Due Process and Beyond:
Procedural Fairness

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Procedural due process should be a process "which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." Daniel Webster

I. What is "due process"? When is it required?

The Constitution states only one command twice. Both the 5th and 14th Amendments to the Constitution use the same eleven words. Those amendments say that no citizen can be "deprived of life, liberty or property without due process of law." Put simply, "due process" is the process that is due to a citizen before he or she can be deprived of life, liberty or property. But "due process" is never put simply. To quote Professor Erwin Chemerinsky, Dean of the U.C.-Berkley School of Law:

> "There is no concept in American law that is more elusive or more controversial than substantive due process….[S]trangely enough, if you look through Supreme Court opinions you will never find a definition."

Substantive Due Process asks this question:

Was the government's deprivation of a person's life, liberty or property justified by a sufficient purpose? Substantive Due Process means the government must show a compelling reason that would demonstrate adequate justification for the taking of life, liberty or property.

Procedural Due Process asks this question:

Did the government follow the proper procedures when it took away life, liberty or property? Procedural due process means that the government must give notice and an opportunity for a hearing before it can take life, liberty or property.

When is "due process" required?

Since the Constitution prevents the government from taking "life, liberty, or property" without due process of law, the threshold question is whether one of these three protected interests is at risk. If life, liberty or property is at risk, then the "process" is "due." Since administrative hearings typically do not involve the taking of life or liberty[1], whether "due process" is required is often dependent on whether an appellate court has declared that there is a property interest in the benefit, license or privilege the government wishes to take from the individual.

II. The Original Duties of the Three Branches of Government

A. Duties of the Legislative Branch[2]

1. Make and fund laws;
2. Collect taxes, borrow and coin money and regulate commerce;
3. Maintain the military and declare war;
4. Establish and maintain roads;
5. Create the postal service and other administrative agencies and manage them via:
    a. Oversight committees;
    b. Establishing restrictive statutes to govern agencies;
    c. Audit or investigate agencies and agency administrators; and
    d. Appropriate or withhold funding for the agency.

B. Duties of the Executive Branch

1. Administer (enact) laws made by congress (sign or veto; and
2. Administrative oversight/management, *e.g.* Cabinet Meetings.

C. Duties of the Judicial Branch

1. Enforce the laws created by congress and signed by president;
2. Prevent erroneous deprivation of life, liberty or property via a system providing hearings before judges in courts of law; and
3. Declare act of coequal branch of government unconstitutional.[3]

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[1] An administrative prison discipline hearing often does not involve a loss of liberty because the prisoner's liberty was already lost upon incarceration. However, if one of the disciplinary sanctions the prison wishes to impose has been defined as a loss of liberty by an appellate court, a higher level of "process" may be "due." See: *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995); *Sandin v. Conner*, 115 S.Ct. 2293 (1995); *Wolff v. McDonnell*, 418 U.S. 539 (1974).

[2] See Article 1, Section 8 of the Constitution for more information.

[3] *Marbury v. Madison*, 5 U.S. 137 (1803): Federal courts were able to declare an act of a coequal branch of government unconstitutional. Scope of judicial review has expanded to cover the actions of the executive branch and all administrative agencies.

III. Privilege to Property: Creation and Evolution of Administrative Hearings

A. *McAuliffe v. City of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892): Government benefits were considered "privileges" which the government could limit or remove at will.

B. *Londoner v. Denver*, 210 U.S. 373, 28 S.Ct. 708 (1908) and *Bi-Metallic v. State Bd. of Equalization*, 239 U.S. 441, 36 S.Ct. 141 (1915) entitled the person being deprived of a government benefit to **notice** and an **opportunity** to contest the government's action.

C. *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927). Tumey was charged with violating the prohibition act. He objected to the mayor also serving as judge although the practice was commonplace and was authorized by state statute. His objection was overruled and Tumey was convicted by the mayor/judge. On appeal, he argued he was deprived of due process of law violating the 14th Amendment because of the mayor's pecuniary interest in the result of the trial. The mayor/judge received $12 per conviction over and above his usual salary, amounting to, on average, an additional $100 per month. The State of Ohio argued that due process was afforded because the evidence clearly showed the defendant was guilty and he was only fined the minimum amount. Held: "No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge, which existed both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village. There were thus presented at the outset both features of the disqualification."

D. Justice Oliver Wendell Holmes dissenting in *Springer v. Philippine Islands*, 277 U.S. 189, 48 S.Ct. 480 (1928):…Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a *quasi*…"

E. *U.S. v. Curtiss-Wright Export Co*., 299 U.S. 304 (1936) began the Court's trend in ruling in favor of Congress's right to delegate authority to administrative agencies on condition that Congress provide standards to direct the agencies in executing governmental policies (like APA). Accord, *Misretta v. United States*, 109 S.Ct. 647 (1989).

F. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961): Occupational licenses, welfare payments, etc., are more than mere privileges and those deprived of them have a right to some due process protection.

