaced as of January 1 by the 2010 Rules of Professional Conduct)
    - Rules of the ARDC
    - Rules of the Board of Admission and Committee on Character and Fitness
  - In Tennessee, the is the Board of Professional Responsibility

Which Code?

- There are codes of conduct for **adjudicators**
  - Illinois Code of Judicial Conduct (Supreme Court Rules 61-68)
  - Administrative Law Judge Code of Professional Conduct (Illinois)
  - National Association of Hearing Officials Model Code of Ethics
  - American Bar Association's Model Code of Judicial Conduct for State Administrative Law Judges
  - National Association of Administrative Law Judiciary's Model Code of Judicial Conduct for State Administrative Law Judges

NAHO Model Code of Ethics

- Section VI: Dignity and Decorum of the Forum
  - Hearing officials should promote the dignity and decorum of the administrative hearing process and tribunal. Hearing officials should exercise their lawful authority in any proceeding to ensure that all persons involved conduct themselves with the proper decorum.

Rule 2.8: Decorum and Demeanor

- An ALJ shall:
  - (A) require order and decorum in proceedings before the ALJ; and
  - (B) be patient, dignified, and courteous to litigants, witnesses, lawyers, staff and others with whom the ALJ deals in an official capacity, and shall require similar conduct of lawyers, staff, and others subject to the ALJ’s direction and control.

Words of Caution

- “[A] judge is a judge 7 days a week, 24 hours a day and must act accordingly.” *Inquiry Concerning a Judge Frank*, 753 So.2d 1228, 25 Fla. L. Weekly S147 (2000).
- The reputations of hearing officials are not based on the totality of their work product nor are their reputations based on only their best behavior.
- It takes years to develop a favorable professional reputation, but it takes only one appearance or perception of bias, one intemperate hearing, or one incompetently written decision to damage not only the reputation of the hearing official involved, but also the reputations of other affiliated administrative adjudicators. It isn’t fair, but it is the truth.

Interpreting Codes of conduct

- The text of the rules under the canons is intended to be authoritative and enforceable.
- The commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the rules.
- When the text uses shall or shall not, it is intended to impose binding obligations, the violation of which can result in disciplinary action.

- When should or should not is used, the text is a statement of what is or is not appropriate conduct, but not as a binding rule under which a judge may be disciplined.

- When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

Application of the Code

- The canons and rules thereunder are rules of reason.
- The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.
- The code is designed to provide guidance to an ALJ.
- It is not intended that every transgression will result in disciplinary action.
- A reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression.

Rule 2.15 Responding to Judicial and Lawyer Misconduct

- (A) A judge having knowledge that another judge has committed a violation ... that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness … shall inform the appropriate authority.
- (B) A judge having knowledge that a lawyer has committed a violation [of the rules governing their conduct]… that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness … shall inform the appropriate authority.

Rule 2.15 continued

- (C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code
  - shall take appropriate action.
- (D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct
  - shall take appropriate action.
- Communicating directly with the person; communicating with a supervising person or other authority.

Duty of a judge to report lawyer misconduct to the ARDC.

- Opinion 99-6, April 14, 1999
- A judge must take appropriate disciplinary action against a lawyer whom the judge knows to have committed an ethical violation but need not report the misconduct to the Attorney Registration and Disciplinary Commission.
- But this opinion involved an elected judge of general jurisdiction, not and administrative judge.

- Judges have available an array of disciplinary measures that are not available to lawyers.
- publicly or privately chastising the lawyer
- holding the lawyer in contempt
- reporting the lawyer
- if the lawyer misconduct (if proved) would constitute a crime, the judge is under an obligation to notify

- The Committee declines to speculate on whether the judge would be subject to discipline for not reporting behavior tantamount to a crime if the judge imposed other sanctions. Certainly, the prudent judge would consider the gravity of the behavior when deciding whether or not to report the lawyer to the ARDC.

What Not to do ….

- Ignore the misconduct
- Yell and scream at the lawyer who is behaving badly
- Demean the lawyer
- Be drawn into escalating arguments
- Be overly familiar with the attorneys

Always remember your own conduct matters

- You set the tone and the parties will tend to reflect that same tone.
- Always give attention to the matter before you (no manicures, texting and or other behaviors that appear to distract your attention).
- Remain neutral.
- Be respectful (even when others aren’t).
- Most discipline complaints against adjudicators involve issues of demeanor and temperament.

