
BENCH BOOK

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INTRODUCTION

This bench book is designed to advise judges as to proper conduct of a state hearing and how to address a variety of situations that arise in the hearing process. It is to be used as a training tool for all judges.

The policies set out in this bench book represent the official policies of the Administrative Adjudications Division (AAD) of the California Department of Social Services (CDSS). If a judge encounters a situation but believes the policy set out in the bench book should not be applied under the circumstances, that judge should consult the appropriate Presiding Judge.

Because it is awkward to identify persons as he/she, a judge or party will alternatively be referred to as either "he" or "she" throughout a section.

The Staff Development Training Bureau (SDTB) intends to update this bench book as necessary. The date of any additions or modifications will be listed on the bottom of the appropriate page.

Judges are encouraged to make suggestions for corrections or additions to current bench book subjects or ideas for new subjects by submitting written suggestions to the SDTB at MS 19-72.

ABANDONMENTS

Reference: MPP §22-054.22

A state hearing is considered abandoned if the claimant fails to appear within 20 minutes of the scheduled time. But, if the judge and county representative are still available when the claimant appears late for a hearing, the hearing should be held, if possible, to avoid the inconvenience of having to reschedule the hearing. If witnesses were present and have left or the interpreter has departed, then the matter must be considered abandoned or postponed.

The notice informing claimants of the time and place of the hearing also informs claimants that failure to appear will result in a written dismissal of the claim unless a reopening request is submitted within 10 days of the scheduled hearing. Such requests are granted only for good cause as determined by State Hearing Support Section (SHSS) staff.

Once a written dismissal decision is received, the claimant may reinstate the claim only by requesting a rehearing which will be reviewed by the Chief Administrative Law Judge. Based on the assertions made in the request by the claimant, the rehearing may be granted.

When the Chief Administrative Law Judge has granted a rehearing, he has determined that the claimant had good cause for not appearing at the initial hearing. Therefore, if the claimant appears at the rehearing, the judge should not evaluate whether the claimant had good cause for failing to appear at the initial hearing. The judge should proceed as in any other case.

If the claimant is not present at the rehearing, the judge should **carefully review the hearing file to determine if notice of the hearing was sent to the claimant's last known address. The judge should conduct a brief hearing to** determine whether the county or the state was notified of a change of address. If the notice was mailed to the current address of record, the judge shall, after waiting ten days from the date of the rehearing, find that the claimant is unwilling to present the case (MPP §22-054.33) and dismiss the rehearing if the claimant has failed to contact the judge and offer a good cause explanation for the nonappearance. The decision must include a procedural history and a rehearing order sustaining the original dismissal.

If the notice was not mailed to the correct address, the judge must postpone the case so it can be rescheduled.

A hearing request is also considered abandoned if a claimant, at the hearing, is unwilling to proceed with the hearing. This includes behavior of the claimant or of the authorized representative (with the claimant's concurrence) that is so disruptive, abusive or offensive that the judge is unable to conduct a fair and impartial hearing. Before dismissing a claim, the judge must warn the claimant and/or AR that continued offensive behavior will result in a written dismissal. If the AR is the disruptive individual, the judge shall give the claimant the opportunity to proceed without the AR being present.

The same AR should not be permitted to resume participation in the hearing if the matter is continued to a later date.

Refer to *Disruptive Participants*.

AID PENDING

Reference: MPP §§22-072, 63-804.1, 10-117
Title 22, CCR §50953

I Applicability of aid pending

Aid pending is only applicable when:

- A. There has been a decrease, reduction, discontinuance, suspension or cancellation of aid.
- B. There is a change in the manner or form of payment to a protective or vendor payment.

Aid pending is never relevant when:

- C. The grant is unchanged or increased.
- D. An application is denied.

Aid pending shall initially be issued if there is a timely filing. Normally, a timely filing is a hearing request filed prior to the effective date of the county action. Therefore, if an action is to take effect December 1, the filing must generally be made by November 30.

Note that the counties will often propose to reduce or discontinue Aid to Families with Dependent Children (AFDC) or Food Stamps (FS) benefits "effective November 30." This is a technical error, since the discontinuance really does not take effect until the first of the following month, as the AFDC Assistance Unit (AU) or FS Household (HH) is eligible on the last day of the payment month.

EXCEPTIONS:

There are many exceptions to the general rule. The most common are:

- E. Timely notice is not required (per §22-072.2). In those cases, the claimant must file within 10 days of the required adequate Notice of Action (NOA), per §22-072.3, to receive aid pending.
- F. Timely notice is required but is not issued. In these cases, a hearing request is timely for aid pending purposes when it is filed before the date the untimely notice could have taken effect.

Example:

Assume that the general rule applies and that 10 day prior notice is required. The county issues a NOA on April 25, to decrease the AFDC/FS benefits effective May 1. This NOA could have permitted the county to decrease benefits effective June 1. A hearing request submitted by May 31 is timely for aid pending purposes. (MPP §22-072.5)

II Timeliness of NOA/hearing request

- A. For an NOA to be timely, there must generally be 10-day advance notice. The first and last days are excluded. A NOA sent on April 20 is timely to take effect May 1 because there are 10 days (April 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30) between the date of mailing and the effective date of the action. (MPP §22-072.4)
- B. If an NOA is not adequate, a filing is considered timely whenever it is filed. (MPP §§22-001a, and Paraphrased Regulation (Parareg) 004-2 (AFDC), MPP §63-504.21 and Parareg 201-4 (FS) Pararegs 219-1 through 219-4 (for specific NOAs), Title 22, CCR §51014.1 (Medi-Cal benefits).
- C. If an NOA is timely and adequate, the claimant must file before the effective date. A filing is timely if it would have been timely except for a "holiday" (Saturday, Sunday, and certain other holidays, per MPP §§22-002 and 22-001h.(1). Thus if the NOA was to be effective June 1, and a person ordinarily must file by May 31, when May 31 is a Saturday, and June 1 is a Sunday, a filing on June 2 would be timely for receipt of aid pending.
- D. "Good cause"--In food stamps, a judge may order aid pending even if the claimant filed a hearing request after the last day for timely filing if the claimant can establish good cause for the untimely filing.

There are no good cause exceptions for an untimely filing in AFDC, Medi-Cal or Social Services. Consult with the Presiding Judge before issuing an aid pending order based on good cause for a late filing in these programs.

III Cessation of Aid Pending

Aid pending shall generally cease when:

- A. The judge decides the issue involves a matter of law or policy. (MPP §22-072.73) Aid pending shall not be terminated if the issue is a question of fact, even if the factual contention appears ridiculous on its face. However, the factual question must affect the eligibility determination.

Example:

AFDC is being discontinued because the claimant's certified bank records show he has \$100,000. He claims that the actual value is \$1,000 because the bank simply put in two (2) too many zeros. Aid pending continues.

On the other hand, if the same claimant contends the bank has added one (1) zero too many, and the real value of the bank account is \$10,000, stop aid pending. The factual challenge does not affect the law/policy question of eligibility, because the claimant's undisputed property still exceeds the maximum allowable AFDC property limit.

2. The county proposes to discontinue a 70-year-old claimant's FS benefits because it is undisputed his countable personal property of \$2,500 exceeds the \$2000 limit.

Even though there is no factual dispute, continue aid pending as the issue involves a question of judgment, i.e., is the claimant entitled to have property with a value up to \$3000 as he is over 60 years of age.

- B. The claimant voluntarily, knowingly and in writing waives continued aid. (MPP §22-072.74)
- C. The claimant has received a no good cause postponement. (MPP §22-072.75)
- D. The FS certification period expires. (MPP §22-072.76)
- E. The claimant withdraws or abandons the hearing request. (MPP §22-072.7) Note that after a conditional withdrawal, aid pending may be retroactively reinstated if the claimant requests a hearing and has complied with the conditions of the withdrawal.**

EXCEPTIONS:

In drug restriction cases, aid pending shall continue (if the hearing request was timely filed).

In overpayment adjustments, GAIN and FSET sanction cases, the sanction shall not take effect if the initial filing was timely. (Note: Overpayment adjustments, GAIN and FSET sanctions are not technically aid pending.)

In ADHs, aid pending is never appropriate.

IV. Miscellaneous:

Multiple issues: In cases involving multiple issues (e.g., AFDC, FS, and Medi-Cal) or when there are multiple parts to one issue (e.g., AFDC grant computation) the judge may need to make multiple aid pending rulings.

