



California Division of Measurement Standards

WEIGHTS AND MEASURES

ADMINISTRATIVE CIVIL PENALTY

ADVOCATE TRAINING



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Enforcement History

- Prior to 1994
 - Notice of Violation
 - Criminal citation
 - Long form criminal filing
 - Civil unfair business practice/unfair competition filing

Imposition of penalties is generally the purview of the courts

- After 1994
 - California Legislature gave Sealers of Weights and Measures the authority to impose administrative civil penalties to handle minor violations up to \$1,000 per violation



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Authority

CA Business and Professions Code, Division 5, Chapter 1, Section 12013

Any sealer shall have the authority, as a public officer, to arrest, without a warrant, any person whenever such officer has reasonable cause to believe that the person to be arrested has, in his presence, violated any provision of this division, the violation of which is declared to be a public offense.

CA Business and Professions Code, Division 5, Chapter 1, Section 12015.3

- The sealer may levy civil penalties for violations of this division or a regulation adopted pursuant to this section
- CA Code of Regulations, Title 4, Division 9, Chapter 12, Article 2, "Penalty Guidelines"



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Administrative Civil Penalty Overview

- Imposition of penalties is generally the purview of the courts
- California Legislature gave Sealers of Weights and Measures the authority to impose administrative civil penalties for violations of Business and Professions Code, Division 5.
- Penalty limited to \$1,000 per violation
- Requires timely notification to Respondent of proposed action and reasons
- Requires a hearing before an impartial party, if requested
- Requires Due Process – confront witnesses, present their side, timely decision, right to appeal decision



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The Advocate

**A Starring
Role**



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Role of the Advocate

- **Prosecutor in the hearing process**
- **Makes an opening statement**
- **Presents the case at the hearing**





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Role of the Advocate

- **Questions witnesses, both for the County and the respondent**
- **Presents the County's evidence**
- **Summarizes the case and how the evidence proves the alleged violation(s) during the closing statement**
- **Ex parte conversations or meetings - discussions outside of the hearing – do not engage in these**



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The Supporting Roles

**Hearing Officer
Respondent
and
Witnesses**



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Role of the Hearing Officer

- **Judge and Jury**
- **Determination of the facts in the case**
- **Makes the decision based upon the evidence**



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Role of the Hearing Officer

- **Controls the tone of the hearing – ensures that it is informal**
- **Provides an adequate record of the hearing**
- **Receives relevant, material and competent evidence**
- **Remains impartial and unbiased**



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Role of the Respondent

- **The defendant or accused party**
- **Gives an opening statement**
- **Presents their side of the story with evidence**





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Role of the Respondent

- **Questions witnesses, both their own and the county's**
- **Summarizes their evidence during a closing statement**



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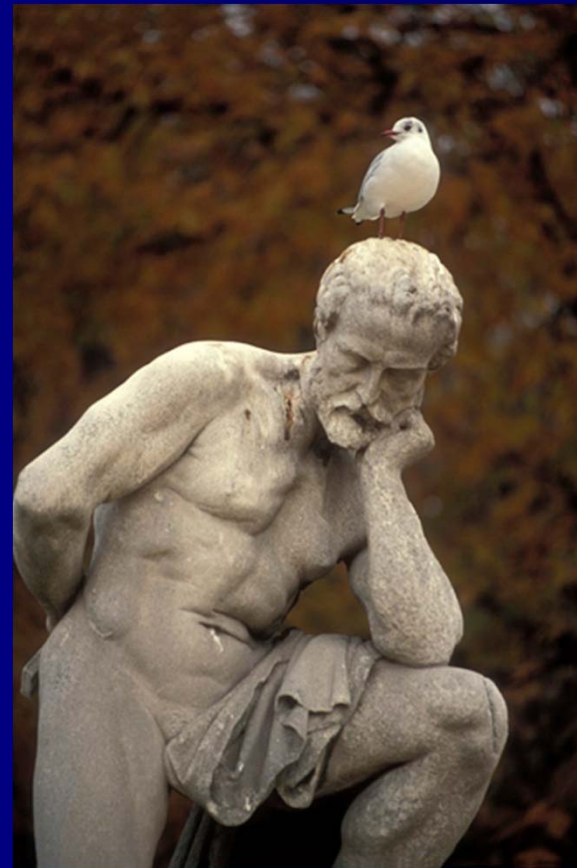
Role of the Witnesses

- **Provides direct evidence of the violation(s) at the hearing**
- **Evidence of facts derived from the five senses – hearing, sight, touch, taste, smell**
- **Testifies about what he/she did, saw, heard, or said**



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**Things
To
Consider**





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**BASIC INVESTIGATION
CONCEPTS THAT THE ADVOCATE
MUST KNOW**



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Who are Investigators?

