



Tips for Effective Advocacy During Telephone Hearings

With courts increasingly scheduling even contested hearings by telephone, we thought we'd begin to compile a list of considerations and ideas. Following are ideas gathered from judicial officers who have presided over and attorneys who have participated in contested hearings by phone, as well as input from our appellate attorneys to support preservation of the record and address due process concerns. We hope to add to this list over time; please contact your staff attorney with any other ideas!

Preparation

- **Pretrial conferences:** Request them and actively participate in them!
- **Internet/phone:** Ensure that your telephone and/or electronic device is charged and in working condition before the hearing begins.
- **Stipulations:** Stipulate and agree to as many issues/exhibits as possible ahead of time.
- **Motions in limine:** Use these to address any unresolved evidentiary issues ahead of the hearing. While the court may not be able to make time to hear them in advance of the day before the trial/hearing, even resolution day-of will preserve a cleaner record and a more focused hearing.
- Visuals such as documents/exhibits will be more important now than ever. Consider using reports, photographs, timelines, etc. Send any **documents/exhibits** to all parties and the court via email in advance. Before the hearing starts, ask the court how the court would like to mark exhibits, as doing so ahead of time will make things more organized/run smoother during the hearing.
- Make the time to talk to **witnesses, counsel, and clients** before the hearing. Explain the novelty of the situation and how everyone is figuring things out. Explain the procedures that will be used, answer any questions, and discuss any anticipated issues.
- **Discuss and agree in advance of the hearing** the order in which attorneys will present evidence, question witnesses. Also, find out how the hearing will be recorded.
- **Hearing time:** Plan for the hearing to take longer than a live hearing; some attorneys and judges have estimated twice as long. Discuss whether there is a plan for attorneys to consult with their clients privately (e.g. on another line, with scheduled breaks, etc.)
- **Consult with an attorney on OCR's appellate litigation support list** (<https://www.coloradochildrep.org/wp-content/uploads/2019/09/Litigation-Support-List.pdf>) to make sure you've anticipated and planned for any appellate issues.

During the Hearing

- **Identify yourself** each time you speak (does not apply to each question during direct, cross, or rebuttal). Encourage others (including the court) to do the same.
- **Continue to think of how to make your case persuasive.**
 - Try to encourage hearings by Zoom or another service that provides visuals and audio, as visuals such as body language and facial expressions can be critical to credibility determinations. Where you cannot have a hearing with visuals, body language and facial expressions will not be available to the fact finder, so be sure to ask questions to paint a thorough picture of witnesses' credibility and emotions, where relevant.
 - Opening statements and closing arguments may be more necessary now than ever, as they will put your persuasive theme and theory before the fact-finder during the beginning and end of the hearing.

Last updated 3/30/20. Please continue to share your ideas, and we will continue to update this document!

- **Keep an eye on the record.**
 - Discuss how the hearing will be recorded ahead of time and get verbal affirmation that recording has begun.
 - Ensure that every witness is sworn in properly.
 - If someone’s statement is difficult to hear due to technology or other issues, ask the court to have the statement repeated. If you get an “uh-ha” or other answer that is not clear, or you can’t understand the answer, make sure you make the witness clarify it.
 - Ensure that your objections are heard and ruled on by the court.
 - As in all hearings, make sure all legal findings and factual considerations are addressed through evidence.
 - Don’t hesitate to ask the questions necessary for a solid record, even if the hearing is taking time.
 - Be sure to continue to make all necessary ICWA-related records.
 - Remember that an attorney from OCR’s appellate litigation support team is likely available to help with any issues that come up during the hearing. If you send an email to all of the attorneys on the list (<https://www.coloradochildrep.org/wp-content/uploads/2019/09/Litigation-Support-List.pdf>) or the listserv, you will likely get a prompt response.

After the Hearing

- If given the opportunity, ***draft proposed detailed findings and orders***.
- **Check in** with clients, witnesses, and opposing counsel to answer any questions and address any concerns.

Other Ideas

- When not engaging in formal cross or direct, ask questions “in the negative” (i.e., “Who is not available on ### date for the next hearing” rather than “does #### date work for everyone?”). Or ask questions of one participant at a time.