Judicial Ethics for Hearing Officials : Ex Parte Communications and Maintaining Neutrality

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National Association of Hearing Officials
2023 Professional Development Conference
Reno, Nevada September 2023

Ex Parte Communications: Hypothetical 3 A 1

- 3. ALJ Jones is employed by a federal agency that adjudicates personnel matters for federal employees. Jones has been assigned to hear the following cases with specific scheduled hearing dates. Jones receives the following communications:
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- A) In the Department of Veteran Affairs v. Smith, Jones receives an e-mail from Dr. Smith in which Smith states: "Please postpone my June 15th hearing date for two months because I have fired my lawyer, Brown, and I am going to represent myself. Oh, by the way, does it matter that my main defense witness, my former nurse, Mr. Jeans, is refusing to voluntarily show up at the hearing?" ALJ Jones knows that the government attorney representing the federal agency is opposed to all postponements in these cases.

Ex Parte Communications: Hypothetical 3 A 2

- **D.C. Rules of Jud. Conduct Rule 2.9**

- **CANON 2 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL**
- **OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY**
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- **Rule 2.9. Ex Parte Communications**
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- **(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:**
- **(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:**
- **(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and**
- **(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond…….**

Ex Parte Communications: Hypothetical 3 A 3

- 5 U.S.C. Section 551 (14), definition of ex parte communication
- (14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter.
- 5 U.S.C. Section 557(d),
- (d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law--
  (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

Ex Parte Communications: Hypothetical 3 A 4

- 2010 MSAPA SECTION 408. EX PARTE COMMUNICATIONS.
- (a) In this section, “final decision maker” means the person with the power to issue a final order in a contested case.
- (b) Except as otherwise provided in subsection (c), (d), (e), or (h), while a contested case is pending, the presiding officer and the final decision maker may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication. For the purpose of this section, a contested case is pending from the issuance of the agency’s pleading or from an application for an agency decision, whichever is earlier.
- (c) A presiding officer or final decision maker may communicate about a pending contested case with any person if the communication is required for the disposition of ex parte matters authorized by statute or concerns an uncontested procedural issue.

Ex Parte Communications: Hypothetical 3 A 5

- Board of Trustees of the University of Arkansas v. Secretary of Health and Human Services
- 354 F. Supp.2d 924, 937-938 (E.D. Ark., 2005). (ALJ held prehearing meeting with two employees of Medicare contractor that was party to Medicare hearing outside the presence of other parties to the hearing. The court held that this was an improper ex parte communication under 5 U.S. C. Section 557(d)(1)(A),(B), and the ALJ failed to place on the public record of the proceeding a memorandum stating the substance of the communications with the two employees[contrary to the requirements of 5 U.S.C. Section 557(d)(1)(C)(ii).]. The District Court did not reverse the agency decision solely because of ex parte communications, but it did rule that on remand the case should be assigned to a different ALJ to avoid the appearance of impropriety.).

Ex Parte Communications: Hypothetical 3 B 1

- B) In the case of Dept. VA v. Johnson , Jones receives a telephone call from lawyer White, representing psychologist Johnson, in which White states: "The complaining witness, Stevens, is dangerous to other people as he threatened both myself and my client with bodily harm if we showed up at the hearing in this case. The hearing is tomorrow. Can you request police presence at the hearing to watch Stevens at all times?"

Ex Parte Communications: Hypothetical 3 B 2

- Mathew Zaheri Corp. v. New Motor Vehicle Bd., 55 Cal. App. 4th 1305, 64 Cal. Rptr. 2d 705 (1997). Attorney's ex parte communication to administrative law judge of fear for attorney's safety based on behavior of opposing party was improper, as was ALJ's failure to disclose communication, but it was not improper to grant rehearing of protest of franchisee because of improper ex parte communication.
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Ex Parte Communications: Hypothetical 3 C 1

- C) In the case of Dept VA v. Melville, Judge Jones presides at the hearing held in a rural county federal government office. During the lunch break, Judge Jones has lunch with the federal agency attorney, the court reporter, and the agency representative. There is a spirited discussion. Defense counsel, Lowan, and the doctor, Melville, sit at another table, and observe that the ALJ and the government attorney are very friendly, and tell jokes during lunch. When the hearing reconvenes, if Lowan objects to the lunch room interaction, what should the ALJ do?
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Ex Parte Communications: Hypothetical 3 C 2

- 8. Wells v. Del Norte School Dist. C-7, 753 P.2d 770 (Colo. 1987). Teacher was entitled to a new hearing from the school board, based on appearance of lack of impartiality that occurred when hearing officer sat at restaurant table and had ex parte conversations with counsel for school board and school board's witness during lunch break at removal hearing.