- Peace officers
- Public officers
- Sworn or not
- Private citizens





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Role of the Investigator

- The gatherer of information (facts)
- Who evaluates that information to determine if a crime has been committed
- Determines who is responsible for the crime.



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The Basic Steps of an Investigation

- The event occurs
- You investigate and take notes
- You write the report
- Others learn about the event from your report



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What is a Crime?

- An act or omission
- By a person, firm, corporation, or association
- In violation of statutory law
- For which there is a punishment



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Spirit vs. Letter of the Law

- Spirit of the law - the intent of the Legislature when the law was created
- Letter of the law - the most strict interpretation of the statute



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Elements of a Crime

Those constituent parts of a crime which must be proved by the prosecution (advocate) to sustain a conviction.

EXAMPLE:

BPC §12512 – “When the sale of a commodity is based upon a quantity representation either furnished by the purchaser or obtained through the use of equipment supplied by him, the purchaser shall in no case buy the commodity according to any quantity which is less than the true quantity.”

ELEMENTS:

- Sale of a commodity
- Purchaser provides quantity representation or uses his own equipment to determine quantity
- Purchaser buys the commodity in less than the true quantity



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Due Process

- ❖ **Fifth and Fourteenth Amendments to the United States Constitution**
- ❖ **California Constitution – contains similar provisions as the US Constitution**



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Due Process

- ❖ **Extends to every case in which an individual may be deprived of life, liberty or property – criminal, civil, or administrative**



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Due Process

The process that, at a minimum, provides a person charged with a crime a -

- **Notice of the charges against them**
- **An opportunity to respond**
- **Review the evidence and obtain full disclosure of the case against them**
- **Opportunity to be heard, to present evidence and to question witnesses**



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Due Process

Includes the Respondent's right to -

- **Request a hearing before an impartial Hearing Officer**
- **Right to legal representation**
- **Right to a timely legal decision, in writing**



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4th Amendment to the U.S. Constitution

"The right of the people to be secure in their person, house, papers and effects against unreasonable searches and seizures shall not be violated."

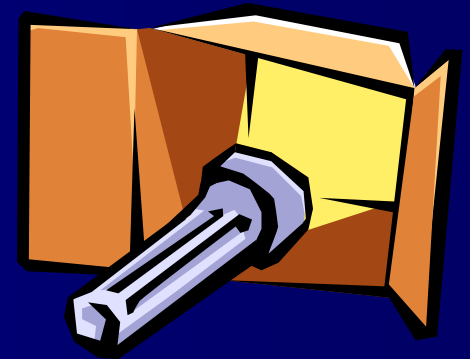




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Search and Seizure

- Search and Seizure are not the same thing
- Search: An exploration to find evidence
- Seizure: The taking custody or control of the evidence found in the search





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Types of Searches

- Plain view
- Open fields
- Public places
- Eavesdropping in a public place
- Optical aids





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Four Ways to Legally Search

1. **By consent**
2. Search warrant
3. Incident to a legal arrest
4. In an emergency to save lives,
exigent circumstances





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Search By Consent

- Most Weights and Measures searches are conducted in this manner
- A consent search is legal; it is advisable to obtain the consent in writing
- From the person in control of the area to be searched
- Leave a receipt for items seized
- Tag or mark each item for identification



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Exclusionary Rule

- The exclusionary rule requires that any evidence obtained by an officer's methods that violate a person's constitutional rights be excluded from being used in a criminal prosecution.
- Weeks vs. U.S. 1914
- Rochin vs. California 1952
- Mapp vs. Ohio 1961





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Fruit of the Poison Tree Doctrine

- The exclusionary rule extends to any evidence which was directly or indirectly obtained as a result of the initial unlawful search or seizure.
- Illegally seized evidence is inadmissible in court and additional evidence developed from it is also inadmissible.





