A Primer for Case Management and Hearing Conduct for Adjudicators

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Introduction

When conducting a hearing, your substantive function is to create a complete record of the facts to which you will apply the law and reach a legal conclusion. However, you must always be sensitive to the larger picture: to your litigant (especially if they are self-represented) you are the face of the government. The ***perception*** of fairness as important than actual fairness. The losing party is more likely to accept the outcome of the proceeding and the legitimacy of the agency, if that party perceives the proceeding was fair. Therefore, it is critical to conduct your hearing in an orderly fashion to ensure that you are fair to all parties.

The art of conducting a fair hearing involves more than just ruling on objections and marking exhibits. Preparation is essential.

I. Laying a Foundation

It is stressful to be constantly disorganized. Presiding over hearing where you barely know what the case is about is a recipe for mistakes and deprives you of the mental bandwidth to ensure that your record is complete. If you are always scrabbling at the last minute to write a decision on time, you don't have time to do solid research or to craft your best language. The best skill you should develop as an adjudicator is some sort of organizational system to keep track of your case assignments, files,

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[1] The material presented here is based on my experience as an administrative law judge and as an advisor to judges and administrative law judges. The suggestions presented here are mine alone and should not be attributed to the Pennsylvania Public Utility Commission. I would also urge you to consult the procedural rules which govern proceedings in your tribunal as they may require a different practice than what I present here. These materials may not be reproduced or republished without my express permission.

hearing calendar and other deadlines.

Time spent planning is never time wasted. As you receive your case assignments, you should also spend some time with your work and personal calendars. The earlier you map out your assignments and litigation timeline on your calendar the better. Consider when your decision is due. Create a system for yourself to record your decision due dates, making sure that you leave enough time for writing and administrative processing and any personal commitments that might have. (Your family will thank you if you plan ahead so that you don't have to take your work computer to the beach!)

There are a million different ways to manage your workload and deadlines. Like exercise equipment, the best method is a method that you will use. I find a "tickle" system is effective for me. I keep a list of my case assignments in a database that can be sorted by an "event" date. An "event" date might be the date the exhibits are due in advance of the hearing, the date of the hearing, the date that an answer to a motion is due, the date a brief is expected to be filed etc.

Give some thought to how you organize your physical or digital case files. Each file should be organized so that you can quickly put your hands on the initiating action, other pleadings, and any orders you have issued.

I also keep running notes for most of my cases. These notes include the names of the parties and their representatives, a general description of the subject of the complaint and notes on any prehearing conferences, hearings or motions that might occur. These personal notes are also a good place to keep track of your initial impressions, any prior relevant cases and notes on research that may need to be done. A log of events and thoughts in your case become a useful resource for writing your decision.

II. Before the Hearing

A. Reviewing Your File

A few minutes reviewing your file in advance of your hearing will save you hours of work later. Many problems can be resolved proactively ahead of the hearing. Early review of an assignment also provides an opportunity for you to design the conduct of the hearing to accommodate the resolution of any defects in the parties or procedure. If you spot a potential problem, you have an opportunity to research your

authority to design a procedure to remedy the defect, dismiss the case, or cure the problem.

Some issue to consider:

- Is your file complete? Do you have copies of all the relevant pleadings, including any underlying agency actions?
- Jurisdiction: Do you have jurisdiction over the subject-matter of the dispute? Was the initiating document timely filed?
- Who are your parties? Are they the "correct" party to bring the dispute?
- Are any of your parties self-represented?
- If a hearing has been scheduled, did the correct parties receive adequate notice of the time and place of your hearing? Do you have phone numbers and/or email addresses for all of the parties?

Other issues to look for in your initial review:

- Are any of your parties entities that may be required to secure counsel for representation, such as a corporation or association?
- Is an interpreter needed?
- Do you have any conflict that might prevent you from ethically hearing the case?
- Does your statute require publication or public notice?

If you have determined that you have jurisdiction over the parties and the subject matter to the dispute and that the parties have received adequate notice of the date and time of the hearing, you should next review the substance of the dispute.

- What is the law that controls your dispute?
- What facts will you need in your record to reach an outcome?
- What documents do you need for the record?
- What evidentiary problems might you encounter?

- Are there any outstanding motions that need to be resolved in advance of the hearing?

