

2018 Government Practice Seminar

DUE PROCESS FOR ADMINISTRATIVE HEARINGS

10:15 a.m. - 11:00 a.m.



Presented by

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ISBA Government Practice Section CLE:

Due Process for Administrative Hearings

May 4, 2018, ISBA CLE Centre & Webinar

Speaker:

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What process is due?

At its most basic level - Notice and opportunity to be heard –

Goldberg v Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970)

Fundamental due process required to contest agency action.

Agency action denying public benefits affects a basic constitutional property right. 397 U.S. at 262.

Due process requires timely and adequate notice detailing reasons for proposed adverse government agency action. 397 U.S. at 267.

Due process requires an opportunity to be heard. 397 U.S. at 267.

Hearing must be held at a meaningful time and in a meaningful manner. 397 U.S. at 267.

Hearing must include an effective opportunity to confront and cross-examine any adverse witnesses. 397 U.S. at 269.

Hearing must include an effective opportunity to present his or her own testimonial and documentary evidence and arguments. 397 U.S. at 269.

Due process requires that the hearing opportunity be tailored to the capacities and circumstances of those to be heard. 397 U.S. at 268-269.

Due process requires an impartial decision maker. 397 U.S. at 271.

Decision maker's conclusion must rest solely on legal authority and evidence presented and admitted during the hearing. 397 U.S. at 271.

Decision maker's determination must state reasons for his or her decision and indicate evidence he or she relied on to make the decision. 397 U.S. at 271.

Administrative Procedure Act Iowa Code Ch. 17A

The Iowa Administrative Procedure Act (APA) serves as the minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public. Iowa Code 17A.1(2)

The purposes of the Iowa APA include: assuring a uniform minimum procedure for all agencies to follow in the conduct of their most basic functions; increasing fairness of agencies in conducting contested case proceedings; and to simplify the process of judicial review of agency action. Iowa Code 17A.1(3)

The Iowa APA is intended to strike a fair balance between its purposes and the need for efficient, economical and effective government administration. Iowa Code 17A.1(4)

The Iowa APA's impact is limited to procedural rights. Iowa Code 17A.1(4)

The Iowa APA defines a contested case as a proceeding in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing. Iowa Code 17A.2(5)

Requirements for reasonable notice and opportunity to be heard are specified in the Iowa APA. Iowa Code 17A.12.

General rules of evidence for administrative contested case proceedings are defined in the Iowa APA. Iowa Code 17A.14.

General requirements for the form of a decision in a contested case proceeding are specified in the Iowa APA. Iowa Code 17A.16. These decisions are usually issued by an administrative law judge following the contested case appeal hearing.

Prohibited ex parte communications are defined in the Iowa APA. Iowa Code 17A.17.

A fair and impartial decision maker is required by the Iowa APA. Disqualification procedures are specified for various defined circumstances. Iowa Code 17A.11.

Iowa Administrative Code

Individual state agency procedural rules in the Iowa Administrative Code (IAC) further define, specify and clarify processes for various types of contested case proceedings involving state agency action denying or allowing a right, duty or privilege. All administrative rules must flow from statutory authority. See *City of Des Moines, et al v. Iowa Department of Transportation*, No. 17-0686, filed April 27, 2018 (Iowa Sup. Ct.)

For example:

871 IAC Ch. 26 specifies the procedural rules for Iowa Workforce Development unemployment insurance appeal hearings.

481 IAC Ch. 10 specifies the procedural rules for Department of Inspections and Appeals Administrative Hearing Division contested case hearings.

876 IAC Ch. 4 specifies procedural rules for Iowa Workforce Development Workers Compensation Division contested case proceedings.

General Considerations and Best Practices for all administrative proceedings

Language Access – Hearing must be conducted in the language the participant can understand in order to be meaningful and tailored to the capacities and circumstances of the parties to be heard.

Plain Language – Use clear, concise, correct language in written notices and decisions. Hearing instructions and ALJ questions should be stated in simple direct terms. Use language tailored to the parties' capacities and circumstances.

Scheduling and rescheduling hearings – Meet timeliness standards for a prompt outcome. Allow a reasonable length of time for the hearing to give the parties an effective opportunity to present testimony, exhibits and arguments.

Implicit Bias – Fair and impartial decision maker bases decision solely on evidence presented and applicable law.