IV. From "Privilege" to "Property" – *Goldberg v. Kelly*

The Court finally abandoned the right-privilege distinction in *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970). *Goldberg v. Kelly*, 397 U.S. 254, 261-263 (1970), declared persons deprived of government benefits previously considered privileges had a property interest in those benefits warranting trial-like due process. The minimum procedural safeguards required under *Goldberg* are:

1. Right to timely and adequate notice of the basis for the action

2. Opportunity to defend against the reason for the action

3. Opportunity to confront adverse witnesses

4. Opportunity to present arguments and evidence orally

5. Opportunity to cross-examine witnesses

6. Right to disclosure of opposing evidence

7. Opportunity for representation by counsel

8. Right to a determination based solely on the evidence presented at the hearing

9. Right to a reasoned decision stating the evidence upon which it relied

10. Right to an impartial decision maker

When *Goldberg v. Kelly* was issued in 1970, all federal statutes and regulations relating to the conduct of administrative hearings under the Social Security Act made *Goldberg v. Kelly* the gold standard by which all hearings related to human services and federal disability benefits should be conducted.

However, *Goldberg v. Kelly* was not destined to remain controlling law for long. Chief Justice Burger recognized this in his dissent in *Goldberg* at 284:

> "…the complexity of the administrative process as we have seen it for the past 30 years would suggest the possibility that new layers of procedural protection may become an intolerable drain on the very funds earmarked for food, clothing and other living essentials."

[4]Only a year later, with tens of thousands of welfare recipients waiting months for the trial-like hearings *Goldberg* required, the Court deduced Chief Justice Burger's dissent in *Goldberg* had been right all along.

[4] For reasons that are unclear, and despite the Supreme Court's rulings abrogating *Goldberg v. Kelly* in *Richarson v. Perales*, *Wolff v. McDonald*, *Goss v. Lopez*, and *Matthews v. Eldridge*, the federal government never modified the federal statutes and regulations which set *Goldberg v. Kelly* as the standard by which human services hearings are to be conducted. All other hearings are bound by *Mathews v. Eldridge*.

V. Post-*Goldberg v. Kelly* Evolution of Procedural Due Process

A. *Richardson v. Perales*, 402 U.S. 389 (1971) held admission of hearsay documents in a Social Security hearing, without cross-examination of the document's declarant, did not violate due process. The opinion by Justice Blackmun, which 6 other justices joined, said *Goldberg v. Kelly* had imposed "undue judicialization" on what was only a *quasi*-judicial process and would impair disbursal of government benefits to those intended as the law's beneficiaries. Held: It was impracticable, because of the nature and volume of administrative cases, to require all the elements of due process in *Goldberg v. Kelly* for all hearings--"the system must be fair—and it must work."

B. *Board of Regents of State College v. Roth*, 408 U.S. 564 (1972): Roth was hired as assistant professor for a fixed term of one year. Tenure was available, but only after 4 years. Roth was not rehired, was not told why, and was not given an opportunity to challenge the decision not to hire him. He brought action in Federal District Court alleging he was entitled to a statement of reasons and a hearing. U.S. Supreme Court held that due process adheres only when life, liberty or property is at risk. Roth's need, desire or unilateral expectation of being rehired did not constitute a property right which warranted due process protection. Neither federal nor state appellate courts have varied from this position. See also *In re 'Ao Ground Water Management Area High-Level Source Water Use Permit Applications*, 128 Hawai'I 228, 287 P.3d 129 (2012); *Lewis v. Jaeger*, 818 N.W.2d 165 (Iowa, 2012); and *Wynkoop v. Town of Cedar Lake*, 970 N.E.2d 230 (Ind.App. 2012).

C. *Wolff V. McDonnell*, 418 U.S. 539 (1974): State prison inmates facing internal disciplinary proceedings are entitled to advance written notices of the violations against them and further written notice of the evidence against them.

D. *Goss v. Lopez*, 419 U.S. 565 (1975): Process due depends on competing interests involved. Elaborate procedures unnecessary for limited school suspension; would harm educational interests. Need "some type of hearing" due to potential loss of opportunity for education. Informal conference between student and principal held in school office enough if student receives:

1. Notice regarding allegations against them;
2. An opportunity to hear and rebut the allegations (but no right to call or cross-examine witnesses and no right to counsel); and
3. An opportunity to present his/her version of events.

The level of procedural due process required for a limited school suspension remains essentially the same today.[5]

[5]In 2012, 18-year-old high school student injured younger student with his automobile on school property and received 10-day school suspension. *Heyne v. Metropolitan Nashville Board of Public Education*, 380 S.W.3d 715, 286 Ed. Law Rep. 730 (Tenn. 2012) held: Student had a claim of entitlement to public education warranting procedural due process. But written notice of charges and, if he denies them, an

VI. Procedural Due Process Today

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) an analytical technique for determining the necessary level of due process required for administrative hearings. The *Mathews* balancing test:

1. What is the private interest that will be affected?
2. What is the risk of the erroneous deprivation of the identified private interest if the hearing is conducted using the process to which the petitioner objects?
3. What is the cost to the agency (in time, resources and money) for the additional procedural protection which is sought?

U.S. Supreme and Federal Court administrative law cases citing *Mathews v. Eldridge*:

A. *Club Madonna, Inc., v. City of Miami Beach*, 924 F.3d 1370 (U.S. App.-11th Circ., May 24, 2019): City took emergency administrative action suspending club's business license after discovering that 13-year-old trafficked girl had been forced to dance nude at the club and to turn over to her captors any money she earned working at the club under threat and actions of physical abuse, which resulted in law enforcement issuing a search warrant, raiding the club, recusing the victim and arresting her captors. The Club argued, among other things, that they were entitled to a pre-suspension hearing. Court held that *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976) can require pre-deprivation hearing, that is not always the case when there is a need for quick action due to immediate and pressing concerns for the physical and mental health and welfare of minors.

