

2018 County Advocate Workshop

CALIFORNIA DEPARTMENT OF
PESTICIDE REGULATION

The Advocate's Challenge

What is the Advocate's Challenge?

To prepare and present the County's case so the Hearing Officer finds in your favor!

The Advocate's Challenge

- Prepare a logical case and argument
- Prepare a list of stipulations
- Present the county's evidence through testimony of witnesses
 - › Have evidence on the record for each element
- Make strong opening statement and closing argument

The Advocate's Job

- Other staff have gathered and examined the evidence
- Your job is to examine the County's evidence and present it in a logical order to support the County's case.
 - › Elicit testimonial evidence from the witnesses
 - › Introduce other evidence (usually documents)

How do you get there?

- Just as a thorough inspection or detailed investigation is essential in preparing the Notice of Proposed Action (NOPA), a well-crafted NOPA is a roadmap to follow in preparing for a Hearing.
- The elements are the stops you must make when following the roadmap.

Confidence

- Things seem more difficult until attempted
 - › Become easier with practice
 - › Requests for assistance are respected and encouraged
- Communicate

Advocate Consultation

- Your Deputy/Supervisor should be able to help
- Your DPR Enforcement Branch Liaison (EBL) is there to assist you!
 - › Access to Department Experts (ex. Environmental Monitoring or Worker Health & Safety)
- Communicate

Due Process

Purpose of Civil Penalties

- Levy fines for violations and gain compliance
- Facilitate open dialogue

Basic Principles

- Equality in enforcement of laws and regulations
- Administrative Civil Penalties are an alternative to other types of civil actions such as court actions
 - › Require certain formalities to be followed

Due Process

- U.S. Constitution
 - › “not deprive any person of life, liberty, or property, without due process of law”
- CA Constitution (Art. 1, sec. 7, subd.(a).)
 - › A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws...”

Due Process – Basic Rights

1. Impartial decision maker
2. Reasonable notice
3. Reasonable opportunity to be heard (a hearing)

Due Process

- Provides procedural protection to the person whose property (including money) the government (you!) proposes to take away.
- Protect rights, while providing for a streamlined process (compared to court proceedings)
- CACs do not have authority to “negotiate mutual settlements”