Bench Card on Procedural Fairness – Practical tips for all proceedings.

Specific Due Process Requirements for agency action

U.S. Department of Labor requires each state's unemployment insurance appeals tribunal administrative law judges to comply with a list of 31 criteria to ensure that fundamental due process is provided to all parties involved in an administrative contested case proceeding. These criteria comply with the basic *Goldberg v Kelly* mandates. These criteria can serve as a "best practices guide" for any administrative contested case proceeding.

This U.S. Department of Labor criteria includes, but is not limited to:

Notice

- Adverse agency action must include appeal rights (IWD statutes and rules)
- Appeal hearing notice must be sent at least ten days before the hearing date (IWD statute)
- Appeal hearing notice must include a statement of the issue(s) on appeal

Opportunity to be heard

- Explain hearing process, including right to question witnesses, general order of testimony
- Give each party chance to ask questions about the hearing process at the beginning

Confrontation

- Each party can confront opposing witnesses
- Each party can cross-examine a witness immediately following the initial testimony
- ALJ can assist a party in forming cross examination questions

Written Decision

- ALJ must prepare a written decision for each case
- ALJ decision includes factual findings on all necessary elements and facts at issue
- ALJ factual findings must be relevant, accurate, complete, specific, clear
- ALJ makes appropriate credibility assessments
- ALJ conclusions of law must provide necessary support and basis for outcome reached

Fair and Impartial (no bias or prejudice)

- No negative demeaning or disparaging behavior
- Maintain high standards of demeanor
- Be fair and appear to be fair
- Put parties at ease
- Nothing in the form of a lecture
- Provide necessary assistance to fully develop the record

IMPLICIT BIAS BENCH CARD

Act Consciously and Deliberately

- Allow more time for cases in which implicit bias may be a concern.
- Avoid decisions under rushed, stressed, distracted or pressured circumstances.
- Engage in thoughtful information processing - objectively and deliberately consider the facts at hand. Avoid low-effort decisions or decision made on auto-pilot.
- Take special care in situations when you must respond quickly to avoid making snap decisions.
- Articulate the reasoning behind your decision before committing to a decision to allow yourself to critically review your decision-making process.

Be Self-Aware

- Analyze your emotional state. Do the negative or positive emotions you are feeling pertain to the case?
- Consider whether you are requiring more or less from a person than you would from others.
- Ask yourself if your opinion of the parties, witnesses, or case would be different if the people presenting belonged to a different social/racial group.
- Consider how the person is different from others in his/her same social/racial group or gender.
- Be mindful of your decision-making process, not just the resulting decision.

Create Processes to Serve as a Check on Unintended Bias

- Take notes and rely on those notes over memory.
- Consider what evidence supports the conclusions you have drawn and how you have challenged unsupported assumptions.
- Seek feedback from others. Would others perceive or handle the situation differently?
- Track your decisions and periodically examine them for any pattern of bias.

Sources: Pamela M. Casey, et al., *Addressing Implicit Bias in the Courts*, 49 Court Review 64 (2013); National Center for State Courts, *Strategies to Reduce the Influence of Implicit Bias*; Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012); National Council of Juvenile and Family Court Judges, *Right from the Start: The CCC Preliminary Protective Hearing Benchcard*

Issued by the Committee for Equality and Justice of the Minnesota Judicial Branch, April 2015

Questions: Contact Committee for Equality and Justice, cej@courts.state.mn.us or <http://mncourts.gov/cej>



**MINNESOTA
JUDICIAL BRANCH**

BENCH CARD ON PROCEDURAL FAIRNESS

PRACTICAL TIPS FOR COURTROOM PROCEEDINGS

INTRODUCE YOURSELF. Introduce yourself at the beginning of proceedings, making eye contact with litigants and other audience members. Court staff can recite the basic rules and format of the court proceedings at the beginning of each court session. Written procedures can be posted in the courtroom to reinforce understanding.

GREET ALL PARTIES NEUTRALLY. Address litigants and attorneys by name and make eye contact. Show neutrality by treating all lawyers respectfully and without favoritism. This includes minimizing the use of jokes or other communication that could be misinterpreted by court users.

ADDRESS ANY TIMING CONCERNS. If you will be particularly busy, acknowledge this and outline strategies for making things run smoothly. This can help relax the audience and make the process seem more transparent and respectful.