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Evidence





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Evidence

Testimony,
writings, material
objects, or other
things presented to
prove the
existence or non
existence of a fact





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Requirements for evidence

- ❖ **Relevant** - must be related to the facts of the case
- ❖ **Material** - must have great significance to the facts of the case
- ❖ **Competent** - must have been obtained legally and be admissible during the hearing
- ❖ **Maintenance** - must be controlled, handled, identified, and stored properly





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Types of evidence

- 1) Direct evidence – shows the existence of facts by the witness' knowledge derived from his / her five senses – the witness' testimony



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Types of evidence

2) Real evidence – objects that speak for themselves and do not require explanation – physical things



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Types of evidence

3) Circumstantial evidence – does not directly prove a fact, but establishes facts that tend to prove certain elements of the case



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Types of evidence

4) Hearsay evidence –
second hand evidence
based on the statement of
someone else who may
have observed the
violation





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Hearsay Exceptions

1. Confessions and admissions
2. Prior statement of witness
3. **Business records**
4. **Public records**
5. Judgments
6. Former testimony
7. Declaration against interest
8. Spontaneous, contemporaneous, and dying declarations
9. State of mind or physical state



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Types of evidence

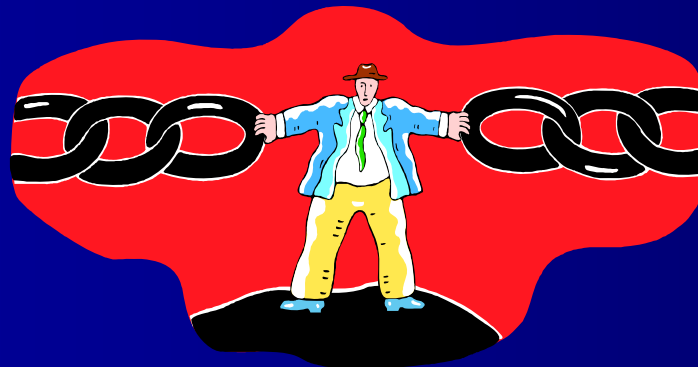
- 5) Prima Facie evidence – on its face
 - accepted as true unless challenged
 - weights and measures standards(BPC §12312)



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Chain of Custody

A chain of custody is the method by which tangible evidence is accounted for from seizure to the hearing. The safest chain has the fewest links.





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Challenges to the Chain of Custody

- The item has no identification
- The chain has missing information
- The evidence storage is accessible to many individuals
- The seal on the container has been tampered with or broken



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Burden of Proof

- ❖ **Proof** – the effect of evidence, derived from considering it, that leads to reasonable conclusions
- ❖ **Burden of proof** –
Rests with the Advocate





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Standards of Proof

- Preponderance - more than 50% - for administrative actions and civil actions
- Beyond a Reasonable Doubt – 100% - for criminal actions



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Statute of Limitations

- Misdemeanor/Infraction – one year from the occurrence of the violation
- Administrative Civil Penalties – within one year of occurrence (CA CCP §340)



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The Notice of Proposed Action

NOPA



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The NOPA must include:

- Written notification that the Sealer proposes to assess the Respondent with a penalty for violations of the California Business and Professions Code
- The grounds upon which the penalty is based, i.e., specific BPC sections
- Notification that the Respondent can stipulate to the violation(s) and waive the right to a hearing
- How the penalty amount was determined (based on Table A, CCR §4802)
- The right to review evidence and where it can be reviewed
- The right to request a hearing, within 20 days of receipt of the NOPA, and present evidence and questions witnesses
- That failure to request a hearing is a waiver to the right to a hearing and appeal of the Sealer's final decision



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California Code of Regulations §4802 “Penalty Guidelines”

4802. Penalty Guidelines. In applying Sections 12015.3 or 13302 of the Business and Professions Code, the sealer shall use the provisions of this section to determine the types of violations for which penalties may be assessed and the amounts of the penalties. Nothing in this article prohibits a sealer from seeking other relief through the criminal or civil court process in lieu of administrative action.

- (a) For the purposes of this article, violation types are designated as “Category A” “Category B” and “Category C”
- (1) “Category A” violations are violations in which there are actual, or there is the potential for actual false, deceptive, or misleading business practices, or significant monetary loss to consumers, or repeated violations of subparagraph (2), that occurred within a two-year period at the same location and which resulted in an action and subsequent penalty. Included in this category are certain violations subject to prior legislated fine levels pursuant to Business and Professions Code Section 12729. The appropriate penalty range for these violations is \$400-\$1,000; however, such penalty shall not exceed the maximum criminal fine specified in the charging section.
- (2) “Category B” violations are violations in which there is a reasonable potential for intermediate level of consumer or competitive harm; or repeated violations of subparagraph (3), that occurred within a two-year period at the same location and which resulted in an action and subsequent penalty. The appropriate penalty range for these violations is \$150-\$600; however, such penalty shall not exceed the maximum criminal fine specified in the charging section.
- (3) “Category C” violations are primarily violations that would typically have a less egregious effect on consumers or equitable competition in the marketplace. Included in this category are other violations included in Business and Professions Code, Division 5 that are not included in Table A. The appropriate penalty range for these violations is \$50-\$250; however, such penalty shall not exceed the maximum criminal fine specified in the charging section.
- (b) Table A shall be used to establish the level of severity of a particular violation and its corresponding penalty range. Except where specific violation parameters are provided, the violation column in Table A is an abbreviated description of the corresponding section in the California Business and Professions Code, Division 5, Weights and Measures.