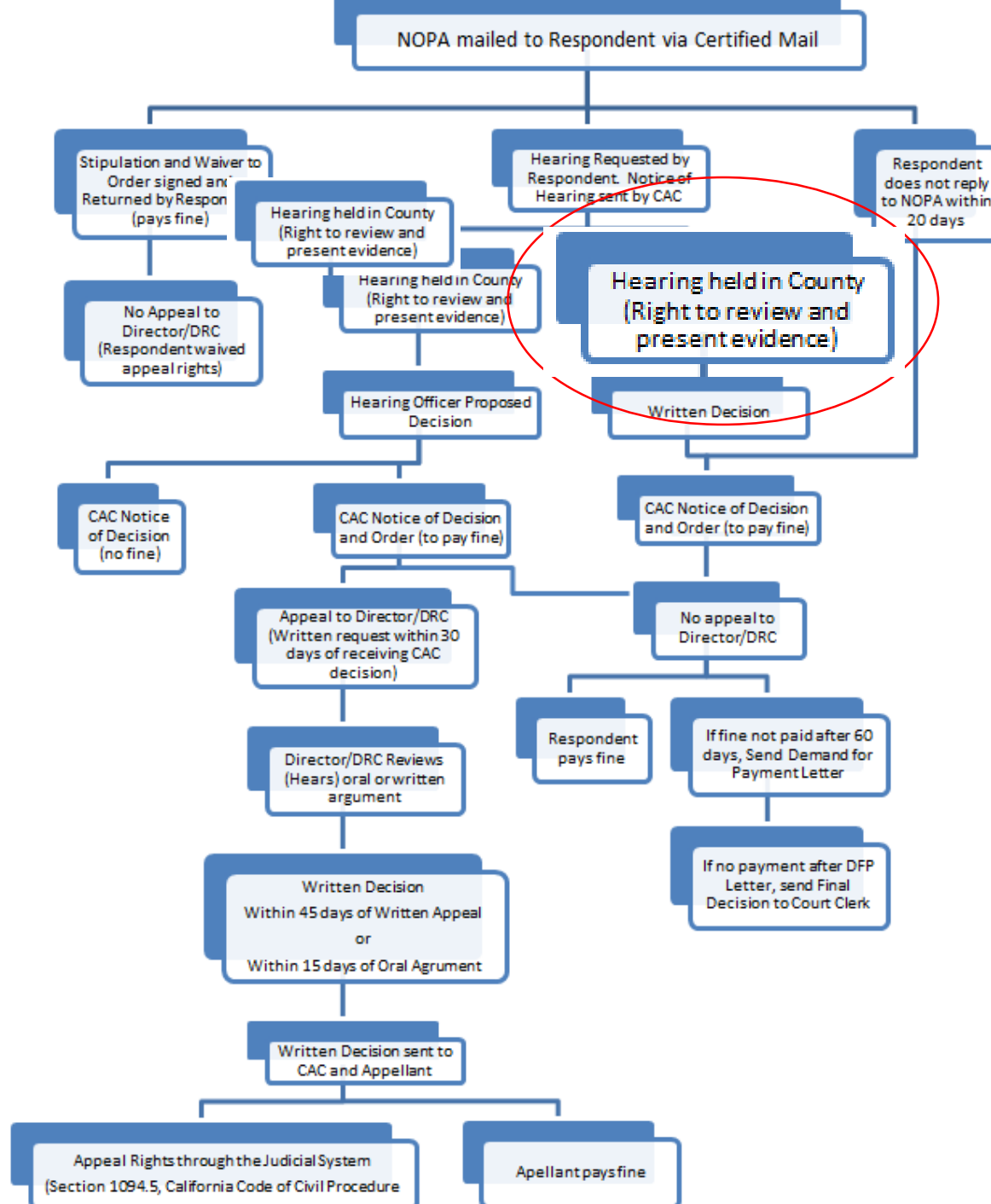
Hearing Goals

- Provide a fair and impartial hearing
- Keep the process simple
- Provide sufficient evidence to the Hearing Officer to make a finding
 - › Explain the violation(s)
 - › Provide facts and evidence to prove violations
 - › Explain fine classification determination
- Give respondent opportunity to be heard

Notice Requirements

- A previous court decision resulted in DPR's direction to all CACs to include the *Preparing for Your Administrative Pesticide Penalty Hearing* brochure (DPR-ENF-o86) with each pesticide NOPA

Section 5



Civil Penalty Process Simplified

1. NOPA mailed to respondent
2. Hearing requested
3. Notice of hearing
4. Pre-Hearing conference
5. **The Hearing**
6. Hearing Officer prepares Proposed Decision
7. CAC Issues Decision
8. Respondent pays fine or appeals to DPR/DRC

Hearing Roles

- Commissioner
- Hearing Officer
- County Advocate
- Respondent
- Witnesses
 - › Expert
 - › Lay
- Observers

Hearing Outline

- Pre-hearing conference
- Welcome by Hearing Officer
- Hearing
 - › Opening statement
 - › Evidence
 - › Closing statement
- Hearing Officer's closing

Ex parte Communications

- An *ex parte* communication is a communication between one of the parties and the decision maker (i.e. Hearing Officer) about the hearing without the other party present

***Ex parte* communications are prohibited**

MORE Due Process

- Additional Reading Workbook
Section 8

Safety – Everyone Must Know...

If the County believes a Respondent may be abusive during a hearing:

- › Commissioner should tell the potential Hearing Officer about this when offering the case
- › County has responsibility to take measures to ensure safety of **all attendees**. If needed, the County should consult with the Sheriff about safety and “keep the peace call” procedures.

Advocate's Role & Responsibilities:

Elements and Burden of Proof

The Advocate's Challenge

- Elements of the Violation - focus on facts
- Plan your presentation, general to specific
- Read the investigation
- Bring “life” to your story
- Evidence, exhibits and alternative explanations
- Prepare your witness
 - › Witness credibility
 - › Cross examination

How to meet the challenge

- Present to the Hearing Officer:
 - › Simple story of what happened
 - › Each element of each violation
 - › Testimonial evidence related to each element
 - › Documentary (and other) evidence related to each element
 - › County witnesses told the truth
 - › County met the burden of proof
 - › You valued his/her time

MORE Advocacy

- Additional reading - Workbook
Section 10

Lists of Lists

- Elements of each violation
- Evidence for each violation
- Witnesses
- Proposed Stipulations
- Witness Questions
- Respondent Questions
- And more!

