PREPARING FOR A VOCATIONAL REHABILITATION HEARING

What's an Advocate to Do?

NAPAS Conference
Washington, D.C.

Ronald M. Hager, Staff Attorney
James R. Sheldon, Jr., Supervising Attorney
National Assistive Technology Advocacy Project
Neighborhood Legal Services, Inc.
295 Main Street, Room 495
Buffalo, New York 14203
Tel. (716) 847-0650; fax 716-847-0227
TDD (716) 847-1322
E-mail: ***rhager@nls.org; jsheldon@nls.org*****;**
Website: ***www.nls.org***

June 2000

TABLE OF CONTENTS

Page

Introduction 4

Telephone Screening 3

Client Interview 3

Factual Investigation 4

Review of VR Agency File 4

Medical or Disability-Related Research 4

Technology-Based Research 5

Legal Research 6

Gathering of Supporting Documentation, Including Reports from Experts 6

Evaluation of Case Merit 6

Agreement to Represent at the Hearing 7

Attempt to Resolve Without the Necessity of a Hearing 7

Request Hearing 7

Developing a Theory of Your Case 9

Find Out How Hearings are Run in Your State 10

Determine Who Your Administrative Law Judge Will Be 11

Obtaining Documentary Evidence and Introducing It at the Hearing 11

Prepare a Witness List 16

Obtain a Witness List for the Agency 16

Prepare and Deliver an Opening Statement 16

Prepare and Conduct a Direct Examination of Your Witnesses 19

Prepare for and Conduct a Cross Examination of the Agency's Witnesses 24

Prepare For and Answer Any Objections Made by the Agency's Representative 27

Prepare and Deliver a Closing Argument 28

Prepare a Closing Brief or Written Argument 29

Post Hearing Evidentiary Development 31

I. Introduction

A. Effective representation of clients or consumers at state vocational rehabilitation agency (VR) hearings involves a number of discreet steps.

B. The following steps will (or may) typically occur before you make a commitment to represent the individual at a hearing. If you make a very early commitment to represent the individual, the majority of these steps may be part of the hearing preparation process.

1. Telephone screening
2. Client interview
3. Check written notices, determine deadlines (if any) for requesting hearing
4. Factual investigation
5. Review of VR agency file
6. Medical or disability-related research
7. Technology-based research
8. Legal research
9. Gathering of supporting documentation, including report(s) from experts
10. Evaluation of case merit
11. Agreement to represent at hearing
12. Attempt to resolve without the necessity of a hearing
13. Request hearing

C. The following are activities you must perform in connection with your representation at the hearing:

1. Develop a theory of your case
2. Find out how hearings are run in your state

3. Determine who your administrative law judge (ALJ)[1] is going to be and how that will affect your preparation

4. Obtain documentary evidence and introduce it at the hearing

5. Prepare a witness list

6. Obtain the agency's witness list

7. Prepare and deliver an opening statement

8. Prepare for and conduct direct examination of your witnesses

9. Prepare for and conduct a cross examination of the agency's witnesses

10. Prepare for and answer any objections made by the agency's representative

11. Prepare and deliver a closing argument

12. Prepare a written argument

Note: While the order of activity is typical of how an advocate would progress in the development of a case, in practice these activities may occur in a different order, or many of the activities will occur simultaneously.

II. Telephone Screening

A. If your office has telephone intake specialists

1. Make sure that screener identifies whether a time limit for requesting the hearing (i.e., statute of limitations) will run out before the individual can meet with you. If so, either the individual should be directed to request the hearing (or other review) before your first meeting, or your office should do so for them.

2. Before scheduling an appointment, tell the client/consumer that your agency will only commit to representation at the hearing, at a later date, after a full investigation of the merits of their appeal.

---

[1]Although the person running the hearing may be called by another name in your state, such as hearing officer or referee, we will use the term ALJ throughout.

B. If you do your own telephone screening

1. Conduct mini-interview by phone to determine if there is immediate basis to reject the case (e.g., service is based on financial need and they do not meet income guidelines for VR agency).

2. Identify whether there is need to immediately request hearing. Arrange to do so, or have individual do so, if necessary.

3. Identify the issue(s) in dispute and identify what documents/information you will need when the individual meets with you.

4. Schedule interview date.

III. Client Interview

A. Whenever possible, this should be done face-to-face.

B. Be sure to obtain any needed releases to obtain medical documents, other confidential information, or to speak with potential witnesses/report writers.

C. Obtain copies of any VR agency documents the individual has received.

1. If hearing (or other appeal) has not been requested, determine if there is a need to do so before your work on case proceeds.

2. Advise client about how and when that decision will be made.

D. Obtain copies (or identify the need for) any evaluations, reports, and other documents that are relevant to the issue(s) involved.

E. Confirm with the client/consumer how you intend to proceed with case.

1. If you are not yet making a commitment to represent the individual at the hearing, make this clear.

IV. Factual Investigation

A. Much of this will have already occurred during the telephone screening and client interview process.

B. There may be facts you need to establish in your case that cannot be established through your client interview. The following are examples:

1. Whether your client can meet the academic requirements of the university in question's program.

2. Whether a person must obtain a specific degree or certification to work in the field identified.

3. Whether there is a less costly alternative to meet the needs in issue.

C. It is always helpful to make a checklist of these facts (or areas of inquiry), adding to it as new items are identified.

