This paper provides an administrative law judge (ALJ) with a brief overview of how to conduct a hearing on the merits. This presentation builds on the methods discussed in Part 1 of this series, How to Conduct a Prehearing Conference. Part 3 will present a mock prehearing conference and hearing on the merits (September 12, 2017, 1:30 p.m. to 2:30 p.m.,

I. The ALJ’s case-related duties
   A. Case management: management of resources outside the hearing process
   B. Conducting hearings: conduct of formal proceedings for the receipt of evidence and legal argument.
   C. Preparing written orders, proposals for decision, and final decisions

II. What is a hearing on the merits?
   A. A hearing on the merits is a forum: (1) during which the parties present to the ALJ evidence and legal argument; and (2) after which the ALJ marshals the evidence and argument into a final written administrative decision.¹
   B. For the ALJ, a hearing is an exercise in multi-tasking, much of which will become part of the administrative record.

III. Convening the hearing
   A. Preliminary steps:

¹Depending on the ALJ’s authority, the ALJ’s final work product will be a final administrative decision (subject to some level of appeal) or a proposal for decision (subject to adoption by an administrative agency). The differences in the finality of the two types of documents are not relevant to the scope of this presentation. For ease of reading, this paper will use the term “final administrative decision.”
1. ALJ’s arrival time: The ALJ should arrive at the hearing on the merits before the scheduled time and be ready to begin at the scheduled time.

2. Copy of notice of hearing: The ALJ should have a copy of the notice of hearing to confirm the scheduled time, date, and place of the hearing.

3. Outline of opening remarks: The ALJ should have an outline of his or her opening remarks.

4. Recording of the proceeding: The ALJ should confirm that a recording of the proceeding—whether by digital recorder or by court reporter—is ready to proceed.

5. Operation of equipment: If one or more of the parties will appear by telephone or video conference, the ALJ should ensure his or her understanding of how to operate the equipment.

6. Sufficient space: The ALJ should have sufficient space on the bench to receive and store exhibits for the hearing.

7. Court reporter’s needs: If a court reporter is present, the ALJ should ensure that the court reporter has sufficient space, a clear view of the persons who will speak, and access to a power supply.

8. Translator’s needs: If a translator is required to be present, the ALJ should have made arrangements for the seating of the translator and for the translator’s (and court reporter’s) clear understanding of how the translator will conduct his or her work.

9. Exhibit log: This is a standard form that is used to record the exhibits offered. For each exhibit, the log should show:
   a. The exhibit identifier (Respondent’s Ex. 6)
   b. The exhibit description (Map of the original property)
   c. The heck boxes showing whether an exhibit was:
      (1) Offered;
      (2) Admitted or rejected;
      (3) The subject of an objection; and
      (4) The subject of notes by the ALJ.

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10. The ALJ’s note-taking materials.
11. The ALJ’s files of materials, including copies of:
   a. Governing laws, including:
   b. Organic statute for your agency
   c. Rules of procedure that govern this case
   d. Laws that apply in this case, including:
      (1) Jurisdictional statutes
      (2) Organic statutes
      (3) Agency rules
      (4) Recent appellate opinions that interpret the application of laws relevant to this case
   e. The case materials for this case, including:
      (1) Live pleadings
      (2) All written orders that you issued during the course of the case
      (3) Any pre-hearing briefs
      (4) Your pre-hearing notes

B. Identification procedures
   1. The ALJ and the proceeding
      a. The ALJ should identify himself or herself for the record, including his or her name and the title of the name of agency conducting the proceeding.
      b. The ALJ should identify the case by its style and docket number, including that the proceeding is a hearing on the merits
   2. The parties
      a. If one or more parties intend to appear by telephone or videoconference, the ALJ should initiate the phone call or video conference to contact the parties.
      b. The ALJ should ask each party or party representative to identify himself or herself on the record.
      c. If a party or party representative is not present or does not respond to the telephone call or video conference, then ALJ should note the party’s non-appearance on the record and ask the other parties whether:
(1) they know the reason for the party’s non-appearance;
(2) they have any suggestions on alternative means of contacting the non-appearing party; and
(3) they wish to proceed without the non-appearing party.

C. Challenges to venue, jurisdiction, and notice

1. Venue
   a. A challenge to venue is a matter that usually is required to be raised as a prehearing motion.
   b. An objection to venue raised at the opening of the hearing is generally moot.

2. Jurisdiction
   a. Challenges to jurisdiction usually may be raised at any point in the hearing process.
   b. Unless the issue of jurisdiction has been addressed in the prehearing conference, confirm that the parties have no objections to the jurisdiction of the ALJ or of the agency that will make the final administrative decision.
   c. If a party has a jurisdictional objection, hear the objection and any responses. The ALJ need not make a ruling on the issue immediately and may proceed with the balance of the hearing before making a ruling.

