2020

Managing the hearing room in administrative law proceedings

Indiana Continuing Legal Education Forum (ICLEF)

MANAGING THE HEARING ROOM IN ADMINISTRATIVE LAW PROCEEDINGS

May 6, 2020

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MANAGING THE HEARING ROOM IN ADMINISTRATIVE LAW PROCEEDINGS

Agenda

9:00 A.M.	**Program Begins**
10:30 P.M.	Refreshment Break
12:15 P.M.	**Program adjourns**

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May 6, 2020

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Tammy J. Meyer practices with Metzger Rosta in Indiana. She received her BS, *summa cum laude*, from Indiana Wesleyan University and her JD, *summa cum laude*, from Indiana University McKinney Law School. She has been doing trial work for nearly 30 years. A significant part of her practice is business litigation, drug and device litigation, trucking, premises, products liability claims, and insurance coverage litigation.

She also serves as an Administrative law Judge for the Indiana Secretary of State – Securities Division. She frequently speaks at State, National, and International seminars, is an instructor for NITA, and for Indiana Continuing Legal Education Forum's Trial Advocacy College. She served as Chair of the Trial Tactics Committee of DRI, is a member of the Defense Trial Counsel of Indiana, and actively participates in IADC. She is former President of the IU McKinney School of Law - Indianapolis Alumni Board. She is a Fellow of the Indianapolis and Indiana Bar Foundations. She has authored numerous articles. For several years, she has been named as one of the top Super Lawyers and top 25 Women Lawyers in Indiana. She serves on the Board of the Indianapolis Humane Society, Arts for a Purpose, and the Indiana Education Employment Relations Board where she serves as Chair.

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Daniel G. Foote, born 1969 in Rockford, Illinois, has practiced law in Indiana for over twenty-two years, and is currently serving his fourth term as a member of the Indiana Worker's Compensation Board. In that role, Dan is accountable to a constituency of employees and their families, large and small employers, insurers, medical providers, lawyers, governmental entities, and Indiana's taxpayers. He hears and decides worker's compensation and occupational disease cases in the northeastern region of Indiana and, together with his fellow Board members, hears administrative appeals at the Board's office in Indianapolis.

In 1992, Dan graduated from Indiana University as a member of the Honors Division and the Mortar Board Senior Honor Society. Dan earned a B.A. in Political Science and a Certificate in Latin American Studies. In 1993, Dan enrolled in the evening division of the Indiana University School of Law. During his legal studies, Dan took a semester of coursework in Guanajuato, Mexico.

In 1997, Dan began his career as a lawyer at the Indianapolis firm of Locke Reynolds, LLP, which he continued with the worker's compensation practice group at Due Doyle Fanning, LLP between 2002 and 2005. In 2005, Dan was appointed to the Worker's Compensation Board. Since that time, he has maintained a concurrent practice devoted to business litigation, auto liability, premises liability, product liability, juvenile law, appellate matters and alternative dispute resolution. He has tried a number of civil cases and appeared in approximately forty appeals. Dan has argued before the Indiana Court of Appeals and the Indiana Supreme Court. In 2016, Dan completed mediation training is now a Registered Civil Mediator. Dan enjoys public speaking and is a frequent lecturer on a variety of areas of Indiana law.

Over the years, Dan has served in a wide variety of community and civic roles. For example, he participated a Sister Cities International project that connected Bloomington, Indiana with the village of Posoltega, Nicaragua. He was an accredited international observer of post-civil war elections held in Nicaragua (1990) and El Salvador (1994). In the late 1990s, Dan produced and hosted unique programming on public radio, including an hour devoted to the music of traditional cultures from around the world. Since 2012, Dan has used his Spanish skills by volunteering with Operation Walk Midwest, a not-for-profit group of orthopedic surgeons that provides free joint replacement surgeries and joint implants to indigent patients in Nicaragua and Guatemala.

In his spare time, Dan repairs and modifies tube amplifiers and vintage electronics, and curates an extensive vinyl collection.

Table of Contents

Section One

Managing the Hearing Room in Administrative Law Proceedings.....Tammy J. Meyer

Section Two

Managing Administrative Hearings
Tips and Tricks for the Newly-Appointed
Administrative Law Judge……...Hon. Daniel G. Foote

Section One

MANAGING THE HEARING ROOM IN ADMINISTRATIVE LAW PROCEEDINGS

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Section One

Managing the Hearing Room in Administrative Law Proceedings.....Tammy J. Meyer

Where to Hold the Hearing

Hearings can be held at the agency offices, a court reporter's office, government building, school or college facility, public library, convention center, or hotel.

Hearings can be conducted in person, by phone conference, or by videoconference such as Zoom or through Veritext.

Set up for the Hearing

Check the facilities and room in advance. Ensure that the facilities are physically accessible, adequate, free from noise, unlocked, and that furniture is arranged accordingly. In certain situations, security may be needed. Adequate audio visual, internet, computer, or phone conferencing capabilities may be needed. Make sure the court reporter has all necessary equipment such as extension cords, electrical plugs, microphones (if needed), etc.

Make sure that no interpreters are needed for the hearing. If an interpreter is needed, use a certified interpreter. IU School of Language Studies is a good resource.

Court Reporter & Off Record Discussions

Arrange for a court reporter in advance. They may also be able to assist with video conferencing, phone conferencing, Real Time reporting, and marking of exhibits. Their offices are generally free of charge and can be used for hearings.

All hearings should be transcribed.

Provide the court reporter with the caption and names/spelling of all parties and counsel prior to the hearing.

Make sure the court reporter is located near witnesses so that they can hear clearly at all times.

The ALJ should be the only person instructing the court reporter to go on and off the record. The ALJ should be in control of the proceeding at all times.

The ALJ should make sure that the record is clear. Parties and counsel should not talk over one another. All questions need to be answered verbally and not with a nod of the head or other indication. The ALJ can always ask if the answer was a yes or no.