B. *Kerry v. Din*, 135 S.Ct. 2128 (2015): Assuming that a citizen has a procedural due process right to an explanation of the grounds for the denial of her husband's visa application, that right was satisfied when a consular officer informed the citizen that her husband was inadmissible under Immigration and National Act's "terrorist activities" bar to admissibility.

C. *Spinelli v. City of New York*, 579 F.3d 160 (U.S. App.-2nd Circ. 2009): Gun shop owner complained of 4th Amendment and procedural due process violations in connection with the search of her gun shop without a warrant, the confiscation of her firearms inventory and the suspension of her firearms dealer's license. Held: Plaintiff did have protected property interest in firearm's dealer's license as its continued possessions was essential to the pursuit of livelihood. Lack of pre-deprivation hearing did not violate due process due to the exigent circumstances that existed necessitating prompt action to secure the gun shop. City's policy of providing notice and

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explanation of the evidence against him and an opportunity to present his side of the story satisfy due process.

opportunity for hearing only after the lengthy investigation is completed did not comport with due process. The delay served no important underlying governmental interest and caused significant financial loss to Spinelli over an extended period. Notice to Spinelli was inadequate. Spinelli's eventual success in having her gun dealer license reinstated 58 days after its suspension was not he result of the City's affording her due process, it was despite the absence of due process. The warrantless search of the gun shop was objectively reasonable and did not violate the 4th Amendment.

D. *Gilbert v. Homar*, 117 S.Ct. 1807 (1997): State university employee suspended without pay following his arrest on drug-related charges claimed his due process rights had been violated when he did not receive full pre-suspension hearing. Held: Limited pre-termination hearing *(i.e.* an initial check against a cmistaken decision based on whether there were reasonable grounds to believe charges against the employee are true and support the proposed action) was sufficient to comply with due process) because limited pre-termination hearing was to be followed by a more comprehensive post-termination hearing.

Select State Appellate Cases following *Mathews v. Eldridge*:

E. *Naina Sachdev, M.D., v. Oregon Medical Board*, 292 Or.App.778, 426 P.3d 118 (Or. App. July 18, 2018): Medical doctor petitioned for review of a final order of the Oregon Medical Board that revoked her license to practice medicine, imposed a $10,000 fine, and assessed the costs of the proceeding. The board imposed the sanctions on the basis that licensee violated several provisions of ORS 677.190 by violating an interim stipulated order and breaching the standard of care in the course of prescribing controlled substances. Court agreed with one of the petitioner's seven assignments of error: the board did not provide the petitioner with adequate notice with respect to the board's grounds for discipline. Reversed and remanded.

F. *Consiglio, M.D., v. Department of Financial and Professional Regulation*, 988 N.E.2d 1020 (Ill.App. 1 Dist. 2013): Three physicians were licensed by the state to practice medicine. Subsequent to being licensed, each of the three was convicted of battery or abuse against a patient in the course of care or treatment. Pursuant to an act passed after their convictions, their licenses were revoked without a hearing based solely on the convictions. Plaintiffs argued the act violated their procedural due process rights because it called for revocation of their licenses without a hearing. Citing the *Mathews v. Eldridge* balancing test, the court held: Due process is a flexible concept, and the procedural safeguards it requires may not be the same in all situations. It does not necessarily require a proceeding that is akin to a judicial proceeding, nor does it require a hearing in every instance a government action impairs a private interest. The risk that their medical license would be erroneously revoked under the act was low because the act operates only upon a conviction which is a matter of public record and can be established without a fact-finding hearing.

G. *Bussoletti v. Department of Public Welfare*, 59 A.3d 682 (Pa. 2012): Mentally retarded adult male living with his parents received county benefit of daily door-to-door transportation to training facility even though he lived 3 miles from nearest paved road. "Pathways" transportation service had difficulty picking him up during inclement weather. Commute caused much wear and tear on vehicles. Pathways said commute too costly. Proposed 3 options: (1) meet Pathways at paved road nearest his home; (2) use alternate transportation provider, Green Arc; or (3) have his parents drive him for which they'd be reimbursed 51¢ per mile. Recipient objected to the change. At hearing, ALJ determined regulation allowed Recipient to select any "willing and qualified provider," Pathways was no longer willing and acted in accordance with regulations when proposing modifications. On appeal, Recipient contended procedural due process rights were violated: parents were pressured to agree to modification; discouraged from filing appeal; given false statements re hearing and appeal rights; ALJ refused to address the issue of the illegality of Pathways' modification proposal. Held: Recipient was entitled to notice and an opportunity for hearing and had received both.

H. *Pishny v. Board of County Commissioners*, 47 Kan.App.2d 547, 277 P.3d 1170 (2012): Coalition of landowners sought reversal of resolution by County Board of Commissioners to allow city to annex additional land. Landowners claimed they did not receive due process at a public board meeting. Court held their due process rights were not violated because they received adequate notice of the city's intentions and notice of the public hearing and received the opportunity to be heard.

