TEXAS WORKFORCE COMMISSION
Special Hearings
Rule 13 Hearing Officer Handbook

I. Evidence - Introduction

A number of statutes, rules and regulations governing administrative hearings before state agencies provide that the Hearing Officer or Tribunal shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure. Even in the absence of such provisions, the courts have ruled the same way.

Rules of evidence have been developed over hundreds of years of experience. They are grounded in principles of fair play and common sense. The rules of evidence in common law are the product of the system of trial by jury. They were aimed to protect from false reasoning, a temporarily convened tribunal of laymen: the jury.

Although the statutory rules of evidence are not binding upon administrative tribunals they may be used wherever necessary to achieve substantial justice. Distinction must be drawn between the freedom of the Hearing Officer to receive evidence which would be excluded in a court of law and to use such evidence in making findings of fact and conclusions of law. The basic test of admissibility is whether there exists a reasonable "guarantee of trustworthiness". If not, the evidence has little or no probative force.

While Hearing Officers may receive certain evidence which would be excluded under some of these rules in a court of law, knowledge of such exclusionary rules is extremely useful in evaluating and weighing evidence and in determining what evidence is needed in order to arrive at a fair decision. Further, these rules of evidence have many exclusionary provisions which show what kind of evidence is clearly admissible.

Although exclusionary rules of evidence are not binding in administrative hearings, there must be some limitation on the admission of evidence. To admit all evidence that may be offered, however remote from the issues and however untrustworthy, would often not only mean delay, but would result in intolerably long and confused records. In this connection, every effort should be made by the Hearing Officer to limit irrelevant testimony or evidence. Conversely, every effort should be made by the Hearing Officer to obtain all relevant evidence. Although almost any oral or documentary evidence may be received by the Hearing Officer, it does not give the Hearing Officer carte blanche to consider that everything and anything is of probative value. That is one reason the Hearing Officer should be acquainted with the legal exclusionary rules and should understand how they would apply to offered evidence. When the Hearing Officer refrains from applying them, the Hearing Officer should have a cogent reason for doing so. Conversely, the Hearing Officer should avoid applying the exclusionary rules mechanically.

When attorneys are appearing before the Hearing Officer they may wish to offer objections to testimony. At that time the Hearing Officer should explain the result of the hearing is to obtain facts. The attorney should also be assured that the decision of the Hearing Officer must be supported by admissible, valid, and legal evidence and that for this reason we rarely exclude from the hearing of the Hearing Officer any evidence which is offered. In the event they insist on making the objection, the attorneys will usually be satisfied by a phrase such as, "Objection is overruled and you may have your exception noted in the record."

Where the Hearing Officer is inclined to exclude evidence, but is in doubt on the question of its competency, relevancy, or materiality, the evidence should be admitted. It is better to have a complete record than a limited one.

It is important that the Hearing Officer bear in mind that in the following sections in this handbook relative to evidence, the use of the word "inadmissible" means that the evidence which is inadmissible cannot alone and without other admissible evidence be used to support a decision. Therefore, the following should be read with the thought in mind that "inadmissible" is equal to "insufficient" to support a decision. There are virtually no rules of exclusion. Any evidence presented by the parties, their witnesses, or representatives which is reasonably relevant, and not unduly repetitious should be admitted.

II. Definitions and Terms

Evidence includes all the means by which an alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. Evidence is the medium of proof.

Proof is conclusion arrived at by a consideration of the evidence. Proof is the result of evidence. Testimony means statements taken under oath or affirmation.

Evidence, which includes testimony; may be either documentary or oral in nature.

Facts are what a witness has seen, heard, smelled, felt or tasted. The general rule is that a witness must speak of facts alone. The witness may not utter opinions, conclusions or references.

Circumstances are collections of facts. Inferences can be drawn from facts and circumstances.

Evidentiary facts are primary facts which are obtained from testimony. They are the building blocks with which you construct the house or the ultimate facts.

Ultimate facts are derived from evidentiary facts and lead to or result from a conclusion drawn from the existence of the evidentiary facts and upon which the law must be imposed to arrive at a conclusion of law.

Conclusions of Witnesses are statements a witness makes and believes but did not witness or know from personal knowledge. They may be based on two or more separate facts.

III. Kinds of Evidence

Direct or Firsthand evidence is proof of the facts in issue communicated to the trier of the facts by witnesses having actual knowledge of them by means of their senses. Such proof would involve information actually seen, heard, touched, tasted or smelled by the witness. Direct or firsthand evidence carries the greatest weight in a hearing.

Circumstantial evidence is proof of collateral facts, where circumstances are shown from which the inference may be drawn that the principal and essential facts existed, in such a way that the

proof is irreconcilable with any other theory that can be presented. Circumstantial evidence is good evidence which should not be ignored.

Documentary - Writings, instruments, inscriptions and documents of all kinds.

Real - Objects, exhibition of parts of the body, premises.

Pictures - Photographs and moving pictures which are true representations, x-ray plates.

Diagrams and Models

Maps

Positive evidence - Proof that a certain fact does exist or did exist is positive evidence.

Negative evidence - Proof that a fact does not exist or did not exist is negative evidence. Usually, positive evidence about a particular fact is considered stronger than negative evidence as to the same facts.

Prima Facie Evidence - (The Latin phrase "*Prima facie*" literally means "at first view". Prima Facie evidence, which if unexplained or un-contradicted, would establish the fact alleged.

Self-serving Evidence or Testimony - Testimony, letters or documents submitted as evidence which are self-serving or in a person's own favor are usually inadmissible in evidence.

Telephone Conversations - Before proof of telephone conversations may be admitted, it is necessary that the identity of the speaker be sufficiently authenticated. Such authentication may be based on recognition of the voice because of prior or subsequent conversations with the same person or may be based on action of the speaker subsequent to the telephone conversation.

Hearsay or Secondhand evidence is a statement of a witness regarding matters the witness does not personally know but has only heard from someone else. Such evidence is admissible in a hearing but does not carry as much weight as firsthand evidence.

IV. Reasons for Rules of Evidence

The object of evidence is to inform the trier of the case of the material facts bearing upon the issues, in order that the truth may be discovered and a just determination of the controversy reached.

(1) The Rules of Evidence have been tested by years of experience and found effective.
(2) They have evolved and changed gradually in keeping with the times either by legislation or court interpretation.
(3) It is important to know what is or is not admissible in order to "gather in" the reliable evidence, or evidence with probative force.
(4) Their purpose is to establish the truth.
(5) They restrict trials to the germane issues of the dispute.

(6) They are designed to reduce delays during trials by excluding excursions into matters outside the germane issues.
(7) They are comparable to the "ground rules" of most contested sports.
(8) They are brought into play while the "contest" is on.

V. Stipulations

The parties to an appeal, with the consent of the Rule 13 Hearing Officer, may stipulate in writing the facts involved. Advance, written, stipulations are uncommon in the kind of administrative hearings Special Hearings holds and should not be solicited by the Hearing Officer. Informal agreements on the record during a hearing about what is in dispute and what is not are acceptable.

While the rules require, under our practice and procedure, that stipulations be in writing, it is believed that the same purpose can be served and much more quickly and easily by dictating as a part of the appeal hearings, such stipulations as have been reached by the parties and having the parties under oath identify the stipulations which have been dictated as the stipulations they have made and that they have agreed mutually to these stipulations.

Stipulations are usually made to saving the time of the Hearing Officer and the parties. However, they have no value in uncomplicated hearings because testimony may be secured from the parties as easily as stipulations could be drawn up and agreed to. It is not good practice to attempt to use stipulations unless the parties are represented by counsel.

Where parties enter into a stipulation regarding the facts in the case for evidence, it is in the case for all purposes until the litigation is ended or until the trier of the case, upon application, should relieve the party therefrom.

VI. Facts and Opinions

Facts are testified to by witnesses having personal knowledge.

Opinions are rendered by experts who are qualified and not under compulsion to testify.

