

## **Best Practices in Administrative Hearings in Washington**

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Administrative hearings are similar to trials, and although both are governed by due process considerations, some significant differences exist in procedure and practice.

The degree of formality varies widely among various agencies, and procedures need to be tailored to the specifics of the forum.

Present all of the issues, testimony and documentary evidence necessary to meet your burden of proof, but tailor it to the statutory and regulatory standards relevant to your case.

Do not compromise the record, as many administrative decisions are ultimately decided on appeal.

### **Preparation for Hearing**

#### Know the Agency's Process

- Prior to any administrative hearing, review the enabling statute that creates an agency or vests it with certain powers and that may specify administrative procedures for hearings before the agency.
- Read thoroughly the agency's procedural regulations, rulings, policy manuals, or internal operating procedures that the agency may have adopted to govern its hearings.
- If the agency has not adopted procedural rules, then review the model rules.
- Re-examine the Administrative Procedure Act and state administrative procedural requirements of general applicability.
- Consider Constitutional requirements of due process and other "common law" procedural requirements applicable to administrative agencies.

#### Know the Presiding Officer

- Determine whether the presiding officer, administrative law judge, or hearing examiner (the "presiding officer" or "judge") is assigned to the agency by the Office of Administrative Hearing, or employed by the agency.
- Review prior decisions by the presiding officer if possible, particularly regarding cases similar to yours.



- Gather information from other advocates about the particular practices of the presiding officer before whom you will appear, including other ALJs and attorneys general.
- How active a role does the presiding officer play in taking testimony from witnesses? How do they handle exhibits? Do they apply any evidentiary rules? What is the hearing officer's attitude toward clients, witnesses and advocates?
- Does your judge preside with a firm hand or allow parties leeway and grant most requests? Should you be prepared for anything unusual about the hearing officer's conduct during hearings?

### Physical Preparations

- Administrative hearings are held in a variety of settings, often informal, such as meeting and conference rooms.
- Consider visiting the hearing room in advance to see where the presiding officer sits, the physical layout for you and your client, where witnesses and staff will sit in relation to the judge, and whether there is a room for colloquy.
- Most hearings are open to public observation, but the hearing officer may issue an order excluding witnesses.
- Confirm availability of easel, recorder, computer equipment, screen, etc.
- Determine how the record is going to be preserved and consider buying the transcript or making your own recording (either by tape or reporter) if you anticipate the need for record citations in post-hearing briefs, or if you anticipate the need to appeal.

## **Prehearing Considerations**

### Discovery

- Discovery may be entirely prohibited or, if permitted at all, conditioned or limited to the extent not otherwise dictated by enabling statutes or agency rules.
- Except as otherwise provided by agency rules, the presiding officer has broad discretion to decide whether and how much discovery to permit.
- The ALJ may entertain (though not necessarily grant) requests to permit the taking of depositions, the requesting of admissions, and all other procedures authorized by civil rules.
- For subpoenas of witnesses and records seeking information through third parties, the presiding officer will consider: (a) whether all parties are represented by counsel; (b) whether undue expense or delay in bringing the case to hearing will result; (c) whether the discovery will promote the orderly and prompt conduct of the proceeding; and (d) whether the interests of justice will be promoted.

- Always start with informal discovery by communicating with other parties about facts, documents and public records.

### Public Records Act

- The Public Records Act offers a means of discovery that is unique to administrative law.
- Requests for agency documents can be used instead of formal discovery, or as a supplement.
- Consider making a records request for documents submitted to the agency during administrative litigation similar to the one you are undertaking.
- You can also request internal emails, memoranda or interpretive statements on how to implement a statute or regulation.
- In most cases, protocol is to inform the parties and the presiding officer before making a public records request.
- Try to tailor it narrowly to relevant evidence and avoid a shot-gun approach, which might unnecessarily alienate agency staff, including the ultimate decision maker.

### Prehearing Negotiations

- Develop the case for hearing, but consider negotiations of settlement, which is encouraged in administrative proceedings.
- Discussions can produce discovery regarding the case, or tailor public records requests.
- At the very least, try to narrow the issues for hearing prior to appearing before the presiding officer.
- Prehearing conferences, when available, can facilitate efficiencies and focus points of controversy – and save client's money.
- Keep in mind that any pre-hearing settlements must be reviewed and approved by the agency itself, and authority to settle cannot be delegated.

