Chapter 10
Presenting the County's Case

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Section 10.1
County Advocate: Role and Responsibilities

The role and responsibilities

The County Advocate is chosen by the Commissioner to represent the County and present its case against the Respondent in an administrative civil penalty hearing. The County Advocate's role is to introduce the County's evidence for a violation to the Hearing Officer.

Briefly, the County Advocate:

- Prepares a logical case and argument
- Conducts the Pre-Hearing Conference with the Respondent to review stipulations
- Presents stipulations (if any) to the Hearing Officer
- Makes an opening statement explaining what the County will prove
- Presents the County's case
  - Calls witnesses to testify about what happened when, where, how, and by whom; and
  - Has witnesses for the County validate any documentary evidence tendered to prove or disprove the case at hand
- Cross-examines Respondent witnesses
- Makes a closing statement summarizing the County's evidence and how the evidence proves the elements of the alleged violation(s)
- Cannot "testify," even if sworn in by the Hearing Officer

Preparation

Preparation is paramount to a successful case. The County Advocate should:

- Complete an independent "elements of the violation" analysis
- Match evidence with the elements
- Choose credible witnesses
- Make a list of questions for witnesses
- Assume nothing about how a witness will testify
- Consider the appropriate questions to ask witnesses that allow them to testify effectively and enter exhibits into evidence
- Craft stipulations for the pre-hearing conference

Section 10.2
Preparing for a Hearing

Introduction

The most important thing the County Advocate can do to prepare for the hearing is to plan well in advance. These tips may be used as a "checklist" to prepare for presenting the County's case to the Hearing Officer.

Elements of the Violation analysis

Start by independently performing the Elements of the Violation analysis (Chapter 3). Even though it may have been done by the inspector, the supervisors and/or managers, and the Commissioner, do it again. This may reveal the strengths and weaknesses of the County's case.

Outline the presentation

If each element of the violation is not satisfied with at least one piece of evidence, the issue must be decided in favor of the Respondent. It is the County Advocate's responsibility to admit evidence to establish each element of the violation(s). See Chapter 3 for a discussion of evidence types and direct vs. circumstantial evidence.

Plan the presentation from beginning to end. Determine what topics to address in the opening statement, examination of witnesses, and closing argument. Plan the presentation to enter evidence into the record to convince the Hearing Officer that a violation occurred. Start with a general background and then detail specific points that support the County's case against the Respondent.

Focus on facts

Think about the argument or each fact the Hearing Officer will consider. Analyze each of the elements of the violation(s) and **develop a checklist of the facts**. You need to have at least one (and preferably more) piece(s) of evidence to support each element of the violation. Think about what the Hearing Officer will need in the record to develop the "findings of fact" portion of the Proposed Decision. Remember the preponderance of evidence standard for administrative civil penalty hearings.

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Preparing for a Hearing, Continued

Craft stipulations	Request a pre-hearing conference to craft stipulations with the Respondent (or Respondent's representative). Consider drafting some in advance. See Section 10.4 for more information.
Elicit the facts of the case	The County Advocate elicits information from witness statements and introduces exhibits with the purpose of entering evidence into the record for the Hearing Officer to consider while making the proposed decision. **Evidence is entered through witness testimony only. The words of the County Advocate are not considered "evidence."** It is a temptation for the County Advocate to think what they say during the hearing is the most important thing the Hearing Officer will hear during the hearing. It is a mistake for Advocates to believe they are being efficient by telling the facts and details of the incident instead of calling a witness to do so. The witnesses testify, bring in the facts, and lay the foundation for demonstrative evidence or records. Witnesses, and the facts they provide, earn and lose credibility as their testimony is weighed. Witnesses are essential to enter evidence into the record for the Hearing Officer to determine the facts of the matter.
Establish witness credibility	Determining if a witness is credible is the province of the Hearing Officer. The County Advocate assists in this task by asking the witness some introductory background questions to introduce them as credible and trustworthy – establishing witness credibility is a key part of the presentation.
Pre-hearing interview with County witness(es)	Make sure that the witness has told you **all** the information prior to the hearing. Witnesses who present new information during the hearing (that the County Advocate was not aware of) could cause the case to be compromised. Remind the witness to testify only to what they positively know – do not guess. During the hearing, when testifying the witness can reference the investigative report/inspection/case file to refresh their memory if necessary. At the time of the hearing, make sure the witness is available at the beginning of the hearing for the oath, and then can wait nearby until called.

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Preparing for a Hearing, Continued

Pre-hearing interview with County witness(es), (continued)	Witnesses need to be prepared ahead of the hearing for any question the Hearing Officer and Respondent (or their representative) may ask. Prepare witnesses for both direct examination and cross-examination.
Review violation(s) with witness	When preparing for the hearing, review the elements of the violation with the witness. Since witness testimony is essential to enter the County's documentary evidence, make sure the witness understands how their testimonial evidence helps to prove the elements of the violation(s). It is not appropriate to "coach" witnesses (i.e., tell them what to say), and it is essential they understand they must **always** tell the truth. A prepared witness will move the hearing along smoothly; an unprepared witness can cause confusion and delay the hearing. Prepare witnesses for both direct examination and cross-examination.
Complex information	Be ready to present complex information. If the subject matter is complicated, use a witness (lay or expert) who can present topical information first to help set the stage for eyewitness testimony. A lay witness might testify before the expert witness so the factual testimony is established for the Hearing Officer before the expert witness is called to offer opinions or draw conclusions from those facts.
Visual aids	Visual aids are effective. Examples include enlarged aerial photos or maps, photographs, and anything that may assist the Hearing Officer in making findings of facts relative to the incident. This is also important in hearings where the Respondent wants to reduce the fine. However, always include a copy of visual aids as exhibits in the case file on regular 8 ½" by 11" paper.
Witness order	Use a logical witness order. Determine the order of witnesses in a manner that will logically present the County's case, which may not necessarily be in chronological order.

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Preparing for a Hearing, Continued

Enter evidence into the record	Enter relevant facts as evidence into the hearing record. Ask questions to elicit facts. In most cases, ask questions that allow the witness to testify to events in chronological order to make it easier to follow what happened in the incident. Use direct examination to focus on the facts relevant to the incident, or to establish facts about what happened before or after the incident.
Introduce exhibits	Use witnesses to lay the foundation for introducing exhibits into the record. During the pre-hearing conference, try to reach agreements (stipulations) with the Respondent about which exhibits will be allowed into the hearing. This will help the hearing flow smoothly. If parties cannot reach agreements about exhibits in the pre-hearing conference, exhibits may be introduced during the hearing and the Hearing Officer will determine if the evidence should be entered into the record.
Alternative explanations	Consider alternative explanations for the incident – the Respondent will. How might the Respondent describe the events? Different conclusions may be reached from the same set of facts. What might the Hearing Officer and Respondent conclude from the evidence? Think about other conclusions that could be made from circumstantial evidence. For more information on direct vs circumstantial evidence, see Chapter 3.
Ask only pertinent questions	Avoid questions that might elicit facts that do not make sense or call for inconsequential detail. Irrelevant, inconsequential, or confusing testimony or details may divert attention from the credibility of the witness(es) and the facts of the case.
Cross examination	Prepare questions to ask the Respondent or Respondent's witness(es) during the Respondent's rebuttal. During the hearing, be prepared to develop additional questions based on the Respondent's evidence that help prove the County's case or provide clarity to the incident.
County Advocate decorum	Always be respectful and avoid personal attacks. These are informal hearings, and it is important to maintain a cordial and respectful relationship with the Respondent. The Respondent is also a constituent, and the County will likely work and interact with them again.

