1. General Evidentiary Issues

A. Definitions

Evidence: Proof legally presented through witnesses, documents, objects either real or demonstrative. [See California Evidence (Evid.) Code Section 140, pg. 1]

Evidence as defined by lexicographers and law writers, includes all the means by which, in a judicial trial, it is sought to establish or disprove any material allegation of a civil or criminal pleading. Any circumstance which affords an inference as to whether the matter alleged is true or false is therefore evidence, and is commonly understood to be within the meaning of that term. The word **"evidence"**, in its technical meaning and common acceptance, includes all of the means by which any fact in dispute at a judicial trial is established or disproved.

The Rules of Evidence: the law governing the admissibility of proof at a hearing. They include the codified rules of the jurisdiction as well as constitutionally mandated requirements.

B. Court vs. Administrative Rules

The rules of evidence developed over the centuries to meet the special problems of presenting evidence to a trial jury. The emphasis is on **admissibility of evidence** as a means for screening out evidence that is not sufficiently reliable to form the basis of the lay jury's findings of fact.

Administrative law has developed with notions of efficiency, without juries and, for the 20th (and now 21st) century, with the notion that administrative agencies are not bound by the formal rules of evidence.

The California Department of Social Services (CDSS) Manual of Policies and Procedures (MPP) Section 22-050 provides as follows:

".1 The taking of evidence in a hearing shall be conducted by the Administrative Law Judge in a manner best suited to ascertain the facts and to control the conduct of the hearing.

.11 Prior to taking evidence, the Administrative Law Judge shall identify the issues and shall state the order in which evidence shall be received.

.2 Except as provided below, evidence shall be submitted if **it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs.**

.21 The **rules of evidence**, as applicable in judicial proceedings, **shall not be applicable** in state hearings.

.22 The Administrative Law Judge **shall be permitted** to exclude evidence which is irrelevant, cumulative, or unduly repetitious. (See Evid. Code Section 352, pg. 4)

.23 The Administrative Law Judge **shall exclude** evidence which is **privileged** under the **Evidence Code** if the privilege is claimed in accordance with the law. (However, see Evid. Code Section 910, pg. 19)

.3 Although evidence may be admissible under Section 22-050.2, the Administrative Law Judge shall consider the nature of the evidence in assessing its probative value.

.4 "Official Notice" describes the manner in which an Administrative Law Judge or the Director will recognize the existence and truth of certain facts which have a bearing on the issue in the case, without requiring the actual production of evidence to prove such facts. Official notice may be taken of either a proposition of law or a proposition of fact….**"** (See Evid. Code Sections 450, 451, 452 and 453, pgs. 6-8)

C. Relevant and Material Evidence

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (See Evid. Code Sections 210, pg. 2, 350 and 351, pg. 3)

Materiality – Historically, **materiality**, has been defined as relevant evidence which bears some relationship to the issues in the particular case. Because courts and lawyers have tended to use the phrase as if it were synonymous with **"relevance"**, the concept is no longer defined separately under most state's laws.

D. Cumulative, Repetitive and Prejudicial Evidence

See Evid. Code Section 352 and MPP 22-050.22! (see prior page)

E. Foundation – Authentication

Foundation = Preliminary questions which are asked of a witness to establish a basis for admissibility of evidence. The questions **"lay"** a foundation for the subsequent questions by illustrating the relevance of the critical questions or the absence or waiver of a privilege. In a court, the foundation demonstrates the criteria for admissibility

(which in administrative hearings such issue generally goes to the weight that is going to be given that evidence once it has been admitted), i.e., experts. (See Evid. Code Sections 400, pg. 4 and 1400-1402, pgs 38-40*)

Foundation evidence aids the ALJ in determining whether the evidence to be offered is relevant, not unduly repetitious or otherwise wasteful of the judge's time. In addition, it will help the judge determine the reliability of the evidence and what weight it should be accorded.

"Lack of foundation" is the objection made to prevent the admission of evidence that has not been shown to be relevant to the issue (or relevant but repetitious or otherwise wasteful). Like most objections which go to admissibility, rather than weight, such an objection need not be entertained in an administrative hearing where the ALJ can admit all evidence. However, the absence of an adequate foundation should cause the ALJ to consider whether the proffered evidence should be admitted.

