The OAH

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Official Newsletter of the Arizona Office of Administrative Hearings

Questioning Witnesses -Reality is the Record

Allen Reed, Administrative Law Judge

***Director's note**:* OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

The adversarial hearing or trial process is the currently established legal means (arbitration and mediation aside), for resolving disputes between parties, including disputes with State agencies The process is often referred to as the search for the truth and is presumed to be more reliable than trial by combat or the dunking stool. Whether the process actually finds what it is seeking, depends on how a case is presented.

Disputes involve a multitude of factual and legal matters. Unless disputed matters involve only legal issues (such as the application of the law or the interpretation of a contract), the factual picture of the events surrounding any legal controversy are generally crucial to a case. These facts may be lost or distorted since the past, unless videotaped, is rarely completely recaptured. Physical facts, whether documents or other tangible items, are not as transitory as events and are, therefore, more susceptible to certainty. Nevertheless, events leading to (as well as tangible matters which may be part of) a dispute depend on the presentation of the testimony of persons having some knowledge about relevant events and conditions.

The facts surrounding any controversy will vary somewhat with each person having any experience with or exposure to those facts. It is generally accepted that persons may observe a neutral phenomenon but subjectively experience different responses, feelings or recollections about the event. It is even more likely that persons who are participants in a situation where they have a personal interest (emotional, financial, or psychological, etc.) will interpret the events differently from participants with conflicting or no interests. These differences often become greater over time. Truth may become very subjective based on selective recollection.

However, in any shared experience, absent delusion or fabrication, the facts cannot be completely altered. The devil (the dispute or disagreement) will be in the details. The ultimate truth in contested matters brought on for hearing before the OAH is based on the record established at the hearing. If a party fails to prepare or present competent evidence (usually in the form of witness testimony), the record may well reflect a reality which is seriously distorted from the actual state of affairs, but in the mind of the Administrative Law Judge (ALJ), the record will nevertheless constitute the reality of what happened, or of what presently is, for the purpose of making a recommendation in the case.

Although all possibilities connected with the questioning of witnesses cannot be anticipated or discussed in this article, there are some general rules which may prove to be instructive. The following is not all inclusive but should present a framework for the efficient presentation of your case through testimonial evidence. In order to competently question a witness you need to organize your entire case.

Know the issues! Know the specific matter(s) the hearing is about. Identify the disputed matters. One cannot ask relevant and probative questions without fully understanding the issue(s).

Know the law! Know how the law applies to each issue and how the law applies to the entire case.

Prioritize the issues! Differentiate between what is important and what is not. Too often parties expend unnecessary time and energy in trying to make a point about inconsequential matters.

Prioritize your facts! Once you know the issues and the law, you should be able determine what facts are important, what you need to prove (establish as true), and how you are going to prove it.

Questioning Witnesses
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The Office of Administrative Hearings (OAH) began operations on January 1, 1996. Administrative Hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to the OAH for independent proceedings. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

The process of unifying the administrative hearings function in OAH-style agencies began in 1945 with California. The current states or cities having adopted the model, with year of inception are: Arizona (1996), California (1961), Colorado (1976), Florida (1974), Georgia (1995), Chicago (1997), Iowa (1986), Kansas (1998), Louisiana (1996), Maine (1992), Maryland (1990), Massachusetts (1974), Michigan (1996), Minnesota (1976), Missouri (1965), New Jersey (1979), New York City (1979), North Carolina (1986), North Dakota (1991), Oregon (1999), South Carolina (1994), South Dakota (1994), Tennessee (1975), Texas (1991), Washington D.C. (1999); Washington (1981), Wisconsin (1978) and Wyoming (1987).

Mission Statement:
We will contribute to the quality of life in the State of Arizona by fairly and impartially hearing the contested matters of our fellow citizens arising out of state regulation.

2nd Quarter Statistics At A Glance

Acceptance Rate:
ALJ findings of fact and conclusions of law were accepted in **96.93%** of all Administrative Law Judge decisions acted upon by the agencies.* ALJ decisions, including orders, were accepted without modification in **93.82%** of all Administrative Law Judge decisions acted upon by the agencies. **77.77%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:
There were 50 appeals filed in Superior Court.

Rehearings:
The rehearing rate was **.32%**, defined as rehearings scheduled (3) over hearings concluded (942).**

Completion Rate:
The completion rate was **102.93%**, defined as cases completed (1615) over new cases filed (1569).