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Preparing for a Hearing, Continued

Focus on the purpose	Stay focused on the purpose of the hearing. If the Respondent or a lawyer steer off course with tangents it can create confusion and take up a lot of time. The County Advocate needs to keep their witness questions focused on the reason for the hearing.
Focus on the elements of the violation	Never ask the Respondent or Respondent's witness "why" or "how." This is an invitation to offer excuses and irrelevant theories that divert attention from the facts of the case such as: 1. Did the violation occur? 2. What evidence shows the violation occurred? 3. Did the Commissioner set the fine in the correct fine classification? 4. Is the case cogent (i.e., clear, logical, and convincing) enough for the Hearing Officer to make findings of fact and determinations in favor of the County? Make sure there is **at least one piece of evidence** to support each element of the violation.
Conclude witness examinations with courtesy	Thank all witnesses after they testify, including the Respondent's witnesses.

Section 10.3
Direct Examination Checklist

Disclaimer

This direct examination checklist is an optional tool intended to complement, not replace, contents of this Volume. The checklist includes basic concepts DPR recommends a County Advocate consider.

Preparing direct examination questions

- ☐ **Perform the Elements of the Violation exercise.** Identify the strengths and weaknesses of your case.
- ☐ **Develop an outline.**
- ☐ **Clarify.** Are the questions clear? There should be no compound questions. Make sure each question elicits only one fact.
- ☐ **Build analytical or evidentiary bridges.** Relate how the testimony of one witness builds on the testimony of another.
- ☐ **Make transitions.** Clearly announce transitions to new topics to ensure the hearing participants can absorb the information presented.
- ☐ **Repeat and emphasize critical information.** Be creative about repeating information critical to the County's case.

Presenting the County's case

- ☐ **Lay the foundation.** Be prepared to authenticate and "lay the foundation" for any exhibits introduced through witnesses. A foundation is sufficient preliminary evidence that establishes the authenticity and relevance of exhibits or witness testimony so material evidence will be entered into the record. Material evidence directly bears on the outcome of a case.
- ☐ **Non-expert (lay) witnesses must speak from personal knowledge.** Make this clear:
    1. A **lay witness** can testify to what they saw, felt, smelled, or heard.
    2. An **expert witness** relies on their **special knowledge**, gained from their specific training and experience, to offer an **expert opinion** on technical or scientific matters**.**
    3. A **lay witness** should not offer an opinion that relies upon **technical or scientific expertise or special knowledge.** Use expert witnesses instead to provide expert opinions.
- ☐ **Be prepared to contend with your own "difficult" witness.** Be ready to elicit testimony from the County's witness if the witness freezes up or forgets details. Ask open-ended questions.

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Direct Examination Checklist, Continued

Presenting the County's case, (continued)

- ☐ **Prepare the witness for the Respondent's cross-examination questions.** Anticipate, do not dispute or ignore facts that do not support the case. Prepare the witness to refute non-supporting facts to the advantage of your case.
- ☐ **Use open-ended, non-leading questions vs. closed-ended, leading questions.** Open-ended questions help a witness testify to the details of an incident, and begin with who, what, when, where, why, or how. Close-ended questions are used on cross-examination and are useful to elicit a simple "yes" or "no" answer. Generally, close-ended questions are not asked on direct examination (except for establishing foundation, refreshing recollection, or questioning an adverse witness).

Section 10.4
Pre-Hearing Stipulations

Definition

Stipulation - A voluntary agreement between opposing parties concerning some relevant point. Matters that are the subject of a stipulation are no longer in dispute or contested and need not be addressed during the hearing.

Purpose

Stipulations are discussed in the pre-hearing conference, a private meeting between the County Advocate and the Respondent (plus any representatives). Points of agreement are introduced to the Hearing Officer who enters them into the record as a stipulation of facts.

Stipulation example

The County Advocate and Respondent could agree that the violation did occur, and they could stipulate to a specific fact (or facts) concerning the violation.

The following are some example stipulations:

1. The Commissioner has the authority under [*e.g., FAC section 12999.5 or B&PC section 8617*] to levy an administrative civil penalty.
2. The Notice of Proposed Action (NOPA) was received by the Respondent and the respondent requested a hearing.
3. The *Preparing for Your Administrative Civil Penalty Hearing* brochure was received with the NOPA.
4. Respondent received a copy of the case file (#) from the Commissioner's office on (date).
5. Product (EPA Registration No. xxx-xxx-xx) is a registered pesticide.
6. The active ingredient of Product is (name).
7. Other stipulations.

For example, the Respondent could disagree with the fine amount, or whose responsibility it is to pay the fine. These points are not stipulated and are addressed in the hearing.

The County Advocate presents the written list of stipulations to the Hearing Officer. The County Advocate would also inform the Hearing Officer the Respondent wants to proceed with the hearing to discuss the fine.

Stipulations are voluntary

The Respondent should **never** be pressured to stipulate. In fact, the County Advocate and Hearing Officer must not appear to be displeased with a Respondent who refuses to stipulate.

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Pre-Hearing Stipulations, Continued

How to enter stipulations into the record

Once the hearing is on the record, the Hearing Officer will ask if the County and Respondent have any stipulations to enter into the record. The Hearing Officer will then recite, for the record, each stipulation agreed to by the Respondent. For each stipulation, the Hearing Officer will ask for reaffirmation by the Respondent they understand and agree to the stipulation.

The Respondent can withdraw a stipulation

The Respondent may withdraw a stipulation made during a prehearing conference. If they request to withdraw a stipulation, the Hearing Officer may attempt to ascertain why the Respondent is withdrawing a stipulation, although the Respondent has no obligation to provide a reason.

The Respondent may withdraw a stipulation because:

- The Respondent did not understand the nature of the stipulation and wants to contest the facts set forth in the NOPA to which the Respondent has stipulated;
- The Respondent did not understand that the Hearing Officer's Findings or Conclusions may be based upon the stipulation without taking further evidence.

The Respondent can withdraw the stipulation at any time, up to the conclusion of the hearing.

Any discussions about stipulations after the hearing has begun should be entered in the hearing record.

The County Advocate would need to adjust their presentation accordingly if a stipulation is withdrawn or rescinded.

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Pre-Hearing Stipulations, Continued

Stipulations record template

Stipulations can be crafted as a numbered list on a plain piece of paper, or on something more formal like the template below.

STIPULATIONS

Date: _____ File No.: _____

Respondent: _____

Parties Present: _____

No.	Describe stipulation in detail	Respondent Agreement
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.		
13.		
14.		

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Section 10.5
The County Advocate Opening Statement

Introduction

The opening statement is limited to presenting facts and introducing the parties, County staff, and principal witnesses. This is an opportunity to explain who is who and how they relate to the case. The opening statement also gives the Hearing Officer an overview of the issues.

The County Advocate's role

The County Advocate's role during the opening statement is to ensure the Hearing Officer is familiar with the violation, the evidence, and the witness(es) for the County's case.

Remember:

- **Evidence** is entered into the hearing record from witness testimony during direct and cross examination, and by acceptance of exhibits as documentary evidence.
- Only evidence entered into the record may be considered by the Hearing Officer.
- Only evidence entered into the record may be considered on appeal.

Statements by the County Advocate during the opening statement and closing argument are not considered "evidence."