Going off the record is different than taking a recess. However, in either instance the reason should be stated on the record.

Administration of Oath

The court reporter or ALJ should administer the oath.

The oath can be administered to all witnesses in a group at the beginning of the hearing or individually prior to each witness testifying.

The oath should be substantially similar to: "Do you swear or affirm that the testimony you are about to give is the truth?"

If an interpreter is used, an oath should be given to the interpreter as well, such as: "Do you swear or affirm that you will truthfully and accurately translate all questions and answers?"

Judge/Trier of Fact

The ALJ is the Judge and trier of fact. There should be no ex-parte communications. All parties and counsel should be treated with respect and fairly. Address all counsel and witnesses by their last name. Do not argue with counsel or witnesses.

Counsel should address the ALJ as Judge and treat the ALJ with the respect due any judicial officer.

Judicial Demeanor/Attitude/Behavior

Attitude, demeanor, and behavior are important. The ALJ should be fair and impartial. The ALJ should not show facial expressions as counsel make presentations or witnesses testify. The ALJ should avoid the appearance of favoritism or bias to parties and counsel.

The ALJ should be attentive at all times. The ALJ should take notes – written or on the computer. Those notes are the personal property of the ALJ and are not a part of the record.

The ALJ may also wish to follow along with testimony in Real Time so as to allow for review of a question and answer and avoid having to have questions and answers read back by the court reporter.

Controlling the Hearing

The ALJ should be in control of the hearing at all times. In the beginning, the ALJ should announce the case, introduce herself/himself, have the parties and counsel identify themselves, and advise all counsel and parties how the hearing will proceed. The hearing should proceed on time. Any time limits should be given in the beginning. The court reporter can also assist with keeping track of time on the record. A brief explanation of the purpose of the hearing may be helpful as well.

The parties should state their appearances on the record. If a party fails to appear for the hearing, the ALJ may adjourn the hearing after making a record of the failure to appear, or the hearing may proceed without the party.

Opening statements may be allowed with the party carrying the burden of proof going first. Opening statements are not required. After openings, the party with the burden of proof can put on their witnesses and introduce exhibits. Cross examination of each witness should be permitted. After the party with the burden of proof is done, the defense should put on its witnesses and introduce its exhibits with cross examination being allowed. Afterwards, closing arguments may be allowed.

The ALJ should control the questioning of witnesses and whether re-direct and re-cross may be allowed. The ALJ can stop questioning or ask the party or counsel to move on. However, the parties should be in control of the order that they present witnesses and documents.

At all times, the ALJ should maintain order. The ALJ decides when recesses are taken and for how long. Time limitations can be imposed and enforced. The ALJ should consider the needs of the parties and counsel when taking recesses and lunch breaks. Special needs should be noted for the ALJ in advance of the proceedings.

The ALJ should close the hearing with any instructions to counsel and parties such as when proposed findings of fact and conclusions of law are due and how they are to be submitted.

Uncooperative Witnesses

Again, the ALJ should be in control of the hearing at all times. If a witness is uncooperative or disruptive, the ALJ may step in, with or without the request of a

party or counsel. The witness should be admonished by the ALJ. If instructions to a witness are not heeded, the ALJ may consider excusing the witness from the room. Make sure any conduct is noted for the record. For example, if the conduct of the witness is the issue, make sure the ALJ describes it and puts it in the record. Security may be called if necessary.

The ALJ may instruct a witness to answer a question or answer with just a yes or no.

Disruptive/Argumentative Attorneys

The ALJ should not hesitate to control and instruct disruptive or argumentative attorneys to conduct themselves accordingly. If conduct is the issue, the ALJ should describe it for the record.

The ALJ may instruct counsel to not be argumentative or abusive to a witness or counsel. Or, the attorney may be instructed by the ALJ to move on or stop certain questions or conduct.

Pro se Litigants

Litigants representing themselves can present unique problems. They may need more instruction on how to proceed. However, the ALJ should avoid giving legal advice and assisting a party to make his or her case. The pro se litigant should be given the same respect as counsel.

Opening Statements

Opening statements are not mandatory but may be helpful. Time limits can be put on openings so as to manage the hearing and ensure proper allotment of time for witnesses to testify and exhibits to be introduced.

Testimony – Direct & Cross

Testimony begins by the party who has the burden of proof. First direct testimony and then cross. If a party is pro se and testifying they can be permitted to do so in the narrative. After cross examination, re-direct may be permitted. The ALJ decides when the testimony ends. The ALJ may also ask questions for clarification or omitted information necessary to make the ALJ's decision.

If multiple counsel are involved, only one counsel should be permitted to question the witness. In other words, if two attorneys represent a party, they both should not be permitted to question a witness – one attorney per witness. If

multiple parties are involved, each party must be permitted to question each witness.

ALJs should avoid arbitrary time limits on questioning witnesses. However, if questioning becomes repetitive or irrelevant, the ALJ can order the questioning to end.

Witness can be allowed out of order if necessary. For example, an expert for the respondent is only available in the morning so the ALJ may permit the witness to be called out of order.

Exhibits

Exhibits should be marked and identified. The court reporter or ALJ can do this. The ALJ can decide who to mark the exhibits (letters, numbers, consecutive or not). Exhibits can be shown to a witness and the ALJ by paper exhibits, electronically, on an overhead screen, by video, or Elmo.

In videoconferencing, Zoom, or telephonic hearings, consideration must be given in advance on how exhibits will be introduced and shared. Veritext can do so via a split screen and by confidential files.

Ruling on Evidentiary Objections

Know whether the Rules of Evidence apply to your hearing. Even if the rules do not apply, objections can still be made. The ALJ should rule on the objections and do so promptly.

The ALJ can strike testimony or exhibits if they are irrelevant or improper, with or without an objection.

