Cross-Examination Tips – A Mock Administrative Hearing
with Dwain Fagerlund, Mary Long, and Sarah Huber
1-hour
Description: How to test witness credibility during an administrative hearing.

Learn the basic objectives of cross-examination. Watch live examination of witnesses in a mock hearing. Identify inconsistencies that indicate evasion and deception. Search for weakness of recollection; test how a witness came to know the facts to which the witness testified; explore possible interest in the outcome of the trial; expose any bias or prejudice a witness may have; give a witness the opportunity to be frank or evasive; and judge whether the testimony was reasonable or unreasonable.

I. Objectives
   a. Find agreement (low hanging fruit)
      i. Easy stuff: "You live in [Your State]. Yes. You applied for a driver's license with the Department of Transportation. Yes. You passed both the written and behind-the-wheel tests. Yes. You were granted driving privileges in North Dakota. Yes." Theme: with privileges also come responsibilities.
      ii. Facts specific to the issue in dispute: "Recall Officer Smith's testimony? You told him that you drank two beers. Agree with that statement?" "Yes." (witness may know that his statement was recorded).
      iii. Testimony that corroborates testimony of opposing party can be especially persuasive.

   b. Challenge credibility (more risk / more reward)
      i. Easier to establish that witness is mistaken or biased than outright lying.
      ii. Elicit testimony that can be compared / contrasted to facts that can be independently proven. "How much did you have to drink?"
      iii. For example, you know that the alcohol concentration test results are above the legal limit. If the blood alcohol concentration was 0.27 and the driver claims to have only consumed two beers, the finder of fact can reasonably conclude that the witness's memory was impaired by the consumption of alcohol (or that she was lying).

iv. Independent proof: Review the administrative record for prior inconsistent statements where a witness made admission to a credible witness and/or a recorded statement.
v. Memory: Details, details, details. Test the witness's memory by inquiring about specifics. When did you start drinking? What were you drinking? Who were you drinking with? Where were you drinking? If you get a "I don't recall" or "I don't know", that may be evidence of impaired memory or untruthfulness. If a witness has to refresh their recollection for every question, their testimony may be impeached.
vi. Bias: What is the relationship of the witness to the hearing participants? How would that relationship color the witness's view of each position? Example: Parents testify on minor driver's behalf. If minor's driving privileges are cancelled, parent will have to drive minor to school and activities.
vii. Assumptions: There are a lot of "facts" that we all just "know." Administrative hearing officers can take judicial notice of some that are beyond dispute, e.g., 2:00 AM is after sundown in the lower 48 states. Others must be proven unless a party admits or stipulates to the assumed fact, e.g., "How do you know that the radar device was working properly?"
viii. Reliable source of information: Bad in, bad out. Establish that the witness's source of information was not reliable. Q: "How far away was the vehicle when you saw the traffic violation?" A: "1/2 mile." Q: "All you could see were taillights, right?" A: "Yes." Q: "Is it possible that the vehicle was swerving to avoid a deer?" A: "Yes." Q: "Did you ask the driver why he swerved?" A: "No." Q: "Is it common for deer to cross the road at that location?" A: "Yes." Q: "How many times did you see the pickup swerve?" A: "Only once."
ix. Outrageous claims. Keep your cool. Give them rope.
x. Keep it simple. Limit inquiry to a small number of issues – then stop your cross-examination.

II. Plan ahead:

a. What are the elements that must be proved by the agency? What will this witness say to support or refute them? What are the points that the other participants are trying to establish? What will this witness say to refute / support them?

   i. Research whether any legal presumptions apply to your area of administrative law. Presumptions may shift the burden of proof from one party to the other.