Chapter 9
The Hearing Officer

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Section 9.1
Roles and Responsibilities

Introduction

Conducting the hearing, generating the official record, and writing the Proposed Decision is the sole responsibility of the Hearing Officer.

Because the adjudicative function must be separate from the investigative, prosecutorial, and advocacy functions, CACs usually use the services of a Hearing Officer to conduct administrative pesticide penalty hearings on behalf of the Commissioner. For example, the Commissioner may choose a Hearing Officer from another county program, may exchange services with another CAC, or may choose a Hearing Officer from CACASA's list of contract Hearing Officers.

Attributes of a Hearing Officer

1. A steady, even temperament.
2. An ability to review the evidence fairly, objectively, and impartially.
3. An ability to maintain decorum in the hearing.
4. A sense of humor/relatability/trustworthiness.
5. An ability to listen and absorb sometimes complex information, for long periods of time.
6. An ability to synthesize information and write clearly and concisely.
7. A willingness to give, expect, and demand common courtesy of all persons involved in the hearing process.
8. Flexibility, an ability to handle new and unexpected situations rationally and with composure.
9. The ability to make a decision in the case.
10. **COMMON SENSE**. This is the most important characteristic of all. Applying good common sense to any hearing situation will result in proper decisions in a vast majority, if not all, of the time. Remember, Hearing Officers in these actions are not required to be attorneys. Therefore, they are not expected or required to have any "special knowledge" beyond personal experience and the information contained in this Volume.

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Roles and Responsibilities, Continued

Responsibilities of a Hearing Officer

The Hearing Officer is assigned by the Commissioner to be the "finder of fact" who considers the relevant evidence presented in the hearing. The Hearing Officer must:

- Fairly and impartially hear the matter on behalf of the CAC
- Run the hearing:
  - Listen carefully and neutrally to the parties
  - Admit evidence presented by County Advocate/Respondent during the hearing to the record
- Compile the written record and manage the audio recording of the hearing
- Write a Proposed Decision for the Commissioner
  - Determine credibility of witnesses testifying at the hearing and, if necessary, explain why certain witnesses are more credible than others in their Proposed Decision
  - Determine the weight each piece of evidence carries
  - Consider ONLY the evidence presented at the hearing
  - Make findings of fact and determinations based on the evidence presented
  - If the violation is found to have occurred, make sure the CAC classified the violation correctly, and the fine is placed within the corresponding fine class
  - Apply relevant rules and laws correctly, using the appropriate burden of proof
- Provide the official hearing record and written Proposed Decision to the CAC

Section 9.2
Hearing Officer Checklist

Disclaimer

This Checklist is an optional tool intended to complement, not replace, contents of this Volume. The checklist includes basic concepts DPR recommends a Hearing Officer consider.

Contents of this section

The Hearing Officer Checklist contains:

1. Request to Perform a Hearing
2. NOPA Review
3. Pre-hearing Conference
4. Hearing
5. Proposed Decision

Each task is described below.

1. Request to perform a hearing

- Obtain a written request from the Commissioner to perform a hearing.
- Make an inquiry about a hearing room. The room should be private and large enough to accommodate the anticipated number of participants and observers. The table should be large enough to provide for proper seating configuration. There should be adequate number of electrical power sources in the room.
- Make an inquiry about an audio recorder. Know how it functions and know how to start, pause, resume, and end the recording.
- Ensure there are enough batteries or power sources, and if needed, an extension cord. A rule of thumb is that hearings for Class C or Minor violations usually last ½ to 2 hours; Class B or Moderate violations usually last 1 to 2-1/2 hours; and Class A or Serious violations usually last 2 to 4 hours. Multiple violations may double usual times.
- Request a copy of the NOPA and other documents transmitted to the Respondent.

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Hearing Officer Checklist, Continued

2. NOPA review

Upon receipt of the NOPA, the Hearing Officer should:

- Review the NOPA. The NOPA includes the section(s) violated, the circumstances of each violation, the classification and fine amount for each violation and the reason for assessing that amount, and the applicable fine regulations.
- Compare the wording (in the NOPA) of the section(s) allegedly violated with the actual law or regulation sections. Make note of any discrepancies or paraphrasing.
- Identify the elements of each violation and make an evidence checklist to assist in keeping track of the evidence (when it is entered into evidence in the hearing). The list of elements of each violation will assist in keeping the hearing on track and when writing-up findings.

THE HEARING OFFICER MUST NOT FORM AN OPINION BEFORE HEARING THE EVIDENCE AT THE HEARING.

3. Pre-hearing conference

Only the County Advocate, Respondent, and/or Respondent's representative, one assistant, and an interpreter, if necessary are allowed in the pre-hearing conference. In no case should the Hearing Officer, witnesses, observers, the Commissioner, Court reporters, or any other parties be present at the pre-hearing conference while stipulations are being discussed. The pre-hearing conference is typically done away from the Hearing room, such as in an office, prior to the start of the hearing.

The pre-hearing conference affords the County Advocate the opportunity to:

- Explain the process of the hearing.
- Assist in clarifying the violation(s), fine class(es), and associated fine range(s) with the Respondent. Even when the NOPA contained a description of violation classes and fine ranges, additional explanations may be necessary.
- Craft stipulations. Stipulations are agreements or concessions between the two parties. In some instances, most or all potential exhibits are stipulated. To a lesser degree, the alleged violation is stipulated.

Continued on next page

Hearing Officer Checklist, Continued

4. Hearing

The Hearing Officer should provide the Respondent with a meaningful opportunity to be heard, focus solely on the issue(s) at hand, and clearly have in mind what evidence must be presented to sustain the action.

Once the hearing starts, in general, the Hearing Officer should:

1. Make sure the tape recorder is functioning.
2. Identify the hearing name, date, location, and time into the audio record.
3. Ask that all participants identify themselves.
4. Ask all participants providing evidence to take an oath.
5. Enter (read) any stipulations the County Advocate and Respondent agreed to during the pre-hearing conference, into the record. Ask the Respondent if they agree to each of the stipulations.
6. Ask lay witnesses to leave the room and to not speak with each other about this matter until they are called.
7. Ask the Respondent what the issues are. In most cases, the Respondent will indicate that they would like the Hearing Officer to decide on the matter of the violation and fine amount. In some cases, the Respondent will stipulate to the violation and is solely concerned with the issue of the fine amount.
8. Exercise control of the hearing process.
9. Dissect each violation into elements and have the element checklist for reference. Each element must be satisfied with at least one piece of admissible evidence. Admissible evidence may include direct evidence (witness testimony), circumstantial evidence (presentation of one or more facts connected), personal knowledge (expert witness), and exceptions to the hearsay rule (e.g., certain public employee or business reports). As evidence is presented, indicate its appropriateness to the element checklist (sometimes, this is called "making an inference").

   Although it is neither the Hearing Officer's responsibility to present the case for the County, nor present the Respondent's rebuttal, it may be necessary to ask clarifying questions to reach a just and fair decision. Do not leave questions unasked or unanswered.

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Hearing Officer Checklist, Continued

4. Hearing, (continued)

10. Exercise control over the participants with respect to demeanor. Participants may become emotional. Respondents and County Advocates alike may become defensive, intimidated, and/or frustrated. Maintain the hearing on a professional level
11. Read exhibits to be admitted by the parties as evidence into the record.
12. Discuss the exhibits offered by the parties.
13. Keep an eye on who is in the room. Do not let witnesses into the room until it is their turn to testify. If persons who you do not know enters the room, ask who they are and if they are going to be a witness in the hearing.
14. Conclude the Hearing. Close the record. Turn off the tape recorder.

From this point on, **no one** else, besides the Hearing Officer, has **any** input into the decision-making process.

5. Proposed Decision

See Chapter 11 for a thorough discussion of what should go into this process.

When writing the Proposed Decision, the Hearing Officer should:

- Address each violation separately.
- Use an elements of the violation checklist. During the hearing process, many statements and exhibits are offered, but not all are relevant or probative. If any element of a violation is not satisfied with at least one piece of evidence, the County has not met its burden of proof. It is the County's obligation to admit evidence to establish each element of the violation(s).
- Review the completed Proposed Decision. Is each Finding of Fact supported by evidence? Is the Proposed Decision supported within the Findings of Fact? If so, the decision is probably fair and supportable under potential appeal.