Example:

1. There is a discontinuance of AFDC, FS, and Medi-Cal but no NOA was sent regarding Medi-Cal; the AFDC NOA was sent on May 15 to be effective June 1; and the FS NOA was sent May 22 to be effective June 1.

The claimant filed a hearing request on June 5. At the hearing on August 3, the judge learns that the claimant's FS certification ends August 31.

The county has not issued any aid pending.

The judge shall:

- (1) Determine that aid pending is not appropriate for AFDC (untimely filing).
 - (2) Order retroactive benefits for FS (untimely NOA) to be issued from June through August but to cease at the end of August due to the end of the certification period.
 - (3) Order retroactive and continuing Medi-Cal benefits on an aid pending basis. (The judge must also order the county to continue Medi-Cal in the decision itself.)
2. The county proposes to decrease IHSS due to decreased need for laundry, and no further need for medical transportation. If the claimant contests both matters, issue aid pending at the prior level. If the claimant does not contest the medical transportation deletion, and says that the laundry need should be unchanged **and does not indicate any other dissatisfaction with the re-evaluation**, allow the county to reduce the IHSS level by the amount of medical transportation as there is no factual or judgmental dispute in regard to that issue.

If there are multiple IHSS reductions, and the claimant contends that total need has stayed the same or increased, aid pending shall be issued at the prior level, even if the claimant agrees that certain reductions are not in dispute.

V. Amount of Aid Pending

In FS, if aid pending is appropriate at all, it shall be issued at the prior level. (MPP §22-072.5) In other programs, "aid shall be continued in the amount that the claimant would have been paid if the action were not to be taken". In some cases, this may result in an actual grant increase.

Example:

1. The county proposes to decrease the claimant's AFDC benefits due to alleged receipt of UIB. The claimant denies receipt. The claimant also has a cost of living adjustment (COLA) in the month of the proposed county action. Aid pending should be issued in the amount to which claimant received without regard to the UIB income but must include the COLA.
2. AFDC was \$400, based on receipt of \$100 Unemployment Insurance Benefits (UIB). The county sends an NOA to decrease AFDC to \$200, based on current receipt of \$300 UBI. The claimant denies receipt of any UBI. Aid pending should be granted as if no UBI were received, i.e., at \$500 level.

VI. Intervening NOA:

In some cases, the county sends a second NOA after the claimant has filed a timely hearing request on the first NOA. If the second NOA involved a different factual basis, the claimant must file timely on the second NOA to receive the benefits reduced in the second NOA.

Example:

The claimant files timely on an NOA discontinuing AFDC and FS effective August 1. On August 4, the county sends a timely and adequate NOA proposing to stop AFDC benefits September 1 because the only eligible child has turned 19. The claimant does not file on that NOA. The hearing is held on September 10. The judge should order aid pending from August 1 only until September 1 for AFDC, and from August 1 forward (assuming the matter is fact/judgment) for FS.

CLAIMANTS AND AUTHORIZED REPRESENTATIVES

Reference: MPP §§22-001 c.(2) and 22-085
Notes from the Training Bureau 95-6-2 and 96-6-2

Claimants

A claimant is a person who has requested a state hearing and is or has been either:

- A) An applicant or recipient of aid.
- B) A foster parent or foster care provider on behalf of a foster child whose foster care benefits are affected by a county action.
- C) The representative of the estate of a deceased applicant or recipient.
- D) The caretaker relative of a child with regard to that child's application for or receipt of aid.
- E) The guardian or conservator of the applicant or recipient.
- F) The sponsor of an alien.
- G) A Transitional Child Care provider who receives direct payments for child care services on behalf of a Transitional Child Care family. Per MPP §22-003.14, a Transitional Child Care provider may only be a claimant in a hearing if the issue is an overpayment that was assessed against the provider.

A deceased person can never be a claimant. If the applicant or recipient of aid is deceased, the claimant is the legal representative of the estate. If there is no estate to be probated, the claimant may be a relative of the deceased.

In some instances an individual or organization will have obtained a Superior Court order declaring the individual or organization to be a "special administrator" and authorizing the individual/organization to act on behalf of the decedent in a state hearing. In such case, the individual/organization can be the claimant. The authorized representative would be any person who was authorized to act in that capacity by the special administrator.

An employee who was displaced by a GAIN participant on a GAIN assignment also may be a claimant in a state hearing to dispute his/her displacement. (MPP §42-731)

Persons who cannot be claimants in a state hearing include parents or relatives of living adult applicants or recipients, IHSS providers (except in *Miller v. Woods* cases), representatives of nursing homes or hospitals, or persons who have filed applications on behalf of applicants or recipients (who are either physically or mentally unable to act for themselves).

Authorized Representatives (AR)

A claimant may choose to have another person represent him at the hearing. It is preferable for a judge to obtain a DPA 19 or other authorized representative form from the claimant at the hearing, although the judge may proceed without such a form if the claimant is present.

When the claimant is not present at the hearing, the judge needs to determine why the claimant is not present, e.g., is the claimant incompetent, or is the mentally competent claimant simply not present.

If the claimant is incompetent, comatose, suffering from amnesia or other mental impairment, then a relative of the claimant, an individual with knowledge of the claimant's circumstances who completed and signed the Statement of Facts for the claimant, or an attorney may be recognized as AR without an AR form. The judge has discretion not to recognize an individual as AR for an incompetent claimant but should have good evidence that the person is not acting in the best interests of the claimant before declining to recognize the person as AR. Refer to *Notes From the Training Bureau 95-6-2*, question 10, for persons other than those stated above who may act as AR for an incompetent claimant.

The judge may accept the sworn testimony at the hearing of the "AR" that the claimant is incompetent unless the judge has some evidence to the contrary.

If the claimant is competent but not present at the hearing, the general rule is that the AR must provide the judge with a DPA 19 or other authorized representative form to be recognized as an AR. The DPA 19 or authorized representative form must have been signed and dated by the claimant on or after the date of action or inaction with which the claimant is dissatisfied.

If the claimant signs a DPA 19 or other authorized representative form designating an organization to act as AR, any individual employed by that organization may be recognized as AR. The judge may also recognize an attorney or someone acting under the direct supervision of an attorney as the AR without a signed DPA 19 or other authorized representative form **IF** the attorney or person acting under the direct supervision of the attorney states on the record that he has had contact with the claimant since the disputed action or inaction **and** that the claimant authorized him to act on the claimant's behalf.

If a prospective AR who is not an attorney or is not a person acting under the supervision of an attorney appears at a hearing without the mentally competent claimant, and without a signed a DPA 19 or other authorized representative form, the judge may proceed with the hearing if the person swears or affirms that the claimant has authorized him to act as AR and the judge further determines that the person was authorized to act as AR. The judge is encouraged to make a collateral contact such as a phone call to the claimant to establish that the prospective AR was authorized to act as AR before proceeding with the hearing. If the judge conducts the hearing, the prospective AR will still have to provide an AR form after the hearing is closed. If the judge does not receive a DPA 19 or other authorized representative form in the time allowed, the judge shall dismiss the claim under MPP §22-054.36.

CONTINUANCES

Reference: MPP §§22-053.2 and .3

If the judge conducting the hearing determines that evidence not available at the hearing is necessary for the proper resolution of the case, the judge shall have the authority to continue the hearing to a later date. The judge shall have the authority to direct either party to produce additional evidence. When a continuance is ordered during a hearing, oral notice of the time and place of the continued hearing shall be given on the record to each party present at the hearing. The judge shall then either send a follow up letter to the parties, confirming the date, time and place of the continued hearing, or have the claimant sign a record open and time waiver form (DPA 421) and provide a copy of that form to all parties, that notifies the parties of the date, time and place of the continued hearing.

When a judge continues a hearing on her own motion, the judge should obtain a time waiver from the claimant. If the claimant refuses to sign a time waiver, the judge shall in her discretion advise the claimant that the judge will decide the case based on evidence that was submitted at the hearing and that no continued hearing will be scheduled. A judge may also continue a hearing without a time waiver, but will still be responsible for having a decision issued by the adopt due date.

If both parties to a hearing have been properly notified of the time, date and place of a continued hearing and either party fails to appear at the scheduled time and place without notifying the judge, the judge shall:

1. Wait 30 minutes after the scheduled hearing time.
2. If either party still does not appear after 30 minutes have elapsed, the judge should open the record and conduct the continued hearing in the absence of the missing party. **The judge should wait at least five (5) days before preparing a decision.**
3. If the absent party later contacts the judge prior to submission of the decision and gives a good cause reason for her nonappearance **and for not contacting the judge or county representative prior to the continued hearing,** an additional continued hearing should be scheduled. Appropriate time waivers should be obtained. The judge shall not consider the evidence taken at the initial continued hearing **if there is any possibility the evidence can again be presented with both parties present.** The judge shall inform the parties **if** the evidence taken at the initial continued hearing will not be considered.