1 = Category A (\$400 to \$1,000) 2 = Category B (\$150 to \$600) 3 = Category C (\$50 to \$250)

TABLE A

B&P §	VIOLATION	TYPE		
12016	Hindering or obstructing sealer.	1		
12018	Neglect or Refusal to exhibit weighing or measuring device for inspection	1		
12021	Marking or stamping false or short weight or measure on containers: Taking false tare (knowingly).	1		
12022.5	Fresh meats or roasts: Advertising/selling on basis of net weight, not including added fat.		2	



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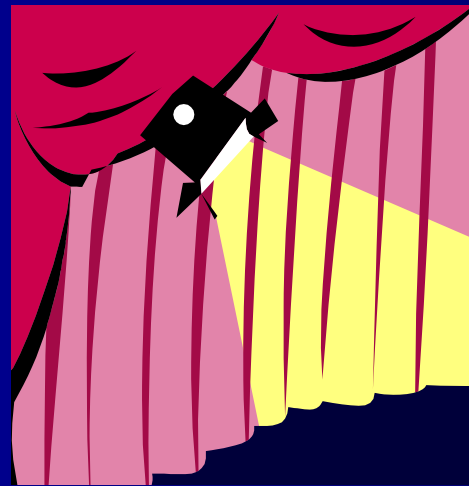
The NOPA must:

- Be mailed to the Respondent – certified mail, return receipt requested, suggested but not mandatory
- A copy must be mailed to the Division of Measurement Standards



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Setting the Stage





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PREPARING FOR THE HEARING



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The Advocate **must take the time** to properly prepare his/her presentation for the hearing.

- Review the NOPA and case file to become familiar with the facts
- Review the code sections violated to become familiar with the “elements of the crime”
- Collect and review the physical evidence
- Develop the questions you need to ask to prove the violation(s)
- Consider questions you will want to ask the Respondent
- Meet with your witness(es) to review your questions and responses – advise your witness(es) to answer honestly and tell the truth
- Prepare your exhibits – copies for the Hearing Officer and Respondent



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- Develop your opening statement – what you intend to prove, what the violation was, why it is a violation and its importance, what the appropriate type and amount of the penalty is pursuant to the CCR
- Develop your closing statement - what the evidence is, how it proves the violation, why the violation and proposed penalty is appropriate, what decision you would like the Hearing Officer to make
- Develop stipulations that you would like to have the Respondent agree to during the prehearing conference
- Prepare a binder containing your opening statement, evidence list, witness list, questions for your witness(es), questions for the Respondent, your “script” for the hearing, your closing statement



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Hearing Checklist

- ✓ Arrange for a suitable, quiet location for the hearing
- ✓ Obtain – tape recorder, tapes, markers, and other necessary equipment
- ✓ Make sure equipment functions and batteries are fresh



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Hearing Checklist

- ✓ Make sure there are adequate seats for all participants
- ✓ Do you need an interpreter?
- ✓ Can you accommodate the disabled?



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THE PREHEARING CONFERENCE



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The Hearing Officer may hold a prehearing conference prior to the hearing for the following reasons:

- Greet the parties
- Explain the hearing procedures and how the hearing will proceed
- Determine if there is a need for an interpreter or reasonable accommodations
- Explain the roles of the various parties
- Determine what evidence and exhibits will be presented and possibly mark them before the hearing
- Develop stipulations that both the Advocate and Respondent agree to so that time is saved having to present those issues during the hearing
- Determine the reason(s) for the requested hearing



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The Show Begins





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THE HEARING



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Conduct of the Hearing

The Hearing Officer will do the following:

- Start the tape recorder
- Open the hearing with a statement and brief remarks
- Read stipulations into the record
- The Hearing Officer may identify and describe the marked evidence by reading it into the record if it was marked during the prehearing conference





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Conduct of the Hearing

- Administer the oath to all persons that will testify during the hearing
- Request opening statements from the Advocate and Respondent





