

Introduction to Due Process Hearing Skills

NATIONAL DISABILITY RIGHTS NETWORK

Annual Conference, Virtual

June 8-12, 2020

Welcome and Introductions

Review of Agenda

Factual Investigations

Erica M. Molina, June 2020

Research & Investigation Steps

- Telephone screening
- Client interview – there could be several. Have a goal for every client meeting or conversation.
- Check written notices, determine deadlines for requesting a hearing
- Factual investigation (interview the expert, the vendor, the manufacturer, the job coach, etc.)
- Review the VR or special education file

Research & Investigation Steps

- Medical- or disability-related research
- Legal research
- Gather and review all supporting documentation, including expert reports, doctor's notes, etc.
 - The client may be able to assist you in collecting these documents.
- Evaluation of case merit, and your resources
- Develop a timeline to help you establish the relevant events of the case; use it throughout your preparation.

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Interviewing Clients and Witnesses

- Establish trust
- Be a good listener
- Take good notes
- Build a narrative
- Probe for additional information
- Help the witness remember by:
 - setting the scene;
 - triggering detail; or
 - using other sources

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Case Development
Legal Research, Theory of Case
Proof Chart, Settlement

Dustin Rynders
Updated 5/22

Why Litigate

- Individual relief (ethical obligation).
 - Including whether “Stay Put” or Pendency is needed
- Demonstrate to Opposing Party that P&A litigates/ stands up for positions it takes in lower levels of advocacy.
- Training Experience for Lawyers
- Systemic relief (alone or as part of a broader strategy on an issue).
- Building a record (legal and factual).
- Discovery.
- Legal theory test drive.

Legal Research; What Do You Have to Prove

- Federal and State Statute
 - Federal and State Regulations
 - Case law in your jurisdiction
 - Previous hearing officer decisions (especially of same hearing officer)
-
- Many generally sympathetic cases may not be clear winners depending on law and fairness of hearing process. Break down legal challenges of case for client to make informed decisions related to litigation and settlement.

Special Education; What do You Have to Prove

- Endrew F
 - To offer substantive prong of FAPE, especially for children in special education settings, program must be “appropriately ambitious,” focused on “challenging objectives,” and “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”
- Rowley (still particularly relevant if child is in regular classes).
 - Focus on grade promotion, passing grades, etc.
- *Michael F.* factors for select Circuits:
 - (1) whether the [student’s] “program is individualized on the basis of the student’s assessment and performance;
 - (2) program is administered in the least restrictive environment;
 - (3) the services are provided in a coordinated and collaborative manner by the key ‘stakeholders’; and
 - (4) positive academic and non-academic benefits are demonstrated.”

Special Education; Key Assistive Technology Cases / Guidance

- As a general matter, a district is not required to purchase devices the student would require regardless of whether or not the student is attending school. However, this exclusion does not apply if the IEP team determines that the student needs the device or service to receive FAPE and accordingly includes it in the IEP. *See, e.g., Letter to Anonymous, 24 IDELR 388 (OSEP 1996)*

Vocational Rehabilitation; What You Have to Prove

- Whether the vocational rehabilitation agency followed regulations and policy.
- Policy is based on regulations, so will need to look at both regulations as well as state handbook / policy manual.
- Make sure State VR policies are consistent with federal statute and regulations.
- Standard—whether the service is necessary to assist individual in preparing for, securing, retaining, advancing in, or regaining an employment outcome consistent with the individual's abilities and interests and informed choice.

Evaluation of Case Merit Considerations

- No P&A can take all cases
- Saying yes to one client for litigation, means saying no to others
- Is there another strategy that may resolve issue more quickly (another IEP meeting, call to supervisor, state complaint, etc.)
- Is there a good faith argument
- Is client really struggling and, if so, is available relief likely to help
- Could client obtain private representation if P&A rejects
- Does opposing party question P&A's commitment to zealous advocacy
- Is there a plan for expert fees
- Does case present opportunity for training
- Does client understand litigation time, stress and risk and remain committed to move forward

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Theory of Case

- Legal path to victory. For example:
 - Medicaid: medically necessary, cheapest (state plan, waivers, managed care).
 - IDEA: appropriate, least restrictive (focus on lack of meaningful progress).
 - Process: in your case, in rule adoption.
 - Discrimination: unequal treatment, illegal reason.
- Long-term perspective and corresponding, well-defined scope of representation.

