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# Administrative Hearing Procedures and Practice

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**A**dministrative hearings are similar to trials, but with some crucial differences in procedures and practices. Here I give an overview of an advocate's role in the three phases—preparation, hearing, and posthearing—of practice before an administrative body and tips to make your presentation more persuasive.<sup>1</sup>

## I. Preparation

Preparation involves learning the law, procedures and practices, fact investigation and discovery, case analysis, prehearing negotiation, and settlement.

### A. The Law and Procedures and Practices Particular to the Venue

There are four basic sources where you can find the law and rules and regulations pertaining to practice before administrative bodies:

- The statutes creating the agencies. All agencies—federal, state, or municipal—are created by legislation to execute the corresponding law. These statutes delineate these agencies' power and scope of authority, sometimes containing explicit procedures for agency hearings.
- Case law that establishes procedural or substantive requirements directing how administrative agencies may execute the applicable law.<sup>2</sup>

<sup>1</sup>This article is adapted from the Administrative Hearing Training Manual of the Center for Legal Aid Education.

<sup>2</sup>Cases such as *Shapiro v. Thompson*, 394 U.S. 658 (1969), and *Goldberg v. Kelley*, 297 U.S. 254 (1970), established for welfare recipients fundamental due process rights requiring welfare agencies to establish clear eligibility standards and pretermination hearings. Other cases such as *Sullivan v. Zebley*, 493 U.S. 521 (1990), and *Avery v. Secretary of Health and Human Services*, 762 F.2d 158 (1st Cir. 1985), changed the standards for evaluating substantive claims. See also Robert P. Capistrano, *Making the Fair Hearing More Fair*, in this issue.

- Rules and regulations, policy manuals, and internal memoranda adopted by agencies that establish hearing procedures, evidentiary rules, and other practice guidelines.
- The federal Administrative Procedure Act and the state equivalent that have general applicability to all administrative proceedings.<sup>3</sup>

You need to consider every possible source of procedural law in your case and know the rules and regulations that will govern your hearing.<sup>4</sup> By insisting on procedural formalities, you help safeguard clients' rights, including the due process right to a full and fair hearing.

All hearings are conducted by a hearing officer who is, by law, deemed to be impartial. This person may also be known as the judge, the hearing examiner, or the review examiner. The level of formality in administrative hearings varies across agencies. For example, administrative law judges preside over hearings on claims for Social Security Disability Insurance and Supplemental Security Income; these proceedings tend to be more formal and more similar to a trial. Hearings before a public housing authority, welfare agencies, or the U.S. Citizenship and Immigration Service have fewer formal procedural requirements. In all cases the hearing officer hears evidence, records it (usually by tape recorder, although the Citizenship and Immigration Service may use a videorecorder), and decides the case. The judge may be passive or active during the hearing, may be well versed in the law or may be ignorant of or uninterested in it, and will generally be under time constraints. In order to receive a favorable decision for your client, you must persuade the hearing officer of the correctness of your position. Whenever possible prior to the hearing,

learn as much as you can about the hearing officer assigned to your case. To do this, you may talk to hearings office staff members and other advocates who have appeared before the agency or hearing officer in question, observe hearings, read hearing transcripts, or listen to hearing tapes. During the hearing, you should note how the hearing officer conducts a hearing and whether you are able to control any aspect of the hearing or the hearing officer.

*Practice Tips:* Gather information from other advocates about the particular practices of the hearing officer assigned to hear your case:

- Does the hearing officer play an active role in taking testimony from witnesses?
- How does the hearing officer handle exhibits?
- Does the hearing officer apply any evidentiary rules?
- Is the hearing officer knowledgeable about the substantive law?
- What is the hearing officer's attitude toward clients, witnesses, and advocates?
- Should you be prepared for anything unusual about the hearing officer's conduct during hearings?
- If your client has limited-English proficiency, how well does the hearing officer work with interpreters and what precautions may you need?<sup>5</sup>

## B. Case Analysis and Planning

Case analysis comprises six steps that are not necessarily linear or follow a particular order. The key is that you consciously consider all these steps while representing your client but remain flexible and

<sup>3</sup>Administrative Procedure Act, 5 U.S.C. §§ 500–596 (2005).

<sup>4</sup>Some sources are more helpful than others. E.g., the Social Security Act and Regulations provide few details about hearing procedures before an administrative law judge. The most useful source of learning and understanding these procedures is *Hearings, Appeals and Litigation Law Manual (HALLEX)* (see Office of Disability Adjudication and Review, Social Security Administration, HALLEX: Hearings, Appeals and Litigation Law Manual (n.d.), [www.ssa.gov/OP\\_Home/hallex/hallex.html](http://www.ssa.gov/OP_Home/hallex/hallex.html)). You can get further information about hearing procedures from secondary sources, e.g., THOMAS E. BUSH, *SOCIAL SECURITY DISABILITY PRACTICE* (2d ed. 1998); NATIONAL HOUSING LAW PROJECT, *H.U.D. HOUSING PROGRAMS: TENANTS' RIGHTS* (3d ed. 2004 & Supp. 2010).

<sup>5</sup>See *infra* for a more detailed discussion on working with interpreters at administrative hearings. See also Michael Mulé, *Language Access 101: The Rights of Limited-English-Proficient Individuals*, 44 *CLEARINGHOUSE REVIEW* 24 (May–June 2010).

be ready to modify your case theory as evidence is developed or your client's situation changes. You may use a chart to organize these steps and capture the information, or you may perform some of these in your head rather than formally on a chart, especially as you gain experience with particular types of cases.