Preparing the Case

1. Element analysis of code(s)
2. What evidence for each element?
3. Who will present the evidence (testify)?
4. How to prepare the witness?

Burden of Proof

- Administrative Civil Penalties
 - › Preponderance of the Evidence- **Hearing**
 - › Substantial Evidence- **Appeal**
- Other court actions
 - › Clear and Convincing Evidence
 - › Beyond a Reasonable Doubt

Preponderance vs. Substantial



Although related, these standards have several key distinguishing features:

	Preponderance of the Evidence	Substantial Evidence
What?	• The government must prove that the alleged violation was “more likely than not” to have occurred.	• The CAC decision must be based on enough relevant evidence and inferences from that evidence to support a conclusion, even though other conclusions might have also been reached.
When?	• The government must prove the alleged violation according to this standard at the hearing.	• The CAC decision is reviewed by DPR and courts according to this standard.

DRC: Structural Pest Control Board
Disciplinary Review Committee

FAC section 12973- Elements

“The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide”

- Each person can do the elements slightly differently, for example
 - › Use of a substance
 - › Substance is a Pesticide
 - › Conflict with labeling
 - › Registered pursuant to this chapter
 - › Labeling delivered with the pesticide

Elements Analysis

- In addition to the code(s) cited, make sure you analyze the authorizing code(s)
 - › FAC 12999.5, 15204, 15204.5 or B&P 8617
 - Authority, NOPA elements, Notice of Hearing
 - › 3CCR section 6130, 16 CCR section 1922
 - Classification (reasons)
 - Fine amount

Strengths and Weaknesses

- The elements of the violation analysis should help you to know:
 - › What information you are missing
 - › What other argument could the respondent make based on your evidence?

Advocate's Role & Responsibilities:

EVIDENCE AND WITNESSES

Types of Evidence

- Testimony
 - › Statements from people with first-hand knowledge of the facts
 - › Expert Opinion
- Documentary Evidence
 - › Documents (pesticide label, use report, etc.)
 - › Photographs
 - › Diagrams, drawings or maps
 - › Recordings (audio or video)

Testimony

- Who do you need to bring to the hearing to provide relevant testimony?
 - › Are there any witnesses who have seen, heard, or done something in the case?
 - › Are there any witnesses with special expertise?
 - › Do any of your witnesses have an “opinion” that you want the hearing officer to hear?

Witnesses

- Use everyone's time effectively.
 - › Plan who will present which pieces of information
 - › Choose your witness(es).
 - › Decide which witness will give the hearing officer which piece of information.
- Make a list matching each witness with the facts that the witness knows.

Witness Responsibilities

- Witnesses for both the County and Respondent must
 - › Provide testimony/evidence
 - › Tell the truth
- **MORE** reading on being a witness
 - › Workbook Section 25

Witness Types

LAY WITNESS

Offers opinions or inferences based on the witness's own perception

EXPERT WITNESS

Offers an opinion about something they did not personally see, hear, or otherwise experience, based on their own education, experience and training.

Witness Preparation

- Be mindful of your witnesses' time and other commitments
- Prepare an outline of what you expect to ask
 - › Identify the key points you need
- Prepare with your witness (if possible)

Practice, Practice, Practice

- Make witness comfortable
- Think about the person listening to the tape
- A polished presentation increases credibility
- But not too much practice
- Be flexible

Witness Preparation

When writing your questions, don't forget to think about:

- Who?
- What?
- When?
- Where
- Why?
- How?

Scripted Question Examples

LAY WITNESS

- Explain day
- How involved
- What they saw/felt/smelled, etc.

EXPERT WITNESS

- Education & Background
- Licensing, Experience & Training
- “Qualification to be an expert”
- Opinions

Witness Preparation

- Witness preparation is important:
 - › Do not assume you know how your witnesses will respond.
 - › Don't assume your witness will know where you are headed with your questions.
 - › Ask "simple" questions, not "compound" questions.