B. Prehearing Orders and Prehearing Conferences

As a best practice, a prehearing order should be issued in every case. A prehearing order should at least include:

- The date, time, and format of the hearing
- Contact information for you or your staff
- Contact information for the representative of the opposing party
- Instructions for requesting a continuance
- Instructions for requesting an accommodation or interpreter
- Consequences for failing to appear or failing to meet any deadlines that you establish
- Instructions for submitting exhibits in advance of the hearing

If you have a complex case (a case with many parties), or a case that raises a legal issue of first impression, you should consider convening a prehearing conference. Many issues can be resolved with a prehearing conference. Some of the topics you might cover include:

Case Management and Scheduling. A prehearing conference is an opportunity to work with the parties collaboratively to set deadlines for the exchange of discovery, the filing of motions and other procedural matters. The parties generally know their case, their schedules and witness availability better than you do. They are more likely to develop a sensible case management schedule if you permit them the space and opportunity. If everyone can agree on a schedule, you may find that the parties are more likely to meet the deadlines and request fewer continuances.

Discuss the Issues. A prehearing conference also permits the parties to discuss what the issues are in the case. If you have self-represented parties you may be able to answer any procedural questions they may have about what you expect in terms of evidentiary presentation. You also have an opportunity to signal to the parties areas in the record for which you want factual development or legal analysis.

Explore the Possibility of Settlement. If your agency has a procedure which encourages parties to settle cases, it is a good idea to initiate that process as early as possible in the litigation process. Even if the parties cannot resolve their entire dispute, they may be able to stipulate to facts and save hearing time. CAUTION: Be careful about becoming too involved in substantive settlement discussions unless the case can be reassigned to another hearing officer. While you can help the parties identify areas of common ground, you do not want to create a conflict for yourself or be in a position where you cannot be neutral and impartial if the parties are unable to reach an accord.

Other issues. You should also discuss the type of evidence the parties might be producing. For example, if any parties anticipate producing proprietary or confidential evidence, you may need a protective order.

You should also consider:

- If you have confidential or proprietary testimony will you need to make provision for a portion of your hearing to "closed" to the public?
- If you are holding your hearings by video or telephone, do you have the technology to do this? Do you need a moderator to help you manage the hearing technology
- Are there any logistical issues with witnesses that you might need to consider?
- Will you be hearing from expert witnesses?
- Do you need to take any witnesses out of order?

You will want to discuss how exhibits will be handled. Ideally, exhibits should be served on you and the other parties in advance of the hearing and should be pre-marked for identification. Consider whether you need any special rules for exhibits such as photographs or maps, or unusual evidence such as videos or sound recordings. If you hearing will be conducted remotely, how will exhibits be provided to the court reporter or otherwise filed with the record?

C. A Word of Caution

As you work through your case file, reviewing the pleadings and doing your legal research, be very careful to maintain your neutrality. Be wary of reaching a conclusion about who will prevail before you hear the evidence. You must remain neutral and your mind must remain wholly open to persuasion.

You must also resist the urge to "over manage" the case. This is especially true if you used to represent the agency before becoming an adjudicator or if you were trained as a litigator. Your objective is to facilitate the parties in accomplishing their strategy – not to suggest a different or better strategy.

III. At Your Hearing: Ensuring the Opportunity to Be Heard

A. Demeanor

Your personal affect in conducting your hearings is probably the single most important factor in creating the perception of a fair hearing. The Golden Rule applies here: Treat others as you would like to be treated.

- Start on time: starting on time signals to the parties that you respect the value of their time; if you happen to be late, apologize and if appropriate provide a reason for your tardiness
- Introduce yourself
- Eye contact: Eye contact is important to showing respect.[2] Eye contact also signals that you are interested in and listening to what the person is saying.
- Address your litigants by name; don't be afraid to ask for pronunciation.
- Focus: Avoid doing other things while you are conducting a hearing, even if your hearing is by telephone.

B. To Script or Not to Script

The opening of the hearing is where you will introduce your case for the record, and introduce your parties. It is also a good opportunity to explain hearing

[2] However, you should be cognizant that some cultures find direct eye contact rude or aggressive. Educate yourself about some of the ethnic and cultural groups that are prevalent in your jurisdiction and modify your demeanor as appropriate.

procedure and your expectations. A script can be helpful to make sure that you don't forget anything:

> *We are now on the record. This proceeding today is the date set by the Commission for hearing on the complaint of _____, docketed at Public Utility Commission Docket No. _____ I am Administrative Law Judge Mary Long, and I have been assigned to preside over this matter and render an initial decision. Today is ___ and the time is ____. This hearing is being conducted remotely.*
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> *On the telephone with me are the complainant, ____ and _____representing the utility, _____*
>
> *I want to start with a little bit of housekeeping:*
>
> *We have a court reporter who is making a word-for-word transcript of today's hearing. Please be sure to identify yourself before you begin speaking. This transcript is the record of today's proceedings and all other recordings are prohibited.*
>
> *This hearing is being conducted by telephone. If for any reason, someone becomes disconnected from the conference bridge, you must immediately call back in. I will wait 2 minutes for you to call back in. If you do not call back in 2 minutes, I will proceed with the hearing in your absence.*