Example: "I apologize if I seem rushed. Each case is important to me, and we will work together to get through today's calendar as quickly as possible, while giving each case the time it needs."

EXPLAIN EXTRANEIOUS FACTORS. If there are factors that will affect your conduct or mood, consider adjusting your behavior accordingly. When appropriate, explain the issue to the audience. This can humanize the experience and avoid court users' making an incorrect assumption.

Example: "I am getting over the flu. I'm not contagious, but please excuse me if I look sleepy or uncomfortable."

EXPLAIN THE COURT PROCESS AND HOW DECISIONS ARE MADE. The purpose of each appearance should be explained in plain language. Tell the defendant if and when she will have an opportunity to speak and ask questions. Judges and attorneys should demonstrate neutrality by explaining in plain language what factors will be considered before a decision is made.

Example: "Ms. Smith: I'm going to ask the prosecutor some questions first, then I'll ask your lawyer some questions. After that, you'll have a chance to ask questions of me or your attorney before I make my decision."

USE PLAIN LANGUAGE. Minimize legal jargon or acronyms so that defendants can follow the conversation. If necessary, explain legal jargon

in plain language. Ask litigants to describe in their own words what they understood so any necessary clarifications can be made.

MAKE EYE CONTACT. Eye contact from an authority figure is perceived as a sign of respect. Try to make eye contact when speaking and listening. Consider other body language that might demonstrate that you are listening and engaged. Be conscious of court users' body language too, looking for signs of nervousness or frustration. Be aware that court users who avoid making eye contact with you may be from a culture where eye contact with authority figures is perceived to be disrespectful.

ASK OPEN-ENDED QUESTIONS. Find opportunities to invite the defendant to tell his/her side of the story, whether directly or via defense counsel. Use open-ended questions to invite more than a simple "yes" or "no" response. Warn litigants that you may need to interrupt them to keep the court proceeding moving forward.

Example: "Mr. Smith: I've explained what is expected of you, but it's important to me that you understand. What questions do you have?"

EXPLAIN SIDEBARS. Sidebars are an example of a court procedure that can seem alienating to litigants. Before lawyers approach the bench, explain that sidebars are brief discussions that do not go on the record and encourage lawyers to summarize the conversation for their clients afterward.

STAY ON TASK. Avoid reading or completing paperwork while a case is being heard. If you do need to divert your attention briefly, pause and explain this to the audience. Take breaks as needed to stay focused.

Example: "I am going to take notes on my computer while you're talking. I will be listening to you as I type."

PERSONALIZE SCRIPTED LANGUAGE. Scripts can be helpful to outline key points and help convey required information efficiently. Wherever possible, scripts should be personalized—reading verbatim can minimize the intended importance of the message. Consider asking defendants to paraphrase what they understood the scripted language to mean to ensure the proper meaning was conveyed.

Adapted from EMILY GOLD LAGRATTA, *PROCEDURAL JUSTICE: PRACTICAL TIPS FOR COURTS* (2015).

FOR ADDITIONAL READING

EMILY GOLD LAGRATTA, *PROCEDURAL JUSTICE: PRACTICAL TIPS FOR COURTS* (2015), available at <https://goo.gl/YbuC3K>.

Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 Cr. Rev. 4 (2007-2008) (an AJA White Paper), available at <http://goo.gl/afCYT>.

Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 Cr. Rev. 76 (2013) (an AJA White Paper), available at <http://goo.gl/RrFw8Y>.

Brian MacKenzie, *The Judge Is the Key Component: The Importance of Procedural Fairness in Drug-Treatment Court*, 52 Cr. Rev. 8 (2016) (an AJA White Paper), available at <http://goo.gl/XA75N3>.

David B. Rottman, *Procedural Fairness as a Court Reform Agenda*, 44 Cr. Rev. 32 (2007-2008), available at <https://goo.gl/sXRTW7>.

Tom R. Tyler, *Procedural Justice and the Courts*, 44 Cr. Rev. 26 (2007-2008), available at <https://goo.gl/UHPkxY>.

PROCEDURAL FAIRNESS/PROCEDURAL JUSTICE

A BENCH CARD FOR TRIAL JUDGES

WHAT IS PROCEDURAL FAIRNESS OR PROCEDURAL JUSTICE?