When an objection is made, the ALJ decides is a response to such can be made by the opposing party or counsel.

Argument – Closing Statements

Closing arguments/statements may be permitted by the ALJ. Time limitations can be imposed. Post hearing briefs can be allowed to summarize arguments instead.

Render Legal/Factual Findings

The ALJ renders his or her findings of fact and conclusions of law after the hearing. These may be final or proposed depending on the agency. The ALJ may

require the parties to prepare their own proposed findings of fact and conclusions of law and submit those to the ALJ by a specified date. Usually the ALJ will require these to be submitted by email or disc in Word format for ease in adopting or revising the same.

MANAGING THE HEARING ROOM
IN
ADMINISTRATIVE LAW PROCEEDINGS

Tammy J. Meyer

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Where is the Hearing?

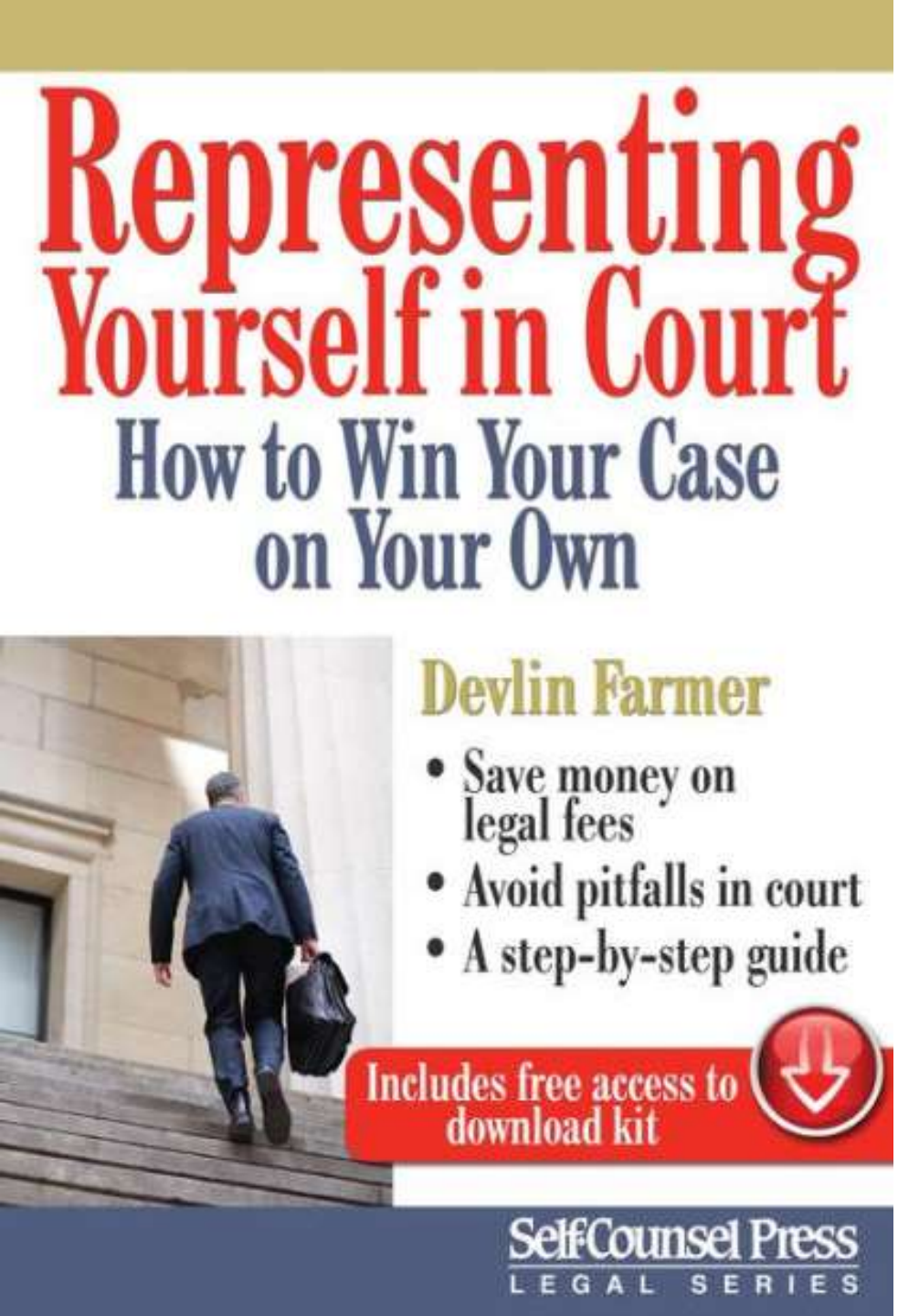
Set up for the Hearing


The Court
Reporter

The Trier of Fact

Judicial Demeanor

Controlling the Hearing



Pro Se Litigants

The Hearing:

- Opening Statements
- Direct and Cross
- Exhibits
- Objections
- Closing statements

The Final Order

Section Two

Managing Administrative Hearings Tips and Tricks for the Newly-Appointed Administrative Law Judge

Hon. Daniel G. Foote
Hearing Member - Worker's Compensation Board of Indiana
Attorney at Law and Registered Civil Mediator
Indianapolis, Indiana

Section Two

Managing Administrative Hearings
Tips and Tricks for the Newly-Appointed
Administrative Law Judge……...Hon. Daniel G. Foote

MANAGING ADMINISTRATIVE HEARINGS

TIPS AND TRICKS FOR THE NEWLY-APPOINTED ADMINISTRATIVE LAW JUDGE

Indiana Continuing Legal Education Forum

May 6, 2020

Presented by Daniel G. Foote

I. INTRODUCTION

So, you have been asked to serve as an Administrative Law Judge. Serving Indiana's taxpayers and lawyers as an adjudicator is a great honor, and, for the most part, is a rewarding and satisfying position. As an ALJ, you will have the opportunity to hone your expertise in a given field of law. Whether you simultaneously maintain a legal practice, or plan to return to the practice of law after your service as an ALJ, you will no doubt learn valuable lessons as you watch skilled lawyers practice before you.