Preparing your witness for cross-examination

- After you ask your witness questions, the Respondent will have the opportunity for cross-examination.
- Prepare your witness to be comfortable with answering
 - › “I don’t know”
 - › “I need to refresh my recollection by looking at my investigative report”
 - › Etc.

Prepare for Cross-Examination

- It is also important to prepare a few questions to ask the Respondent (or witnesses called by the Respondent).

More later!

Evidence

- Case File Contents:
 - › All the documentary evidence you need (or think you may need) during the hearing
 - Plan for the respondent to not stipulate to anything
 - › Laws & regulations to refer to
 - › Ideally tabbed out and orderly so it is easy to refer to.

Exhibits

An exhibit is:

- A document,
- A record, or
- Some other tangible object

Formally introduced as evidence in a hearing.

Exhibits

- You must bring copies of exhibits for:
 - › The Hearing Officer
 - › The Respondent
 - › Yourself

Exhibit Size

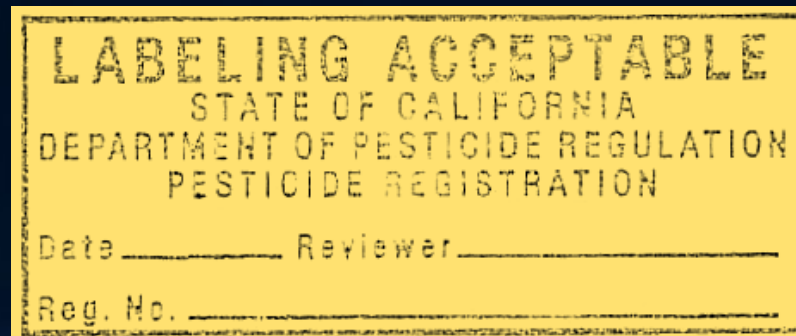
- Make sure exhibits fit into 8½ x 11 folder.
- For larger exhibits, ALSO make a copy that fits on 8 ½ x 11 paper.
- For video or other media, ALSO copy it onto media (CD, DVD, etc.) that allows you to present a copy to the Hearing Officer and Respondent.

Original Exhibits

- Do not submit original exhibits (i.e. pesticide labels) to the Hearing Officer (but do have it available).
- Do submit clear, legible copies to the Hearing Officer.
- Do not bring dangerous or hazardous materials exhibits into hearing area.

Examples

- Pesticide labeling
 - › The one at the Use Site (preferred)
 - › Specimen labeling may not be “California registered”
 - › DPR Label Resource Center versions
 - Example: Label effective on January 25, 2018.



Visual Aids

- During the hearing, how do you request permission from the hearing officer for a map/video to be displayed?

The Hearing Day

A Hearing in 10 Easy Steps

1. Pre-Hearing Conference
2. Welcome, introductions, sign-in, housekeeping
3. Start Hearing (go on the record)
4. County's Opening Statement
5. Respondent's Opening Statement (now or before Respondent's rebuttal, but not both)

A Hearing in 10 Easy Steps

6. County Advocate case-in-chief

- › Direct examination of Witness 1 by Advocate
- › Cross-examination of Witness 1 by Respondent*
- › Re-direct examination of Witness 1* by Advocate
- › Re-cross-examination of Witness 1 by Respondent*
- › Direct examination of Witness 2
- › And so on

** Optional*

A Hearing in 10 Easy Steps

7. Respondent's rebuttal

- › Direct examination of Witness 1 by Respondent
- › Cross-examination of Witness 1 by Advocate*
- › Re-direct examination of Witness 1* by Respondent
- › Re-cross-examination of Witness 1 by Advocate*
- › Direct examination of Witness 2
- › And so on

**Optional*

A Hearing in 10 Easy Steps

8. County Advocate's Closing Argument
9. Respondent's Closing Argument
10. Hearing Officer's Closing Remarks & close record

The Pre-Hearing Conference

- Stipulations
 - › Who is in the room? Who isn't?
 - › What is the goal?
 - › How much preparation required with stipulations?

