

The OAH



Janet Napolitano
Governor

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Director

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www.azoah.com

Official Newsletter of the Arizona Office of Administrative Hearings

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 articles may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

Exclusion of Witness From the Hearing Room

Diane Mihalsky, Administrative Law Judge

Rule R2-19-118 of the Rules for the Office of Administrative Hearings provides that, "[a]t the request of a party, or at the discretion of the administrative law judge, the administrative law judge may exclude witnesses who are not parties from the hearing room so that they cannot hear the testimony of other witnesses." This article briefly discusses the circumstances under which a party may request and the administrative law judge may grant a request to exclude witnesses from the hearing room.

The administrative rule is wholly discretionary, which means that, if a party requests that non-party witnesses be excluded, the administrative law judge is not required to grant the request.¹ Parties' attorneys cannot be excluded from the hearing. Parties may request, or the administrative law judge may order, that witnesses be excluded at any time during the administrative hearing.² If the rule of

"Exclusion"

(continued page 2)

Opening Statements and Closing Arguments

Brian Brendan Tully, Administrative Law Judge

Opening statements and closing arguments delivered during an administrative hearing are not considered evidence by the Administrative Law Judge who conducts the hearing. They are presented by a party, a party's authorized representative, or a party's legal counsel. Such statements are not given under oath or affirmation and are not subject to cross-examination by the opposing party.

Opening Statements

Opening statements are presented prior to the parties presenting their respective cases. Opening statements are an opportunity for the parties to briefly outline their respective presentations to the Administrative Law Judge. Because such statements are not presented under oath or affirmation subject to cross-examination, the opening statement is not the time for a party to explain their entire case. If a party were to do so, that party would be required to repeat the explanation under oath subject to cross-examination in order for the explanation to be considered testimonial evidence.

"Opening and Closing"

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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 agen-

cies 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.

3rd Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **93.99%** of all Administrative Law Judge decisions acted upon by the agencies.* ALJ decisions, including orders, were accepted without modification in **85.7%** of all Administrative Law Judge decisions acted upon by the agencies. **8.29%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were 27 appeals filed in Superior Court.

Rehearings:

The rehearing rate was **1.77%**, defined as rehearings scheduled (16) over hearings concluded (903)**.

Completion Rate:

The completion rate was **105.35%**, defined as cases completed (1714) over new cases filed (1627).

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 3rd quarter) was **37.92 days**. The frequency of continuance, defined as the number of continuances granted (137) over the total number of cases first scheduled (1585), expressed as a percent, was **8.64%**. The ratio of first settings (1599) to continued settings on the calendar (221) was **1 to 0.138**

Dispositions:

Hearings conducted: **60.5%**; vacated prior to hearing: **36.4%**; hearings withdrawn by the agency: **3.1%**.

Contrary Recommendations and Agency Response: 20.22% 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 **61.0%**.

*1.43% of Administrative Law Judge decisions were certified as final by the OAH due to agency inaction or were rendered moot by settlement.

** Cases which were vacated are not included.

“Exclusion”

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exclusion is successfully invoked at the start of the hearing, the non-party witnesses will not be allowed to hear the parties' opening statements. The purpose of the rule allowing witnesses to be excluded from the hearing is to prevent witnesses from fabricating facts and to preserve individual witnesses' testimony, which otherwise might be tainted if the witnesses are allowed to hear others' testimony.³ Once a witness has testified and has been cross-examined, he or she may stay to hear the remaining testimony and

closing argument.⁴

Some witnesses lack first-hand knowledge of the events giving rise to the administrative claim or dispute but, instead, are called to testify as an expert about his or her opinion of the significance of facts that other witnesses' testimony establish.⁵ Expert witnesses generally are not subject to exclusion because, although their opinions may be unfounded or unconvincing, opinions are not facts and cannot be true or false.⁶ As a practical matter, if the parties' experts are not allowed to hear and respond to or critique each other's opinions, the hearing may be unduly prolonged as the parties and the administrative law judge attempt to characterize the experts' respective positions. The record also may be compromised if the parties and the administrative law judge inadvertently mischaracterize or inadequately summarize an expert's opinion.

A party may oppose a request to exclude witnesses if the party shows that the witness is essential to the presentation of the party's case.⁷ For example, a party may have retained an investigator or consultant to help it prepare for the hearing.⁸ The purpose of having an investigator or consultant at the hearing is to allow him or her to call the party's attention to factual matters that the party may not be aware of.⁹ A witness's presence also may be essential to the party's case when the witness is also acting as translator for the party or when the party and the witness have a special relationship, for example, husband and wife, parent and child, or therapist and patient,¹⁰ that will facilitate the presentation of evidence and expedite the hearing. But, because the administrative rule is wholly discretionary, the administrative

law judge may find that the witness's presence is less important than the other party's right to invoke the rule and may order that the witness be excluded.