3. Challenges to notice
   a. Notice requirements are typically set by law.
   b. The burden is usually on the claimant to prove that notice complies with the applicable law.
   c. A challenge to notice requires the Respondent to show how the alleged notice failed to comply with the law.
D. The “sovereign citizen” defense

1. What is the defense?
   a. As discussed in “How to Conduct a Prehearing Conference,” the “sovereign citizen” defense is a quasi-legal argument sometimes advanced by persons who object to the scope of governmental regulation of almost any type.
   b. The “sovereign citizen” defense is most often asserted in cases involving the right to pursue a profession or trade, the right to carry firearms, and the right to use private property.
   c. The respondents’ arguments are often based on documents that may have little basis in fact or law—or that are unrelated to the claim asserted.

2. Who asserts this defense?
   a. The defense is often asserted by persons who are representing themselves or who are relying on non-licensed attorney representation.
   b. In most cases, the persons asserting these defenses are attempting to assert their challenge to the scope of governmental regulation of their lives.
   c. In most cases, persons asserting these defenses realize that they have little chance of success but wish to be heard.
   d. However, some of the proponents of this defense are advocates of violence and what they regard as “self-defense.”

3. How should an ALJ deal with these defenses?

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For a comprehensive review of the “sovereign citizen” profile and defense, attendees at this conference should attend Session 6, “MANAGING HEARINGS INVOLVING DIFFICULT PARTIES, WITNESSES & ATTORNEYS, PART 2,” presented by Joseph Rubenstein, Senior Judge, Minnesota Department of Human Services, on Monday, September 11, 2017, from 4:00 to 5:00 p.m.

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a. Carefully. An ALJ should show respect to every party, including those who assert the “sovereign citizen” defense.

b. An ALJ should be aware that some “sovereign citizen” proponents have come to hearing rooms armed; some jurisdictions permit armed, non-public safety personnel to attend public hearings.

c. An ALJ who is made uncomfortable by these persons should discuss the issue with his or her manager, including taking a recess to raise the issue.

d. If appropriate, an ALJ may ask that armed security be present for the hearing.

E. Preliminary motions

1. The ALJ should ask the parties if anyone has a preliminary motion or a scheduling matter to be addressed before the presentation of any opening arguments.

2. If any are made, the ALJ should hear any responses from opposing counsel and make rulings as appropriate.

3. Motions in limine are typically inappropriate in an administrative hearing since no jury will be present.

F. Confirmation of the version of the laws that govern the proceeding

1. At a point early in the hearing, the ALJ should confirm the version of the statutes, rules, and other agency policies that govern the case.

2. If the version is one that has been superseded, the ALJ should request and receive a copy of the version that does apply.

3. If the parties disagree about which version applies, the ALJ should request and receive their respective versions, followed (at some point, including post-hearing) by the ALJ’s ruling on the issue.
G. Daily agenda
1. The ALJ should state his or her understanding of the day’s agenda, including:
   a. which party representative will proceed first;
   b. the names of any witnesses to be presented that day;
   c. and whether the party representative wishes to offer all of the day’s evidence at once or as presented by each witness.
2. The ALJ’s review of the daily agenda is a useful procedure that will help maintain the ALJ’s and parties’ joint understanding of the presentation sequence.

H. Dealing with unrepresented parties
1. The ALJ may wish to develop a standard presentation to persons who choose to appear without counsel
2. The ALJ should explain that the ALJ’s task is to resolve the dispute (or to recommend a resolution) but not to represent the unrepresented party.
3. The ALJ may describe in brief the sequence that the hearing on the merits will follow; the unrepresented party may ask the ALJ during the hearing to identify which step in the process the hearing currently stands.

I. Information for parties, witnesses, and observers
1. The ALJ should take a few minutes to remind the non-attorneys about the basic rules of decorum and procedure in the hearing room.
2. The rules may include:
   a. If persons need to talk, they may leave the room and return when they have completed their discussions
   b. Persons may (or may not) have water or cold drinks in the hearing room
   c. The ALJ will take a break before lunch for persons to use the bathroom; if someone needs to take a break at other times, they may leave the room and return
   d. If the ALJ or the court reporter cannot hear or see a witness during testimony, the ALJ or court reporter may
ask the person to repeat the testimony, speak louder or more clearly, or move to another seat.

J. Dealing with the media
1. In many jurisdictions, administrative proceedings are public proceedings unless made private by statute.
2. Members of the media may be present and may report on any aspect of the case.
3. Members of the media should not be allowed to interfere with the hearing process in the hearing room.
   a. For example, photography may be permitted, but a photographer may be required to not use artificial lights and to remain seated during the hearing process.
   b. Similarly, reporters may attempt to interview persons during breaks in the hallway or lobbies but not in the hearing room.
4. Typically, ALJs refrain from giving statements to the media; although it may be appropriate for an ALJ to give a brief statement to representatives of the print media summarizing the administrative hearing process.