Ex Parte Communications: Hypothetical 3 C 3

- Vandegriff v. First Savings & Loan Ass'n 617 S.W. 2d 669 (Tex. 1981). Savings and Loan charter applicant met with Texas Savings & Loan Commissioner after first application had been rejected by Commissioner. Applicants presented new information to Commissioner. Shortly thereafter, applicants filed a second application which was ultimately accepted by Commissioner, and a new charter was issued. The Texas Supreme Curt held that this was not an improper ex parte communication because there was no current contested case at the time of the communications, and no prejudice occurred because the ex parte communications information was disclosed at the second hearing, and there was an opportunity for opponents of the charter application to counter, or present contrary information at the second hearing.
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Reasonable doubts about judge's impartiality Hypothetical 4 A 1

- 4. ALJ Jones is newly appointed to a federal agency. Prior to his appointment, Jones was a federal agency prosecutor for fifteen years who prosecuted numerous license revocation and suspension cases and who appeared numerous times before the agency as trial counsel in revocation and suspension hearings. Jones was known as a vigorous advocate of protecting the public from unscrupulous doctors and psychologists. ALJ Jones has not been assigned to any cases in which he was agency counsel, and he has not heard any professional licensing cases in his first year as an ALJ.
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- A) Judge Jones has been assigned to hear a physician licensing revocation case against Dr. Williams. Chuck, counsel for Dr. Williams, moves to disqualify Jones on the grounds that Jones has a pro-prosecution bias based on his years of experience in the attorney general's office. Chuck asserts that ALJ Jones impartiality might reasonably be questioned. What should Judge Jones do?
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Reasonable doubts about judge's impartiality Hypothetical 4 A 2

- **D.C. Rules of Jud. Conduct Rule 2.11**

- **CANON 2 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL**
- **OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY**
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- **Rule 2.11 Disqualification .**
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- **(A) A judge shall disqualify himself or herself in a proceeding in which**
- **The judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:**
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- **(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.**

Reasonable doubts about judge's impartiality Hypothetical 4 A 2

- Andrews v. ALRB 28 Cal. 3d 781 (1981): "The California supreme court held that: (1) administrative law officer's practice of law with law firm which had represented individual farm workers in suit against the Secretary of Labor and which engaged in employment discrimination suits on behalf of Mexican-Americans, even if it could be taken as evidence of his political or social outlook, was not a ground for his disqualification; (2) mere appearance of bias was not a ground for disqualification; (3) temporary status of administrative law officer could not be used as an element in a showing of bias; (4) allegation that some of administrative law officer's findings were not supported by substantial evidence did not provide grounds for disqualification; and (5) administrative law officer's reliance on certain witnesses and rejection of others could not be evidence of bias no matter how consistently he rejected or doubted the testimony produced by one of the adversaries." [syllabus of Cal Supreme court opinion].
- [**social and political background and legal experience not grounds for disqualification**].

Reasonable doubts about judge's impartiality Hypothetical 4 B 1

- B) Judge Jones has been assigned to hear a psychologist license revocation case, in which a psychologist is charged with aiding an unlicensed person in a "rebirthing experience" in which a ten year old child died from asphyxiation. Prior to becoming an ALJ, Jones was National Vice President of "Parents against Exploitation of Children," a national advocacy organization that seeks to outlaw alternative treatment schemes like rebirthing for children who are victims of child abuse. Jones has resigned from the organization upon taking office as an ALJ. What should Judge Jones do? Should he disclose the prior association? Should he recuse himself from this case?
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Reasonable doubts about judge's impartiality Hypothetical 4 B 2

- **D.C. Rules of Jud. Conduct Rule 2.11**

- **CANON 2 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL**
- **OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY**
-
- **Rule 2.11 Disqualification .**
-
- **(A) A judge shall disqualify himself or herself in a proceeding in which**
- **The judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:**
- **(6) The judge:**
- **(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;**
- **(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;**
- **(c) was a material witness concerning the matter; or**
- **(d) previously presided as a judge over the matter in another court.**

Reasonable doubts about judge's impartiality Hypothetical 4 B 3

- Williams v. Pennsylvania 136 S.Ct. 1899
- (June 9, 2016). Former prosecutor (elected district attorney) who approved capital charges against defendant Williams violated due process of law when, as chief Justice of Pennsylvania Supreme Court, he denied recusal motion brought by Williams lawyer and participated in decision to reinstate death penalty sentence against Williams which had been stayed by lower courts because of Brady violations. The judge's prior involvement as a prosecutor violated due process of law because there was an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.

Reasonable doubts about judge's impartiality Hypothetical 4 B 4

- Liljeberg v. Health Services Acquisition Corp. 486 U. S. 847 (1988). U.S. Supreme Court vacated a judgment on the merits in a case in which the court held that the trial court judge violated 28 U.S.C. Section 455 (a) ("judge's impartiality might reasonably be questioned" standard) by deciding a case, and not disqualifying himself. The judge was a member of the Board of Trustees of Loyola University, and Loyola, although not a party to the lawsuit, stood to benefit financially if the judge ruled in favor of one of the litigants in a dispute over ownership of a certificate of need for a new hospital. The judge ruled in favor of that party and resolved credibility issues in favor of that party.

Reasonable doubts about judge's impartiality Hypothetical 4 C 1

- C) Judge Jones is assigned to hear a case in which a federal environmental agency seeks $100,000 in civil penalties against Big Oil company for oil seepage into a lake next to the refinery. Prior to hearing this case, Judge Jones attended a three day national conference sponsored by Pacific Legal Foundation (PLF) which addressed environmental law related issues. Big Oil Co. donates $500,000 per year to PLF, which is 5% of PLF's annual budget . PLF paid for Judges Jones airfare, and hotel lodging expenses, to attend the conference. Many of the conference speakers discussed topics that were generally relevant to environmental law issues that would come before Judge Jones. What should Judge Jones do? Should he disclose the prior association? Should he recuse himself from this case?