Qualifications. By the qualification of an expert is meant testimony under oath by the expert or some other witness who has knowledge of the facts, that the expert witness has training or experience of sufficient nature, length, or dignity, as would cause him to have a reasonable basis upon which he/she can base an opinion which will have probative force. The witness is said to be qualified as the result of these facts. Proper cross-examination, for instance, of such a witness would entail attacking the fact of the witness' knowledge and acquaintance with the particular subject with respect to which the witness is expressing an opinion or delving into the reasons the witness is expressing an opinion to be as testified. Cross-examination would also be pertinent of such an expert witness to determine why and how the witness arrived at the opinion.

Opinion is reasoning, based on facts, such as: cause and effect, values, handwriting, blood specimens, cause of injury or death, mental condition and damages.

A layman need not be qualified to give opinions relative to speed, intoxication, color, weight, size, quantity, state of emotion, apparent physical condition, identity and likeness, identification of person by their voice (over telephone), estimated age, rational or irrational conduct, genuineness of handwriting.

Conclusions: Bearing in mind that the Hearing Officer is attempting to elicit all facts possible about the issues, it is highly possible that witnesses who are not experts will testify to what at first glance is apparently an ultimate fact when in truth and in fact the so-called "fact" is nothing but a conclusion, or in other words, an opinion of the witness. While in judicial proceedings this type of testimony is wholly inadmissible, in our proceedings the opinion or conclusions of the non-expert witness has no probative force except it might show a state of mind or an intention which existed in the mind of the witness, for instance, at the time the witness did something or omitted to do something while under the apprehension that the conclusion was accurate.

It is for the Hearing Officer to "conclude". The Hearing Officer's opinion as to the conclusion which must be drawn from the existence of certain facts may or may not agree with the opinions or conclusions of the witness. In any event where a different conclusion is compelled by the facts such opinion testimony by the non-expert witness should have no bearing on rebutting the conclusion of the Hearing Officer. However, the giving of an opinion or a conclusion by a non-expert witness should be the signal to thoroughly explore why the witness reached the conclusion. The ultimate facts which lay behind the witness' conclusion or opinion may well be pertinent and helpful in the solution of the case.

VII. Affidavits

An affidavit is a statement sworn to before a person authorized to take oaths and acknowledgments.

Strictly speaking, the affidavits are inadmissible in judicial proceedings. However, there is a guarantee of trustworthiness in such affidavits in that they are made in proceedings which require an oath by witnesses and probably would fall within the definition of the crime of perjury as set in the Penal Code of Texas. The crime of perjury is punishable as a felony. This would seem to justify using these affidavits as proof of facts in our proceedings. The only fault of the affidavit is the inability of anybody to cross-examine the affiant.

Occasionally, a document will be received which purports to be an affidavit but which lacks some of the necessary requisites of an affidavit. It may not be signed by the affiant or by the notary, or it may not bear the notary's seal. Such a document can, if furnished in response to a notice to appear for hearing, be used as an appearance by the party furnishing it but it should be given no more weight than the usual written but unattested document. The appearance should be shown as "(claimant) (employer) by unsworn statement."

It has been our long-standing policy that more weight is given to sworn testimony of a hearing witness than is given to an affidavit executed by an individual not subject to the hearing examination; therefore, we must make our policy clear to a party attempting to introduce such evidence. If the party does not wish to produce the witnesses, the Hearing Officer should inform the party that the party must bear the risk of non-persuasion.

VIII. Relevancy of Evidence

1. What is relevant relates in some logical way to the principal fact. A fact is relevant to another fact when, according to the common course of events, the existence of one, either by itself or in connection with other facts, proves or renders probable, the existence of the other. Relevant evidence is not necessarily competent, i.e., "hearsay".

2. Generally, it is irrelevant if the purpose of showing that a person did a particular thing at one time to prove that he did a similar thing at another time. Exceptions are where such proof is intended to show a regular or continuous course of conduct. Generally, the fact that a party is a habitual litigant is irrelevant. Proof of prior dealings between the litigants is irrelevant. Proof of prior dealings between the same parties may be relevant to show authority to act. Generally, the wealth of a party is irrelevant and inadmissible.

IX. Administrative Notice

Administrative notice covers undisputed matters of which a trier of the case will take notice, as within general knowledge, although no evidence thereof is introduced. Administrative notice is taken of matters which are of such general and public knowledge that everyone is presumed to be acquainted with them. In court proceedings this notice is referred to as judicial notice.

Examples of Matters of Fact:

(1) Historical events,
(2) The course of nature,
(3) Mortality tables,
(4) Intoxicating nature of certain beverages,
(5) Geographical facts,
(6) Census Statistics,
(7) Meteorological data on certain days,
(8) Official weather reports.

Examples of Matters of Law:

(1) Statutes of the state,
(2) Acts of Congress,
(3) Traffic regulations of a city,
(4) Court procedures,
(5) Authority of public officers.
(6) Laws of other states or foreign countries may be administratively noticed in the discretion of the Hearing Officer.
(7) The nature of proceedings before an administrative hearing require a Hearing Officer to include as part of the hearing record any facts that the Hearing Officer intends to administratively take notice. This practice avoids surprise on the part of the parties when the parties receive the decision. It also provides for rebuttal by the parties which should be helpful to the Hearing Officer in guarding against taking notice of events which do not meet the requirements.

X. Presumptions

Definition: A presumption is an inference drawn from particular facts or from particular evidence, unless and until the truth of the inference is disproved. A presumption is indulged to supply the place of facts and disappears in the presence of substantial evidence to the contrary.

Presumption of Fact: A presumption of fact is made upon principles of induction. It is an inference drawn by a logical process of reasoning from observation, experience or other admitted facts. Every inference must stand upon some clear, direct evidence and not upon some other inference or presumption.

Presumption of Law: There is a rule of law and part of the law itself. For example, the presumption of death after seven years' unexplained absence. A presumption of law is subject to the same condition as a presumption of fact, in that it disappears when substantial evidence to the contrary is introduced.

Conflicting Presumptions: Where there are conflicting presumptions of unequal weight, the stronger will prevail.

Examples of Presumptions:

(1) A fact continuous in its nature is presumed to continue to exist.
(2) The continuance of law in force is presumed.
(3) Identity of name is presumptive evidence of the identity of person, where there is similarity of residence or trade or where the name is an unusual one.
(4) It is presumed that an instrument was made at its date and that it was delivered at the time of its date.
(5) Delivery of an instrument is presumed from possession thereof.
(6) Legitimacy of children is presumed.
(7) Knowledge of the contents of their books is presumed when members of a firm have access to them and an opportunity to know how their accounts are kept.
(8) It is presumed that parties know the terms of their contracts.
(9) Mailing of letters. It is presumed that a properly addressed and stamped envelope, deposited in a post office or regularly maintained post box, reaches its destination.
(10) If the proof is that such mailing took place in the regular course of business without direct testimony of the person who mailed the letter himself, it does not give rise to the presumption of mailing the particular letter involved.
(11) A letter of communication is presumed to have been mailed on the date shown by the postmark. However, this is rebuttable by proof of the actual time of the mailing.
(12) Telegrams are presumed to be delivered, if properly addressed and transmitted.
(13) It is presumed that public officers do their duty in good faith.
(14) It is presumed that a person in possession of personal property is its owner.
(15) Where alleged services are rendered by a relative or close friend, it is presumed, in the absence of agreement, that they were given voluntarily, gratuitously and without expectation of pay.

No Presumptions: Fraudulent intent is not presumed. Payment is not presumed by lapse of time except where various statutes of limitations which outlaw certain debts and obligations apply.

Presumption on Presumption: A presumption cannot be based upon another presumption.

Presumptions arise only as the result of the existence of facts and must be based only on facts.

XI. Hearsay Rule

Hearsay is a statement of a witness relative to matters the witness does not know but has only heard someone else say.

Technically, hearsay is defined as a statement as to the existence or non-existence of facts by some person, not under oath as a witness, made outside the presence of the court, without the opportunity of cross-examination of the person making the statement where the statement is introduced to prove the truth of the facts contained in such statement. The one necessary element in determining whether any evidence offered is hearsay and inadmissible (where it lacks a guarantee of trustworthiness) is whether the statement is introduced to prove the truth of the facts contained in such statement.