Theory of Case, cont'd

- Roadblocks
 - Eligibility and service coverage.
 - Provider of last resort.
 - Statute of limitations.
 - Standing, private right of action.
 - Exhaustion of administrative remedies.
 - Ripeness and mootness.
- Burden of proof and presumption

Merits of Case; Assess Strengths & Weaknesses

- Your elevator speech.
- Factually correct, compelling and consistent with mission and goals.
- Credible witnesses with expertise and personal knowledge.
- What are other side's most compelling facts and likely arguments. Know in advance how you will respond. In special education, review Prior Written Notice carefully.

Proof Chart

- Consider organizing by topic, within category of what you will need to prove. Be sure to include specific facts that need proved as well as import and ultimate question

Goals Not “Appropriately Ambitious”	Exhibit(s)	Witness(s)	
No Goal on Independent Notetaking			

Pre-Hearing Settlement Attempts - Benefits

- Always a good strategy:
 - Saves client time and stress
 - Saves P&A resources
- Process can focus and strengthen your case even if unsuccessful:
 - Clarify issues in dispute...avoid wasting time at hearing
 - Resolve one or more issues in client's favor
 - Opportunity for “free discovery”...to review strengths, weaknesses of agency's case
 - Opportunity to assess your own witnesses

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General Strategies

- Don't Hide your Cards, Play Them!
 - Strong Draft Complaint or Pre-Hearing Memo
 - Highlight expert evaluations and documentation
- Know Your Adversary
 - Knowledge of the relevant law
 - Experience in hearings
 - Willingness to resolve without a hearing
- Continue to Assess Strengths & Weaknesses of Case
- Continue to take steps to prepare for litigation, preparing for hearing and showing other side you are planning to go forward
- Keep talking to client & opposing party about potential settlement
- In special education, Consider attending resolution Session (within 15 days of filing)
- Always show willingness to mediate. Consider making written settlement offer.

VR Hearing Issues

Due Process Allowed Under Title I

1) **Negotiation** – Process Not Required

Less Formal

2) **“Supervisor Administrative Review”** –
Process Not Required

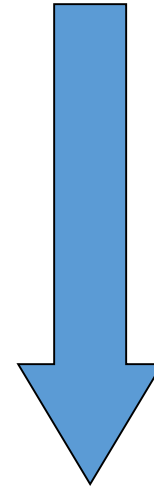
3) **Mediation** – Process Required, but voluntary.

4) **Impartial Hearing** – Process Required

[5) Administrative Review of I.H. Decision – Not
Required – optional as decided by each
State]

6) **Appeal** to State or Federal Court

More Formal



What issues may an individual address via due process, including an impartial hearing?

- Denial of eligibility.

34 C.F.R. § 361.57(b)(5)

- *Any other determination* (emphasis added) that affects the provision of VR services.

34 C.F.R. § 361.57(a)(1)

ADR/Informal Dispute Resolution

- ADR procedures (such as negotiation, mediation, etc.), may not be used to delay or deny an individual's right to an impartial hearing.
- An individual cannot waive the right to an impartial hearing by agreeing to go to mediation.

The Impartial Hearing Officer: Changes Under WIOA

- The impartial hearing officer shall have the authority to *render a decision and require actions* (emphasis added) regarding the applicant's or eligible individual's VR services under the Act.
[§722(5)(A)]

Obtaining and Introducing Documentary Evidence

- It is very likely that documents will make up the majority of your evidence. You will want to make sure that your state's rules allow you to freely submit documents as a substitute for in-person testimony.
- There are several potential advantages to using written reports and other documents instead of testimony:
 - The witness in question may not be available.
 - You (or your client) can avoid the cost of paying for your witness's time (if that is required) or reimbursing your witness for travel costs.
 - Preparation time will be less extensive.
 - You have better control over what goes into the record.

Stay Put or Status Quo Provisions: During Mediation and Impartial Hearing

- The VR agency may not reduce, suspend, or terminate any VR service, or refuse to conduct required assessments and IPE development, during mediation or impartial hearing unless the individual requests a reduction of services, or VR has evidence of a crime in obtaining services.

34 C.F.R. §

361.57(b)(4)

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The VR File

- Should be provided well in advance of hearing, in FULL. There should never be any doubt that you've received the entire record in VR's possession. Requests should always be in writing. Some sample language:

"I am requesting a full and complete copy of the case file for review. This would include, but is not limited to: all case notes, application(s), closing letters, form letters, email records, signed and unsigned IPEs, medical forms, assessments and results, evaluations and results, medical reports, referrals, authorizations, vouchers, college documents, completed due process forms, etc., beginning from application date to current date."