### 1. Determine Your Client's Goal

Depending on your client's goals, similar fact patterns with similarly situated clients can lead to different directions in a case. Your job is to advise your client what options she has and to assist her in choosing the one that most closely meets her goals. Some examples may help clarify this, but your client ultimately decides which legitimate option to pursue.

### 2. Evaluate Options and Review Notices from Agency

Understanding a client's goals is only one part of evaluating the options for that client. You also need to review any available agency notices so that you can ascertain any important deadlines and determine the scope of the hearing. You must determine what action the agency has taken, or failed to take, and the reasons for such action or inaction. Agency notices and appeal requests usually define the parameters of an appeal and are part of the initial case analysis. Your client is allowed to appeal only the action that the agency has actually taken. The notice also limits the issues that the agency can raise at hearing. Basic due process and agency regulation usually require notice that fairly apprizes an individual of what action is being taken and the reasons for such action so that the individual can respond. Agency notices function similarly as pleadings in a court case: they define the scope of the proceedings. Limiting the agency to the action and basis for such action can benefit your client. Each administrative agency has procedures and notice requirements with which you must become familiar.

### 3. Parse the Statute, Regulations, and Rule into Their Elements

This is an essential step to determine what legal research and evidence you

need to prove your client's case. Identify the law that applies to your client's case. This may vary with the area of law. There are some general rules when interpreting the applicable law.

Agencies are created by statute and must function within the statutory limits. Within those statutory parameters, agencies often have broad authority to define the details of programs that they administer. These details are usually spelled out in regulations interpreting the statutes. The regulations may be further interpreted by agency policy, practice, and procedures, which are often available in agency policy manual or memoranda.

In case of ambiguity or conflict in governing statutes and regulations, as a general rule federal statutes are superior authority to federal regulations; federal law is superior to state statutes, and state statutes are superior to state regulations. For example, if federal law governing a program administered by a state gives a recipient the right to request a hearing orally, state regulation cannot legally require hearing requests to be in writing. In most situations, the agency regulations will have the most detail defining the rights, protections, and obligations of the parties. But when ambiguities arise, you should read all provisions of the law together to make sense of each part, and check for consistency between the parts. Where there are conflicts or ambiguities, an agency's interpretations of its own laws and regulations carry great weight. Once you identify the relevant law, you need to evaluate separately each element of the law. Elements are the conditions that must be met if the law is to apply. Good legal analysis considers every element in logical sequence.

### 4. Identify Legal Issues for Research and Analysis

Some cases involve only disputes about facts; the law is clear on its face, and everyone agrees on its meaning. In that case the hearing involves a presentation of evidence on the conflicting facts, and the hearing officer makes findings of fact and decides after evaluating credibility and strength of the evidence. Often the law contains terms that require you to

research to ascertain their definition and interpretation. Legal analysis begins with research to define the terms and phrases of the elements and applying those definitions to facts. Some terms and phrases are “terms of art” that have specific meaning in the context of one law that may be inconsistent with the definition in the context of another law or with a lay definition. Dictionaries can be useful when a lay definition is needed either in the absence of a clear legal definition or to add clarity to the legal definition.

### **5. Determine the Evidence Needed to Prove Each Element, and Identify What Evidence Must Be Developed**

After you have parsed the relevant law and regulation into their elements, you will review facts that you need to prove to establish each element. What facts would tend to establish each element? What information would convince the trier of fact? Link facts to the proof that is available at this point. Do you know and have the necessary information? How do the facts you know fit into the required elements?

### **6. Establish a Theory for Your Case**

The theory of the case is your client’s “story” told in a coherent and organized way that demonstrates your client meets all the legal requirements entitling her to a particular identified result (client’s goal). Your best argument is a simple, convincing, compelling, and detailed story. Start with a sparse story; add details about your client to cover all the critical elements of her claim; personalize your client. In the end everything in your trial plan should support your theory that can persuade the decision maker. In some cases you may have one theory with multiple parts; in others, alternative theories (for example, a client’s disabling condition qualifies the client for an exemption, but even if she were not disabled, her advanced age qualifies her for an exemption). Your responsibility is to present what may be a complex set of facts and law in a coherent, logical, and understandable way, clearly leading to the conclusion that meets your client’s goals. Identify missing proof and discovery methods to fill any factual holes in

the elements that you need to prove. You need to determine how to uncover those facts and whether a simple phone call or visiting the premises with a camera suffices or a formal discovery is needed.

### **C. Fact Investigation and Discovery**

The fact investigation and discovery phase is assembling the evidence you need to prove the case. It may involve locating and interviewing witnesses, getting information about parties, securing and reviewing documents and real evidence, taking photos and videos, or otherwise documenting conditions and situations, and reviewing public and institutional records. Most administrative hearings occur on a tight timeline that does not allow for extensive discovery and fact investigation.

The statutes and regulations governing some administrative forums define and permit certain types of discovery. Formal discovery may entitle you to have a case summary describing the factual and legal basis of agency action, access and copy your client’s records, request documents, have answers to interrogatories, or subpoena witnesses or records, or all five. Subpoena is typically used after you have identified what is needed through discovery and must force testimony or production of evidence at the hearing. State freedom-of-information statutes may provide access to records that agencies maintain but are not referred to in agency rules, such as internal e-mails and memoranda to field offices on how to implement a regulation. The agency, often through the hearing officer, may entertain, though not necessarily grant, requests that it subpoena witnesses and records; seeks information through third parties (such as agency requests for birth records); or arranges for independent evaluations (such as medical evaluations in a social security disability case or evaluation of a learning disability in a special education case). During discovery, pay attention to what is in as well as what is missing from the records.