F. Weight of Evidence – Standard of Proof

1. Weight of the evidence = The relative value assigned to the credible evidence offered to support a party's position on a given issue. It is not quantifiable in an absolute sense:

> "The weight of evidence is not a question of mathematics, but depends on its effect in inducing belief'…'There is no rule requiring a court to determine an issue solely on the number of witnesses." **Hessler v. Suburban Propane Natural Gas Co. of Pa. 166 A2d 880, 882 (Pa. 1961) citing Hale & Kilburn Mfg. Co. v. Norcoss, 199 Pa. 283, 293, 49 A. 80, 84**

2. Standard of Proof = The amount of evidence necessary for a party to prevail in a given case. **"Preponderance," "clear and convincing"**, and **"beyond a reasonable doubt"** are all standards of evidence. (See Evid. Code Section 115, pg. 1, and 662, pg. 10)

The United States Supreme Court in **Steadman v. SEC, 450 U.S. 91 (1981**) held that unless Congress has specifically prescribed a different standard of proof, the Federal Administrative Procedures Act (APA) requires that the standard of proof in an administrative proceeding is the "**preponderance of the evidence**".

"The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder, both the presiding officer and any administrative appeal authority, must be convinced that the factual conclusion it chooses is **more likely than not**." Koch, Administrative Law and Practice, Vol. 1, p. 491 (1985)

[Caveat – In Intentional Program Violation (IPV) or Administrative Disqualification Hearings (ADH's) in the Food Stamps (FS) Program - the burden of proof is **"clear and convincing"**]

G. Burden of Proof

1. Burden of Proof = the duty of a party to prove a certain issue by the assigned standard of proof. It is a composite of two distinct evidentiary concepts: the burden of going forward with the evidence and the burden of persuasion.

Generally, both burdens initially rest with the party pleading the existence of a fact.

Burden of going forward with the evidence = the duty of a party to present sufficient evidence on an issue in order to have the issue considered by the fact finder. It is also referred to as the **"burden of producing evidence"** (see Evid. Code Section 110, pg. 15). In a jury trial, if the burden of going forward (burden of producing evidence) has not been met, the judge may decide the issue without sending it to the jury (motion for directed verdict or summary judgment).

Think of the **burden of persuasion** as that issue dealing with the weight of the evidence. We will not discuss the burden of persuasion further in this session.

2. The ALJ's concern about the burden of proof

The Federal APA and most state APA's assign the burden of producing evidence to "the proponent of a rule or order." In other words, the party initiating the action that creates the need for a hearing has the burden of producing evidence on those issues that it needs to establish to get the result it seeks.

Where appropriate, tribunals modify the assignment of the burden of producing evidence to require the party with the most knowledge of the facts involved to present the evidence regardless of which party has the burden of proof.

H. Presumptions

A presumption is a procedural device that operates to shift the evidentiary burden of producing evidence to the party against whom the presumption is directed. In other words, the proof of fact "A" is enough to satisfy a party's burden to establish fact "B" and the burden of showing the fact "B" does not exist shifts to the opposing party.

Presumptions are of two (2) types.

1. Rebuttable Presumption is when the additional facts may show that the inferred fact may not exist. (See Evid. Code Section 641 and 662, pg. 10)

2. Legal (Conclusive) Presumption is where the inferred fact is deemed to exist as a matter of law (statute or case law) and may not be disproved by additional facts even if those facts might lead to a different inferred fact. (See Evid. Code Section 620, pg. 10)

   Example: The legal presumption of drunkenness based upon a blood alcohol content in excess of .08 may not be rebutted by proof that a defendant was, in fact, capable of operating his car in a competent manner.

I. Marking and Identifying Evidence for the Record

Caution – Marking attachment pages to Statement of Position (SOP) as **Exhibit #** ?? when the ALJ will mark the SOP as an Exhibit itself.

Foundation/Authentication and Voir dire.

J. Objections – to preserve record for appeal – waiver.

2. Hearsay and the Legal Residuum Rule

A. Hearsay

By the 17th century, hearsay was excluded from evidence in the common law courts because the judges felt that it was untrustworthy or unreliable.

It was unreliable because the declarant making the statement might not have been a competent witness at the time the statement was made in that he:

(a) did not accurately **perceive** what was reported,

(b) did not **remember** what was perceived, or

(c) did not **communicate** the perception accurately;

(1) Interpreters

(2) Sign Language

(3) Spelling Boards

1. Or, the declarant might have **purposely** misstated the facts or partially suppressed the truth;

2. And, none of the safeguards of an in-court testimony were available when the statement was made, to wit:

(a) the declarant was not under oath at the time the statement was made.

(b) The statement was not made in the presence of the trier of fact who would be able to make a contemporaneous observation of the declarant's demeanor.

(c) The declarant could not be cross-examined at the time the statement was made.

Hearsay is evidence that depends on the credibility of someone who cannot be cross-examined for its probative value. Lawyers traditionally define it as an out-of-court statement offered to prove the truth of the matter asserted. (See Evid. Code Sections 150, pg. 1and 1200, pg. 32)

California Evidence Code Section 225 provides that a "Statement" means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.

