

Evidence, Ethics, and the IDEA Hearing Officer

NYS Impartial Hearing Officer Training



Preliminary Remarks ...

COURSE CODE: _____

Please Write This Number Down on the Affirmation Form

Introduction

- Technical rules of evidence do not apply, unless the enabling statute says otherwise
- IDEA defers to commonly applied State evidentiary standards
- IHO, however, must have the knowledge and ability to conduct hearings in accordance with appropriate, standard *legal* practice

Introduction (cont.)

- New York has not adopted any specific evidentiary standards
- The IHO has discretion whether to apply the technical rules of evidence
- However, the IHO should not ignore the rules



Introduction (cont.)

- The rules help to determine which evidence is worthy of being admitted
- The rules also -
 - provide rational support for why evidence should be admitted
 - establish uniformity and predictability
 - promote due process



Introduction (cont.)

- It is the responsibility of the IHO to be versed in the rules and their underlying policies
- Understanding the rules and their underlying policies will help in deciding admissibility and weight
- Today, we will review select rules and start a discussion on IDEA related procedures with evidentiary implications



Exercise Appropriate Judgment



- Do not overly rely on the technical rules of evidence
 - Confused record
 - Prolonged hearing
 - Flawed decision
- Sensible approach increases likelihood of fair, efficient and timely hearing



Authentication

Authentication is “an inherent logical necessity” to establishing relevancy. (7 Wigmore § 2129, p. 564.)

An item cannot be determined relevant unless it is first deemed authentic.

The proponent must establish that the item is what s/he claims it to be. Testimony of a witness with knowledge or agreement of the parties can provide the necessary foundation.

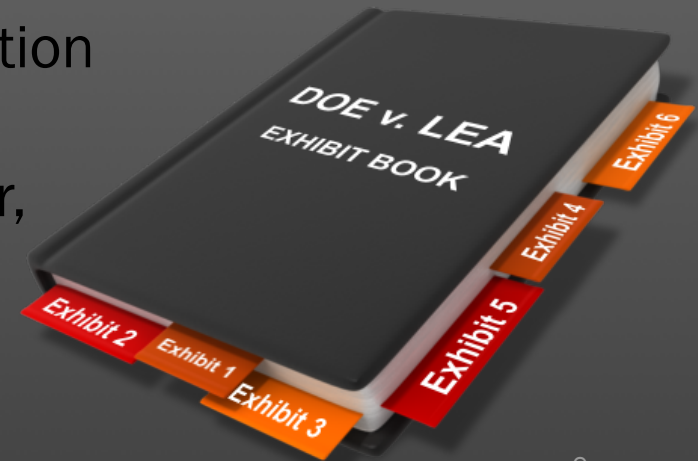
Authentication

The time and expense devoted to proving the genuineness of each document sought to be introduced into evidence is impractical.

Two prevalent practices:

- Wholesale introduction of disclosure packets
- Marking disputed documents for identification

Both approaches are understandable. However, caution is warranted.



Authentication

Best Practice - Permit wholesale receipt of those documents for which the parties expressly stipulate on the record to their authenticity, relevance and reliability.

Documents in dispute should be introduced piecemeal.



Important ...

CODE #2: _____

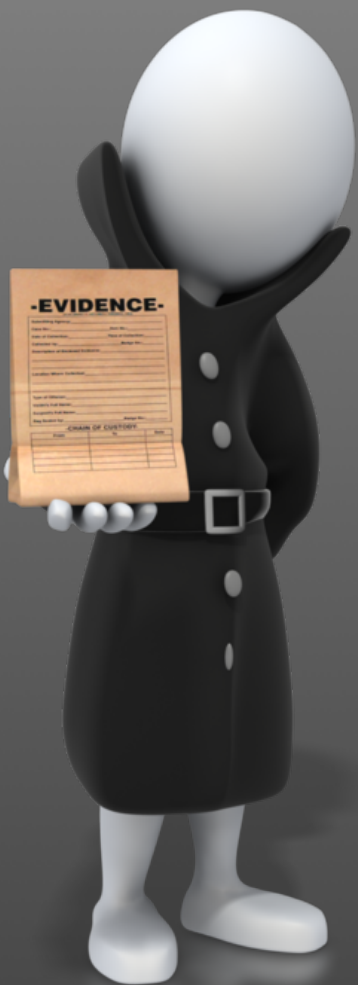
Please Write Code #2 Down on the Affirmation Form

The Best Evidence Rule

The rule requires the proponent of an item to produce the original (or duplicate original) to prove its contents or explain why the original (or duplicate) cannot be produced.

