

5-1-1988

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Recommended Citation

Judith F. Schulman, *Professional Responsibility Issues in Administrative Adjudication: A Colorado Perspective*, 2 BYU J. Pub. L. 269 (1988).
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Professional Responsibility Issues In Administrative Adjudication: A Colorado Perspective*

*Judith F. Schulman***

I. INTRODUCTION

This comment briefly addresses Professor Levinson's article "Professional Responsibility Issues in Administrative Adjudication" from a Colorado state perspective. Initially, the comment outlines the Colorado statutory and regulatory framework for lawyer and judicial discipline, discusses the authority of Colorado Administrative Law Judges (ALJs) to control and supervise attorneys practicing before them, and finally, discusses standards of conduct for Colorado Administrative Law Judges.

II. ATTORNEY AND JUDICIAL DISCIPLINE IN COLORADO

A. *Powers of the Colorado Supreme Court*

Colorado is no exception to the general rule described in Professor Levinson's article that state supreme courts have exclusive authority to issue licenses to practice law and to impose discipline on attorneys for improper and unethical conduct. The Supreme Court in Colorado has exclusive authority not only over admission to the practice of law in the state,¹ but also to define and regulate the practice of law.² In addition, every lawyer licensed to practice law in Colorado is subject to the disciplinary and disability jurisdiction of the Colorado Supreme Court in all matters relating to the practice of law.³

Detailed rules governing admissions to the Bar,⁴ unauthorized practice of law,⁵ and disciplinary procedures for lawyers in Colorado⁶

* These comments were presented at the Western States Seminar on State and Local Administrative Law, sponsored by the BYU Journal of Public Law, on January 21, 1988.

** Administrative Law Judge, State of Colorado.

1. COLO. R. CIV. P. 201.1

2. *Unauthorized Practice of Law Comm. v. Employer's Unity, Inc.*, 716 P.2d 460 (Colo. 1986).

3. COLO. R. CIV. P. 241.1; *People v. Susman*, 196 Colo. 458, 587 P.2d 782 (1978).

4. COLO. R. CIV. P. 201-227.

5. *Id.* at 228-240.1.

6. *Id.* at 241.1-260.7.

have been adopted by the Colorado Supreme Court and are part of the civil procedure rules for the state. Further, the Supreme Court has adopted as an appendix to the disciplinary rules the Code of Professional Responsibility ("Code").⁷ Violation of the provisions of the Code is specifically made a ground for attorney discipline in Colorado,⁸ among various other enumerated grounds for discipline.⁹

Judges in Colorado are subject to the Colorado Rules of Judicial Discipline ("C.R.J.D.")¹⁰ administered by the Commission on Judicial Discipline.¹¹ Grounds for discipline of judges in Colorado include any violation of the Code of Judicial Conduct, among various other listed grounds.¹²

B. Powers Administrative Law Judges Do Not Have

Based on this regulatory framework, it is apparent that certain authority to control attorney behavior is reserved exclusively for the Supreme Court in Colorado and cannot under any circumstances be exercised by administrative law judges or administrative agencies in this state.

First, neither ALJs nor state administrative agencies can regulate the admission of lawyers, licensed in Colorado, to practice before state agencies. Any lawyer so licensed automatically has authority to practice before all state agencies unless and until the Supreme Court acts to limit that authority.¹³

Second, ALJs in Colorado have no authority to impose discipline against attorneys practicing before them, since such action is within the exclusive authority of the Supreme Court.

Third, although there are no Colorado cases or specific statutes directly on point, it is apparent that ALJs in Colorado have no contempt power. The Colorado Supreme Court has held that the power to punish for contempt is an inherent judicial power within the meaning of the Colorado Constitution and belongs exclusively to the courts ex-

7. *Id.* at appendix to ch. 18-20.

8. *Id.* at 241.6(1).