When we speak of **Procedural Fairness** or **Procedural Justice** (two terms for the same concept), we refer to the perceived fairness of court proceedings. Those who come in contact with the court form perceptions of fairness from the proceedings, from the surroundings, and from the treatment people get.

Research has shown that higher perceptions of procedural fairness lead to better acceptance of court decisions, a more positive view of individual courts and the justice system, and greater compliance with court orders.

Researchers sometimes identify the elements of procedural fairness differently, but these are the ones most commonly noted:

VOICE: the ability of litigants to participate in the case by expressing their own viewpoints.

NEUTRALITY: the consistent application of legal principles by unbiased decision makers who are transparent about how decisions are made.

RESPECT: that individuals were treated with courtesy and respect, which includes respect for people's rights.

TRUST: that decision makers are perceived as sincere and caring, trying to do the right thing.

UNDERSTANDING: that court participants are able to understand court procedures, court decisions, and how decisions are made.

HELPFULNESS: that litigants perceive court actors as interested in their personal situation to the extent that the law allows.

MEASURING FAIRNESS

"Measurements . . . define what we mean by performance."

—Peter Drucker

There are tools to help you measure fairness in your court. You can then see if you can improve over time.

The Center for Court Innovation has *Measuring Perceptions of Fairness: An Evaluation Toolkit*, available at <http://goo.gl/TVu42A>.

The National Center for State Courts has its *CourTools*, which includes an Access and Fairness survey in both English and Spanish, available at www.courttools.org.

The Utah Judicial Performance Evaluation Commission has a *Courtroom Observation Report*, which can be used by courtroom observers to give qualitative feedback, available at <http://goo.gl/1bWAVk>.

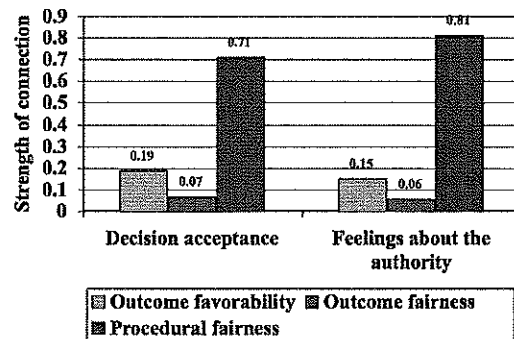
KEEP IN MIND:

- This may be the most important contact with the court system the parties will ever have.
- Filling out forms on the bench may be important, but eye contact and engagement with the parties are critical.
- Trust is not a given. But it can be gained in each hearing through adherence to procedural-fairness principles.
- People make assumptions when they lack knowledge. Explain things.
- Listening is a key skill. Decision acceptance is greater if it's clear you listened—note their key points when ruling.
- Like others, judges can be affected by perceptions, assumptions, and stereotypes—in other words, implicit biases. Be aware.

WHY IS IT IMPORTANT?

Several rigorous evaluations have shown that both acceptance of court decisions and overall approval of the court system are much more closely connected to perceptions of procedural fairness than to outcome favorability (Did I win?) or outcome fairness (Did the right party win?). Studies also show increased compliance with court orders when participants experience procedural fairness.

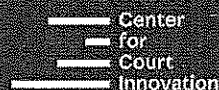
WHY DO PEOPLE ACCEPT COURT DECISIONS?



Source: Survey of court users in Oakland and Los Angeles, California, reported generally in TOM R. TYLER & YUEN J. HUI, TRUST IN THE LAW (2002).

FOR MORE INFORMATION

ProceduralFairness.org
ProceduralFairnessGuide.org
Center for Court Innovation (www.courtinnovation.org)
National Center for State Courts (www.ncsc.org)



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Appeals Quality Criteria Checklist

