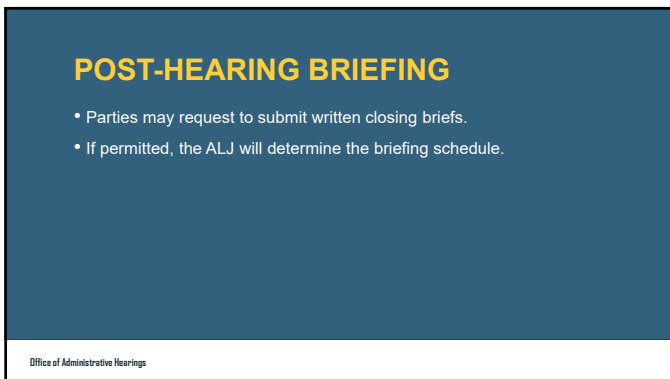




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POST-HEARING BRIEFING

- Parties may request to submit written closing briefs.
- If permitted, the ALJ will determine the briefing schedule and page limits.
- The ALJ may permit the parties to submit simultaneous written briefs or staggered briefs
- Post-hearing written briefing will delay when the record closes. The ALJ will set a date on which the record will close and the matter will be considered submitted for decision.

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REOPENING THE RECORD

After the matter is submitted for decision, the ALJ may reopen the record for various reasons, including, most commonly:

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- To allow a party to submit redacted copies of exhibits;
- Pursuant to Government Code § 11516; or
- When the agency rejects the Proposed Decision and remands the matter.

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- To allow a party to submit redacted copies of exhibits;
- Pursuant to Government Code § 11516; or
- When the agency rejects the Proposed Decision and remands the matter.

Government Code § 11516 allows an agency to amend the pleading *after* the matter is submitted for decision.

- Parties have an opportunity to show they will be prejudiced without the chance to submit additional evidence.
- Where such prejudice is shown, the agency (ALJ) shall reopen the case to permit introducing additional evidence

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PROPOSED DECISIONS

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PROPOSED DECISIONS: TIMING (GOV. CODE, § 11517, SUBD. (C)(1) & (2))

Proposed Decision (PD) is sent to the agency within 30 days. All exhibits admitted during the hearing are marked in Case Center and sent with the PD.

PD is public record and sent to respondent 30 days after provided to agency

Agency has up to 100 days to:

- Adopt the PD in its entirety
- Reduce or mitigate the penalty (including costs)
- Make technical or minor changes
- Reject the PD and
 - Refer it back to the ALJ to take additional evidence, or
 - Decide the case on the record

If agency does not act within 100 days, PD is deemed adopted.

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PROPOSED DECISIONS: CONTENTS

ALJ makes findings of facts and conclusions of law.
 "The decision shall be in writing and shall include a statement of the factual and legal basis for the decision." (Gov. Code, § 11425.50, subd. (a).
 The evidence must support the facts and the facts must support the conclusions. (*Topanga Assn. for a Scenic Community v. County of L.A.* (1974) 11 Cal.3d 506.)
 For **credibility determinations**, the ALJ "shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness." (*Id.*, subd. (b).)
 Reviewing courts "shall give great weight" to credibility determinations.

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PROPOSED DECISIONS: CONTENTS

Where allegations are not proven, the pleading may be dismissed.
 If all or any of the charges are proven, the ALJ may propose license discipline.
 Discipline can include a letter of reprimand, fines, suspension, stayed suspension and/or revocation and probation, or outright revocation.
 Most agencies publish recommended guidelines of terms and conditions of probation. ALJs may deviate from the guidelines, but must explain reasoning in the PD.

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PROPOSED DECISIONS: CONTENTS

To determine type of discipline, the ALJ must balance public protection against the vested property right of a respondent to practice his or her profession or occupation.
 The goal of the disciplinary process is not punishment but public protection.
 "The objective of an administrative proceeding relating to a possible license suspension is to protect the public; to determine whether a licensee has exercised his privilege in derogation of the public interest. 'Such proceedings are not for the primary purpose of punishing an individual. [Citation.] Hence, such proceedings are not criminal in nature.'" (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164 (citing *Cornell v. Reilly* (1954) 127 Cal. App.2d 178, 184.)

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PROPOSED DECISIONS: COST RECOVERY

Costs may be recovered only if authorized by statute. (*Wilson v. Bd. of Retirement* (1959) 176 Cal.App.2d 320, 322.)

Recoverable costs include the reasonable costs for investigating and prosecuting the case against a respondent.

Costs include charges incurred up to the date the hearing begins. (*Schneider v. Medical Board* (1997) 54 Cal.App. 4th 351.)

ALJ must analyze the reasonableness of the costs. (*Zuckerman v. Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32.)

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PROPOSED DECISIONS: COST RECOVERY

Agencies seeking costs often support their requests with declarations. Those declarations shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

(2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

(3) When the agency presents an estimate of actual costs incurred, its Declaration shall explain the reason actual cost information is not available.

(4) The ALJ may permit a party to present testimony relevant to the amount and reasonableness of costs. (Cal. Code Regs., tit. 1, § 1042, subd. (b)(1)-(4).)

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HEARING DOs AND DON'Ts

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HEARING DOs AND DON'Ts

- Writing effective opening and closing briefs
 - Some judges prefer a detailed hearing brief with legal issues outlines and discussion of anticipated key evidentiary issues while other prefer oral arguments and briefs only for the legal issues
- How to make the most of opening and closing arguments

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HEARING DOs AND DON'Ts (CONTINUED)

- Talk to opposing counsel PRIOR to hearing – stipulations, order of witnesses, other agreements or logistics
- You increase your credibility when you work professionally and collegially with parties and witnesses
- Explore settlement options prior to hearing

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HEARING DOs AND DON'Ts (CONTINUED)

- Use your evidence at hearing to educate and persuade the ALJ
- Remember the APA's hearsay rule: hearsay may only supplement and explain direct evidence. Introduce carefully.

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HEARING DOs AND DON'Ts (CONTINUED)

- Have CVs readily available for those witnesses whose backgrounds or qualifications are important to the issues
- Provide written reports for all experts or sufficient basis of the expert opinion before they testify

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HEARING DOs AND DON'Ts (CONTINUED)

- Self-represented litigants
 - Prepare for hearing – witnesses, evidence, your own statement.
 - ALJ cannot give legal advice. ALJ must balance assisting getting the evidence the respondent wishes into the record without serving as their counsel
 - Remember the only evidence the ALJ considers are statements under oath and admitted documents (not opening or closing statements)
 - The ALJ and agency counsel may ask respondent questions

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HEARING DOs AND DON'Ts (CONTINUED)

- Before filing motions in limine, discuss with the other side. Better to work it out than file multiple motions with the hearing judge.
- Think about tailoring your hearing to be helpful to the ALJ (e.g., agency rules)
- Come prepared for hearing. Know your evidence, the law, your arguments, and your opponent's argument.
- Respect the ALJ's time by preparing your evidence so it can be presented efficiently. If documents are voluminous, help the ALJ by providing a trial brief, comprehensive index, key to acronyms or abbreviations, etc.
- If you know the strengths and weakness of your case, you can avoid "over-presenting" an issue

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REMOTE HEARING DOs AND DON'Ts

- Advance exchange of exhibits
- Limitations
- Material differences between in-person and remote hearings
- Best practices
- Resources that may help attorneys learn the digital evidence platform OAH uses (Case Center)

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QUESTIONS?

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THANK YOU!

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