While it might seem attractive to discard the role of advocate and finally get to be the one who makes the decisions, serving as an adjudicator is not easy, and must be undertaken as a weighty responsibility. Serving as a Judge of any type should be considered a great honor, and you may be justifiably proud of your new role. As you do this job, however, always remember that you are not the boss. Carry yourself with professionalism and humility. After all, you work for the lawyers, parties and taxpayers, and not the other way around.

As an ALJ, you have the solemn role of serving not only as the arbiter of law, but as a finder of fact. As such, you will serve as the administrative counterpart of both judge and jury over legal and factual disputes. Resolving close issues of proof and witness credibility may be the most challenging aspect of the role, and the ALJ is unable to rely on the collective wisdom of a jury to resolve disputes. You must be prepared for the fact that somebody is going to lose, or even feel as if you made the wrong call.

In addition, rather than simply render a verdict or award, ALJs must provide a well-written explanation of every decision. Administrative Findings of Fact and Conclusions of Law must restate the disputed issues, fairly assess the factual disputes and correctly apply applicable law – all in a manner sufficient to sustain judicial review.

Of course, every lawyer brings his or her unique background, experience and philosophy to the role of Administrative Law Judge. An ALJ may have practiced for years as a Plaintiff or Defendant in a particular niche area, and based on experience as an advocate, may think he or she knows what should be done in a given situation. However, the duty to administer the intent of a given statutory mandate or to impartially hear and determine a dispute between two squabbling witnesses often requires one to cast aside personal opinions or ideological points of view. Every single case is different, and every party is legally entitled not only to due process, but to your best effort at impartiality. This requires one to take apart a problem from a variety of perspectives.

After hearing and determining a number of cases, hopefully you will find that your ability to weigh competing points of view will be greatly enhanced.

As is the case with every pursuit, there is only one way to learn how to be an Administrative Law Judge – by doing the work and by accumulating experience. In the law, practice may never make perfect. Instead, parties and lawyers will make that impossible, because they continuously finding ways to present adjudicators with previously-unheard of problems. But, just as trial lawyers become good through mentorship and by trying cases, and good mediators become good mediators by mediating, good ALJs learn fresh lessons and develop skills with every single hearing.

It is hoped that not all lessons have to be learned the hard way, and the following thoughts and accompanying discussion are shared to help you avoid some traps for the unwary.

II. SELECTING AN APPROPRIATE HEARING VENUE

From the outset, selecting a convenient and appropriate venue is key to fulfilling the role of an ALJ. When a citizen or a stakeholder becomes party to a dispute, they may believe that they are entitled to their "day in court." As such, they may expect to see the trappings of a courtroom when the day of hearing arrives. As you know, the most important parts of any legal proceeding are the opportunity to be heard and the provision of procedural and substantive due process. To the layperson, however, the *appearance* of a fair proceeding, or lack thereof, may leave a the most lasting impression.

Unlike civil Judges, ALJs do not necessarily have access to dedicated courtrooms or the latest courtroom technology. Many ALJs find themselves on the constant search for an appropriate setting in which to hold hearings. A hearing venue should bear the appearance of officialdom if possible. If dedicated hearing room does not exist, consider holding proceedings in a neutral and official location, such as a governmental or public facility. The setting should emphasize the ALJ/agency role as a neutral and official referee. Academic institutions or even moot court rooms make good settings, as do unused county court rooms or jury rooms, council chambers or county commissioner rooms.

In selecting a hearing venue, always consider accessibility issues. The facility should be easy to find, have close access to convenient parking, and must be accessible to lawyers, parties or witnesses with disabilities.

These days, unfortunately, physical security is often a concern. If your hearing is held in a governmental facility, such as a State office building, security is monitored at points of ingress or egress. In some smaller local facilities, however, security may be available only upon request or upon use of a "panic button." When you use a borrowed facility, familiarize yourself and your staff with security measures in advance. If there is acute concern for security in a particular case, it is wise to notify local authorities a couple of days in advance of a hearing. In some cases, parties and witnesses will have access to public facilities without the need to pass through security inspections or metal detectors. In such locations, State or Capitol Police, County Sheriffs and local

police agencies are always willing to make their presence known if there are security concerns – as long as they have advance notice.

Always ensure that you and your entourage treat facilities with respect. More importantly, treat the personnel who run them with courtesy. If your docket includes multiple hearings, running the hearing room extends to maintaining order among the lawyers gathering in waiting areas. Do not allow a crowd to disturb ordinary business in a borrowed facility. Otherwise, your next request to use the facility may be declined.

Finally, upon departure from a borrowed room, always remember conduct a final search for any lost or forgotten briefcases, files, notes and electronic devices. Once the room is vacated, be certain to "check out" with the facility. Advise your host of your departure and always remember to thank your hosts for their hospitality. A little courtesy goes a long way, and may ensure your access to a facility for future use.

III. USE OF PRE-HEARING CONFERENCES

Prior to your hearing date, familiarize yourself with your docket and to the issues with which you may presented. With a little preparation, once the hearing date arrives, you will come across as confident and familiar with the parties and lawyers. In certain instances, parties may appear before you having suffered a grievous loss, or who may be facing a painful or embarrassing personal, professional or business situation. If a dispute involves any such sensitivities, it is best to know of them in advance so as to be prepared to conduct the hearing with a mood appropriate to the issues.

Other than reviewing the docket and any pleadings or filings, the best way to get acquainted with the parties and their issues is to conduct formal or informal pre-trial conferences. The ALJ and the parties may use the pre-trial conference to discuss the facts of the case, resolve evidentiary disputes, narrow the issues, arrive at stipulations as to any agreed facts, issues or evidence, and perhaps to explore the possibilities for settlement.