V. Review of VR Agency File

A. Since the information in this file is confidential, you will need a release to review it and obtain copies of relevant documents.

1. Be sure to obtain copies of any documents that may be relevant to your case.

2. You will need to determine if there is a state or agency policy which requires that you pay a charge per page for copies.

B. A review of the documentation in the file (including any personal notes from VR agency staff) may give you some idea of why the particular decision was made.

1. It may also give you an idea of what additional documents or facts would help support your case.

VI. Medical or Disability-Related Research

A. This may be needed in some cases, but not in others.

B. Depending on the services or interventions sought, there may be a need to show through professional texts or literature that the need identified, or services sought to address that need, is supported by the text or literature.

C. Some examples where books or literature may help:

1. The individual's condition is aggravated by extremes of heat, requiring the installation of air conditioning in a vehicle or home office.

2. The literature may support the employment goal chosen despite the particular cognitive disability.

D. There are many good sources for this type of information on the Internet.

E. If you already have an expert who is working with the client that expert may also be a wonderful resource for this information.

VII. Technology-Based Research

A. Like medical research, the need for this will be on a case-by-case basis.

B. In many cases, the individual will be seeking an assistive technology device or other technological intervention that is new to the decision makers at the VR agency and new to the ALJ. It may also be new to you as the advocate.

C. The fruits of your research will help you educate yourself on what it is you are advocating for.

1. If you cannot satisfy yourself that it will help the individual succeed in work or at a training program, you are unlikely to convince a decision maker of this.

D. Again, if there is an AT expert already involved, this individual may be an excellent resource for this information.

E. The documents you obtain through research can be submitted to the VR agency and at the hearing to assist you in educating those decision makers.

1. Sometimes the VR agency, when confronted with better documentation of how the item or service will assist the individual, will change its mind and approve funding.

2. If the case must go to a hearing, your documentation can be submitted as an exhibit and will provide the ALJ with a rationale for ruling in your favor.

VIII. Legal Research

A. To present your case, you must apply the specific facts to the legal standard. If you are not sure what the legal standard is, you will have to do some legal research.

B. We suggest that you make liberal use of the resources available through the National AT Advocacy Project, including:

1. Our 28-page publication, *Funding of Assistive Technology - State Vocational Rehabilitation Agencies and Their Obligation to Maximize Employment* (July 1999)

2. Other supporting materials, including newsletters and links to other resources, from the Neighborhood Legal Services, Inc. website [www.nls.org].

C. Legal research will help you evaluate the merits of your case and develop a legal theory for pursuing the appeal.

IX. Gathering of Supporting Documentation, Including Reports from Experts

A. The need for supporting documentation will vary depending on the issue(s) involved and how many issues are in dispute.

B. If your client is working with an expert who supports her position, you will want to get a copy of any written reports prepared by the expert.

C. Since many of the documents/reports you seek will be confidential documents, you must be prepared to forward a signed release along with your request.

X. Evaluation of Case Merit

A. No Client Assistance Program (CAP), Protection and Advocacy Program (P&A), or other advocacy agency has the resources to represent every individual who seeks to appeal to a hearing.

B. As a way of maximizing resources, advocacy programs must limit their representation to those cases that have merit.

1. There is no easy rule of thumb for how much merit must exist to commit resources.

2. Most CAP or P&A programs will take a much harder look at the merits if the appeal would involve a very large commitment of resources.

C. If you are reserving your right to later reject the case before committing resources to an appeal, you should confirm that in writing to the client or consumer.

XI. Agreement to Represent at the Hearing

A. Once you are satisfied that your agency is willing to commit resources to represent the individual at a hearing, you should communicate that to the individual.

B. Preferably, your commitment should be stated in writing.

C. You should make it clear that you are not agreeing to appeal the case to a higher level should you receive an adverse hearing decision. Your agency's decision to appeal to a higher level of administrative review (if your state has that optional appeal available) or to court should only be made upon a fresh review of the merits.

XII. Attempt to Resolve Without the Necessity of a Hearing

A. It is always sound advocacy to attempt to negotiate a resolution before an appeal moves forward. In fact, if you work for a CAP, a condition of your funding is that you attempt to negotiate or mediate disputes before an appeal proceeds.

B. Even if your negotiations do not result in a full resolution of the matter, you could accomplish one of more things:

1. You can clarify the issue(s) in dispute, so that you do not waste time at the hearing getting everyone "on the same page."

2. You can resolve one or more issues in your client's favor, limiting your need to prepare on those issues.

3. This is an opportunity for "free discovery." You get an opportunity to review the strengths and weaknesses of the agency's case, and to size up their potential witnesses.

XIII. Request Hearing

A. As a practical matter, you may have requested the hearing much earlier.

B. In our experience, agency decision makers are often more willing to negotiate if there is a hearing request outstanding.

C. To eliminate any later controversy over when the hearing was requested, it is best to send the hearing request to the agency by "certified mail, return receipt requested."

1. If hearing requests are permitted by fax, save the fax receipt.

D. Your state VR agency may prescribe a particular method and have forms that may be used for requesting a hearing. You should follow any procedures that have been put in place to request a hearing.