If a fact exists independently of a document, the rule does not apply, unless the material facts of consequence place the document at issue.

Where there is no doubt as to the accuracy of an item, requiring an original is cumbersome and can lead to inefficiency.



Legal Relevance

- All evidence should have probative value, otherwise it should be excluded
- Material + Authentic = Probative Value
- For evidence to be material, it must have logical connection to the material facts of consequence in the hearing



Legal Relevance

- Evidence can be logically, but not legally relevant
- Exclude logically relevant evidence when it -
 - causes unfair prejudice or confusion of the issues
 - is unduly repetitious
 - would be overly time consuming to present



Legal Relevance

New York State law requires that we exclude evidence that the *IHO determines* to be irrelevant.



Whether evidence is relevant is a judgment call.

A focused definition of what is relevant should yield a manageable and complete record.

Opinion Evidence

- Common law prefers that witness testimony be limited to statements of observed facts
- Opinion testimony can be helpful to the trier of fact and, because of this, the common law has made exceptions
- Lay and expert witnesses may provide opinion testimony



Lay Witnesses

Opinion testimony is permissible, provided -

- it is based on first-hand knowledge or observation;
- the testimony would be helpful to understanding the testimony or determining a fact in issue; and
- is not based on scientific, technical, or other specialized knowledge



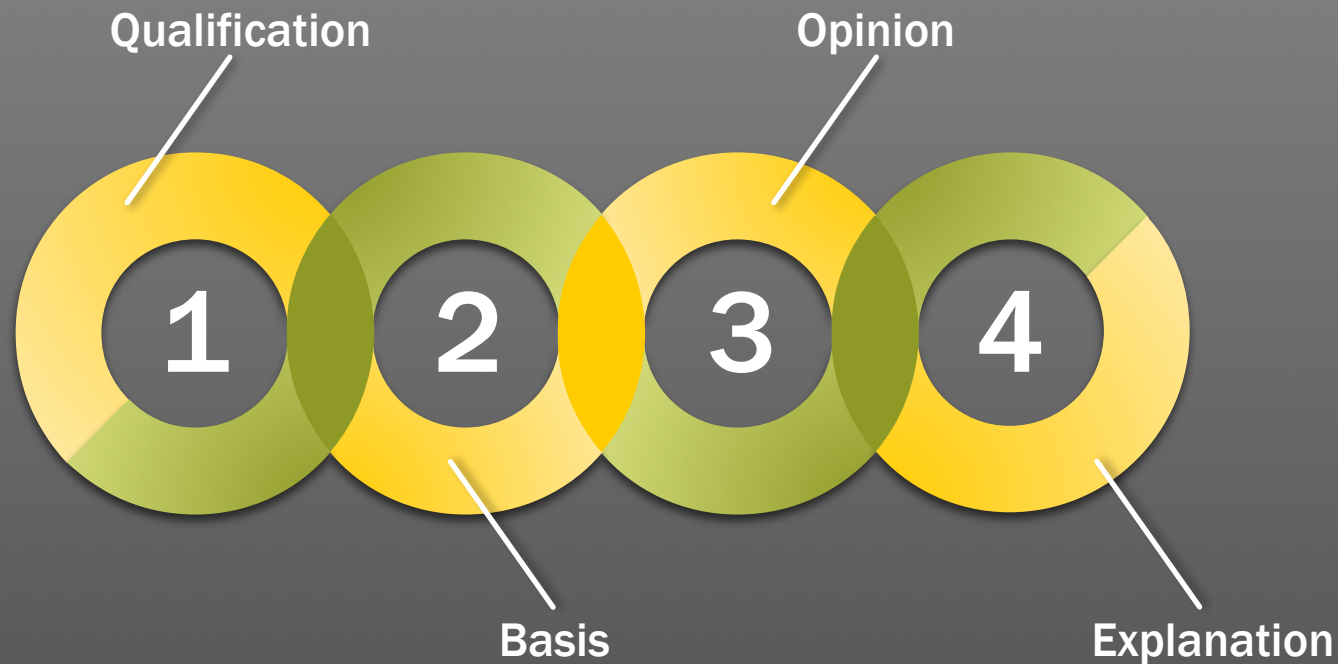
Expert Witnesses

Expert witnesses may -

- offer factual testimony
- help with scientific or technical principles
- offer opinion testimony

The IHO has discretion to determine whether to allow expert testimony





Expert Opinion Testimony

Opinion testimony should include four topics, each with its own elements of foundation.