Reasonable doubts about judge's impartiality Hypothetical 4 C 2

- 3. In Re Maria Aguinda , 241 F. 3d 194 (2d Cir., 2001) Court of Appeal denied plaintiff's petition for writ of mandamus to direct a district court judge to recuse himself from deciding action brought by plaintiffs against Texaco for environmental damage in two foreign countries. The basis for recusal was that the judge attended an expense paid seminar that was funded by nonprofit foundations but that was sponsored by an organization that received general funding from Texaco, the defendant in the lawsuit, and at which seminar one of the speakers was the former chief executive officer for Texaco. The mandamus petition was denied because the topics discussed at the seminar had no bearing on any issue that is material to resolution of the claims or defenses in the lawsuit, and because defendant Texaco's involvement in the seminar was too remote, that is it had an indirect and minor funding role. .
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Bias, Prejudice: Hypothetical 5 A 1

- 5. ALJ Jones is newly appointed to the federal agency regulating pharmacists on military bases. Judge Jones, a Vietnam veteran, was a civil trial attorney who defended medical malpractice cases prior to becoming an ALJ. Jones was also a POW, who was held in the same prison camp as Senator John McCain. Judge Jones is assigned to hear a pharmacist license revocation case in which a Vietnamese pharmacist, James Lam, is charged with negligently mixing liquid antibiotics which were contaminated and which led to the death of five children.
- A) Pharmacist Lam testified during the hearing that he carefully mixed the proper antibiotics, and he denied that he was negligent in any fashion. Lam's testimony, brought out by his attorney, Frank, was very persuasive in supporting Mr. Lam's defense. Judge Jones asked Mr. Lam where he received his training. Lam replied that he was trained in Hanoi, North Vietnam, and then later on as an expatriate in Paris, France. Judge Jones then stated for the record that "He, Judge Jones, could never find to be truthful the testimony of citizens of North Vietnam, regardless of how believable their testimony was, because of his POW experience." What should Judge Jones do at this point? Can Judge Jones ethically continue to hear and decide this case?

Bias, Prejudice: Hypothetical 5 A 2

- **D.C. Rules of Jud. Conduct Rule 2.11**

- **CANON 2 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL**
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- **Rule 2.11 Disqualification .**
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- **(A) A judge shall disqualify himself or herself in a proceeding in which**
- **The judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:**
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- **(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.**

Bias, Prejudice: Hypothetical 5 A 3

- **CANON 2 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL**
- **OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY**

  DC Rules of Jud. Conduct Rule 2.2
- **Rule 2.2. Impartiality and Fairness**
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- **A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.***
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- **Rules of Jud. Conduct Rule 2.3**
- **Rule 2.3. Bias, Prejudice, and Harassment**
- **(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.**

Bias, Prejudice: Hypothetical 5 A 4

- **DC Rules of Jud. Conduct Rule 2.3**
- **Rule 2.3. Bias, Prejudice, and Harassment**
- **(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so….**

Bias, Prejudice: Hypothetical 5 A 5

- **DC Rules of Jud. Conduct Rule 2.6**
- **Rule 2.6. Ensuring the Right to Be Heard**
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- **(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.***

Bias, Prejudice: Hypothetical 5 A 6

- Berger v. U.S., 255 U.S. 22 (1921). Judge had no lawful right or power to preside as judge on the trial of three defendants upon their indictment under the Espionage Act, when judge publicly stated his animosity to German–Americans as those persons whose "hearts reek with disloyalty". This is a showing of personal bias and prejudice against those defendants' national origins that is sufficient to disqualify that judge

Bias, Prejudice: Hypothetical 5 B 1

- B) Later on, in pharmacist Lam's testimony, the agency attorney started cross-examination as to Lam's pharmacy practices. Judge Jones stepped in, told the AG to sit down and Judge Jones started conducting his own very vigorous cross-examination of the pharmacist. When Lam's attorney objected to specific questions, the judge overruled every objection, and continued the cross-examination until it was finished. Both the agency attorney and Lam's Attorney objected to the judge's cross-examination. When asked why he took over the cross examination, Judge Jones replied that he had been a pretty good trial attorney himself, and that he did a better job on cross- examination than either attorney. Has Judge Jones violated any ethical provisions in this cross-examination?