This is also a good time to explain a little bit of basic procedure to the parties so that they know what to expect:

> *Now I will explain a little bit of procedure so that you know what to expect. [Complainant] as the person seeking relief from the Commission you have the burden of proving that you are entitled to the relief that you have requested. This means that you must present testimony in this hearing which shows that the [Respondent] has violated the law in some way. You may testify on your own behalf. After you testify, the [Respondent] will have an opportunity to ask questions.*
>
> *Once you have finished, it will be the [Respondent]'s turn to present witnesses. After the [Respondent]'s counsel has asked her questions, you will also be able to ask the witness questions.*

When both sides have offered the testimony and exhibits they want me to consider, each party will have an opportunity to make a final statement on the record explaining to me what they think that they have proven with their evidence. Or, if you prefer, you may request to send a written statement that summarizes your case.

Are there any questions about the hearing procedure?

The problem with scripts is that after a while, you can read through it while you are thinking about other things, like your grocery list. Sounding like an automaton or reading through your script so quickly that your parties don't have time to process what you are saying, does not enhance the perception of fairness. It enhances the perception that you have someplace else you'd rather be. If you catch yourself sounding like a robot, consider reworking your script into bullet points or a thumb outline. If you aren't sure how you sound, ask a colleague to attend your hearing and provide you with feedback.

C. Managing Your Record

If you have a court reporter to transcribe your hearing, this person is the most important person in the room. Take a few minutes before the hearing to have the parties spell their names for the court reporter. If representatives have business cards, have them provide one to the court reporter. If you are conducting a complex or technical hearing, consider providing your court reporter with a list of spelling for specialized vocabulary or common acronyms. Always remind your parties to speak one at a time and to avoid speaking over one another.[3]

If your hearing is transcribed using a recording device, make sure it works and is fully charged. Test the position of the microphone and sound. Be sure to have a backup power supply within easy reach.

Most agencies require witness testimony to be "sworn." Especially in a remote hearing, you may need to stop a witness from telling their story until you administer an oath.

Your statute or regulation may require you to administer a specific oath. If a specific oath is not required, be aware that some people will not "swear" to tell the truth, but are willing to "affirm":

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[3] You might also let your court reporter know what your expectation is if he does not hear something– some hearing officials will allow the court reporter to interrupt. Others do not. It's a good idea to have this conversation with the court reporter ahead of time.

Do you solemnly swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Exhibits. All of your exhibits that the parties present to you must be clearly identified in the transcript. Ideally, exhibits are pre-marked before your hearing starts, and the parties have exchanged copies with each other. Typically, exhibits are marked with the party's name or role and a number or letter: Complainant Exhibit 1 or Respondent Exhibit A. If an exhibit has many pages and a witness is only referring to selected pages, you may want to separately mark those pages.

You should also have a system in place for keeping track of which exhibits are identified and which exhibits are moved for admission and admitted (or not admitted) into the record. If you have copies of the exhibits ahead of time, it is not a bad idea to create some sort of a table which lists each exhibit with a short description. You might also direct the parties to provide you with a coversheet which lists each exhibit the parties may be using that you can mark during the hearing. You can also simply make notes on your copies of the exhibits and keep separate piles on the bench. (Do not mark the copies that are submitted to the court reporter for the record.)

Keeping Track of Testimony. If evidence is not recorded in your record, it does not exist. Be aware of non-verbal communication in a hearing. The transcript does not "see" what is going on in the hearing room. If a witness is making a gesture that might be relevant, make sure to describe the gesture for the record. Remind your witnesses to say "yes" or "no" rather than nodding or shaking her head.

Do not allow a witness to point at an exhibit and testify with a preposition:

"The accident happened here." (Witness pointing.)

The location of "here" will not show up in your transcript and will not provide a useful fact for your decision. You can direct the witness to mark the exhibit:

Let the record reflect that the witness has marked the location of the accident with a red "X" on the map labelled as Respondent's Exhibit A.

Alternatively, you can have the witness describe the location, or ask a question to clarify the record yourself:

Is it fair to say that you are pointing to the intersection of Jones Street and Smith Boulevard in the upper right-hand corner of the map labelled as Respondent's Exhibit A?

If the witness is referencing a multi-page document, make sure that the witness clearly identifies what page of the exhibit they are referring to. Don't be shy about stopping the testimony to clarify to record on this point:

Let the record reflect that the witness is referring to the 5th page of this 10-page document marked for identification as JamCo Exhibit 3, which is dated March 17 in the top left-hand corner….