9. *Id.* at 241.6. These include, *inter alia*, acts or omissions violating accepted rules or standards of legal ethics; acts or omissions violating the highest standards of honesty, justice, or morality; gross negligence when acting as a lawyer; and violation of state or federal criminal law.

10. *Id.* at ch. 24.

11. C.R.J.D. 1, 4.

12. *Id.* at 5. Other grounds for discipline include willful misconduct in office, willful or persistent failure to perform judicial duties, and intemperance. The Code of Judicial Conduct is an appendix to COLO. R. Civ. P. ch. 24.

13. However, Colorado Administrative Law Judges do have discretion to admit or refuse to admit lawyers in good standing from other jurisdictions to practice before state agencies in particular cases. *Id.* at 221.1.

cept in cases where the Colorado Constitution confers such power upon some other body.¹⁴ The author is aware of no Colorado state administrative agencies that have been granted such power pursuant to the state constitution or otherwise. Colorado administrative agencies and ALJs thus have no authority to hold attorneys in contempt or to enforce any contempt orders.¹⁵

III. STATUTORY AUTHORITY OF ADMINISTRATIVE LAW JUDGES IN COLORADO

Administrative law judges in Colorado are part of the State Division of Administration¹⁶ and are classified employees within the state personnel system.¹⁷ Administrative law judges must be attorneys in good standing admitted to practice in Colorado with five years' experience practicing law.¹⁸ They are available on request to provide services to all state agencies (except the Public Utilities Commission) that have statutory authority to use ALJs.¹⁹ The executive director of the Department of Administration is specifically authorized to promulgate procedural rules governing the conduct of hearings before state administrative law judges,²⁰ and such procedural rules have been promulgated by the director.²¹ These rules do not specifically address either control of attorney conduct in administrative hearings or rules of ethical behavior for administrative law judges, although it would appear that statutory authority for such rules, if appropriately limited in scope, does exist.²²

The actual authority of Colorado ALJs in any given hearing depends upon the provisions of the enabling act of the specific agency for which the ALJ is sitting and upon the provisions of the State Administrative Procedure Act (APA).²³ The provisions of the APA are controlling unless more specific or contrary provisions exist in the agency's

14. *People v. Swena*, 88 Colo. 337, 296 P.2d 71 (1931).

15. This does not mean that ALJs have no authority to control attorney conduct in other ways short of prospective discipline or contempt. See *infra* parts IV and V.

16. Administrative law judges in Colorado are organized into a "central panel," rather than being employees of the state agencies on whose behalf they sit. However, use of ALJs by state agencies is generally discretionary.

17. Colo. Rev. Stat. § 24-30-1003 (1982 Repl. Vol.).

18. *Id.* at § 24-30-1003.

19. *Id.* at § 24-30-1003.

20. *Id.* at § 24-30-102.

21. Rules of Practice, Division of Administrative Hearings, Department of Administration, State of Colorado. 1 COLO. CODE REGS § 104-1 (Aug. 1, 1987).

22. COLO. REV. STAT. § 24-30-102 (1982 Repl. Vol.).

23. *Id.* §§ 24-2-101 through 24-4-108.

own enabling act.²⁴ For the most part, however, the expansive provisions of the APA governing authority of the ALJ to conduct hearings apply, either directly through the APA or through similar provisions in the agency's governing statute.

The Colorado APA provides in pertinent part that in conducting a hearing an administrative law judge has authority to

regulate the course of the hearing . . . reprimand or exclude from the hearing any persons for any improper or indecorous conduct in his presence; and take any other action authorized by agency rule consistent with this article or in accordance, to the extent practicable, with the procedure in the district courts²⁵

It is apparent that this provision gives considerable authority to ALJs to control the course of proceedings before them, although, as noted above, such authority falls short of being able to impose future discipline on a misbehaving attorney, either in terms of action against that attorney's license or in terms of action affecting the attorney's overall authorization to practice before a given agency. Specifically, it would appear that pursuant to this provision, ALJs have been granted powers similar to those possessed by trial courts in the state (with the notable exception of contempt power) to control the behavior and conduct of those individuals appearing before them. Such authority explicitly includes the power to exclude attorneys for improper conduct in the presence of the ALJ. The section also provides at least some implicit authority for the position that ALJs in Colorado have the power to disqualify attorneys for conflicts of interest.²⁶