I. *Fischetti v. Village of Schaumburg*, 2012 IL App (1st) 111008, 967 N.E.2d 950, 359 Ill.Dec. 920 (2012): Vehicle owner fined $100 as the owner of a car that ran a red light at an intersection monitored by an automated camera brought \ action against the village, seeking declaratory judgment and administrative review. Held: "Procedural due process" does not protect persons from the loss of life, liberty or property; it is the process that protects them from the mistaken or unjustified deprivation of life, liberty or property. It includes a right to present evidence and argument, a right to cross-examine witnesses and impartiality in rulings upon the evidence which is offered.

VII. Elements of Procedural Due Process: From Establishment to Present Day

A. Adequate Notice for the Basis of the Action

1. *Shaw v. Valdez*, 819 F.2d 965 (1987). Complaint that right to "fair hearing" regarding unemployment compensation benefits was violated was valid due to lack of fair notice of factual and legal issues to be faced.

2. *Brock v. Roadway Express*, 481 U.S. 252, 107 S.Ct.1740 (1987). Notice is sufficient if it provides allegations and substance of relevant evidence supporting allegations (whistle-blower case did not require disclosure of identity of accusant).

3. *State ex rel. Currin v. Commission on Judicial Fitness*, 311 Or. 530, 815 P.2d 212 (Or. 1991). Disciplinary proceeding brought against judge. On judge's petition for mandamus relief, court held judge was constitutionally entitled to notice of particularity of charges against him, including names of complainants, places and dates related to allegations.

4. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). Due process means parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must first be notified.

5. *City of Houston v. Carlson*, 393 S.W.3d 350 (Tex.App. 14th Dist. 2012): Substitute procedure conducted by city in lieu of statutorily-required public hearing was insufficient to satisfy procedural due process rights of condominium unit owners as to city's issuance of notice to vacate property after inspection deemed units unsafe. Hearing notices were inadequate as they did not warn owners that inaction might result in them having to vacate property and provided only six days' notice prior to hearing. City apparently made no attempt to comply with specific statutory procedures.

6. *Calloway v. Ohio State Medical Board*, --- N.E.2d ----, 2013 WL 2247048 (Ohio App. 10 Dist. 2013): An elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

7. *Matthew M. v. Department of Children and Families*, --- A.3d ----, 2013 WL 3336908 (Conn.App. 2013): For purposes of due process, notice of an administrative hearing is not required to contain an accurate forecast of the precise action which will be taken on the subject matter referred to in the notice; it is adequate if it fairly and sufficiently apprises those who may be affected of the nature and character of the action proposed, so as to make possible intelligent preparation for participation in the hearing.

8. *Pratt v. Kansas Department of Revenue*, 48 Kan.App.2d 586, 296 P.3d 1128 (2013): Motorist was not prejudiced by arresting officer's failure to certify method of service of form notice on her following DUI arrest where motorist met filing deadlines for administrative and judicial review of driver's license suspension and her driving privileges remained intact (suspension was stayed) throughout review proceedings.

9. *Sutton v. North Dakota Department of Transportation*, 927 N.W.2d 93 (ND Supreme Court, May 16, 2019): Report and Notice form completed by the officer at the time of the DUI arrest and provided to the appellant gave appellant adequate notice of what was at stake, what the officer was relying on, that Sutton was "lawfully arrested and informed that he…will be charged with the offense of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs.

B. Opportunity to be Heard

1. *Armstrong v. Manzo*, 380 U.S. 545 (1965). The opportunity to be heard must be granted at a meaningful time and in a meaningful manner. What constitutes "meaningful time" is determined based on facts of each case.

2. It is not the hearing itself, that due process requires, but the ***opportunity*** to be heard: *Traverso v. People ex rel Dept. of Transp*., 384 P.2d 488 (Cal. 1992) (due process requires opportunity to be heard rather than actual hearing); *Reno v. Flores*, 113 S.Ct. 1439 (1993) (INS proceeding); *Tur v. FAA*, 4 F.3d 766 (9th Cir. 1993) (emergency revocation of pilot's license); *Banks v. Secretary of the Indiana Family and Social Services Administration*, 997 F.2d 231 (7th Cir. 1993) (denial of Health care providers' reimbursement claims); *Skydiving Center v. St. Mary's Airport Commission*, 823 F.Supp. 1273 (D.Md. 1993) (revocation of school's permit to conduct parachute drops); *Odum v. University of Alaska*, 845 P.2d 432 (Alaska 1993) (employment termination of professor); *United States v. McCalla*, 821 F.Supp. 363 (E.D. Pa. 1993) (INS telephone hearing).

3. There is no right to a full evidentiary hearing in cases where there are no genuine issues of material fact to be determined. *Landesman v. Board of Regents of State of New York*, 463 N.Y.S.2d 118 (3rd App. Div., 1983).

4. When an emergency exists, the immediate protection of the public has precedence over the right to be heard; an agency may take action immediately but must provide opportunity for hearing within a reasonable time. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723 (1977) (driver's license taken based on driving record showing repeated convictions for traffic violations).