Bases of an Expert

Three Possible Sources

Facts personally observed

Example: treating physician, evaluator

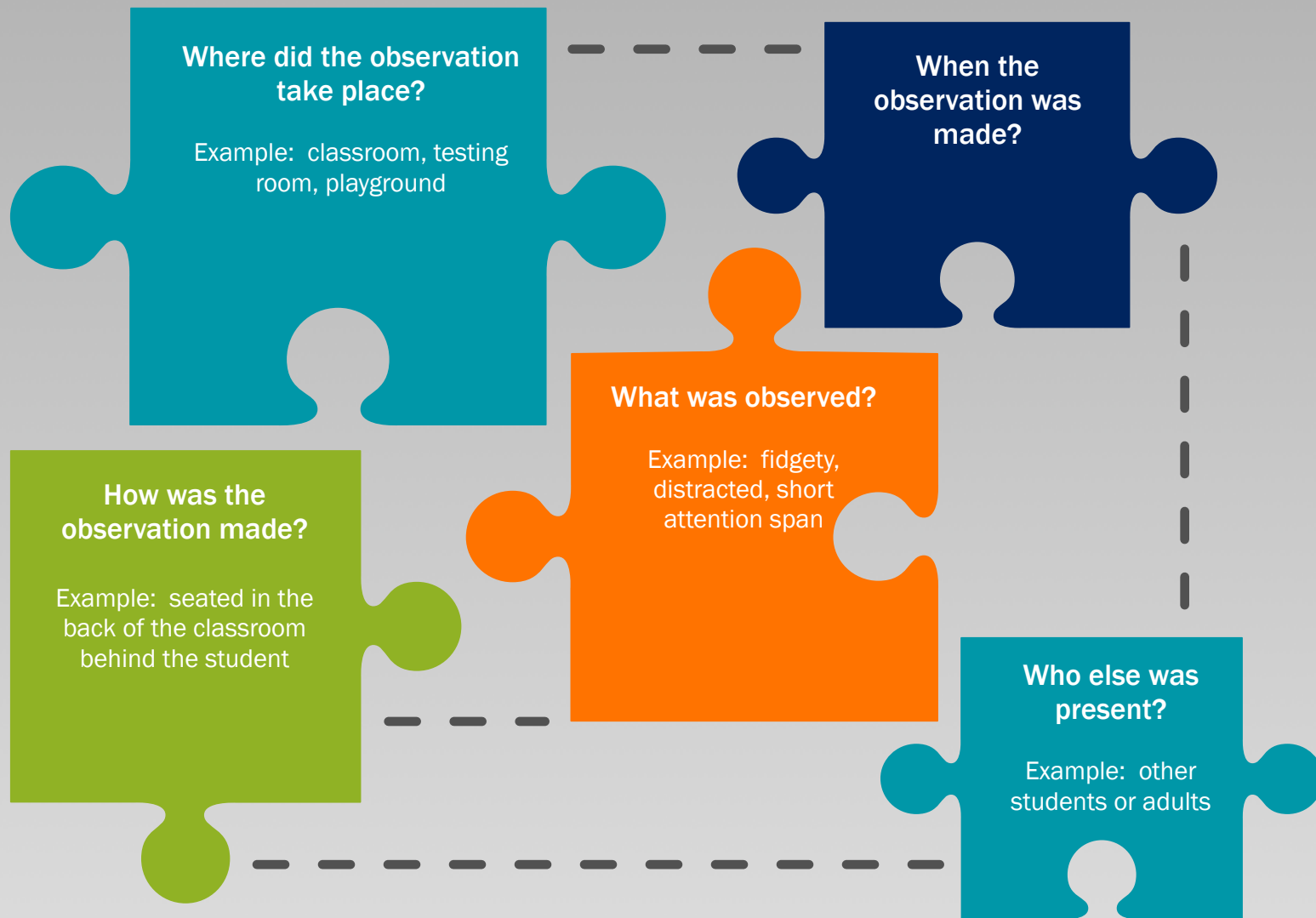
Presentation of Data

Example: review of CSE assessments,
any IEEs available

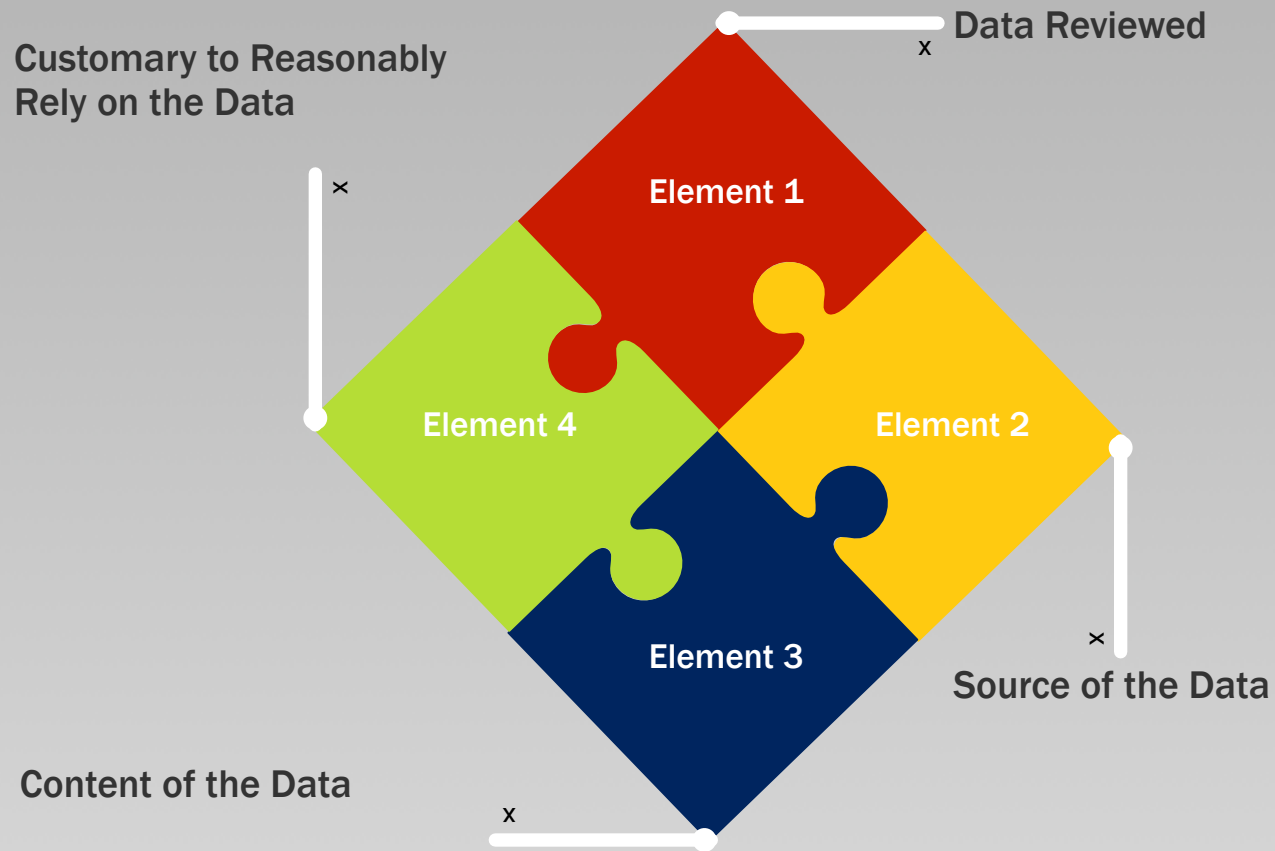
Assumed Facts

Example: hypothetical question, sitting-
in and listening to the testimony





Personal Observation - Elements of Foundation



Presentation of Data - Elements of Foundation

(When data is provided prior to the hearing.)