Section 9.3
Starting the Hearing

Tips

The role of the Hearing Officer begins as soon as the parties walk into the room. First impressions are important. Keep control with a calm demeanor. Engender credibility with respect and courtesy from the start. Be consistent by calling everyone by their last name, including the County Advocate and Respondent.

Observers

Because the hearing is open to the public, it is not unusual to have observers in the hearing. The Hearing Officer must not allow the audience members to hold conversations during the hearing, or comment during the hearing. County staff must not discuss the hearing or related matters in hallways or public areas near the hearing. Observers are not allowed to communicate with the Hearing Officer unless the communication is initiated by the Hearing Officer.

Starting the Hearing

Use a script or checklist to organize the Hearing (see examples in this chapter). A Hearing Officer may develop their own script if it covers the basics and provides order. The Hearing Officer should provide a general outline of the order of the hearing and explain it as simply as possible since many participants may have never been in a hearing.

- Start the recording and begin with "We're on the record now."
- Read the date, place, time started, who is present, and case number into the record.
- State that this is an administrative civil penalty hearing. Each person in the room will state and spell their name, including witnesses. Begin with each person representing the County. Each person states and spells their name, and their role (i.e., County Advocate, co-County Advocate, witness, translator, etc.). Repeat the process for the Respondent and each person representing the Respondent.
- Advise that this is an informal proceeding, and the formal rules of evidence do not apply. For instance, hearsay evidence is admissible in this proceeding. Although admissible, the fact that it is hearsay affects its weight as evidence in the hearing.
- Go over the ground rules of how the hearing will proceed:
    - The hearing will be recorded.
    - Discuss the order of the hearing (i.e., County's opening statement, Respondent's opening statement, etc.).

Continued on next page

Starting the Hearing, Continued

Starting the Hearing, (continued)

  - Describe the County's burden of proof and the preponderance of evidence standard.
  - State that the Hearing Officer is allowed ask questions during the hearing.
- Remind both sides that intent is not a factor in any pesticide requirement.
- Demonstrate impartiality. Let the Respondent know that everyone will be heard in turn. Each side will be allowed to finish. There will be no open debate among the participants. Participants always address the Hearing Officer, not the other party.
- Discuss the evidentiary exhibits presented:
  - Verify that Hearing Officer, Respondent, and County Advocate each have a copy of all the evidence to be admitted into the record.
  - Verify that the Respondent had an opportunity to review the County's evidence.
  - For efficiency, the Hearing Officer may permit the County Advocate to admit the exhibits in case file provided to the Respondent into evidence at this time. In this instance, ask the Respondent if they have any objections to the County's exhibits being admitted into evidence. If they object, ask what the objections are, and in which specific exhibit(s). Also emphasize the Respondent will have an opportunity to object later in the hearing when the exhibit is referenced/discussed.
- Advise no *ex parte* communication (communication between one of the parties and the Hearing Officer about the hearing without the other party present) during breaks.
- Discuss the expected time range of the hearing. Ask each party how long they anticipate needing to present their case.
- Find out plans for witnesses. Sequester lay witnesses. The County should be able to provide room(s) away from the hearing to sequester witnesses for Respondent and County.
- Accept the stipulations drafted by the County Advocate and accepted by the Respondent. Be sure to record each stipulation agreed to by the Respondent. For each stipulation, reaffirm with the Respondent that they understand and agree to the stipulation.
- Discuss any agreed upon stipulations.
- Read the stipulations into the record. Once the stipulations are read into the record, the issue(s) of the hearing should come into focus.
- Begin the hearing.

Section 9.3.1
Hearing Record Templates

Introduction

The templates on the next two pages are examples for the Hearing Officer to consider using or adapting to facilitate a smooth hearing.

The **Hearing Sign-in and Oath Record** template is used to make a record of individuals attending the hearing and manage other aspects of the hearing. The Hearing Officer may use this form to record individuals who make an affirmation to tell the truth during a hearing by marking an "O" in the rightmost column.

The **Exhibits Record** template is to assist the Hearing Officer in assuring that exhibits are marked and cross referenced when they are introduced into evidence.

A sample **Stipulations Record** template can be found in Section 10.4.

Continued on next page

Hearing Sign-in and Oath Record Template

Date: _____ Hearing Officer: _____
Location: _____
File No.: _____ Respondent: _____

Printed Name	Affiliation and/or Title	Are you a witness or scheduled to testify? *Indicate Yes or No*
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.		
13.		
14.		
15.		
16.		

Page _____ of _____

Exhibits Record Template

Date: _____ Hearing Officer: _____
Location: _____
File No.: _____ Respondent: _____

County Exhibits		Respondent Exhibits	

Page _____ of _____

Section 9.3.2
Example Opening Remarks Script

Introduction

The opening remarks should communicate the start of the hearing and tell the participants what to expect. This script is intended to provide a model of possible items to address. It is not all inclusive and the Hearing Officer may want to develop their own script for opening remarks.

Housekeeping details before hearing – not on the record

Directed to all:
Before we get started, the restrooms are located _____.

The County's Advocate will lead us to the assigned meeting area if the hearing needs to be evacuated because of a fire drill or emergency. At that point, the County Advocate is in charge, and we will follow their instructions for a safe and orderly evacuation.

Please turn off or silence your cell phones and pagers.

We will take a fifteen-minute break at approximately _____.

If it makes sense, we may work through lunch or go into the lunch hour. If we take a lunch break, it will last approximately one hour.

If you need a break sooner, please raise your hand, requests can be accommodated.

When we take a break, there should be no *ex parte* communication with me, that is no communication between one of the parties and me without the other party present.

Opening remarks – on the record

Verify that the audio recorder is on and working.

Directed to all:
We are on the record.

Good morning/afternoon, my name is _____. I have been asked by the Agricultural Commissioner of _____ County to be the Hearing Officer for this matter. This hearing is being held at the office of the _____ County Agricultural Commissioner.

Today is *(day of week, month, day, year, and time)* .

Continued on next page

Example Opening Remarks Script, Continued

Opening remarks – on the record, (continued)

This is a hearing in the matter of County of _____ v. _____, also known as Case File Number _____, which is the official reference number for the case.

This is an administrative civil penalty hearing authorized by *[Food and Agricultural code sections 12999.5 or 15204 or 15204.5 or Business and Professions Code sections 8617 or 8663]*.

The purpose of this hearing is to present and hear evidence. My purpose as Hearing Officer is to make findings of fact in this matter and propose a decision for the Commissioner based upon the evidence and testimony presented in this proceeding. Are there any questions about this?

Has everyone signed in on the "Sign-in" sheet? If you did not, please do so now.

Will the County Advocate please quickly introduce *yourself (and the people at your table)*? State and spell your name and state your role in this hearing. Thank you.

Will the Respondent please quickly introduce *yourself (and the people at your table)*? State and spell your name and state your role in this hearing. Thank you.

As you are aware, I am recording this hearing. I have a few things I need to cover so that we all understand how this proceeding will work. Please listen carefully. I have three general areas to cover.

First: I'll state a few items for the record and review procedures
Second: I'll ask if there are any questions before we begin
Third: I'll review any stipulations agreed to by the Respondent

Then we will start the hearing

Continued on next page

Example Opening Remarks Script, Continued

The Hearing Officer's role – on the record

Directed to all:
I am here to make findings of fact and to propose a decision based upon the evidence and testimony presented in this proceeding. It is my role to determine if a violation occurred and whether the Commissioner classified and placed the fine at the correct level.

The burden of proof for administrative civil penalty hearings is the "preponderance of the evidence" standard, or that it is more likely to have occurred than not. This is equivalent to a probability of greater than 50%.

Courtesy – on the record

Directed to all:
This will be an orderly and polite proceeding, and we will always treat each other with respect.

- Because this hearing is being recorded, only one person is allowed to speak at a time.
- While we are taking testimony, each time a person begins to speak, they must be identified for the audio record. So, if the County Advocate does not say something to the effect of "Ms. Witness, what did you do on such and such date?" I may interrupt and say, "For the record, Ms. County Advocate is asking questions of Ms. Witness."
- Disruptive commentary or outbursts from the audience, including gasps, whispering, conversations, pronouncements, motions, etc., are not allowed. If an audience member is disruptive in any way, they will be asked to leave this hearing session – do not expect a warning first.
- Do not attempt to speak over me.
- Parties must not interrupt each other.
- Both parties will have an opportunity to present evidence and testimony during this hearing. Additional evidence or testimony cannot be introduced after the hearing is concluded.