Examples of utterances which ordinarily would meet the test of the definition of hearsay but nevertheless are not hearsay and are admissible are:

(1) Testimony of a witness that he heard a third party say that he was feeling unwell, where such evidence is offered to show not the truth of the facts contained in the statement but that, at the time the utterer made the statement, the declarant was conscious and able to talk.
(2) Reports made by expert appraisers when the report is offered in evidence not to show the truth of the facts contained in the report but the fact that an appraisal had been undertaken.
(3) Report of administrative agencies where the report is offered not to show the truth of the facts contained therein but to prove that an administrative agency has considered a certain matter.
(4) All of these examples are not hearsay because they do not meet the last and most important element of the definition of hearsay.

In a court of law, hearsay evidence is generally inadmissible unless it comes under one of the recognized exceptions to the rule, but in administrative appeal hearings, hearsay is admissible even if it does not come under one of the exceptions. The decision in an administrative appeal hearing is based upon the weight of the evidence. Hearsay testimony can be admitted as evidence into the record; however, such evidence will not carry as much weight as firsthand testimony. Generally, greater weight must be given to direct testimony under oath that is subject to cross-examination than hearsay testimony or unsworn written statements, including those which result from investigations by TWC representatives.

XII. Exceptions to the Hearsay Rule

Each of these exceptions, it will be noted, is based upon the existence of a guarantee of trustworthiness because they are based upon some situation which gives to the class of declaration in question an average reliability greater than those of hearsay declarations generally. It will also be seen that these declarations are made under circumstances which would reasonably indicate that the declarant is speaking in a natural unforced way and for purposes other than litigation.

Keep in mind that all the following are examples of hearsay. The hearsay statements will be given the same consideration as other evidence, which is not of a hearsay nature, if certain conditions are met; that is, if they fall within one of the exceptions. It is the Hearing Officer's responsibility to make certain that the conditions for each exception are met before the hearsay statements are given the same evidentiary weight as other non-hearsay evidence.

(1) Declarations as to bodily condition of the declarant. An example of evidence which is admissible under this exception to the hearsay rule is testimony that the witness heard the victim of an accident say, "My head aches" for the purpose of proving that the speaker did then have a headache.

(2) Declarations as to a state of mind. Here again is a guarantee of trustworthiness in that the statement, to come under the exception, must have been made under circumstances free of suspicion and made before the declarant had any reason to falsify. For this reason, the exception is confined to a description of the mental state at the time of the declaration. An example of this exception would be testimony of a witness that the witness had heard another state, "I hate 'X' and intend to kill 'X'." This statement is admissible to show that the declarant did actually hate "X" and did at that time when he made the statement intend to kill "X".

(3) Spontaneous declarations as to objective facts. Here again the reliability of the testimony justifies admissibility of this type of hearsay. Examples of this type of admissible hearsay statements are declarations made by persons injured in accidents and those made by victims of crimes of violence when the witness testifies that the declarant had uttered them under circumstances that reveal that such statements were absolutely spontaneous. Generally, to be admissible they must have been provoked by startling or unusual events and must have been declarations which were, in the sense that they were not forethought, almost involuntary. One of the guarantees of the reliability of this type of exception to the hearsay rule is that they are made under circumstances which would give no time to fabricate facts contained in the statement.

(4) Evidence in previous proceedings. Generally, in judicial proceedings the requirement for the admissibility of this type of hearsay as an exception to the hearsay rule is that the witness be dead or not available to testify in a subsequent proceeding. Generally, it requires the same parties and the same issues.

(5) Declarations and statements of fact against interest. When it is considered that this exception to the rule prohibiting the admissibility of hearsay testimony rests upon the fact that the utterance is against the pecuniary or proprietary interest of the declarant it is obvious how such a declaration has a great degree of reliability. These types of statements must not be confused with admissions which are dealt with hereinafter. They only concern financial interests against which the declaration is opposed. A good example is that the witness testifies that an employer stated that the employer owed the

claimant a salary check and had not paid the claimant. The admissibility for instance of this form of testimony would go a long way to disprove the employer's sworn testimony at the hearing that the employer did not owe the claimant any money.

(6) Admissions. To be admissible such statements must have been made at a time when the declarant had no motive to falsify. They are sometimes described as admissible because the declarations are contrary to a position which the party is taking at the subsequent date of a proceeding which has arisen upon the fact admitted prior to the proceeding. When admitted in evidence and when weighed against the position which the interested party (the declarant) is taking at the appeal hearing, this type of evidence is of great probative value. Since the later contrary position has been taken after it became apparent to the declarant that a former declaration will hurt the declarant, the guarantee or reliability of such previous declaration is obvious on its face. Perhaps this exception and the "Statements Against Interest" rule are the most reliable of these exceptions and have great probative influence. Let it not be understood that these statements by way of admission are incontrovertible. When once admitted in evidence they are like any other evidence which must be weighed to determine where the greater weight of the competent legally admissible evidence would lie.

(7) Acquiescence. One particular admission which will probably be important to the Hearing Officer is the question of silence or acquiescence. While the ancient maxim, "Silence gives consent" states a broad principle, it does not, without qualification, represent a practical rule of law. At most, silence warrants an inference of assent of correctness to a comment only when no other explanation is equally consonant with silence. In other words, silence may be treated as an admission only when one ought to speak. The rule may be stated as follows: Where a statement is made in the presence of a party under such circumstances that the party heard and understood what was said, had an opportunity to reply, and would naturally have replied unless the party admitted the truth of the statement, the silence may be received as a tacit admission of its truth.

(8) Regular entries in the books and records of a business. The guarantee of trustworthiness of this type of evidence is found in the fact that the entire business of the country is conducted on such records and the records are frequently checked as to correctness by systematic balance striking. Since many types of this kind of evidence may come in and be admissible under some of the other exceptions to the hearsay rule, the application of this particular rule requires certain facts to exist to make these documents admissible only under this exception. The requirements are:

(a) The witness who made the entries is not available or present at the hearing.

(b) The documents must be books or records of original entry, such as payroll records, day books, cash books, journals, ledgers, slips and other like memoranda.

(c) Entries must have been made within a short time after the transaction.

(d) The entries must be "regular" entries and must bear an apparent fairness on the fact of the record and be free from suspicion or alteration.

(e) The information in the documents must pertain to the business of the offeror. The rule respecting this type of evidence has been broadened to extend to birth records, attendance records, and the like.

(f) The documents must be authenticated or proven to be what they purport to represent. The proof must comply with the above requirements and in addition thereto that they were relied on in the conduct of the business.

(9) Office written statements or public documents. Books, documents, and records of a public nature which are required by law to be kept, are "prima facie" evidence because they are made by disinterested persons in the discharge of a public duty with no reason to falsify such entries. In this type of evidence we have a guarantee of trustworthiness in the fact that the statement was made in the line of an official duty by an officer who is sworn to perform that duty in addition thereto they are public records open to inspection and correction. The statements must be in writing and to be admissible under this exception must be authenticated by the signature of the official charged with the duty of authenticating the record or recording the facts contained in the written statement. It must also contain the imprint of a seal where there is a seal authorized for such officer.

(10) Evidence as to reputation. Testimony of this character is admissible because of two factors:

(a) The inherent difficulty of obtaining any satisfactory evidence of the desired fact other than proof of tradition and reputation create a necessity for this evidence; and

(b) The fact that a prolonged observation and discussion of certain matters of general interest by a whole community will sift possible errors and bring the result down to us in a fairly trustworthy form. An example of this type of testimony would be the testimony of the witness as to the general moral character of a person and the person's reputation for truth and veracity and as to whether the witness would or would not believe a statement made by such person.

XIII. Handling Documentary Evidence

If a party in a telephone hearing sends a copy of a document to the Hearing Officer, which was not previously sent to the Commission, and which was not sent to the opposing party, the Hearing Officer should first determine the relevancy and materiality of the offered document. If the document is not relevant and material, the document should be excluded and the Hearing Officer should continue in the development of the record. The Hearing Officer must clearly state the ruling regarding this on the record. If the Hearing Officer determines that the document is relevant, the Hearing Officer should attempt, if possible, to fax or email the document to the other party. If successful in this attempt, the hearing should proceed as usual. If faxing or emailing of the document is not a viable alternative, the Hearing Officer should inquire of the other party whether the party is willing to waive review of the document. If the other party has no objection, the Hearing Officer should describe the document and enter the document into the record. If waiver cannot be secured, the Hearing Officer should inform the parties that it will be necessary to continue the hearing at some point to enter the document into the record. Before continuing the hearing, the Hearing Officer should complete as much of the hearing as is possible without discussion of the document. The Hearing Officer should never use the fact that a party did not receive a document as basis for denying the document.