For proceedings governed by the Indiana Administrative Orders and Procedures Act, Ind. Code § 4-21.5-3-18 provides

> Sec. 18. (a) The administrative law judge for the hearing, subject to the agency's rules, may, on the administrative law judge's own motion, and shall, on the motion of a party, conduct a prehearing conference. The administrative law judge may deny a motion for a prehearing conference if the administrative law judge has previously conducted a prehearing conference in the proceeding.
>
> …
>
> (f) Any notice under this section may include any other matters that the administrative law judge considers desirable to expedite the proceedings.

Ind. Code 4-21.5-3-19 further provides

(b) To expedite a decision on pending motions and other issues, the administrative law judge may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity:

(1) to participate in;
(2) to hear; and
(3) if technically feasible, to see;

the entire proceeding while it is taking place.

(c) The administrative law judge shall conduct the prehearing conference, as may be appropriate, to deal with such matters as the following:

(1) Resolution of the issues in the proceeding under section 23 of this chapter.
(2) Exploration of settlement possibilities.
(3) Preparation of stipulations.
(4) Clarification of issues.
(5) Rulings on identity and limitation of the number of witnesses.
(6) Objections to proffers of evidence.
(7) A determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form.
(8) The order of presentation of evidence and cross-examination.
(9) Rulings regarding issuance of subpoenas, discovery orders, and protective orders.
(10) Such other matters as will promote the orderly and prompt conduct of the hearing.

The administrative law judge shall issue a prehearing order incorporating the matters determined at the prehearing conference.

(d) If a prehearing conference is not held, the administrative law judge for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

With respect to settlement negotiations, the ALJ may explore the possibility of a negotiated resolution, but may wish to proceed with some caution. Clearly, Indiana law favors the negotiated resolution of disputes, and judges of all kinds encourage the parties to explore and reach compromise solutions to their problems. The ALJ may wish to request that parties refrain from disclosing the details of negotiations, but instead focus on the broader reasons and outlines of a potential settlement. Lawyers and parties may be tempted to blurt out otherwise privileged settlement positions, or may attempt to persuade you they are not being treated fairly by the other side. In such cases, it may be wise to advise lawyers and parties in advance of the parameters of settlement discussions you are willing to hear.

IV. MANAGING THE DISCOVERY PROCESS

Many areas of administrative law will allow or require lawyers to conduct discovery in some form. For example, the Indiana Worker's Compensation Board has adopted the civil discovery rules (Trial Rules 26 – 37) by administrative rule. See 631 I.A.C. 1-1-3. For administrative proceedings governed by Title 4, the discovery rules are also mentioned by reference. Ind. Code § 4-21.5-3-22 provides

> (a) The administrative law judge at the request of any party or an agency shall, and upon the administrative law judge's own motion may, issue:
>
> (1) subpoenas;
> (2) discovery orders; and
> (3) protective orders;
>
> *in accordance with the rules of procedure governing discovery, depositions, and subpoenas in civil actions in the courts.*
>
> (b) The party seeking the order shall serve the order in accordance with these rules of procedure. If ordered by the administrative law judge, the sheriff in the county in which the order is to be served shall serve the subpoena, discovery order, or protective order.
>
> (c) Subpoenas and orders issued under this section may be enforced under IC 4-21.5-6.

In administrative proceedings, the subject matter is strictly defined by statute, as is the authority of an agency or its ALJ. As such, discovery should be permitted, but the ALJ should use the pre-trial process to limit the scope of discovery so as to promote a quick administrative resolution of a dispute. During the pre-trial process, it is well within an ALJ's authority to establish the scope of, and schedule for, discovery. The ALJ should monitor the parties to ensure that discovery is going smoothly, and that neither side is propounding discovery that is burdensome or abusive. Do not assume that the parties' discovery requests are always narrowly-tailored to the dispute at hand.

Managing the discovery process in matters involving *pro se* litigants is particularly tricky. While you cannot provide legal advice or help one side over another, you have the duty to ensure that the overall course of the dispute unfolds in a fair manner. Occasionally, you may see lawyers propounding voluminous discovery, drafted in perfect legalese, that may be incomprehensible to a layperson. If this arises during the pre-Hearing process, you may be able to step in to ensure that the pertinent discovery questions are answered, and that necessary documents are produced. When a lawyer complains to you that discovery requests served on an unrepresented party have not been answered, you may be able to use a pre-Hearing conference to assist, in a limited fashion, to iron out the dispute.

V. THE HEARING

A. Statutory Role of the ALJ – Ind. Code § 4-21.5-3-25 and 4-21.5-3-26 provide a good example of the role of an ALJ in administrative proceedings. Ind. Code 4-21.5-3.25 provides, in part:

> (b) The administrative law judge shall regulate the course of the proceedings in conformity with any prehearing order and in an informal manner *without recourse to the technical, common law rules of evidence applicable to civil actions* in the courts.
>
> (c) To the extent necessary for full disclosure of all relevant facts and issues, the administrative law judge shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limitation under subsection (d) or by the prehearing order.
>
> (d) The administrative law judge may, after a prehearing order is issued under section 19 of this chapter, *impose conditions upon a party necessary to avoid unreasonably burdensome or repetitious presentations by the party*, such as the following:
>
> > (1) Limiting the party's participation to designated issues in which the party has a particular interest demonstrated by the petition.
> >
> > (2) Limiting the party's use of discovery, cross-examination, and other procedures so as to promote the orderly, prompt, and just conduct of the proceeding.
> >
> > (3) Requiring two (2) or more parties to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.
>
> If a person is allowed to intervene in the proceeding after the commencement of a hearing under this section, the administrative law judge may prohibit the intervener from recalling any witness who has been heard or reopening any matter that has been resolved, unless the intervener did not receive a notice required by this chapter or the intervener presents facts that demonstrate that fraud, perjury, or an abuse of discretion has occurred. Any proceedings conducted before the giving of a notice required by this chapter are voidable upon the motion of the party who failed to receive the notice.
>
> (e) The administrative law judge may administer oaths and affirmations and rule on any offer of proof or other motion.