Set the scene with the opening statement

Some Hearing Officers that preside over pesticide administrative civil penalty cases may have limited knowledge about pesticide use enforcement. The opening statement is the County Advocate's opportunity to:

- Explain the facts of the case in the simplest of terms.
- Tell a very short account about exactly what happened.
- Introduce the witnesses and documents that demonstrate what happened and who was the cause of the unlawful events.

Informal hearing

If the Hearing Officer has not already done so, remind everyone the hearing is not a formal court hearing and the strict rules of evidence, including hearsay rules, do not apply. Any evidence, including hearsay evidence, is admissible to show the event did or did not occur.

- The caveat about hearsay evidence is that the Hearing Officer cannot base the Proposed Decision solely upon hearsay evidence.
- There must be some direct evidence.

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The County Advocate Opening Statement, Continued

Burden of proof	*If the Hearing Officer has not already done so*, explain the burden of proof in an administrative action is "by a preponderance of the evidence," or that it was "more likely than not to have happened."
Do not contradict the Hearing Officer	The Hearing Officer controls the proceedings, as a Judge does in a courtroom. If the Hearing Officer has already noted what laws apply in this case, explained burden of proof, or has discussed the rules of evidence or application of the hearsay rule in the hearing, **do not duplicate their efforts or attempt to "correct" the Hearing Officer.**
Key elements of an effective opening statement	Opening statements should be clear and concise. The opening statement summarizes the facts of the case, the elements of the violation, previews the evidence (witness testimony and documents) will prove or disprove the elements of the violation, and addresses the Respondent's probable defenses. Note that opening statements are not themselves "evidence." In comparison, the closing argument will restate the facts of the case, the nature of the evidence entered into the official record, and how the witness testimony and documents proved or disproved the elements of the violation. The closing argument is discussed in Section 10.10.
Identify the violation and the elements	Describe the facts and evidence that prove the violation occurred, for example, witness statements and testimony, reports, photographs, diagrams, laboratory results, etc.
Refute probable defenses	Be prepared to refute, based on facts and evidence, the Respondent's probable defenses. Do this briefly, in one or two short sentences, and without argument. Never try to explain what the Respondent might have intended or try to explain why a Respondent did something – let the Respondent do that.

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The County Advocate Opening Statement, Continued

Conclude opening statement on a strong point

For example:

> "We will provide sufficient evidence to prove each and every element of the violation in the case, and sufficient evidence to show the Commissioner correctly classified the violation and the fine amount was within the classification range."

Remember that if a strong statement is made in the opening statement, the evidence must be brought forth during examination of witnesses and entered into the hearing record.

Section 10.5.1
Example County Advocate Opening Statement

Overview

As discussed earlier, the opening statement preview's the County's case-in-chief and is limited to presenting facts and introducing witnesses.

The example opening statement below is for an alleged violation of 3 CCR section 6614(b)(1). For this situation, does this example state:

- The events in chronological order, including
  - Who applied the pesticide?
  - What the pesticide is? If needed, what the active ingredient is?
  - When and where the pesticides were applied?
- Who the witnesses are the County Advocate will call on to testify?
- What the violation is?
- What evidence proves the violation occurred?
- What the violation class and fine amount is?

When read aloud the opening statement should be about two minutes long.

Disclaimer

This is an example adapted from an actual opening statement, to use as a starting point. Every situation is different; use good judgment for the individual county and unique situation, and determine what format works best for the case.

Example

Today, the _____ County Agricultural Commissioner's office will show that:

On July 7, 20XX, at approximately 10:00 a.m., *OK Dusters* Pilot *Harold Nash* began an application of the pesticide *Pesticide Name* (EPA Registration No. *123-456*) to 16 acres of *crop* on *Site ID, Site Name and Grower*.

Witness 1 will testify that at that time, approximately 50 feet away from *Site ID*, he was working on the *Neighbor's field* when he felt droplets from the application contact him. *Witness 2* will testify that also at that time, separately on the other end of the ranch and approximately 25 feet away from *Site ID*, he was driving a vehicle on a road that separates *Site ID* from the *Neighbor's field* when he felt droplets contact him as well. *Witness 2* will testify that within seconds he had symptoms of pesticide exposure. *Witness 1* called the Commissioner's Office to report the incident. Our office immediately dispatched one deputy and an inspector, *Alexandria Howard*, to investigate. Inspector *Howard* will testify that samples taken of *Witness 1*'s sweatshirt, a

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County Advocate Opening Statement Example, Continued

Example, (continued)

swab sample of a sign in the *Neighbor's Field* facing *Site ID*, and gradient foliar residue samples from the *Neighbor's Field* and *Site ID* were analyzed and found positive for *compound*, the active ingredient in *Pesticide name*. These samples confirm that *Nash's* application contaminated *Witness 1*, the sign, and the *crop in the Neighbor's field*. By contaminating the bodies and clothing of two people with a pesticide, *OK Dusters* violated 3 CCR section 6614(b)(1).

The County will show that this is a Class ___ violation because ___, and the fine range for this class is $____ to $____. The Commissioner has set the fine at $____.

The County will provide sufficient evidence to prove each element of the violation in this case, and sufficient evidence to show that the Agricultural Commissioner correctly classified the fine and the fine amount.

Probable defenses

As mentioned in the previous section, the County Advocate may be aware of, or suspect, a potential Respondent defense. In that case, the Advocate can consider including language rebutting the probable defense in an appropriate location in the opening statement. For example, before discussing the fine classification and amount, the Advocate could add:

> *Nash* may claim that his application was not the source of the drift. *Alexandra Howard* will testify that pesticide use report searches demonstrate that no other pesticides were applied with this active ingredient during the relevant time frame. Thus, the source of the drift could only have been the application conducted by *OK Dusters*.

Section 10.6
Direct Examination of Witnesses

Introduction

In the informal administrative civil penalty hearing process, the County bears the burden of proving a case by a preponderance of the evidence. To do this, County Advocates calls witnesses to provide testimony in the hearing. Examination of witnesses builds the analytical bridge between the elements of the violation and the evidence necessary to support each element.

The County Advocate's primary role is to elicit testimonial evidence from witnesses, who provide "facts" or factual information that can be examined and considered by the Hearing Officer. It is the County Advocate's job to use examination of witnesses in manner that persuasively establishes the foundation of the County's case supported by factual evidence.

Definition and purpose

Direct examination is the initial questioning of a party or witness, by the side that called the witness to testify. The primary purpose of direct examination of the County's witness is to convince the Hearing Officer the County's version of events is supported by facts and more credible or likely to have occurred than the Respondent's version. The goal of direct examination of witnesses by the County Advocate is to provide all the evidence required to meet the burden of proof.

How to conduct a direct examination

Direct examination brings forth evidence for the case and establishes credibility of witnesses. Direct examination presents evidence that:

- Sufficiently meets the burden of proof
- Convinces the Hearing Officer and other reviewers
- Withstands cross-examination
- Anticipates and contradicts evidence that the Respondent may present

Direct examination of witnesses provides the County Advocate an opportunity to:

- Develop a persuasive argument
- Use questions to convey the argument
- Have an eyewitness recount the events
- Have a qualified expert witness provide an expert opinion

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Direct Examination of Witnesses, Continued

Getting started

What questions must be asked during direct examination to obtain the testimonial evidence needed?

Do the "Elements of the Violation" analysis. Make a list of *every single item* the Hearing Officer needs to know.

Keep focused:

- What is the "theme" of the case (e.g.: "We are here to show that Okay Dusters _____.")
- What must be *proven*?
- What are the expected defenses of the Respondent?