If the offering party in a telephone hearing did not mail a document to either the Hearing Officer or the other party or neither the Hearing Officer nor the other party received the document, the Hearing Officer should inquire about the contents and nature of the document in order to determine whether the document is relevant and material. If the document is not relevant and material, the Hearing Officer should rule that the document is not relevant and material, and should continue

with the development of the record. If the document appears to be relevant and material, the Hearing Officer should try first to complete as much of the hearing as possible before effecting a continuance. The offering party should be advised to mail or fax to the Hearing Officer and the other party, any document(s) that are to be entered into the record during the next hearing.

If a party in a telephone hearing refers to a previously undisclosed document, the Hearing Officer first shall determine relevance and then attempt to have the document faxed or emailed to the other party, ask for a waiver, or postpone the hearing. If the hearing is not postponed and the document is not faxed, the Hearing Officer shall determine the length of the document. The Hearing Officer shall label all proposed exhibits and consider objections regarding admissibility from any party.

The Hearing Officer, in the conduct of a hearing, should be acutely aware that the Hearing Officer is, in effect, creating an "appellate" record by use of a digital recording. The recording is blind in that the only thing it does is to record voices. Many otherwise fine records are ruined where the Hearing Officer fails to take the following steps.

The steps to be followed in this manner each time, are as follows:

(1) When documentary evidence is sought to be introduced and made a part of the record, the Hearing Officer should identify the document in some convenient location, as Exhibit #1, etc. Other documents should likewise be identified using consecutive Arabic numerals regardless of which party offered the exhibit. However, the Hearing Officer may identify which party offered the document. If there are reopenings, the Hearing Officer continues with the numerical sequence.
(2) The document should be authenticated by testimony establishing that it is what it purports to be.
(3) An opportunity to examine the proffered document should be afforded to all interested parties.
(4) A party or their representative who wishes to object to the introduction of evidence should be allowed to state their objection and the basis therefore on the record.
(5) A witness who is testifying with respect to any documentary evidence should identify the documents in the testimony as "Exhibit #10" or some similar statement. Many witnesses will testify as to "it", "them", or "this" without identifying what they are talking about causing ambiguity of the record.

Hearing Officers should mark each exhibit with an exhibit label. The label should be affixed to an unobtrusive place preferably on the first page of the exhibit. Subsequent pages of multi-page numbered exhibits should be numbered 2 of 8, 3 of 8 and so forth. The first page of the exhibit should identify the total number of pages in the exhibit. In the case of extremely long exhibits, the initial page should be labeled and the total number of pages identified.

The Hearing Officer when accepting an exhibit into the record should not only mark the exhibit, but should state for the record that he/she is marking the identified document as Exhibit x.

The Hearing Officer should obtain either the original of a document or a true and correct copy thereof. No evidence may be accepted into the record that cannot be made a part of the record and

retained. An exception may be made for bulky objects not subject to being kept with the file. In such case, a photo of the object might be secured from the party.

When a party does not have a copy of a document, the party may waive the right to have a copy and the document can be described or read for them by the Hearing Officer. Waiving the right to a copy is distinct from offering an objection to admissibility and these should not be combined into one question.

A party or witness should not read or refer to documents unless those documents are entered into evidence. Employer computer records are documents also, and if they are used as evidence, should be printed out and mailed to the Hearing Officer and the claimant. A party may look at various records or notes to refresh their memory; however, if they are going to be read or discussed in the hearing, copies should be obtained and entered.

Any document sent to the Hearing Officer prior to the hearing is considered offered as a potential exhibit and cannot be ignored by the Hearing Officer. The party is not required to "bring it up" during the hearing for the exhibit to be considered offered. The Hearing Officer must either admit the document or rule on the record why it is not being admitted. Any document referred to during the hearing is also considered a potential exhibit and cannot be ignored. This would include file documents and documents that the parties may not have sent to the Hearing Officer.

Exhibits should not be written on or defaced by the Hearing Officer other than what is needed to properly identify the document. It is permissible to note the date and time of receipt if necessary. The exhibit label should not cover the information on the document.

A document should be entered as contemporaneously as possible to the time it is discussed in the testimony. It is permissible for a few questions to be asked to lay a foundation for the document, but it should be entered as soon as possible. The Hearing Officer should not wait until the end of the hearing to enter all the documents and should not enter all documents at the beginning of the hearing before allowing the parties to state for the record why they were sent.

The Hearing Officer should be familiar with all file documents including the fact-finding statements of the investigation. If any party gives testimony that appears to conflict with their previous statement in the file, the party should be confronted with that file document. The appropriate method is to enter the file document as evidence and then ask the party to explain the apparent inconsistency. Any file documents referred to in the hearing must be either entered as exhibits or a ruling made on the record as to why they are being denied.

File documents may not be used or read in the hearing unless they are entered as exhibits.
No document should be used in a decision unless it has been entered as an exhibit.

The Hearing Officer should be liberal in admitting any documents offered that might be considered material and relevant to the issues.

XIV. Best Evidence and Parol Evidence Rules

Best Evidence Rule. This requires a party to produce the best evidence of which the case in its nature is susceptible. The use of substitute or secondary evidence is forbidden when the original or primary evidence can be had. This rule is literally interpreted. Trustworthy copies (Photostats) are usually admissible in the first instance. The rule relates entirely to documentary evidence. If a writing is collateral to the principal fact, it is not necessary to produce it. Collateral matters are not within the rule.

Secondary evidence of the contents of a writing may be offered where it is shown that the original is lost, destroyed, or without the jurisdiction and unavailable.

Where any form of a written agreement is in the case, or, where a series of written communications represent the agreement, the Hearing Officer should be extremely careful to make every effort to obtain either the original or an authenticated copy and introduce it in evidence after authentication and to adhere to the procedure with respect to written evidence provided for above. The best illustration of the necessity of observing this lies in a case where the employer and all the witnesses testified that a written contract contained a provision which was important to the decision and, in fact, the crux of the case. There was unanimous agreement that this provision was contained in the written agreement. However, a copy of the written agreement was obtained by the Hearing Officer and the agreement was found to be lacking in the provision that all witnesses testified was in the written agreement. It was then obvious that the witnesses had been testifying as to their opinions or conclusions as to what the contract meant and had given the Hearing Officer the impression that they had been testifying to ultimate facts. Without obtaining written instruments it is impossible for the Hearing Officer to place a legal construction on the agreements as to what they mean or what they contain. It is the responsibility of the Hearing Officer to construe these instruments and not the responsibility of the parties or the witnesses.

Parol Evidence Rule. The foregoing is particularly true where a written agreement is clear, unambiguous and contains all the elements necessary to a contract and is complete in its details. If this situation obtains, the Hearing Officer must be aware that a rule called the "Parol Evidence Rule" prohibits oral testimony from being considered to change, add to, modify or vary in any respect the express terms of the clear and unambiguous contract. In short, the written contract will govern, and not the oral testimony, regardless of whether or not it is admitted in evidence in the record of the hearing.

Notwithstanding the above-mentioned prohibition of oral testimony to vary the terms of a written contract, the rule is not applicable where the contract is ambiguous or not clear in its terms. Parol evidence may be introduced from the parties to straighten out the lack of clarity or correct the ambiguity. Likewise, if the contract is not complete but the other parts are clear insofar as the contract goes, parol evidence may be used to supply the missing part of the contract but not to affect the clear parts of the contract.

About the foregoing, the Hearing Officer must notice that the law in some cases makes use of "customs and usages" which have obtained in an industry or in a business. The principle governing the admission of evidence of customs or usage of the trade or locality to supplement a written instrument is the same as that which determines the admissibility of a collateral agreement. Where,

from all the circumstances including the terms of the writing and of the custom or usage sought to be introduced, it appears to the Hearing Officer that the writing was designed to be the embodiment of the transaction, the custom or usage relating to the same subject matter is not competent and will not support a decision. On the other hand, if it appears that the custom or usage is that the writing might well have been in contemplation of a custom and with the expectation that the custom would be used to supplement its terms, the latter is admissible and useable in the decision.