- Client has a right to their own copy. So do you.
- Bring enough copies of all anticipated exhibits for everyone to have their own. Helps limit confusion during the proceeding.

More VR-Related Issues....

- Know your timeframe for appeal (may differ between general and other VR agencies).
 - If the case history is vague, submit a new, written request to VR requesting relief on behalf of your client. Upon VR's denial in response, start counting timeframe from that point.
- Signed versions of the IPEs on record.
- Up-to-date releases, on the record.
- The exact issue stated by the client on the appeals form.
- Know your state's VR-related case law very well. VR may rely on such cases, even if irrelevant to the issue at hand.
- Also know any state law applicable to VR hearing proceedings. Have this language available to you during the hearing.
- Consider introducing joint exhibits in advance of hearing.

VR Hearing Format

- This is different state to state, agency to agency. The hearing officer's communications and demeanor at the actual hearing will set the tone.
 - How many people will be there?
- Research your hearing officer!
 - Is there a conflict (e.g., was she a P&A contractor in the past)? Is the officer familiar with VR and disability law?
- Consider physical and other kinds of accessibility needs—for both you and your client.
 - Assess the need for an interpreter, transportation assistance for client. This should be covered by VR.
 - Paratransit – does your client need a later start than 9:00 AM?
 - Are the tables high enough for a wheelchair?
 - Safe means of exit from the room in case of emergency, or breaks?

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Special Education Hearing Issues

Make Sure a Prior Written Notice has been Issued by District

- Must be provided to parent a reasonable time before the district proposes or refuses to initiate or change the identification, evaluation, educational placement or provision of FAPE.
- Must Include:
 - A description of action proposed or refused
 - An explanation why the district proposes or refuses to take action
 - Other options considered by the district and why these options were rejected
 - A description of evaluations & info considered

File for hearing

- **Triggers Pendency** – Status must reflect last agreed-upon IEP unless both parties agree differently. Forces a stay of any change to an IEP approved by the District. Pendency remains in effect throughout hearing and subsequent appeals
- **Gets the District's Attorney Involved**
- **Has Financial Implications for the District** – especially if P&A bringing the case
- **Triggers Mandatory "Resolution Session"**

Complaint

- Parent or a public agency may file a due process complaint on identification, evaluation or educational placement or the provision of FAPE to the child.
- Must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action or, within an explicit State time limitation.
- A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
- A proposed resolution of the problem to the extent known and available to the party at the time.

Complaint

- Put Significant Effort into the Complaint
- Identify all violations and the specific facts supporting them
- Why?
 - Shows strength of case
 - Shows breadth of issues (which has \$ implications)
 - Expands bases to recover attorney fees if hearing does result
 - Parties may not raise issues at hearing that were not addressed in the due process complaint notice, unless the parties agree.
- Non-IDEA claims?

Sufficiency

- The complaint must be deemed sufficient unless the opposing party notifies the hearing officer and the other party within 15 days of its receipt that is insufficient.
- Within five days of receipt of the notice, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements and must immediately notify the parties.

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Reply/Answer

- Unless the LEA has sent a prior written notice
- Within 10 days of receiving the due process complaint, the LEA must send to the parent a response that includes
 - An explanation of why the agency proposed or refused to take the action raised in the due process complaint
 - A description of other options that the IEP Team considered and the reasons why those options were rejected
 - A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action
 - A description of the other factors that are relevant to the agency's proposed or refused action.

Pre-Hearing Resolution Session

- The district must convene a meeting with the parent within 15 days of notice of complaint
- Exceptions: the parent and district waive in writing or mediation process.
- Opportunity to resolve the complaint. Must include a district person with decision making authority; not a CSE meeting
- No attorney for district unless parent brings an attorney.
- Successful Resolution: Settlement Agreement - legally binding document; enforceable in State or Federal Court.
- No Resolution: 45-day due process time line begins after resolution meeting

Resolution Session Strategies

- If your client or parent is a good witness, let them share their concerns (after being prepped by you!)
- Offer creative solutions.
 - Mutually agreed on 3rd party evaluation
 - Involvement of independent consultant
 - Trial period + data collection; then reconvene to reconsider
- If resolution unsuccessful, proceed to hearing if the merits of the case are still in tact. Backing down has consequences for you and your client.