1. Explanation - (6)
 - a. Order of testimony
 - b. Right to question witnesses
 - c. Opportunity for each party to ask questions about the hearing process or procedures before proceeding
2. Opening Statement - (6)
 - a. Identify parties
 - b. Date
 - c. Place
 - d. Hearing officer name
 - e. Administrative decision appealed
 - f. Explained issue
3. Exhibits - (6)
 - a. Described and marked all exhibits
 - b. Allowed parties to review the exhibits & offer objections
 - c. Authenticated offered exhibits if questionable or challenged
 - d. Entered all competent, relevant and reasonably available exhibits
 - e. Explained why any offered exhibit was not entered
 - f. Ruled on admissibility of any documents read into the record as offered exhibits
4. Witness Order - (6)
 - a. Called in proper order and sworn
 - b. Evidence developed in logical order (no bouncing between witnesses)
5. Order of testimony from each witness [logical & orderly manner] - (3)
6. Timely Opportunity to Question own Witness(es) - (9)
7. Clear Language - (6)
8. Single Point Questions - (6)
9. Clarification of Statements, which include Conclusions - (6)
10. Opportunity to Confront all opposing Witnesses - (9)
11. Cross Examination - (9)
 - a. Timely opportunity for cross exam (before testimony from another witness)
 - b. Properly controlled cross exam
 - c. Provided appropriate assistance when necessary
12. Controlled undue Extension or Repetition of Testimony - (3)
13. No Leading Questions about Material Issues - (6)
 - a. by Hearing Officers
 - b. Hearing Officer did not allow others to ask leading questions
14. Control of Interruption(s) - (6)
15. Off the Record ~ - (6)
 - a. Anticipated
 - i. Before going off record, indicated "going off record"
 - ii. After going off record, summarized what occurred and got Concurrence of the parties
 - b. Unanticipated (i.e. tape ended unexpectedly)
 - i. After going back on record, the Hearing Officer reconstructed lost testimony or asked last speaker to repeat missing portion.
 - ii. Got Concurrence of the parties
16. Interpreters - (6)
 - a. Instructed how to properly interpret
 - b. Administered Oath
 - c. If necessary, establish on the record that fluent in both languages
 - d. Require word for word interpretation (first person testimony)

Appeals Quality Criteria Checklist

17. Continuances (granted when necessary and supported by the record) – (3)
- | | |
|--|--|
| <input type="checkbox"/> a. granted, necessity supported by the record | <input type="checkbox"/> c. denied, good cause was shown by the record |
| <input type="checkbox"/> b. granted, necessity NOT supported by the record | <input type="checkbox"/> d. denied, good cause was NOT shown by the record |
18. Conclusion of Hearing (asked parties if they had anything further to add) – (6)
19. Within Scope of Notice – (9)
- If new issues arose, got appropriate waivers, after full disclosure of how resolving the issue would affect all parties, so they can agree to proceed or request a continuance to prepare for hearing on the new issue.
20. No Gratuitous Comments (nothing in the form of a lecture, must maintain high standards of demeanor & decorum) – (6)
21. Attitude (fair and appear to be fair, put parties at ease, provide necessary assistance) – (6)
22. Bias & Prejudice (no negative, demeaning, or disparaging behavior) – (9)
23. Obtain Reasonably Available Evidence (necessary to dispose of the issue(s)) – (9)
24. Issue Statement (clear, simple statement of statutory issues) – (3)
25. Findings of Fact supported by Evidence (supported by substantial evidence in the hearing record) – (9)
26. Findings of Fact -- (9)
- | | |
|---|--|
| <input type="checkbox"/> a. findings on all necessary elements and facts at issue | <input type="checkbox"/> c. must be relevant, accurate, and complete |
| <input type="checkbox"/> b. conclusions of laws - provide necessary support & basis | <input type="checkbox"/> d. no inappropriate recitation of testimony |
27. Required Conclusions (conclusions of law must logically follow from the findings of fact) – (6)
28. Logical Reasoning (conclusions of law must logically follow from the findings of fact) – (6)
29. Form, Style, and Organization – (3)
- | | |
|---|--|
| <input type="checkbox"/> a. statement of the issue(s) being decided | <input type="checkbox"/> c. rationale |
| <input type="checkbox"/> b. findings of fact | <input type="checkbox"/> d. conclusions of law |
| | <input type="checkbox"/> e. ruling |
30. Decision states Legal Effect – (3)
- | | |
|--|---|
| <input type="checkbox"/> a. each issue addressed as affirmed, reversed or modified (if modified, how?) | <input type="checkbox"/> b. administrative action to be taken is clearly stated |
|--|---|
31. Understandable Decision – (6)
- | | |
|---|---|
| <input type="checkbox"/> a. grammatically correct | <input type="checkbox"/> d. avoided objectionable or abrasive words or phrases |
| <input type="checkbox"/> b. concise | <input type="checkbox"/> e. professional appearance |
| <input type="checkbox"/> c. easily understood | <input type="checkbox"/> f. correct spelling or absence of typographical errors |