Judges should schedule continued hearings either:

1. On a day that the judge is not scheduled for hearings, or

2. Prior to the first hearing time slot of the judge's hearing day or after the last time slot of the hearing day so long as it will not interfere with the judge's duty to hear other cases.

DISQUALIFICATIONS/RECUSALS

Reference: MPP §22-055
California Government Code §11425.40

At a **scheduled** hearing, a party may request the judge to disqualify herself. **The judge shall go on record and rule on such request.** The judge shall then disqualify herself at the hearing if the judge determines that she cannot conduct a fair and impartial hearing. If the judge disqualifies herself, she shall postpone the case; or, if another judge is available to hear the case at the hearing site, the judge shall ask the case to be reassigned to another judge. If the judge disqualifies herself at the claimant's request and the hearing is postponed, the judge shall notify the claimant that the hearing will be rescheduled. The judge shall document the postponement as a good cause postponement on the DPA 99.

If the judge determines that she can conduct a fair and impartial hearing and prepare an unbiased decision, she shall rule on the record that she will conduct the hearing and prepare a decision.

Judges should also advise the party requesting the disqualification that either party has the right to request a rehearing and that the California Department of Social Services Legal Division will consider arguments for a rehearing including whether the judge has conducted a fair, impartial hearing.

If after the hearing has begun but before a decision has been written, the judge determines that a disqualification is proper, the case will be assigned to another judge. The claimant would be given the option of having the new judge prepare a decision based on the record established at the hearing or to have a new oral hearing with the newly assigned judge.

Judges should be aware that the appearance of impropriety may cause a problem. Thus if a judge has made a statement that a reasonable person would consider to be prejudicial to either party, the judge should consider disqualifying herself even if she believes she can decide the case in a fair manner. **Similarly, if the judge has had a personal or working relationship with a party or witness, the judge should disclose this fact even if she believes she can conduct a fair and impartial hearing. If upon such disclosure, either party asks the judge to disqualify herself, she should rule on such request on tape.**

A judge should only disqualify herself if she has a very good reason for doing so. For example, if a judge is a personal friend of a county witness who will testify as to disputed facts, it would be proper for the judge to recuse herself. Similarly, if the judge personally knows a claimant or has a bias either for or against a particular claimant and such bias precludes the judge from making impartial findings of fact, it would be proper for the judge to recuse herself.

However, it is not proper for a judge to recuse herself simply because she has already conducted a hearing with a claimant or because a claimant has a reputation for filing many hearing requests.

DISRUPTIVE PARTICIPANTS

Reference: MPP §22-049.2 and §22-054.33

The judge has wide discretion in dealing with disruptive participants. The judge shall warn any disruptive individual that disruptions will not be tolerated. If the disruptive individual is not a party or a representative and does not respond to the warning, the judge should exclude the individual. The judge may take a recess to reduce the tension.

- If the disruptive individual is the representative of the claimant, the judge should inform the claimant that if the behavior does not cease, the AR will be excluded. The judge should give the claimant the option to continue the hearing without the representative or to continue the hearing to a later date *with a different representative*.
- If the disruptive individual is the claimant and the judge concludes that the hearing cannot continue, the judge should inform him that the hearing will be terminated and that the claimant will receive a written decision in the mail. The judge shall take no further evidence. If the judge has taken sufficient evidence to prepare a decision on the merits, he should prepare the decision. If the judge had not taken sufficient evidence before terminating the hearing to prepare a decision, the judge should dismiss the claimant's hearing request on the basis the claimant is unwilling to proceed (MPP §22-054.33).
- If the disruptive individual is the county representative, the judge should also terminate the hearing. The judge should then decide the case based on the evidence presented prior to the termination of the hearing.

Exclusion from the hearing is an extreme measure and should be undertaken only when reasoning, recesses, and other less drastic measures are unsuccessful.

When the safety of the judge or other persons present at the hearing is at issue, the judge should obtain security through the county welfare department or the California Highway Patrol (CHP) before proceeding with the hearing. If safety becomes a concern at the hearing, the judge should terminate the hearing and make efforts to obtain security.

EXCLUSION OF WITNESSES AND OBSERVERS

Reference: MPP §22-049.12 and .13

An observer may be present at a hearing if the claimant agrees to or requests the presence of the observer, and the judge concurs. Usually, an observer is a student, or a county or state employee in training for a position related to state hearings. At the hearing, the judge should identify the observers for the record at the hearing.

The judge may, on her own motion or upon the reasonable request of either party, exclude a witness from the hearing room during the testimony of another witness. The judge, generally, may not exclude the county representative, or the claimant, except the claimant may be excluded upon the request of her authorized representative, and with the claimant's consent. Unless excluded as disruptive to the hearing process, both the claimant's representative and the county's representative should not be excluded. Refer to *Disruptive Participants*.

Either party's representative is permitted to have an advisor present throughout the hearing. (MPP §22-049.13) If that advisor is also going to testify as a witness, the advisor may not be present as an advisor until after she has testified. A fraud investigator may be such an advisor.

The judge should exercise her discretion to exclude a witness. In determining whether to exclude a witness the judge should consider the possibility that the testimony of anticipated witnesses will be affected if there is no witness exclusion. If more than one witness is excluded, they should be admonished not to discuss the case with each other. The judge may request that a witness remain at the hearing site after she has testified so that a party can recall the witness for further questioning. If more than one witness is asked to remain after offering evidence, each should be admonished not to discuss the case with other witnesses.

Once a person has testified and then has become an advisor, the advisor may not again testify, except for providing rebuttal testimony; or subject to the judge's ruling to exclude or admit the advisor's testimony after considering the arguments of the parties.

Effective July 1, 1997, Government Code §11430 regarding *ex parte* communications applies to AAD hearings. The statute changes the way AAD addresses *ex parte* communication issues.

EX PARTE DISCUSSIONS

Reference: MPP §22-049.82
California Government Code §§11430.10 through .80 (effective July 1, 1997)

MPP §22-049.82 states "merits of a pending state hearing shall not be discussed between the Administrative Law Judge (judge) and a party outside the presence of the other party."

This regulation prohibits a judge from contacting a party, outside the presence of other parties, to discuss the merits of a case. This regulation, however, does not prohibit a judge from contacting a party, outside the presence of other parties, to discuss nonsubstantive matters about the case, or from contacting a non-party to discuss substantive issues. Program contacts are not *ex parte* communications because program staff are not parties.

For example, a judge may not contact a claimant to ask if the claimant was orally advised of the importance of the lump-sum informing notice. However, a judge may contact a claimant to reopen the record, ask for an oral time waiver, or schedule a continued hearing.

Also, because the Office of Medi-Cal Dental Services is a hearing party, a judge may not contact that office to ask why a Treatment Authorization Request (TAR) was denied. However, a judge may contact the Office of Medi-Cal Dental Services to request a position statement.

While a CDHS Medi-Cal Field Office is a party, CDHS program staff is not.

Judges may properly contact program staff to determine if a decision is a final or a proposed decision. Judges may also properly contact program staff to ask about CDSS or CDHS policy, federal waivers, litigation, federal Action Transmittals, proposed regulations, etc.

Government Code §11430 which becomes effective July 1, 1997, applies to CDSS judges. That section is set out verbatim, in pertinent part below:

§11430.10 Pending proceedings

- (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
- (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

- (c) For the purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.

§11430.20 Permissible communications

A communication otherwise prohibited by §11430.10 is permissible in any of the following circumstances:

- (a) The communication is required for disposition of an ex parte matter specifically authorized by statute.
- (b) The communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy.

§11430.30 Permissible communications from employees or representatives of agencies

A communication otherwise prohibited by §11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

- (a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record.
- (b) The communication is for the purpose of the advising the presiding officer concerning a settlement proposal advocated by the advisor.
- (c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative proceeding that is nonprosecutorial in character.
- (1) The advice involves a technical issue in the proceeding and the advice is not otherwise reasonably available to the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in §11430.50.

§11430.40 Communications received prior to serving as presiding officer, disclosure

If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve, shall

disclose the content of the communication on the record and give all parties an opportunity to address it in the manner provided in §11430.50.