Bias, Prejudice: Hypothetical 5 B 2

- **DC Rules of Jud. Conduct Rule 2.6**
- **Rule 2.6. Ensuring the Right to Be Heard**
-
- **(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.***

Bias, Prejudice: Hypothetical 5 B 3

- Dayoub v. Com., State Dental Council and Examining Bd., 70 Pa. Commw. 621, 453 A. 2d 751 (1982). Dentist was denied fair hearing before a fair tribunal when the record of proceedings before the state Dental Counsel and Examining Board revealed several occasions during which member or members of Board heatedly questioned dentist and argued with him in such manner that their behavior was much more in line with that of prosecuting attorney than of neutral, detached and impartial decisionmaker.
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Bias, Prejudice: Hypothetical 5 B 4

- Department of Highway Safety and Motor Vehicles v. Pitts, 815 So.2d 738 (Fla. App. 1 Dist., May 2, 2002) Motorist successfully challenged on judicial review motor vehicle agency order suspending motorist's driver's license because motorist was denied procedural due process rights at administrative hearing. Hearing officer denied motorists' attorney's right to examine arresting police officer about circumstances of DUI arrest, and to examine blood alcohol test operator when hearing officer substantially restricted attorneys' questioning by ruling that questions were not relevant. Hearing officer also asked questions of police officer in support of agency position in hearing, and therefore hearing officer departed from the role of a neutral and detached impartial decision maker in violation of due process of law.

Bias, Prejudice: Hypothetical 5 B 5

- Tele-Trip Co. v. N. L. R. B., 340 F. 2d 575 (4th Cir. 1965). Petitioner wanted to set aside the order of the National Labor Relations Board, when Tele-Trip Co. complaining that they were denied a fair hearing because of the conduct of the examiner. The court refused to set aside the order although the manner in which the examiner conducted the hearing called for critical comment when examiner persistently interrupted the examination of witnesses, (approximately sixty times to ask questions), assumed the responsibility of taking over the interrogation in argumentative fashion; on occasion displayed a critical approach, and showed attitude closely bordering on partisanship or even hostility

Bias, Prejudice: Hypothetical 5 B 6

- 14. People v. Perkins 109 Cal. App. 4th 1562, 1Cal. Rptr. 3d 271 (2003). The California Court of Appeal reversed a criminal conviction and granted a new trial based on judicial misconduct which deprived the defendant of the right to a fair trial, and the due process right to an impartial Judge. The Court concluded that the trial judge was "intemperate in his examination of appellant [defendant] and that … the judge prejudicially interfered with the defense, and conducted himself as though he sided with the People [prosecution]."

Bias, Prejudice: Hypothetical 5 C 1

- C) After the hearing is completed, Judge Jones started to write his proposed decision, when he received a telephone call from a journalist writing an expose of the pharmacy case, which was very newsworthy because of the deaths of children. The journalist promised not to publish the story until the judge's decision had been approved by the state pharmacy board. The judge agreed to the interview, and he was quoted as stating: 1) " Pharmacist Lam was one of the worst, most unbelievable witnesses that he had seen give trial testimony in his years of trial practice"; and that 2) "Children died through gross negligence at this pharmacy, this is unconscionable, and someone should pay for this." Judge Jones proposed decision recommended revocation of the pharmacist's license, and this decision was approved by the state pharmacy board. The interview with Judge Jones was then published as part of a larger story in a major daily newspaper. Has Judge Jones violated any ethical provisions in giving this interview, and making the statements reported in the story?

Bias, Prejudice: Hypothetical 5 C 2

- **DC Rules of Jud. Conduct Rule 2.10**
- **Rule 2.10. Judicial Statements on Pending and Impending Cases**
- **(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.**
- **(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.**

Bias, Prejudice: Hypothetical 5 C 3

- U.S. v. Microsoft Corp., 253 F. 3d 34 (D.C. Cir., 2001). The Court of Appeal disqualified district court judge from hearing case on remand because judge made extensive comments to media representatives while the case was pending before the judge. The Court of appeal concluded that the district court judge had violated the following ethics provisions: “Canon 3A(6) of the Code of Conduct for United States Judges requires federal judges to "avoid public comment on the merits of pending or impending" cases. Canon 2 tells judges to "avoid impropriety and the appearance of impropriety in all activities," on the bench and off. Canon 3A(4) forbids judges to initiate or consider *ex parte* communications on the merits of pending or impending proceedings. Section 455(a) of Title 28 of the Judicial Code requires judges to recuse themselves when their ‘impartiality might reasonably be questioned’.”.253 F. 3d at page 107.
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Bias, Prejudice: Hypothetical 5 D 1

- D). Judge Smith is an ALJ presiding at the hearing in Gonzales v. Blank Jewelers, a sexual harassment case adjudicated under the EEOC statute(fair employment act) statute. Plaintiff Gonzales is both female, and working in California without a valid work visa. Gonzales testified to the events in question, in which a supervisor at work repeatedly grabbed her at work and asked her to have sexual relations with him, and she repeatedly refused, and asked the supervisor to stop touching her, and to stop talking to her like that. After that testimony, Judge Smith made comments on the record in two categories: 1) these sexual harassment cases are a waste of taxpayer money and agency resources; Judge smith hoped that plaintiff understood how serious these charges were, that the male defendant had a family to support, and that she understood how easy it was for women to fabricate he said/she said claims that would destroy the career of the charged male defendant; and 2) Gonzales was ungrateful to her employer who provided her a job even thought she was an illegal alien, and that she should not sue her employer because she broke the law as well. Has Judge Smith violated any ethical provisions in making these comments?