E. Your hearing request should contain the following:

1. It should be dated and signed.

2. It should identify the date(s) of any notice(s) of decision that you are appealing from.

3. It should identify each decision of the agency that you are appealing.

a. For example, if the agency decision denies funding for a laptop computer and for special transportation to a training program, both issues should be identified as part of the appeal.

4. If your client/consumer has been receiving an ongoing service and the agency's decision seeks to discontinue or lessen the approved service, your hearing request should seek "aid continuing" or "continuation of the status quo" pending a decision on the hearing request.

a. For example, if the individual has been receiving transportation services and the agency now proposes to discontinue the service, the hearing request should ask that the service be continued while the appeal is pending.

5. It should indicate that you will be the representative at the hearing.

a. If your client was the person to file the hearing request, you should now confirm in writing that you will be the representative.

b. If your client's hearing request did not contain the detail suggested above, we suggest a supplemental letter containing those items.

XIV. Developing a Theory of Your Case

A. Each request for VR agency funding of a specific service or item to be purchased involves

the following potential elements, each of which could become issues for a hearing:

1. The individual must be eligible for VR agency services.

2. The service(s) or item(s) sought must be among those covered by the VR agency. Here, there may be a conflict between State law or policy and federal law.

3. If the services or items in question are subject to financial need criteria, the individual meets that financial criteria or fits within a recognized exception.

4. Are the specific services or items sought covered by the "comparable benefits" requirement. If so, the VR agency is not required to provide the items unless the entity identified on the Individualized Plan for Employment (IPE) to provide them fails to do so.

5. The funding of the services or items in question are necessary to enable the individual to achieve an employment outcome, i.e., by obtaining a job, retaining a job, or advancing in employment.

6. The services or items sought must be the least costly alternative that will allow the individual to achieve the employment outcome in question. (Although this requirement is not spelled out in either Title I of the Rehabilitation Act or the federal VR regulations, the issue is, as a practical matter, present in every dispute.)

B. Any one of these six categories of issues may involve three or more issues that need to be addressed.

1. For example, basic eligibility for VR agency services (issue #1) may involve the need to document both the disability and the individual's past failure when he or she attempted to work.

2. The least costly alternative issue may involve the need to explain the less costly alternatives that were considered and why they were rejected.

3. It may also involve the legal issue of the individual's right to maximize employability through VR agency-sponsored services.

C. Once you have identified the issues that are involved in your case, you can develop both a theory of your case and a plan to support that theory through testimony, documentary evidence, and legal arguments.

XV. Find Out How Hearings are Run in Your State

A. If you have never done a VR hearing before, you should take steps to find out how those hearings are run in your state.

1. This could differ significantly from state to state.

2. Listed below are some of the major categories of inquiry.

3. Remember, the more you know about how hearings are run the better prepared you will be at the hearing.

B. What are the typical credentials of the administrative law judges (ALJs)?

1. In some states, they may all be attorneys. In other states, they may all be non-attorneys.

2. In some states, the ALJs will be employees of the state. Elsewhere, they may all be independent contractors.

3. The background of the ALJs may have an impact on how the hearings are run.

C. Will the identity of the ALJ be known prior to the hearing?

D. Will the hearing follow relaxed rules of evidence?

1. Typically, administrative hearings use relaxed rules of evidence.

a. Hearsay rules do not apply.

b. Documents are freely admitted, as an alternative to in-person testimony, and without the need for a witness to authenticate the document as a business record.

2. Some states, either by regulation or by custom, may impose rules of evidence that are more typical of the courts.

a. If your state is more formal, you need to find out what formalities must be followed to submit documents as evidence at the hearing.

E. Will you be required to submit proposed exhibits (or a list of them) and a witness list in

advance of the hearing?

F. Will there be a formal set of requirements and time lines for submitting written arguments or briefs?

G. Will testimony be recorded by a court reporter or by a tape recorder?

XVI. Determine Who Your Administrative Law Judge Will Be

A. If the identity of the ALJ will be available prior to the hearing, find that out as soon as you can.

B. If you have no experience with this ALJ, see if you can find out from other colleagues what that person is like.

C. All of the issues set forth in section XV, above, will also be relevant here.

D. In asking questions of other advocates, you will want to specifically find out:

1. What they know about the ALJ's background

2. How the ALJ has ruled on issues similar to yours

3. Whether the ALJ has a history of favoring either the agency or the individual

4. Whether the ALJ pushes formality or informality (e.g., will he or she insist on pre-hearing identification of evidence, a briefing schedule, etc.)

5. How much the ALJ knows about persons with disabilities, the field of vocational rehabilitation, or the legal requirements governing your case

E. Remember, even though your preparation will be affected by what you learn about the ALJ, you still must be aware that you are constructing a record for potential court review if you lose the hearing.

XVII. Obtaining Documentary Evidence and Introducing It at the Hearing

A. It is very likely that documents will make up the majority of your evidence. As noted above, however, you will want to make sure that your state's rules allow you to freely submit documents as a substitute for in-person testimony.

B. There are several potential advantages to using written reports and other documents instead of testimony:

1. The witness in question may not be available.

2. 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.

3. Preparation time will be less extensive.

4. You have better control over what goes into the record.

   a. You can ask ahead of time for the potential witness to limit the subject matter that is addressed in the report.

   b. As the old saying goes, "A written document cannot be cross-examined." You will not face the potential surprises that come with cross examination.