K. Dealing with difficult people in the hearing room
1. Dealing with difficult attorneys
   a. Trial attorneys who are unfamiliar with the administrative process may attempt to use trial room tactics improperly in an administrative hearing.
   b. These tactics may include: berating or belittling witnesses, making sidebar comments on the record, challenging the authority of the ALJ, and similar tactics.
   c. An ALJ should not tolerate any of these behaviors.
   d. One well-established approach is the 3-strikes-you-are-out rule:
      (1) At the first instance of improper attorney behavior, the ALJ may go off the record, clear the room, and speak to counsel. The ALJ should identify the problem, ask counsel his or her intention in conducting himself or herself in this manner, remind counsel that the state bar rules of conduct
apply in administrative proceedings, and warn counsel not to continue.

(2) At the second instance, the ALJ may stay on the record with all present, instruct the offending attorney about the problem, require an apology, and warn him or her that a third violation may result in sanctions.

(3) At the third instance, the ALJ may stop the proceedings and consult with his or her managing ALJ about the scope of sanctions available to control this conduct. Recall that most jurisdictions require a separate hearing before sanctions may be imposed, if they are available in administrative hearings.

2. Dealing with difficult parties or witnesses
   a. If a witness is represented by counsel, the ALJ may wish to identify the problem and instruct the witness’s attorney to confer with his or her client about the problem.
   b. If a witness is not represented by counsel, the ALJ may wish to identify the problem and warn the witness that continuation of the offending behavior may result in sanctions.
   c. Depending on the jurisdiction, an ALJ may exclude the witness’s testimony or exclude the party from the hearing room if the offending behavior continues.

3. Dealing with difficult observers
   a. An ALJ should not tolerate offending behavior by observers.
   b. Offending behavior may take the form of signaling answers (including approval or disapproval of a testifying witness’s statements), making audible outbursts, whistling or applauding, engaging in confrontational behavior during the hearing or during breaks, or the wearing of clothing that is inappropriate or offensive.
c. An ALJ should carefully consider the rights of proponents to wear buttons or t-shirts supporting or opposing a contested topic.

IV. Case-in-chief

A. Opening statements
1. In some jurisdictions, the claimant has the right to present an opening statement before putting on its case-in-chief. The respondent has the option to present an opening statement either immediately following the presentation by the claimant or immediately before presenting its case-in-chief.
2. The ALJ should ask the parties if they wish to make opening statements. The ALJ should clarify how much time is allowed for presentation of opening statements.

B. The Rule
1. Some jurisdictions permit the use of The Rule in administrative hearings.
2. For non-attorneys, the Rule is usually unfamiliar and may be viewed with mistrust.
3. Upon announcing a party’s request for application of the Rule, the ALJ may summarize the Rule and how it will affect persons who are present in the hearing room.

C. Witnesses
1. The basics
   a. The party that goes first: In most cases, the party with the burden of proof will offer its first witness after the conclusion of opening statements.
   b. The ALJ’s instructions to the witness: The ALJ may instruct the witness to state and spell his or her name for the record.
   c. Swearing in the witness: Either the ALJ or the court reporter will swear in the witness.
   d. Prohibition on the use of leading questions: The attorney calling the witness may not ask leading questions unless:
      (1) the attorney has designated the witness as an adverse witness; or
(2) the purpose of the leading questions is to expedite the presentation of non-substantive matters, including witness background information.

e. Role of the first witness: Typically, the first witness has been selected by counsel to provide the ALJ with a chronology of the important events in the case.

D. Practice tips in dealing with witnesses:
1. Sequence of events in witness testimony
   a. If the ALJ has questions about the sequence of events, the ALJ may ask the witness or counsel to fill in the gaps.
   b. If the chronology of events is complex, the ALJ may instruct counsel to provide an exhibit that shows all of the significant events.

2. The witness who communicates unclearly
   a. Identify the source of the problem. Problems may include the witness who:
      (1) Speaks too softly or to quickly to be understood;
      (2) Is nervous, overwrought, or tearful;
      (3) Is chewing gum or eating candy; and
      (4) Is unable to answer a question without coaching.
   b. The ALJ may stop the testimony and, either or on off the record, speak to the witness to explain:
      (1) The ALJ’s job is to listen and to understand;
      (2) The ALJ is having a difficult time understanding the witness;
      (3) The ALJ will give the witness a brief opportunity to address the problem before starting again.

3. The witness whose memory improves
   a. Sometimes a witness subject to cross-examination has little or no memory of an event; later, on direct examination, the witness’s memory is clear.
   b. The ALJ may ask the witness the reason for his or her change in the ability to recollect clearly

E. Exhibits
1. The organization and preservation of exhibits
a. An ALJ has the duty to receive, consider, rule on offers and objections, organize, and preserve evidence for the administrative record
b. An ALJ’s system of dealing with exhibits should be a uniform system that is easy to manage.