Bias, Prejudice: Hypothetical 5 D 2

- **DC Rules of Jud. Conduct Rule 2.3**
- **Rule 2.3. Bias, Prejudice, and Harassment**
- **(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so….**

Bias, Prejudice: Hypothetical 5 D 3

- Fitch v. Commission on Judicial Performance, 9 Cal. 4th 552, 887 P. 2d 937, 37 Cal. Rptr. 2d 581 (1995). Judge was publicly censured by commission on Judicial Performance for inappropriate statements and conduct with court employees and attorneys. Censure was upheld by Calif. Supreme Court. The judge's improper conduct included such examples as telling one court reporter, "Your butt looks good in that dress"; telling another court reporter, "I certainly hope you're not that frigid at home with your husband"; Also, judge slapped or patted a court reporter and a court trainee on their buttocks.
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Bias, Prejudice: Hypothetical 5 D 4

- Hernandez v. Paicius, 109 Cal. App. 4th 452, 134 Cal. Rptr. 2d 756 (Calif. Court of Appeal, 2003). The California Court of Appeal reversed the lower court judgment without a showing of prejudice because the trial judge made numerous comments about the residency status of the plaintiff which reflected stereotypes about illegal aliens and that raised questions about the fairness and impartiality of the judicial proceedings. The appellate court also ordered that the case be reassigned to another judge upon remand.

Bias, Prejudice: Hypothetical 5 D 5

- Catchpole v. Brannon, 36 Cal. App. 4th 237, 42 Cal. Rptr. 2d 440 (California Court of Appeal, 1995) The California Court of Appeal reversed the lower court judgment based on denial of the due process right to an impartial decision maker. This is because the trial judge made numerous comments about the plaintiff which reflected stereotypes about the nature and roles of men and women, and which showed gender bias on the part of the judge. This satisfied the reasonable doubts about the impartiality of the judge standard for reversal of the judgment, and remand of the case to a different judge.

Separation of functions: Hypothetical 6 A 1

- A) ALJ Miller is an employee of the Alcoholic Beverage Control Department (ABC) in the adjudication division. Miller is assigned to adjudicate a proceeding brought by ABC against Hank's Bar, which serves alcoholic beverages and offers topless dancers for entertainment. Hank's is charged with violating ABC regulations that limit contact between dancers and bar patrons. ABC sought a six month suspension of Hank's ABC license. At the hearing, Hanks' lawyer, Bob, raised a constitutional challenge (due process of law) based on bias to the authority of ALJ Miller as an ABC employee, to hear the case. What should Miller do? Should he/she accept or reject the challenge? Can ALJ Miller rule on constitutional issues?
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Separation of functions: Hypothetical 6 A 2

- 1. 5 U.S.C. § 554(d) (Federal APA separation of functions provisions)
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- (d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--
  (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
  (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency....

Separation of functions: Hypothetical 6 A 3

- 5 U.S.C. § 554(d) (Federal APA separation of functions provisions) [continued]
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- An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply--
  (A) in determining applications for initial licenses;
  (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
  (C) to the agency or a member or members of the body comprising the agency.

Separation of functions: Hypothetical 6 A 4

- 1. Withrow v. Larkin, 421 U.S. 35 (1975) state medical licensing agency did not violate due process of law when board could both investigate and then later adjudicate licensing suspension proceeding against physician for violating abortion laws. Institutional combination of both investigative, prosecutorial and adjudicative functions in one agency did not violate due process of law because there was no unconstitutional risk of bias in the agency structure. The court noted that internally different employees performed the investigation and prosecutorial responsibilities for the Board. Also, Board's exposure to evidence at investigative stage, and Board's determination that there was probable cause to believe that doctor had violated law, did not mean that board violated due process of law and that board could not be fair to doctor in adversary hearing stage.
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Separation of functions: Hypothetical 6 A 5

- Walker v. City of Berkeley, 951 F. 2d 182 (9th Cir., 1991). Discharged city employee who challenged discharge on wrongful termination grounds both in court under Section 1983, and through city administrative hearing process was denied due process of law when city staff attorney acted both as advocate for city in Section 1983 court lawsuit, and as decision maker in local administrative process.
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Separation of functions: Hypothetical 6 A 6

- Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board of California, 99 Cal. App. 4th 880, 121 Cal. Rptr. 2d 729 (2002). ABC licensee challenged assignment of department ALJ to hear license suspension case brought by Department against licensee for violating no contact regulations that apply to licensees' which serve alcoholic beverages and offer topless dancers for entertainment.. Licensee argued that there was no statutory authority for department to appoint staff ALJ to hear case, and alternatively, that if there was such statutory authority, that the appointment of an ALJ who worked for the Department that prosecuted the suspension action violated the due process of law right to an impartial decision maker. The court rejected both challenges holding that there was statutory authority to appoint a staff ALJ, and that due process of law was not violated by the appointment of a Department staff ALJ. Employment of the ALJ, and payment of the ALJ's salary by the Department did not create a risk of bias, that the ALJ would tend to favor the Department.
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Pro Se Litigants:Hypothetical 6B1