Notice – on the record

Directed to Respondent:

- Did you receive a copy of the Notice of Proposed Action?
- Did you request a hearing?
- Did you receive the Hearing Notice at least 10 days before the hearing? *Refer to FAC section 12999.5 if you have questions. If*

Continued on next page

Example Opening Remarks Script, Continued

Notice – on the record, (continued)

Respondent did not receive the Notice ten days before the hearing, ask when they received it and if they are ready to proceed today.

- Did you receive a pamphlet or document entitled "Preparing for Your Administrative Pesticide Penalty Hearing?" *If the Respondent says they did not receive the brochure, provide the brochure, and allow the Respondent time to review it. Be prepared to reschedule if the Respondent says they need more time to prepare.*

NOTE: At any time, the Hearing Officer can stop the hearing if the Hearing Officer believes a due process right has not been met (e.g., notice, rights, translation availability) and reschedule the hearing for another time.

Rules of Evidence – on the record

Directed to all:
This hearing is not a formal court proceeding, and the formal rules of evidence in a court of law do not apply. For instance, hearsay evidence is admissible in this proceeding. Although admissible, the fact that it is hearsay affects the weight of the evidence in the hearing. Hearsay will not be the only evidence I rely upon to make my decision.

I will not accept any legal briefs from either party. If either party has an objection, I expect the objection to be clear and understandable to a layperson.

Also, proving intent is not a required element of pesticide penalty hearings.

Decision process – on the record

Directed to all:
I will evaluate any evidence presented for its credibility and relevance, make findings of fact, and then write a Proposed Decision for the Commissioner based on the evidence presented at the hearing. I will submit my proposed decision to the Commissioner in approximately 30 days.

If the Proposed Decision is adopted by the Commissioner, they will prepare an order and instructions for closing out the matter in approximately 15 additional days. If the Commissioner does not adopt my Proposed Decision, or adopts only part of it, they will provide you with further instructions for closing out this matter.

Continued on next page

Example Opening Remarks Script, Continued

Hearing procedure – on the record

Directed to all:
Once the hearing begins, the County Advocate will give an opening statement. After that, the Respondent has the option of giving an opening statement immediately, or later during the Respondent's rebuttal. Next, the County Advocate will present the County's case and call witnesses. The Respondent will have the option of cross-examining any witnesses. When the County Advocate is done, the Respondent will have the opportunity to present a rebuttal and call witnesses, and the County Advocate will have the option of cross-examining the Respondent's witnesses. I may ask questions of witnesses offered by either side. Because this hearing is being recorded, please refrain from talking over each other at any time.

If you are going to be called as a lay witness in this matter, please raise your hand. Witnesses will be excluded from the room during the hearing until they are called. Witnesses may be excused after they have completed testifying if there is no possibility they will have to testify again.

If you are going to be called as an expert witness at this hearing, please raise your hand. Persons who are going to be qualified as expert witnesses are allowed to stay in the hearing room. In any case, I caution witnesses to not talk to each other about the case until this matter is concluded.

Bias

Usually, the Respondent will not express any concerns about bias. Do not bring bias/impartiality up as part of your routine script; the Respondent has the responsibility to allege and prove bias. This text is provided for your convenience if the Respondent raises bias as an issue.

Directed to Respondent:
You are entitled to a fair, full hearing of the relevant evidence by an impartial Hearing Officer. I have no interest in this case whatsoever and believe I am impartial and unbiased in this matter. If you have any specific concerns about my impartiality, now is a good time to state them. Do you have any specific concerns about my impartiality?

Listen carefully and try to address the concern(s) in a sensitive manner. Hopefully you can satisfy the Respondent with a simple response to the concern(s). If they have legitimate or specific concerns, note them for the record. Ultimately, only you can recuse yourself from this hearing.

Continued on next page

Example Opening Remarks Script, Continued

Exchanging records of evidence – on the record

Do both parties have three copies of any documentary evidence they wish to present as exhibits during the hearing? Please provide me with a copy of your documents and then exchange documents at this time. *If copies need to be made at this time, take a break if needed. The Hearing Officer should explain to both parties how they want the exhibits entered into evidence.*

I may interrupt speakers occasionally to state for the taped record the name of the person who is speaking or to point out which exhibit is referenced, or where you are pointing. I will try to avoid doing this at moments when it might be distracting to you. I do this in case there is an appeal and the person listening to the tape will be without the benefit of seeing what I am seeing and help to put a name to the voices.

Additional statements that may be necessary

If necessary, add any of the following instructions

- Persons who are parties to this action, and their representatives or witnesses will get a chance to speak. If you are not a party to this action, you are not to speak unless you are invited to speak by me. *This is important if you have audience members who may not be directly involved in the action.*
- Witnesses or potential witnesses will leave the room when the proceeding begins and wait until called. I caution witnesses to not talk to each other about the case until this matter is concluded.
- At no time are any parties or witnesses to approach me to talk about any issue related to this case until after the Commissioner has issued the Commissioner's Decision.

Administer affirmations – on the record

I will now administer Affirmations to everyone who will provide evidence or act as an interpreter.

a. Witness: "Do you solemnly swear or affirm that the evidence you shall give in this matter shall be the truth, the whole truth, and nothing but the truth?"
   Note: If more than one person is sworn in at the same time, begin the above oath with "Do you and each of you solemnly," *Also, members of the California Bar do not have to participate in the Oath.*
b. Interpreter: "Do you solemnly swear or affirm that you will well and truly interpret English into _____ and _____ into English to the best of your ability in this matter?"

As applicable, sequester the witnesses until called upon to testify.

Continued on next page

Example Opening Remarks Script, Continued

Questions? – on the record

Directed to all:
Are there any questions?

Directed to all:
Matters that are the subject of a stipulation are no longer in dispute or contested and need not be addressed at the hearing. Have the parties held a pre-hearing conference and reached any stipulations?

Pre-hearing conference not yet held

If not, would the County Advocate and the Respondent, that would be _____ and _____, like to step out of the room and have a pre-hearing conference to attempt to reach some stipulations? If so, we will now go off the record for a few minutes.

Turn off the tape. The County Advocate and Respondent (and or representative) should retire to a room separate from the hearing room. The County Advocate writes out any stipulations on which they agree.

When the pre-hearing conference has concluded and the County Advocate and Respondent have returned to the hearing room, verify that the audio recorder is on and working.

Back on the record. _____ and _____ have just completed the pre-hearing conference.

Pre-hearing conference review - on the record

During the pre-hearing conference, I understand the parties discussed matters and reached several stipulations. I will read the stipulations into the record exactly as written by the County Advocate. I will then ask the Respondent to acknowledge on the record your agreement with each stipulation when I conclude it:

Read list of stipulations.

Before we begin with your opening statements and calling witnesses, does either side have any questions they wish to ask about the proceeding?

If not, we will proceed to the opening of the hearing.

Continued on next page

Example Opening Remarks Script, Continued

Court reporters	*Court reporters are not required in our informal hearing process. However, occasionally a Respondent wishes to provide a court reporter (at their own expense) to make a transcript of the hearing. You can accommodate this situation. However, the court reporter's record is NOT the official record of the hearing.* *If applicable…* **Directed to parties and court reporter:** I will allow the court reporter to interrupt for the sake of their record. However, I want to make it absolutely clear that my recording represents the official record of this hearing and any future proceedings in this matter, if there are any.
End of Opening Remarks	*This is the end of the opening remarks. Keep the hearing running in an orderly manner, take good notes, listen to the testimony, keep evidence organized, attach documentary evidence presented and accepted, plan reasonable breaks, and keep control of the hearing room.*

Section 9.4
Managing the Hearing

Have a plan

Use a script or checklist to organize the flow of events. Pay careful attention to witness testimony. Organize the exhibits and mark them for easy reference. Always refer to exhibits by letter or number verbally (for the audio record). Keep the hearing moving. Do not leave a question unasked or unanswered.

Identifying exhibits

The preferred practice is to number or letter all exhibits consecutively, as they are admitted. Traditionally, County exhibits are given a letter and Respondent exhibits are given a number. Be sure each exhibit has a very clear permanent mark (no sticky notes). Labels with glued backs are useful, especially with objects. Colored labels are best for documents, since a written number on them may be hard to see. Use a colored pen when writing on the documents. Be sure the parties have the same numbers or letter on their copies.