C. Deciding what documents you will need

1. In putting together the "theory of your case," you will want to create a list of each piece of evidence that will be used to establish or address each point you have to establish.

2. In a more complicated case, you may actually want to develop a "proof chart" which outlines both the evidentiary and legal support for each area that you will need to address.

3. As you determine what documents you will use (or at least seek to obtain) to establish each point, those will go down on your list.

D. Providing guidance to the experts who write reports

1. Most of the reports you solicit will come from individuals who are asked to state an expert opinion. When you speak or write to the report writer, we suggest that you provide him or her with some guidelines for writing the report.

2. Several key items should be contained in every report:

   a. It should be on letterhead, dated and signed.

b. It should list the reporter's job title or professional title, professional credentials, and any special licenses possessed.

c. It should explain the nature of the relationship and length of time working with your client.

d. If the reporter did specific evaluations or tests in connection with your client, those should be spelled out.

e. If the reporter is recommending a specific service or other item to be funded, the reporter should explain what other less costly alternatives were rejected.

f. If relevant, the reporter should specify how the particular service or item recommended will help the individual overcome the limitations of a disability and allow him or her to succeed in a job or training program.

[For further elaboration on this topic, we recommend that you obtain and read the June-July 1998 issue of AT Advocate, the newsletter of the National Assistive Technology Advocacy Project, with its feature article: "Report Writing: Justifying the Need for Assistive Technology."]

E. Introducing the documents at the hearing

1. Whenever possible, you will want to submit the original document and not a photocopy.

   a. However, if your document(s) comes from a record already maintained by another (such as school records or hospital records), you will want to submit the best copy you can get.

   b. Encourage the reporter or agency to mail you copies (if time allows) rather than faxing them, as the readability will be much better.

2. You should retain a copy, in your case file, of each document that has been submitted, identified by exhibit number or letter (e.g., "appellant's exhibit 3" or "appellant's exhibit C").

3. If your state does not require a witness to authenticate the writing and your reporter will not also be a witness

a. Following whatever procedure is in place for introducing documents, submit the document(s) to the ALJ as part of your evidence in the case. For example, all exhibits may be introduced at the outset of the hearing, unless there is a specific objection to a document.

b. If you have more than two or three documents to submit, you should make up a typewritten list of them for both the ALJ's convenience and your own records.

4. If the reporter is also a witness

a. Follow the rules for establishing the witness's credentials as noted in section XXI, below.

b. Have the document marked for identification.

c. Show the document to the witness and ask her to identify it (i.e., "This is my report dated January 23, 2000).

d. As relevant, have the witness testify to the following:

(1) The nature of the relationship with your client and the duration of that relationship, including frequency of visits or meetings

(2) The context in which the document or report was prepared

(3) Any tests, examinations, conversations with your client, collateral investigations, etc. that were performed prior to writing the report

(4) An indication of what conclusions or expert opinions were reached as the result of the tests, examinations, etc.

(5) An indication that the written report memorializes the conclusions and expert opinions reached

(6) A summary of any events occurring since the report was written (e.g., further evaluations, experience with your client) that support or change the earlier conclusions. Keep in mind that you may be using the witness to clarify a report that is not totally supportive in its present state.

(7) NOTE: Even if this series of questions, or "foundation" for submission of the document is not required, we suggest it be followed in cases where the reporter is also a witness, as it makes the report more valuable as a supporting document.

e. Ask that the document be introduced in evidence. If your state's procedures allow, it is better to have the document introduced in evidence before you ask the witness the above questions so the ALJ can have the document in front of her as you are going through these questions.

5. If your state's hearing procedures require that records be authenticated or that you lay a foundation for the record's submission:

a. It is not clear to us if any states require this level of formality for VR agency hearings.

b. If the document is an individual report, rather than a business record, we suggest following the procedure outlined in section XVII.E.4, above, for when your reporter is also a witness.

c. If the document being submitted is also a "business record,"[2] you should follow this approach:

(1) Have a witness who can testify that the document(s) is among those that the agency (or business) routinely retains in the normal course of its business.

(2) Have the witness testify that the document(s) was, in this case, retained in the course of the business. [E.g., the school district special education program retained various documents as part of its delivery of special education services to the individual.]

(3) The witness need not be (and seldom is) the person who prepared the document. It is enough that the witness can identify it as a business record.

---

[2]If your state requires this procedure it is because the document is considered "hearsay," i.e., the use of other than in-hearing testimony to prove an assertion contained in the document. Under the typical rules of evidence used in the courts, hearsay can be admitted under a business records exception.

(4) It is probably not a problem if the document is a photocopy (it nearly always will be), so long as the witness can identify it.

XVIII. Prepare a Witness List

A. Some states may require an early exchange of witness lists.

1. Even if state procedure or the ALJ do not require the exchange, you may wish to get the agency or its lawyer (if they are represented by a lawyer) to exchange this information.

2. If state procedures or ALJ rules do not require this exchange, you may not want to volunteer this information if there is an advantage to maintaining the element of surprise that outweighs getting similar information from your adversary.

B. It is good to make up this list as early as possible as you will need to contact each of these individuals, make sure they are available to testify on the date in question, and then prepare them to testify.