IV. POWER OF COLORADO ADMINISTRATIVE LAW JUDGES TO EXCLUDE ATTORNEYS FOR IMPROPER CONDUCT

As the APA provision listed above²⁷ makes clear, ALJs in Colorado may reprimand or exclude attorneys for improper conduct during the course of a hearing. However, this authority does not extend to conduct outside the presence of an ALJ. Further, the power is clearly limited to the matter at hand; ALJs have no authority to prohibit attorneys from appearing before the ALJ or the agency in question concerning matters other than the one in which the improper conduct arose. While the provision is broad enough to permit exclusion of an attorney

24. *Id.* at § 24-4-107; *People ex. rel. State Bd. of Account. v. McFarland*, 37 Colo. App. 93, 543 P.2d 112 (1975); *Home Builders Assn. v. Public Util. Comm'n*, 720 P.2d 552 (Colo. 1986).

25. COLO. REV. STAT. § 24-4-105(4) (1982 Repl. Vol.).

26. See *infra* sections IV and V for further discussion on these points.

27. *Supra* note 25.

from an entire hearing on a particular case, such drastic action is generally taken only as a last resort after reprimands or recesses to "cool down" have been unsuccessful. An informal oral survey of Colorado ALJs, conducted by the author in January 1988, indicates that the power to exclude misbehaving counsel is rarely needed or utilized by Colorado ALJs, although it has been invoked on rare occasions.

V. POWER OF COLORADO ADMINISTRATIVE LAW JUDGES TO EXCLUDE ATTORNEYS FOR CONFLICTS OF INTEREST

Although there is no explicit statutory provision or case law authorizing Colorado ALJs to disqualify attorneys appearing before them for conflicts of interest,²⁸ there are several theories which support the proposition that Colorado ALJs have such authority.

The APA provision cited above²⁹ arguably provides support for this position in two ways. First, it authorizes administrative law judges to exclude individuals for "improper conduct" which occurs in the ALJs presence. Representing individuals during a hearing or prehearing proceeding while having a conflict of interest or an appearance of such conflict surely falls within the category of "improper conduct" (by reference to the Code of Professional Responsibility³⁰) in the presence of the ALJ.

In addition, since the APA section in question also authorizes ALJs to act in accordance with the procedures of the district courts, it is appropriate to look to the actions taken by district courts in Colorado with regard to this issue.

In Colorado it is clear that trial courts have inherent authority to supervise the conduct of lawyers practicing before them and to disqualify lawyers for conflicts of interest.³¹ Furthermore, the Colorado Supreme Court has held that counsel may and should be disqualified by trial courts in Colorado where there is an appearance of impropriety, even in the absence of an actual conflict of interest or other ethical violation.³²

Based on this authority and practice of district courts in Colorado,

28. There also appear to be no state agency rules governing these matters, with the exception of COLO. R. CIV. P. 241.2(e), 241.3(d), and 241.4(d), providing for a one year cooling off period before former Supreme Court Grievance Committee members and their counsel as well as Supreme Court disciplinary prosecutors can represent lawyers before the Supreme Court Grievance Committee.

29. COLO. REV. STAT. § 24-4-105(4) (1982 Repl. Vol.).

30. Code of Professional Responsibility, Canons 5 and 9, COLO. R. CIV. P. at appendix to ch. 18-20.

31. *Clearly v. District Court*, 704 P.2d 866 (Colo. 1985).

32. *Id.*

administrative law judges in Colorado arguably may follow similar procedures based upon an implicit authorization under the APA.