(f) The administrative law judge may give nonparties an opportunity to present oral or written statements. If the administrative law judge proposes to consider a statement by a nonparty, the judge shall give all parties an opportunity to challenge or rebut it and, on motion of any party, the judge shall require the statement to be given under oath or affirmation.

B. Outline and Script for a Typical Administrative Hearing -- If you are just starting your job as an ALJ, it may help to create and rehearse an outline of a typical hearing. Not all hearings are the same, but here are a few points to consider adding to your outline:

- Open the Hearing. Your outline begins with the case caption and cause number, and the date, time and place at which a Hearing is being held. Indicate that the Hearing is now convened and is on the record.

- Introductions. Introduce yourself, and then introduce the parties and their counsel. This is a good time to write down the spellings of the names of all counsel, parties and witnesses. It is also a great time to attempt to master the pronunciation of names!

- Are we ready to proceed? Ask all parties and witnesses if they are prepared to proceed as scheduled, and if not, deal with any requests for delay or continuance.

- Set the pace and tone. You will wish to set a measured tone and pace so that everyone can be heard and understood. Advise the room that the hearing will proceed in a question and answer format – witnesses should wait for lawyers to finish their questions before answering, and lawyers should wait for witnesses to answer before staring the next question. Explain that parties should not talk over each other or interrupt. If there is an objection, testimony will stop while the objection is argued and a ruling is made.

- Presentation of written stipulations of facts, issues in dispute, and evidence. Next, ask counsel if they have prepared any written pre-trial stipulations regarding agreed facts, issues in dispute, or evidence to be admitted into hearing. You will want to review the lawyers' factual stipulations to ensure that the are appropriate and address factual, rather than legal, matters. If the parties are stipulating to the admission of evidence, note the admission of all such Exhibits for the record.

- Address preliminary matters. Ask if there are any preliminary matters, or any motions. Parties will frequently advise the ALJ of special needs, time constraints, or requests for separation of witnesses.

- Opening Statements. Next, allow all parties to offer brief opening statements. Following any opening statements, offer the floor to counsel for the party bearing the burden of proof or the burden of moving forward.

- Witness Testimony and Oaths. Always remember to administer the oath to each witness called. It is wise to swear witnesses individually just prior to their testimony, rather than *en masse*. This emphasizes the gravity of the oath to each individual witness. Have the witness state his or her name for the record, and then read them the oath presented. Ind. Code § 4-21.5-3-26(b) provides that "All testimony of parties and witnesses must be made under oath or affirmation." For all persons expected to be witnesses, the ALJ or court reporter may administer the oath. In Indiana, a suggested text for the oath is as follows:

  > Do you swear or affirm that the testimony you are about to give in this matter will be the truth, the whole truth and nothing but the truth?

- Use of Translators. In the event testimony is being taken through a translator, the translator must also be sworn. Ind. Code 4-21.5-3-16(d) provides the following script for the translator's oath:

  > Do you affirm, under penalties of perjury, that you will justly, truly, and impartially interpret to _____ the oath about to be administered to him (or her), the questions that may be asked him (or her), and the answers that he (or she) shall give to the questions, relative to the cause now under consideration before this agency?

- Plaintiff/Petitioner's Case. Introduce direct examination of witness. Offer opposing counsel the opportunity to cross-examine the witness, and offer Plaintiff's counsel the opportunity to re-direct. At that point, most witnesses should be done testifying, but you have the discretion to permit limited re-cross or to entertain omitted questions. When the Plaintiff/Petitioner completes the presentation, confirm that the party has rested.

- Defendant/Respondent's Case. Repeat the same cycle as above.

- Introduction of Exhibits. If Exhibits are introduced during the course of testimony, always ensure that counsel have exchanged marked copies. Ask counsel if there are any objections to the admission of every Exhibit. Hear and determine those objections. You must note for the record whether a given Exhibit is admitted, admitted in part, admitted subject to redaction, or not admitted. Keep careful notes for yourself for the status of each Exhibit.

- Questions from the Bench. Be very careful in asking questions from the bench. In general, it is wise to assume that the lawyers have carefully prepared their presentations, and that they are hoping you will enter your decision based on the evidence they have presented. If you ask a question, you may "blow up" the case or open new avenues of inquiry. That said, it is perfectly acceptable to ask questions, especially if you missed something, need to clarify the timeline, or do not understand some basic information that sets the scene for the ultimate dispute. Once you ask a question, however, be certain to allow both sides the opportunity to ask any questions to follow up on your question.

- Closing Argument. Once both parties have rested, you may wish to offer opposing sides the opportunity to present brief closing arguments.

- Post-Hearing Submissions. Following closing arguments, if you feel you need to have the case briefed, or wish to see each party's position summarized, feel free to request the preparation of legal Briefs or proposed Findings of Fact and Conclusions of Law. In the alternative, counsel may insist on the need to prepare post-Hearing submissions. In either case, be sure to impose a strict time deadline, and advise counsel that at the close of the briefing period, you will enter a decision without reference to any missing submissions. Memories fade and lawyers move on to other matters quickly , so it is best to receive post-Hearing submissions shortly after the Hearing.

- Closing the Hearing Record. Finally, at the conclusion of the Hearing, it can be a nice touch to thank lawyers for their excellent presentations, and to thank parties and witnesses for attending. In almost every situation, you will wish to advise the parties that you are taking the matter under advisement, and that you will issue a written decision once you have carefully reviewed all of the written filings, evidence, and testimony.