It is easier to infer that the custom or usage was intended to stand with the contract, than that a collateral agreement was so intended, for the probability is usually strong that the terms of an outside agreement would have been incorporated in the writing if not meant to be superseded, but the custom or usage would usually be tacitly accepted as part of the understanding without it being thought necessary to set it down in writing. The question, therefore, is whether the custom or usage is so inconsistent or repugnant to the probable purpose of the writing as that the parties by their writing intended to depart from it. If so, evidence of the custom or usage will be excluded otherwise it will come in.

It must also appear that the custom must be almost invariably observed and followed in the industry or locality for a sufficient length of time as to render the knowledge of such custom so widespread as to impute knowledge thereof to all parties, before evidence of such custom will be allowed to vary the terms or add to a contract.

XV. Burden of Proof

Weight of Evidence. Preponderance of Evidence means the greater weight of the evidence. In a civil case, the plaintiff must establish its claim by a fair preponderance of the evidence. The attitude, appearance, and acts of parties and witnesses may be taken into consideration and there may be deduced therefrom such inferences as fairly arise out of the given circumstances. The advantages of the trier of the case who saw and heard the witnesses should be considered and when the truth hangs upon the credibility of the witnesses, the conclusions of the trier of the case should be given the greatest weight.

Prima Facie Case. When the party who has the burden of the proof has produced sufficient evidence to be entitled to judgment in favor of such party, a "prima facie" case has been made out. When the other side goes forward and presents evidence, such side may overcome the "prima facie" case.

Res judicata. This means "the thing adjudicated." An existing final judgment rendered upon the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all other actions on the points of issue and adjudicated in the first suit.

XVI. Credibility of Witnesses and Weight of Evidence

A. Credibility and weight generally

In General. The two subjects described in the heading of this section of the manual are two distinct and different matters. They have been grouped together because they relate to each other. The determination of the credibility of witnesses, that is, determining which evidentiary facts are going

to be accepted by the Hearing Officer must precede the second step. The second step is an analysis of the accepted evidentiary facts and the making of such analysis of them as will enable the Hearing Officer to arrive at the ultimate fact. The ultimate fact must be arrived at by the Hearing Officer, not by the witness.

If a witness is detected testifying as to opinions or conclusions as facts, the witness should be meticulously questioned about the basis for such opinion or conclusion.

B. Considerations regarding credibility of witnesses

One of the most important duties which rests on the Hearing Officer is determining the credibility of the witnesses. It is from the testimony of witnesses and the other evidence that the facts which are controlling in the case are "found" to be the facts by the Hearing Officer, so that the Hearing Officer may apply the law and reach a decision.

To help the Hearing Officer arrive at the facts, the following suggestions are made respecting the credibility of witnesses in situations which will confront the Hearing Officer.

The situation may arise where there is an apparent conflict in the testimony of two witnesses. This does not mean that the Hearing Officer must find that one is not worthy of belief and that the other is. No person ever sees all an event or comprehends all a situation. Each person fills in the gaps in observation and comprehension from experience. Two persons honestly describing the same event, therefore, will almost always give different descriptions.

Testimony of witnesses is composed of evidentiary facts. The Hearing Officer's search is for the ultimate facts. Therefore, it is quite probable that some evidentiary facts from one witness and other evidentiary facts from another witness may be accepted by the Hearing Officer. From the evidentiary facts which are accepted it becomes the duty of the Hearing Officer to find what the ultimate fact is.

Experience shows that the Hearing Officer will be greatly handicapped in doing a job properly if the Hearing Officer enters the hearing with the idea that most witnesses are untruthful. Most cases of perjury are exposed by interrogation from an experienced trier of the facts. If possible, the Hearing Officer should attempt to arrive at the ultimate facts by reconciling all the testimony and the evidence.

It may occur that part of the testimony of a witness may be accepted as true and the rest disbelieved. It is entirely permissible to give no credibility to the entire testimony of a witness who willfully testifies falsely as to a material fact. However, this is within the judgment of the Hearing Officer. A disinterested witness is not necessarily entitled to more credibility than an interested witness. However, in determining a witness' credibility, a lack of interest in the outcome may be considered. Also, showing a bias, hostility, or any emotion, which would tend to convince the Hearing Officer that the witness was probably either deliberately or unconsciously giving testimony in such a fashion as to create a different impression than the actual truth of the matter, may well justify discounting the witness' testimony.

C. Appraising and determining the weight of the evidence

When the terms "greater weight of the evidence" or "preponderance of the evidence" are used, it is meant that there are more evidentiary facts established which tend to establish an ultimate fact. To illustrate the difference between an evidentiary fact or set of facts and an ultimate fact, the question of whether a worker was in employment or was independent should be given consideration. The evidentiary facts are such as the right to control, the right to stop work, what was the ultimate object of the performance of service, etc. The ultimate fact of whether a worker was in employment is derived from weighing the evidentiary facts on one side against the evidentiary facts on the other.

Generally, the evidentiary facts must first be established by applying the rule of credibility to the witnesses. Then, after these evidentiary facts have been established and weighed, the ultimate fact will be found to exist. For instance, the testimony in some respects would be conflicting between two witnesses who saw an automobile accident from two opposite points or from different sides of the street. In that case, giving greater weight to the testimony of the witness whose view was better than the other witness is not a matter of disbelieving one and believing the other.

In determining the greater weight of credible testimony, the number of witnesses is not controlling. The testimony of a single witness, if believed, may be given sufficient credibility to establish either the ultimate fact or evidentiary facts from which the ultimate facts may be found.

Generally, greater weight must be given to direct testimony under oath that is subject to cross-examination than hearsay testimony or to general reports made to the departments in the course of its investigation. Direct testimony may be disbelieved, however, where it appears unreliable, contradictory, or inherently improbable.

It is the responsibility of the Hearing Officer to afford the parties a fair and impartial hearing, an opportunity to present their evidence, and obtain a just decision. To the extent that the underlying principles of evidence herein discussed are useful in achieving this goal, these underlying principles should be observed by the Hearing Officer in hearings. However, the efficiency of the Hearing Officer must not be hampered by too strict an interpretation of these rules.

XVII. Substantial Evidence Rule

From *Railroad Commission v. Shell Oil Company*, 161 S.W. 2d 1022, 1029 (Texas Sup. Ct., 1942)

> "In such a case, the issue is not whether or not the agency came to the proper fact conclusion on the basis of the conflicting evidence, but whether or not it acted arbitrarily and without regard to the facts. Hence it is generally recognized that where the order of the agency under attack involved the exercise of the sound judgement and discretion of the agency in a matter committed to it by the Legislature, the Court will sustain the order if the action of the agency in reaching such conclusions is reasonably supported by substantial evidence. This does not mean that a mere scintilla of evidence will suffice, nor does it mean that the court is bound to select the testimony of one side, with absolute blindness, over that introduced by the other. After all, the court is to render justice in the case. The

record is to be considered as a whole, and it is for the court to determine what constitutes substantial evidence. The court is not to substitute its discretion for that committed to the agency by the Legislature, but is to sustain the agency if it is reasonably supported by substantial evidence before the court. If the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside."

XVIII. Representation of Parties

Parties to an appeal hearing have the right to appear without representation if they so desire.

Section 207.007 of the Act provides that any individual in any proceeding before the Commission may be represented by counsel or other duly authorized agent. Commission Rule 18(3)(C), 40 TAC §815.18(3)(C) provides that any party may appear by an attorney or by any other party who is qualified to represent others. It is believed that this means that a party may bring anyone to the hearing to represent him/her, the only requirement being that the representative be the authorized agent of the party. Such representation should be permitted over the objection of the opposing party but subject, of course, to the application of Commission Rule 18(3)(D), 40 TAC §815.18(3)(D).

Commission Rule 18(3)(D), 40 TAC §815.18(3)(D) confers upon the Hearing Officer the discretionary power to refuse to allow any person to represent others in an unethical manner or who intentionally and repeatedly fails to observe the provisions of the Act or the rules of the Commission.