Stipulations

- Stipulations are agreements
 - › Their purpose is to help parties figure out what they agree upon
 - › You then list these agreements so you don't have to go over those parts again in the hearing
- Should be crafted in a manner that avoids the need to later address issues that are not contested by the Respondent

Stipulation Examples

- The Somewhere County Agricultural Commissioner has authority under FAC section 12999.5 to take this action.
- Okay Dusters, LLC is a pest control business licensed by the Department of Pesticide Regulation.
- Katch SC (EPA Registration No. 12345-999-AA) is a registered pesticide.
- The active ingredient in Katch SC is kilamide.
- County Exhibit C is a copy of the Katch SC labeling that was available at the use site on September 15, 2017.

Stipulations

- When stipulations are made during the pre-hearing conference, the County Advocate must write them out exactly, and give a copy to the Respondent and Hearing Officer
- Both parties should review and sign the stipulations before the hearing
- The Hearing Officer must read stipulations agreed upon during the pre-hearing conference into the official record (Hearing Officer's becomes the official copy)

Issues Remaining

- After the Stipulations have been agreed to, what are the issues left to be decided?
- It may be the violation, but the fine amount may also be at issue.

MORE Hearing

- Additional Reading - Workbook:
 - › Section 14
 - › Section 15
 - › Section 16

Hearing Begins

- Welcome and introductions
- Going on the record
- Explanation of process
- Swearing in of witnesses
- Stipulations will be read into the record

Admitting Evidence

- The Respondent should have had an opportunity to review the County's evidence prior to the hearing.
- The Hearing Officer has discretion on how evidence is admitted into the hearing

Admitting Evidence

- One way ...
 - › The Hearing Officer may allow the County's evidence to be admitted (minus anything the Respondent has an objection to) at the start.
 - Objected pieces should be discussed on the record during the hearing. Hearing Officer can note any objections on the record at that time
 - REMINDER: "Any relevant evidence" may be admitted at the hearing

Admitting Evidence

- Another way ...
 - › The Hearing Officer may require each piece to be admitted individually during the hearing.
 - › Advocate should keep track of what has been entered and what hasn't

Opening Statement

- An opening statement is not mandatory, but consider why you would want to skip it?
- An opening statement is limited to presenting facts.
- Summarize what you are going to do—but be brief.
- Don't talk about things the Hearing Officer may have already talked about during the introduction.

Direct Examination

County Advocate

(Case-in-Chief)

- At this point, you call your witnesses and present your evidence.
- The stipulations should have narrowed the scope of your presentation, but be prepared for the Respondent not to agree to any of your proposed stipulations
- Depending on your stipulations, you may not need to call some or most of your witnesses to testify.
- Be prepared to argue the fine amount!

Testimony

- “Testimony” is verbal evidence that a witness gives at the hearing
- Testimony can be given by a lay witness or an expert witness
- The Advocate cannot testify

Direct Examination Defined

- Direct examination is the initial questioning of a party or witness by the side that called him or her to testify.
- The main purpose of direct examination is to have the witness explain to the Hearing Officer what the evidence is, what it shows, and how the evidence proves the County's explanation of events

Direct Examination

- What questions to ask during direct examination so the witness can explain the evidence and how it proves a violation occurred
- Your earlier “elements” analysis and your evidence list helps you present what you want the Hearing Officer to know and which witness you want to deliver it.

Keep Yourself Focused

- State your case in a sentence or two.
- What elements do you have to prove?
- What do you have to defend against?

Failure to analyze the
“elements of the violation”
is one of the biggest
mistakes an Advocate can
make!

Very Important!

In preparing for direct examination, the “elements” assist you in developing questions you will now ask of the witnesses for the purpose of extracting information (evidence) for the record.

Direct Examination

- *Who is the witness?*
 - › Please state your name.
 - › Where do you work?
 - › What is your title?
 - › What does a _____ do?

Direct Examination

- *About the Incident*

- › Can you describe...
- › What did you do...?
- › When did the incident occur?
- › When did you...?

- › *Where did the incident occur?*
- › *Where did you...?*
- › *Why did you...?*
- › *How did you...?*

Direct Examination

- Don't ask leading questions of your witnesses during your direct examination!
- Asking leading questions of your own witness (because of frustration) may be an indication that you did not do a complete elements analysis and/or spend sufficient time preparing with your witness.

