Midwives Guide to Administrative Hearings:

This guide is not legal advice or a substitute for the advice of an attorney. For individualized advice and counsel, consult an attorney. Julie Gunnigle, the attorney for the AAM, is available at (480)266-0129.

I. GENERAL INFORMATION

I have received a request for documents from AzDHS. What happens next?

There are a few documents that should be provided to the Department of Health upon request. These are a written assertion to decline a test (R9-16-110(C)), informed consent for midwifery services (R9-16-109(C)), and current NARM certification and CPR training (R9-16-104). By law, you must provide these documents to the Department within five calendar days of a Department request. Similarly, within thirty days of terminating midwifery services a midwife must submit a midwifery report or within five days in the event of a patient, fetal, or newborn death. The Department can request other information like charts or patient records relating to an enforcement action, but be aware that the Department has a formal process called a subpoena to obtain that information. Unless the Department gets a subpoena from a court for your records, they are not entitled to those records.

If AzDHS is informally asking you for information, ask if they have a valid subpoena before volunteering patient charts or records.

I have received a Notice of Deficiency from the Arizona Department of Health. What happens next?

A Notice of Deficiency is the first step the formal process the Department takes in regulating licenses. Keep in mind that at this stage, the “Deficiency,” whether it be for a technical or serious violation of the rules, is just an allegation. The Department still must prove that the midwife violated the rules before taking action on her license. Depending on the nature of the allegation, the process can move forward in several ways. If the “Deficiency” is minor or technical, AzDHS may offer the midwife an opportunity to fix the issue, pay a fine, take additional CEUs, or a combination thereof. If the deficiency can be fixed in some way, the Notice will have language telling the midwife what she can do.

If the “Deficiency” is more serious, for example it is an allegation of Prohibited Practice, the Department may offer an informal dispute resolution process. This process is the licensing equivalent of a plea bargain. The Department may offer a penalty and, if the midwife agrees to take the penalty, the process ends there. If, on the the other hand, the midwife does not agree, the case can proceed to a hearing.

II. HEARING

What is a hearing?

A hearing is your opportunity to hear the evidence against you and challenge AzDHS's case before a neutral judge. If you are considering taking your case to a hearing there are a few things you should know.

First, at a hearing you are not required to prove anything. The Department has the burden of proving a violation of the rules. Unlike a criminal case however, the burden is much lower. The Department must prove that the rules were broken by a "preponderance of the evidence"—that it is more likely that a licensee broke a rule than that she did not. If an agency cannot prove this, there can be no action against a licensee. You may even collect costs and fees if Administrative Law Judge finds that the Department's position was not substantially justified. A.R.S. 41-1007.

Second, hearings are designed to give you a voice. They are designed to challenge agency action in front of a neutral third party. Contesting an action not only tests the quality of the Department's case, but also the Department's willingness to pursue cases that are not worth taxpayer money or are not in the public's interest.

Third, even if the Administrative Law Judge rules against a licensee, there may be an unseen benefit. For example, in a recent case Thomas Salow, the then acting Assistant Director of Licensing at the Department of Health, admitted in a hearing and on the record that DHS has known and has failed to rectify the conflict in the rules regarding client transfer. The case might not have had a favorable outcome, that information is invaluable for challenging the rules in other ways.

What rights do I have at a hearing?

You have the right to a hearing. Should you disagree with an action taken by the AzDHS against your license, you should take your case to a hearing. By law, you will have at least 20 days' notice of your hearing date in order to prepare. A.R.S. 41-1061. If you cannot attend the hearing at the scheduled date, you should let the judge know in writing at least 15 days before the hearing and telling the judge the good reason to delay.

You have the right to subpoena testimony and documents relevant to your case. A subpoena is a formal request for someone to appear or to produce relevant documents. If you believe that another party or the Department has documents, emails, policy papers, or studies relevant to the way the rules are being interpreted in your case, you may choose to subpoena those documents. A.R.S. 41-1062(4). The office of administrative hearings has fill-in-the-blank subpoena forms available here.

You have the right to present evidence in your defense. This means that you can bring witnesses and ask them questions, you can cross-examine the Department's witnesses, and you can submit documents relevant to your case.