Continuance:
The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 2nd quarter) was **38 days**. The frequency of continuance, defined as the number of continuances granted (220) over the total number of cases first scheduled (1542), expressed as a percent, was **14.26%**. The ratio of first settings (1578) to continued settings on the calendar (238) was **1 to 0.15**.

Dispositions:
Hearings conducted: **58.3%**; vacated prior to hearing: **38.7%**; hearings withdrawn by the agency: **3.0%**.

Contrary Recommendations and Agency Response:
20% of Administrative Law Judge decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge decisions was **72.0%**

*1.10% of Administrative Law Judge decisions were certified as final by the OAH due to agency inaction or rendered moot by settlement.
** Cases which were vacated are not included.

Questioning Witnesses
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Know the witness! What does the witness know about the facts and how can you best get that information into the record. Put your witnesses at ease. A nervous witness generally will not testify as effectively as one who is organized and natural.

Knowledge of the issues, law, facts, complexity of the subject matter and the ability of the witness to communicate are some of the things that must be considered when determining what questions to ask and how to ask questions of the witness. Remember, you are presenting your story. It should generally consist of a logical and connected sequence of events with a beginning, middle and an end. Questions and answers should convey information in a clear, succinct, non confusing manner. Although an ALJ has experience in listening and separating the "wheat from the chaff", he or she cannot hear what is not said or what is unnecessarily convoluted.

Because of the relaxed rules of evidence in the administrative setting (*see* A.R.S. §41-1092.07), evidence must only be substantial, reliable and probative. The questioning of a witness in an administrative hearing is less demanding from a legal perspective and more demanding from a practical perspective. You won't be constrained by technical rules of evidence but you will have to be aware of the potential for a broader range of evidence which may be admitted and considered with the potential for extraneous or irrelevant information being placed into the record. In the latter instance, the ALJ will often request that the evidence be made relevant to the issues. In the administrative hearing, issues concerning evidence are usually more practical (how much weight certain evidence should receive) rather than legal (why evidence should or should not be admitted).

Factors to consider in questioning a witness are numerous. Among them are the type of case. A Seriously Mentally Ill-Behavioral Health case will differ from a Mobile Home Landlord - Tenant case. Who are the parties? A disciplinary case where an agency is represented by an Assistant Attorney General (such as a case arising out of the Arizona Medical Board where the Board is attempting to suspend or revoke a physician's license) will differ from cases involving private parties having the primary interest (such as the typical Registrar of Contractor (ROC) case where a homeowner is complaining about work performed by a contractor). Are attorneys involved in the case? Whether none, one or all the parties are represented by attorneys, will affect the questioning of witnesses. What is the subject matter of the case? Who has the burden of proof? Are you trying to establish the truth of a fact or refute the other side? Who is the witness? What is his or her knowledge about the case? Keep in mind that if you are the person who has the most personal knowledge about the case, you are your most important witness. Technical and esoteric areas will require a certain type of testimony, possibly from an expert. Participants in a hearing will present their respective versions of the facts based on their subjective recall and that of their witnesses. Presumably, there will be conformity between the testimony by a party's witness and a party's position on the facts. There may be exceptions to this since ROC inspectors are not necessarily party witnesses.

One of the first rules of the trial arena is, "Never ask a question to which you don't know the answer." Since the administrative setting has limited discovery tools, the answers which will be given by adverse witnesses very often cannot be known until a question is asked at hearing, although one should always have some understanding of the other side's case. For administrative purposes, the rule can be modified to state, "Never ask your own witness a question to which you don't know the answer."

This does not mean you may cause your witness to testify less than honestly or truthfully. Nevertheless, proper preparation prior to hearing to determine what the witness knows or does not know and how the witness will testify about those elements which are crucial to your case is essential for the effective presentation of your case. Try to strike a balance between no preparation and over preparation of a witness. Oftentimes when it comes to credibility, there may be little difference between a witness who is too rehearsed causing answers to sound artificial and a witness who is unsure and disorganized in giving answers. Both may result in credibility problems.

Is narrative testimony better than short question and answer? Generally, long narrative questions and answers are not favored. This is because narratives tend to ramble, may be convoluted and confusing, and often contain irrelevant information. When possible, it is best to keep questions to your witnesses simple, direct and succinct in order that the answers are similar. Do not ask multiple questions as a single question because they are confusing and require multiple answers. Make sure the witness lets you finish a question before an answer is given. Make sure you let the witness finish an answer before you ask the next question.