Commission Rule 18(4), 40 TAC §815.18(4) confers upon the Hearing Officer the discretionary power to expel from the proceeding any person, whether or not a party, who fails to comport themselves in a manner befitting the proceeding. Departmental policy is that prior to exercising this authority, the Hearing Officer should first warn the person of the possible expulsion.

A partnership may be represented by any of its members or a duly authorized representative, and a corporation or association may be represented by an officer or a duly authorized representative [Commission Rule 18(3)(B), 40 TAC §815.18(3)(B)].

It is the responsibility of the Hearing Officer to advise the parties of their rights, to give them an opportunity to fully develop their positions, and to ensure that all evidence necessary for a fair decision is presented, regardless of whether or not a party is represented by an attorney or other, or has no representation. The Hearing Officer should be completely impartial in this respect, as it is his/her responsibility not only to provide a fair hearing for the parties involved, but to be sure that all necessary facts are established so that the decision will be in accord with the intent of the law and protects the public interest which sometimes does not coincide with the interests of the parties. The Hearing Officer is the authority in charge of any hearing he/she is conducting, and while every courtesy should be extended representatives of all parties, he/she must protect the right of any unrepresented party and must never let the proceeding get out of control.

XIX. Opening the Hearing

In greeting parties, party representatives and the Hearing Officer should be affable but, at the same time, careful to preserve the dignity of the Tribunal. The Hearing Officer should be courteous and helpful to all concerned but should not discuss details of the case prior to the hearing or unduly delay the commencement of the hearing. Although the Hearing Officer may be acquainted with parties or party representatives as the result of their participation in hearings in other cases, the Hearing Officer should avoid any undue demonstration of familiarity which might give any other hearing participants the impression that the Hearing Officer may be biased in his/her conduct of the hearing.

The Hearing Officer should first ask each party if there are other participants who will be appearing since they might need to be added to the conference. If only one person appears for a party, the Hearing Officer should treat that person as the primary representative, even though other witnesses may be later added to the hearing.

A copy of the decision will be mailed to the representative per the Hearing Officer's instructions on mail distribution.

The Hearing Officer should not permit discussions concerning the issues while the recording is off. Both parties should be connected before engaging in conversations about witnesses, primary representatives and other matters.

All identifying information necessary for the record should be recorded first. This includes the following type of information.

(1) The number of the appeal.
(2) The employer's tax account number.
(3) Name and correct address of the employer and their entity type and whether they are in bankruptcy.
(4) Names and capacity in which they appear of all other persons appearing for the hearing. Even if the hearing is in-person, the Hearing Officer should ask if there will be any witnesses participating by telephone.
(5) Date, time, and place of the hearing.
(6) The name of the Hearing Officer conducting the hearing.
(7) An explanation that the Hearing Officer is conducting the hearing on behalf of the Commissioners who will make the decision in the case.

All participants should be asked to state their full names on the record. If the name is not usual, they should be asked to spell it. All necessary addresses of the parties should be verified on the record. The Hearing Officer must explain the importance of having correct mailing addresses which includes the admonition that subsequent appeal deadlines run from the date of mailing, not the date of receipt by the party. Each party should give their correct mailing address, and then the Hearing Officer should repeat that address for the record and have the party verify that the Hearing Officer has read the correct address. If either side is represented by another person or company, the Hearing Officer should verify both the representative's address and any address of that particular party.

Issues and procedures to be followed in the hearing should be explained to the parties after the preliminary identifying information is recorded.

The Hearing Officer shall ask all persons giving testimony to identify themselves by name. This is to afford the parties the opportunity to challenge the identity of a witness.

It should also be pointed out that Rule 13 hearings are administrative in nature and that they do not follow regular courtroom procedure. On the other hand, while the hearings are informal in nature, control of the hearing must be maintained by the Hearing Officer in the interest of an orderly proceeding. Each party should be given ample opportunity to fully present evidence relevant to their case.

The Hearing Officer should be sure that the parties understand the purpose of the hearing and the procedures to be followed before proceeding with the hearing. Both parties should be allowed to ask questions about issues or procedure of the Hearing Officer prior to beginning testimony.

If a party wishes to present a witness to testify in one of our hearings, they should have made prior arrangements with the individual to have them available at the time of the hearing. In the case of a telephone hearing, if the party failed to make such advance arrangements, the Hearing Officer should nonetheless make a reasonable effort to contact the offered witness. More than one effort should be made to contact the individual. If the witness is unable to participate when called, due to the lack of advance arrangements, the Hearing Officer should normally proceed with the hearing, without the witness. The Hearing Officer should limit testimony to relevant matters, but should not refuse to call a witness. If a witness is unavailable, the Hearing Officer may proceed without that witness as long as the Hearing Officer has made a reasonable effort to contact the witness. The Hearing Officer should not contact extra witnesses until it is time for that witness to give testimony; they should not be contacted at the beginning of the hearing such that they have to listen to the entire hearing and wait for their turn.

The Hearing Officer shall instruct each party and witness not to prompt testimony and not to refer to previously undisclosed documents. After recording the identifying information in the record and making a complete opening statement but before any testimony, the oath should be administered to the individuals who are to testify. Attorneys, observers, and any other parties present who are not giving actual testimony do not need to take the oath.

The oath should be administered to all individuals who will be testifying after the completion of the identifying information and the explanations of the issues and procedures. If a party or witness objects to taking an "oath" or to being sworn, they may "affirm" that they will tell the truth. The form of the oath should require the witnesses to swear or affirm that they will tell the truth, the whole truth and nothing but the truth under penalty of perjury.

In the event that the Hearing Officer neglects to administer the oath prior to the witness' testimony, the oath should be administered as soon as the Hearing Officer realizes that they failed to administer the oath. In such cases, the witness would be asked to swear or affirm that the testimony they have already given was the truth and that any later testimony will be the truth, etc.

If the hearing is lengthy and appears likely to continue for an extended period of time, the Hearing Officer may order brief recesses at reasonable intervals. Such recesses should be reserved for hearings lasting well over one hour. The Hearing Officer should not postpone a hearing because it looks like there is not enough time to finish it, but should proceed and finish as much as possible before continuing.

The Public Information Act, Chapter 552 of the Government Code allows the public to have access to records and information compiled and maintained by state agencies if not otherwise considered confidential by law.

> **If there is any question concerning possible confidentiality of certain records, the Hearing Officer should refer the question to the Director of Special Hearings for further clarification from the General Counsel's Office.**
>
> **Commission representatives are subject to monetary fines for the disclosure of the contents of any record that may be considered confidential. Any questionable requests for disclosure should be cleared by the Director of Special Hearings through OGC or the Open Records department.**

The Hearing Officer should always take the best evidence available. If the firsthand witness is available to testify, the Hearing Officer should take the sworn testimony, if possible, rather than taking a written statement in lieu of testimony.

XX. Use of Interpreters

In some cases, it will become apparent that an interpreter will be needed. The official interpreter should be provided by the Commission.

If the Department is aware ahead of time, the hearing will be scheduled with an interpreter provided by the Commission. In cases where a Spanish interpreter is needed, unless otherwise authorized, agency policy is to use a Federal Court-certified interpreter. With languages other than Spanish, the Staff will also make every effort to obtain a competent interpreter for the language involved. If unaware of the need for a needed interpreter prior to the hearing, the Hearing Officer should check with the state office to see if one can be obtained on short notice. However, if an interpreter is not available, the Hearing Officer must postpone the hearing until an interpreter can be provided. If a party has requested an interpreter, the party should not be pressured to continue without one because an interpreter was not available. If the parties do not need an interpreter and the interpreter is needed for a witness only, the Hearing Officer should go ahead and take testimony from the available parties before continuing to get an interpreter for the witness.

In some cases, the party who needs the interpreter will bring a relative with them for that purpose. As there is a risk that such an individual would not be sufficiently objective or competent to render quality interpretation, a relative will be used only as a last resort and only with languages other than Spanish. A representative can never be used to act as an interpreter for a party. It should be clear that the interpreter is neutral and is not to represent either party. The interpreter should refrain

from interacting with the parties in a manner that makes it appear the interpreter is representing a party.