Example Lay Witness Testimony

- “I saw the helicopter fly overhead, then I felt a mist...”
- “I was driving down County Road 57 when I saw...”
- “I heard a roar, like a jet engine...”
- “My eyes started to burn, and I felt like throwing up...”

Direct Examination- Expert Witness

- *Who is the witness?*
 - › What kind of education and experience is required for your job?
 - › Tell us about your education and experience which is relevant to the education requirement for this job.
 - › Tell us about other training you have which is relevant to what you did during this investigation.

Direct Examination-

Expert Witness

- *Who is the witness?*
 - › Do you have any other experience that is relevant to the things you did during this investigation?
 - › Tell us about it.

Expert Witness

- Qualify the “expert” by asking questions about:
 - › Present occupation and occupational history
 - › Academic background
 - › Licenses and license history
 - › Special honors
 - › Association membership(s)
 - › Publications
 - › Teaching experience
 - › Other special familiarity or experience with the subject matter, including special studies, and
 - › Previous instances when they have been qualified as an Expert Witness.

Example –

Expert Witness Testimony

- In my opinion, the damage on this lettuce plant is consistent with drift from...
- In my opinion, the symptoms experienced by the individual are consistent with...

MORE Direct Examination

Additional Reading - Workbook:

- › Section 9
- › Section 10
- › Section 19

Let's Try It

Note how the Advocate elicits responses to three basic questions:

1. Who is the witness?
2. What did the witness do?
3. What is witness's opinion?

What do you think?

- Based on the witness' responses, do you feel confident the witness can be qualified as an "expert witness"?
- That is, a witness who can offer an opinion about something they did not personally see, hear, observe or otherwise experience, based on their own education, experience and training?

Let's Try It, Again

Note how the Advocate elicits responses to three basic questions.

1. Who is the witness?
2. What did the witness do?
3. What is the opinion of the witness?

Can this witness be qualified as an “expert witness”?

Do Not “Testify”... While Acting as the Advocate

- Instead, let your witnesses testify
- “Testifying” when you should not be testifying does not count as “evidence”
- Do not testify when you should not be testifying!

Exhibits

Introducing an Exhibit

- Prioritize the exhibit (evidence) that best describes how the County came to a logical conclusion there was a violation, so the Hearing Officer will decide in the County's favor
- Avoid presenting multiple exhibits showing the same thing.
- As we discussed earlier, follow the Hearing Officer's lead. May allow you to
 - › Introduce all exhibits at the beginning
 - › Introduce as go along and lay the foundation

Poor Approach

Advocate: Your Honor, I would like to have these exhibits marked for identification.

Hearing Officer: Okay, Ms. Advocate. Do you have copies for me and the Respondent?

Advocate: I'm Sorry, Your Honor. I thought each of you already had copies in your folder.

Hearing Officer: We will recess for 15 minutes to provide you time to make additional copies.

Better Approach

Advocate: Your Honor, I would like to have these exhibits, County Exhibit A: a Pesticide Use Report dated March 13, 2018, from Okay Dusters; and County Exhibit B: a diagram of the tomato field sprayed from Farmer John's 2018 operator ID, admitted into evidence.

Admissibility of Exhibits

- You must lay a proper foundation for an exhibit in order to have it admitted into evidence. An exhibit comes in through witness testimony.
- How do you lay the foundation to have an exhibit admitted?
 1. What is the exhibit?
 2. How does it relate to this case?

Admissibility of Exhibits

Advocate: Please look at Tab A in the County's Case File. Do you recognize this document?

Witness: Yes, I do.

Advocate: What is it?

Witness: It is a Field Worker Safety Inspection Report dated June 13, 2018 noting some items I found to be not in compliance during an inspection at Farmer John's Ranch.

Admissibility of Exhibits

Advocate: Is there a signature on the report?

Witness: Yes. That is my signature next to the box marked “Inspector” on page 2.

Advocate: Your honor, I would like to admit Tab A, Field Worker Safety Inspection Report 103-M-99-13476 conducted by Inspector Smith into evidence as county Exhibit A.