Failure to analyze the "Elements of the Violation" is the biggest mistake a County Advocate can make.

Choosing witnesses

- Which witnesses will provide relevant testimony?
- Are there witnesses who have seen, heard, or done something in the case?
- Are there expert witnesses with specialized knowledge?
- Do any witnesses have an "opinion" the Hearing Officer should hear?

Witnesses

Choose the best witness to support the County's case. Do not have witnesses provide testimony that repeats what has been said by another witness – *use everyone's time effectively*.

If you are using multiple witnesses:

- Decide which witness will give the Hearing Officer which piece of information, and
- Make a list matching each witness with the facts the witness knows

Important

When preparing for direct examination, use the "elements" to develop questions to ask the witnesses for the purpose of extracting information (evidence) for the record.

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Direct Examination of Witnesses, Continued

Planning your questions

When preparing questions for the witnesses, think about:

- Who?
- What?
- When?
- Where?
- Why? (Respondent's intent is not at issue)
- How?

Examining a witness

Begin with laying the foundation to establish your witness is competent and credible:

- Please state and spell your name.
- Where do you work?
- What is your title?
- What does a _____ do?
- 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?
- Do you have any other experience that is relevant to the things you did during this investigation? Could you please tell us about it?

Transition to What? When? Where? How? questions elicit testimony to establish evidence for the record:

- What did you do during the investigation of this incident?
- What…?
- When did the incident occur?
- When did you…?
- Where did the incident occur?
- Where did you…?
- How did you…?
- Tell us about any specific procedures you must follow.
- Why did you sample…?

See also the following sections on *Strategies for Direct Examination* and *Questions to Avoid* for more detailed information on questioning witnesses.

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Direct Examination of Witnesses, Continued

Types of questions

- **Narrative questions** call for a narrative response, i.e., "What procedures did you use to collect samples?"
- **Objective questions** ask for a time or date or what a specific person did. These are good questions to start with for reluctant speakers. Examples are "Did you receive any calls from…?" "What day and time?" "Did you visit the site?"
- **Leading Questions**, see below
- **Vague and ambiguous questions** should not be used. The witness may not properly address the question. The witness preparation process should help you identify and correct vague and ambiguous questions
- **Compound questions** should not be used. These questions have multiple parts, and the witness may not properly address the parts of the question. Consider rephrasing or dividing the compound question into multiple, shorter questions.
- **Multiple choice questions**, a list of answers for a witness to choose from, should not be used. The proper answer may not be in the list.

See also the following section, *Questions to Avoid* for additional information and examples.

Leading questions

Leading questions subtly prompt the witness to answer in a particular way. County Advocates cannot ask leading questions of a witness during direct examination.

For example, the question "Do you have any problems with your boss?" subtly raises a question in the witness's mind that there are problems. It is more appropriate to ask an open-ended question such as "Tell me about your relationship with your boss" because this does not impart any judgement onto the witness.

Asking leading questions of one's own witness (because of frustration) may indicate you either did not:

- Do a complete elements analysis, and/or
- Spend sufficient time preparing the witness.

Witness preparation

Witness preparation is important. **Do not make assumptions** about how a witness will respond. **Do not assume** a witness will know where the questions will lead.

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Direct Examination of Witnesses, Continued

Strategies for direct examination

Use questions on direct examination to let the witnesses recount what happened. The narrative should be simple, clear, and interesting (though, not "distractingly" interesting).

- Use the witnesses to verbally draw a picture or scene for the Hearing Officer to visualize, so they can understand what happened and why it is important. To draw the verbal picture, ask the witnesses open-ended questions that will cause them to describe things, rather than answer "yes" or "no."
- Ask simple questions, covering one point at a time. Do not ask "compound" questions with multiple parts and expect your witness to remember it all by the end.
- Ask questions that show a **lay** witness is credible, understands the nature and obligation of telling the truth, has personal knowledge of and remembers the relevant events, and can communicate this to the Hearing Officer.
- Ask questions that show an **expert** witness is credible, understands the nature and obligation of telling the truth, has sufficient knowledge, training, experience, and expertise to offer an opinion about the relevant events (even though they did not personally observe the event) and is able to communicate this to the Hearing Officer.
- Make a link between witness's testimony and its relevance to the matter under consideration. To be "relevant," the evidence must have some reasonable connection with, or have some value or tendency, to prove a matter or fact significant to the case.
- Authenticate evidence to show it is trustworthy and reliable by eliciting testimony from a witness with knowledge of the evidence.
- If a case relies on hearsay evidence, such as official records, elicit witness testimony to explain what the record is, how it was created, and what it means.
- The witness should not guess – if the witness does not recall, they can ask to review the evidence (i.e., investigation or investigation report) or answer truthfully "I don't know."
- If a witness starts to be flustered, ask the Hearing Officer for a break.

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Direct Examination of Witnesses, Continued

Sample questions to avoid

1. *Please describe the symptoms that you experienced when you were exposed to the spray.*
    a. Lacks foundation (First establish there was exposure to spray).
    b. First establish foundation, then ask this question with a more specific time frame, i.e., what symptoms occurred on what day/time.
2. *Isn't it true that your employer never gave you protective gear?*
    a. This is a leading question. Leading questions are inappropriate for direct examination in administrative hearings.
    b. What does "protective gear" mean?
    c. Vague as phrased because there are too many negatives in the question. Use only one negative per question. If a question has multiple negatives, the Hearing Officer may ask for it to be rephrased.
3. *Why did you allow overspray onto the next field?*
    a. Lacks foundation (first establish overspray occurred).
    b. Question assumes it was purposely done.
4. *Tell me what the label instruction said.*
    a. Overly broad. Calls for speculation. Typically, someone cannot recite everything that was stated on a label. Isolate the question down to a specific portion of the label.
5. *Can you explain why you do not believe that the lab results show no contamination?*
    a. Too many negatives – vague and ambiguous
6. *When did you first notice that the plants were showing signs of damage from pesticides and what did you do next?*
    a. Compound question. Assumes facts not in evidence.
    b. First ask "Did you notice any signs you believed indicated pesticide use?" then "When?" followed by "What actions did you take?"
7. *When did you first go to the doctor? That same day? The next day?*
    a. Leading. Compound. Assumes facts not in evidence. Maybe the witness never went to the doctor.
8. *What were your symptoms? Did you have headache, sore throat, shortness of breath, dizziness?*
    a. Leading (suggests the answer). Vague as to when the symptoms occurred. Compound question.

Section 10.7
Expert Witnesses

Definition

Expert witness - A person recognized as having special knowledge, training, experience, skill, or education on the subject they testify on. The expert witness is permitted to state their opinion concerning technical subjects even though the witness was not present at the time the activity or incident in question took place.

- A witness is offered either by the County Advocate or Respondent and is accepted as an "expert" by the Hearing Officer because the witness is believed to have specialized and/or technical knowledge not possessed by an average person.
- Through their education, training, and experience, licensed CAC staff can be qualified as expert witnesses in a hearing, subject to objection by the Respondent.

Each side must qualify its witness as an "expert"

The party offering the testimony or opinion of an expert witness at a hearing must first elicit information demonstrating that the witness, because of the witness's special knowledge, experience, training, skill, and education, is better qualified to render an opinion than a person without that background.

Qualify the witness as an "expert" by asking questions about the witness's:

- Present occupation,
- Academic background,
- Occupational history,
- 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.

The "expert" may be examined

The "expert" offered by the County Advocate (or Respondent) may be examined (questioned) by the opposing side in an attempt to disqualify the witness as an expert.