Informal discovery is limited only by your imagination. It can include searches for potential evidence, interviewing potential witnesses, potential adverse witness-

es and others who may have information about your client's claims, discussing aspects of the case with agency personnel, and reviewing the publications of an expert whom the agency or an adverse party will call. Today the Internet can help us locate lost people and find their contact information, search many public record databases for valuable information, learn often startling amounts of information about people and businesses, usually for free.

### 1. Reviewing Agency Records

In virtually all situations clients have a right to access their own agency records and obtain copies of various items.<sup>6</sup> To gain access to a client's records, you typically need a written, signed authorization for release of information by the agency. Some agencies require appointments to review records.

Knowledge of agency policy and practices can be useful when seeking records to ensure that all relevant records are reviewed. Your client's paper "file" may be only part of the agency records. There may be separate files containing sensitive materials (examples are psychological or counseling files which more fully reflect the nature of a student's problems, the school's knowledge of the problems, and how the school reacted). Increasingly there are computerized records of phone conversations, actions taken on a case, notices given, benefits paid, and other information that may not be in the paper file. An agency may attempt to limit access by opening records that it deems "relevant" to your inquiry. This is improper without your permission because the agency may inadvertently or intentionally withhold information that you would find useful.

When reviewing records, note documents or records you want to copy. (Post-its are helpful.) Ask questions if something is confusing, request to see documents that you think should be in the file or to which the file refers but are not there, and ask if any other agency records pertain to your client. Consider talking to your client's agency worker about the case. This

may reveal information not reflected in the formal record and may allow you to narrow issues in dispute. Take notes so that there is a clear record of what you reviewed, with whom you spoke, and what information is not reflected in the copies of documents or other records you obtained. Your client may have other relevant documentary evidence that is not in the agency record; for example, clients' letters to the agency or its employees may not appear in the agency files, but your client or someone else may have copies.

### 2. Reviewing Other Records

Sources other than the administrative agency involved may maintain or keep additional records about your client. You may obtain such records by an oral request or you may need to make a formal written request or a subpoena. Typically employers, schools, hospitals, doctors, mental health and addiction treatment facilities, and counselors require an authorization before speaking to you or giving you access to records. While a general authorization may be accepted, some sources may require a separate, specially prepared authorization, often one they prepare. Moreover, some states require specific authorization for releasing certain sensitive information (such as records regarding HIV (human immunodeficiency virus) status, substance abuse or treatment, mental illness, pregnancy termination, and the like). With respect to agency records, ascertain that you have reviewed all relevant records. Cost can be an issue when obtaining such records; some state statutes can be helpful—for example, a statute requiring health care providers to supply copies of medical records free to indigent persons in social security disability cases.

### 3. Witnesses

Once you identify sources of evidence necessary to prove the legal elements in the case, you need to go similarly through witness identification. Make a list or a chart that identifies three important elements: identity and contact information of the witness; whether the witness is friendly, indifferent, adverse, or expert;

<sup>6</sup>Some agencies may charge you for the cost of copying the file.

and the purpose of the witness' testimony (e.g., what documents you plan to introduce through the witness or facts to which the witness will testify or both).

#### 4. Reanalyzing Case in Light of Discovery

After you complete discovery, reanalyze the case and revise the case theory as needed. Your client's story must be coherent and supported by the available evidence, and you have identified evidence to prove every element of your client's case. Where possible, the evidence should undermine or counter any negatives anticipated from opposing parties. Evidence about the context can more fully explain your client's situation, build sympathy, and increase understanding of your client's circumstances. You should pursue the course that has the best chance of helping your client meet her goal.

##### *Practice Tips:*

- Secure authorization of release from your client permitting you to access agency records or files maintained by the opposing party; make copies for other record reviews.
- Identify the names and contact information of all potential witnesses.

#### D. Prehearing Negotiation and Settlement

When you have a clear theory of the case and are reasonably sure of the facts and the potential outcomes that will meet your client's goals, you may consider negotiations to settle the matter. You should approach negotiations so that they enhance your client's case, but avoid them where such benefit is not likely. Where there will be an ongoing relationship between the parties in the dispute, you should avoid causing lasting problems or enmity in that relationship.

There are three basic reasons for pursuing negotiations in administrative cases: when negotiations are likely to produce discovery regarding the case; when negotiations may narrow the issues for the

hearing; and when negotiations may result in a settlement providing your client with all the benefits at issue.

If you settle the case, first be sure to obtain or write a dated confirmation of all the terms of the settlement. This may vary with the situation. In a welfare context the resulting settlement could be a new notice of action indicating the benefits that your client will get, or an actual transfer of the benefits to your client. In other contexts the settlement may be an agreement signed and dated by the opposing party.

If you reach agreement, the opposing party typically wants you to withdraw the hearing request immediately. *Do not withdraw a hearing request until you have written confirmation of all the terms of the settlement.* If necessary, request postponement of the hearing on the basis that the case may be fully resolved when negotiations are completed. If you withdraw before you have confirmation of the settlement and a dispute arises as to the terms agreed upon, it may be too late to refile the hearing request. When you have written confirmation, immediately withdraw the hearing request, since hearing examiners appreciate as much advance notice as possible. Provide the opposing party with a copy of the withdrawal.