5. *Fillinger, R.N. v. Rhodes* (Director, Board of Nursing Examiners), 741 S.E.2d 118 (2013): Board denied R.N. opportunity to be heard in opposition to misconduct allegations where board failed to issue status reports after it had initiated administrative process upon complaints which could result in revocation or suspension of R.N's professional license and repeatedly continued scheduled hearings without giving reasons for the

continuances (there was a written agreement between the Board and the complaining parties to extend time for Board's final ruling).

6. *Clark v. Louisiana State Racing Commission*, 104 So.3d 820, 2012-1049 (La.App. 4 Cir. 12/12/12): Notice of hearing complied with due process though it did not specifically notify him that the LSRC was seeking an enhanced penalty based on his prior disciplinary violations as the notice cited a rule which provided for tiered penalties and jockey did not request a more definite statement.

7. *Hansen v. Board of Registered Nursing*, 208 Cal.App.4th 664, 145 Cal.Rptr.3d 739 (2012): Expiration of the period for the nurse to challenge the default revocation of her license (before nurse received actual notice) did not violate her right to due process where the nurse failed to keep the Board informed of her current address and Board sent notice to address of record via certified mail.

8. *Myers v. Coats*, 966 N.E.2d 652 (2012): Ex-offender brought action against DOC for declaratory relief and damages on allegations Director failed to provide ex-offender with procedure to contest his erroneous listing on sex offender registry.

9. *Fairfax County School Board v. S.C. by Cole*, 827 S.E.2d 592 (Va. Supreme Court, May 30, 2019): Due process protects the opportunity to be heard by requiring, at a minimum, some kind of notice and some kind of hearing. The disciplinary proceedings afforded were constitutionally sufficient and did not violate student's due process rights.

C. Right to Have Counsel (at expense of Petitioner)

1. *Kearse v. State Health & Human Services Finance Commission*, 456 S.E.2d 892 (S.C. 1995). There is no constitutional right to counsel at the state's expense in an administrative proceeding unless the action could result in incarceration (no liberty interest at stake).

2. *Montilla v. INS*, 926 F.2d 162 (2nd Cir. 1991). The right to counsel (at petitioner's expense) is a fundamental right in an agency hearing.

3. *Father & Sons Lumber & Building Supplies, Inc. v. NLRB*, 931 F.2d 1093 (6th Cir. 1991). The administrative procedures act guaranteed the right to counsel, not the right to the *effective assistance* of counsel. See also *Loe v. Sex Offender Registry Board*, 73 Mass.App.Ct. 673, 901 N.E.2d 140 (Mass.App.Ct.2009).

4. *Moseley Grocery v. State Department of Public Health*, 928 So.2d 304 (Ala.Civ.App., 2005): DPH disqualified grocery store from participating in Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) and store appealed. Failure of DPH to notify grocery store of its right to counsel in its charge letter did not prejudice a substantial right of the grocery store where store actually had legal presentation throughout the proceeding.

5. *Watson v. Fiala*, 101 A.D.3d 1649, 957 N.Y.S.2d 523 (2012): Aside from certain narrow exceptions, the right to counsel does not extend to civil actions or administrative proceedings. Due process considerations in such cases require that a party to an administrative hearing be afforded the opportunity to be represented by counsel.

6. *Sharma v. State University of New York at Buffalo,* 170 A.D.3d 1565 (NY Supreme Court Appellate Division, 4th Department, March 15, 2019): Student was suspended by state university for two years following an administrative determination that the student was responsible for sexual violence. Student contended university violated his right to appear by counsel. Held: He was not denied the assistance of counsel or other advisor. It was undisputed that student was informed he had a right to an advisor, including an attorney, and that a university law student could be provided to him free of charge, more than a month prior to his hearing.

D. Opportunity to Present Evidence and Argument

1. Appellate courts have reversed where judges have limited each to party to a certain number of hours to present their cases, including time used for cross-examination. *Goelner v. Goelner*, 770 P.3d 1387 (Colo. 1989), *Rosa v. Bowen*, 677 F.Supp. 782 (1988).

2. Presentation of evidence can be accomplished by means other than oral hearing without violating due process. *Mathews v. Eldridge, supra*; *FDIC v. Mallen, supra*; and *Landesman v. Bd. of Regents of New York State, supra*.

3. Refusing a final oral argument isn't error if a written argument is allowed. *Union State Bank v. Galecki*, 417 N.W.2d 60 (Wis.Ct.App. 1987).

4. *Hicks v. Kentucky Unemployment Insurance Commission*, 390 S.W.3d 167 (Kent.App. 2013): Claimant was denied subpoena duces tecum on the ground that the documents he requested were "primarily documentation the claimant should have had in his possession." However, certain information relating to the Commission's investigation and his employment file would not have been in his possession. Court held his

due process rights were violated when he was not granted the administrative subpoena he requested.

5. *Hertelendy v. Great Lakes Architectural Service Systems*, 976 N.E.2d 950 (Ohio App. 8th Dist. 2012): Unemployment claimant disputed that he was hired as a fabricator rather than a driver. He wished to call two witnesses to testify regarding for which position he was hired. They were standing by to testify by telephone when the hearing said he did not believe he needed to take their testimony. Thus, they did not testify. Appellate court held their testimony was relevant and material and it was a due process violation not to take their testimony.