Ruling on Objections. Generally, the purpose of an objection is to block an impermissible question or to exclude inadmissible evidence. Impermissible questions might be a leading question[4] on direct examination or a compound question.[5]

Attorneys may also use objections as a strategy to disrupt the questioning of the opposing side. You may permit such objections unless the questioning becomes aggressive or argumentative. If you find a party is using repetitive objections to simply obstruct the proceeding and drag out the hearing, don't be shy about instructing counsel that their conduct is neither persuasive nor appreciated.

When an objection is made, it's usually a good idea to permit the other side to respond. One, this gives you a minute to think about your ruling; and two, even if you don't need a minute to think, hearing from both sides adds to the perception of fairness.[6] Your evidentiary rulings should be clearly stated in your transcript. Ideally, when a party makes an objection you will simply "sustain" the objection, which means the question needs to be re-asked a different way or excluded altogether, or "overrule" the objection and direct the witness to answer the question.

Generally speaking, you don't need to provide a lengthy explanation for your evidentiary ruling. Avoid getting into a debate with counsel as to the legal basis for

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4 A leading question is a question which suggests the answer.

5 A compound question is a string of questions disguised as one question. Compound questions should be discouraged because they often confuse the witness. Compound questions will also and muddy your record.

6 You also may find it prompts counsel to withdraw the question altogether.

your ruling. The objection is noted for the record. You've made your ruling. Time for the next question.

However, if you are working with a self-represented litigant, you may do well to offer a short explanation for your ruling. For example, on a hearsay objection, you may need to explain that they can only testify as to what they say or said themselves, but the cannot repeat something their neighbor told them.

Asking Questions. The model of the adjudicator as a silent referee does not suit an administrative hearing. As an administrative adjudicator you have an elevated duty to ensure that the record is complete. Therefore, asking questions in certain situations is essential and serves a variety of functions.

For example, when you have a self-represented petitioner, a few open-ended questions will help the person relax and tell their story. Often it will put the person at ease, especially if they are concerned about testifying "the right way." I typically ask the complainant to use as many dates and names as they can recall in order to encourage a linear story. You will want to establish person's identity by asking for their full name and address. You might indicate that you have read their complaint or application and note that their story begins at a certain time or place, which will prompt them to continue:

> *I have read your complaint where you state that you called the utility on March 22, to complain that your bill was high. Tell me why you called and what happened next.*

Avoid asking "yes or no" questions, but instead use open ended questions which invite the witness to explain or provide more detail about some aspect of their testimony. Pay particular attention to dates, if they are important, and be sure to clear up any vague or unclear timelines. Do not permit a witness to guess or speculate. You may need to remind the witness (and their counsel), that "I don't know" is a perfectly fine answer or that the hearing is not a memory test.

Any time you ask a witness questions, be sure to permit the opposing party to ask any questions that your queries may have generated. Time permitting, you should also provide the witness an opportunity to add or clarify their testimony.

Going Off the Record. Just don't -- especially if you have a self-represented litigant. Remember, if its not in the transcript, it did not happen.

If you must go off the record for some reason, be sure to clearly state for the record the reason you are going off the record (for example, reviewing calendars to establish a date for a hearing). When you come back on the record, state how long you were off the record, summarize anything that was discussed and any agreements that were reached. I usually ask the parties if they agree with my summary of the off-the-record discussion. Permit the parties to add anything they think may be relevant.

If you need to take a recess for a comfort break or to interrupt the build-up of tension in the room, you should state that you are taking a recess, state the period of time and the time that you will reconvene. Avoid addressing the parties when you are in recess.

D. Managing Your Parties

When you are new to the bench, it is best to be firm with the parties and strict with your exercise of discretion until you have established your reputation with the advocates and learned who you can trust. New adjudicators are often tested by advocates, much like school children will test a substitute teacher. You can always become more permissive later if it suits you, but it's very difficult become more restrictive.

It is also important to review the procedural rules of your agency and to understand any limits you may have on your authority to grant continuances, schedule further hearings, or terminate the proceedings a party simply won't obey instructions.

Insist on civility. In a hearing, parties should address you. Do not permit them to argue with each other, talk over each other, or argue with a witness. Use recesses to break the tension if necessary.

E. Closing

At the end of the hearing, review all of the exhibits that were referenced in the testimony and ensure that the parties have moved for the admission of all the exhibits they want you to consider. Make sure that you actually admitted them on the record and provided copies to the court reporter.

