# Limiting Bias in Adjudications

# Learning Objectives for this Module

## Learn why the rules on ex parte communications are different for adjudications than for Article III trials.

## Learn when agency decisionmakers are allowed to consult with other persons in the agency.

## Learn how separation of functions helps reduce bias in agency proceedings.

# Reading Assignment

## Chapter 3, pp. 92-99.

# Issues to be addressed

## Ex Parte Communications - Art III Trials v. Adjudications

### What is an ex parte communication in an Article III trial?

### Why are these forbidden in Article III trials?

#### How is this tied to the adversarial nature of an Article III trial?

#### How does the lack of expertise of the judge figure in?

### Why are they less of a problem in agency proceedings?

#### How is the relationship between a litigant and the court different between a litigant and an agency?

#### Why is knowledge by the judge of the issues and parties treated differently from a trial?

## Ex parte Communications in Formal Adjudications

### No ex parte communications - 557(d)

#### What is the extreme sanction for a party who violated this ban?

### What is the loophole for agency personnel?

#### ex parte communication prohibition only applies to communications with interested persons outside the agency

#### Are agency personnel like adverse parties in a trial?

## What Communications are Allowed?

### http://biotech.law.lsu.edu/Courses/study\_aids/adlaw/554.htm

### What proceedings are exempt from section (d)?

### (d)(1)(C) to the agency or a member or members of the body comprising the agency

#### This is input from the secretary or the commissioners if an independent agency, i.e., the people who actually make the decision.

## Separation of Functions

### What is separation of functions?

#### How does this mitigate the loophole of communication with agency personnel?

#### Why do we care?

### Separation of function has very different results in a large federal agency than in small state agencies

#### Federal - still in the agency and focused in one area

#### States - often outside the agency (central panel), losing all expertise

#### We will discuss more deeply in the Louisiana Administrative Law Module (Wooley) Module.

## EPA Example

### Can the EPA ALJ consult with an EPA scientist to better understand a case?

#### What if it is about advice on facts in issue?

### Can the EPA ALJ consult with an agency lawyer about law?

#### What about the lawyer prosecuting the case?

### Can the ALJ consult with a party in the case, outside of the proceeding, to get additional facts?

#### How can these consultations be accomplished - what would you do in an Article III trial?

## Consumer Product Safety Commission Example

### Can the commissioner consult with his staff?

#### Are they considered legally the same person?

### What about the head of the prosecution staff?

#### What is the key question?

### What about consulting with the heads of companies not currently before the agency?

#### Can ex parte contacts occur before a proceeding?

### Why should the agency be cautious about ex parte contacts?

#### Why do they invite remand from the courts?

# Evaluation Questions

## Why is the problem of ex parte contacts different for ALJs and Article III judges?

## Discuss ex parte contacts in adjudications, including contact between agency staff, decision makers, parties, and interested persons.

### What is the solution to curing ex parte contacts?

## What is separation of functions in administrative hearings and how does this improve the fairness of hearings?

### How does the Louisiana DAL arise from separation of function concerns?

## Must all agencies separate their functions into investigation, prosecution, and decisionmaking?

### What must an agency like a state board of medical examiners do to limit bias if it does not have separation of functions?

### Why is separation of functions difficult for small agencies?