Hearing Officer: Any objection to the admission of Exhibit A from the Respondent?

MORE Admissibility of Exhibits

- Additional Reading - Workbook:
 - › Section 4: DPR-ENF-o86 *Preparing for Your Administrative Pesticide Penalty Hearing*;
 - › Section 6.2
 - › Section 9
 - › Section 17
 - › Section 19

Objections

- The Hearing Officer may ask the other party if there is any objection to an exhibit.
 - › You can object to either an exhibit or a question.
 - › There must be a reason for your objection.
- The most common legal objections are:
 - › Lack of foundation, and
 - › Lack of relevance

Objections

- Notes
 - › “All relevant evidence” is admissible in our pesticide civil penalty hearings.
 - › If the Hearing Officer attempts to rule on the admissibility of a piece of evidence, the Advocate should speak up. Instead, that objection should be noted for the record in order to preserve the argument on appeal.

Lack of Foundation

- If there is no “foundation” for the exhibit and no evidence was presented to show:
 - › What the exhibit is, or
 - › How it relates to the case...

Then you may have a problem.

What is “Relevance”

- Evidence Code Section 210:
Evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

A Relevancy Objection

- **Hearing Officer:** Mr. Respondent, do you have any objection to the report that has been marked County Exhibit A?
- **Respondent:** Yes, I object. It's full of lies. I wasn't in violation of section 6764. I didn't even sign the thing. My employee, who no longer works for me, signed it.
- **Hearing Officer:** Your objection is noted for the record.

Hearsay Defined

- A statement (oral or written) made outside the hearing that is offered at the hearing to prove the truth of what the statement asserts

Hearsay

The hearsay rule is not strictly applied in administrative hearings. Therefore, **all relevant evidence** should be admitted if it is the sort of evidence which responsible persons would rely on, even if the evidence is hearsay.

Cross-Examination

Cross-Examination

- During cross-examination, witnesses can be challenged on their:
 - › Knowledge
 - › Opinion
 - › Perception
 - › Motive
 - › Memory
 - › Bias
 - › Credibility

Cross-Examination

- You can ask leading questions during cross-examination.
- For example, “Isn’t it true that...”

Cross-Examination

- Things you should not do during cross-examination:
 - › Don't repeat the same type of question.
 - › Don't interrupt the witness.
 - › Don't argue with the witness.

What if you disagree with testimony?

- Disagreement with a respondent's witness can only come in the form of contrary evidence.
- For example, you could ask the respondent's witness:
 - › “During Inspector Poe’s testimony, he said, ‘...’ Are you saying you disagree with his evidence?”
 - › “Can you tell us why...?”

Closing Arguments

Purpose of the Closing Argument

- Last chance to show the Hearing Officer you have the elements to prove there was a violation
- County goes first, followed by respondent
- Summarize key testimony and documentary evidence
- Leave space to rebut the respondent's case.

Content of the Closing Argument

- Focus on the fundamental issue at hand: do your elements analysis
 - › Your evidence was the best relevant evidence
 - › Your witnesses were the best witnesses
 - › Talk about the fine regulations – connect the dots
- Should you prepare a script?
- Two to three minutes – maximum!

Content of Closing Argument

- There is no “cross-closing” or “rebuttal;” this is your last chance
- This is the time to say something if the Respondent made outrageous claims or didn’t prove their case.
- Be nice; be professional.

How you met the challenge

- Your Closing Argument contains:
 - › Simple story of what happened
 - › Each element of each violation
 - › Testimonial and documentary evidence related to each element
 - › County witnesses told the truth
 - › County met the burden of proof
 - › You valued the Hearing Officer's time

MORE Closing Argument

- Additional Reading - Workbook
 - › Section 23.1 - example

Review

Preparation is paramount!

1. Do the “elements” analyses.
2. Make your lists of lists.
3. Assume nothing about how a witness will testify.

Preparation is paramount!

4. Choose your witness(es)
5. Think about the questions
6. Always think about the tape!

Final Thoughts

1. Plan ahead
2. One piece of evidence for each element
3. Think about the recording
4. Take a break
5. Don't panic, stay confident !