You have the right to be represented by an attorney at your own expense, or to represent yourself. You need not be an attorney to represent yourself in a hearing. Should you choose to represent yourself at an administrative hearing, you may find the process different and less daunting than Superior Court. A hearing in front of an administrative law judge is far less formal than a case in most courts. The Rules of Evidence do not apply and the hearing need not proceed in any formal order. A.R.S. 41-1062(1). The Arizona Office of Administrative Hearings has many of the commonly used forms available online as well as guidance on what to expect at a hearing.

You have the right to a second opinion. When the Department issues a final order, you have the ability to appeal that order in Superior Court.

What happens at a hearing?

Order of the Hearing:

1. The Administrative Law Judge (ALJ) will call the case. The parties and attorneys will identify themselves. The Administrative Law Judge will ask witnesses to swear or affirm that they will tell the truth.

2. Show respect to the ALJ by using the appropriate title. Address the ALJ as either Judge, ALJ, Your Honor, or Mr. X or Ms. X depending on the gender of the Administrative Law Judge. Do not call the ALJ "hearing officer."

3. At the beginning of the hearing, both sides may make opening statements. This is your opportunity to outline your position for the ALJ. A good opening statement will give the judge a short overview of what you will prove and how. It is not the time to present your entire case. *For example: "I will show that my conduct on [date] was within the scope of practice by having Client X, Midwife A, and Expert B testify."*

4. After opening statements, the party with the burden of proof generally proceeds by presenting evidence. AzDHS has the burden of proof in enforcement actions. AzDHS may then present the ALJ with evidence. This evidence may come in the form of a person testifying, documents for the court to review, or both. You have the right to ask questions of any witness, even if it is a witness for AzDHS. *Note: Sometimes the ALJ will change the normal order of presentation to make the hearing go more smoothly.*

5. After AzDHS has had the opportunity to present evidence, you may choose to present evidence. This means that you will have the opportunity to call witnesses, ask them questions, and show the judge documents. You should also know that AzDHS will have the opportunity to ask additional questions of your witnesses.

6. Upon completion of that presentation, AzDHS may request an opportunity to present rebuttal evidence**.** However, such evidence should not be redundant, repetitive or cumulative to the party's prior evidence.

7. After all evidence has been presented, the parties are then given an opportunity to present closing statements. Closing statements are not evidence, but they do summarize the evidence and the reasons that you believe that you should not be sanctioned. The Administrative Law Judge will examine all of the evidence.

8. After completion of the Closing Statements, the hearing is then concluded. The Administrative Law Judge then prepares a written Recommended Decision for submission to the agency, board or commission where the case originated. Note that AzDHS is not required to follow the sentencing recommendations of the ALJ.

What should I *not* do at a hearing?

The Office of Administrative Hearings has provided the following Top Ten list of things NOT to do at a hearing:

10. "HEAR" TODAY, GONE TOMORROW!
Once the hearing time and date has passed, the hearing cannot be reset by just a telephone call, so do not call the Office of Administrative Hearings (OAH) and ask for a hearing. Read the Notice of Hearing for the date, place, and time of the scheduled hearing. In most cases, the hearing will be held in Phoenix, Arizona. The OAH also maintains a Tucson office. Periodically , there are cases (primarily Child Protective Services and Registrar of Contractors) that are heard in other venues (Flagstaff, Kingman, Lake Havasu, Prescott, Show Low, Sierra Vista, and Yuma).

9. "HEY ROCKY, WATCH ME PULL A RABBIT OUT OF MY HAT!"
Do not come to the hearing and apologize that you do not have any of the important documents or evidence that you wish the Administrative Law Judge to consider. This is the parties' day to be heard, so come to the hearing prepared. If a party comes to the hearing unprepared and informs the Administrative Law Judge that documents, photographs, and other items exist but were not brought to the hearing, it is as if such items do not exist. Judges need to review evidence. Representations that such evidence exists, without bringing it to the hearing, are not going to be helpful to a party's case. When a party brings exhibits to the hearing, copies should be brought for the Judge and for the other party.

8. "MY DOG ATE MY WITNESS."
Do not show up at the hearing and inform the Administrative Law Judge that ten witnesses could have been brought to the hearing "who would testify that … ." If witnesses would be helpful to a party's case, a party should ensure their appearance at the hearing so the Judge can observe them and listen to their testimony. Parties may subpoena witnesses in accordance with OAH procedural rule 19-113. If a witness cannot physically be present, a party may file a request to have a witness appear telephonically. If you wish to proceed in that manner, see OAH procedural rule 19-114.

