THINGS THAT DRIVE US CRAZY:

COMMON MISTAKES IN PRESENTING YOUR CASE

Materials Prepared by

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Pre-hearing Preparation

Unfortunately, one of the most common errors made by attorneys, and perhaps the most annoying to presiding officers is for an attorney to attempt to represent a party at an administrative hearing without understanding the scope of the hearing, what is at issue in the hearing or the rules of administrative practice that pertain to the agency for which the case is being heard. There is no excuse for this kind of ignorance of the law; the scope of the hearing, the relevant rules of practice and the issues pertinent to the case are described or referenced in the initial notice from the agency and the notice of the hearing. The parties and their counsel should have read those notices prior to the hearing, *at the very least*. Preferably, the statutes and regulations that pertain to the allegations made by the agency also should be thoroughly reviewed prior to the hearing.

If you intend to cite a case that may be unfamiliar to the presiding officer or to your opponent, provide copies of the case. Bring at least two copies to the hearing—one for the administrative adjudicator and one for the opposing party.

Motion Practice

Motion practice can be a substantial aspect of an administrative proceeding. The hearing officer typically has a full workload and, as a practical matter, appreciates motions, whether oral or written, that are concise and succinct. If the hearing is the type in which you have a prehearing conference to discuss scheduling, your jurisdiction allows motions for summary determination, and you anticipate filing a motion for summary determination in the matter, let the hearing officer know so that briefing on the motion can be built into the prehearing schedule. Although procedural rules often set the deadlines for filing the motion and the response, these deadlines may be impractical in

some cases, as they do not leave enough time for the hearing officer to issue a ruling on the motion prior to the scheduled hearing date. Therefore, some hearing officers prefer to set a timeline of filing motions for summary determination that may differ from procedural guidelines.

When writing a motion, avoid using fifteen pages when the same message can be conveyed in five. Likewise, when making an oral motion, a lengthy oration is neither necessary nor useful. If you are going to file a motion for summary determination, make sure to attach to the motion the evidence (either by way of affidavit or documentation) of the facts you contend are undisputed. Even the simple, foundational facts need to be established on the record. Also, try to be as specific as you can as to the issue you want resolved. Track, and stick to, allegations in the agency notice.

Another important aspect of effective motion practice during the hearing is timeliness. Timely motion practice requires strict attention to the hearing as it progresses. Motions are more likely to be granted if the situation calls for the motion. If, during the course of the hearing, testimony or other evidence is presented that suggests a motion, make it. It is not necessary to hold your motion until the conclusion of the hearing. Conversely, don't make a motion prematurely.

With regard to motions, remember that simultaneous briefing usually is permissible. If it is not, or you prefer serial briefing, the moving party normally has the final say. However, administrative adjudicators typically have the discretionary authority to deny the movant the power to file a responsive brief.

Nature and Conduct of the Hearing

At the beginning of the hearing, or during the pre-hearing conference, the presiding officer will make an opening or summary statement which will serve as a roadmap or ground rules for the hearing. Do not ignore that statement, perhaps while checking your cell phone for emails and text messages. Don't assume the statement is being made for someone else's benefit. The statement is as much for you as for anyone else in the hearing room. Ignoring the opening statement often results in wasting time, making avoidable mistakes, and creating a bad impression on the person who is deciding your case.

An administrative adjudicator is expected to be more involved in the administrative hearing process than a judge in a traditional court setting might be. Decades of case law supports their active involvement in the hearing. It is expected that ALJs will ask questions, particularly if a party is self-represented. It is not improper for them to do so. They have an affirmative duty to make a fair and complete record of the hearing. Failing to ask questions to develop the record can even be reversible error. Consequently, you

should not resent their involvement, display anger toward it, or challenge their right to ask questions.

Agencies believe that they have the authority to interpret their own statutes and regulations and that they should be accorded deference by the administrative adjudicator in doing so. You may argue that the agency is not entitled to deference; however, whether the agency is entitled to deference will ultimately be determined by an appellate court. In many states, case law clearly supports the deference given to an agency. Fighting the concept of deference, as opposed to focusing your efforts on making your case regarding the issues presented in a hearing, could be a waste of time.

Don't assume that the administrative adjudicator knows something (*e.g.* how the agency will apply a statutory standard) and therefore neglect to make a record on that matter. It is important to establish your position (and the basis for your position) on the record for all pertinent matters, even if you think you know what the adjudicator might think or do.

An ALJ or hearing officer is not a "Court of Equity" and should not be treated as such. Administrative hearings fall under the Executive Branch of government and are tribunals of limited jurisdiction. Appellate courts, including the U.S. Supreme Court, have approved of quasi-judicial authority being passed on to the Executive Branch of government only in instances where a legislative body has provided ample standards to direct administrative agencies in executing governmental policies. These standards set the boundaries of the authority of hearing officials and their authority to act is dependent entirely upon the statutes vesting them with power. The administrative adjudicator understands the limits of his or her power and a challenge to the scope of that power is properly made on appeal, not at the hearing.