¹ Cf. *Ariz. R. Evid.* 615; *Ariz. R. Cr. P.* 9.3(a) which makes exclusion mandatory.

² See, e.g., *State v. Edwards*, 154 *Ariz.* 8, 13-14, 739 P.2d 1325-26, 1330 (App. 1986).

³ See, e.g., *Edwards*, 154 *Ariz.* at 13, 739 P.2d at 1330.

⁴ See *Ariz. R. Cr. P.* 9.3(a).

⁵ See generally cases interpreting *Ariz. R. Evid.* 702.

⁶ See, e.g., *Burgunder v. State of Arizona*, 55 *Ariz.* 411, 427, 103 P.2d 256 (1940).

⁷ Cf. *Ariz. R. Evid.* 615(3); *Ariz. R. Cr. P.* 9.3(a).

⁸ Cf. *Ariz. R. Evid.* 9.3(d).

⁹ See *State v. Williams*, 182 *Ariz.* 368, 380, 904 P.2d 437, 449 (1995); *State v. Hill*, 174 *Ariz.* 313, 321 n.3, 848 P.2d 1375, 1383 n.3 (1993) (citing comment to Rule 9.3(d)), cert. denied, 510 U.S. 898, 114 S. Ct. 268, 126 L. Ed. 2d 219 (1993).

¹⁰ Cf. *State v. Uriarte*, 194 *Ariz.* 275, 279, 981 P.2d 575, 577 (App. 1999) (interpreting Victims' Bill of Rights).

“Opening and Closing”

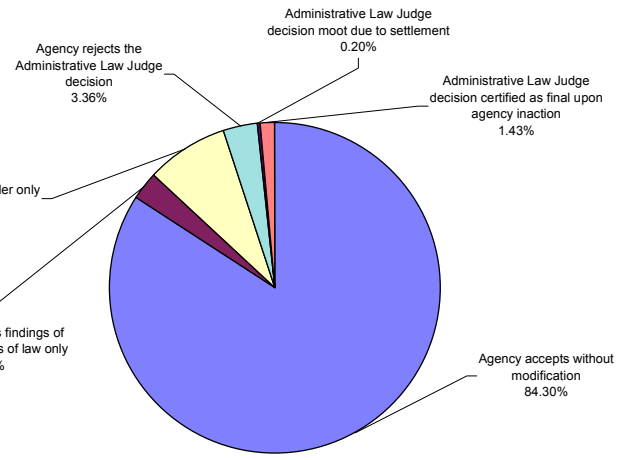
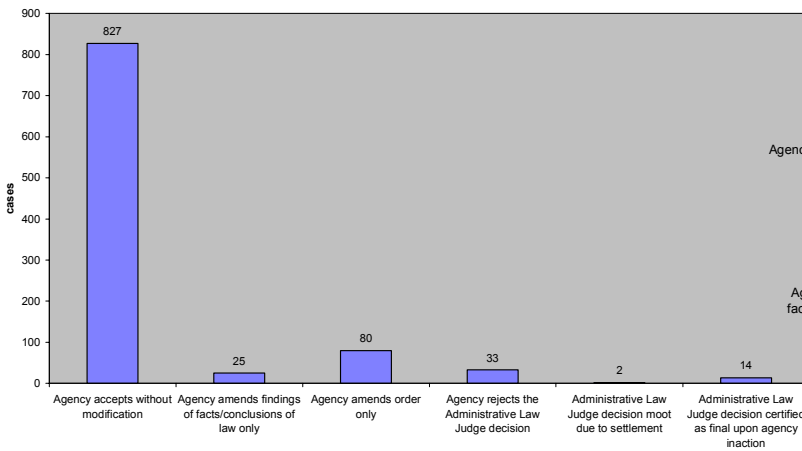
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Closing Arguments