XIX. Obtain a Witness List for the Agency

A. If state procedure does not require this, see if you can get it anyway.

B. If witness list requirements are similar to what some courts require as pre-trial statements, you should be able to obtain both the names of the witnesses and how the agency plans to use them.

1. Again, even if state procedure does not require this, you may want to have the agency's representative agree to this exchange.

XX. Prepare and Deliver an Opening Statement

A. The opening statement is an oral summary, presented at the beginning of the hearing, which provides the decision maker with a preview of what your case is all about.

B. This is your opportunity to accomplish several things:

1. Explain who your client is and what they are trying to achieve through the VR agency's sponsorship.

2. Clarify the actions taken by the agency and the issues which remain in dispute for the hearing.

3. Explain your theory of the case.

    a. The parties may not totally agree on this.

    b. This is your opportunity to make sure the ALJ understands your arguments, even if he or she does not yet agree with them, right at the outset of the hearing.

4. Explain what is not in dispute.

    a. In our experience, this can be critical as you want to make sure that you do not have to waste time establishing a point that is undisputed.

    b. For example, if your client is seeking voice dictation software for a personal computer:

        (1) The agency may agree that your client is capable of using it, and that it will allow the individual to do assignments more quickly.

        (2) If their only contention is that the extra expense is not justified because your client achieved a C+ average during the freshman year without it, your issue may be limited to the question of whether the VR agency has a higher obligation to assist your client to perform to his or her capacity (i.e., to maintain a B or A average) and prepare him or herself for use of this technology following graduation.

5. Briefly explain the nature of the testimony and documents you will be submitting and how they demonstrate that your client is entitled to what he or she is seeking.

6. Depending on the case, this might be used as an opportunity to bring up the unfavorable facts in your case and explain why they do not work against you as they agency may suggest.

7. This is an opportunity to "engage the ALJ."

    a. Get the ALJ interested in your client and interested in the issues.

b. By presenting the opening statement in conversational tones, rather than as a formal speech, you are more likely to draw the ALJ into this real life drama.

C. Do you ever waive the opening statement?

1. We believe this should be very rare in VR hearings.

2. In some forums – and we do not think the VR hearing is one of them – an advocate may choose a very simplified form of opening statement.

a. In our experience, this might be appropriate in some SSI hearings in which the advocate is very familiar with the ALJ, knows the ALJ has already reviewed the record, and does not need an elaborate explanation of their position.

b. By contrast, in most states VR hearings occur infrequently enough that one can rarely assume that the ALJ will be familiar with the issues involved, the documentary evidence to be in the record, and the applicable law.

D. How long should the opening statement be?

1. This is where your research about what the ALJ is like will come in handy.

2. Some ALJs have a reputation of not wanting to hear a long opening statement.

a. In those cases, you will probably want to figure out a way to keep the statement under five minutes.

b. However, if a longer opening statement is needed, you must be prepared for an ALJ who is resistant to it.

3. Even if the ALJ has the reputation of being an attentive listener, your goal should still be to summarize your points as briefly as possible.

a. The complexity and expected length of the hearing may dictate how long is appropriate.

b. For example, a 20-minute opening is generally not appropriate for a two hour hearing with six exhibits and three witnesses. It may be appropriate for a two-day hearing with 50 exhibits and 13 witnesses.

E. Should a written statement be used in lieu of or to supplement the opening statement?

1. Just as trainers use handouts and overheads to supplement an oral presentation, this multi-media approach can be very effective.

2. Again, we would rarely waive the right to an oral opening statement. However, good written materials may allow you to shorten your oral statement.

3. Unless the case is extremely complex, the written statement should be just long enough to provide the ALJ with a written outline of the theory of your case and how you intend to prove it.

F. Other guidelines for the opening statement

1. Do not overstate your case. You will do more damage to your case by false promises than a weak point would otherwise do.

2. Do not promise a witness or document that you do not have yet and might not be able to obtain.

3. Do not try to paint the agency or its representatives as the bad guys.

a. Even if there is a lot of bad blood between your client and the agency, you need to stay on the "high road" as much as possible.

b. ALJs are interested in facts, expert evidence, and relevant law, i.e., what they need to make their decision. Your characterizations of the agency and its employees may only serve to make the ALJ angry at you.

4. If the agency gives its opening statement first:

a. If they make a concession that helps your case, underscore it during your opening statement.

b. If they clearly make an overstatement (remember, that is a no-no), and you know that evidence will establish it to be an overstatement, it can be very effective to bring attention to it to discredit their case.

XXI. Prepare and Conduct a Direct Examination of Your Witnesses

A. There are three types of potential witnesses you might use: your client, other lay witnesses, and expert witnesses.

B. Preparation involves a number of elements

1. Determining what the witness knows or can say

2. Of the information the witness has, determining what is both relevant and helps your case

3. Preparing an outline of questions

4. Practicing with the witness

a. Some advocates will go through a mock direct examination. Others will go either go over sample questions and discuss other areas of testimony, or simply discuss the areas of testimony with the witness.

b. There is nothing wrong or unethical about preparation or even practicing with a witness. It is even appropriate to suggest different ways of expressing the same thing, so long as the witness believes this remains truthful. On the other hand, the advocate cannot simply tell the witness what to say.