Assumed Facts - Elements of Foundation

Expert's opinion can be established through hypothetical questions or by expert's reaction to testimony s/he has heard

Caution warranted because of limitations

- Presumes the assumed facts are in, or will be made part of, the record
- Inaccurate testimony based on incomplete question
- Possibility of testimony being heard incorrectly



Important ...

CODE #3: _____

Please Write Code #3 Down on the Affirmation Form

Hearsay

- Admissible in IDEA hearings, despite the other party having a right to confront witnesses
- Fear of trier of fact considering potentially unreliable and untrustworthy statements because declarant's sincerity, perception, and/or memory cannot be tested
- Though it is admissible, IHOs wrestle with how much weight to give it





Assertive Statement

Includes oral and written assertions, as well as assertive nonverbal conduct (e.g., pointing, nodding)

Declarant Unavailable

Includes unavailability due to exercise of privilege, refusal to testify despite being compelled to do so, or illness

Offered for its Truth

Statements offered for purpose other than truth are admissible, provided relevancy is established

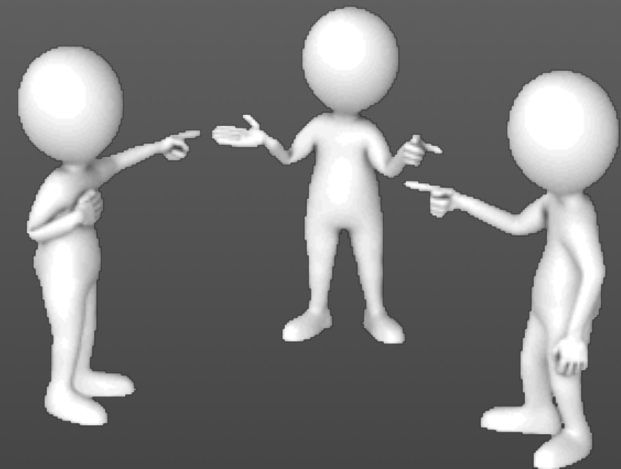
Hearsay

There are numerous exceptions to the hearsay rule, including the statement against interest

An admission is one of the most frequently used exceptions

There are three kinds of admissions:

- personal
- adoptive
- vicarious



Judicial Notice

IDEA IHOs can take judicial notice of facts



Only adjudicative facts that are not subject to reasonable dispute or can be accurately and readily determined may be judicially noticed

Facts known only by personal observation of the IHO must not be judicially noticed