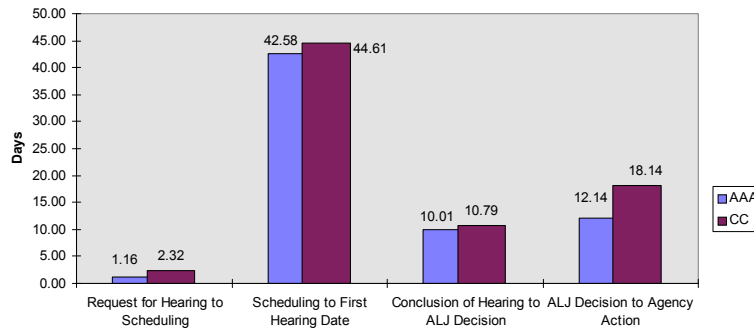
At the conclusion of the parties' presentations, they are afforded an opportunity to present closing arguments. Closing arguments provide an opportunity for the parties to summarize their respective positions and to make recommendations to the tribunal based upon the evidence of record. Generally, the party with the burden of proof delivers the first closing argument. The opposing party then goes next. The party with the burden of proof may, at the discretion of the Administrative Law Judge, be given an opportunity to deliver a final response or reply to an opposing party's closing argument.

After the parties' closing arguments, the hearing is concluded. The Administrative Law Judge will then consider the evidence presented during the hearing in preparing the recommended decision.

Agency Response to Administrative Law Judge Decisions January 1 - March 31, 2003



Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, January 1 - March 31, 2003



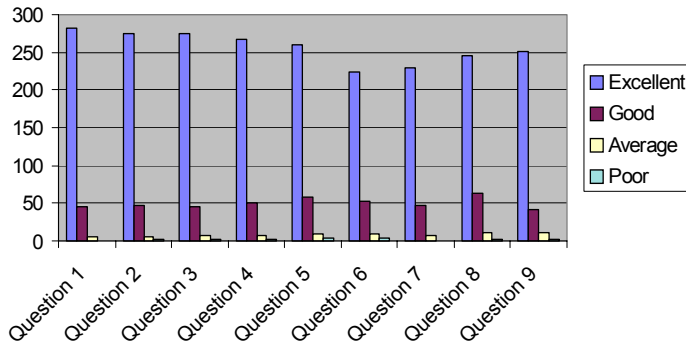
*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An 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.

1627 Cases Filed January 1, 2003 - March 31, 2003

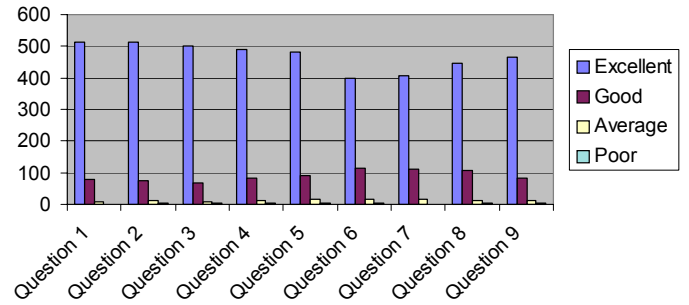
	3rd Q	FY 2003		3rd Q	FY 2003		3rd Q	FY 2003
Accountancy	4	7	Dental	0	5	Pest Control	10	15
Acupuncture Board	0	0	Economic Security	0	1	Physical Therapy	1	1
ADA	0	0	Economic Security-CPS	53	190	Podiatry	0	0
Administration	0	6	Education	0	5	Psychologist Examiners	0	0
Admin. Parking	0	52	Environ. Quality	43	114	Public Safety - CW	3	5
Agriculture	3	2	Funeral	0	0	Public Safety - Trans	3	11
Ag. Empl. Rel. Bd.	0	0	Gaming	5	8	Public Safety - Adult CC	0	0
AHCCCS	850	2378	Health Services	80	231	Pvt. Post. Ed.	0	0
Alternative Fuel	0	1	Insurance	35	101	Racing	5	16
Appraisal	7	18	Land	2	13	Radiation Regulatory	0	0
Attorney General	1	4	Liquor	19	49	Registrar of Contr.	375	1241
Arizona Works	0	0	Lottery	0	1	Real Estate	16	53
Athletic Board	1	1	Maricopa Cty. Housing	0	0	Revenue	27	57
Banking	10	33	Medical Board	5	16	School - Deaf & Blind	0	1
Behavioral Health Ex.	1	2	Naturopathic	0	1	Secretary of State	0	8
Building/Fire Safety	29	86	Nursing	10	34	Technical Registration	0	2
Charter Schools	0	1	Nursing Care Admin	3	3	Veterinary Board	0	1
Chiropractic	1	4	Occupation Therapy	0	0	Water Qual. App. Bd.	1	1
Clean Elections	1	1	Osteopathic	0	0	Water Resources	0	7
Community Colleges	0	0	Parks	0	0	Weights and Measures	20	40
Cosmetology	3	7	Peace Ofc. Standards	1	6			

Evaluations of OAH Services

Unrepresented Responses 3rd Quarter



All Responses 3rd 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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