## **Hearing Practice**

### Hearing Components

- Opening Statement – by presiding officer, by parties, by representatives.
- Testimony and Evidence – whether written or oral.
- Closing – in addition to or instead of post-hearing brief.

### Opening Statements

- Anticipate opening comments by the presiding officer about the procedure, and also possibly about the issues they feel need to be addressed.
- Prior to the hearing and off the record, confirm availability or ask for permission to make an opening statement.
- Succinctly orient the judge, your client and the opposing party by stating your theory of the case, highlighting the most important evidence that supports your theory, and clearly stating what you are asking for.
- Practice making an opening that identifies the issues and summarizes the evidence – pretend you are at a party telling a stranger a story about your case.
- Keep it short and direct – if your case is complicated and you need more than a few minutes, submit a prehearing memorandum.

### Direct Examination

- The goal of direct examination is to prove a prima facie case and because it is the key to developing a complete record, be sure to cover all essential legal and factual points.
- Do not limit direct examination to the bare bones of a prima facie case if there are other facts that would help persuade the presiding officer to resolve disputed issues in your client's favor, but do limit direct examination to only what is needed.
- Do not allow your witness to rant or ramble, and prepare your client as a witness to present testimony in an orderly, coherent manner.
- Prepare your witnesses to begin and end on strong points.
- Do not state facts yourself, and do not express opinions about a witness's testimony while examining the witness – reserve comments on the credibility or weight for closing.
- Consider using pre-filed testimony to tell an orderly and coherent story instead of live direct examination.

### Role of the Presiding Officer

- The administrative law judge may conduct an initial examination of your client and other witnesses before your direct examination.
- Do not treat the presiding officer as an adverse party, and even if the questions are objectionable consider the costs and benefits of objecting before doing so.
- If an objection is necessary to protect your client's appeal rights, then and only then you should object and succinctly state your reasons for objecting.

- Be prepared to follow up with additional questions not addressed by the hearing officer.
- During your direct examination, be alert for indications that the presiding judge does not understand or comprehend the witness, so you can clarify the testimony immediately.

### Cross Examination

- Considering your opponent's probable theory of the case, prepare cross-examination questions for each opposition witness.
- To control an adverse witness during cross-examination, avoid open-ended questions and prepare questions that require only a "yes" or "no" answer.
- If the witness evades a question, simply repeat the question politely until you get an answer, or ask the presiding officer to instruct the witness to answer the question.
- Each question should introduce no more than one new fact, and questions should progress logically toward a specific goal.
- Do not argue with the witness.

### Cross Examination – or Not?

- You may have to wait until the hearing itself to decide whether to cross-examine a particular witness.
- If your case is strong, minimize your risks, but if you have a weak case you may be forced to consider whether to ask the witness a question that you don't know the answer to, or take other risks on cross-examination.
- Consider foregoing cross-examination if the witness did not hurt the essential elements of your case or if the witness's testimony was not credible.
- Consider forgoing cross-examination entirely if the witness failed to bring up damaging testimony on direct, to avoid opening the door by conducting cross-examination and thereby creating a second chance to raise the damaging testimony on re-direct.

### Redirect Examination

- Redirect is only necessary to correct misstatements, inconsistencies, or misleading impressions that may have been created during cross-examination.
- Ask the hearing officer for the opportunity to reexamine your witnesses after your opponent or the hearing officer has questioned them.
- Limit redirect only to what is necessary to make corrections, to rehabilitate your witness's credibility, and to clarify your witness's favorable testimony.

- Depending on the forum, the applicable rules, and the hearing officer's style, you may use redirect examination to introduce issues not already raised in direct or cross-examination – but do not withhold important testimony on purpose because you might not be permitted.

### Closing

- Practices regarding closing arguments vary according to the type of hearing and the style of the presiding officer.
- Determine from the presiding officer at the beginning of the hearing whether closing arguments will be permitted at all, and if so, whether orally or in writing or both.
- Be prepared to give a concise and persuasive closing argument, and then summarize the facts and law in detail in a post-hearing brief or memorandum.
- You may need to ask in advance for the opportunity to do a rebuttal, and the hearing officer may require you to reserve time from your closing.