C. Avoid the use of leading questions on direct examination

1. A leading question is typically one in which the question itself becomes the assertion of fact, with the witness merely agreeing to it.

a. For example, the following question is leading: "And isn't it true that you have difficulty writing because of spasticity in your hands and must take notes on a laptop computer." Obviously, the witness is left to simply say yes.

b. A better way to approach this might be to ask: "The report from Dr. X (already in evidence) indicates some fine motor problems with your hands." "Explain how you take notes during a lecture." "Describe what problems, if any, you experience writing." "How do you compensate for this limitation in the classroom?" These are called open questions.

2. A way to avoid leading questions is by using questions that ask: Who? What?

When? Where? How? Describe?

3. When is it appropriate to ask leading questions?

   a. They are appropriate when establishing background information that is not central to a fact or opinion you seek to establish.

   b. They are appropriate where the witness's young age or mental disability would make it difficult to respond to non-leading questions.

   c. They are the norm on cross examination.

4. In the informality of many administrative hearings, leading questions are often tolerated more than they would be in court. You should still avoid them as testimony is much stronger if it comes in response to non-leading questions.

D. Testimony of your client

1. In some cases, this may be your only witness as the various experts may be able to submit reports and other documents in lieu of testimony.

2. Your client can only testify based on their personal knowledge and not as an expert. (Even if your client could qualify as an expert witness, they are not a good choice to provide expert opinions in their own case.)

3. Your client is typically in the best position to provide first hand, concrete testimony concerning: their disability and how it limits them; their personal work goals; why they are seeking the particular services that are the subject of the appeal; if there are less costly alternatives that have been suggested, any personal experience with those alternatives and why they would not work.

E. Testimony of lay witnesses

1. This could be a family member, friend or acquaintance.

2. Like your client, this person should only testify based on personal knowledge and should not try to state expert opinions unless they are an expert.

3. This witness can testify to any number of things about your client that are best described by a family member, friend or neighbor.

4. If the lay witness is not available, consider obtaining a written statement from them to submit at the hearing.

F. Testimony of expert witnesses

1. A good short-hand definition for an expert is any "trained observer."

   a. For example, even a classroom aide can, in a very technical sense, testify as an expert if the individual has been trained to identify problems associated with your client's disability, such as the need to adjust seating in a wheelchair.

   b. The aide can then testify to the nature and frequency of those observations.

2. The following are some of the experts that could serve as witnesses in a VR hearing: a doctor or psychiatrist, a mental health counselor, a speech pathologist, an orientation and mobility instructor for the blind, a rehabilitation engineer, and a high school or college guidance/career counselor.

3. After identifying the expert's field of expertise, it is critical that you caution them to limit their testimony and opinions to those matters that lie within their expertise.

   a. For example, a speech pathologist cannot testify as an expert on psychological testing or state an expert opinion relative to the individual's cognitive ability.

   b. However, the speech pathologist can explain that part of his or her evaluation process is to review the psychological testing results to determine what level of communication the individual can be expected to achieve using an augmentative communication device. This witness could then explain what appeared in the psychological report and how that affected his or her opinion relative to communication ability.

G. Elements of expert witness testimony

1. Establish the expert credentials of the witness.

   a. Generally, this means identifying education background, professional certifications or licenses, publications, and years of experience in the field.

b. A good approach, if the credentials are extensive, is to obtain a resume or vita to submit as evidence. The witness can then identify it and testimony can highlight the most important features as relevant to the specific testimony.

2. Establish the nature of the relationship with your client.

a. This will include the length of the relationship, frequency of visits or meetings, and specifics about the relationship.

b. Zero in on those activities with the client (evaluations, observations, etc.) that become the foundation for the expert opinion.

3. Establish the specifics of the evaluations performed, documents or outside reports reviewed, consultants contacted, etc.

4. Identify any underlying findings or conclusions that make up the foundation for the expert's ultimate opinion(s).

5. Have the expert explain the ultimate opinion reached.

6. It is best to have the expert explain any specialized terms and give as many concrete examples as possible.

7. If the expert is recommending a particular service, intervention, or piece of assistive technology, have the witness identify if there are other less costly alternatives, the extent to which they were investigated, and why they were rejected.

H. Prepare your witnesses for cross examination

1. You must learn to play the "devil's advocate," identifying the potential weaknesses in your case and in your witness's testimony.

2. You can even ask your expert what she thinks are the potential weaknesses in her testimony and ask her to think about ways to counter them.

3. Let the witness know they are subject to cross examination, as well as follow-up questioning by the ALJ.

4. Provide the witness with a sample of the kinds of questions that may come up,

instructing them to answer truthfully.

5. Let them know they should only answer the questions asked and not volunteer additional information. (E.g., a yes/no question gets answered yes or no. The witness must rely on you to decide if additional follow-up is needed in the form of a supplemental direct examination, called re-direct.)

6. Let the witness know it is OK to say: "I don't know"; "I don't remember"; "Please repeat the question"; "I don't understand the question."

7. The expert witness should be prepared to say that a particular question asks for an opinion outside their area of expertise.

XXII. Prepare for and Conduct a Cross Examination of the Agency's Witnesses

A. As the advocate for the applicant or recipient of VR services, you have a right to cross examine any witness who testifies for the agency.

B. The challenge of cross examination, in an administrative hearing, is that you do not know ahead of time everything the agency's witnesses will say.