During the hearing

- Stop if the parties interrupt.
- If tempers flare, consider a break.
- Everyone deserves respect from all parties.
- It is about the issues, not the personalities.
- Do not let things get bogged down. Allow the point to be made and move on. Eliminate redundancy.
- Do not allow discussion between either party and the observers, or comments from the observers to the Hearing Officer.
- Do not let lay witnesses into the hearing room until it is their turn to testify.
- If it is apparent that a non-English-speaking party does not understand the question or the hearing process, stop the hearing until a translator is present.
- Ensure arguments are funneled through the Hearing Officer, and not between the witnesses or the hearing may digress.

Continued on next page

Managing the Hearing, Continued

During the hearing, (continued)

- Consider the person (one who reviews the case on appeal) listening to the audio recording. They cannot see what takes place in the hearing. It must be clear in the recording what is being referred to during testimony or argument.
    - Have the County Advocate or Respondent state the name of the witness, or the witness state their name before answering or making a statement.
    - Make sure when a witness, County Advocate, or Respondent points to a document, map, photo, diagram, etc., you audibly interject the exhibit number or letter and other description if the County Advocate or Respondent fails to do so.
    - Explain any hand gestures or visuals for the record.
    - If a compass direction is used, make sure the exhibits have the compass bearing clearly marked.
    - If handwritten notes are used in evidence, read them into the record and have the parties agree to what was written on the note.
- Stop the recorder when there is a break in the hearing. Make sure to start it again when the break is over.

Closing the record

Prior to the close of the hearing, it may be helpful to review the exhibit list with the parties, on the record, to catch any problems. Always ask if there are any more exhibits to be submitted.

Keep the exhibits, tape recording of the hearing, and all procedural documents (e.g., NOPA) together in a secure location. These items make up the "administrative record" which must be returned to the Commissioner with the Proposed Decision.

Section 9.4.1
Example Hearing Script

Opening statements and case-in-chief – on the record

Verify that the audio recorder is on and working.

Directed to parties:
Your opening statements will be brief. The County Advocate will go first and then the Respondent will have an opportunity to present a statement.

Mr./Ms. (name of County Advocate), you may begin with your opening statement.

Mr./Ms.. (name of Respondent or representative), you have the opportunity to do an opening statement now or wait until you present your case. Which would you prefer?

Calling witnesses and introducing evidence

Directed to parties:
Mr./Ms. (name of County Advocate) will you please present the charges, evidence, and testimony?

Mr./Ms. (name of Respondent or representative), will you please present your evidence and testimony?

Closing statements– on the record

Directed to parties:
Mr./Ms. (name of County *Advocate)*, you may begin with your closing argument.

Mr./Ms. (name of Respondent or representative), you may begin with your closing argument.

Does anyone have any additional questions or testimony?

Section 9.4.2
Example Hearing Officer's Closing Remarks Script

Introduction

Closing remarks should communicate closure of the matter and tell the participants what to expect after the hearing concludes. This script is intended to provide a model of possible items to address. It is not all inclusive and the Hearing Officer may want to develop their own script for closing remarks.

Closing – on the record

Is there anything more either side would like to add that would help me in making my Proposed Decision?

As I mentioned in my opening remarks, my purpose as Hearing Officer is to make findings of fact in this matter and propose a decision for the Commissioner based upon the evidence and testimony presented in this proceeding.

I have made note of the stipulations and listened to both the County Advocate's and Respondent's arguments. I have made note of the testimony and evidence presented. I have taken notes and there will be an audio recording for me to review as well.

I will consider the evidence and testimony you presented. I will apply the stipulations both parties agreed to in the pre-hearing conference. I will evaluate the evidence and testimony presented for its credibility and relevance.

I mentioned in the opening the burden of proof for administrative civil penalty hearings is the "preponderance of the evidence" standard. I will determine if the County Advocate provided sufficient evidence to support the Commissioner's proposed action, and I will determine whether the Commissioner appropriately classified the violation and fine amount.

My findings will be based on a preponderance of the evidence. I will do my best to write my findings in a way that is understandable to both parties.

Continued on next page

Example Hearing Officer's Closing Remarks Script, Continued

Closing – on the record, (continued)

After my analysis, I will write a Proposed Decision for the Commissioner. I will submit the Proposed Decision to the Commissioner within 30 days.

If the Proposed Decision is adopted by the Commissioner, [*he/she*] will prepare an order and instructions for closing out the matter in approximately 15 additional days.

If the Commissioner does not adopt my Proposed Decision, or adopts only part of it, they will provide you with their reasons for not adopting or modifying my Proposed Decision and will provide you with further instructions for closing out this matter.

As applicable: Employers are reminded it is imperative to refrain from retaliating against employees for any testimony presented at this hearing.

As there is no further evidence to be submitted, I will now close the hearing. It is (*time*). We have just concluded a hearing in the matter of County of _____ v. _____, also known as Case File Number _____. Additional evidence or testimony cannot be introduced. Do not attempt to contact me to provide additional evidence, testimony, arguments, or other information. Further contact with me is prohibited until my Proposed Decision is delivered to the Commissioner.

I want to thank each of you for your time today. I want to extend special thanks to the witnesses as I know this can be a stressful situation.

Thank you for following our procedures. Thank you to the County for providing the hearing room.

We are now off the record.

Turn off audio recording.

Hearing concluded

*Begin packing up. Avoid being drawn into conversations with parties. General pleasantries may be exchanged, but conversations about the case are inappropriate. Do not allow "*ex parte *communication."*

Section 9.5
Taking Official Notice

Definition and examples

Official notice - the acceptance of the existence of a relevant fact or law without requiring formal proof because the fact or law cannot reasonably be disputed. Official notice can be taken of facts that are universally known to be true or can easily be verified by consulting sources whose accuracy cannot reasonably be questioned. Official notice can be taken of all constitutional, decisional, and statutory law.

Examples:

- July 5, 2017, fell on a Wednesday.
- Blythe is in Riverside County.
- FAC section 11701 states that it is unlawful for a person to advertise, solicit, or operate as a pest control business, unless the person has a valid pest control business license issued by DPR.

Official notice cannot be used to establish facts which can reasonably be disputed

Hearing Officers cannot "officially notice" facts which are not common knowledge, not easily verified by consulting reliable sources, or which can reasonably be disputed.

If the situation warrants, the Hearing Officer may want to ensure fairness and provide notice to the Respondent the Hearing Officer intends to officially notice a particular fact or law.

Director's review on appeal of Hearing Officer's official notice

During an appeal, if the Hearing Officer took official notice of a specific fact or law, the Director may consider whether it was proper for the Hearing Officer to do so. That is, whether existence of the fact or law cannot be reasonably disputed. The Director may also consider the relevance of the law or fact to the case, and whether the inferences drawn from it by the Hearing Officer were reasonable. If the fact or law "officially noticed" was critical to the reasoning of the decision, the Director could reverse or modify the Commissioner's decision based on those determinations.

Important!

It is not necessary for a Hearing Officer to take official notice unless there is an actual reason to do so. For example, it is not necessary to take official notice of the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) because it is not enforced by the counties, and therefore not relevant to the County's administrative hearings.

Continued on next page

Taking Official Notice, Continued

Judicial (or official) notice

If this request is before the Hearing Officer, the requesting party should be asked to specifically state what they want the Hearing Officer to take "judicial notice" of. It is not necessary for a Hearing Officer to take judicial notice unless there is an actual reason to do so.

A Hearing Officer may need to make a simple response such as "I take judicial notice of this matter," or "I do not find it necessary to take official notice of _____." Or, it may be necessary to craft a more detailed response, such as "I will only take judicial notice of the parts of the FAC and 3CCR as they relate to pesticides, pest control operations and regulation in California."

Section 9.6
Admitting Evidence

Evidence

Evidence is introduced in the hearing. Evidence includes oral testimony under oath (witnesses), documentary evidence (e.g., inspection reports, investigation reports, or lab results), and demonstrative evidence (e.g., photographs, charts, or maps). Occasionally, physical evidence (such as a glove, a container, or a posting sign) may be introduced as well.

Note

The law is not evidence. It is not something to weigh or determine if it is true. Relevant codes are reference material not evidence.

Number of copies

Each party should come prepared with at least three copies of each exhibit: one each for the Hearing Officer, for the opposing party, and for the presenting party. Getting necessary additional copies is best handled before the hearing begins.

Entering exhibits into the record

It is a best practice for the Hearing Officer to accept exhibits as the hearing proceeds so that there is context for why the exhibit is relevant and to allow Respondent to object.