6. *Pila'a 400, LLC v. Board of Land and Natural Resources*, 132 Hawai'I 247 (HI Supreme Court, 2014): BLNR brought action against landowner and imposed assessment. Landowner sought administrative determination. Held: Even if the notice failed to technically comply with all statutory requirements, administrative hearing given landowner complied with all requirements of due process as landowner was given ample opportunity to present evidence and argument on all matters including those not noticed.

E. Opportunity to Call and Cross-Examine Witnesses

1. *State, Department of Motor Vehicles v. Vezeris*, 102 Nev. 232, 720 P.2d 1208 (1986): Appellant who lost driver's license following an administrative hearing for DUI argued due process rights were violated when affidavit of person who withdrew blood sample was admitted over objection at administrative hearing. Appellant asserted he had due process right to cross-examine the person who withdrew his blood. Held: Only defendants in criminal proceedings may object to the use of such affidavits and that admission of affidavits over objection did not violate due process.

2. Agency did not deny petitioner the right to confront and cross-examine witnesses where affidavits were given under oath to agency investigators with statutory authority to take those statements, which were required by regulation. The petitioner failed to make any request to question any affiant, thereby forfeiting his right to cross-examine the affiants. *Valkering U.S.A. Inc. v. U.S. Dept. of Agriculture*, 48 F.3d 305 (1995).

3. Petitioner argued he was denied full, fair hearing because administrative procedures didn't provide cross-examination. Appellate court held he'd had many proceedings throughout administrative process, including appeal to superior court, and never requested right to cross-examine witnesses nor complained about unsworn testimony. *Third & Catalina Associates v. City of Phoenix*, 182 Ariz. 203, 895 P.2d 115 (1995).

4. *Bennett v. NTSB and FAA*, 55 F.3d 495 (1995.) Petitioner argued he was denied ability to cross-examine primary complainants against him. 10th Circuit, held his "invocation of the 6th Amendment is misplaced for the Confrontation Clause speaks only of 'all criminal prosecutions.' That constitutional right does not apply to civil administrative manners generally (*Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502 (1960)." The court further held that the petitioner

   > "had been notified during the week preceding the Hearing that the O'Malleys would not be able to attend due to their vacation plans and that FAA would seek to have the O'Malleys' 'testimony, at least in the form of a declaration' available at the hearing…Bennett failed to subpoena the O'Malleys as was his right under Board's Rules of Practice. Nor did he seek to depose the O'Malleys or request a continuance either before the Hearing or afterwards. Thus having forgone the available opportunities for cross-examination, he cannot ascribe error on that ground."

5. *Youngs v. Industrial Claims Appeals Office*, --- P.3d. ----, 2013 WL 1459528 (Colo.App. 2013): Although a party in a workers' compensation hearing has a fundamental right to cross examination, that right may be restricted. Indeed, only where the restriction is severe enough to constitute a denial of the right will limitation of cross examination be overturned as an abuse of discretion.

6. *Davis v. Cumley*, 398 S.W.3d 566 (Mo.App.So.Dist. 2013): City personnel board's enforcement of time limits to present evidence and cross-examine did not violate due process rights of demoted police department employee where board, on its own, granted employee's counsel additional time for both cross-examination and for presentation of employee's evidence and where employee's counsel failed to timely object to the board's time limits, request additional time, or provide a summary of the evidence he desired, but was unable, to present.

F. Right to a Reasoned Decision Based Solely on the Record

1. *Asman v. Ambach*, 478 N.E.2d 182 (N.Y. 1985). Due process rights are denied in a proceeding in which no record is made.

2. At a licensing hearing where the issue of the licensee's competence and negligence are of a complicated nature, expert testimony is required to establish proper "competency standards" and whether they are met. Board may not rely on their own expertise to interpret the facts, and this does not come within the area of judicial notice of generally recognized technical or scientific facts. *Appeal of Schramm*, 414 N.W.2d 31 (S.D. 1987).

3. *Pida v. State, Dept. of Motor Vehicles*, 803 P.2d 229 (Nev. 1990). New hearing required when entire audio recording of original hearing is destroyed.

4. *Morales v. Merit System Protection Board*, 932 F.2d 800 (9th Cir. 1991). Unavailability of a portion of a recording, due to recorder malfunction, is not harmful error if existing record is sufficient for meaningful review and petitioner didn't argue testimony was inconsistent or misconstrued.

5. *Ortiz-Salas v. INS*, 992 F.2d 105 (7th Cir. 1993). Transcript of a record with 292 notations of "inaudible" was not a due process denial because the burden is on the appellant to prove the missing items would have made a difference in the outcome, invoking the "harmless error" rule.
6. The basic principle of exclusiveness of the record is violated when an agency decision is based upon undisclosed information. *American-Arab Anti-Discrimination Commission v. Reno*, 70 F.3d 10445 (9th Cir. 1995).

7. *State v. Dussault*, 245 P.3d 436(Alaska App. 2011): Defendant requested conditional release from Alaska Psychiatric Institute which resulted in several hearings. State filed motion to disqualify judge alleging that he engaged in improper ex parte communication with Commissioner of Department of Health and Social Service during the conditional release hearings. Court reversed judge holding communications were not authorized by law and created appearance of partiality.