§11430.50 Violations; duty of presiding officer

- (a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:
 - (1) If the communication is written, the writing and any written response of the presiding officer to the communication.
 - (2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication.
- (b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.
- (c) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:
 - (1) The party shall be allowed to comment on the communication.
 - (2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that was concluded.

§11430.60 Disqualification of presiding officer

Receipt by the presiding officer of a communication in violation of this article may be grounds for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the *ex parte* communication may be sealed by protective order of the disqualified presiding officer.

§11430.80 Communications between presiding officer and agency head regarding the merits of any issue

- (a) There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

- (b) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or where the presiding officer does not issue a decision in the proceeding.



Where the agency conducting the hearing is not a party to the proceeding, the judge may consult with other agency personnel. The *ex parte* communications prohibition only applies between the judge and parties and other interested persons, not between the judge and disinterested personnel of a nonparty agency.

Thus judges may usually contact CDSS or CDHS program staff about the merits of the case where a county is the hearing party. Where the county is a party, judges should not contact a CDSS or CDHS analyst if such analyst could be considered an interested nonparty in the case at hand. For example, it would not be proper to contact a CDHS analyst after the hearing where the county representative cited that analyst in the county's position statement unless the judge allows the parties to participate in such post-hearing discussion. Similarly, if a judge contacts a CDSS or CDHS analyst and such analyst advises the judge of particular knowledge or interest in the specific case, the judge must stop any discussion on the matter unless the parties are also allowed to participate in the communication. Parties may communicate to the judge about matters that are not issues in the hearing (§11430.20 and §11430.30) without having to notify the other party about such communication.

When CDHS is a hearing party, the judge may contact CDHS program staff for assistance or advice as long as the CDHS program staff contact was not an advocate at the hearing or involved in the case prior to the hearing. Thus, it would be proper for a judge to call the CDHS Benefits branch about a denial of a Treatment Authorization Request (TAR) for a wheelchair because a Medi-Cal field office was the advocate at the hearing, not the Benefits branch. If the Benefits branch employee had an interest in the specific case at issue, the judge must stop discussion on the matter unless the parties are also allowed to participate in the communication.

It would not be proper to contact the Office of Medi-Cal Dental Services on a dental scope case however, because there is no separation of function between the advocate and the program contact. That is, the Office of Medi-Cal Dental Services is both the advocate and the program contact.

While it would be proper for a judge to contact CDSS or CDHS staff for advice or assistance on a case, the judge must not simply set out the facts and ask the staff person to decide the case for her.

Note that §11430.10 DOES NOT prohibit the judge from communicating to a party about an issue in the hearing, but only prohibits a party from communicating to a judge. It is

nonetheless strongly recommended that judges NOT communicate to either party outside the presence of the other party.

If, after the hearing has been conducted, the judge decides she needs to communicate with a party or needs additional evidence, the judge should reopen the record by writing a letter to the parties and explaining what additional information is needed. If the judge requests one party to submit additional evidence, the judge must ensure that if such evidence is received, it is forwarded to the other party and that the other party is given an opportunity to respond.

It is still proper for the judge to contact the county (or the claimant) to schedule a continued hearing (§11430.20) as long as the judge and the party do not discuss the merits of the case outside the presence of the other party.

Section 11430.80 states that there shall be no communication, direct or indirect, while a proceeding is pending about the merits of any issue in the proceeding between the presiding officer and the agency head or other person to which the power to hear or decide in the proceeding is delegated. This new prohibition means that effective July 1, 1997, if a judge discusses the merits of a case with her Presiding Judge and then writes a proposed decision on the case, that Presiding Judge will not have the authority to act on the proposed decision. The Presiding Judge must send the proposed decision to another Presiding Judge or a Specialist to adopt or alternate. Neither the judge nor the Presiding Judge may discuss the merits of the case with the Presiding Judge or Specialist who will be reviewing the proposed decision. The Presiding Judge in each region has the discretion to either discuss a case with a judge which is likely to require a proposed decision or to refer the judge to another Presiding Judge or Specialist.

Judges may discuss the merits of any case with their Presiding Judge where the Presiding Judge does not have the authority to act on the proposed decision such as in orthodontic cases or EPSDT cases.

Government Code §11430.80 only concerns ex parte discussions about the merits of the case. Presiding Judges will still have delegated authority to adopt or alternate decisions where the judge discusses matters with him not related to the merits of the case. For example, a judge may ask her Presiding Judge whether a case should be postponed, whether a Special Needs Trust case should be written as a proposed decision or a final decision, or whether the Presiding Judge has seen any cases on the Assistance Dog Special Allowance program.

The judge may also submit a memo with the proposed decision to her Presiding Judge citing program contacts. However, the memo may not discuss what the program analyst said because such memo would then be an indirect communication about the merits of the case in violation of Government Code §11430.80(a).

Any judge may discuss the merits of a case with another judge. The judge may also discuss the merits of a case with another Presiding Judge or a Specialist as long as such Presiding Judge or Specialist will not be reviewing the case.

EXPLANATORY REMARKS

Reference: MPP §§22-003.1, 22-049.7, and 22-065

The tape recorder should be turned on as soon as the parties enter the room; or if the judge is more comfortable introducing herself first, the tape should be turned on immediately after this introduction and a statement that the tape recorder is being turned on.

The following points shall be covered during the opening remarks at every hearing although not necessarily in this order. The judge should make the remarks in a conversational tone, to put the claimant at ease.

1. The judge shall state her name and identify for the record the claimant, the claimant's address, the date of the hearing, the hearing site, and the following information:

Introductions:

Each participant and observer shall be identified on the record. This will facilitate the making of a transcript in the event of further litigation.

The interpreter, if present, shall be qualified and sworn in. (Refer to *Interpreters*.)

2. The judge shall indicate that she has been appointed by the Director of the California Department of Social/Health Services to conduct a fair, independent, and impartial hearing, and that he/she is not employed by nor associated with the county or CDHS.
3. The claimant shall be informed that:
 - A. The hearing will be tape recorded as required by state law.
 - B. All testimony is to be given under oath or affirmation. Witnesses shall be sworn or affirmed or state that they will testify under penalty of perjury.
 - C. All relevant documents submitted will be marked as exhibits.
4. Prior to taking testimony, the judge shall ask if the claimant has read the position statement, or if the case involves an interpreter, ask if the interpreter has translated the position statement to the claimant.
5. The judge shall inform the parties that the decision will not be issued the day of the hearing (except in cases of bench or stipulated decisions); that it will be based on the information introduced during the hearing, and the period after the hearing if the record is left open; that the decision will be in writing and will be received in

the mail; and in the case of proposed decisions that the decision may be reviewed by others within the Department and if the Director disagrees with the judge's proposed decision, the Director may overrule the judge.

6. Appeal rights including time limits shall be mentioned and the claimant referred to the decision cover page for an explanation of these rights. (This may be done at the end of the hearing at the judge's discretion.)
7. The order of testifying shall be explained; as well as the party's rights to testify, to ask questions, and to present any additional documents.
8. In those cases in which there is a possibility of criminal prosecution, the claimant shall be advised that testimony, documents and the hearing file can be used by the prosecutor and the tape recording may be subpoenaed. If the claimant requests a postponement to obtain legal representation after this explanation, it should generally be granted. (Refer to *Postponements*.)
9. *The issue shall be defined before the testimony begins to ensure that all the parties know what issue(s) will be resolved in the hearing.* The issues should be defined again at the close of the hearing so that the issues decided in the written decision will not be a surprise, particularly if issues are added during the hearing, or the issues change. (Refer to *Scope of Issues*.)

FORMS

The following forms should be available at every hearing:

1. Aid Pending Decision (DPA 284)

The original should be given to the county (or CDHS where appropriate), the first copy to the claimant or AR, and the next copy placed in the hearing file.

2. Authorized Representative (DPA 19)

The claimant should sign a completed DPA 19. The original should be placed in the hearing file and copies given to the county/CDHS and the claimant/AR.

3. Discrimination Complaint Referral (GEN 1076)

The judge needs to complete this form at the hearing and provide copies to the parties as explained on the GEN 1076. The judge must send the original GEN 1076 to the Civil Rights Bureau at the address listed on the GEN 1076. Place a copy in the hearing file.

4. Interpreter/Translator Billing (DPA 302)

Before signing a DPA 302, the judge should review it to ensure the interpreter completed it correctly. By signing the form, the judge is simply certifying that the interpreter was present at the hearing site; the judge is not approving payment.