## **Evidentiary Matters**

### Rules of Evidence

- Administrative hearings are typically less formal than court proceedings, and any evidence that a “reasonably prudent” person would rely on will probably be admitted.
- Even hearsay is admissible, but it cannot be the sole basis of the hearing officer's decision so plan to supplement it with harder evidence.
- Rules of evidence nonetheless apply by analogy to the extent the presiding officer determines, taking into account Constitutional due process limitations.

### Objections

- Prior to the hearing, consider the evidence you plan to introduce, anticipate possible objections to your documents and to your witness's testimony, and plan your probable justification on evidentiary grounds.
- Consider the evidence that your opponent is likely to introduce, whether you may have a sound basis for objecting to its admission, and anticipate how and when you must object to preserve the record for appeal.
- If the presiding officer overrules your objection, offer to submit a post-hearing legal pocket brief in order to preserve the issue for appeal instead of arguing the point at the hearing, at the risk of alienating the administrative law judge.

- Use objections sparingly as needed only to make a record for appeal, and instead of objecting make note of hearsay, irrelevance and other evidentiary weaknesses and then emphasize them in closing or post-hearing briefs.

### Use of Exhibits

- The procedure for introducing exhibits at an administrative hearing is less formal than in judicial proceedings, but be prepared to lay a foundation properly.
- Depending on the type of case, submitting exhibits and documents to the presiding officer before going onto the record prior to the hearing may be preferable.
- Some agency rules contain protocols for submitting documentary evidence, and may even prescribe exhibit numbering or formatting standards, so make sure to check and comply.
- Admitting all documents and other evidence before going on the record may present no problems if you are merely stipulating to the admissibility of unobjectionable documents, but insist that any objections to the admissibility of a document take place on the record.
- Be sure the way the exhibit comes into evidence ensures that the hearing officer – and any appellate tribunal – understands the purpose, nature, authenticity, and reliability of the exhibit.
- Before the hearing, prepare a list of the evidence you need to have admitted, or a binder with exhibits numbered, and then check off each item as it is admitted.

## **Post-hearing Concerns**

### Leaving the Record Open

- Consult the applicable regulations to determine whether post-hearing submissions are permitted and, if so, what procedures you must follow.
- You may request to keep the record open for a defined period of time to submit additional evidence or post-hearing memoranda, particularly if problematic issues emerged at the hearing.
- If the presiding officer leaves the record open for the submission of additional evidence, you should obtain that evidence and submit it as quickly as possible.

### Post-Hearing Briefing

- Check the agency's rules, but in most administrative forums, you have the right to file a hearing memorandum after the hearing concludes.

- The advantage of submitting post-hearing briefing is that you can incorporate the actual testimony and evidence that was presented, which can be particularly important if the opposition introduced evidence that surprised you or requires explanation or analysis.
- Administrative decisions often reflect the points, emphasis, organization, and even phrasing of well-written hearing briefs, and you can help the judge by writing your brief so that it can be cut and pasted into an order easily.
- Drafting a memorandum prior to the hearing is a useful technique to assist you in organizing and understanding the case.

### Acting on the Initial Order

- After the hearing, review the agency rules about whether administrative review is available, and the time periods for agency or judicial review.
- When the order comes out, mark your calendar with the appropriate deadlines.
- Confer with your client about the impact of the decision, and be sure that the client understands the decision and its ramifications.
- Discuss any potential grounds for appeal and offer your best assessment of the likelihood of prevailing on appeal, considering especially the basis for the decision and the appropriate standard of review.
- Consider and identify whether and when any compliance activities are required.

### **Final Thoughts on Etiquette**

- Even though administrative hearings are not as formal as court trials, do not compromise your credibility or that of your client by lowering your standards of professionalism or courtesy.
- Give the presiding officer the same level of respect and deference that you would give a judge in a courtroom proceeding.
- Be mindful of the prohibition of ex parte communications, and if you have any doubt about whether your procedural question is proper, send an email with opposing party's counsel copied stating your issue.
- Always make sure that you, your client, and your witnesses arrive at the hearing on time or early, so plan on appropriate travel time and logistics.
- Be polite to all of the parties, and stay calm – don't get angry when the other side is doing their job well.