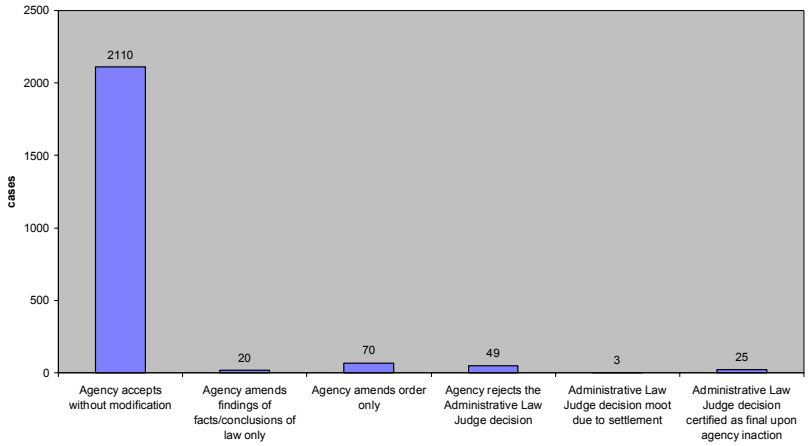
When you question the witness begin with the obvious. What is their name, relationship to the parties, basis for knowledge concerning the matters at issue, and basis or foundation for any special knowledge. This preliminary questioning will set a more comfortable mood for you and the witness as well as laying a foundation for who the witness is and what the witness knows. Don't dwell on it, but address any evident weaknesses in your witness before the other side does (potential bias, memory, lack of direct knowledge, etc.)

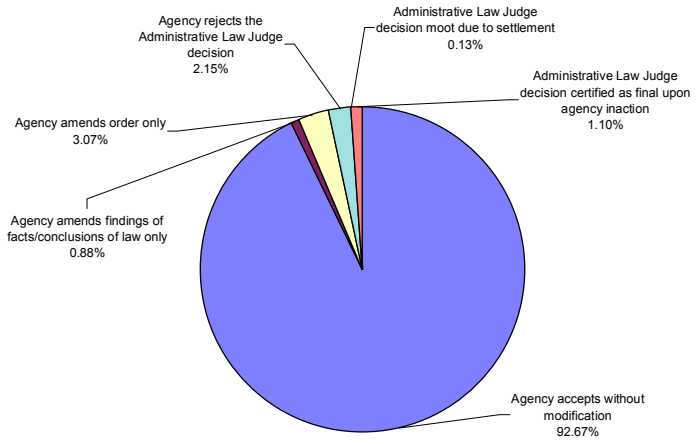
Make sure your questions are properly organized so you can convey the message you are trying to convey in an orderly and logical manner. Don't jump from one issue to another and then back again.

Leading questions may be asked of hostile or adverse witnesses. The leading question usually has the answer contained in the question. If properly phrased, it should only require a "yes" or "no" answer, and can make very direct evidentiary points, limiting possible unfavorable evidence which could detract from those points.

Do not lose your composure or get angry if an adverse witness does not answer the way you want. Impeachment of witnesses may be

Agency Response to Administrative Law Judge Decisions October 1 - December 31, 2002

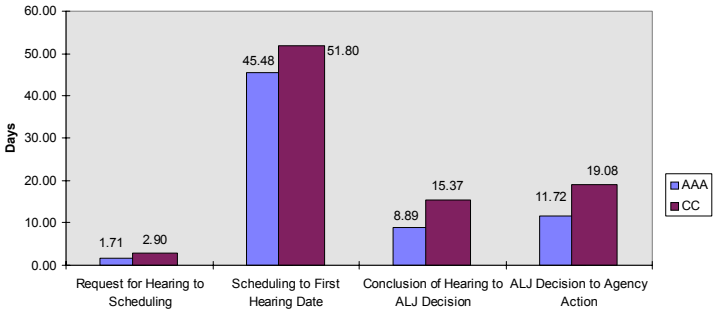




accomplished any number of ways. Impeachment simply means that the truthfulness or accuracy of a person's testimony is suspect for any number of reasons. These can range from a prior felony conviction, or personal bias, or a person's ability to have perceived or recall the events they are testifying about. Does the witness know what she claims to know? How does the witness know? If you cannot impeach the witness, don't continue questioning on the same issue because this often results in the adverse testimony making an even stronger impression than would otherwise be the case. If a witness is testifying based on what someone else told them (generally hearsay), don't spend time attacking the credibility of the witness but rather point out the potential unreliability of the hearsay and its source.

Keep in mind that the Law, especially in the administrative setting, does not need to be mysterious. The Law has little utility in the abstract, save as an intellectual exercise and can only be given substance by its application as a tool for the benefit of people. Your presentation of evidence through the questioning of witnesses needs to follow practical rules based on organization, preparation, reason, and plain common sense.

Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, October 1 - December 31, 2002



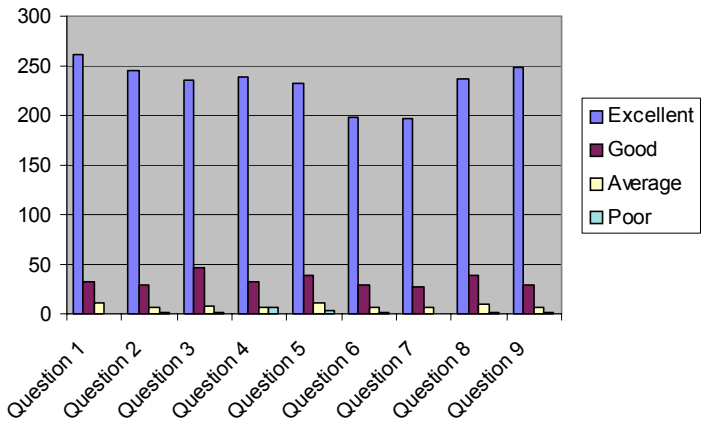
*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An example would be proposed discipline on a professional license with the possibility of suspension or revocation. Parties are entitled to a hearing before the OAH prior to the agency acting.

1569 Cases Filed October 1, 2002 - December 31, 2002

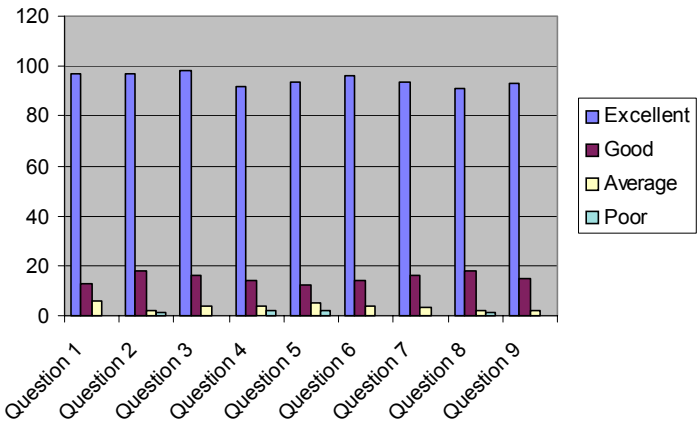
	2nd Q	FY 2003		2nd Q	FY 2003		2nd Q	FY 2003
Accountancy	1	3	Dental	3	5	Pest Control	0	5
Acupuncture Board	0	0	Economic Security	0	0	Physical Therapy	0	0
ADA	0	0	Economic Security-CPS	69	137	Podiatry	0	0
Administration	2	6	Education	3	5	Psychologist Examiners	0	0
Admin. Parking	3	52	Environ. Quality	41	71	Public Safety - CW	0	2
Agriculture	0	0	Funeral	0	0	Public Safety - Trans	2	8
Ag. Emply. Rel. Bd.	0	0	Gaming	1	3	Public Safety - Adult CC	0	0
AHCCCS	670	1531	Health Services	71	151	Pvt. Post. Ed.	0	0
Alternative Fuel	1	1	Insurance	39	66	Racing	11	12
Appraisal	9	11	Land	4	11	Radiation Regulatory	0	0
AZ Bd. Occup'l Therapy	0	0	Liquor	12	30	Registrar of Contr.	475	862
Attorney General	2	3	Lottery	1	1	Real Estate	17	37
Arizona Works	0	1	Maricopa Cty. Housing	0	0	Revenue	11	30
Banking	13	23	Medical Board	6	11	School - Deaf & Blind	0	1
Behavioral Health Ex.	0	1	Naturopathic	0	1	Secretary of State	4	8
Building/Fire Safety	24	57	Nursing	12	24	Technical Registration	2	2
Charter Schools	1	1	Nursing Care Admin	0	0	Veterinary Board	0	1
Chiropractic	3	3	Occupation Therapy	0	0	Water Qual. App. Bd.	0	0
Clean Elections	0	0	Osteopathic	0	0	Water Resources	4	7
Community Colleges	0	0	Parks	0	0	Weights and Measures	14	20
Cosmetology	4	4	Peace Ofc. Standards	2	5			

Evaluations of OAH Services

Unrepresented Responses 2nd Quarter



All Responses 2nd Quarter



Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

Note: The four major groups of those who responded are: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The evaluations are filled out immediately after the hearing and the evaluations are not disclosed to the ALJ involved.

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