After signing, the judge may return the DPA 302 to the interpreter (it is the interpreter's responsibility to submit it to AAD). If the interpreter leaves the DPA 302, the judge may give it to support staff to route to the SDTB at MS 19-72.

5. Notification of Open Record and Waiver of Time (DPA 421)

After completing a DPA 421, give the top copy to the party who is required to submit evidence during the record open period and the next copy to the other hearing party. If the copies are not clear, the judge should ask the county representative to make necessary copies. Place the original DPA 421 in the hearing file,

6. Withdrawal/Conditional Withdrawal of Request for Hearing (DPA 315)

Give copies to the hearing parties and place the original in the hearing file.

7. Subpoena and Subpoena Duces Tecum Forms

If needed at the hearing site, a judge should complete these forms and give the forms to the party requesting the subpoena. (Refer to *Subpoenas/Subpoenas Duces Tecum.*)

If time allows, judges may ask support staff to prepare and mail subpoena documents.

8. Self-addressed, stamped envelopes

If the record is left open for a claimant to submit additional evidence, give the claimant a self addressed, stamped envelope. It is not necessary to provide such envelopes to county staff or authorized representatives.

In addition to the forms listed above, Disability Hearings Bureau (DHB) judges are encouraged to ensure the following forms are available at the hearing site:

9. Release of Information (MC 220)

The original should be retained by the judge after it is signed by the claimant, and a copy may be given to the claimant. The form should not be dated by the claimant.

10. Disability Determination and Transmittal (MC 221)

This form can be filled out at the hearing to ensure all relevant information is obtained. No copies need to be given.

11. Applicant's Supplemental Statement of Facts (MC 223)

The judge may give this form to the claimant to complete when there is no such form in the file; when the form is in the file but was completed more than six months in the past; or when the condition(s) has changed.

12. Pain Questionnaire (DEP 2079)

The judge may give this form to the claimant to complete, using the same criteria as in (10), above.

13. RFC Assessment (DEP SP 2004)

The judge may give this form to the claimant/AR to give to the claimant's physician to complete and return.

14. Evaluation Form for Mental Disorders (DEP 1002s)

The judge may give this form to the claimant/AR to give to the claimant's psychiatrist/psychologist/physician to complete and return.

15. Psychiatric Review Technique (SSA-2506-BK)

The judge may use this form to make sure that she asks all relevant questions. Do not give this form to the claimant to have her physician/psychologist complete.

16. Daily Activities Questionnaire (DEP 2059)

The judge may have the individual complete the form, particularly in the case where the claimant has nonexertional (especially if psychological or psychiatric) impairments. The form may also serve as an aid in ensuring that all relevant questions are asked.

HANDLING THE PRESS AT A HEARING

Reference: MPP §22-049

A claimant will occasionally request that a reporter or news team be permitted to attend and/or film the hearing. The media may be admitted to the hearing only in those cases in which the claimant has made a specific waiver of his right to confidentiality on tape and in writing *and* the judge has determined that the presence of the media would not be disruptive to the hearing process.

The judge shall determine if any access will be granted to the media. The judge should consider: maintenance of proper hearing decorum; county objections; potential disruption to the proceedings; adverse effect on witnesses; physical space and conditions of the hearing room; potential distractions for the judge, including impediments to the judge's ability to discharge responsibilities; any other factors which, in the discretion of the judge are necessary to ensure the orderly and proper conduct of the hearing.

The Presiding Judge shall be notified immediately if a request is made to allow the media to attend a hearing. This notification should take place before the hearing. If the appropriate Presiding Judge cannot be reached, contact the Chief Administrative Law Judge or another Presiding Judge.

If the media is allowed to attend a hearing, the judge *must prepare a proposed decision* and submit that decision to the Presiding Judge for review.

INTERPRETERS

Reference: MPP §22-049.6
California Government Code §§11435.45 through .65

A successful interpreter-assisted hearing requires a joint effort and close cooperation between the interpreter and the judge. The judge has the primary responsibility for the control and the conduct of the hearing. The judge also shares responsibility with the interpreter for making the hearing as intelligible as possible to all hearing participants.

The judge shall not proceed when the parties are unable to understand the interpretation. The hearing shall not be conducted in any language other than English.

Determining the Necessity of an Interpreter

In most cases requiring the assistance of an interpreter, AAD will be aware of the need for an interpreter before the hearing and a certified interpreter will have been scheduled. However, if no interpreter was scheduled and at the hearing either the judge, the county or the claimant requests assistance of an interpreter, every effort should be made to obtain one immediately. AAD's Interpreter Coordinator may be reached at (916) 229-4195 or (8) 424-4195. If the judge determines an interpreter is necessary and cannot be obtained, the hearing should be postponed. The hearing file should be prominently marked stating that an interpreter is needed and the claimant's language, including any particular dialect.

Qualifying the Interpreter

AAD makes every effort to schedule a *certified* interpreter when an interpreter is needed for a hearing. An interpreter may have been certified by the courts, by the federal or state government, or (through 1994) by CDSS. If an interpreter is certified, the judge need only briefly examine his qualifications, but should also inquire as to any possible interest in the outcome of the case, ensure there is an ability to communicate with the person who requires language help, and briefly remind the interpreter of his responsibilities.

If the interpreter is **not** certified, the judge shall ask the interpreter whether his qualifications were examined by a judge in a previous state hearing and deemed acceptable by the judge. If the interpreter answers yes, the judge should ask the claimant/authorized representative and the county if they accept the interpreter's qualifications. If they do, there is no need to further examine the interpreter's qualifications.

On the other hand, if the interpreter has not been previously qualified or if either party does not agree to the interpreter's qualifications, the judge should qualify the interpreter in the manner set forth in the attached form. If the interpreter is unacceptable, the judge should then postpone the hearing so that another interpreter

can be scheduled. On rare occasions, it may be permissible to use the services of an interpreter who does not qualify (e.g., a county employee who was not involved in the case, or a friend or relative of the claimant, particularly if an unusual language is involved) when it is to the claimant's disadvantage to have the hearing postponed and both the claimant and the county agree.

Conducting a Hearing with an Interpreter

Before the hearing, the interpreter should be given the position statement to read and to interpret for the claimant.

At the beginning of the hearing, the judge shall administer an oath to the interpreter. This oath should be similar to the following:

"John Smith, do you swear or affirm to interpret from _____ to English and from English to _____ as literally, and as accurately as possible during the entire hearing and further swear to respect the confidentiality of matters presented in these proceedings?"

After swearing in the interpreter, the judge shall make sure the interpreter has read the claimant the statement of the interpreter's duties, and the claimant understands the interpreter's role (refer to the Attachment). Some judges may prefer to have the interpreter statement read on tape, which practice is perfectly acceptable.

The judge shall conduct the hearing in the same manner as a hearing without an interpreter, except the judge must ensure the hearing participants pause frequently to allow the interpreter to provide an interpretation of what was said.

There are three types of interpretation which are commonly employed: "simultaneous", "consecutive" and "summary". Simultaneous interpretation occurs instantaneously while the speaker is talking. Consecutive interpretation is the interpreting of a phrase immediately after it was said. Summary interpretation summarizes or condenses the essence of the dialogue and is given at frequent intervals during the proceeding.

It is within the discretion of the judge as to which type of interpretation will be used during which portion of the proceedings. However, to preserve the integrity of the record, all testimony provided by the person or persons for whom the language services are being provided should be consecutively interpreted. Consecutive interpretation is the preferred type of interpretation.

Simultaneous interpretation requires an exceptionally skilled interpreter and the judge should ensure that the interpreter is sufficiently competent to use this technique. In addition it is essential that the interpreter use a very soft voice when using this technique so that the hearing tape can be transcribed if necessary.

Summary interpretation can be used effectively at the following times: During technical discussions between the county representative and the AR where the parties have agreed the claimant's rights are protected; and when the individual or his AR specifically waive consecutive interpretation. Summary interpretation is not appropriate when testimony is being given.

4. Judge's Duties at the Completion of an Interpreter Hearing

At the end of a hearing involving an interpreter, review the Interpreter/Translator Billing form (DPA 302) to ensure it was accurately completed by the interpreter. If not, complete and/or revise the DPA 302 or direct the interpreter to do so. When the DPA 302 is completed, sign and date it. Return the DPA 302 to the interpreter (the interpreter is responsible for submitting the DPA 302 to AAD). If a DPA 302 is left by an interpreter, give it to support staff upon returning to the office (support staff will route it to the SDTB at MS 19-72. (Refer to *Forms*.)