Research Your Hearing Officer

Must not be...

- An employee of the SEA or the LEA
- A person having a personal or professional interest that conflicts with the person's objectivity in the hearing

Must possess knowledge of, and the ability to understand...

- The provisions of the Act, regulations, and legal interpretations of the Act by Federal and State courts
- Conduct hearings in accordance with appropriate, standard legal practice
- Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice

Hearing Rights

Any party has the right to:

- Be accompanied and advised by counsel; individuals with special knowledge or training with respect to the problems of children with disabilities
- Present evidence and confront, cross-examine, and compel the attendance of witnesses
- Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing
- Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing and electronic findings of fact and decisions.

Hearing Rights

- State law determines parameters of representation by non-attorney advocates
- Parents involved in hearings must be given the right to:
 - Have the child who is the subject of the hearing present
 - Open the hearing to the public
 - Have the record of the hearing and the findings of fact and decisions provided at no cost to parents.

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Disclosure

- At least five business days prior each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.
- A hearing officer may bar any party that fails to comply from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

Special Issues

- Treat it like a federal bench trial
- Discovery
- Hearing logistics and introduction of documents
- Burden of proof
- Rules of evidence
- Is IEP Committee Disagreement Needed Before Hearing
- What to Look for in PWN
- Resolution Hearing v. Mediation

Special issues

- Identifying Witnesses and Preparing for Cross with School District Witnesses
- Experts
 - Identifying Types
 - Cost reduction strategies
 - Preparing to Write Report
 - Preparing to Testify
- Role of Parents in Hearing
- Post Hearing Briefing

Special Issues

- Expert witness qualifications
- Federal Rules of Evidence, Rule 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b)** the testimony is based on sufficient facts or data;
- (c)** the testimony is the product of reliable principles and methods; and
- (d)** the expert has reliably applied the principles and methods to the facts of the case.

Direct Examination of Lay and Expert Witnesses

Edited by Ron Hager, June 2020

Preparing a Witness for Direct Exam

- In all of witness preparation keep in mind what you need to prove to win.
- Facts should make hearing officer want to rule for you and legal arguments will give reason.
- Get them comfortable with setting for hearing, explain professional dress, maintain eye contact.
- Explain how hearing is run and roles of players involved.

Preparing a Witness for Direct Exam

- Interview witness and find out how they answer questions—short, long, organized, all over the place.
- Tell them about the questions you plan to ask and the order of your questions—OK to practice.
- Help the witness understand how much information to give in response to a question.
 - When I ask this, I am looking for this
 - Just relax and answer the question as best you can
 - I will follow up if you forget something

Preparing a Witness for Direct Exam

- Prepare the witness for cross exam.
 - Discuss with them weak areas you see and talk about an explanation
 - Make sure they listen carefully to the question and only answer it
 - OK to say you don't understand
 - Explain the role of re-direct, when they will have a chance to explain

Construction of Direct Examination

- Construct your direct exam with your case theory in mind.
- Be sure to cover the facts you need to prove your case.
- But also tell a story and personalize the client/witness.
- Anticipate the cross exam.

Organize the Direct Exam in a Persuasive and Logical Way

- Start by accrediting the witness—student, parent neighbor—also gets the witness comfortable.
- Organize your questions by topic or in chronological order—chronological easiest—but can also use both.
- Utilize the doctrines of primacy and recency by starting and ending big.
- Not as critical for an administrative hearing, but you want to leave an impression.
- Remember the record—make sure its in there.

Conduct a Persuasive and Interesting Direct Exam

- The witness is the star of direct exam.
- Use simple non-leading questions—types of questions.
- Have notes about what you hoped to cover with a question and ask follow-up questions if something is not covered.
- Use head notes to signal a change in topic.
- Keep a steady pace to your questions and avoid long pauses.
- Go back and make sure you covered all your points before ending.

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The Expert Witness

Elements of expert testimony

- Establish Qualifications—use of vita
- Tender the witness as an expert (if necessary)
- Establish nature of relationship with client
 - This will include the length of the relationship, frequency of visits or meetings, and specifics about the relationship.
 - Zero in on those activities with the client (evaluations, observations, etc.) that become the foundation for the expert opinion.
- Establish the specifics of the evaluations performed, documents or outside reports reviewed, consultants contacted, etc.