C. Ruling on Evidentiary Objections

In general, administrative proceedings are intended to be conducted without resort to formal rules. This helps to ensure that administrative relief is available promptly and without astronomical legal expense. In other words, the lawyers and parties are asked to put a great deal of trust in the ALJ to sort through what might otherwise be objectionable or even inadmissible in a civil trial court. After all, the ALJ is a trained lawyer, and many of the considerations designed to keep from improperly swaying a jury composed of laypersons simply are not present.

That said, ALJs must be prepared to deal with objections of all sorts, including those regarding relevance, repetition, constitutionality, privileges and hearsay. In addition to preparing an outline for your hearings, you may wish to come armed with a brief reference summarizing all common evidentiary foundations, rules and objections.

In most administrative hearings, relevance is strictly limited by the statutory relief available in a given dispute. In addition, hearsay may be admitted in most administrative hearings, but at the same time cannot serve as the sole basis for a decision or award. For example, Ind. Code § 4-21.5-3-26(a) provides, in part

> …. Upon proper objection, the administrative law judge *shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts*.
>
> *In the absence of proper objection, the administrative law judge may exclude objectionable evidence*.
>
> *The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence*.
>
> …
>
> (c) Statements presented by nonparties in accordance with section 25 of this chapter may be received as evidence.
>
> (d) Any part of the evidence may be received in written form if doing so will expedite the hearing *without substantial prejudice to the interests of any party*.
>
> (e) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties shall be given an opportunity to compare the copy with the original if available.
>
> (f) Official notice may be taken of the following:
>
> > (1) Any fact that could be judicially noticed in the courts.
> > (2) The record of other proceedings before the agency.
> > (3) Technical or scientific matters within the agency's specialized knowledge.
> > (4) Codes or standards that have been adopted by an agency of the United States or this state.
>
> (g) Parties must be:
>
> > (1) notified before or during the hearing, or before the issuance of any order that is based in whole or in part on facts or material noticed under subsection (f), of the specific facts or material noticed, and the source of the facts or material noticed, including any staff memoranda and data; and

(2) afforded an opportunity to contest and rebut the facts or material noticed under subsection (f).

D. Judicial Demeanor/Attitude/Behavior & Controlling the Hearing

In general, administrative hearings are less formal than proceedings before civil trial courts or courts of appellate jurisdiction. First, the hearing is likely to take place outside of a formal courtroom setting. Rather than presiding from a bench, you may be seated at a table across from the lawyers and witnesses. Second, you are unlikely to be wearing judicial garb, and will instead look just like the lawyers appearing before you. Third, there will be no Bailiff announcing your presence with an "All Rise!" Administrative hearings are more relaxed and more accessible that civil proceedings, and that is in great measure a good thing for all involved. Parties who are unfamiliar with administrative hearings, however, may be presenting you with a dispute that they view as "make or break." The hearing may be one of the most important events on the calendar of a party or witness, and in fact, may be one of the most critical events in a person's life.

For that reason, it is important to approach the hearing in the most professional manner possible. The Hearing room should be open to the parties at the appointed time, and all necessary personnel and equipment should be in place. The ALJ should dress appropriately, as if he or she were appearing before a civil tribunal.

In many cases, the ALJ will know the lawyers on a first-name basis. In the context of a Hearing, and the time period surrounding it, the best practice is to refer to lawyers in formal terms, such as "Mr. Smith," "Ms. Smith" or simply "Counsel." While the lawyers know that their clients are going to get a fair shake, their clients themselves may have doubts, and there is nothing like a "familiar" attitude among the lawyers to stir up lingering anxiety, and even to taint the final result of a proceeding.

It is fine to greet parties and counsel in a manner that feels most comfortable to you. While some lawyers say that one should never smile in a courtroom, at times it is okay, and even reassuring, to offer a smile or a greeting to parties or witnesses. Once a Hearing begins, however, strike an official and formal tone that suggests who is in control of the Hearing room. Lay down the ground rules and advise all present that interruptions are to be avoided. In particular, witness oaths should be administered in a formal tone and at a thoughtful pace.

As you proceed through the Hearing, make it a point to introduce and conclude each section of your hearing outline. By doing so, you will condition the lawyers to expect the bench to tip them off as to when to begin speaking. For example, at the beginning of opening arguments, be the first to invite the argument, and at the conclusion of the first opening, thank the lawyer and move on to the next lawyer. Likewise, during witness testimony, place your own bookends on the beginning of each section of direct examination, cross examination, and redirect. In this manner, you will make it known that you are running a measured proceeding, and are not inviting the lawyers to run away with endless rounds of questioning. When a lawyer appears to conclude a presentation, affirmatively ask if they are resting their case.

When witnesses are speaking, do your very best to make eye contact from time to time, and make it known that you are carefully following the testimony. If credibility is at issue, this is your opportunity to carefully observe the witness and his or her mannerisms. Although you may be able to make an audio recording of the hearing for later reference, witnesses will expect most judges to make occasional notes.

If at any point during the Hearing lawyers and witnesses begin speaking too softly or too quickly to be understood or recorded, do not hesitate to pause. Remind the witness that there is no hurry, or that they need to speak up. More importantly, if witnesses or lawyers begin to interrupt each other, or worse yet, the ALJ, the time has come to pause the proceeding. Once you lose control of testimony, it can be difficult to regain. Stop the offending persons and politely remind them that you are unable to understand them if they are interrupting each other, and that a record of the proceeding is being made.

With respect to note-taking, you do not need to attempt to transcribe the Hearing. Keep an audio recording for later reference. Rather, use your notes to record key details and to record your own contemporary, first-impression view of the evidence. At that close of the hearing, make some additional notes as to the direction you wish to go with the case. As mentioned above, it is best to make decisions when the evidence is fresh in your mind, and making a few notes will help preserve your impressions while you await post-Hearing submissions or tend to other Hearings.