To commend a particularly competent interpreter or to complain about an inadequate interpreter, contact AAD's Interpreter Coordinator at (916) 229-4195 or (8) 424-4195.

ATTACHMENT I QUESTIONNAIRE AND EXAMINATION OF NON-CERTIFIED INTERPRETERS

If a person's foreign language qualifications have not been previously examined or if either party to the hearing does not stipulate to the interpreter's qualifications, the judge should qualify the interpreter in the manner prescribed below.

1. In what language (and/or dialect, if applicable) do you claim to be qualified to serve as interpreter?
2. Can you read and write in both that language and in English?
3. How did you acquire your proficiency in (a) _____(English)
(b) _____(language and dialect?)
4. Have you had any experience interpreting for people in formal or informal proceedings?
5. Have you previously served as a(n)_____ (language) interpreter for state hearings with the Department of Social Services, other administrative hearings, or in court proceedings? If so, in how many proceedings and in what kind? Were you ever disqualified from serving by the hearing officer or judge?
6. Do you have any interest whatsoever in the outcome of this hearing?

7. Do you understand that it is your responsibility to interpret literally, adding or subtracting nothing? Do you understand that you must inform the judge if you are unable to understand the words used, or to keep up with the speed at which the individuals are speaking?

ATTACHMENT II

"The Department has provided an interpreter for this hearing. Every effort has been made to assure you and all parties to the hearing that this interpreter is sufficiently knowledgeable and competent to provide an unbiased interpretation.

"The interpreter is under oath to interpret everything that is said completely and accurately. The interpreter must remain neutral so that we can be assured that what is said is what is being interpreted. You should not ask nor expect the interpreter to argue in your defense just as the interpreter must not slant the proceeding for or against you. Please do not reveal information to the interpreter which you do not want to have interpreted. Please ask to have repeated or explained any questions or word you have not clearly heard or understood. The interpreter is here to help us all eliminate the language obstacles so that a fair determination can be made in this case."

OATHS

Reference: MPP §22-049.3

Testimony is a statement at a hearing given under oath, affirmation or under penalty of perjury.

The judge shall administer an oath to an interpreter before administering an oath to parties and witnesses. (Refer to *Interpreters*.)

The oath should **be** given in the following or similar words:

Do you swear or affirm the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

If a party or witness declines to take an oath or affirmation or to declare he is telling the truth under penalty of perjury, the judge shall advise the person that his statements will be given little weight because they are hearsay evidence, and not testimony.

Sometimes an AR who has not taken the oath will make substantive statements or declarations. The judge should point out that the statements are hearsay declarations, and suggest that the AR may want to take the oath and give testimony.

If the judge forgets to administer the oath or affirmation but remembers before the hearing record is closed that the oath or affirmation was not administered, the judge **shall** ask each hearing participant to take an oath or affirmation **in the following or similar words:**

“All statements I made at the hearing were the truth,
the whole truth, and nothing but the truth.”

If a judge discovers after a hearing has concluded and the participants have left, that an oath was not administered, the judge shall send an affidavit and a cover letter to each hearing participant who testified. The cover letter shall request that the affidavit be signed and returned in the enclosed self-addressed stamped envelope. The affidavit shall state, in these or similar words:

“All statements I made at the hearing were the truth,
the whole truth, and nothing but the truth **under the laws of the State of California.**”

POSTPONEMENTS

Reference: MPP §22-053

1. No good cause need be established for the first time a hearing is postponed where Food Stamps were identified as an issue in the claimant's hearing request. Good cause must normally be established before a hearing is postponed for hearings where the claimant has not identified Food Stamps as an issue.
2. The judge shall note on the DPA 99 that the case was postponed, the reason for the postponement, and must sign the comments section of the DPA 99.
3. Good cause reasons for postponements are stated in MPP §22-053.16. The good cause reasons are:
 - death in the family
 - personal illness or injury
 - sudden and unexpected emergencies which prevent the claimant or the authorized representative from appearing
 - a conflicting court appearance which cannot be postponed
 - the county, when required, does not make a position statement available to the claimant not less than two working days prior to the date of the scheduled hearing, or the county has modified the position statement after providing the statement to the claimant, AND the claimant has waived decision deadlines contained in MPP §22-060.
4. The CDHS is not required to make a position statement available two days in advance of the hearing. A claimant is thus not entitled to a good cause postponement if this situation occurs.
5. Good cause for a postponement does **not** include:
 - The issues are too difficult.
 - The AR is on vacation.
 - The AR's child has a medical appointment.
 - The claimant requests a second postponement to obtain legal assistance and there are no extenuating circumstances.

Postponements should not be granted in any of these circumstances.

6. The judge may postpone a case for reasons other than those stated in MPP §22-053.16 at her discretion. The judge should not abuse her discretion in granting postponements, but should grant the postponement if it would violate due process to deny the postponement request.
Examples of discretionary postponements include:

- A claimant needs assistance in understanding issues and communicating at the hearing.
- A crucial witness is unavailable due to illness.
- The claimant requests a first postponement because he was unable to obtain legal assistance.
- The claimant requests a second postponement to obtain legal assistance in a case involving potential criminal prosecution if the claimant was unable to obtain legal assistance after the first postponement despite a diligent effort to obtain such assistance.
- A claimant arrived on time for a scheduled hearing which was significantly delayed due to other hearings, and she cannot wait any longer.

· **The parties mutually agree to postpone the case and there are no prior postponements.**

7. In cases (other than cases where the county has failed to make a position statement available at least two working days prior to the hearing) where the judge grants a postponement at the claimant's request, the time frame for rendering a decision will be automatically extended. Judges must give the claimant a written notice that explains the time for rendering a decision is extended for a period not to exceed 30 days **or orally advise the claimant that the time for releasing a decision will be extended for a period not to exceed 30 days.**
8. If the county has failed to furnish adequate notice under MPP §§22-001a.(1) and 22-049.52, the judge must grant a postponement if the claimant requests a postponement. The claimant shall be advised of the right to waive adequate notice requirements for purposes of proceeding with the hearing. This includes situations where the county representative has increased the amount of the AFDC overpayment or Food Stamp overissuance from the amount stated on the NOA. (Refer to *Aid Pending*.) **If a postponement is granted because adequate notice was not provided, the county position statement shall substitute for applicable notice for purposes of rescheduling the hearing if the position statement plus the original NOA meet adequate notice requirements. Since the claimant has already requested a hearing, the position statement need not advise of hearing rights.**
9. Once the record is opened, the claimant and county representative sworn in, and evidence has been taken, the matter shall not be postponed. The judge has taken jurisdiction of the case and should conduct the hearing, even if it means continuing the case. Any exceptions should be approved by the appropriate Presiding Judge.

RECORDING THE HEARING

Reference: MPP §22-049.4

Prior to each hearing the judge should test the tape recorder to assure that it is working properly. Judges should also advise the claimant and county appeals specialist to sit near the microphone so that their voices can be heard in case the judge or someone else wants to listen to the tape after the hearing.

There may be times when a defect in the tape recorder or other factor results in unrecorded proceedings. If this is discovered during the hearing, and the mechanism is repaired, the judge should summarize the evidence for the record and ask the parties to stipulate as to the sufficiency and accuracy of the summary. If one party requests that the hearing start over again, the judge shall do so.

If it is discovered after the hearing that the proceedings were not recorded, the judge shall notify the parties, prepare a summary of the proceedings from his notes, and mail it to the parties with the request that they submit any additional information they desire to be included in the summary. The judge shall mail any response from one party to the other party for comments. Once the party agrees with the judge's summary he should be requested to sign a statement that the summary accurately reflects the evidence presented. If either party objects to this procedure, or if the parties do not agree as to what evidence was presented, the judge shall conduct another hearing. The judge may also schedule a continued hearing on his own motion in lieu of contacting the parties by mail.

If a party or authorized representative wishes to tape record the hearing, the judge should permit the tape recording unless he finds that it will disrupt the hearing. If the judge does not allow the taping, the judge shall specify his reasons on the record. The judge shall advise the parties that his recording is the only official record of the hearing.

REHEARINGS

Reference: MPP §22-065
Welfare and Institutions Code (W&IC) §10960

After receiving an adopted final or proposed decision or a Director's alternate decision in the mail, a hearing party or authorized representative may request a rehearing within 30 days after receiving the decision.

There is no right to a rehearing on a decision which adjudicated an ADH, for FS (MPP §22-230.151) or AFDC (45 Code of Federal Regulations (CFR) §235.112(c)(2)). If an ADH was combined with a regular hearing, a rehearing is only permissible on the portion of the decision which adjudicated the overpayment/overissuance issue, not the Intentional Program Violation (IPV) issue. There is also no right to a rehearing on a rehearing decision.