Much like the beginning of the hearing, you should have a script or agenda of closing instructions. The close of the hearing is also a good time to go over any briefing schedule you might impose. If your case is not subject to briefing, you may

permit the parties to make a closing statement which summarizes what they think they've proven.

Finally, it is a good idea to explain what happens next and when can the parties expect your decision, etc.:

> *In approximately three or four weeks, I will receive a transcript of today's proceeding from the court reporter. Once I receive the transcript, I will issue [a briefing letter which provides instructions for the filing of briefs, including a date when those briefs will be due.] OR [an order that closes the record.] As my schedule permits, I will render an initial decision which will be issued within [X] days of the date that the record closes. That decision will be mailed to you and will include instructions for filing exceptions to the Commission if you disagree with my decision. Please read that letter carefully as it includes important deadlines for the filing of those exceptions. If you do not meet the filing deadline, the Commission will not consider your exceptions. Are there any questions?*
>
> *Very good. I thank you for your participation today. The time is ___ and the hearing is now adjourned*.

Like your opening script, you want to be careful with your tone and pace.

IV. After the Hearing

After the hearing, and before you stash your case file away in the "decision pending" drawer, it is a good idea to jot down some notes and general impressions while the hearing is still fresh in your mind. Go through any notes you made on the bench and mark any areas of testimony that you think are important to rendering your decision. Make sure you have all of the evidence that you need. If you don't, now is the time to check your agency rules and consider re-opening the record or scheduling an additional day of hearing. It's much better to do this sooner rather than later.

Every decision has four essential elements: findings of fact; conclusions of law; analysis and ordering paragraphs. It is also helpful to the reader to include a short summary at the beginning of your decision which sets out in two or three sentences what the case is about, whether the burden of proof was met, and which party prevailed. Give special thought to your ordering paragraphs: this is the meat of your decision which tells the parties what they are required to do.

When you do sit down to write your decision, consider your target audience. Consider who your parties are. Consider who might review your decision. If you are writing a decision for a self-represented litigant, you want to take extra care to be sure that you are clearly explaining the reason for your decision and the law that guides it. Legal provisions that are self-evident and well-known to you or to attorneys may not be as easily understood by an individual with no special training. Even if your party loses, they are more likely to accept the outcome of your decision and consider it to be "fair" if it 1) shows that you listened; and 2) clearly explains the reason for your decision in plain language. That is, don't bury the basis for your outcome in a lengthy quote from a Byzantine-drafted statute. You might have to include the quote, but take the extra two or three sentences to explain what it means and why the facts direct the outcome.

Also consider the non-parties who may be reading your decision. As an adjudicator you are a referee when you are on the bench. But, you are also a teacher. Your decision is an opportunity to explain the law to other lawyers, other complainants, and whatever tribunal may be reviewing your decision, such as an agency head or appellate court. If your reader does not understand your decision, it is because you did not take the time to explain it. Taking the time to explain why the facts and law you relied upon to reach your decision in simple, clear, and concise language will go far in bolstering the perception of fairness that you began to build in the hearing process.

V. Last Advice

A. Checklists and Bench Cards

Checklists or issue flow cards are very useful for case types that are the most common in your docket. You can create them yourself by reviewing the governing statute, regulations and any case law that explains the terms in the statute. For example, if you are determining whether a utility customer is entitled to a payment arrangement, you need to know the household income, and the number of members of the household, and whether they have been awarded a payment arrangement in the past. A checklist of these questions on the bench is very helpful to ensure that you have a complete record. Bench cards are helpful to have on the bench to give quick answers to common evidentiary objections or other legal or procedural matters which may arise frequently.

B. Mistakes

I've made mistakes. You will make mistakes. You will believe a liar. You will not believe someone who is telling the truth. You will make a procedural decision that ends up making your hearing needlessly complicated. You will issue an order that you think is perfectly clear, but the parties will ask for clarification or fail to provide what you've asked for. A decision that you spent months writing will get reversed by a reviewing body.[7]

The first thing to remember, is that you will live to fight another day. Many mistakes can be fixed later in the proceeding. You will learn from your mistakes. The key is to not let the fear of making a mistake become an obstacle to your ability to decide. The essential function of an adjudicator is to hear both sides and to make a decision. You must have confidence that most of the time you will get it right.

C. Never Stop Learning

Whether you have been on the bench for three weeks or thirty years, you can always improve the way you handle things. You can try a different way of preparing your cases. You can learn to handle your parties more effectively. You can learn to write your decisions better and craft your orders more clearly. The more your treat your role of a hearing official as one that can always be improved and perfected, the more effective you will be as an adjudicator and the fulfilling your job will remain.

[7] This will happen at least once in your career even if you don't make a mistake.