You may want to avoid negotiations if they have no current or potential useful result, or if pursuing negotiations puts the opposing party on notice of your involvement in the case and allows them time to prop up a weak case.<sup>7</sup>

## II. Hearing

Many aspects of administrative hearings may be unfamiliar to those with experience in litigating in other contexts. These differences are found in all aspects of the hearing.

### A. Setting of the Hearing

Administrative hearings are held in a variety of settings, often informal, such as

<sup>7</sup>You might consider delaying the contact for negotiation until it is too late for the opposing party to gather evidence that would bolster its case, or until after the opponent has prepared a hearing summary or brief locking in a weak position. Since delays in contacting opposing parties and agencies also may mean compromising early access to potential discovery for your client, you must carefully weigh this approach.

meeting rooms and conference rooms. Rarely are administrative hearings held in settings as formal as courtrooms or legislative chambers. Most administrative hearings are private, and observers may be present only with the permission of the parties and the hearing officer.

*Practice Tip:* You may wish to visit the hearing room in advance to find out the setup of the room; the seating arrangements; whether there is a chalkboard, easel, exhibit stand, television, videocassette recorder, or other necessary equipment in the hearing room; and whether there is a place nearby where you and your client can meet before the hearing or during recesses in the hearing.

### B. Components of a Hearing

The components of an administrative hearing vary with the type of hearing and the agency involved, but the standard elements of most hearings are opening comments by the hearing officer or administrative law judge; opening statements by the parties or their representatives; testimony of the parties and other witnesses and introduction of evidence into the record; and closing arguments by the parties or their representatives.

*Practice Tip:* You may have to ask the hearing officer for permission to make an opening statement and a closing argument. If possible, you should do so in advance of the hearing, either orally or in writing, or at the beginning of the hearing.

### C. Opening Statements

Your opening statement should be short and direct, stating succinctly your theory of the case and highlighting the most important evidence that supports your theory.<sup>8</sup> An effective opening statement orients the hearing officer, your client, the opposing party, and anyone else (such as, expert witnesses) present in the hearing room to the chief factual and legal strengths of your case. Rehearse your opening statement several times before the hearing. Your delivery at the hearing should be smooth, confident, and

persuasive. Do not try to accomplish too much with your opening statement. Typically opening statements in administrative hearings should be three minutes in length at most. If your case is unusually complex, address the difficult or complicated issues in a prehearing brief or memorandum and simply refer to the brief or memorandum in your opening statement.

### D. Evidence

Administrative hearings are often less formal than court proceedings, and the formal rules of evidence normally do not apply. However, many of the principles on which the rules of evidence are based remain important in administrative proceedings. In order to prepare for an administrative hearing, you need to know which party bears the burden of proof with respect to each element of the case. As a rule, with some exceptions, applicants have the burden of proving eligibility for the benefits at issue, and the agency has the burden of proof in termination cases.

There are two basic kinds of evidence: testimonial (what your client and other witnesses tell the hearing officer) and documentary evidence. Your statements or documents not put into evidence are not evidence. The hearing officer must decide the case based on the evidence actually introduced at the hearing and is not supposed to consider anything not in evidence.

#### 1. Direct Examination

The primary objective of direct examination is to prove a prima facie case.<sup>9</sup> However, do not limit direct examination to the bare bones of a prima facie case. You must also persuade the hearing officer to resolve disputed issues in your client's favor. Direct examination is your main opportunity to make a complete record. Some things to remember:

- Prepare the witness properly.
- Have the witness make a good oral and visual impression.

<sup>8</sup>You may want to find out whether your hearing officer allows opening statements since many do not.

<sup>9</sup>For a more detailed discussion of witness examination techniques, evidentiary issues, and general trial practice, see THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* (3d ed. 1992).

- Cover all the essential legal and factual points.
- Present an orderly, coherent story in a persuasive manner.
- Begin and end the testimony on strong points.

Your role in conducting direct examination is to elicit the facts of the case from your witnesses, not to state the facts yourself. Your questions and your statements are not evidence and do not establish facts. The testimony of your witnesses does that. Remember not to lead your witnesses, for by doing so you conceal their testimony with your own statements. Remember, too, not to express opinions about a witness' testimony while examining the witness. Reserve comments on the credibility or weight of a witness' testimony for your closing argument.