Elements of expert testimony

- Identify any underlying findings or conclusions that make up foundation for expert's ultimate opinion(s).
- Have expert explain ultimate opinion reached.
- Best to have the expert explain any specialized terms and give as many concrete examples as possible.
- If expert recommending particular service, intervention, or piece of AT, have witness identify if there are other less costly alternatives, extent to which they were investigated, and why they were rejected.

Using Documents to Support the Expert's Opinion

Some Options:

- Highlight important sections of the expert's report.
- Use the agency's notice to differentiate the expert's opinion with the agency's opinion.
- Use journal articles, professional standards, or consensus statements.

Differentiating the Competing Expert's Opinions

- How are the opinions similar?
- How are the opinions different?
- What is the rationale for the divergence?
- Why is your expert correct?

Persuasive Techniques for Direct Examination

- Humanize the Witness
- Use Plain Language
- Avoid Narratives
 - Punctuate Expert testimony at logical breaking points
- Use Examples and Analogies
- Do not go beyond area of expertise

Prepare expert for cross

- Learn to play “devil’s advocate,” identifying potential weaknesses in case and in witness’s testimony.
- Ask your expert what are potential weaknesses in testimony and ask about ways to counter them.
- Provide witness with sample of kinds of questions that may come up, instructing to answer truthfully.
- Only answer questions asked and don’t volunteer additional information. You can follow up with re-direct.
- OK to say: “I don’t know”; “I don’t remember”; “Please repeat the question”; “I don’t understand the question.”

Cross Examination

From Thomas

Why Cross Examination?

- Your chance to question adverse witnesses
 - They have told their side of the story during direct exam
- Your chance to frame the issues
 - You get to formulate the questions – allows you to strategize
- Your chance to confront inconsistencies
 - You can highlight issues such as misunderstanding, dishonesty, motives, etc.
- Your chance to take away defenses
 - A defendant must only disprove one element – you must prove all!

General Tips - 1

- Don't be a jerk!
 - Most witnesses have not testified.
 - Be polite but make them answer.
 - Make the hearing officer sympathetic to you.
- Listen
 - Easy to get distracted.
 - The hearing officer is listening; you should be too.
- Brevity = Clarity
 - Don't want to belabor an issue.
 - Get the points you need for closing and move on.

General Tips - 2

- Lead

- Administrative Hearing v. Court.
- Still necessary where possible.

- Be an expert

- Very easy to give the witness control if unprepared.
- What are their professional standards, rules, process, etc.
- If they don't follow their own rules, what business do they have opining about your client?
- Time investment but large dividends.

General Tips - 2

- Guide them in and close the door
 - Sometimes described as “don’t spring the trap until the witness is inside.”
 - Carefully construct cross-exam in a way that gives them little or no choice but to agree or appear unreasonable.
- Be cool

Cross Examination generally – 1

- Why are we leading?

You are giving the information.

You get to testify.

You get to frame the information.

VR Van Modification Ex.:

Q: The IPE was developed in January of this year?

Q: You wrote that it was necessary for my client to have a modified vehicle?

Q: You approved her vocational goal?

Cross Examination generally – 2

- One question – one point

Don't want to waste time and attention arguing about with which part of the question the witness disagrees.

Q: My client lives out in the country, right?

(can make them look immediately hostile or unreasonable if they argue with you about this)

Q: You requested approval of this expense?

Q: From the District manager?

Q: Which is the next step toward payment?

- Facts – not opinions or value judgments

This leads to expansion, which can derail and let the witness take charge.

Characterization words – Good/Bad/Adequate/Acceptable

Cross Examination generally – 3

- Proving a negative isn't always impossible.
 - The “find it” game.
 - Can be tricky

Q: On January 7, 2019, our office requested “all records”

Q: On January 15, 2019, you provided us “all records”

Q: You didn't withhold anything?

Q: You have a copy there of what you produced?

Q: Can you find _____ for me in that record?

Cross Examination generally – 4

- Is that a yes?

Uh huh and Unh Unh or head nods – gives you the opportunity to let the witness know you're in charge – be polite but take that opportunity to get on to them.

“I suppose” is not good enough when you know you're right.

Go through the options – show them that “yes” is correct, and they don't need to “guess” or “suppose.”

- Primacy and Recency

Rhetorical tool - Start on a high note; end on a high note.

- Impeachment

Three steps: 1. Recommit; 2. Accredit; 3. Confront.

Cross Examination generally – 5

- Impeachment

Three steps: 1. Recommit; 2. Accredit; 3. Confront.

