Mock Administrative Hearings: Facing Uncommon but Challenging Issues

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This session will present four scripted "skits" that illustrate problems that could be encountered by a hearing official. In each session, class attendees will be asked to identify and discuss the problems exhibited and will engage in a broader examination of the challenges each presents in a hearing and how each might be addressed by a hearing official to maintain control of that hearing. The final "extra" presentation will present a short example of when a hearing official can take administrative notice. As with the other skits, attendees will respond to questions and will participate in an interactive dialogue.

Hearing Skit 1

Misleading a Witness. An ALJ orders counsel for an applicant to stop misleading a witness during direct examination and directs that the aspects of testimony that were the result of that witness being misled be excluded. The ALJ warns counsel that all testimony of that witness will be excluded if the attempts at tampering with the witness do not end. The skit illustrates several ways in which the attorney may be trying to mislead the witness during direct examination; attendees will be asked to identify where and whether this occurred and will discuss how the ALJ handled this matter. A moderated discussion about this issue and its impact on the consideration of testimonial evidence will be part of this presentation.

What is a Misleading Question?
A question that (a) uses logic in such a way that it deliberately causes someone to reach an incorrect conclusion,
(b) makes an argument rather than asks a question.
This may typically be the subject of an objection made to a line of questioning to a witness during a trial.

What is Witness Tampering?
The act of attempting to improperly influence, alter or prevent the testimony of witnesses.

Guided Questions/Discussion.
At what points did counsel try to, or successfully, mislead his witness?
Should the hearing officer have heard argument on the objections before making the ruling?
(When is it appropriate to ask a question or direct a party to rephrase without an objection pending?)
Do you agree with the rulings of the hearing officer?
How would this hearing process have been impacted if leading questions were allowed?
Was counsel just refreshing the recollection of his witness?

Further reading.
Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1, (1995). (1995).
https://heinonline.org/HOL/Contents?handle=hein.journals/cdozo17&id=1&size=2&index=&collection=journals

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Hearing Skit 2

Foreign Language Interpreters. A licensee whose primary language is Spanish has appealed the revocation of his license as a home healthcare provider to the Department of Public Health. He has testified that during the investigation of his alleged drug use, which was the reason for the revocation, he told the investigators (who were asking about his financial status) that he "didn't even have ten cents." The translator, who is a witness for the DPH, has testified that the investigator's report indicated that the licensee told investigators that he "didn't even have ten kilos." Given the licensee's dialect and the context of the statement, his words could properly be translated as claimed by the licensee. Did the translator make a mistake? The licensee has moved to strike this testimonial evidence. This skit will show the arguments of the parties and ask the attendees to rule.

Guided questions.
How would you rule?
Does your hearing process direct how to handle suspected mistakes made by interpreters?
Does your jurisdiction have a rule as to whose testimony should prevail?
What are the implications of this situation on this hearing and, more broadly, on the use of interpreters?

Further reading:
Lisa Santaniello, *If an Interpreter Mistranslates in a Courtroom and There is No Recording, Does Anyone Care?: The Case for Protecting LEP Defendants' Constitutional Rights*, 14 Nw. J. L. & Soc. Pol'y. 91 (2018). https://scholarlycommons.law.northwestern.edu/njlsp/vol14/iss1/3.

Michael B. Shulman, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 Vanderbilt Law Review 175
(1993) https://scholarship.law.vanderbilt.edu/vlr/vol46/iss1/4.

"'*Get Down' From the Car. 'Make' the Line." Is Miami English a New Dialect?*
https://www.nytimes.com/2023/07/26/us/miami-dialect-english-spanish.html

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Hearing Skit 3

Self-represented Litigants and Settlement Agreements. This skit will show an ALJ directing self-represented parties in the settlement of a matter that has been characterized by procedural problems. The skit will illustrate the actions the ALJ has taken to handle those problems and what he does to be sure the parties understand the impacts on their right to a fair process. The question of the extent to which an ALJ should be involved in settlement, particularly with self-represented parties, will be discussed. The question of whether the parties have been improperly pressured into settlement will also be considered. The broader question of the value of stipulated agreements and their use with self-represented parties will be discussed.

Guided questions.
Did the actions of the ALJ improperly influence the parties to accept the settlement?
Do you believe the parties understood their procedural rights?
What adjustments do you make to your hearing script when a self-represented party is involved?
What should an ALJ do if he or she believes that the rights of unrepresented parties have been violated?
How far should a hearing officer go to explain the terms and impact of a proposed settlement agreement?

Further reading.
Susan D. Carle, *The Settlement Problem in Public Interest Law*, 29 Stan. L. & Pol'y Rev. 1 (2018).
https://law.stanford.edu/publications/settlement-problem-public-interest-law/.

Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085 (1984).
https://law.yale.edu/sites/default/files/documents/faculty/papers/againstsettlement.pdf.

For example of state guidance, see Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants (with commentary) | Mass.gov.

Hearing Skit 4

Managing Difficult Parties. The state's primary power company filed an application to renew its permit to discharge water into Long Island Sound from the cooling waters necessary to the operation of its nuclear power plant. An environmental activist, who is the state President of the Sierra Club, intervened as a party and is doing all she can to delay proceedings. The activist tried to delay the process by filing a motion to disqualify the hearing officer and objecting to requests for production at the pre-hearing conference. Previously, the activists failed to comply with an order to compel production and filed numerous motions for extensions of time. The pre-hearing conference is being televised to a local cable station whose reporter is being disruptive in the proceeding. At the conference, the intervenor, who has been joined by the Sierra Club's national president, has continued her mission to disrupt the process, objecting to the pre-hearing information filed by the applicant and the agency, and seeking to include the national Sierra Club as an intervenor. Throughout the skit, the attendees will be invited to ask questions and make comments on the hearing officer's actions to control the proceeding.

Further reading.
Indiana Continuing Legal Education Forum (ICLEF), *Managing the Hearing Room in Administrative Law Proceedings* (2020), Indiana Continuing Legal Education Forum 2020. 47.
https://scholarship.law.nd.edu/iclef_2020/47.

Snider KM, Devereux PG, Miller MK. *Judges' Emotion: An Application of the Emotion Regulation Process Model*. Psychiatry, Psychology and Law (2022), Vol. 29, No. 2, 256–273.
https://dx.doi.org/10.1080/13218719.2021.1904454.

Leben, Steve, *Ten Tips for Judges Dealing with the Media* (2011), Court Review, Volume 47, Issues 1-2, 38-41.
https://digitalcommons.unl.edu/ajacourtreview/351?utm_source=digitalcommons.unl.edu%2Fajacourtreview%2F351&utm_medium=PDF&utm_campaign=PDFCoverPages.

Guided questions.
What do you think about the efforts of the hearing officer to control the process?
How well did the hearing officer balance the rights of the applicant with the demands of the intervenor?
Did the hearing officer sufficiently consider the regulatory requirements that govern the application?
What should the hearing officer have done to accommodate the press?

Hearing Skit 5 (if time permits)

Extent of Administrative Notice. The hearing officer takes administrative notice of a particular fact that raises the question of whether that notice was correctly taken.

Guided questions.
Was it appropriate for the hearing officer to take notice?
When is it appropriate to take administrative/judicial notice?
How do you address requests for notice?
Do you hear argument?