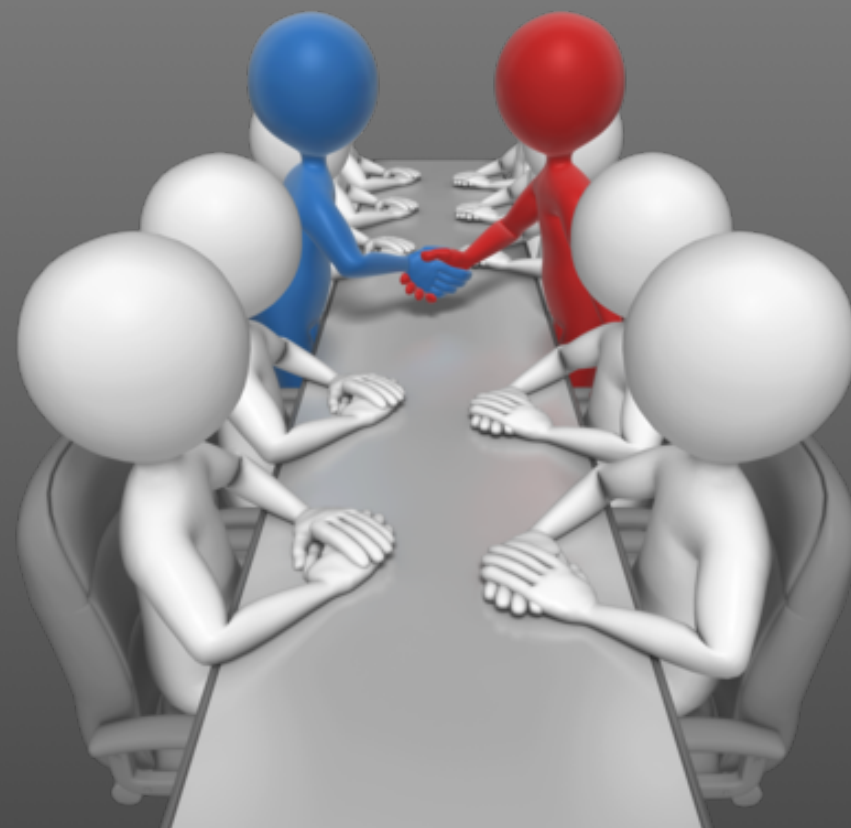
Judicially noticed facts should be noted in record

IDEA Related Procedures with Evidentiary Implications



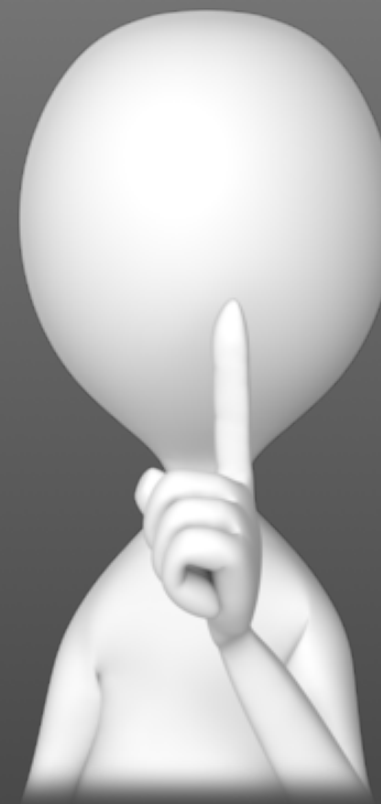
Resolution Meetings

- IDEA speaks of “participation” at the resolution meeting
- What is participation?
- Who decides if participation occurred?
- Must engage in fact finding process regardless of how the IHO defines participation



Resolution Meetings

- Discussions held during mediation are confidential and, therefore, not admissible
- Discussions held during resolution meetings are not confidential and potentially admissible
- The IHO must determine whether the discussion is reliable and legally relevant



Motions



- IDEA does not provide for motion practice
- IHO's broad authority extends to deciding motions
- When there are genuine factual issues, a record must be made prior to the IHO ruling on the motion
- Decide motions early, when possible