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Conduct of the Hearing

- Allow the Advocate and Respondent to call witnesses
- Take the testimony from the witnesses
- Take the exhibits and permanently mark them so they become part of the record if they have not already been read into the record
- Allow the Advocate and Respondent to cross examine the witnesses



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Opening Statement

**“The opening statement is not proof,
not evidence, just a summary of each
side’s version of what happened.”**

John Grisham - Theodore Boone - Kid Lawyer
2010



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The Advocate will:

- Give an opening statement
- Ask the Hearing Officer to take judicial notice of CA Business and Professions Code, Division 5 and the CA Code of Regulations, Title 4, Division 9
- Call witnesses for the Advocate
- Ask questions of the Advocate's witnesses to elicit direct evidence
- Introduce the Advocate's exhibits and physical evidence
- Cross examine the Respondent's witnesses
- Give a closing statement



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Closing Statement

The case is summarized to include the alleged violations, the evidence, the justification for the penalty amount, a request for the hearing officer to decide in favor of the presenter.



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The Respondent will:

- Give an opening statement
- Call his/her witnesses
- Ask questions of his/her witnesses to elicit direct evidence
- Introduce his/her exhibits and physical evidence
- Cross examine the Advocate's witnesses
- Give a closing statement



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- **Lawyers are not necessary to represent the Respondent, but they may be present**
- **Strict rules of evidence do not apply in this type administrative hearing**





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Conduct of the Hearing

- The Hearing Officer may ask questions to clarify things
- If a question is ambiguous, the Hearing Officer should ask that it be rephrased
- Request closing arguments / statements from both sides
- Inform the parties of the expected decision time frame
- Inform the Respondent of the appeal rights
- Close the hearing by stating: "The hearing in the matter of _____ v. _____ Department of Weights and Measures is now closed, the time being ___a.m./p.m."



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The Decision and Order

The Hearing Officer has 60 days after the conclusion of the hearing to issue, in writing, a proposed final Decision and Order.

The Sealer will make the final Decision and Order and notify the Respondent

A copy of the Decision and Order must be mailed to both the Respondent and the County Sealer of Weights and Measures or State Sealer.

The penalty imposed is due and payable within 45 days of the postmark of the Decision and Order.

The Decision and Order must include the right to appeal information.



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REVIEW OF THE CASE PRESENTATION



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It is advisable for the Advocate to meet with his/her witnesses after the hearing to debrief on what went right and wrong with the presentation, including testimony and evidence.

It is advisable for the Advocate to schedule a debriefing with the Hearing Officer after the decision is rendered to discuss the hearing for guidance on the "good, bad, and ugly" of the presentation.



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AFTER THE DECISION AND ORDER



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**The Respondent accepts the Decision
and Order and pays the penalty to the
County or State**

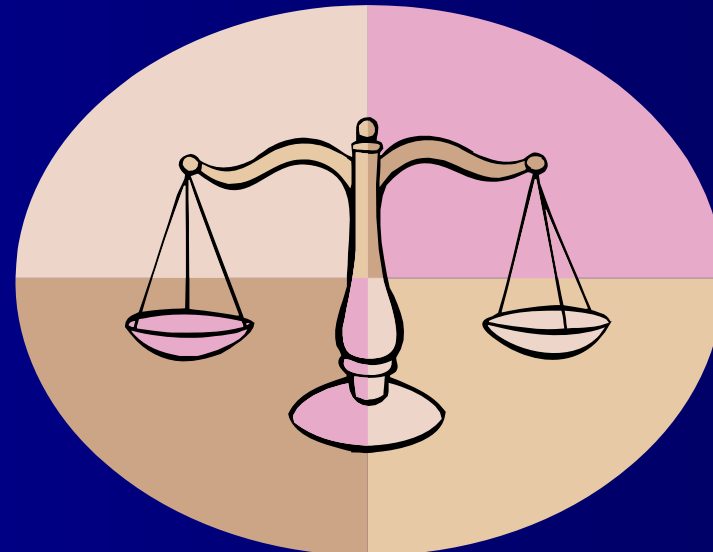
or

**The Respondent does not accept the
Decision and Order and chooses to
appeal**



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The Appeal Process





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The Appeal Process

Department of Food and Agriculture

Any person who does not request a hearing within the 20 day time frame permitted by regulation may not file an appeal with the Department when the Sealer issues the final decision



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The Appeal Process

Department of Food and Agriculture

- Respondent may appeal decision to the Secretary within 30 days
- Must be in writing stating the grounds for appeal
- Mailed in care of the Secretary to DMS at 6790 Florin Perkins Road, Suite 100, Sacramento, CA 95828



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Questions?



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