- B) ALJ Goodman, a staff employee of the ABC Department has been assigned to hear the case of ABC v. Willies' Bar, Inc., in which the Department is seeking to suspend Willies' license for 90 days for selling alcohol to minors. At the hearing, Willies' Bar, Inc., President, Jack, entered an appearance on behalf of Willies. Jack, who was not an attorney, sought to represent Willies at the hearing? What should ALJ Goodman do at this point? Allow non attorney representation of Willies by Jack? What problems will Goodman encounter in a pro se litigant hearing as contrasted with a hearing in which an attorney represents the licensee?
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Pro Se Litigants: Hypothetical 6B2

- Camille v. Alcoholic Beverage Control Appeals Board, 99 Cal. App. 4th 1094, 121 Cal. Rptr. 2d 758 (2002). ABC licensee challenged in court revocation of license for selling beer to underage minors. Licensee's challenge was based, in part, on argument that ABC Department lacked jurisdiction to revoke license because licensee was not represented by attorney during hearing. Licensee was represented at hearing by non-attorney president of corporation that held liquor license. Court rejected licensee's argument, and held that while corporations must be represented by attorneys in courts of records (except small claims courts), this requirement does not apply to administrative agencies and tribunals so that it was not improper for the non-attorney President of corporate licensee to represent licensee in revocation hearing.
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Honesty: Hypothetical 6 C 1

- C) ALJ Stevens is a WCJ who adjudicates workers' compensation cases before the state WCAB. Stevens is required to submit 90 day decision affidavits at the end of each pay period. Relevant agency regulations require WCJ's to certify that he/she has no outstanding decisions which are older than 90 days that have not been filed in the record. Stevens has filed several such affidavits based on submitting decisions 90 days or less in long hand written form to his administrative assistant, when the regulations requires that the decisions be typed, signed, and officially filed. Does Stevens have any ethical problems with this practice?

Honesty: Hypothetical 6 C 2

- Young v. Gannon, 97 Cal. App. 4th 209, 118 Cal. Rptr. 2d 187 (2002). Worker's compensation Judge (WCJ), who was terminated for dishonesty, neglect of duty, incompetence, and inappropriate behavior with attorneys who appeared before him, challenged termination in court. Termination was upheld. The Court of Appeal concluded that there was substantial evidence supporting the agency findings related to dishonesty. The WCJ was found to have been dishonest in falsely completing 90 day decision affidavits (Cal. Labor Code S 123.5(a)), and he was found to have acted inappropriately toward two female attorneys who appeared before the judge by initiating dating and friendship relationships with those attorneys without disclosing the relationships and/or recusing himself from cases in which those two attorneys appeared before the judge. .

Personal and professional relationships:Hypothetical 6 D 1

- D) ALJ Josephson is male and newly single, and wants to start dating, and or develop friendships with females. Josephson knows several single female attorneys who regularly appear before his agency, the state WCAB. Would Josephson encounter any ethical problems if he developed personal relationships with either or both of these attorneys, on a friendship or dating basis? Does he have to disclose these friendship or dating relationships when these attorneys appear before him. Should he recuse himself from any hearing in which they appear before him? Is he better off not mixing professional and personal relationships?
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Personal and professional relationships:Hypothetical 6 D 2

- Young v. Gannon 97 Cal. App. 4th 209 at page 215: "Appellant also engaged in inappropriate conduct toward two female attorneys who appeared before him. State Compensation Insurance Fund Attorney Nona Rentzer (Rentzer) appeared in WCAB cases before appellant from July through September 1996. Appellant was interested in pursuing a relationship with her. In July 1996, he asked Rentzer to come into his chambers during a conference. For 30 to 40 minutes, while the other attorneys involved in the conference waited, he engaged her in a personal conversation. As she was leaving his chambers, he gave her a card with his telephone number on it and invited her to lunch and the shooting range. Thereafter, he telephoned her at least half a dozen times, sent her greeting cards and sought her out when she had appearances before the WCAB. Appellant's conduct made Rentzer uncomfortable. She was afraid, however, that if she did anything to anger him he would harm her.
- Appellant had been trained in disclosure requirements and recusal obligations as well as judicial ethics. Despite his training, he did not recuse himself from cases in which Rentzer was appearing. Neither did he disclose to the parties that he had a personal interest in Rentzer. He attempted to justify his behavior by stating that Rentzer's appearances before him were at "uncontested" settlement conferences, even though adversarial parties were involved in those settlement conferences. Appellant's conduct was persistent and conveyed an appearance of impropriety."

The Humorous Judge 7 1

- 7. **<u>The Humorous Judge:</u>** Judge Green presided over a state administrative hearing in which a parent was seeking to have his name removed from a state child abuse registry. The parent had been placed to the list for corporal punishment, spanking their child with a paddle that left bruises on the child. The parent's argument was that corporal punishment was necessary to discipline children. The Judge humorously quipped "Spare the rod, and Spoil the Child?" and laughter broke out in the hearing room. The parent thought the judge was mocking him, and asked the judge what he meant by that. The judge humorously added "If I tell you, I will have to kill you" (a line from a movie). The judge then explained that he was kidding and that telling jokes sometimes eased the tension in these hearings which could otherwise be pretty grim. (hypothetical based on judicial humor in a death penalty case: <u>People v. Monterroso</u> (2004) 34 Cal. 4th 743, 762, 101 P. 3rd 956, 22 Cal. Rptr 3d 1 "….even well conceived judicial humor is best invoked in measured doses.")