Continued on next page

Expert Witnesses, Continued

Objections

If the other side objects to a witness being called an "expert witness," see if they will agree to "very knowledgeable", or if not, then "knowledgeable."

Complex code sections

As discussed in Chapter 2, laws and regulations are constructed in various styles. Some can be simple and straightforward; others are a more complex construction of ideas and elements. Sections that are conjunctive ("and," "including") or disjunctive ("or," "except") are easier to prove with factual testimony and evidence.

The County Advocate should consider introducing expert testimony into the hearing when the section cited is of an aggregate construction style (some but not all elements) or mixture construction style (balance of the elements). These styles tend to be more difficult for a Hearing Officer to contend with when weighing evidence.

The testimony of an expert witness can strengthen the case by providing testimony about:

- Aspects of facts or evidence they did not personally witness,
- Complex evidence,
- Processes or procedures, or
- Complex or difficult concepts.

For example, if the hearing is for a violation of either 3 CCR 6600 or 6614, it may be advantageous to have an expert witness to be able to explain some of the elements on the record.

Hearing Officer makes the determination

The Hearing Officer will determine whether the witness is qualified to be an "expert witness" who can offer an opinion regarding technical subjects in the case even though the person was not present at the time of the incident or activity.

The Hearing Officer may allow several witnesses to be qualified as expert witnesses.

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Expert Witnesses, Continued

Caution

The questions below are generally suitable to be used to lay the foundation for admitting a county inspector/biologist as an expert. However, the County Advocate should tailor the questions to each person being qualified as an expert witness. The "A" and "B" answers are alternative responses, with the "B" answers making a stronger case.

Example of qualifying the expert witness

1. What is your name
   A. Marty Major.

2. What is your occupation?
   A. I am a biologist.

3. What is your place of employment?
   A. I work for the Somewhere County Department of Agriculture & Weights and Measures.

4. What is your current title?
   A. Agriculture and Standards Inspector II.

5. How long have you worked in this capacity?
   A. For three years.
   B. For three years. Before that I served as an Agriculture and Standards Inspector I for five years, and before that I worked for a pest control business as an applicator for one year.

6. What academic degrees do you hold, from where and when obtained?
   A. Bachelor of Science from the University of California Davis –20XX.
   B. I graduated from the University of California Davis in 20XX with a Bachelor of Science. I majored in Viticulture with a minor in Agricultural Pest Management.

7. Do you hold licenses as an Agriculture and Standards Inspector?
   A. Yes, I do.
   B. Relevant to this hearing, I have the County Agricultural Inspector/Biologist licenses in Pesticide Regulation and Investigation and Environmental Monitoring. I have had these licenses for four years.

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Expert Witnesses, Continued

Example of qualifying the expert witness, (continued)

8. Do you have any other special licenses?
   A. No, not really.
   B. I also have an Agricultural Pest Control Adviser License from the Department of Pesticide Regulation. I've had this license for over ten years.

9. What additional training do you have relative to pesticide regulatory activities?
   A. I have attended a couple of trainings from DPR, but I can't remember the names of them.
   B. I have attended numerous County or Department of Pesticide Regulation trainings, specifically: Structural Regulatory Training; Investigation and Sampling; Field Fumigation Safety; Pesticide Regulatory Training; Restricted Materials and Permitting; Report Writing; Elements of the Violation; and the California Environmental Protection Agency's Basic Inspector Academy.

10. What are the duties and function of your current position?
    A. I conduct inspections on growers.
    B. I perform a variety of inspections, investigate, and enforce those provisions of the California Food and Agricultural Code, the Code of Regulations, Business and Professions Code, National Organic Program and County Ordinances governing the work of the County Department of Agriculture and Weights and Measures. I determine compliance with applicable laws and regulations in either agriculture or weights and measures, conduct enforcement activities, evaluate permits, and certificate requests, perform related investigations, and public service functions.

11. Do you conduct any training or lecturing in your field? When and where?
    A. I have given presentations at our annual seminar.
    B. I have assisted in developing and preparing training for County staff, specifically in the area of Pesticide Regulation and Investigations. I have also given presentations at our annual Worker Safety Seminar for the past several years our office puts on for growers and applicators.

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Expert Witnesses, Continued

Example of qualifying the expert witness, (continued)

12. Have you been asked to give testimony as an expert witness in this field before? How many times?
    A. I have not been asked to give expert testimony previously.
    B. I have been asked to give expert testimony in two prior hearings.

Your Honor, I am tendering Marty Major as a qualified expert witness in the field of _____.

Section 10.8
County Exhibits

Definition

An **exhibit** is a document, record or other tangible object formally introduced as evidence.

Exhibit copies

Have at least three copies of exhibits, one each for:

- The Hearing Officer
- The Respondent
- The County Advocate

Also, consider having a copy for witness(es) to refer to as well.

Exhibit size

- Make sure all exhibits fit into a standard 8 ½" by 11" piece of paper.
- For larger exhibits, ALSO make a copy that fits on 8 ½" by 11" paper.
- For video or other media, ALSO copy it onto media (CD, DVD, etc.) to present to the Hearing Officer and the Respondent.

Originals

Do not submit original exhibits to the Hearing Officer but have them available (this includes pesticide labels, copies of investigations that have not been redacted, etc.).

Submit clear, legible copies of exhibits to the Hearing Officer.

Do not bring dangerous or hazardous material exhibits into the hearing area.

Choosing an exhibit

Section 7.15 discussed *Preparing a Case File for the Respondent*. For the hearing, the Advocate's role is to present the exhibit(s) that best represents the evidence for each element. Good exhibits are pieces of evidence that are relevant to the County's case. Avoid presenting multiple exhibits showing duplicate material.

Entering exhibits

The Hearing Officer has discretion on how exhibits are entered into evidence. The Hearing Officer may require the County Advocate to lay the foundation for each exhibit as the hearing proceeds. Alternatively, the Hearing Officer may admit all the exhibits at the start of the hearing and allow the Respondent to voice any objections to each exhibit then or as they are introduced. The Hearing Officer should tell the County Advocate how the Hearing Officer

Continued on next page

County Exhibits, Continued

Entering exhibits, (continued)

wants the evidence presented prior to the hearing. If the County Advocate has not worked with the Hearing Officer before and is unfamiliar with their approach, be flexible.

Official records exemption

When introducing an official record (inspections, investigations, photographs, etc.) made by a county employee as evidence, the County Advocate should elicit testimony of each element of the "official records" exemption discussed in Section 9.9 *Common Objections*, notably:

- How the record came to be in existence (Who, what, where, when, how)
- Why the record was made

Establishing a written document as an official record

When a writing authored by county employees is introduced as evidence, elicit testimony of each element of the "official records" exemption discussed in Section 9.9. For example, when offering an interview summary with the Respondent contained in an investigation report, the testimony might go as follows:

> **County Advocate Question:** What is page 15 of the report?
> **Witness Answer:** It is a summary that I wrote up of a conversation that I had with the Respondent.
> **Q:** Why did you speak with the Respondent that day?
> **A:** I was working. I was investigating a complaint for the County.
> **Q:** When did you write this summary?
> **A:** I always write up interview summaries either the same day as the interview or the next day. That is our policy. I'm not sure which it was this time.
> **Q:** How did you write up the summary? Do you follow a procedure?
> **A:** I took notes while I was interviewing the Respondent. I then read my notes back to the Respondent at the conclusion of the interview to make sure I had everything covered, to make sure I had the narrative clear, and to give the Respondent an opportunity to clarify or make corrections. When I sat down to write the summary, I basically transcribed those notes.
> **Q:** Does this summary accurately represent what the Respondent told you?
> **A:** Yes. I was paraphrasing, except where there are quotation marks, which are his exact words.