*Practice Tips:*

- Organize your written questions for each witness prior to the hearing.
- Be prepared for the possibility that the hearing officer may conduct an initial examination of your client and your other witnesses prior to your direct examination. In many cases this is standard practice. However, you may wish to consider carefully any objections you may have to the practice. If you do not object or if, despite your objection, the hearing officer conducts the initial examination, you should be prepared to follow up with additional questions not addressed by the hearing officer. As a practical matter, you may wish to cross-reference the hearing officer's questions with your written list of questions and eliminate those asked by the hearing officer. You will then be prepared to question your witness without fear of repeating matters already addressed.
- If the hearing officer conducts an initial examination, you should not treat the hearing officer as an adversary. Always be tactful and polite. If you find a hearing officer's question objectionable (e.g., the question seeks information that is irrelevant to the subject matter of the hearing), you should carefully consider the costs and benefits of objecting before doing so. If an objection is necessary to protect your client's appeal rights, then you should object and succinctly state your reasons for objecting. If an objection is not necessary to preserve the issue for appeal, consider whether you can correct the problem without objecting. For example you may be able to bring the issue to the hearing officer's attention in a posthearing legal memorandum, or you may be able address the problem with follow-up questions to the witness at the hearing itself. Try not to alienate the hearing officer if at all possible.
- When you question your witnesses, slow down the pace to elicit the critical parts of the witness' testimony in short, easily digested segments. Listen carefully to your witness' answer to each question before moving on to the next question. Make sure your witness has fully answered each question asked.
- Monitor the hearing officer's reactions to the witness' testimony and watch for indications that the hearing officer does not comprehend the witness' testimony. If it appears from the hearing officer's reactions that your witness is not coming across, ask the witness to clarify her testimony immediately (e.g., "I'm sorry, I didn't quite follow that. Where was the meeting held?").
- Connect your witnesses with evidence in a coherent presentation. Remember that each of your witnesses does not have to tell the entire "story." This may be done through a choreographed succession of witnesses. Where necessary, you may make references during your examination of a witness to prior or anticipated testimony.
- In many administrative contexts, you can subpoena witnesses to appear and testify at the hearing. You may do so if you need the hearing testimony of a recalcitrant witness or to ensure that a friendly witness appears. Consult the applicable regulations to determine the procedures for subpoenaing witnesses. Sometimes an affidavit from such a witness in lieu of hearing testimony suffices, but you should consult the applicable regulations.

## 2. Cross-Examination

The main purposes of cross-examination are to elicit from your opponent's witnesses testimony and other evidence that is favorable to your client's position and to discredit any adverse testimony from your opponent's witnesses. Prepare cross-examination questions for each opposition witness, and know your opponent's probable theory of the case. However, you may have to wait until the hearing itself to decide whether to cross-examine a particular witness. Base your decision on the following considerations:<sup>10</sup>

- Has the witness hurt your case? If not, cross-examination is not necessary.
- Is the witness important? If so, you should do some cross-examination. If not, do not bother.
- Was the witness' testimony credible? If not, you may want to leave it alone and avoid giving the witness an opportunity to establish credibility.
- Did the witness forget to bring up damaging testimony on direct? If yes, you may want to forgo cross-examination to keep the damaging testimony out of the record. If you open the door by conducting cross-examination, you may give the witness or the witness' advocate a second chance to raise the damaging testimony.
- What are your realistic expectations? Unless you realistically expect to score points, you may want to avoid or limit cross-examination.
- What risks do you need to take? If your case is solid, minimize your risks. If, however, you have a weak case, you may need to take risks on cross-examination.

### *Practice Tips:*

- Listen carefully to the direct examination of each of your opponent's witnesses to determine whether conducting a cross-examination is worthwhile. In some cases cross-examining an adverse witness may not be necessary or advantageous.

- To control an adverse witness during cross-examination is your job. This is best accomplished through well-drafted questions that leave no room for any answer other than "yes" or "no." Each question should introduce no more than one new fact, and questions should progress logically toward a specific goal. Never ask open-ended questions.
- If the witness evades a question, simply repeat it. If the evasion continues, repeat the question politely until you get an answer.
- Avoid arguing with the witness about the adequacy of an answer; instead ask the hearing officer to instruct the witness to answer the question.
- As your opponent conducts direct examination of an adverse witness, listen for testimony that may contradict a prior statement by that witness. During your cross-examination, you can impeach the witness with the witness' prior inconsistent statement.

## 3. Redirect Examination

If necessary, you may ask the hearing officer for the opportunity to reexamine your witnesses after they have been questioned by your opponent or the hearing officer. The purposes of redirect examination are to correct misstatements, inconsistencies, and misleading impressions that may have been created during cross-examination; to rehabilitate your witness' credibility; and to reinforce and clarify your witness' favorable testimony. For example, if your opponent's questions on cross-examination only brought out the part of a conversation that was unfavorable to your client, you can use redirect to introduce testimony about the rest of the conversation. Similarly if during cross-examination your witness' conduct was called into question, and your witness has an explanation, you can use redirect to allow the witness to explain.

In most judicial proceedings the scope of a redirect examination is limited to the issues raised or implicated on cross-examination. You are not allowed to use

<sup>10</sup>*Id.*

redirect to introduce issues that have not already been raised in direct or cross-examination. This may or may not be the case at your administrative hearing, depending on the forum, the applicable rules, and the hearing officer's predilections. Regardless of the circumstances, withholding an important part of your witness' testimony from direct examination to save it for redirect is always dangerous. Even if the hearing officer allows testimony on redirect that is beyond the scope of cross-examination, the testimony may not be as convincing as when raised on direct since the hearing officer may view it as an afterthought. And, of course, your opponent may end up not cross-examining your witness at all, and then you will have no opportunity for redirect and cannot introduce important testimony.

#### 4. Introducing Exhibits

In most cases, witness testimony, without more, will not be sufficient to prove your case. Submitting exhibits, such as documents and other forms of evidence, is often necessary. Depending on the type of case, submitting this evidence to the hearing officer in advance of the hearing may be appropriate. For example, in social security disability cases, what is customary, and indeed preferred, is for advocates to submit the claimant's medical records, affidavits from the claimant's treating doctors, and other documentary evidence to the administrative law judge before the hearing. However, in other types of cases, such as unemployment compensation, presenting evidence at the hearing, often during the course of witness testimony, is customary.