The ALJ or hearing officer has numerous, detailed statutes and regulations governing the circumstances under which—to use but one example--sanctions are to be imposed and the severity of those sanctions. It is fruitless to throw a client who has clearly committed the impermissible act which was alleged upon the "mercy of the court." An administrative adjudicator has no authority to do anything other than that which the statutes and regulations require—and they rarely (if ever) permit the waiver of sanctions in instances where the evidence proves the allegations to be true.

Conduct of the Parties and Counsel

Regrettably, the bar's tendency is often to take the administrative venue lightly—"This is *just* an administrative hearing." Keep in mind, however, that this administrative process is provided for and described in the statutes which attorneys have taken an oath to uphold. While before the hearing officer or ALJ, keep in mind he or she has an intense respect for the administrative judicial process, and fully expects the litigants and counsel to share the same sentiment. Demonstrating respect for the administrative hearing

official or tribunal establishes your respect for the law and acknowledges the importance of the matter before the court.

Thus, it follows that attorneys and clients should be especially mindful of gestures at counsel table and avoid lengthy or frequent sidebar conversations during the hearing. It is important not to make dramatic or even noticeable gestures or appear to be ignoring what is going on in the hearing. This includes body language, eye rolling and scoffing at an adversary's comments or the ruling of the hearing officer. Composure and respectful behavior should be maintained while the adversary is addressing the court. Moreover, do not let personal feelings spill over into the presentation, tone or comments made to the court. It is not comforting to a client, and indeed may result in the client complaining to the bar, when a presiding officer needs to scold a misbehaving attorney.

Perhaps most importantly, be polite and never interrupt or challenge the administrative adjudicator when he or she is asking a question or presenting his or her position on the record.

Of course, properly-based objections to testimony are permissible. But do not as a general matter interrupt a testifying witness in an effort to try to limit his or her testimony. An objection and timely motion to strike are sufficient to preserve your legal point, and they permit a better "flow" of the evidence, saving time for everyone. The witness is entitled to testify in full and the presiding officer has a duty to build a complete hearing record. Appellate courts have frequently remanded cases for re-hearing or supplementation of the record in instances where testimony appears to have been intentionally limited. Ordinarily, the only limitation placed on testimony should be one of relevance.

Do not argue with the administrative adjudicator regarding his or her rulings on objections or motions. Once the ruling has been made, your opportunity for further argument about the ruling is at the appellate level. If you need to preserve your objection for the record (or want to put on offer of proof on the record), do so and move on.

If a self-represented party or his/her witness is on the witness stand, do not ask ambiguous, argumentative, repetitive, compound, confusing, harassing, leading or unintelligible questions. If you do, the hearing officer will sustain an objection against the form of the question *sua sponte*. An ALJ should not, and ordinarily will not, allow counsel for one party to bully, confuse, intimidate or railroad the self-represented party. Allowing a self-represented party to be treated in this manner can result in a remand for re-hearing.

Do not persist in ploughing the same furrow over and over again. The administrative adjudicator is paying attention. If a presiding officer happens to miss a point, which is unlikely even if you think they have, there is the record of the hearing to review. The hearing official typically has a very heavy docket and appreciates succinctness far more than unnecessary repetition.

Administrative adjudicators are impressed by professionalism, not posturing. Expertise is demonstrated by competence at representing a client in an administrative venue, not by grandstanding or pretentiousness. Remember, there is no jury for which to perform; the presiding officer will not be impressed by your attempt at cleverness or other trial tactics.

Hearsay

Don't raise a hearsay objection to every out-of-court statement. It wastes your time (and the ALJ's), and implies you need an evidence refresher course (FRE 801 and 802). Hearsay is an out-of-court statement, offered *to prove the truth of the matter asserted*— not merely an out-of-court statement.

Hearsay is generally admissible in administrative hearings unless it is precluded by statute or is unreliable (*i.e.*, is not the type of statement commonly relied upon by reasonable and prudent persons in the conduct of their affairs). As a result, hearsay is routinely accepted in a formal administrative adjudication. Exclusion of hearsay may even be reversible error.

- Out-of-court statements made to show the reason for an investigation are not hearsay.
- Out-of-court utterances offered to prove a matter implied by, but not asserted in, the utterance are not hearsay.
- Out-of-court statements made by a party or witness that is present to testify regarding the statements are not hearsay.
- Out-of-court statements made by agency staff regarding agency policy or procedures or by experts in peer-reviewed publications regarding a matter within their area of expertise are not hearsay.
- An out-of-court statement is admissible as hearsay if it has relevance apart from the truth of the matter that it asserts or implies as in, *e.g.*, situations in which the relevant point is not what the statement *says*, but the *fact that it was made*.