1. However, if you have thoroughly prepared, you will have some idea of what the witness will say based on reports they have authored, or what they have stated in negotiation meetings or in other meetings with your client.

2. If there is material in their written reports that can help your case, be prepared to have them confirm those statements on cross examination.

C. What is the goal of your cross examination? Before you begin a cross examination, you should have your objectives clearly in mind. The goal to be reached will be one or more of the following:

1. To establish that the witness is either lying on one or more material points, or prejudiced. (Hopefully, both of these factors will rarely come up in VR hearings.) These types of arguments go down hard with ALJs. We do not want to believe that people are liars. If at all possible, try to characterize as mistaken or misinformed.

2. To force the witness to admit certain facts

3. To supplement testimony that the witness has already given

a. He or she may not have been asked on direct examination to explain things that will help your case.

4. To weaken the testimony by showing a limited ability to observe what he or she is testifying to

5. To show that an expert witness or even a lay witness who testified to an opinion is not competent or qualified because he or she lacks the necessary training or experience.

a. Be careful with this, however, as this goal may backfire.

b. If the witness appears to be qualified, you might choose the opposite strategy of conceding their qualifications so that the ALJ does not sit through several minutes of dissertation on the witness's credentials.

6. To impeach a witness by showing that he or she has given a contrary statement at another time

a. Here again, your preparation is crucial. You should be familiar with the content of any reports the witness has authored so that you can draw attention to inconsistent statements.

D. Preparing for a line of cross examination before testimony is given

1. Using your stated goals as a guide, you should make a list of what you want to establish. For example:

a. To show that an expert's opinion is based on only one meeting with your client, or upon a review of paperwork only

b. To get the expert to admit that two other experts with similar credentials reached a conclusion different from his

2. Depending on your style, you can list out actual questions or outline areas of inquiry. Until you have done a few cases, it is probably better to actually write out the questions, because asking leading questions is foreign to many.

3. If you anticipate use of documents prepared by the witness, you should have those available and marked for easy access.

E. Preparing for cross examination while testimony is being given

1. Still keeping your goals in mind, you will need to keep notes of the testimony with some highlighting of areas for cross examination.

   a. One way to do this is by drawing a line two to three inches from the right hand margin, keeping the notes of testimony to the left of that line, and making notes for cross examination to the right of the line.

   b. Another method is to use a different colored ink to highlight the need for cross examination.

   c. Still another method is to keep one pad for testimony notes and a separate pad for notes to be used for cross examination.

2. If you have the luxury of two representatives at the hearing, you may want to have the second chair keeping the testimony notes while the person doing the cross examination listens to the testimony and keeps much more limited notes, focused on the areas of possible cross.

F. Some other guidelines for cross examination

1. Roll with the punches. If you get hit with an unexpected and damaging answer, you must keep your composure and not let on how devastating it might be.

2. Don't beat a dead horse. T.V. law programs may lead one to believe that a cross examiner who is scoring points should ultimately "go for the jugular" and get the witness to break down. When you have established your point, stop and go on to the next point.

3. Use a series of short, preferably "yes-no", leading questions. You are only interested in establishing your point; you do not want the witness to elaborate or explain away the concession.

4. Disagree without being disagreeable. Your job is to confront and score points for your client. Your job is not to harass the witness, as you may succeed in alienating the ALJ as well.

5. Don't just go over their testimony with an accusative sounding voice, expecting they will back down. All that will happen is they will reaffirm their prior testimony.

6. Do not ask questions if you don't know what the answers will be.

   a. If you prepared and your case went as expected, there is no reason to roll the dice by asking questions where the wrong answer could hurt you.

   b. There will be times when the circumstances suggest planning a series of questions, but quitting when it becomes clear that the witness will not help you.

   c. If things have not gone well, the advocate may "go for broke" and take a chance that the answers will be favorable.

7. Keep the length of cross examination to a minimum.

   a. Most inexperienced advocates tend to go overboard with cross examination, assuming that this is where cases are won.

   b. Stick with your preparation based on your stated goals. Supplement that with anything that you noted during actual testimony. Then stop.

   c. Remember your list of what you have to prove and who will prove it. On cross, you will be only covering a tiny portion of the evidence you will need.

8. Usually some cross examination is desirable. If possible, you want to avoid the impression that unfavorable testimony is completely accepted.

   a. It may be enough to establish that the witness is an employee of the VR agency and is here today as an employee of the agency (i.e., not on their own time). Without challenging their integrity, you are at least reminding the ALJ that this is not a completely neutral witness.

G. There are times when no cross examination is wise.

1. There is no rule that says you have to cross examine every witness.

2. What if the witness has been inarticulate and painted a confusing picture? You may not want to ask questions that may clarify points to help the agency's case.

3. If the witness is obviously hostile to your case, you may not wish to give them any

extra opportunity to take another shot at you.

XXIII. Prepare For and Answer Any Objections Made by the Agency's Representative

A. In preparing for the hearing, find out what you can about the agency's representative. If their style is to make a lot of objections to documents, the type of questions you ask, or anything else, be prepared for how you will address the objections.

B. Unless it is clear that your state has imposed some formal rules of evidence for VR hearings, you should be prepared with some standard comebacks. For example:

1. "This is an administrative hearing and hearsay, in the form of written statements, is fully admissible."