The steps involved in introducing exhibits at an administrative hearing are less formal than those required in judicial proceedings, but you must still follow a logical sequence to ensure that the exhibit comes into evidence in a way that the hearing officer can clearly understand its meaning, credibility, and significance. In order for documents to become evidence in a case, you need to present witnesses who can testify with as much connection to and firsthand knowledge of the document as possible and witnesses who actually

do testify about their connection to and knowledge of the document. Remember that while you probably may introduce exhibits into evidence at an administrative hearing without much (or any) formality or foundation, you should try to avoid doing so. Without a logical presentation and explanation of the exhibit and its connection to the witness and the case, the purpose, nature, authenticity, and reliability of the exhibit will be lost on the hearing officer as well as the appellate tribunal.

#### *Practice Tips:*

- Some hearing officers like to admit all documents and other evidence before going "on the record," that is, before officially commencing the hearing. If you are merely stipulating to the admissibility of unobjectionable documents, this practice may present no problems. However, if you intend to object to the admissibility of a document, insist that your objection take place on the record.
- Organize your exhibits prior to the hearing. Know in advance which exhibits you will refer to, or attempt to submit into the record, in connection with each witness you are going to examine, whether on direct or cross-examination.
- Consider how to highlight the importance of your evidence at the hearing, whether through the testimony of witnesses on direct or cross-examination or in your opening statement or closing argument.
- Prepare your exhibits in as convenient a form as possible. If an exhibit contains a large volume of records, you may wish to submit a brief, written summary along with the records. Always bring copies of your exhibits for your opponent.
- Before the hearing, prepare a list of all the evidence you need to get admitted into the record. As each piece of evidence is admitted, check it off your list. Before you leave the hearing, make sure all of your evidence has been admitted into the record.

## 5. Evidentiary Objections

Prior to the hearing, reconsider the evidence you plan to introduce and the justification for its introduction on evidentiary grounds (it is relevant; your witness has personal knowledge, etc.) Think about the evidence that your opponent is likely to introduce and whether you may have a good basis for objecting to its introduction into the record. Beware of how and when you should object to preserve the record for appeal. At times you may wish to object to a question even though your objection is not likely to be upheld. You may do this for tactical reasons: to interrupt the rhythm of your opponent's direct or cross-examination or to buy your client some time to consider how to answer a question on cross-examination. Be cautious when doing this since excessive use of specious objections may annoy the hearing officer.

## E. Closing Arguments

After the last witness has testified, be prepared to give a closing argument. The closing is an argument, and its purpose is to persuade. It is your final opportunity to persuade the hearing officer that your client should win. You use the closing argument to organize the evidence presented, explain how the evidence addresses the key issues and justify the legal conclusions drawn from that evidence. It allows you to restate the legal elements of the case and highlights the facts in evidence to show that you have met your burden of proof while your opponent has failed to meet her burden of proof. Your task is to summarize the law and the evidence clearly, concisely, and directly. Highlight your case and its strong points. Your argument should pave the way for a hearing officer to decide in your favor.

If your adversary also gives a closing argument, you may wish to offer a rebuttal. You may need to ask the hearing officer in advance for the opportunity to give a rebuttal, and you may need to reserve time from your closing argument for your rebuttal. These practices vary with the type of hearing and the predilections of the hearing officer.

### *Practice Tips:*

- Do not read your argument. It should be spontaneous and not appear to be rehearsed.
- Outline the crucial points so that you can visually check them off as you make your statement.
- Practice your closing argument before the hearing until you feel comfortable with it.

## F. Additional Practice Tips

Here I share a number of additional practice tips that will improve your chances of successful advocacy in an administrative proceeding.

### 1. Hearing Etiquette

Always make sure that you, your client, and your witnesses arrive at the hearing on time or early. Be polite to the hearing officer and all of the parties. Comport yourself in a professional manner at all times. Although most administrative hearings are not as formal as judicial proceedings, you should never compromise your credibility or that of your client by lowering your standards of professionalism or courtesy.

### 2. Showing Deference to the Hearing Officer

Accord the hearing officer the same level of respect and deference you would accord a judge in a judicial proceeding. In some cases the hearing officer may want to maintain complete control of the hearing even to the extent that she will direct the participants where to sit, when to speak, and so forth. While for you to control the hearing is generally a good idea, you should not fight with the hearing officer—you want the hearing officer to be receptive and responsive to your position. Alienating the hearing officer may not serve your client's best interests.

### 3. Objecting to the Hearing Proceedings

In many cases there is an undeniable tension between showing deference to the hearing officer and effectively presenting your client's case and preserving your client's rights. This tension is

particularly evident when a hearing officer allows your adversary to present evidence or arguments pertaining to issues of which you received no advance notice, or when a hearing officer does not allow you to present testimony or other evidence essential to your client's case. Carefully consider your use of objections at the hearing. Where your client is entitled to receive advance notice of issues raised at the hearing but did not, you must object to their introduction. Your objection should be concise and clearly articulated. If the hearing officer overrules your objection, you should offer to submit a posthearing legal memorandum. The same rules apply if the hearing officer does not permit you to introduce certain evidence or if the hearing officer commits any other procedural error: object and, if necessary, offer to submit a posthearing memorandum. This will preserve the issue for appeal. To continue arguing the point at the hearing, especially at the expense of further alienating the hearing officer, is unnecessary.

#### 4. Building a Record for Appeal

You have an important obligation to build the record should an appeal be necessary. You must ensure that all the issues, testimony, and documentary evidence in your case are presented at the hearing or, when permitted by the hearing officer, within a designated time posthearing. You must also make sure that your legal arguments and objections to your opponent's evidence are in the record.