The Humorous Judge 7 2

- **DC Rules of Jud. Conduct Rule 2.8**
- **Rule 2.8. Decorum, Demeanor, and Communication With Jurors**
- **(A) A judge shall require order and decorum in proceedings before the court.**
- **(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.**

The activist judge 8 1

- 8. **<u>The Activist Judge:</u>** Judge Smith is a long time Department of Motor Vehicles (DMV) administrative law judge who has heard hundreds of administrative hearings in which motorists licenses were suspended for driving while intoxicated. In 2000, Judge Smith lost his adult daughter in an auto accident caused by a drunk driver. His daughter was a passenger in another car that collided with the drunk's car, and she was killed. Since that loss, Judge Smith has become an active member of Mothers Against Drunk Driving (MADD) and he has lobbied for tougher laws in the state legislature particularly a .08 blood alcohol level law. Judge Smith has just been elected state wide president of MADD for his state. Judge Smith has heard 200 license suspension cases since his daughter was killed, and he has not disclosed the loss of his daughter nor his MADD activities in any of those cases.
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The activist judge 8 2

- **DC Rules of Jud. Conduct Rule 2.4**
- **Rule 2.4. External Influences on Judicial Conduct**
- **(A) A judge shall not be swayed by public clamor or fear of criticism.**
- **(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.**
- **(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.**

Other Hypotheticals 1

- 1. ALJ Jones hears disability benefits cases and is assigned to hear a case in which the claimant has challenged the termination of his disability benefits. The claimant, Bill, is 5'6" and weighs 300 lbs. Bill's disability conditions include obesity and diabetes. Bill claims that he has a medical condition that makes it very difficult to lose weight. Judge Jones writes a decision which upholds the agency's decision to terminate benefits. In that decision, Judge Jones refers to Bill as a "well-nourished man, who obviously never misses a meal." Judge Ames, who is new, reviews the decision pursuant to a system where each proposed decision is proofread by another judge before it is issued. Judge Ames objects to this language and requests that Jones change it. Jones responds: "But I write like a dream!" and says that Ames has no business telling an experienced judge how to write.
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- 1. Does the language used by Jones violate any ethical principles?
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- 2. Has Jones violated controlling anti-discrimination law by use of the language?
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- 3. If Jones does not change the language, what, if anything, should Ames do?
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Other Hypotheticals 2

- 2 ALJ Green, an immigration judge, was assigned to hear an asylum case. The claimant, Steve, had been a judge in Columbia, where he received numerous death threats. At the hearing, Steve offered evidence of a well-founded fear of persecution if he was deported. In the decision upholding the asylum claim, Judge Green referred to Steve as an "illegal alien" who was trying to avoid deportation. Judge Brass reviewed Judge Green's decision and criticized the use of that term, claiming that it showed bias against immigrants. Brass recommended that Green substitute the term "undocumented persons" for illegal alien. Brass is ready to report Green for illegal bias against immigrants, if Green does not change his decision.
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- 1. Does the language used by Green violate any ethical principles?
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- 2. Has Green violated controlling anti-discrimination law by use of the language?
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- 3. If Green does not change the language, what, if anything, should Brass do?
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Other Hypotheticals 3 1

- 3. ALJ Hall has presided at special education law hearings for the last five years, and has developed a great deal of experience and expertise. Hall's rulings that the District has the burden of proof have created some controversy (and the issue is currently on appeal to the US Supreme Court) but she is generally well respected by all of the attorneys working in the special education field. The Parents of Special Children (PSC) provides support for parents of special needs children. PSC also lobbies for the interests of children, and advocates for pro-child policies in the special education field. The group has issued an "ALJ of the Year" award to Judge Hall and invited her to speak at its annual conference in San Diego. PSC wants Judge Hall to speak for two hours on one day of the conference on the topic of due process hearings, including commenting upon what kind of evidence she likes to see. PSC leadership plans to give Judge Hall a $1000 honorarium and has offered Judge Hall and her spouse free air travel, a free "suite," and free restaurant meals for the five days of the conference. It will be held at the Hotel Del Coronado in San Diego, a plush resort hotel.
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Other Hypotheticals 3 2

- 1. Can Judge Hall speak at the PSC conference without violating ethical standards applicable to ALJ's?
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- 2. Does Judge Hall need the permission of the agency for whom she works to attend the conference? To speak? To accept the award?
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- 3. Should Judge Hall accept the award?
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- 4. Should Judge Hall accept an honorarium for her speech?
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- 5. Should Judge Hall allow PSC to pay for her expenses? Her spouses