2. "Since the formal rules of evidence do not apply, photocopies and faxes are routinely admitted in lieu of originals."

3. There are several objections that you can appropriately make at an administrative hearing:

a. Relevance–is the testimony relevant to the issue at hand

b. Leading–let the witness testify, not the attorney

c. Hearsay–especially if the person who made the statement will also be a witness

d. Compound/confusing questions–you want a clear and understandable record

e. Argumentative/harassing the witness

XXIV. Prepare and Deliver a Closing Argument

A. If your hearing went as planned, your closing argument can be largely a restatement of what you said in your opening statement.

B. All of the guidelines for the opening statement (see section XVIII, above) should be followed here.

C. Preparation

1. Before you begin the hearing it is best to prepare a general outline of what the closing statement will say.

2. Since there are invariably surprises at a hearing, you should edit your outline based on what actually happened.

3. In short hearings (a half day or less), your ability to outline during the course of the hearing will be limited. You will have to work off of short notes that you added to your closing statement outline.

4. In longer hearings, you may have the luxury of editing your outline during the course of the hearing.

5. If you will be submitting a written argument following the hearing, you may want to be very brief with the closing statement, saving the bulk of your arguments for the written statement. No reason to give the other side advance notice of what your points will be.

XXV. Prepare a Closing Brief or Written Argument

A. You should plan to submit written arguments at the conclusion of every VR hearing.

1. We recognize that there are some types of administrative hearings where the decision to submit written arguments will be made case by case.

2. For example, in our office written arguments are not routinely submitted in all Medicaid or SSI hearings. On the other hand, it would be rare to not submit written arguments following a special education hearing.

3. In VR hearings, like special education hearings, the medical, technological, and legal issues tend to be of sufficient complexity that much is gained by getting your arguments on paper.

B. What are the goals of your post-hearing written argument?

1. You can summarize the evidence in a logical, easy-to-understand fashion.

2. You can lay out the relevant law, regulation, policy and case law in a manner that makes it easy for the ALJ to grasp your arguments. You are providing the ALJ with the legal "hooks" for granting a favorable decision.

3. You can discuss the evidence on both sides of an issue and explain why your position should prevail.

4. You can summarize the strengths of your case and meet, head on, any weak points in your case.

5. Putting yourself in the shoes of the ALJ, you should make his or her job easy. Nothing is more satisfying than to see a decision that bears a striking resemblance to your written arguments.

C. What should your written argument look like?

1. Here again, your preparation will pay off if you have learned what kind of written arguments the ALJ likes to see. For example, some ALJs will prefer that you provide both legal arguments and proposed findings of fact/conclusions of law.

2. Generally, there are three options for post hearing arguments: a short letter brief; a long letter brief or short memorandum of law; or a standard memorandum of law.

D. The short letter brief

1. We recommend this when your arguments are four pages or less.

2. It is the preferred method when the law and facts are not unduly complicated.

3. Even though it is in letter form, you should use topical headings to make it more readable.

4. This tends to be a standard approach for Social Security/SSI hearings.

E. The longer letter brief or short memorandum of law

1. The choice of which to use is largely a matter of style.

2. We would not recommend the letter format if the argument is to go for more than 10 pages. The longer the argument, the greater need for topical headings and subheadings.

3. If your opponent is using a memorandum of law format, you may want to do the

same.

4. The longer format gives you the opportunity to expand on one or two complicated issues of law, fact or medical fact.

5. Remember: Unlike courtroom judges, many ALJs do many hearings each week. Most do not have law clerks or decision writers. Make it short and easy to read.

F. The standard memorandum of law (or brief)

1. Always use this format when you need to write 10 pages or more (unless your ALJ or the forum prefers a different style).

2. Generally, this is the best format when you need to discuss multiple issues, with a need for multiple headings and subheadings.

3. As your document gets longer, consider using a table of contents to make it easy for the ALJ to review your arguments.

4. Do not use the more formal or longer document unless necessary. Most ALJs will be more impressed with a short document that gets right to the point and makes his or her job an easier one.

G. When to do proposed findings of fact/conclusions of law

1. This is generally done in addition to or as an addendum to your brief.

2. This could be an expected document under the rules of your forum.

3. Ask the ALJ if he or she prefers that format.

4. If used, tailor your format to the expected format of the decision.

a. For example, many administrative hearing decisions are written in a format the ends with “Findings” and a “Decision.”

H. When does the written argument get submitted?

1. Realistically, you probably cannot have it prepared to turn it in as the hearing ends.

2. Typically, a minimum of two weeks should be requested for submitting written

arguments.

3. If there will be a "briefing schedule," push for a schedule that forces the agency to submit its arguments first.

XXVI. Post Hearing Evidentiary Development

A. If you think you will need some extra time to obtain documents after the hearing, let the ALJ know at the beginning of the hearing, if possible.

1. The ALJ will be more sympathetic to your request if you assure him or her that the evidence was timely sought and the delay is with the reporter.

2. You should be prepared to tell the ALJ why this evidence is critical to your case.

3. The ALJ may point out that he or she is under some time constraints to issue a decision. You should then point out that those time limits are to protect your client and that your client would be willing to waive them to the extent that extra time is needed to secure evidence.

B. Sometimes you will need to obtain additional evidence because a new issue came up at the hearing. In this case, you should have a strong argument for the extension of time.