When granting a rehearing, a Director may order a rehearing on the record or an oral rehearing on one, several, or all the issues presented at the initial hearing. (MPP §22-065.4) When the Director orders a rehearing on the record or limits the issues, either party may request and obtain an oral rehearing on all issues if such request is received before the date of the scheduled rehearing. (MPP §22-062.5)

Once the rehearing request has been granted, only the party who requested the rehearing may withdraw the rehearing request. It is up to the Director or the Director's delegate (e.g., the judge at the hearing) whether to allow the moving party to withdraw.

When assigned a rehearing on the record with limited issues, a judge should review the matter before the scheduled rehearing date to determine if the issues need to be expanded. If the judge determines it is necessary to expand the issues, he should advise the Presiding Judge and notify the parties that the issues were expanded. If the judge also determines an oral rehearing must be scheduled or a party requests an oral rehearing due to the expanded issues, the Presiding Judge will schedule an oral rehearing to be heard by the judge assigned the rehearing or by another judge.

When a judge is assigned an oral rehearing with limited issues on the scheduled hearing date, the judge is responsible for (1) conducting the rehearing and (2) determining whether the issues need to be expanded. If the judge determines it is necessary to expand the issues, the record should be left open (or a continued hearing scheduled) to allow the parties time to respond to the issues added at the rehearing.

There may be rare instances when a full scale rehearing is ordered, but the judge limits the issues. Basically, this will arise when neither the original hearing and decision, nor the rehearing letter, address a jurisdictional issue. For example, if the judge on rehearing, determines that the original filing of the hearing request was untimely, or that he lacks

subject matter jurisdiction, the judge shall dismiss the original claim without reaching the merits of the claim.

At the scheduled rehearing, the judge is required to record the rehearing, even if neither party, or only one party, is present. The judge will accept testimony and relevant evidence from the party or parties, or simply state for the record that no one is present and no documents have been submitted.

If either party fails to appear at the rehearing, and no explanation is provided, the judge shall wait ten days from the date of the hearing before adopting a decision. This allows the party who did not appear an opportunity to present a good cause reason for the failure to appear (MPP §22-054.222). If the initial decision dismissed the claim due to nonappearance, the rehearing decision shall uphold the dismissal on the basis of the claimant's unwillingness to present his case. In all other instances, the rehearing decision shall resolve the merits of the case and decide the issues presented at the initial hearing.

When the judge receives a good cause reason for the nonappearance during the ten-day period following the rehearing, he shall reschedule the rehearing. In that instance, the record of the previously conducted rehearing shall not be considered by the judge, and he shall conduct a *de novo* rehearing to ensure due process for all parties. The judge shall inform the parties that the evidence obtained at the previously scheduled rehearing or continued rehearing will not be considered in any manner.

Once the record is closed, the judge is responsible for preparing the rehearing decision. That decision shall be prepared using the appropriate rehearing format, and shall include a Procedural History, the other elements necessary for all decisions, and an order that includes a sentence which specifically sets aside or upholds the order in the initial decision. (Refer to Orders in the *Decision Preparation section*.)

REQUESTS FOR HEARING TAPE OR TRANSCRIPT

If a hearing party or authorized representative requests a copy of the hearing tape or a transcript, advise the individual to call AAD's State Records Desk at (916) 229-4117 or to submit a written request to AAD, State Records Desk, 744 P Street, MS 19-37, Sacramento, CA 95814.

As of April 1997, the cost to copy a tape is \$10 per tape and the cost to make a transcript is \$100 per tape. Any checks should be made out to the California Department of Social Services.

RESCINDING AGENCY ACTIONS

If a county has issued a NOA proposing an adverse action against the claimant, the county only rescinds that adverse action by taking affirmative steps to rescind the action. When the county agrees to rescind the action, such an agreement is not a rescission, but only an agreement to rescind. If the claimant accepts the county proposal to rescind the action, the judge shall prepare an order binding the county by its stipulation to rescind its action.

The judge should not prepare a decision dismissing the claim just because the county has agreed to rescind an action. A decision dismissing the claim is appropriate only when the county has issued a new NOA that states that the initial adverse action was rescinded AND when the county has taken action to rescind the initial adverse action as noted below.

The NOA advising the claimant that the initial action was rescinded is itself the necessary and sufficient action to allow the judge to dismiss the claim if the initial action was a demand for repayment of an overpayment, a denial of an application, or if the county never took the action proposed in the NOA (e.g., a NOA proposing a decrease in the AFDC grant which was never implemented).

The NOA advising the claimant that the initial action was rescinded **is not** a sufficient basis to dismiss the claim if the county has not in fact taken action to implement the rescission. For example, if the county has advised the claimant that it would reduce the AFDC grant by \$40, in October 1996, to recoup a \$673 AFDC overpayment, the county has not rescinded that action by merely issuing another NOA advising the claimant that it will rescind that action. It must also reissue that \$40.

Conversely, the county has not rescinded its action merely by reissuing the \$40. The county must also issue a new NOA rescinding the initial NOA.

SCOPE OF ISSUE

References: MPP §22-049.5

Immediately after the opening remarks, and before there is any testimony, the judge shall state for the record exactly what issues will be discussed at the hearing. The judge shall state the specific month(s) which are to be reviewed. These will be the only issues decided in the written decision. This will allow the parties to clarify whether these are the real issues, to add issues if appropriate, and to indicate that certain issues have been resolved.

The judge shall limit the issues to county or CDHS actions or inactions. The judge does not have authority to make declaratory judgments even if both parties request such judgments.

The matters discussed at the hearing must be reasonably related to the hearing request or matters that have been agreed upon by the county and the claimant. If additional issues arise during the course of the hearing, the judge shall determine whether they are reasonably related to issues raised in the hearing request. If so, the county will be expected to address them, but at the county's request, the record should be left open to present evidence and/or argument if its rights would otherwise be prejudiced. When the county has failed to *attempt* to make its required prehearing contact and the claimant raises an issue that the judge determines is reasonably related to an issue raised in the hearing request, the record should not be left open in most cases.

Related and Non-related Issues

There is no specific definition of a reasonably related issue. However, a judge should address issues in a hearing that are connected to issues raised in the claimant's hearing request if it would not prejudice the county to hear such issues.

The following examples contrast related and nonrelated issues. In each case, the judge must balance judicial economy with the due process rights of each party.

Example 1:

Related The hearing request is filed on the back of an AFDC discontinuance Notice of Action (NOA). The county has discontinued Medi-Cal and FS at the same time for the same reason. Medi-Cal and FS are reasonably related.

Non-related The hearing request is filed on the back of an AFDC NOA, and the county has discontinued Medi-Cal and FS for a different reason. Medi-Cal and FS are not reasonably related.

Example 2:

- Related** The claimant requests a hearing to dispute an AFDC overpayment. There is an FS overissuance for the exact same period of time, based on the exact same reason, e.g., unreported UBI. FS is reasonably related.
- Non-related** The claimant requests a hearing to dispute an AFDC overpayment. There is an FS overissuance which overlaps the AFDC overpayment, but the reason is different. The FS issue is not reasonably related.

Example 3:

- Related** The claimant requests a hearing on a demand for repayment of an AFDC overpayment. There is no prehearing contact attempted by the county. At the hearing, the claimant wants to discuss the amount and cause of the overpayment. As the county did not clarify the issue(s), the amount and cause are reasonably related. (Note: The judge may find it appropriate to leave the record open for the county to submit evidence.)
- Non-related** The claimant requests a hearing on a demand for repayment of an AFDC overpayment. During prehearing contact, the claimant clarifies that the demand for repayment is the *only* issue. The county had previously issued a notice advising the claimant of the amount and cause of the overpayment. At the hearing, the claimant wants to discuss the amount and cause of the overpayment. These are not reasonably related.

Note: If the claimant had initially requested a hearing on the amount and cause of the overpayment, any subsequent recoupment action taken by the county would be a reasonably related issue whether there was prehearing contact between the parties or not.

Agreements by the Parties

Even if the matter is not reasonably related to the hearing request, the judge should hear the issue if the parties have agreed, during the prehearing contact, to discuss that issue. (Note: Remember that even with the parties' agreement, the judge cannot make declaratory judgments or rule on matters outside the jurisdiction of the state hearing.)