Other Hypotheticals 4 1

- 4. ALJ Fox was an employee of the Alcoholic Beverage Control Appeals Board (Board). The Board has adopted rules for the conduct of hearings and issuance of decisions. Judge Fox was assigned the case of Malone in which licensee Sam contested the imposition of a $5,000 penalty for selling alcohol to an underage minor. The prosecutor, Miller, also worked for the Board. The Board's rules require ALJ's to issue Board-approved pre-hearing orders, and preclude ALJ's from issuing their own pre-hearing orders. The Board-approved orders limit the type of evidence that can be admitted when a licensee offers a "fake ID" defense. The order requires the presentation of the testimony of the employee who was shown the fake ID. If the employee is unavailable, other evidence of the fake ID defense can not be offered, even if there is a good reason for the employee's unavailability. Judge Fox chafed under this policy and wanted to issue his own pre-hearing order, permitting the offer of proof of the actual fake ID, coupled with an examination of the ID by the ALJ. Secondly, Board rules require the board prosecutor to draft a proposed decision (proposed findings and conclusions) that the ALJ is required to use in writing his or her own decision. Finally, the Board has an institutional review board (review ALJ's) who examine all ALJ decisions and written opinions to "ensure consistency in the opinions findings and conclusions." Judge Fox upheld a fake ID reasonable reliance defense in the Malone case, and overturned the $5,000 penalty, based on his examination of the ID. The review judge rejected Fox's decision, and told Fox he would have to uphold the penalty or the decision would be vacated by the Board, and remanded to another ALJ.

Other Hypotheticals 4 2

- 1. Do the Board's mandated pre-hearing orders improperly interfere with the decisional independence of Fox and his colleagues?
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- 2. Do Board mandated prosecutor proposed decisions violate the separation of functions requirements of the APA? Does the policy improperly interfere with decisional independence?
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- 3. Do Board mandated review judge procedures violate decisional independence? Does the review judge's action in Fox's penalty decision violate Malone's right to due process of law?

Other Hypotheticals 5

- 5. Judge Brown was assigned to preside over the 8-member Dental Laboratory Board when it met to consider reinstatement of previously disciplined dental technicians. Brown sat at the middle of a long table, flanked by Board members. The table faced an audience of about 50 people, including a large class of dental technology students. While one of the petitioners, Bill, was testifying, the cell phone of Crown, one of the members, began to ring. Crown answered the phone, and began talking to the caller while remaining at the table. Bridge, a member sitting at the other end, became upset at Crown's behavior and stomped out of the room. While Brown considered what to do, Doe, another member, began to aggressively question Bill, then told him: "I have never heard such a lame excuse in my life– and you call yourself a certified dental tech!" Brown attempted to re-direct Doe, but Doe told Brown that she, Doe, had every right to question the petitioners in any form she chose. Judge Brown, feeling the tension rising in the room, told a joke about dentists. Doe, a dentist, was insulted and left the meeting. Bridge returned and asked that he be "brought up to speed" on whatever he missed. Bill's lawyer requested a new hearing. Brown denied the motion because a quorum had been present to hear Bill's petition.
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- What were Judge Brown's responsibilities in this situation?
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Other Hypotheticals 6 1

- ALJ Watson is assigned to hear a license discipline case brought by the Cosmetology Board against Cosmetologist Jill, a hair stylist, for failure to maintain minimum sanitation standards. The Board alleged that many of Jill's customers suffered from head lice and ringworm, allegedly caused by failure to properly clean hair styling equipment. The Board was represented by a deputy attorney general (DAG). Jill represented herself. One week before the hearing, Jill e-mailed Judge Watson, and stated: "I can't afford a lawyer. Can you recommend one to me? If not, can I bring my husband to the hearing? Most of my clients are friends. They are going to write you letters telling you what a great hairstylist I am. Can I send the letters to your office address?" At the hearing, the DAG offered in evidence a series of written memos detailing complaints about Jill from customers that were received by telephone at the Board offices. The memos stated the name of the complainant, and the substance of the complaint, but not the date of the call, and not the identity of the board staff person who took the complaint. The DAG also offered the written report of the investigator who inspected the hair salon where Jill worked, which documented sanitation violations, but which did not identify whether those violations were found at Jill's work station or one of the other hair stylist's work station. The DAG did not produce the investigator to testify at the hearing, claiming that she was on vacation. When Judge Watson asked Jill if she wanted to say anything about the reports, she denied that she had done anything wrong, and then she said: "I will leave it in your hands, Judge." Jill offered testimony from her husband who stated what a great hairstylist his wife was, and also asked the judge: "please do not take Jill's license away." One week after the record closed, a number of letters from Jill's friends were received at Judge Watson's office. All of them contained the same type of statements as Jill's husband's comments at the hearing.
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Other Hypotheticals 6 2

- Judge Watson was troubled by the weak case put on the Board, and the weakness of the evidence presented by Jill. He decided that he would need more information to write a proposed decision, but did not know where to turn. Judge Watson considered how much help an old friend, who works as an investigator with Consumer Affairs, would be if he could track the guy down. Ultimately, he decided that other matters were more worthy of his immediate attention and put the file aside until "what to do about the mess comes to me."
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- 1. What should Judge Watson have done about the email from Jill?
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- 2. Should the memos have been admitted in evidence? How about the investigator's report?
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- 3. How could Judge Watson have conducted the hearing differently? Should he have required the DAG to put on witnesses? What about asking Jill questions or telling her that she needed more evidence?
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- 4. Whom can Judge Watson talk with about the case?
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- 5. What about the late arriving letters– may he consider them? Admit them?