Before the hearing, make sure you know your client's options for further administrative or judicial review should she lose the hearing, and make sure you understand the standard of review on appeal. In some cases clients get a *de novo* hearing on appeal where they have a second hearing contemplating the entire case in the same manner as it was originally heard. In a *de novo* hearing, you may be able to submit new evidence and arguments. However, most appellate reviews are not *de novo*. The reviewing agency or court considers only whether the hearing officer's decision was clearly erroneous or an abuse of discretion. In these cases submitting new evidence, objections, or arguments on appeal is generally not possible. Thus

make sure that the record is complete at your administrative hearing.

#### 5. Recording the Hearing

You may want to have your own recording of the hearing if you are going to prepare an extensive posthearing memorandum and would like to cite the hearing testimony of various witnesses or other portions of the hearing transcript, or if you anticipate the need for an appeal and want to avoid any delays in getting an official copy of the tape. You should be allowed to do so as long as your recording does not interfere with the conduct of the hearing.

### III. Posthearing

In many administrative cases you may request to keep the record open for a defined period of time to submit additional evidence or memoranda. Posthearing memoranda are useful vehicles to summarize the facts and law or to address problematic issues that emerged at the hearing. Consult the applicable regulations to determine whether posthearing submissions are permitted and, if so, what procedures you must follow.

#### A. Submitting Outstanding Documentary Evidence

If the hearing officer agrees to leave the record open for you to submit additional evidence, you are solely responsible for obtaining and timely submitting that evidence. If you absolutely need more time, you may request an extension, which is generally granted if there is good cause. However, remember that your client may be waiting anxiously for a decision, especially when her livelihood, health care benefits, or housing may be at stake. Do not unnecessarily delay completion of the record. If you are not likely to be able to obtain the additional evidence (or if that evidence turns out to be unhelpful to your client's case), notify the hearing officer that the record may be closed and a decision rendered.

Remember that ordinarily the evidence that you introduce and object to at a hearing forms the sole factual basis for court appeal. A reviewing judge decides whether the evidence submitted at the

hearing is sufficiently “substantial” to support the prior decision. Once the record is closed, you will likely have no further opportunity to submit evidence in your case. Therefore make sure that the record before the hearing officer is complete.

## **B. The Hearing Memorandum**

A hearing memorandum is a written summary of your client’s case organized in the way that you want the hearing officer to consider the case. Writing the hearing memorandum before the hearing is often useful to help you organize and understand the case and its nuances. If you feel that the memorandum accurately summarizes the case as it was presented, you may decide to submit it at the hearing, generally after closing argument. In most administrative forums (check the applicable rules if you are uncertain), you can file a hearing memorandum after the conclusion of the hearing. Procedurally you will need to ask the hearing officer, at the end of the hearing, to keep the record open for a set period of time for submission of a memorandum. The advantage of revising the memorandum and submitting it posthearing is that you can incorporate the actual testimony and evidence that was presented at the hearing. This may be particularly important if the opposition introduced evidence that surprised you or required explanation or analysis.

If you are requesting a favorable finding based on the record prior to the hearing, you must accompany that request with a memorandum that explains why the record is so compelling that the hearing officer must find in your client’s favor without holding the hearing.

Preparing a hearing memorandum is an effective way to influence the outcome of the hearing favorably and can ensure that critical issues are preserved for appeal. Hearing officers are busy people with busy hearing schedules. A well-written memorandum can help the hearing officer organize the evidence and make and write the decision. The written decisions of hearing officers often reflect the points, emphasis, organization, and even phrasing of well-written hearing memoranda. A hearing memoranda can be es-

pecially important if the facts in a case are close or if the argument that supports your client’s case is legally or factually complex. In such situations, a thorough and concise written analysis can be particularly persuasive.

An effective hearing memorandum should be clear, concise, persuasive, and written in simple, declarative sentences with very little “lawyer’s jargon.” For hearing memoranda, there are various acceptable formats such as letters, proposed findings of fact and conclusions of law, and a more formal “legal brief” form. Check to ascertain which of these formats is permissible and customary in your particular forum. Regardless of format, the memorandum must be well organized with clear section heading separating each section and argument. You begin the memorandum without assuming that the reader knows anything about your case. It should include the following elements.

### **1. The Issues**

Start the memorandum with a concise statement of the issues to be resolved; cite statutes and regulations where appropriate. You may present these as questions that are carefully phrased to lead the hearing officer to find for your client by using your reasoning. By stating the issues first, you frame the discussion in your own terms and can lead the hearing officer into the course you set in your case strategy.

### **2. The Facts**

Give a brief synopsis of the relevant procedural and factual history of the case. You want to portray the facts in a light most favorable to your client without omitting critical facts. For each fact, cite its source in the evidence (such as “testimony of claimant at hearing,” “Exhibit No. 3,” and the like). From this section the hearing officer forms an initial opinion of the case. Frequently a busy hearing officer will incorporate your statement of facts into the decision. If your conclusion follows logically from your statement of facts, the officer will be inclined to adopt your position. The key to winning a hearing is often being the best-prepared par-

ty and having the most coherent notion of the facts and issues of the case. Also, if a hearing officer adopts your statement of facts but finds for your opponent, you will have a stronger argument to an appellate court that the hearing officer's conclusion is not supported by the facts.

### 3. Discussion/Argument

Your discussion of the issues raised is the “meat” of your memorandum. Identify each by using separate headings, phrased as an affirmative statement of your position. Break down issues into subissues; each subissue should have headings, indented to indicate the hierarchy of your argument. The headings show the hearing officer the direction of your case and make it easier for her to refer back to later portions of your analysis.