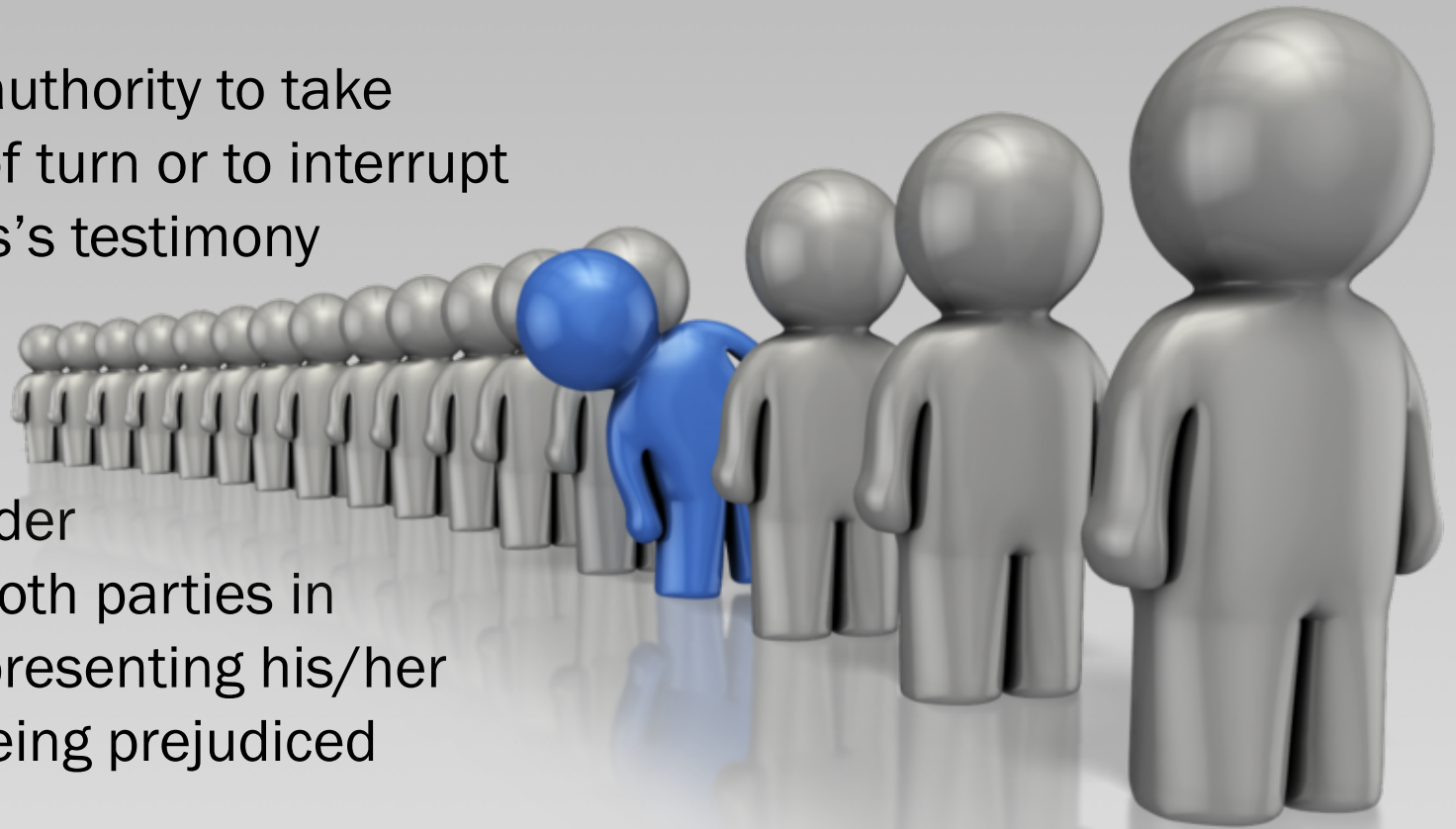
Important ...