The Respondent should have had the opportunity to review the case file (the County's documentary evidence) prior to the hearing. If the parties agree on what exhibits may be introduced, an efficient way to admit exhibits is when the hearing is opened the parties may submit the list to the Hearing Officer as part of the stipulations.

In either case, the Hearing Officer should keep a "running" exhibit list at hand so additions can be made, when necessary.

Marking exhibits

Each exhibit (piece of evidence) must be marked clearly when entered into the record. Since exhibits are an important part of the administrative record, appellate reviewers must be able to identify each exhibit with ease. Traditionally, County exhibits are lettered (A, B, C, etc.) and Respondent exhibits are numbered (1, 2, 3, etc.).

Continued on next page

Admitting Evidence, Continued

Objections

When a party introduces an exhibit or asks a question, the other party can object to either an exhibit or a question. There must be a reason for the objection. The most common legal objections are:

A. Lack of foundation
B. Lack of relevance

There is no need for a Hearing Officer to rule on the validity of an objection on the spot. Rather, you may accept the exhibit or allow the question and just note the objection in your written notes for consideration later when you are analyzing the persuasiveness of the particular evidence and testimony at issue and making your findings.

Section 9.7
Common Objections

Introduction

Objections are common in a conventional court proceeding. In a pesticide administrative civil penalty hearing, an objection to the form or substance of a question or to a party's behavior is generally unnecessary and time consuming.

The strict rules of evidence **do not** apply to administrative hearings. Instead of strict rules of evidence, the Hearing Officer controls the hearing process following the principles of the California Administrative Procedures Act (Government Code sections 11400 *et seq.*).

As stated above, generally formal legal objections are unnecessary in an administrative hearing. For example, if a witness is asked a question that is poorly worded and difficult for the witness to understand, the opposing side might object. That objection is usually unnecessary because the witness will most likely respond "Huh?", or "What?", or "I don't understand" if the question is truly ambiguous. When this happens in a hearing, the person asking the question will usually rephrase it, or the Hearing officer, seeing the problem, will request rephrasing.

There are two objections which need to be discussed in detail for administrative civil penalty hearings, foundation, and relevance. This section will also address hearsay and the common hearsay exemptions used in administrative civil penalty hearings.

Objection: Foundation

When the objection "foundation" is before a Hearing Officer, there probably are a few questions the County Advocate should ask of the witness to "lay the foundation" for the evidence (to show its authenticity, trustworthiness, and relevance). Questions that will probably help to lay the foundation are:

- What is this document?
- Where did you get it?
- How did you get it?

If necessary, the Hearing Officer may instruct the County Advocate to lay the foundation, and if necessary, the Hearing Officer may ask the questions. In any case, a County Advocate should always be ready to lay the foundation for any piece of evidence (including testimony) offered to the Hearing Officer.

Continued on next page

Common Objections, Continued

Definition: Relevant Evidence

Relevant evidence is defined in California Evidence Code section 210 as:

> …evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

As decisions are based on information that is relevant to the issues in the case, it can be needlessly confusing to allow extraneous information into the hearing record. However, the standard for relevancy is *very* broad in administrative hearings. Anything that is even tangentially related to the issues should be allowed. When there is any doubt as to the potential relevancy of the testimony or exhibit, it should be admitted. Always err on the side of more versus less. Be patient with witnesses. Testimony that appears irrelevant initially may be clearly relevant as the hearing proceeds. It will never be a denial of due process to have too much testimony or too many exhibits. The relative significance of each piece of evidence may be evaluated later, when writing the Proposed Decision. Objections of relevance are rarely sustained in a hearing.

Objection: Relevance

"Relevance" to the case at hand is a matter solely under the purview of the Hearing Officer. It is best to not make a ruling on relevance during the hearing but instead respond:

> Your objection is noted for the record. I will give this issue/testimony/matter/evidence the weight it deserves when making my decision. Proceed.

Relevance objections may also arise when a witness is being asked questions they should not have to answer because they are not relevant, are only tangentially relevant, or are of a personal or private nature.

Continued on next page

Common Objections, Continued

Example response to objection: Relevance

Hearing Officer: Mr. Respondent, do you have any objection to the inspection 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.

Other example responses

Hearing Officer: I note the objection and I will give the evidence the proper weight during the decision.

Or

Hearing Officer: The formal rules of evidence for a court of law do not apply in administrative civil penalty hearings.

Definition: Hearsay evidence

Hearsay evidence is defined in California Evidence Code section 1200 as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."

The concept

Hearsay evidence may be unreliable because the statement is not made under oath and is not able to be challenged or explained through cross-examination. Thus, hearsay is not admissible **in court** unless it falls within one of several exceptions ("hearsay rule").

For example, in a courtroom, if a witness for the prosecution says "I saw him shoot her", the defendant can question the witnesses' eyesight, motive for saying that, etc. But if the witness says "Joe told me he saw him shoot her" (which is hearsay) and Joe is not a witness, there is no way, for example, to check out Joe's eyesight.

The hearsay exceptions are designed to allow hearsay **in court** when there are sufficient indications of its reliability to make up for the lack of cross-examination.

Continued on next page

Common Objections, Continued

Hearsay in Administrative Hearings, generally

Fortunately, hearsay is talked about far more than it is actually encountered in this type of administrative hearing. In most cases, the person who discovers, and frequently witnesses, the alleged violations is called as a witness. The Respondent can cross-examine the witness; and the Hearing Officer can decide on the reliability of the evidence based on that exchange. Any writings the witness made are secondary to their oral testimony.

That being said, *the hearsay rule is not strictly applied in administrative hearings.* A Hearing Officer should admit **all relevant evidence**. When in doubt, allow hearsay evidence into the record. A decision will not be overturned for improperly admitting evidence into the record, only on how evidence is weighed in the decision.

While hearsay evidence may be admissible, hearsay evidence cannot, *on its own,* be the only basis for a Hearing Officer's finding unless it would be admissible in a court (i.e., fits within an exception). *Most* hearsay evidence presented in these informal hearings fits within an exception. Hearsay that does not fit any exception may still be used to support a finding if it supplements or explains other evidence upon which that finding is based.

How to handle hearsay objections

If a party objects that the evidence is hearsay, allow them to make their objection on the record. Simply acknowledge the objection by saying "Hearsay evidence is admissible in administrative hearings. The evidence will be admitted to the record and given the weight it deserves during deliberations. Your objection is noted for the record."

Hearing Officers cannot base a finding of fact solely on hearsay evidence (that doesn't fit an exception), whether or not a party objects. The Hearing Officer should mark the evidence that a party objects to as hearsay (e.g., with a red "H") to remind the Hearing Officer to consider the issue during deliberations, to take special care when making the decision, and not rely solely on hearsay evidence to make a finding of fact. If the Hearing Officer determines that evidence is hearsay, the Hearing Officer should then determine whether it falls within the exceptions discussed below.

Continued on next page

Common Objections, Continued

Exceptions to hearsay rule

As noted previously, the exceptions to the hearsay rule allow hearsay evidence **in court**. The exceptions are allowed, primarily because other circumstances indicate its reliability, even though the evidence is hearsay.

The hearsay rule has many exceptions. The exceptions are more complicated than the rule itself and most have little application here. The following are descriptions of two exceptions that can be applied with relative ease and regularity in pesticide administrative civil penalty hearings: party admissions and official records.

Definitions: Admission and Declaration Against Interest

An "**admission"** is anything the Respondent (including Respondent's employees) or a county employee says or does outside the hearing that is offered as evidence. Admissions may include statements by a party's agents, or which the party later adopts through words or actions, including in some cases the failure to repudiate or correct a statement. Admissions can be introduced both to prove a fact and to discredit the party if the prior statement is inconsistent with the party's testimony at the hearing.

A "**declaration against interest**" is a statement made by any person that is contrary to that person's own self-interest, if the person knew the statement was against the person's interest when they said it, and is now unavailable to testify at the hearing.

A. Party admissions and declarations against interest, generally

A statement made by a party outside of the hearing is hearsay. However, the Hearing Officer can base a finding on the content of an outside statement by a party under the party admission hearsay exception. The theory behind this exception is that the party is present at the hearing and available to explain why the statement was made and therefore these statements are more credible.