Recommit: “You testified that my client’s IEP was sufficient”

Accredit: “An IEP must be in writing?” “Is this his IEP?” “All of it?” “Required to have X, Y, and Z in an IEP.”

Confront: “Where is X?”

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Cross Examination – Experts – 1

- Identify the witness.
 - Qualifications
 - Relationship to opponent
- Get copies of any reports by the witness regarding this case.
- Compare the report to the letters of medical justification/your other expert reports.
 - Compare the report to published articles/studies.
 - Compare the report to law and regulations.

Cross Examination – Experts – 2

- Review any professional articles the witness may have written.
- Decide whether, or how, you can use the witness.
 - Any points in your favor?
- It can be dangerous to cross examine and you may decide not to cross examine at all.

Opening Statements

Erica M. Molina, June 2020

Preparing & Delivering an Opening Statement

- An oral summary, presented at beginning of hearing.
- Gives decision maker a preview of what case is about.
- These statements do NOT count as evidence.
- This is an opportunity to accomplish several things:
 - Explain who your client is, what the requested equipment will do for him or her.
 - Explain what is not in dispute.
 - Clarify the issues which remain in dispute.
 - Explain your theory of the case.
 - Explain testimony and documents you will use.

Do You Ever Waive the Opening Statement?

- No universal “yes” or “no”
- May choose a very simplified form of opening statement
 - Consider whether the hearing officer will need an elaborate explanation.
 - A detailed opening is most needed when ALJ is not familiar with the issues, the type of documentary evidence, or applicable law.

Remember the goals of the opening.

- Tailor your opening to meet these goals.

How Long Should the Opening Be?

- It could depend on what you know about the ALJ or hearing officer
 - They may have a reputation of not wanting to hear long opening statements.
 - If so, try to keep it under 5 minutes.
 - If longer statement needed, be prepared for resistance.
- Tailor length to complexity and length of hearing
 - 20 minutes would be too much for a 1 hour hearing with 3 witnesses.
 - 20 minutes (or longer) may be appropriate for 2 day hearing with 50 exhibits and 13 witnesses.

Should Written Statement be Used in Lieu of or to Supplement Opening Statement?

- A multi-media approach – oral opening and written statement – can be very effective
 - Would rarely waive right to an oral opening statement.
 - Good written materials allow you to shorten opening statement.
- Written opening should be no longer than needed to provide the hearing officer with:
 - The theory of your case
 - How you intend to prove your case

Additional Guidelines - Opening Statements

- Do not overstate your case.
- Do not promise a witness or document you might not get.
- Do not paint the agency or its employees as bad guys.
 - Everyone has a job to do, including them. Take the high road.
 - ALJs and hearing officers are interested in facts, expert evidence, and relevant law. Keep your opening to those issues.

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Closing Arguments & Statements

Erica M. Molina, June 2020

Closing Statement, Written Argument, or Both?

When Should I Give a Closing Statement?

- Nearly always; may be extremely short in some cases.

Preparation

- Before hearing, prepare general outline.
- Edit outline based on what happens at hearing.
 - Consider whether a transcript will be provided.
- If submitting written argument, closing can be very short.

Preparing Your Closing Brief or Written Argument

Should you submit written arguments?

- Great variation in how hearings are run in different states.
- Decision should be made on individual circumstances.
- Will the written arguments aid the decision maker in deciding the case?
- How complex are the medical, technological, and/or legal issues involved?

Goal of Your Written Argument – Make the Decision an Easy One!

- Summarize factual evidence in logical, easy-to-understand fashion. Include citations to the exhibits and transcript whenever available.
- Lay out law, regulations, and policy so that ALJ can easily follow the arguments.
- Discuss factual evidence on both sides; apply to the law and policy at hand; and explain why you prevail.
- Summarize strengths. DO NOT make your adversary's arguments! Focus only on your client's story.
- If the hearing officer ends up quoting you in their decision, you know your brief was a good one!

The Format

- Short letter brief
- Longer letter brief, short memorandum of law
 - As document gets longer (two pages or more), use headings to separate sections.
- Standard memorandum of law
- Proposed findings of fact, conclusions of law

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When To Submit?

- Ask for set time agreed upon by all, such as two weeks from date of hearing, or 10 days after receipt of transcript.
- This protocol varies state to state, agency to agency, and officer to officer.
- Sometimes, this may be document you submit before hearing or as hearing ends. This should be part of the research you've done to start with.
- Again, consider whether there is going to be a transcript provided.