E. Uncooperative Witnesses & Disruptive Attorneys

In all judicial proceedings, parties and lawyers may be deeply invested in a dispute. Emotions and tempers run high in legal disputes. Parties and lawyers have been anticipating their Hearing for some time, and have a right to expect that their strongly-held views are going to be heard. More than that, each side usually expects they should win! A good ALJ can accommodate a little bit of emotion, such as sadness or anger, in the Hearing room.

Judicial officials would always do well to remember that they working for the parties, lawyers, and taxpayers, and not the other way around. In that spirit, the ALJ should consider his or her role as that of a referee. The ALJ is just another lawyer who has the difficult role of sorting through a dispute. There is little benefit in lecturing lawyers or witnesses, or in offering specific theories on the law. Rather, the ALJ better serves the role by carefully listening to all sides and maintaining a steady poker face at all times. If you have established control and set the pace of the Hearing using an outline such as the one suggested above, you will have preserved your best chance of keeping the Hearing under control. An outline and script divided into various phases punctuates the proceedings and allows the ALJ to reassert the role of the tribunal at each key moment.

Legal disputes are never easy, but in practice, more than 90% of Hearings go smoothly. Unfortunately, the occasional disruptive witness or lawyer is an unavoidable reality for ALJs. As mentioned above, witnesses and lawyers may subconsciously – or even consciously – perceive

that the ALJ is not a "real" Judge. Occasionally lawyers and witnesses allow a bit of subtle, or not-so-subtle, disdain shine through.

When a Hearing begins to get out of control, or when a lawyer or party becomes emotional or disruptive, one of the best tools at your disposal is your discretion to announce that it is time for a short break. If parties are interrupting each other, it is perfectly acceptable to immediately hold up your hand and say, "Counsel. Please pause for a moment. We are trying to make a record, and I cannot hear what the witness is saying." For the sake of your court reporter, do not hesitate to step in to stop parties from speaking over each other.

If a lawyer or party crosses the line and begins to badger or berate another participant, it may be plain for the record. In some cases, however, unspoken facial expressions, yelling, badgering or unbridled emotion may not be apparent in the written record. Therefore, if you believe a participant is behaving inappropriately, take the opportunity to note the behavior for the record. That way, if you are required to interrupt or place limits on the proceeding, your decision will be justified in the written transcript. Again, the first step in trying to re-establish control is to assert yourself and enforce a brief pause in the testimony or argument. In severe cases, it may be helpful to explain to a lawyer that there is no need for theatrics, as this is an administrative jury and there is no jury to impress or inflame. Or, you may give a subtle hint that a given style of presentation does not really help you understand the issues you charged with deciding. If these subtle pauses and admonitions do not work, you may need to ask the parties to take a ten or fifteen minute break.

Ultimately, the ALJ has a discretion similar to that afforded a civil judge to run a fair proceeding, and may take measures to limit disruptive behavior. Do not let disruptive lawyers or parties get the best of you … maintain your poker face and let them know that you are standing by to hear and resolve a very particular administrative dispute. Start with the least drastic remedy, and to progressively ratchet up the sanctions if unruly behavior continues. In all cases, the key is to ensure that you make a record of any disruptive behavior so as to ensure that your own intervention does not become the basis for an otherwise unnecessary appeal.

F. Pro Se Litigants

Dealing with *pro se* litigants is a particular challenge for lawyers and ALJs. When there is a *pro se* litigant on the docket in a field in which parties are typically represented by counsel, use the pre-Hearing process immediately to reach the *pro se* litigant. Advise them that as the ALJ, you are a neutral party and cannot help either party with their dispute. Explain that while the *pro se* may believe they are correct, that in reality they are facing a very specialized area of law that is governed by statutes. Advise the *pro se* that they may bear the legal burden of proof or burden of production on certain issues, and that you will be unable to assist them in meeting such burdens. Explain that you are limited by the applicable statute, and that the statute may contain traps for the unwary or rules that might seem counterintuitive, but that you are bound by that statute. Explain that while the litigant has the right to proceed without counsel, you are required to apply the same laws and procedures that would be applicable to a represented party.

If the area of law over which you have jurisdiction has a fee-generating provision for lawyers, you may be able to advise the *pro se* that there may be lawyers interested in providing representation. You may be able to ask staff to provide the *pro se* with contact information for a bar association legal referral service. In other words, take all early opportunities to determine if a *pro se* litigant may be able to secure legal representation. At the same time, it is important to keep the case moving towards resolution, so be certain to advise the litigant that while you may afford them a period of time to seek counsel, if they do not do within a certain time frame, you will set the matter for hearing and proceed to a resolution.

Obviously, a *pro se* litigant may make your typical Hearing outline a little more difficult to follow, but it is your job to stick to the Hearing format insofar as possible. At the opening of the Hearing, state for the record that the party is proceeding without counsel. If possible, indicate for the record that you previously gave the party the opportunity to seek legal counsel, but that they have indicated that they now wish to proceed without counsel.

Offer the *pro se* the opportunity to make an opening statement. After swearing in the *pro se* litigant, you may offer them the opportunity to expound on a few basic questions from the bench, while advising them that their answers may be interrupted by an objection from opposing counsel:

1. What is the basis for your dispute?
2. Tell us what happened to you, and when.
3. What relief are you seeking?

If the *pro se* litigant's testimony requires clarification as to details or dates, it may be fine to follow up. Remember, however, that while it is your job to ensure a fair proceeding, you have previously advised the *pro se* that you cannot serve as their legal advocate. As such, in spite of your curiosity, it may be best to leave certain areas alone. Take care in asking questions from the bench that delve into areas that may unexpectedly help or hurt the litigant in making their case. Worse yet, a poorly-thought out question to a *pro se* litigant may inflame the situation, or worse yet, open up new areas of legal dispute that may compound the parties' legal situation. Leave cross-examination to opposing counsel.