2. Practice tips:
   a. Two copies of exhibits
      (1) Require each party to provide the ALJ with two copies of each exhibit.
      (2) On one copy the ALJ may make notes; the ALJ will keep the other copy pristine for the administrative record.
   b. Exhibit record form
      (1) The ALJ should bring to every hearing an exhibit record form.
      (2) The form should be a table with columns for listing each exhibit number; a brief description of the exhibit; whether the exhibit was offered, admitted, rejected, or withdrawn; and the ALJ’s notes about the exhibit.
      (3) The ALJ may instruct the parties to submit at the hearing a prepared exhibit list with completed columns for the exhibit numbers and exhibit descriptions.
   c. Withdrawn and rejected exhibits
      (1) The ALJ should return any exhibits that have been withdrawn; they have no place in the administrative record
      (2) The ALJ should retain any exhibits to which an exhibit has been made and sustained; the rejected exhibit and the ruling on the objection are part of the administrative record.
   d. Time of offering exhibits
      (1) The ALJ may require counsel to offer all exhibits before counsel calls its first witnesses.
(2) Objections may be made when a witness relies on an exhibit.

e. Unified exhibit set

(1) As discussed in the paper on How to Conduct a Prehearing Conference in this conference, require counsel to submit a single set of exhibits.

(2) The offer of individual exhibits will be subject to objection, but the use of a single set of exhibits may lessen the likelihood of submission of duplicates.

f. Rules of evidence

(1) Although the rules of evidence are typically relaxed in administrative hearings, an ALJ must have a clear understanding of the rules, proper objections under the rules, and the basis for sustaining or overruling objections.

(2) A party has right to a ruling on an objection to evidence.

g. Review and confirmation of evidence

(1) Among the last steps in a hearing on the merits should be the ALJ’s review and confirmation of the evidence.

(2) The ALJ should dictate into the record the ALJ’s understanding of the status of each exhibit offered: exhibit number, which party that offered the exhibit; whether the exhibit was the subject of an objection; the ruling on any objection; whether the exhibit was admitted; and confirmation that the ALJ has a copy of the exhibit for the administrative record.

(3) If counsel disagree with the ALJ’s summary, then ALJ should resolve those disagreements before the hearing is concluded.
F. Resting of a party’s case
1. A party rests its case upon the completion of the testimony of a party’s final witness and the offering of the last of the party’s documentary evidence,
2. An announcement of “Claimant [or Respondent] rests” has legal significance because it marks the boundary between one part of the case and the next.

G. Closing arguments/closing briefs
1. Closing arguments: After resting their cases, parties may wish to make brief closing statements reviewing the substance of their claims or defenses, the significant evidence in support of (or failing to support) the claims or defenses of one party, and the law governing the party’s arguments.
2. Closing briefs
   a. In complex cases, parties may wish to present written briefs of the same information to be covered in closing arguments.
   b. Rarely are both closing arguments and closing brief required or desirable.
3. Sequence of presentation
   a. The typical sequence of presentation is for the party with the burden of proof to begin, followed by the opposing party or parties, and ending with the party with the burden of proof.
   b. However, increasingly common for the presentation of closing briefs is the simultaneous submission of initial briefs, followed (some number of days or weeks later) by simultaneous submission of response briefs.
4. Practice tips for closing briefs:
   a. The ALJ should set a time and date by which briefs may be submitted. Unless the parties agree to an extension, the ALJ will not extend the deadline.
   b. The ALJ may wish to set limits on: the number of pages, font size, line spacing, and margin widths.
   c. The ALJ may require briefs to include citations to the evidence by exhibit number and page or to the transcript.
by volume, page, and line. The ALJ may require briefs to include citations to governing law, including case law and/or copies of published opinions.

V. Post-hearing procedures
   A. The post-hearing order
      1. The ALJ may wish to issue a post-hearing order immediately following the hearing.
      2. The first post-hearing order should review the deadlines for submission of briefs or other matters addressed in the hearing.
      3. In addition, the first post-hearing order should include rulings on matters on which the ALJ deferred ruling during the hearing on the merits.
      4. The ALJ may issue subsequent post-hearing orders as necessary until the ALJ’s issuance of the final administrative decision.

VI. Preparing the final administrative decision
   A. This issue will be addressed in detail in a subsequent presentation.
   B. However, the ALJ should avoid making a decision on the merits from the bench.
   C. Most jurisdictions require the ALJ’s final administrative decision (or proposal for decision) to be in writing and to contain findings of fact and conclusions of law.
   D. An ALJ’s rendition of an oral decision is often an unnecessary and confusing act that may prompt oral objections and requests for rehearing.