Since the Respondent has a right to review the County's evidence prior to the hearing, the Respondent has the opportunity to learn about any admissions or statements the County Advocate intends to introduce at the hearing. After reviewing the evidence, the Respondent should be on notice the Respondent or one of the Respondent's employees made an admission that will be used against the Respondent at the hearing. At this point, the Respondent has an opportunity to make arrangements to bring that employee to explain the admission made outside the hearing. Likewise, the County Advocate should be aware of admissions made by County employees and call these people as witnesses to explain their statements, if necessary.

Continued on next page

Common Objections, Continued

A. Party admissions and declarations against interest, generally, (continued)

An outside statement made by a person that is contrary to that person's own interest is also hearsay. However, a Hearing Officer may base a finding on the content of this statement under the declarations against interest exception. The theory behind this exception is that people do not usually say things that would expose themselves to liability, or otherwise impact them negatively, unless it is true. Therefore, these hearsay statements tend to have more credibility. Please note that unlike the party admission exception, where the outside statement must be made by a party, under a declaration against interest exception, anyone can make the statement.

Since the Respondent had an opportunity to review the County's evidence in advance of the hearing, neither party should be granted a continuance to call a witness unless there are *very* compelling reasons why the party could not have anticipated the need for that witness. Moreover, since hearsay is admissible, the person hearing a statement can always testify to the words heard, and the Hearing Officer can determine whether those words fit into the party admission or declaration against interest hearsay exceptions.

Hearsay is usually the most frequent objection attorneys will make at an administrative hearing. They may understand that hearsay is admissible in administrative hearings but believe they waive the objection if they do not put it "on the record." This is an erroneous belief.

Official records

California Evidence Code section 1280 permits official records and other official writings to be admissible as hearsay when offered in any civil or criminal proceeding to prove the act, condition, or event if all the following apply:

(a) The writing was made by and within the scope of duty of a public employee.
(b) The writing was made at or near the time of the act, condition, or event.
(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

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Common Objections, Continued

B. Official records exemption

County Inspection Reports, Pesticide Episode Investigation Reports and Investigative Sample Analysis Reports generally fit this exception. Care should be taken not to try to expand this much, if at all, beyond these documents.

These reports are also admissible as hearsay if used to *supplement or explain* other evidence presented at the administrative hearing. Government Code section 11513 states:

> (c) …Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.
> (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Authentication of writings and official records

Technically, writings must be "authenticated" to become part of the record. A writing is authenticated by introducing evidence sufficient to support a finding that the writing is what the person offering it as evidence claims it to be. Authentication is rarely an issue in these hearings. Writings in these hearings are commonly authenticated by stipulation. If not stipulated, evidence to authenticate a document could include testimony of a custodian of records, or anyone who saw the writing made, including the author.

A witness, normally the author, must also testify in order to present evidence that the writing is an official record – 1) the writing was made by and within the scope of duty of a public employee; 2) the writing was made at or near the time of the act, condition, or event; and 3) the source of information and method and time of preparation indicate trustworthiness. In addition, the author should be available to testify directly to what the author remembers about the events recorded in the official record and to answer questions. The official record can be used to reinforce that testimony. Presenting only an inspection form to prove an act occurred is only acceptable when the author is truly unavailable (e.g., on extended medical leave, etc.). A Hearing Officer could, and should, question the motive of the County for not presenting a witness to provide testimony about events when the witness is available. It is not good policy or practice to rely solely upon the written report in the

Continued on next page

Common Objections, Continued

Authentication of writings and official records, (continued)

application of this hearsay exception. The Hearing Officer may technically be able to base findings on the report but may choose not to because the Hearing Officer doubts its reliability because it raises questions that could have been answered if the author was present as a witness.

Addressing objections

Common objections raised during administrative civil penalty hearings arise from sincere concern. Objections should be addressed in a respectful and efficient manner, such as "The strict rules of evidence are not applied in these hearings. Your objection is noted for the record. Proceed." If the Respondent is represented by an attorney, the attorney may be unfamiliar with administrative hearings generally and/or unfamiliar with the specific hearing processes authorized by FAC sections 12999.5, 15204 and 15204.5 and B&PC sections 8617 or 8663. Certain objections may be made out of habit. Attorneys probably are not purposefully trying to make the situation more difficult. The Hearing Officer should not let the objector (usually an attorney) argue with the Hearing Officer. Simply reiterate "I said, proceed."

Substantiating documents

This may occasionally be a reason for an objection. One way for the Hearing Officer to respond is "Your objection is noted. What specifically do you find deficient in the document?" Then try to address the matter.

Other common objections

What follows is a brief description of the other common objections that might be raised at the hearing. Although the Hearing Officer does not have to stop the asking or answering of a question because of an objection, there are certain behaviors that should be controlled that are, in fact, the behaviors that inspired an objection.

1. **Argumentative**. Presenting an argument or position rather than eliciting information from the witness. If a questioner lapses into this behavior, it is the responsibility of the Hearing Officer to point it out (objection or not) and stop it. Persons representing themselves often lapse into a type of self-testimony when presenting their cases and believe that they are introducing evidence. The Hearing Officer should point out that they can only testify when they are called as a witness. They can, of course, call themselves and testify in a narrative.

Continued on next page

Common Objections, Continued

Other common objections

2. **Leading**. The question suggests the answer to the witness by the form of the question. For example, "Isn't it true that when he said that to you, it made you feel terrible?" The non-leading question would be "How did you feel when he said that to you?" Even though leading questions are allowed, it is important to remember the Hearing Officer is judging *witness* credibility. Therefore, it is perfectly appropriate, and often some help to an inexperienced questioner, to point out that you want to hear the witness's point of view, not the questioner who is putting words in the witness's mouth.

3. **The Best Evidence Rule**. In these hearings, copies are perfectly acceptable as long as they appear credible (i.e., they don't appear altered, etc.).

4. **Privileged**. All witnesses in court must answer the questions asked of them or they can be held in contempt. The exception of this rule is when the information called for is "privileged." A commonly known privilege is "attorney-client." This issue should not arise at these hearings.

5. **Compound Question**. Two or more questions in one (e.g., "What time did you wake up and what time did you go to bed?"). These types of questions usually lead to ambiguous answers which lead automatically to rephrasing of the question into two parts.

6. **Uncertain – Ambiguous – Unintelligible**. As mentioned earlier, these questions, if truly uncertain, ambiguous, or unintelligible, will be answered with a "Huh?" which leads to rephrasing.

7. **The Question Calls for a Speculation**. Witnesses can speculate. The Hearing Officer must simply recognize that the answer is speculation and appropriately "weigh" it.

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Common Objections, Continued

Other common objections, (continued)

8. **Witness not Competent to Answer the Question**. This usually arises when young children or persons who appear infirm are called to testify. The Hearing Officer, once again, should simply consider all of the aspects of a witness' testimony when "weighing" it.

9. **The Question is not Within the Scope of Direct Examination**. In court, when an attorney cross-examines a witness, only questions related to the questions asked on direct examination are allowed. In administrative hearings, parties may ask any relevant question when examining any witness at any point in the process.

10. **The Witness is not an Expert on the Subject Matter and Therefore Cannot Give an Opinion Regarding It**. (Often called lack of foundation.) All witnesses at administrative hearings can give their opinions when asked. The party calling the witness should illicit information from that witness to show the Hearing Officer that the opinion should be given due consideration. The Hearing Officer should consider why this particular opinion should be taken seriously (i.e., weigh the credibility of the witness) when preparing the Proposed Decision.

Section 9.8
Unfairness Allegations

Uniform enforcement

Members of the regulated public are entitled to equal treatment by those enforcing laws and regulations. Uniformity of enforcement is a goal of DPR and is the underpinning of the administrative civil penalty program.

The Hearing Officer

A Hearing Officer who, in a particular case, believes they cannot be fair and impartial should not serve as the Hearing Officer in that case. However, the mere fact that a Hearing Officer is employed by the agency bringing the action (on a permanent or contract basis) does not mean the Hearing Officer cannot be fair and impartial in making their findings and decisions, provided the Hearing Officer was properly excluded from the county's pesticide prosecutorial/advocacy activities.

The Hearing Officer's Introduction

The Hearing Officer only needs to provide their name and inform the audience that the Commissioner has asked them to hear the case on the Commissioner's behalf. It is not necessary to reveal personal or professional qualifications or titles.

Allegations

If the Respondent independently raises an "unfairness" issue, it must be addressed at the hearing and in the written decision. It is a rare occurrence that a Respondent raises a specific unfairness allegation about a Hearing Officer. If they do raise the issue of fairness, it is usually a general concern such as "How can a former Commissioner be fair to me?"