Discuss the most central issue first, and begin with a clear assertion of your position. In your argument for each issue, cite the applicable statutory and case law, and show the relationship between the cited law and the facts of your case. However, use cases sparingly; avoid extensive quotes, and discuss only a few selected authorities. Where testimony conflicts or where the dispute primarily involves conflicting interpretations of the law, write a persuasive argument supported by legal authority. If there is case law that appears to contradict your position, you should cite the case and explain how it is distinguishable from your case or why that law should not be applied. (However, do not go overboard with this; you do not want to make your opponent's case for your opponent or to appear too defensive.) Where you have good argument to make based on logic, make it, whether or not there is legal authority for your position.

### 4. Conclusion

The conclusion should summarize the answers to the issues raised at the beginning of the memorandum. These can be stated in narrative form or in the form of proposed findings. Each proposed finding should state a conclusion of fact and law; for example, “The claimant was discharged for misconduct within the meaning of the Unemployment Law, sec. 1.” Briefly support each assertion or proposed finding

as needed, stating the requirements of the law and facts that show the law favors your client. Arguing in the context of the proposed finding makes it easier for the hearing officer to adopt your proposed finding if your argument is persuasive. Conclude by arguing for your client's right to the desired relief based on the evidence produced. Clearly designate the date to which the requested relief should be retroactive, if applicable.

### C. Client Follow-Up

Stay in touch with your client until the hearing officer issues a decision. Be sure to utilize a monitoring system so that you know if the decision is overdue. If there is an undue delay (and the definition of “undue” varies with the forum), you should contact the hearings clerk to make sure that your client's case has not been misplaced, forgotten, or lost in the mail.

Once a decision is rendered, make sure that your client understands the decision and its ramifications. If the decision is favorable, follow up to see that the hearing decision is enforced and that your client receives all the benefits or the rights mandated in the decision. You may need to check the agency's benefit calculation to make sure that the determination is correct. Close the case only after you are sure that the opposing party has not sought review of the decision or that the time for such review has passed without action from the opposing party.

If the decision is not favorable, explain to your client the rationale of the decision and any appeal rights. Discuss the potential grounds for appeal and your best assessment of the likelihood of prevailing on appeal. In some situations, an individual who is dissatisfied with a decision may request to have the case reopened and revised prior to any appeal.

### D. Working with Clients Who Have Limited-English Proficiency

Although the minimum standard of due process requires agencies to accord a meaningful opportunity for your client to be heard, there are no uniform rules or practice regarding the provision of interpreter at administrative hearings. You may want to consult with your colleagues

to ascertain the practice of a particular forum. Below are some guidelines when using interpreters in administrative proceedings:

### 1. Requesting Interpreters

Where the agency does provide interpreters, be sure to ascertain the language or dialect in which your client is most fluent and request an interpreter of that language or dialect as early as possible.

### 2. Prehearing Preparation

Understanding that your client may have very little experience dealing with court-like settings, be sure to budget extra time to prepare your client with an interpreter even though you speak your client's language. This is to help your client experience how the hearing will be like with an interpreter.

### 3. Bringing Your Own Interpreter to the Hearing

Where agency practice is not to provide an interpreter or if the agency cannot find an interpreter who speaks your client's dialect or language, you should bring your own interpreter to the hearing. Prior to the hearing, you should ascertain the language ability of the interpreter and her interpreting skills and experience. There is nothing worse than having an interpreter who cannot interpret or interprets poorly. If you cannot communicate with your client, bringing an interpreter with you is always advisable. The interpreter can help you communicate with your client before, during, and after the hearing; she can also help you verify the quality of the interpretation given at the hearing even when the agency provides an interpreter.

### 4. Monitoring the Interpretation

Cases are won and lost on the basis of the quality of the interpretation at administrative hearings. If you speak your client's language, it is incumbent upon you to monitor the quality of the interpretation and to object when the interpreter is not properly interpreting. Bear in mind that interpretation cannot be done word for word. Interpretation involves decoding the message in the originating language and encoding it into the receiving lan-

guage with a coat of cultural nuances so that the message has meaning in the receiving language. When there is a substantial difference in the length of the original message and the interpreted message, it is a red flag to signal you that the interpreter may have omitted or added information.

### 5. Conducting the Hearing

Because interpreting is very involving, organize your part in ways that help the interpreter do her job. Here are a few suggestions:

- Ask your questions in short sentences.
- Avoid using idioms and colloquial expressions that do not have cultural equivalents.
- Do not ask compound questions or questions with double negatives.
- If you must use long sentences, pause often to allow the interpreter to catch up.
- Pose your questions directly to your client; do not say "ask her," or "tell him"; just ask the question as if you were communicating directly with your client to avoid confusion.

### 6. Posthearing Debriefing with Your Client

A hearing can be very confusing even to an English-speaking client; the confusion is compounded when your client cannot even comprehend firsthand what was said during the hearing. You should make sure to debrief your client immediately after the hearing; at least inform your client about the status of the hearing and the next steps so as to put your client at ease.



Administrative bodies determine a substantial portion of the claims affecting our clients' access to income, health care, housing, immigration status, and basic rights. Advocates can use these forums efficiently to secure their clients' claims without protracted litigation. By consistently engaging in high-quality advocacy at the administrative level, advocates also play the essential monitoring function to ensure that these agencies operate in ways that respect the fundamental rights of our clients.



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