Before administering the interpreter's oath, the Hearing Officer should introduce the interpreter and explain the function of the interpreter to all witnesses.

The interpreter will be placed under oath. It is essential to put the interpreter under oath prior to any substantive part of the hearing itself. At this time, the Hearing Officer should verify for the record the interpreter's experience in such hearings. If the interpreter is a Federal Court-certified interpreter, only that information need be given. The customary oath for witnesses will be administered by the Hearing Officer through the interpreter to the witness.

The responsibility of the interpreter in hearing is to translate into the language of the witness the question of the Hearing Officer or party, listen attentively to the reply, and translate the reply into English. It is the Hearing Officer's, not the interpreter's, responsibility to judge the credibility of witnesses and to weigh the evidence. Hence, the interpreter should translate the question as it is given to him/her by the Hearing Officer and the answer as it is given by the witness. The interpreter *should not* give a personal interpretation of either the question or answer. These points should be explained to the interpreter on the record at the time the oath is administered. However, if the interpreter is a Federal Court-certified interpreter, such explanation is unnecessary.

In questioning a witness testifying through an interpreter, the Hearing Officer should phrase all questions in simple language. A question may require rephrasing one or more times until its meaning is clear.

Both interpreted and un-interpreted versions should be recorded in the event there are subsequent allegations of inadequate interpretations. The interpreter may use simultaneous interpretation of English to the non-English speaking participant only when English is being spoken. However, when the non-English language is being spoken, the interpretation into English will be done consecutively. Simultaneous interpretation should be used only where special equipment is available to record both speakers.

To alleviate any problems with who said what, testimony should be taken entirely in the foreign language. The interpreter should refrain from talking at the same time the party is talking.

The Hearing Officer should stress that questions and responses be as brief as possible to ensure that all testimony is translated. The parties should say only one or two sentences at a time before allowing the interpreter an opportunity to translate.

There may some cases where Commission records indicate the non-appellant needs an interpreter, but the non-appellant does not appear. In such cases, it is not necessary to interpret the introductory portion of the hearing. However, the testimony portion should be interpreted as the recording may need to be played for or sent to the non-appellant in case of a reopening request.

XXI. Oaths and Affirmations

All testimony at a hearing should be under oath or affirmation and all hearing interpreters should submit to a special oath or affirmation for interpreters. An affirmation should be used whenever, for religious reasons, a person objects to the act of swearing to an oath.
A proper form of oath for parties and witnesses is:

> "Do you solemnly swear or affirm that the testimony you are about to give in this case will be the truth, the whole truth, and nothing but the truth?"

A proper form of oath for interpreters is:

> "Do you solemnly swear or affirm that you will truthfully and accurately interpret all the proceedings and translate all documents in this case to the best of your ability?"

Representatives of parties (attorneys, accountants, union business agents, etc.) need not be sworn unless they give testimony.

The oath should be administered in a manner indicative of a solemn undertaking. The oath should be stated in a deliberate manner and should not be rushed as if it was a routine matter to be disposed of quickly. The Hearing Officer should raise his/her right hand and look directly at the parties while administering the oath, in an in-person hearing. The Hearing Officer should not look away or examine documents while the oath is being administered. In telephone hearings, it is not necessary to have the parties raise their right hands, but the oath will be given in otherwise the same manner as the in-person hearings.

Each witness should be sworn prior to giving testimony, preferably at the beginning of the hearing. If the number of witnesses is small, and it will not detract from the seriousness of the ceremony, the witnesses may be sworn in as a group by the Hearing Officer. The response of all parties should be noted for the record.

XXII. Placing Witnesses "Under the Rule"

A request that witnesses be placed "under the Rule" should be granted upon application of either party. The requesting party is not required to offer any justification for its request. The Hearing Officer may, on his or her own motion and without the concurrence of the parties, place witnesses "under the Rule". If witnesses for one party are placed "under the Rule", witnesses for both parties must be placed "under the Rule".

The Hearing Officer may invoke the Rule on his or her own motion and should not hesitate to use this procedure if there is reason to believe that better evidence will be obtained if a witness is placed "under the Rule". On the other hand, a Hearing Officer should not routinely invoke the Rule in all cases without application for such by either party or in the absence of any reason to believe that better evidence would be obtained if the Rule is invoked.

Each party is entitled to have at least one person present throughout the entire hearing. It is not permissible to place a party or a party's representative "under the Rule". The term "party" includes the claimant and the employer. Proper implementation of this provision for placing witnesses "under the Rule" may be problematical in the case of an employer which is not a sole proprietorship. If the employer is a corporation or a partnership, some officer or employee of the corporation or partnership is entitled to remain in the hearing room with the employer's hearing representative. The designation of such person shall be the prerogative of those representing the employer.

The normal procedure in placing witnesses "under the Rule" is to administer the oath to all of them at the same time, then to direct that they leave and remain out of hearing of the proceedings and not discuss the proceedings in any manner among themselves. Witnesses should be cautioned not to leave the area as they need to be immediately available when called to testify. After witnesses have testified, they should not leave in case they need to be called for further testimony later.

In cases involving a continuance, the parties should be cautioned not to discuss the proceedings with the witnesses "under the Rule." Such activity could jeopardize the testimony of the witnesses. In questioning a witness, the Hearing Officer should avoid summarizing an earlier witness's testimony or otherwise revealing the contents of that testimony. When a witness placed "under the Rule" is called for testimony, the witness should be reminded on record that he or she is still under oath.

In telephone hearings, placing witnesses "under the Rule" requires careful attention by the Hearing Officer. The opportunity for "prompting a witness" can be substantially reduced if the Hearing Officer waits to call the witness or witnesses at another site until it is time for the witness or witnesses to give testimony. If the witness or witnesses are at the same location, the Hearing Officer should ask the primary representative to have the witness or witnesses leave the room until the time for the witness or witnesses to give testimony and have the representative verify on the record that the witnesses have left.

Texas Rule of Civil Evidence 614 ("The Rule") provides in relevant part that "This rule does not authorize exclusion of (1) a party who is a natural person or the spouse of such natural person, (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause."

XXIII. What the Hearing Should Cover

No issues should be heard or decided without first giving notice of such issue to the parties, or without obtaining their agreement to proceed on that issue (waiving notice). In any case where it is discovered that the party who filed the appeal has no authority of record to do so, the Hearing Officer should ask the party at the hearing whether he/she authorized the filing of the appeal before it was filed. If the appellant has not previously authorized the filing of the appeal, it would be acceptable to have him/her ratify the filing of the appeal at the hearing. Necessary authority will be a matter of record if the case is further appealed to the Commission.

The Hearing Officer should familiarize himself/herself with all available documents pertaining to the issues in the hearing. It may be necessary to question the parties concerning the file information, and possibly enter some file documents into the record as exhibits.

In many cases a decision can be reached only after interpretation of an agreement, contract, tax returns, etc. It is desirable in every case of this type to obtain copies of these documents and introduce them into the record. These should be authenticated. To do this, it is necessary to verify that it is the document that it purports to be and that it is the writing which is or was in effect at the time of the circumstances under investigation. In some cases, the Hearing Officer may find it helpful to obtain copies of other documents made pursuant to the main agreement, such as directives, orders, agreements, or other media.

There may be instances where either an issue was inadvertently omitted from the Notice of Hearing or a new issue is raised for the first time at the hearing. Procedures for handling these situations differ.

In cases involving issues that are on appeal, but were omitted from the Notice of Hearing, the Hearing Officer should first inquire of the interested parties if they are willing to waive the fact that they had not received prior notice. When explaining the options to waive notice, the Hearing Officer should explain that, by waiving notice, there will be an immediate ruling on the issues as a part of the decision whereas, by declining waiver, the hearing will be continued to a different date to allow proper notice. The Hearing Officer should avoid any appearance of duress or coercion. If the parties will not waive notice to an omitted issue, the Hearing Officer should take as much testimony on the noticed issues as possible and then continue the case for the omitted issue after proper notice.

Both sides should be given the opportunity to add to the record immediately before the hearing is adjourned. They should also be allowed to make closing statements summarizing their positions on the issues and why the Commission should rule in their favor.