Respondent's burden to produce facts when making an allegation of "Hearing Officer bias"

Under California law, it is a well-settled principle that due process in the case of an administrative hearing requires only a reasonably impartial, reasonably noninvolved reviewer. *McIntyre v. Santa Barbara County Employee's Retirement System*, 91 Cal.App. 4th 730 (2001); *Linney v. Turpin*, 42 Cal.App. 4th 763 (1996).

If the Respondent were to take legal action to overturn a decision, they would assume the burden to produce facts to show that the Hearing Officer was biased against them and was not treated the same as others in similar situations.

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Unfairness Allegations, Continued

Bias cannot be brought up on appeal	If the respondent did not allege bias at the hearing, bias is not grounds to overturn the Decision on appeal.

Section 9.9
Ex parte Communications

Definition

Ex parte communication is a communication between the decision maker (i.e., a Hearing Officer or CAC) and only one party to the action, made outside the presence of the other party to the action.

Importance of prohibition

***Ex parte* communications are prohibited.**

If the decision maker hears from only one party, there is a potential for the decision maker to either:

- reach a decision before hearing all the evidence from both parties, or
- reach a decision on information the other party did not have an opportunity to hear and to cross-examine or refute.

This creates the potential for bias on the part of the decision maker which undermines due process.

If the Hearing Officer is an employee of the County and is confronted with *ex parte* communication or influence from their supervisor or Commissioner, politely tell the person the matter may not be discussed.

Section 9.10
Common Issues – Suggested Solutions

Introduction

What follows is a compilation of examples of issues from actual administrative civil penalty hearings. These examples range from broken audio recorders to requests to video tape the hearing, and other hearing complications. DPR will continue to gather this information and periodically update this section of the Compendium. Over time, many problems that could arise at a hearing will be included and addressed in this section so Hearing Officers using this Compendium will be prepared for any set of circumstances. Hearings are, at their core, basic human experiences. As such, they necessarily will vary as much as the individuals involved.

Leaving the record open

Q: Is it appropriate to hold a hearing and then leave the record open to receive additional evidence from one party?

A: No. The hearing record is complete when the hearing is closed. An *ex parte* communication is a communication between one of the parties and the Hearing Officer about the hearing without the other party present. *Ex parte* communications are prohibited. It is inappropriate, and a denial of due process, for the Hearing Officer to consider evidence from one party which the other party is not allowed to confront and rebut. It is also inappropriate to accept evidence outside the hearing setting even if it is sent to the other party to rebut in writing. The parties should come to the hearing prepared to present all their evidence at that time. If the Hearing Officer is convinced that additional evidence is necessary for a fair decision to be made, the **hearing should be continued** until such time as that evidence can be presented **on the record** with all parties present.

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Common Issues – Suggested Solutions, Continued

One party cannot attend

Q: Is it appropriate if one party cannot attend the hearing on the day and time scheduled, to hold the hearing with the remaining party and send the tape of that to the other party for a written response?

A: No. If one party cannot attend, the Hearing Officer should consider whether there is good cause for continuance. Unless continuing the hearing would impose a significant hardship on the County, brief continuances (i.e., one week or so) should be granted. All factors should be considered including when the continuance was requested, why, etc. If it is decided that a continuance is not warranted, then the hearing should proceed as scheduled. Always presume that the Respondent will appear at the hearing, even if a continuance is requested and denied and even if the Respondent asserts they cannot possibly make it. Stress that the continuance is denied and that the Respondent will only be provided with the statutorily required "opportunity to be heard" at the time scheduled and that the hearing will proceed whether the Respondent is there or not.

Sequestration

Q: Do the parties have the right to have witnesses sequestered?

A: Yes. Sequestering (excluding) of witnesses means keeping them out of the hearing while other witnesses are testifying. A witness need only be sequestered until the witness has testified. The purpose of sequestering witnesses is to ensure that one person's testimony will not influence another's. Therefore, the Hearing Officer should remind witnesses not to discuss their testimony with other witnesses while waiting to testify. It is important that County and Respondent witnesses wait in separate locations.

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Common Issues – Suggested Solutions, Continued

Limiting observers	**Q: Can either party limit the number of persons observing the hearing?** A: No. The hearing is open to the public. The County should make an effort to accommodate a Respondent who requests a hearing room large enough to hold persons they wish to invite. The County should avoid the appearance of "ganging up" on the Respondent by filling the hearing room with County personnel who are not involved with the hearing.
Bias	**Q: Is the Hearing Officer required to inform the Respondent of their right to request disqualification of the Hearing Officer for bias?** A: No. The party alleging, *and prepared to prove*, bias must make the request for disqualification.
Recording	**Q: What do you do if someone requests permission to record (audio or video) the hearing?** A: Allow it, as long as it does not disrupt the hearing. Explain that your audio recording is the official record.
Other laws or regulations	**Q: What if a party wants to refer to a law or regulation but does not have a copy to submit as an exhibit?** A: Since the Hearing Officer may take official notice or judicial notice of laws, regulations, and other officially published documents, the parties can simply request official notice be taken by citing the section or title of the document. By taking official notice of the citation, it becomes part of the record. That information may be used (or not) in making the proposed decision. Official notice cannot be taken for pesticide labels, correspondence, etc.

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Common Issues – Suggested Solutions, Continued

Recording quality

Q: How does one assure a quality audio recording of the hearing?

A: Use a quality recorder, with several microphones, if possible. Make sure everyone speaks slowly and clearly. Allow only one person to speak at a time. Be alert to extraneous noises (e.g., papers shuffling, loud outside noises, etc.). Always have the witnesses and representatives identify themselves before speaking.

Recording issues

Q: What if the audio recorder malfunctions during the hearing and it is not discovered until after the hearing?

A: Due process requires that an adequate administrative record be made of the hearing. This is accomplished by making an audio recording of the hearing, rather than hiring a court reporter. Having someone, even a person experienced at shorthand, take "verbatim notes" of the hearing is not adequate.

The appropriate response to an incomplete tape recording may depend on where the malfunction occurred. In one case the Hearing Officer dropped and broke the recorder at the close of the hearing. The only thing not recorded was the closing statement. The Hearing Officer simply added a note to the administrative record describing what had occurred and their recollection of what was said. If all or most of the hearing was not recorded, it is clearly not possible to adequately recollect and write down all the testimony that had been given. The best practice, in this case, is to repeat the hearing.

Non-party testimony

Q: What if a non-party, with some personal interest in the hearing outcome, wants to appear and testify and/or wants to participate in the hearing?

A: Non-parties do not have a *right* to participate in the hearing. They can observe, but not disrupt, the hearing. Even if the parties agreed to have a non-party testify, this should not be allowed. Even if a non-party has potentially relevant testimony to offer, it is the responsibility of the parties to call the non-party as a formal witness.

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Common Issues – Suggested Solutions, Continued

Non-party representation	**Q: What if a person appears at a hearing, sent by the Respondent as the Respondent's representative?** A: The Respondent may be represented by the owner, a family member, an employee or officer of the company, or other similar representative of the company. Licensed attorneys are the only other persons who can represent the Respondent in a hearing.
Hearing room	**Q: What if the room in which you are to conduct the hearing is inappropriate?** A: If an orderly hearing cannot be conducted in the room assigned, the Hearing Officer must insist on an appropriate room. This is, of course, a matter of judgement as to what is appropriate.
Additional preparation	**Q: What if a Respondent comes to the hearing expecting something more informal and, after seeing the hearing setting, wants to continue the hearing to prepare and/or get an attorney?** A: Unless the County can make a very good argument that the continuance would be prejudicial, allow the continuance. Flexibility is key in situations like this.
Better preparation	**Q: What if the Respondent, after the County presentation, wants a continuance to better prepare and/or hire an attorney?** A: In this situation, the Respondent's request is less compelling. It would not be unreasonable to take the position that the Respondent should have asked for the continuance before the hearing began and to deny the continuance request. Of course, a Hearing Officer will never be accused of denying due process for allowing the continuance.

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Common Issues – Suggested Solutions, Continued

Affirmation

Q: What if a witness refuses to take the affirmation?

A: Start by determining why the witness objects to the affirmation. The witness may object to the religious association (i.e., "…so help me God"). That witness may agree to simply affirm or promise to tell the truth.

Witnesses do not have to "swear to God" or hold up their right hand; they may simply be asked "Will the witnesses in this proceeding please stand?" When they are standing, ask "Do you promise to tell the truth in this hearing?" If a potential witness cannot stand, use your good judgement about how to proceed.