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County Exhibits, Continued

Establishing a written document as an official record, (continued)

Note: Testimony that a writing "is accurate" alone is not sufficient to establish the official records exception and reading the writing into the record is not necessary or helpful. The witness should testify directly to whatever they remember seeing or hearing. A witness may review reports or anything else to refresh their memory but can only testify to what they remember.

Establishing a report as an official record

If the County Advocate offered a pesticide use report from the Respondent as evidence, the testimony might go as follows:

> **County Advocate Question:** Mr. Inspector, can you please look at Tab A in the case file and explain what this is?
> **Witness Answer:** This is a copy of the pesticide use report showing a pesticide application was made to tomatoes at St. Lewis Farms site 16. It was submitted by Okay Dusters.
> **Q:** How did you come to be in possession of this use report?
> **A:** Like all pest control businesses, Okay Dusters is required by law to submit pesticide use reports. In this case, Okay Dusters submits pesticide use reports to the Agricultural Commissioner's Office electronically. I went into CalAgPermits and pulled up the report.
>
> **County Advocate:** Your Honor, I would like to have Tab A admitted into evidence as County Exhibit A.
>
> **Hearing Officer**: [*pauses, giving time for the Respondent to object. The Hearing Officer may also directly ask the respondent if there is an objection*] The pesticide use report #674825 for an application on March 13, 2023, is admitted into evidence as County Exhibit A. You may continue.

Objections

The Hearing Officer may ask the other party if there is any objection to an exhibit.

Either party can object to either an exhibit or a question. There must be a reason for the objection. The most common objections are lack of foundation and lack of relevance.

See also Section 9.9 *Common Objections*.

Section 10.9
Cross-Examination

Definition	**Cross-examination** is the time to ask questions of the other side's witness.
Cross-examination topics	In cross-examination, a witness can be challenged on their: • Knowledge • Opinion • Perception • Motive • Memory • Bias • Credibility When cross-examining the Respondent or the Respondent's witness(es), it is important to be polite working through this line of questioning. This is an informal hearing and more than likely the County will be working with the witness in the future.
Leading questions are allowed in cross-examination	Leading questions may be asked during the cross-examination. For example, "Isn't it true that…" Presumably, the opposing party would not have time to prepare the witness for this sort of questioning and it allows the other side to test the credibility of the witness. Cross-examination is generally limited to questioning on matters that were raised during direct examination.
Things not to do	• Do not repeat the same type of question. • Do not interrupt the witness. • Do not argue with the witness.
Witness testimony	If the County Advocate disagrees with a witness's statement, disagreement can only come in the form of contrary evidence. For example, "During Mr. Poe's testimony, he said '…' Are you saying you disagree with his evidence?" *wait for response* "Can you tell us why?"
Next steps	After cross examination, there is the option of a re-direct examination (from the party that called the witness) and then an option of a final re-cross.

Section 10.10
Closing Argument

Introduction

The closing argument should be brief, capture the basis of the case, and highlight the relevant evidence in support of the action. This is the last chance to persuade the Hearing Officer to find in favor of the County.

Highlight the violation(s), the evidence, and the proposed penalty

Briefly describe the issues and evidence for the Hearing Officer:

- Summarize the violation(s) and main evidence supporting it (them), i.e., review the facts and explain how they prove the Respondent committed the alleged violations, citing specific documents, testimony, or other evidence.
- Explain why the County's evidence is the strongest relevant evidence.
- Explain why the County's witnesses were the strongest witnesses.
- Explain why the violation(s) warrant(s) imposition of a civil penalty in the range proposed by the Commissioner (i.e., refer to the fine guidelines) and briefly explain how and why the Commissioner arrived at the proposed penalty for each violation.

Closing arguments should be two to three minutes-maximum.

Prepare a script

As with the opening, prepare a script for your closing arguments – it is an effective way to get this important job done in two or three minutes.

There is no "cross-closing" or "rebuttal" from the other side. Lay out the case with a summary of the elements and the evidence for each one.

Continued on next page

Closing Argument, Continued

Countering the Respondent's evidence or testimony

This is the time to say something if the Respondent made outrageous claims or did not prove their case.

- If it seems necessary, respectfully remind the Hearing Officer that the standard of proof for levying an administrative civil penalty is "the preponderance of the evidence," i.e., "it is more likely than not" that the Respondent committed the alleged violation(s).
- If it seems appropriate or desirable, respectfully and politely point out any inconsistencies in the Respondent's case or contradictions to the Respondent's evidence provided by the CAC's evidence.
- If it seems necessary given the facts of the case, remind the Hearing Officer:
  - The Respondent received the NOPA and had an opportunity to review the evidence before the hearing; and/or
  - The Respondent had sufficient opportunity to gather their evidence and to present it at the hearing to refute the allegations in the NOPA.
- BE PROFESSIONAL.

Recess to prepare closing argument?

The County Advocate could probably develop most of the closing argument before the hearing and make minor necessary adjustments as the evidence is presented during the hearing.

However, if it feels necessary, ask the Hearing Officer to grant a short recess to prepare the closing argument.

Concluding statements

After discussing the violation(s), the evidence, and the penalty, and countering the Respondent's evidence or testimony, conclude by asking the Hearing Officer to make the findings of fact based upon the evidence that supports the County's action.

Thank the Respondent, the witnesses, and the Hearing Officer for their time.

Section 10.10.1
Closing Argument Example

Disclaimer

What follows is an example closing argument, to serve as a starting point.

Example closing argument

This morning, we presented testimony and documentary evidence to show that on September 12, 20XX, *Lewis Farms* violated California Food and Agricultural Code section 12973, which states:

> "The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner."

The elements of FAC section 12973 are:

- A – There is a pesticide
- B – The use of said pesticide
- C – The pesticide has a label
- D – The label that was delivered with the pesticide
- E – The pesticide label is registered in California
- F – The use was in conflict with the registered label

For Element A, *Lewis Farms* stipulated that [*Product name*] is a pesticide.

For Element B, *Lewis Farms* stipulated and/or *County Inspector* testified …

For Element C, *Lewis Farms* stipulated and/or *County Inspector* testified …

For Element D, *Lewis Farms* stipulated and/or *County Inspector* testified …

For Element E, *Lewis Farms* stipulated and/or *County Inspector* testified …

For Element F, *Lewis Farms* stipulated and/or *County Inspector* testified …

SPACE RESERVED FOR REBUTTAL TO RESPONDENT'S CASE

Continued on next page

Closing Argument Example, Continued

Example closing argument, (continued)

The violation was classified by the Commissioner as a "Class A" violation because it caused a health hazard. A "health hazard" is not necessarily a serious or an acute illness; it is also the risk of an adverse health effect. [*Re-state reasons contained in the NOPA and/or from witness testimony.*] Because of this hazard the violation was classified as a Class A violation.

The fine range for Class A violations is $*XXXX*-$*XXXX*. Considering the relevant facts of this case, including the severity of the potential effects, the Commissioner correctly applied the fine regulation and arrived at a fine of $*XXXX* for the violation of Food and Agricultural Code section 12973.