8. *State Farm Insurance v. Workers' Compensation Appeals Board*, 192 Cal.App.4th 51, 120 Cal.Rptr.3d 395 (Cal.App. 2nd Dist. 2011): After on the job injury, disabled applicant received 24-hour-a-day attendant care at the rate of $30 per hour. Employer's insurer filed petitioner for writ of review. Court held applicant's prohibited ex parte communications with appointed medical examiner required that examiner's written report and testimony be stricken. Decision annulled and remanded with directions.

9. *Commission v. Dearman*, 66 So.3d 112 (Miss. 2011): Judge was publicly reprimanded, suspended for 30 days without pay and charged costs in part because she initiated and invited ex parte communication. Defendant was charged with felony larceny for stealing property, including a camera. Judge told defendant if camera was returned by a certain date, felony charges would be dropped. Judge learned through an ex parte contact that camera had been returned and reduced charge to a misdemeanor.

10. *Cannici v. Village of Melrose Park*, --- N.E.3d ---, 2019 IL App. (1st) 181422 (IL App. 1st Dist., 3rd Div., June 28, 2019): Former firefighter, who owned a house in the village but lived outside the village limits, was terminated for violating city residency ordinance. He sought review of village board's decision to terminate him based on alleged ex parte

communications between attorneys for the board and the village during the administrative process. Held: Although administrative tribunals cannot consider evidence outside the record of an administrative appeal, there was no evidence that the ex parte information (about scheduling) biased, influenced or prejudiced the board's decision. Board's action affirmed.

G. Right to be Heard by an Impartial Hearing Officer

1. A party attacking a judge's impartiality must demonstrate that the alleged bias stemmed from an extrajudicial source and resulted in an opinion reached on a basis other than what the judge learned from his participation in the case. *United States v. Grinnell Corp*., 384 U.S. 563 (1966).

2. *Cinderella Career and Finishing Schools, Inc., v. Federal Trade Commission*, 425 F.2d 583, 138 U.S.App.D.C. 152 (1970). FTC Chairman should have recused himself from participating in review of the Hearing Examiner's initial decision because he'd made public statements indicating prejudgment.

3. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Mayor who is responsible for the city's finances cannot also be the judge presiding over the traffic court that is the city's primary source of revenue.

4. Board of optometrists could not adjudicate a case against a corporation where board members would receive direct financial benefit if the ruling was adverse to the corporation. *Gibson v. Berryhill*, 411 U.S. 564 (1973).

5. *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm*., 217 Neb. 289, 348 N.W.2d 846 (1984). An administrative agency is a neutral fact-finding body when it is neither an adversary nor an advocate of a party.

6. ALJ had lunch with counsel and witness for school district. It created such an appearance of partiality as to taint the entire proceedings. *Wells v. Del Norte School Dist. C-7*, 735 P.2d 770 (Colo. Ct. App. 1987).

7. *Texaco Refining v. Board of Appeals of the City of Delaware City*, 579 A.2d 1137 (1989). In a tax assessment appeal, the city's attorney simultaneously represented the city as an advocate and acted as an advisor to the Board on legal matters which arose during Texaco's appeal. The appellate court held that when advocacy and advisory functions are combined, it violates the principles of due process.

8. There is a presumption that government officials will perform their function without bias. *State of Alabama ex rel Siegelman v. U.S.E.P.A.*, 911 F.2d 499 (11th Cir. 1990).

9. *Beer Garden Inc. v. State Liquor Authority of the State of New York*, 568 N.Y.S.2d 25 (1991). Petitioner's liquor license was revoked by the state liquor authority (SLA). The person who was counsel to the SLA during the investigation and prosecution was subsequently appointed a commissioner to the SLA. She did not recuse herself from voting when the hearing was concluded. The appellate court annulled and remanded the matter back to the SLA for new proceedings in which this commissioner was to be recused holding that acting as counsel for the board and as commissioner during the course of the same proceeding blurred the separate and distinct functions of prosecution and adjudication.

10. *Davenport Pastures, LP, v. Morris County Board of County Commissioners*, 291 Kan. 132, 238 P.3d 731 (2010): Rancher applied for damages due to board's decision to vacate two roads that provided ranch access. District Court Judge awarded $30,000. Board appealed and awarded $4,050 on remand. Rancher appealed. Attorney for board was legal advisor to board, recommended appraiser that board hired as sole expert witness, examined the 3 board members during hearing, advised board members to agree on one damage figure, represented board at all court proceedings against rancher, board agreed on damage amount recommended by expert attorney recommended, and drafted board's report without knowledge of or input by rancher. Rancher's due process rights were violated as multiple roles played by attorney for board created probability of bias that rose to an unconstitutional level.

11. *Absmeier v. Simi Valley Unified School District*, 196 Cal.App.4th 311, 126 Cal.Rptr.3d 237 (2011): District's personnel director was dismissed and challenged termination. School board appointed hearing officer to hear challenge "to ensure impartiality" but hearing officer moved from the area and terminated further consideration of the matter. Board hired law firm to review record transcript and exhibits and provide a report and recommendation. Firm filed 46-page decision containing findings of fact. Firm weighed evidence and resolved conflicts in testimony in favor of the district. Court held law firm had conflict of interest in dual roles as legal counsel and substitute ALJ and could not balance its duty of loyalty to the board with the obligation to be a neutral fact finder.