The real issue is witness credibility. If someone will not "swear" or "promise" to tell the truth, the Hearing Officer should make a note, *and tell the witness*, the testimony will be judged in light of the fact that no pledge was given. The witness, however, should be allowed to testify. This may simply be a matter of "principle" with the witness who will then proceed to give clearly credible testimony. The reality is witnesses who lie in these hearings are not subject to criminal prosecution for perjury.

Stipulation and Waiver to Order

Q: What if the Respondent appears at the hearing and before, during, or after the hearing agrees to the action?

A: The best practice is to have the Respondent sign the Stipulation and Waiver to Order. It is hard to conceive of why the Respondent would refuse this request. With the Stipulation signed, the issue of potential appeal is resolved (i.e., Respondent waives the right to appeal). Without a signed stipulation, the Hearing Officer must proceed with preparing the Proposed Decision for the Commissioner.

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Common Issues – Suggested Solutions, Continued

Another witness	**Q: What if the Hearing Officer wants testimony from a witness who has not been called by either party?** A: While the Director has the authority to issue administrative subpoenas, that authority has not been delegated to Hearing Officers. The Hearing Officer can always request the attendance of witnesses and can continue the hearing to facilitate that attendance. The County should be willing to produce any County employee requested. The Respondent may resist, and cannot be forced into, producing witnesses (e.g., employees). The Hearing Officer should emphasize the importance of the witness's appearance.
Time to review	**Q: May either party ask to read the documents to determine if they have an objection to them being admitted?** A: Yes. Allow the party time to read the document. If there is an objection, clarify that admitting the document into evidence does not mean the evidence is assumed to be true. Remind the party that **all relevant evidence** is admissible in the administrative civil penalty hearing process. If the party believes it is not admissible, then ask what portion they object to. Make note of the objection for the record, but do not offer a ruling during the hearing.
Settlements	**Q: What if the Respondent agrees to the first violation, as long as the County strikes the other two violations?** A: Settlements are not authorized by FAC sections 12999.5, 15204, and 15204.5 or B&PC sections 8617 and 8663. CACs do not have authority to engage in settlements for administrative civil penalty actions concerning pesticide use laws and regulations.
Recording the pre-hearing conference	**Q: Is the pre-hearing conference recorded?** A: No. The pre-hearing conference is intended to be outside of the record to encourage candid discussion ONLY between the County Advocate, Respondent or Representative, a translator (if necessary), and any assistants deemed necessary. No one else (including the Hearing Officer) should be present.

Section 9.11
Hearing Officer Issues and Tips

Introduction

This section summarizes the role of the Hearing Officer.

Issues and Tips

- Prepare for the hearing by:
  - Reviewing the NOPA and relevant attachments,
  - Doing the "elements of the violation" exercise for each code section cited as a violation, as well as the applicable fine regulation, and
  - Making notes regarding these items for the hearing.
- Use organizational tools. For example, the Hearing Officer Checklist, and this section; scripts in this Chapter such as the Opening and Closing Remarks; and forms or lists such as the Sign-in and Oath Record and Exhibits Record.
- A quality audio recording is important. Ensure the recorder works properly. Confirm it produces an acceptable playback volume and that all parties can be heard clearly.
- To ensure a complete record:
  - Have the County Advocate or Respondent state the name of the witness before each question or have the witness state their own name before answering or making any statement.
  - Explain any hand gestures for the record.
  - Housekeeping issues do not need to be on the record – do this off the record.
- Remind parties at the beginning of the hearing that intent is not a required element of any pesticide requirement, it is unnecessary to introduce evidence that will show or not show intent.
- Be aware of who is in the room. Do not let witnesses in until it is their turn to testify.
- After breaks, try to get back early to reorganize and prepare.
- Speak *clearly* and avoid all use of jargon acronyms. For example, say "Department of Pesticide Regulation" not "DPR". Define other common acronyms (i.e., PUR, NOI, RMP, QAL, PCA, etc.). This will avoid any confusion by hearing participants who are not familiar with these abbreviations.

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Hearing Officer Issues and Tips, Continued

Issues and tips, (continued)

- Make sure exhibits and witness testimony are understood by those listening to the recording by:
  - Always referring to an exhibit number or letter verbally. If you, a witness, County Advocate or Respondent are pointing to a portion of an exhibit, always give the reviewer listening to the hearing guidance such as "I am pointing to the second paragraph on page four of Exhibit L which begins with 'On August 7, …'"
  - Making sure that at least one or more of the exhibits has the compass direction clearly marked if the witness, County Advocate or Respondent is giving compass direction.
  - Reading handwritten notes introduced into evidence. This is especially important if the note is not clear or legible.
- Know what can be admitted as evidence in an administrative civil penalty hearing, and common objections. For example, if you were to get a hearsay objection, be comfortable with responding as described earlier in this Chapter.
- The Hearing Officer is responsible for the pace of the hearing:
  - Keep the hearing moving. If the examiner asks the same question repeatedly, tell them that the question was asked and answered and move them along.
  - If the documents are overwhelming or not introduced in a comprehensible order, take a recess to organize the evidence.
- Always ask the examiner if they have any more questions at the end of each examination. Failure to do so may result the Respondent claiming they were rushed, railroaded, etc. if the decision is appealed.
- Proactively avoid *ex parte* communication.
- Avoid use of legal phrases and unnecessary commentary in the hearing and the Proposed Decision.
  Examples of phrases to avoid:
  - "clear and convincing testimony"
  - "beyond a moral certainty"
  - "the Respondent has received due process up to this point"
  - "there was no specific intent, therefore…"
    Intent is not an element of or relevant to pesticide administrative penalty hearings
- Be and appear impartial and unbiased. Hearing Officers should avoid addressing people by their first names. Address County Advocates, Respondents, and witnesses by their proper titles (i.e., "Mr. Smith," "Inspector Ishimoto," or "Dr. Gomez" not "Bill," "Susan," or "Boris.").

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Hearing Officer Issues and Tips, Continued

Issues and tips, (continued)

- The Hearing Officer's role is to apply the laws or regulations correctly in a manner consistent with the purpose of the law or regulation. The Hearing Officer does not have to agree with the laws or regulations and should not state an opinion in either the hearing or Proposed Decision.
- 3 CCR section 6130 or 16 CCR section 1922 identify the Commissioner as being responsible for setting the fine in civil penalty actions. The Hearing Officer is not permitted to change the fine without making a finding the classification or fine mount are not supported by evidence in the record. See Section 11.2.3 for more information.
- Be relaxed and rested on the day of the hearing. Being the Hearing Officer is an arduous task and requires extreme focus and concentration. Eat a good breakfast.

Things a Hearing Officer should NOT do

1. Do not raise issues that were not raised by the parties. For example:
   - Do not raise the issue of bias unless brought up by the Respondent.
   - In the Proposed Decision, do not raise issues that were not raised in the hearing.
2. Avoid these topics unless it is necessary to keep the hearing running:
   - Qualifications/fairness of the Hearing Officer
   - Due process requirements
   - Judicial or Official Notice
   - Hearsay (except to say it is allowed in our hearings)

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Hearing Officer Issues and Tips, Continued

Things a Hearing Officer SHOULD do

1. Always check the sound systems to ensure each party's testimony is audible and clear. Do multi-phased checks of the microphone, that is, record all parties and then play it back to ensure the recording is audible and clear.
2. Always read aloud from prepared written document(s) that set out the rules and procedures for the hearing at the beginning of the hearing. Do not recite from memory just in case something is forgotten. Please consider using the example script in this Chapter.
3. Never consider any evidence that was not introduced during the hearing. Additional "investigation" conducted by the Hearing Officer, outside of the hearing, could be grounds for rejecting a decision on appeal. If the evidence is not introduced at hearing and not subjected to cross-examination and review by all parties to the action, then do not consider the evidence.
4. Avoid using adjectives in the written decision. For example, "clearly" [there was a violation], "severe" [rain], unless that adjective (in this example, "clearly" and "severe") is in the law or regulations. Only use adjectives in the context of the law or regulation from which the adjective is used.
5. Keep the Proposed Decision short. Focus on the issues, finding of facts, and analysis.

Summary

1. Seek the truth.
2. Weigh the evidence presented.
3. Apply laws and regulations correctly.
4. Arrive at a fair decision.
5. Keep it simple.

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