County Inspector holds a [*Bachelor's degree*] from an accredited four-year college, she is licensed by the California Department of Food and Agriculture in [*Pesticide Regulation and/or Investigation and Environmental Monitoring*], has received pesticide enforcement training provided by [*county staff and/or the Department of Pesticide Regulation*] and she is experienced regarding pesticide regulatory issues. She performs her job well and did her duty by testifying today. She is a credible and reliable witness and had no reason to testify untruthfully or in a misleading manner.

The County presented its evidence by way of the credible testimony of *County Inspector*. We believe the evidence presented meets the burden of proof for administrative civil penalty actions by a preponderance of the evidence, or that our evidence showed that it is more likely than not *Lewis Farms* violated the requirements of the *Pesticide name* labeling registered with DPR and available at the use site and therefore violated Food and Agricultural Code section 12973 on September 12, 20XX.

In conclusion, we ask your Honor to find in the County's favor for the violation and the fine amount.

I would like to thank the representatives of *Lewis Farms*, *Mr. Flemming,* and *Mr. Vollan*, as well as your Honor for your time today.

Section 10.11
Ten Things County Advocates Should Do

County Advocate tips

1. Prepare for the hearing by reviewing the evidence and relevant laws and regulations pertaining to the action.
2. Complete the elements of the violation analysis.
3. Make sure that all copies of the evidence entered into the record are legible and numbered for ease of reference by the County Advocate, the Hearing Officer, the Respondent, and witnesses.
   a. Make sure paper documents have page numbers.
   b. Keep papers neat and organized.
   c. Organization is key. Binders/folders with tabs are helpful.
4. When preparing for the hearing, organization of the documents is essential. The presentation of evidence in an orderly and logical manner is very helpful for the Hearing Officer to understand the County's position.
5. Write down the questions to ask witnesses. Do not attempt to do everything from memory. Important questions may be forgotten if they are not written down. Check the questions off as they are asked and answered to avoid repeating them.
6. Stay on task and do not let the witness stray from the question. It's okay to tell the witness "let me rephrase the question" to elicit the appropriate response. Do not ask leading questions.
7. Be relaxed and rested on the day of the hearing. Being a County Advocate is a demanding task and requires focus and concentration.
8. Think about the person listening to the recording. Explain any hand gestures or visuals. Always refer to an exhibit number or letter verbally. When pointing to a portion of an exhibit, give the person listening to the hearing recording a verbal reference such as "Exhibit L, Page 4, I am pointing to the second paragraph, beginning with "On August 7, …"
9. When a break or lunch is taken, and the County still presenting evidence or examining witnesses, get back a little early to get organized and prepare.
10. Watch a TV court show a few times to get the feel for relevancy and presentation of evidence (or how <u>not</u> to present evidence).

Continued on next page

Ten Things County Advocates Should Do, Continued

Other tips	• Practice with your witness(es). They need to be comfortable with the questions they will be asked. • Be familiar with the case. • Anticipate and prepare. • Do not be lulled into a false sense of confidence.
Remember to address the fine amount	While developing the NOPA, the Commissioner documented in the NOPA how they used the available evidence to establish a logical and appropriate fine amount. When presenting the County's case, do not fail to have a witness testify how the CAC determined the classification and arrived at the fine level.

Section 10.12
County Advocate Consultation and Assistance

Consultation

DPR strongly encourages County Advocates to consult with their DPR Regional Office when preparing for a hearing involving a human health Reportable Incident or violation(s) that had substantial adverse effect(s) to human health. Regional Office staff may enlist assistance from DPR headquarters staff and, in appropriate cases, seek advice from DPR staff legal counsel.

Section 10.13
Preparing to be a Witness for the County

Introduction

Witness testimony admits evidence in the case into the record. Typically, the County's staff involved with identifying the proposed violation will testify in support of the County's case with respect to the facts of the violation. In addition, the County Advocate may call outside witnesses to testify on other aspects of the case. The Hearing Officer will weigh all the evidence presented to make the proposed decision. The more credible the witness appears to the Hearing Officer, the more weight (importance) will be given to the witness's testimony. A strong witness for the County will contribute evidence that supports the Hearing Officer to find in favor of the County. The following text provides information to support and inform a witness of what to expect when they participate in a hearing.

The following information will assist you in preparing your witnesses. It can be shared with County witnesses.

Roles of hearing participants

When a hearing is requested, the **County Agricultural Commissioner** (CAC) selects a Hearing Officer to hear the case on the CAC's behalf. The **Hearing Officer** presides over and runs the hearing. The Hearing Officer maintains the official record of the hearing, considers the evidence, and writes the proposed decision for the CAC.

The CAC assigns a county employee (the **County Advocate**) to present the county's case and show a violation of pesticide requirements more likely than not occurred.

The **Respondent** is the person or business the County believes violated the law or regulation. The Respondent may present their case or may choose a **representative**. The representative may only be an attorney, a family member, or an officer or employee of the Respondent's business.
Both the County Advocate and the Respondent/representative may call **witnesses** to answer questions and provide testimony at the hearing.

Witness responsibilities

The main responsibility of a witness is to tell the truth. Present testimony in a fashion which is straightforward and informative, particularly when testimony includes technical information.

Continued on next page

Preparing to be a Witness for the County, Continued

Witness responsibilities (continued)

The Hearing Officer will ask all witnesses testifying to swear or affirm to tell the truth. Truthfully answer the questions asked. If you do not know the answer, say so. Answers should all be spoken, and not made by shakes of the head or other body movements.

There are two types of witnesses. A "fact witness" testifies to what they did, saw, felt, or heard relative to the incident. Certain specialized witnesses may be asked to give their opinion about questions related to their area of training or experience. Such witnesses, based on their background, education, and experience, can be qualified as "expert witnesses." Once accepted, the expert witness has more leeway relative to their testimony and how it will be given.

A regulator, when called to discuss technical matters involved in a profession, is acting as an expert witness. The Hearing Officer relies on the opinions of an expert witness to interpret certain facts. It is important to clearly present technical matters and to appear and act professionally.

Preparing to be a witness

Preparing to be a witness begins as soon as the inspection or investigation reveals a potential violation. This includes following established procedures in collecting samples, photos, and other evidence; maintaining chain of custody; making relevant maps and diagrams; conducting witness interviews; and thorough documentation. The inspection and investigation reports recording these activities are critical, and later can serve as a reference for the facts and events for testimony in a hearing.

To prepare for the hearing:

- Follow the County's procedures to ensure the case file is complete and organized. Go over the facts of the case. If problems with potential evidence are discovered, bring attention to those problems right away.
- Meet with the County Advocate to determine your involvement in the hearing and go over expected testimony. Ask what the County Advocate intends to prove with your testimony and which pieces of evidence will be used. Ask any questions you have of the County Advocate at the earliest opportunity, well before the hearing date.
- Discuss with the County Advocate the questions the Respondent might ask. This is an opportunity to discover problems and arrive at solutions. Be prepared for the cross-examination questions regarding objects, distances, points of observation, etc.

Continued on next page

Preparing to be a Witness for the County, Continued

Preparing to be a witness, (continued)

It is important to practice responses, so they are fluid and not robotic. Know the exhibits you will be asked to testify about, such as the investigation or inspection, pesticide labeling, training records, etc. During the hearing, if you have to read your report to the Hearing Officer it does not inspire confidence in your recollection of the events. Make sure you are familiar with the evidence. Know the facts, the laws or regulations involved, the elements of the violation, and the evidence for each element. While it may not always be possible, consider revisiting the location(s) involved before the hearing to refresh your recollections and make sure you have a clear picture of the area in your mind.