12. *Hall v. Superior Court*, 3 Cal.App.5th 792 (CA App., 5th Dist., Div. 1, 2016): Driver petitioned for a writ of mandamus seeking an order directing the Department of Motor Vehicles to vacate the revocation of his license. Superior Court denied the writ but granted driver relief by remanding to the DMV for a new hearing. Driver filed notice of appeal. Held: DMV Hearing Officer's acts of accepting bribes in other cases violated driver's due process rights. Appropriate action was to vacate the revocation, not remand for new hearing.

VIII. Combining investigative, prosecutorial and adjudicative functions within one board, commission or agency is NOT, in and of itself, a due process violation but it *can* be if the same person(s) performs more than one function on the same case.

It is not unusual to receive a "due process" objection to the action of the agency or to the hearing on the ground that a board, commission or agency cannot conduct investigative hearings regarding a matter and subsequently conduct an adjudicative hearing regarding that same matter. It is often argued that combining investigative, prosecutorial and adjudicative functions within a single agency either violates the right to a reasoned decision based solely on the record, due to *ex parte* contact or the right to impartial decision-maker. However, the case law is clear that the combination of investigative and adjudicative functions does not, in and of itself, constitute a due process violation.

Neither an individual ALJ nor a tribunal can be directly involved as a prosecutor in a case and simultaneously or subsequently adjudicate that same case. Neither can the individual ALJ or the tribunal have a direct or indirect financial interest in the outcome. See below:

Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456 (1975): Physician had license suspended by medical board and appealed. Federal district court (368 F.Supp.796) held statutes authorizing suspension without the intervention of an independent, neutral and detached decision-maker were unconstitutional and unenforceable. The board appealed. U.S. Supreme Court held members of the medical board were not constitutionally precluded from themselves holding adversarial license suspension hearing based on the Board's own investigation and did not establish prejudice or prejudgment on the part of the board.

School board may fire striking teachers for violating anti-strike law even though the board was the party against which they were striking. Familiarity with the facts and prior positions on policy don't themselves disqualify. *Hortonville School Dist.1 v. Hortonville Educ. Assoc.*, 426 U.S. 482 (1976).

"…Pelham signed the notice of violation. Pelham was in charge of the attorneys prosecuting the alleged violations. Pelham was the Department's only witness in its case in chief. Pelham reviewed the hearing officer's findings. Pelham issued the final order. Thus, Pelham was prosecutor, witness, and ultimate judge of the facts and law. Most significantly, in this final role Secretary Pelham necessarily passed upon his own evidence. To approve the hearing officer's findings of fact and conclusions of law, he had to conclude that his own testimony was competent and substantial. Even with the best of intentions, this can hardly be characterized as an unbiased, critical review." *Ridgewood Properties, Inc., v. Dept. of Community Affairs*, 562 So.2d 322, 15 Fla. L. Weekly S367 (1990).

Rand v. City of New Orleans, 125 So.3d 476 (La.App. 4 Cir.), 2012): Administrative hearing process subsequent to a citation under the city's automated traffic enforcement system (ATES), under which a hearing officer hired by the city as an independent

contractor occupied inconsistent positions as both prosecutor and adjudicator, violated the due process rights of cited motorists. Due process requires that a decision-maker not have a direct or indirect financial stake which would give a possible temptation to the average person to make him/her partisan toward maintaining a high level of revenue generated by his adjudicative function. The administrative review procedures of which the plaintiffs complained were subsequently amended by the City and the matter was dismissed as moot by the Louisiana Supreme Court in *Rand v. City of New Orleans*, 235 So.3d 1077 (2017).

City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System, 211 Ca.App. 4th 522, 149 Cal.Rptr.3d 729 (Cal.App. 2012): Same attorney serving as both prosecutor in the hearing regarding retiree's claims and the advising staff person from the agency to the PERS Board when the board made its decision did not violate due process because the person did not vote or act in a supervisory capacity.

Haygood v. Louisiana State Board of Dentistry, 101 So. 3d 90, 2011-1327 (La.App. 4 Cir. 9/26/12): Dual role played by Louisiana State Board of Dentistry's general counsel in acting as both adjudicator over disciplinary proceedings and as advocate on behalf of Board by cross-examining witnesses, supplying objections to complaint counsel, and questioning dentist's credibility violated dentist's due process right to a fair hearing before an impartial adjudicator.

IX. Elements of Procedural Fairness

A. VOICE: Give the petitioners their "day in court." Help them to understand the process and participate in it.

B. NEUTRALITY: Treat everyone with the same degree of pleasant courtesy, addressing everyone in exactly the same manner and making eye contact. Never do something for one party that you would not do for the other or treat with party with more friendliness or familiarity than the other.

C. RESPECT: You must respect their right to a meaningful hearing—a right to present their case. But more than that they are entitled to be treated with the dignity as a human being that everyone deserves—even those alleged to have driven under the influence.

D. UNDERSTANDING: Petitioners appearing before you are worried. They are in trouble. To make matters worse, they are in a strange place and must participate in a system with which they are unfamiliar. Put them at ease. Look them in the eye. Shake their hand. Help them to understand what's going on. In other words, show them some understanding by explaining and reassuring them that they can ask you questions about the process.