What is your next move . . .

- You issue a decision after a contentious daylong hearing. Counsel for Ms. Campbell, the party who did not prevail, files a Motion for Reconsideration and for Recusal.
- The Motion describes you as “rushing [your] consideration of the case on a day when [you] appeared to be preoccupied, taking a two-hour lunch for personal business, unfairly restricting the amount of time for cross-examination of the defendant’s witness, showing bias and prejudice by making pejorative remarks about “press releases,” and “being rude.”
- And, further, “[t]he trial court’s lifestyle choice and personal opinions should not be permitted to deny Ms. Campbell a fair trial.”

What’s your next move

- An attorney in one of your cases leaves you a voicemail message messages calling opposing counsel a “red neck peckerwood” and describing counsel collectively as “Nazis.”
- An Attorney appeals one of your decisions. In the pleading, the attorney states your decision in the matter “ranks with the Dred Scott decision among the injustices in American History” and is a “disgrace to the human race.” He states that you are “[p]etty, barbarous and cruel”; “[the] Decision is a stench in the nostrils of the Nation”; “Shows complete contempt for First Amendment Values”; “[Your name] ... is no better than Respondents—he is a retaliator”; and “Disgraces his judicial office.”

Read All About it

- BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE v. Edward A. SLAVIN, Jr.
- 145 S.W.3d 538 (Tenn 2004)

What’s your next move

- You approved a request from an Attorney Dunlap, admitted in a different state, for permission to appear pro hac vice in a matter involving an appeal of an agency denial of a certificate of need for an opioid addiction treatment clinic proposed to be operated in an area of a small city where the clinic would be excluded by zoning regulations although it would be easily accessible to the target population.
- You grant a Motion for Stay in your matter based upon Dunlap’s representation that a pending Federal District Court case will be dispositive of the ADA accommodation claim over the objection of the agency.

But then …

- You discover Dunlap did not inform you that the federal court had previously dismissed Dunlap's first complaint because of the ongoing Certificate of Need application prior to his filing a second complaint in an adjacent federal district.
- You issue a Notice of Intent to set a hearing.
- Dunlap Objects and asserts that you must issue the certificate of need without a hearing as a reasonable modification under the ADA and that your failure to do so would create a cause of action against you personally and Dunlap would be required to request that the Department of Justice include you in an ADA enforcement action for aiding and abetting the agency denial.

Now, what do you do?

- Judge Summers sua sponte issued an order revoking Mr. Dunlap's admission to appear pro hac vice.
- Judge Summers concluded that this conduct violated Tennessee Rules of Professional Conduct (RPC) 3.3 (candor toward the tribunal), 3.5 (impartiality and decorum of the tribunal), and 8.4 (misconduct), and breached the conditions on which Mr. Dunlap had been granted admission pro hac vice.
- Dunlap appealed …..

- The Chancery Court observed that “[n]o lawyer is entitled to use threats and intimidation to force a judge to perform a discretionary act and such conduct evinces a persistent resolve to undermine and to bend the justice system to that lawyer’s will.”
- He appealed again …
- The Court of Appeals held that the revocation of Mr. Dunlap’s admission was appropriate because he had violated RPCs 3.3, 3.5, and 8.4.
- The Tennessee Supreme Court denied Dunlap’s application for permission to appeal.

Read about it

- Tri-Cities Holdings, LLC v. Tenn. Health Servs. & Dev. Agency, No. M2015-00058-COA-R3-CV, 2016 WL 721067, at *1 (Tenn. Ct. App. Feb. 22, 2016).

- Meanwhile, on May 19, 2014, Mr. Dunlap filed a third federal lawsuit for his Client in the United States District Court for the Middle District of Tennessee and sued Judge Summers in her official capacity as an administrative law judge.
- The lawsuit alleged that Judge Summers intentionally violated the ADA by failing to grant a Certificate of Need to Dunlap's Client as a reasonable modification, that she retaliated against the Client and Mr. Dunlap by making biased and false allegations that Mr. Dunlap misrepresented the status of federal litigation.

- The federal court found that “Mr. Dunlap was clearly less than candid with the administrative tribunal, misrepresented various matters, and tried to obstruct the orderly progression of the administrative appeal.”

- The hearing panel found Mr. Dunlap’s conduct to be contempt for Judge Summers, the tribunal, and the administrative proceedings, in violation of RPC 8.4(d).

QUESTIONS or
COMMENTS