If a claimant raises an issue which is not related to the hearing request, but the county agrees to add it as an issue, the judge shall address the issue. When the county needs additional time to prepare on such an additional, nonrelated issue, that issue should be

added if, and only if, the claimant waives sufficient time for the county preparation of a position statement, the claimant's response, and the county's rebuttal.

Change in County Position

If the action the county proposes to take at the hearing is different from what the county asserted in its notice, the judge shall inform the claimant of the county's changed position.

If the basis for the action has changed (e.g., the original denial was due to excess property and now the county denial is based on a transfer of property, or the amount of overpayment was *increased*), the claimant must specifically waive adequate notice requirements before the judge may include these matters as issues. If the county worker states at the hearing that the amount of overpayment was decreased, the judge shall consider this to be in issue even without a waiver of additional notice, as the original notice included the matter at issue and the claimant's rights have not been prejudiced.

Conclusion of Hearing

The issues should generally be summarized at the close of the hearing so that all parties will know exactly what issues the judge will decide. In all cases where the issues have changed during the course of the hearing, the issues shall be restated.

SUBPOENA/SUBPOENA DUCES TECUM

Reference: MPP §22-051.4,.5,.6, §22-052
California Code of Civil Procedure (CCP) §1986(c) and 1991
California Government Code (Gov. C) §§11180 through 11191
Welfare & Institutions Code (W&IC) §10954

A hearing party or AR may request a subpoena (for a person) or a *subpoena duces tecum* (for documents) before or at a scheduled hearing. Subpoena requests submitted before a scheduled hearing may be made by telephone, fax, or mail to the appropriate AAD unit and are reviewed by a Presiding Judge or designee. Subpoena requests made at a hearing are reviewed by the assigned judge. In determining whether to issue a requested subpoena, judges (including a Presiding Judge) consider several factors, including the following:

- (1) Is the witness/document relevant?
- (2) Is it unduly cumulative or repetitious?
- (3) Is there sufficient time to allow the document to be produced, and submitted, or for the person to attend the hearing?

Is the witness/document relevant?

Witnesses or documents are only relevant if they can provide some evidence in regard to the issue(s) in the case. Thus, subpoenas for persons or documents involved in the particular documenting process generally should not be issued (e.g., for political officeholders, agency heads; documents as to how counties acted in relation to persons not involved in the case to be heard). Subpoenas should be issued when the person(s) or document(s) will help the judge arrive at a correct legal decision.

Is it unduly cumulative or repetitious?

Generally, a Presiding Judge or designee does not deny a subpoena requested before a scheduled hearing on the ground the person and/or documents to be subpoenaed may be unduly cumulative or repetitious. Such denials are uncommon because it is not clear, until the hearing commences, who will appear to testify and/or which documents will be presented.

At a hearing, however, a judge is able to determine if sufficient credible evidence was presented to resolve relevant disputed facts and may appropriately deny a requested subpoena on the basis the person the person and/or documents to be subpoenaed will add little or nothing to the evidence already presented.

Is there sufficient time to allow the document to be produced, and submitted, or for the person to attend the hearing?

Service is limited to times and places which are reasonable (MPP §22-051.6).

Statutory provisions:

W&IC §10954 conveys upon the Director or judge conducting the hearing all the powers and authority conferred upon the head of a department in Article 2, commencing with §11180 of Chapter 2 of Part 1 of Division 3 of Title 22 of the Government Code.

Under Gov. C. §11181(e), subpoenas and subpoenas duces tecums may be issued. The process issued extends to all parts of the state (Gov. C. §11184) but a person is not obliged to attend as a witness at a place out of the county in which he resides, unless the distance is less than 50 miles from his place of residence (Gov. C. §11185).

Witness fees and mileage shall be paid at the same mileage allowed to a witness in civil cases. (Gov. C. §11191) Witness fees and mileage in civil cases is \$35.00 per day, and \$0.20 per mile (Gov. C. §68093).

A county and CDHS is responsible for serving a subpoena issued at its request and for paying witness fees to each subpoenaed person who attends hearing. A claimant or AR is responsible for serving a subpoena issued at his/her request, but witness fees are paid by the State. To claim witness fees from the State, a witness subpoenaed by a claimant or an AR must complete and sign the claim on the back of the subpoena document and give it to the judge at the hearing or mail it to AAD. (MPP §22-051.6)

If a judge receives a claim for witness fees at a hearing, review it for accuracy, ensure the witness signed the claim, and sign it (if approving payment of witness fees). The judge may route all witness fee claims to support staff.

There are contempt powers available, through CCP §1991 made applicable through CCP §1986(c). These have been used only in extremely unusual situations.

Subpoenas and subpoena duces tecum are discussed in California Administrative Hearing Practice, California CEB, §2.91 et seq. Additionally, the CDSS has the option to adopt the procedures set forth in Gov. C. §§11450.05 through .40.

TELEPHONE HEARINGS

Reference: MPP §§22-054.13 and 22-056

- 1) A telephone hearing may be scheduled only if the claimant agrees.
- 2) All telephone hearings shall be conducted by speaker phone and must be tape recorded.
- 3) Telephone hearings may be conducted in any of the following ways:
 - a) With the judge and the county representative in the hearing room and the claimant contacted at home.
 - b) With the judge and claimant in the hearing room and the county representative at another location (e.g., in an out of county case).
 - c) With the county representative and claimant in one location (e.g., the county office) and the judge at another location.
 - d) With the judge in one location, the claimant in another location (e.g., at home) and the county available in a third location (e.g., at the county office).
 - e) With the judge in one location and the claimant at home (e.g., a Dental Scope issue).
 - f) A witness may be contacted by telephone in any of the above instances.
- 4) If the county representative is not in the hearing room, but in another location, the judge must arrange or have support staff arrange for a three way conference call.
- 5) At the beginning of the hearing, the judge shall verify that the claimant has a copy of the position statement.
- 6) The judge shall call the claimant at the scheduled hearing time.
- 7) If the judge calls the claimant at home and there is no answer or a busy signal, the judge shall place another call in five minutes. If there is no answer or a busy signal, consider the hearing abandoned and prepare a decision dismissing the claim unless the claimant contacts CDSS within 10 days of the hearing date.
- 8) If the claimant is scheduled for a hearing at the county office and the judge is at another location, the county shall call the judge when the claimant arrives at the county office. If the claimant does not arrive within 20 minutes of the scheduled hearing time, and does not contact the county, the case shall be treated as an abandonment and any witnesses shall be dismissed. However, if the claimant appears

at the county location more than 20 minutes after the scheduled hearing time and the county contacts the judge, the judge should proceed with the hearing if it would not disrupt the judge from conducting other hearings and if all witnesses (if any) are still available.

- 9) The judge will introduce herself and give the location for the record. The judge will state the claimant's name, the case name if applicable, and the hearing number. Each person present will be asked her name, role in the hearing and location. The judge will observe any problems in voice transmission and arrange for a change in positioning of the parties, if needed.
- 10) The hearing will be tape recorded. The judge will identify the issues and explain the procedures at this point, the right to speak, cross-examine and order of proceedings. The judge will introduce exhibits into evidence. The persons present will be advised to speak slowly and clearly. They will also be advised not to interrupt anyone else who is speaking. Each person will be told to identify herself before speaking.
- 11) The oath should be given with each person individually acknowledging it by voice. The record will then prove that the oath was taken.
- 12) Testimony should be taken just as in an in-person hearing. The judge will control the direct testimony and cross-examination in the same manner as if present in person. In all respects the hearing will be conducted in the same manner as in an in-person hearing.
- 13) For some hearings, the judge may need to review documents that are not part of the position statement. For example, the claimant who is at home, may testify at the telephone hearing that she has a rent receipt that is relevant to the issue at hearing. Or the county representative who is at the same location as the judge may submit into evidence the eligibility worker's case contacts sheet that was not part of the position statement. In any circumstance where new documents are submitted into evidence at the hearing, the judge or some other person must read the pertinent part of the document(s) into evidence.

The judge must then keep the record open and have the document(s) sent to the other party and give that party an opportunity to respond. The judge shall obtain an oral time waiver from the claimant for purposes of keeping the record open.

If both parties are at a location where a FAX machine is available, documents should be faxed either during a recess in the hearing or while the hearing is conducted so that documents can be exchanged and/or the judge can observe documents during the hearing. This will avoid requiring the judge to leave the record open.

- 14) Close the hearing as usual. If aid pending is in question, notify the parties of the decision orally, and give the written aid pending decision to the parties at the judge's location, and mail or fax the written copies to the parties not present.