CODE #4: _____

Please Write Code #4 Down on the Affirmation Form

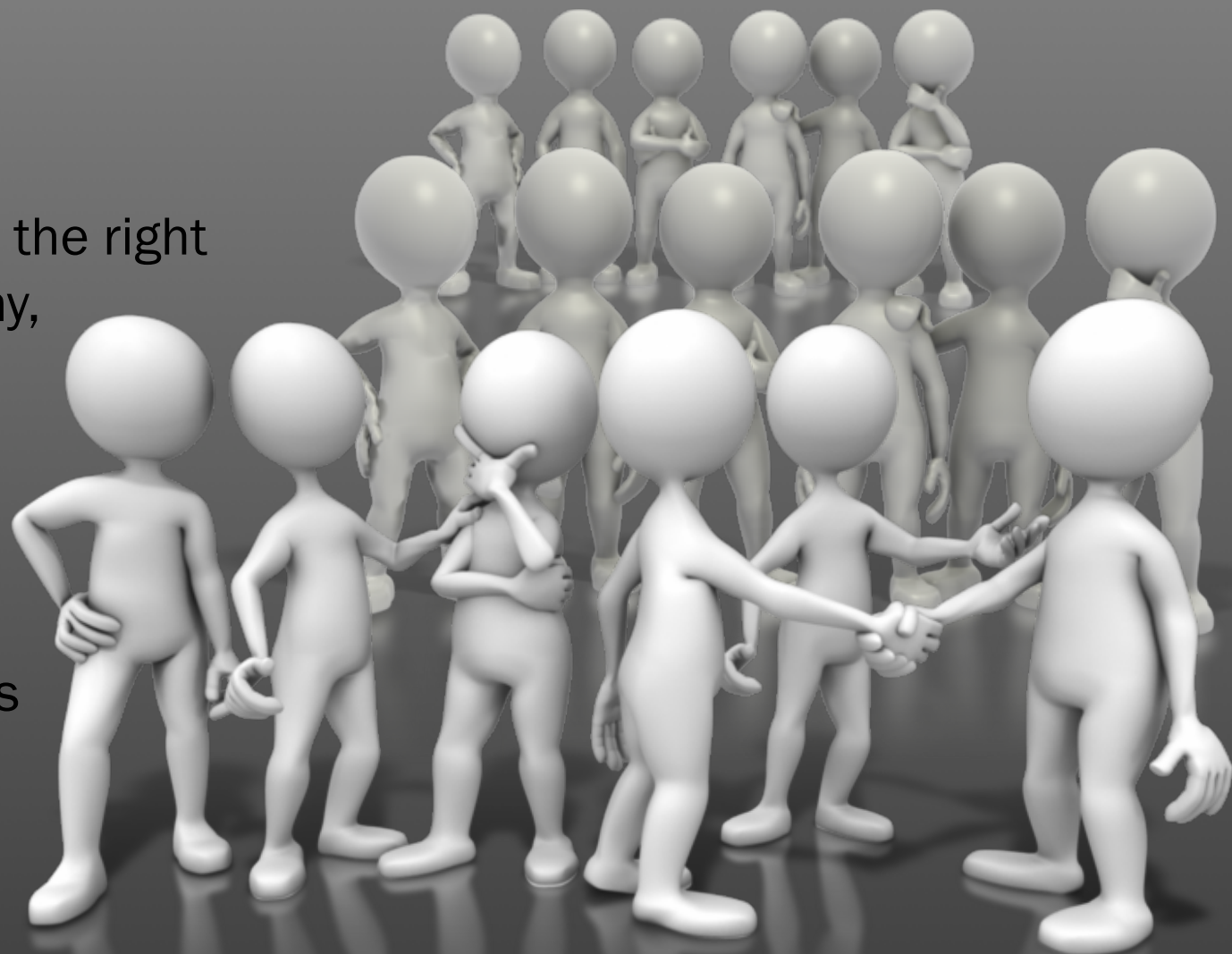
Witnesses

- IHOs have the authority to take witnesses out of turn or to interrupt another witness's testimony
- IHO must consider what is fair to both parties in terms of each presenting his/her case and not being prejudiced



Witnesses

- Though a party has the right to present testimony, s/he is not given *carte blanche* to determine who gets to testify
- Sort out the witness list during the PHC



Oaths

- IDEA does not require the taking of testimony under oath
- Common practice is to take testimony under oath
- The IHO may exercise flexibility in the words used to affirm a witness's undertaking to tell the truth



Handling Witnesses



- Setting a time in hours that each party has to present its case is a practical alternative to a piecemeal approach
- The piecemeal approach is not as efficient
- NYS regulation would support setting a time in hours
- The key is to establish the schedule during the PHC

Handling Witnesses

- The challenge for the IHO when managing the presentation of testimony is s/he may be perceived as overreaching into the adversarial process
- “Encroaching” into the adversarial process is sometimes necessary; the Federal Rules of Evidence, however, provide support



Mode of Interrogating Witnesses

- IHO has discretion to determine how testimony is received into the record (i.e., free narrative or responses to specific questions)
- Free narrative testimony can result in a confused record
- A more methodical approach is preferable, including when working with *pro se* parents



Important ...

CODE #5: _____

Please Write Code #5 Down on the Affirmation Form