4. Assertions

   (a) Oral – If a witness testifies as to what he heard someone say and if that testimony is offered for the truth of the matter asserted, it is hearsay.

   (b) Written – If the witness testifies as to what he has read and if it is offered to prove that what he has read is true, it is hearsay.

   (c) Nonverbal – nonverbal conduct can be a statement. For example, "he nodded his head 'yes'" or "he answered in sign language". A still photograph or motion picture (video tape or CD) can be an assertion constituting hearsay. Normally photos are not assertive; they are passive, but a staged photo or film could be deemed to be an assertion. For example, a picture of a person on crutches pointing to a ladder with a broken rung could be hearsay if the picture is offered to prove that the broken rung caused the injury. A sketch may be hearsay if the artist was given a description by someone else.

5. Non-assertions – Most non-verbal conduct is non-assertive. About half of the out-of-court utterances are non-assertive and therefore are not hearsay.

   (a) Non-assertive utterances – "Hello", "Thank you", "Look out!" are not expressions of fact.

(b) Non-assertive writings – “Keep off the grass”, “Slow down”, are often admitted as evidence for what they imply; betting slips imply bookmaking, but are not introduced to prove the accuracy or truth of the numbers on the slip.

(c) Non-assertive nonverbal conduct – witness testifies to seeing a man limp in order to prove that the man was injured – the limping was not done to express the injury but it may prove it as circumstantial evidence. Or if tulips bloom, it is not to assert that it was spring, but, that fact can be inferred.

B. Hearsay – not admissible in trial courts – exceptions

C. Hearsay in Administrative proceedings

1. Residuum Rule

In the case of Carroll v. Knickerbocker Ice Co., 113 N.E. 507 (1916), a New York Court of Appeals, in construing the New York Workman’s Compensation Act, laid down the rule that

“still in the end there must be a residuum of legal evidence to support the claim before an award can be made.”

The court held that when substantial evidence is required, “hearsay testimony is no evidence.” 218 N.Y. 435

In other words, under the Residuum Rule, although hearsay is always admissible and can be relied upon, there must be some evidence in support of the prevailing (winning) side that would be admissible in a court of law under the formal rules of evidence.

This rule has been abolished with respect to its application before federal agencies.

Under the California Administrative Procedures Act (APA), the current state of the Residuum Rule is encapsulated in California Government Code Section 11513(c) and (d), which provide as follows:

"The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. 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.

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 . . . ."
See Carl S. v. Commission for Teacher Preparation and Licensing, 126 Cal.App.3d 365, 178 Cal.Rptr. 753 (1981)

3. Administrative Law and the Exclusionary Rule

Discussion only!

4. Testifying as a witness

A. Sections 700-791, pgs 10-18
B. Evid. Code § pg. 771
C. Evid. Code § pg. 777. Exclusion of Witnesses & MPP 22-049 this booklet, pg. 14.

5. MPP 22-049.7

The rights of the **claimant** and the **county shall include the right to:**

.71 Examine parties and witnesses; (See Evid. Code Section 711)

.72 Conduct such cross-examination as may be required for a full disclosure of the facts; (See Evid. Code Section 773)

.73 Introduce exhibits;

.74 Bring witnesses;

.75 Examine all documents prior to and during the hearing. (Caveat – See Evid. Code Section 771)

.76 Question opposing witnesses and parties on any matter **relevant** to issues even though that matter was not covered in the direct examination; (not limited to scope of direct examination See Evid. Code Section 773 supra.)

.77 Make oral or written argument;

.78 Rebut the evidence.

6. **MPP 22-049** provides as follows:

.1 Attendance at the hearing is ordinarily limited to the claimant, authorized representative, county representative, legal counsel, authorized interpreter, and witnesses relevant to the issue. Other persons may attend the hearing if the claimant agrees to or requests their presence and the Administrative Law Judge determines that their presence will not be adverse to the hearing.

.11 Appearance by the claimant (in person or by the authorized representative) shall be required at the hearing, unless the hearing is a rehearing or further hearing.

.12 The administrative Law Judge shall be permitted to exclude a witness during the testimony of other witnesses. (See Evid. Code Section 777)

.13 Both the county and the claimant shall have the right to have a representative present throughout the hearing. **Both the county and the claimant's authorized representative shall have the right to designate another person to be present and advise the representative throughout the hearing.** This individual may be a witness who testifies on behalf of the county or claimant and in this circumstance, Section 22-049.12 would not apply. **If this individual is a witness, he/she may not be present as an advisor until after he/she has testified.**

.14 The Administrative Law Judge shall have the authority to exclude persons who are disruptive of the hearing.