If you will be an expert witness know your background and training. The County Advocate will ask questions to establish your qualifications to testify about your technical subject matter. Be able to recite and explain these items. Keeping your résumé or curriculum vitae up-to-date regarding your training and experience may help you list your qualifications and make it easier for you to answer these questions.

Appearance

While the pesticide civil penalty hearings are informal, personal appearance can factor in how you are perceived, which can affect your credibility. Clothing which is too casual or too dressy can be distracting. It is important to appear well groomed and alert. Also:

- Do not chew gum or eat food while testifying.
- Your demeanor must reflect the serious nature of the proceeding. You must maintain your objectivity and professionalism. A calm demeanor projects confidence, which increases your credibility.
- Be aware of your body language. Some witnesses may appear calm and collected when questioned by the County Advocate but cross their arms and appear hostile when questioned by the Respondent. Make sure that your attitude is consistently objective and professional.
- Always be professional: be attentive and serious, avoid laughing and joking around.

Continued on next page

Preparing to be a Witness for the County, Continued

What sort of questions are fact witnesses asked?

Direct examination of County witnesses is conducted by the County Advocate. Questions vary depending on the specific circumstances of each incident. If you are a fact witness, the County Advocate will ask you to identify yourself and describe your involvement in the case such questions as:

Who you are…

- What is your name?
- Where do you work?
- What is the title of your job? What are your usual duties?

What you know about the incident…

- What happened?
- When and where did it happen?
- Who was involved?

These questions "lay the foundation" for your testimony, establish you as a fact witness, and identify the intended subject of your testimony. Then the County Advocate will then ask about your first-hand knowledge of pertinent facts in the case.

Serving as a witness

Here are some other tips and advice:

- Do not worry about being nervous, anyone who testifies gets nervous.
- Be on time and be available immediately when called to testify.
- When in doubt about anything, consult the County Advocate.
- Do not whisper, talk, or cause any disturbances in the hearing room.
- Your testimony will be recorded. All answers to questions must be made verbally. Do not nod or shake your head for a "yes" or "no" response or say "uh-huh". Dimensions and directions must be given verbally rather than demonstrated. Make sure you are creating a clear record which the Hearing Officer, and those listening to the recording on appeal, can understand.
- The Hearing Officer may ask you a question. Address the Hearing Officer as "Your Honor" and answer the question.
- Always tell the truth. Do not worry about how an answer may help or hurt either side. If you try to hide or minimize some fact which you think damages the County's case, you will probably get caught and lose credibility.
- Listen carefully to the questions asked. Make sure you understand a question before you answer. If you are unsure, ask to repeat or rephrase.

Continued on next page

Preparing to be a Witness for the County, Continued

Serving as a witness, (continued)

- Answer only the question asked. Do not volunteer additional information even if you think it is helpful. If there is something you feel is important, wait for a break to discuss it with the County Advocate.
- Use clear, simple language in your responses. Give positive and firm answers when possible. Avoid qualifiers like "I think," "I believe," or "In my opinion" which diminish the value of your testimony.
- Do not hesitate to say, "I do not know," or "I do not understand the question," if indeed you do not know the answer. This response must never be evasive. If you make statements that are not factual, you lose credibility. You may be qualified as an "expert witness", but this does not mean you are infallible; you can only answer the questions to the best of your ability. The person asking will likely rephrase the question.
- While hearings are informal, objections can come up. When an objection is stated by either side, stop talking and wait for the Hearing Officer to rule on the objection. Then follow the Hearing Officer's instructions on whether or not to continue.
- Don't guess: if you don't remember the answer say "I don't remember" or "I don't recall." If you believe the answer is in the reports or materials in the case file, ask if you may refer to those to refresh your recollection.
- Answer the questions in your own words: do not let others put words in your mouth or change your statement to something different from what you meant. Be very careful in responding to questions which begin with "Wouldn't you agree…" or "Would it be fair to say…"
- When you must use acronyms or technical terms **make sure to explain what they mean**. Try to use everyday language when possible. Do not assume the Hearing Officer or others will understand.
- Sometimes you will have to describe complex situations, equipment, or procedures. Work with the County Advocate to ensure you have the charts, graphs, photographs, or other exhibits necessary to ensure the Hearing Officer understands your testimony.
- Do not give personal opinions unless qualified as an expert witness.
- **Do not exaggerate** or make overly broad statements; if you later have to correct them it may make you look unprofessional and unreliable, as well as damage your credibility with the Hearing Officer.
- If you make an error while testifying, **correct it as soon as possible**, do not wait for the Respondent to raise an issue. If you discover the error after you have been dismissed as a witness, discuss the matter with the County Advocate. If you have made an error, admit it, and explain it, if possible.

Continued on next page

Preparing to be a Witness for the County, Continued

Serving as a witness, (continued)

- You are under observation by the Hearing Officer even when you are not testifying. If you choose to or are allowed to remain in the hearing room after testifying, do not react to testimony given by other witnesses or at statements made by the Respondent or representative. Negative reactions may make you appear unprofessional and damage your credibility.
- Never discuss the case with the Hearing Officer on break or after the hearing is closed.
- Do not interrupt the County Advocate while the hearing is in progress. If you must convey information, write it down and hand the note to the Advocate. The Advocate will look at it when they can concentrate. If necessary, the Advocate can ask for a recess and talk to you.

Will anyone try to challenge your answers?

Probably yes. During cross examination, the Respondent will have an opportunity to cast doubt on your direct testimony by examining the foundation, accuracy, and validity of your testimony. This can be done by testing your knowledge and memory, showing inconsistencies, and questioning your motives and credibility. Again, your responsibility is to tell the truth. Maintain a calm, professional demeanor and avoid being defensive. Cross examination may have more vigorous questioning than direct examination. It is important to make sure that your testimony, rather than you, remains the focus. The Hearing Officer will ensure that no one is abusive or threatening towards you.

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Preparing to be a Witness for the County, Continued

Cross examination tips

- The Respondent or representative may try to confuse you or get you angry. They may also challenge your truthfulness, your credentials, your ability to do your job, or your conclusions. This is intentional. Remain calm, courteous, objective, and professional. Do not react and answer the question to the best of your ability.
- When you are asked a difficult question during cross-examination do not look to the County Advocate for help, this may make you look as though you are not independent. Pause and do you best with the answer. If you make an error, the County Advocate may help you correct it with follow-up questions after the Respondent finishes their cross examination.
- The Respondent or representative may ask compound questions (more than one question at a time) or rapid questions. Remain calm and answer at your own pace. You may ask for questions to be repeated or restated.
- Do not be argumentative.
- You may be deliberately asked questions to which cannot be answered with a "yes" or "no" answer. Indicate to the questioner your difficulty and ask to clarify.
- Never give an answer without thinking carefully about your response. There is no problem with pausing for a few seconds to consider the question. Pausing also gives the County Advocate time to object to the question, if necessary.
- The Respondent or representative may sometimes ask fast, demanding questions to speed up your answers in the hope you will make a mistake. Control the pace of your testimony by taking the time to give a well-considered response.
- The Respondent or representative may pose hypothetical questions that require you to give an opinion or draw a conclusion. Fact witnesses may not give opinions. Fact witnesses must avoid answering hypothetical questions.
- If the Respondent or representative should misquote any of your earlier testimony when asking a question, you should correct them before answering the question.

One final tip

Do not discuss the case with anyone that is not part of presenting the case to the Hearing Officer. Hold discussions only when you are in a private location where no one else (including the Hearing Officer, Respondent, or Respondent's witnesses) can overhear.