Furthermore, as Professor Levinson argues in general, such authority may well exist in Colorado apart from the APA as part of the inherent authority of all tribunals, including administrative tribunals, to regulate and control the conduct of proceedings before them. Such authority is no doubt based both on due process considerations and on the need to maintain public confidence in, and respect for, the tribunal. In Colorado, where district court authority to disqualify lawyers goes beyond actual conflicts of interest and embraces the authority to disqualify based upon appearances of impropriety, there is little reason to believe that administrative agency authority in this regard would be limited solely to due process considerations. Instead, like the district courts, Colorado ALJs may well have authority to disqualify counsel for an appearance of impropriety, where such action is necessary to maintain public confidence in the tribunal.

VI. OTHER POWERS OF COLORADO ALJS TO CONTROL ATTORNEY CONDUCT: COLO. R. CIV. P. 11, 37

Because the Colorado APA authorizes ALJs to act "in accordance to the extent practicable with procedure in the district courts,"³³ the Colorado Rules of Civil Procedure are generally applicable to many administrative proceedings in Colorado, where the agencies in question do not have conflicting provisions and to the extent the Rules of Practice of the Division of Administrative Hearings do not supersede the civil rules.³⁴ Among the civil rules that are applicable to administrative proceedings and that can assist ALJs in controlling errant conduct on the part of attorneys are Rules 11 and 37, COLO. R. CIV. P.

Rule 11, COLO. R. CIV. P., like Rule 11 of the Federal Rules of Civil Procedure, provides that the signature on a pleading by an attorney constitutes the attorney's certification that

he had read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not

33. *Supra* note 29.

34. For the most part, the Rules of Practice of the Division of Administrative Hearings ("Division Rules") either closely follow or incorporate applicable rules of civil procedure. However, certain deadlines are shortened in the Division's Rules and certain Division Rules relate to matters not covered by the civil rules. Obviously, many portions of the civil rules (e.g., those dealing with injunctions, jury trials, and post judgment remedies) have no applicability to any administrative proceedings.

interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . .

As a sanction for failure to comply with these provisions, the Colorado rule provides that reasonable expenses incurred because of filing a pleading in violation of the rule, including reasonable attorney's fees, may be imposed against the errant attorney or his client or both.

It is apparent that this rule imposes an affirmative duty to stop, think, and investigate before signing a pleading, and therefore provides a potentially important tool for controlling the course of both civil litigation and administrative proceedings in the face of certain types of improper attorney conduct. Although there is no specific authority in Colorado concerning the applicability of the rule to administrative proceedings, there is every reason to believe that its use in administrative proceedings to curb improper and unethical attorney conduct would be upheld by the courts.

COLO. R. CIV. P. 37, dealing with sanctions for failure to make discovery, also contains provisions directed specifically at improper attorney conduct. Under the rule, if a motion to compel discovery is filed, the court may order the losing counsel or his client or both to pay expenses and attorney's fees to the prevailing party. A similar order may be made by the court under Rule 37 whenever a party fails to obey a discovery order or completely fails to respond to discovery requests under the rules.

Rule 37 sanctions against parties are regularly considered and imposed by administrative law judges in Colorado without any argument that ALJs lack such authority. Rule 37 sanctions against counsel, however, have rarely, if ever, been imposed to date. Nevertheless, both Rule 11 and Rule 37 provide a means to specifically reach and control improper attorney conduct and therefore control the course of proceedings without penalizing the parties themselves where the parties are not at fault. There is no reason why these rules should not be available to ALJs for use as tools in controlling administrative proceedings before them, although admittedly the mechanics of enforcing interlocutory administrative orders for the payment of attorney's fees and expenses has yet to be addressed in Colorado.