7. "TABLE FOR TWO?"

Do not bring any snacks, chewing gum, chewing tobacco, food, or beverages into the hearing room. Pitchers containing water are made available in the hearing room for use by the parties, witnesses, and observers. All food items, other than bottled water, are to remain outside the hearing room at all times. During the hearing, recesses occur, at which time snacks or drinks may be obtained. A one hour lunch recess is generally taken but can be extended, at the Judge's discretion. Listen to the Judge as to the time when the hearing will resume. If the Judge informs the parties that there will be a fifteen minute recess, that means be back in the hearing room within fifteen minutes. Do not expect the Judge to wait longer than the fifteen minutes to reconvene the hearing.

6. "EXTRA, EXTRA, READ ALL ABOUT IT!"
Each Judge has discretion as to what to permit at each hearing. Generally, however, prepared testimony that is written by a party or witness will not be allowed to be read into the record during the hearing. An Administrative Law Judge cannot discern the truthfulness of a witness if a party is reading a statement rather than testifying from the party's own knowledge. If that were to occur, the person might as well just submit the document and have the Judge read it without taking up valuable hearing time. Documents can be offered as exhibits to be admitted into the evidentiary record for consideration by the Judge. Also, when appropriate, documents can be used to refresh a person's recollection as to specific details.

5. "CURB YOUR ELEPHANT."
Copies of original items or documents may be brought to the hearing room to be used as evidence. Once a hearing is concluded and there is a final administrative decision, the matter is subject to appeal. The courts will not accept large items to be part of the record on appeal. In order to avoid a problem with submission of the record to a court, such large objects will not be admitted into evidence at a hearing before the OAH. Generally, only items that can fit within an 8 ½" x 11" folder will be admitted into evidence. Do not expect that large items such as blueprints, doors, bricks, etc. will be admitted into the evidentiary record. Although large items will not be admitted, such items may be utilized at the hearing as demonstrative evidence. That means that they can be viewed by the parties, witnesses, and the Judge, and testimony, may be presented concerning such items. However, parties should expect to leave the hearing room with any large items that are brought into the hearing room.

4. "AND NOW FOR SOMETHING COMPLETELY DIFFERENT..."
Read the OAH pamphlet that accompanied the Notice of Hearing because it contains important information as to the procedures followed by the OAH. Additionally, parties and members of the public are encouraged to visit OAH's website to learn more about the OAH and the Administrative Law Judge who will be presiding over a particular matter. Review the procedures set forth in the OAH's administrative rules. The rules provide information as to when continuance requests should be filed and what information the Judge may consider. Also, the parties may wish to attend another OAH hearing to observe the Administrative Law Judge or become familiar with the hearing process.

3. “HEY GOOD BUDDY!”
Be respectful of the administrative process, and address the Administrative Law Judge as “Your Honor” , “Judge”, or “Mr. or Ms….” but do not address the Judge by his or her first name or as a “hearing officer”.

2. “WELL...ISN’T THAT SPECIAL?”
Do not come to the hearing expecting to get loud or overly emotional. The hearing is a time to have the parties air their differences before a neutral third party, the Administrative Law Judge. It is inappropriate to use profanity, yell, or become disruptive. Acting in that manner does not accomplish anything except the possibility of being admonished for not behaving appropriately. A person who is unruly or disruptive to the hearing process may be removed from the hearing room if he or she does not maintain proper decorum. See OAH procedural rule 19-120. If a party or witness is removed from the hearing room because of unruly behavior, the hearing will proceed in that person’s absence. All parties disagree to some extent on the facts and/or the applicable law. If they agreed, then there would be no need for the hearing. Parties can air their differing views through the calm presentation of witnesses’ testimony and the submission of items into evidence. Getting loud does not sway a Judge. Being respectful and courteous to the Judge as well as to the other participants in the hearing makes for a more pleasant and productive hearing.

1. “SAY GOODNIGHT, GRACIE.”
Hearings are held Monday to Friday during normal business hours of 8:00 a.m. through 5:00 p.m. Do not assume that the hearing will continue past 5:00 p.m. even if witnesses and parties have come from out of town. If a hearing does not conclude at the end of the business day, the hearing will likely be rescheduled for a further hearing date.