VII. STANDARDS OF CONDUCT GOVERNING AJL CONDUCT IN COLORADO

The Colorado Court of Appeals recently held in *Wells v. Del Norte School District C-7*,³⁵ that in quasi-judicial administrative pro-

35. 16 COLO. LAW. 2221 (No. 85CA0246, Colo. Ct. App., Oct. 15, 1987) (*cert. denied*, Apr.

ceedings ALJs should be treated as the equivalent of judges and the Code of Judicial Conduct should be applied to them. In that case, the action of an ALJ outside the hearing room during the pendency of a public school teacher tenure proceeding was held to have created a blatant appearance of impropriety. Although no evidence of any due process violations of any kind were found, the court held that the ALJ's actions in creating an appearance of impropriety violated Canon 2 of the Code of Judicial Conduct and, based on this appearance alone, remanded the matter for a new hearing before a new ALJ.

Under the *Wells* decision, it is clear that ALJs in Colorado are subject to the Code of Judicial Conduct and that Colorado cases and civil rules dealing with disqualification of judges are applicable in the administrative context.³⁶ As is predictable from the *Wells* decision, in Colorado an appearance of impropriety alone is as sufficient for disqualification of a judge, as it is for ALJs and attorneys.³⁷

Whether making Colorado ALJs explicitly subject to the Code of Judicial Conduct ("C.J.C.") and the case law interpreting it will lend greater legitimacy to administrative tribunals, as suggested by Professor Levinson, is unclear. It is clear, however, that the *Wells* case officially provides Colorado ALJs with more detailed guidance in the conduct of their duties than they previously had. Such guidance is, of course, helpful and welcome, although many ALJs in Colorado had considered themselves bound by the C.J.C. long before the *Wells* case was decided. It remains to be seen whether future cases will further refine ALJ obligations under the C.J.C. and if they will consider whether all aspects of the C.J.C. are truly applicable to ALJs.³⁸

It should be noted that although Colorado ALJs are bound by the C.J.C., they obviously are not judges and cannot be disciplined by the state Commission on Judicial Discipline. Nevertheless, any ALJ who consistently fails to fulfill his obligations under the C.J.C. is certainly subject to discipline pursuant to the state personnel system.³⁹ In addition, under the *Wells* decision, litigants aggrieved by an ALJ's failure to comply with the judicial code will have recourse in the courts.

11, 1988).

36. See, e.g., COLO. R. CIV. P. 97, dealing with various substantive and procedural aspects of disqualification of judges which are clearly applicable to administrative law judges as well.

37. *Wright v. District Court*, 371 P.2d 661 (Colo. 1987); *Wood Brothers v. City of Fort Collins*, 670 P.2d 9 (Colo. Ct. App. 1983).

38. For example, it is unclear whether all the limitations on political activity found in Canon 7 or all the restrictions on business activities found in Canon 5 should or need be applied to administrative law judges.

39. COLO. REV. STAT. § 24-50-125. Grounds for discipline under the state personnel system include failure to comply with standards of efficient service or competence, willful misconduct, and willful failure or inability to perform required duties.

VIII. CONCLUSION

In Colorado, the Supreme Court has exclusive authority to admit attorneys to practice and to impose disciplinary measures on them. Therefore, administrative law judges cannot regulate the admission of lawyers licenced to practice in Colorado to practice before state agencies; nor can ALJs impose prospective discipline against attorneys practicing before them. Furthermore, ALJs in Colorado do not have contempt power.

Nevertheless, Colorado administrative law judges have substantial authority to control the course of proceedings before them and the conduct of attorneys who appear before them. This authority is found in the State Administrative Procedure Act as well as in the inherent authority of tribunals to control the course of proceedings before them. ALJs in Colorado have authority to discipline attorneys for conflicts of interest as well as blatant appearances of impropriety which undermine public confidence in the tribunal. Furthermore, ALJs in Colorado have authority pursuant to the Colorado Rules of Civil Procedure to impose sanctions for pleadings filed in violation of Rule 11 and for violations of discovery orders and requests pursuant to Rule 37.

As a final matter, administrative law judges in Colorado are themselves subject to the Code of Judicial Conduct and are therefore governed by all rules and case law relating to disqualification of judges in particular cases. In addition, Colorado ALJs are subject to discipline pursuant to the state personnel system.