XXIV. The Record of Testimony

The Hearing Officer is responsible for obtaining a complete and clear record of all testimony taken in a hearing. The testimony presented to the Hearing Officer must be preserved so that it may be reviewed by the Commission.
Only the Hearing Officer controls the record of evidence. The Hearing Officer should not permit witnesses or representatives to indicate "off the record." Statements can be off the record only when the Hearing Officer directs. If any discussion occurred, a summary with party concurrences must be obtained

Occasionally, the Hearing Officer will have requests by one or both of the parties that they be permitted to bring a recording machine to the hearing to record the testimony or to have it recorded by a reporter. As this practice is consistently permitted in all courts of record, we do not believe that we have the authority to deny the parties the right to record the hearing. It should be pointed out to them, however, that the official record of the hearing is the record which is being made by the Hearing Officer and that it will be controlling in any dispute which may arise with respect to what facts were included in the record.

The following points should be kept in mind in obtaining a satisfactory recording of a hearing:

(1) The recording is to preserve the testimony. For in-person hearings, microphones should be placed closer to the parties than the Hearing Officer. Microphones should never be placed on top of the recorder. Portable cassette tape recorders without microphones should be used only in emergency situations.

(2) At the beginning of the hearing, during the opening statement, all key persons, including the Hearing Officer, must be identified.

(3) Each new voice coming onto the record must be identified by referring to the party by name.

(4) Only one voice should speak at a time. When more than one voice has spoken at the same time, each must repeat its statement singly. The listener cannot know the importance of the statement if it cannot be understood.

(5) Persons with soft voices or mushy pronunciation and distant persons, including those who turn their heads away from the microphone and others, are sometimes impossible to understand. The Hearing Officer must take charge and cause witnesses to speak up and to enunciate clearly. When in doubt, stop the proceedings and test the recording.

(6) Any words used in the hearing that are unclear or vague should be clarified immediately by the Hearing Officer.

(7) Coughs, sirens, passing trucks or automobiles, carpenter work, and other noises may cause the loss of important and key works, such as "not". Extraordinary care must be used under adverse conditions. The testimony may be repeated when doubt exists as to a clear record.

(8) Attempt to have all persons speak as slowly and distinctly as reasonably can be done. The Hearing Officer may diminish or accelerate the tempo by creating a proper example. Voices should be "projected" rather than loud. Witnesses will unconsciously imitate the Hearing Officer.

XXV. Right to Confrontation and Rebuttal

At the time of the hearing, any party (employer or claimant) who appears should be confronted with all evidence in the file, documentary or otherwise, whether secured by prior investigation or not, which is adverse to their interest and which may be considered in arriving at a decision in the case. The Hearing Officer should be liberal in deciding what might be considered adverse to a party's interest.

If circumstances are such that the Hearing Officer is unable to review the file before the hearing, he/she should not use the information secured subsequent to the hearing to reach a decision adverse to the interest of either party unless such party has had an opportunity to be confronted with such information. In this situation, before a decision is made, the case should be reset to allow the party concerned an opportunity to offer rebuttal testimony. This same procedure applies to affidavits received from either party which are received subsequent to the date of the hearing. Information contained in the affidavits which is adverse to the interest of the opposing party should not be used in reaching a decision unless the opposing party has had an opportunity to rebut the evidence in the affidavit.

It should be remembered that in most cases, direct testimony will carry greater weight than affidavits.

If one party arrives late to an in-person hearing or calls in late to a telephone hearing, and is going to be included in the hearing, the Hearing Officer must either replay the recording of the hearing to that point or begin the hearing again. Any procedural information that may have been omitted with the initial instructions should be supplemented after the late-arriving party is included in the hearing.

In Rule 13 cases, there will be no prior testimony to play or send to the employer for a reopening. If the employer does not appear, the hearing does not happen since the employer is virtually always the appellant.

XXVI. Examining Witnesses

The Hearing Officer should afford each party the opportunity to tell their story fully, but should limit the parties to providing relevant material.

Witnesses should be instructed to speak distinctly and as loudly as necessary to record successfully.

When the witness is asked a question, he/she must be allowed to answer it before another question is asked. Questions asked too rapidly will frequently destroy the answer the witness is trying to give. Also, if the witness is not permitted to finish the statement, it will appear in the recording that the Hearing Officer has cut him/her off.

The control of the hearing should, always, rest with the Hearing Officer. Ordinarily, the Hearing Officer will conduct the examination of the witnesses.

Parties and their representatives must be permitted the opportunity for reasonable examination. The Hearing Officer should control and direct the examination conducted by parties or their representatives. Such examinations should not be permitted to stray from the pertinent evidence, nor should they be allowed to degenerate into arguments or mere heckling.

When offering the right of cross-examination to a party, the Hearing Officer should exercise care in the use of legal terminology. Parties not familiar with legal terminology can become unduly tense which could affect the quality of the hearing.

It is also dangerous to refer to an individual who is about to testify as a "hostile witness". In legal terminology, a "hostile witness" is merely one who is called by the opposing side or who is not expected to be friendly to that side. The advantage of labeling a witness as "hostile" is that it permits the opposite side to ask leading questions. One's own witness may show by statements and actions that he/she has become hostile and when it occurs, leading questions may be asked. The danger in our practice is that the parties themselves do not understand the meaning of the word "hostile" and sometimes become incensed to the point of demanding a postponement. Consequently, it is well to avoid the use of the word "hostile" and if it is introduced by attorneys

present, the witness should be instructed with respect to the significance of the term in order to avoid misunderstanding.

Under no circumstances should a Hearing Officer permit "bullying" or intimidation of witnesses; nor should the Hearing Officer engage in any such practice. The dignity of the Tribunal, the decorum of a hearing, and the ordinary courtesy due the parties, their representatives and their witnesses, require that the Hearing Officer prevent haranguing, altercations, or any form of rowdiness during the hearing of an appeal.

The Hearing Officer should permit only one person to speak at a time. When a witness is testifying, no one else should be permitted to break in.

Occasionally it is apparent that a witness' testimony will be difficult to understand because of a heavy accent, speech impediment, etc. In this situation, the Hearing Officer should clarify any unclear answers to confirm the testimony for the record.

When a witness uses proper names in giving testimony, the Hearing Officer should get the identity of the individual or place with the subject matter of the appeal. (For example, when the claimant says, "Joe Smith told me there wasn't any job for me anymore", ask "Who is Joe Smith?".)

When a witness uses a proper name, the Hearing Officer should try to get the correct spelling of the name.

The Hearing Officer should not suggest testimony or the response they anticipate. Questions should be phrased in an interrogatory manner requiring the witness to provide information from their own personal knowledge or observation.

Generally, the shorter the question and the narrower its scope, the greater is the comprehension and the usefulness of the answer. Complicated questions encourage unresponsive answers.

Only one question should be asked at a time. The witness should be required to answer the question before proceeding to the next question.

Questions should be framed in language that the witness understands. Avoid asking questions containing a negative pregnant (e.g., "Did you destroy the record on Tuesday, June 15, 1993?". A negative reply to this question is said to be pregnant with an admission that the record might have been destroyed on another day.)

The "controlled narrative" is the best way of developing testimony in most hearings. This method involves the Hearing Officer asking the witness to recount relevant testimony in their own words. The Hearing Officer then follows that testimony with a more focused "question and answer" format as necessary to clarify details, the source of the witness' knowledge of events, etc.

The narrative question is the method most frequently used by expert examiners after a proper foundation is laid. This type of question can be defined as the asking of a witness to relate what is

known about a situation in their own words. Care must be taken that testimony does not become unduly long, repetitious, or irrelevant.

The Hearing Officer should be careful to inform an unrepresented party of the right to question an opposing party or witness. The Hearing Officer should aid the party in framing questions if necessary in the interrogation.

Parties and their representatives have the right to question their own witnesses, but they should not be permitted to lead or coach or prompt their witnesses. They will be allowed to ask leading questions when examining a dull or uncooperative witness, such as on cross-examination.

The Hearing Officer should maintain an impartial demeanor throughout the proceeding when addressing or questioning witnesses. Gratuitous comments or observations should not be made. Hearing Officers should never indicate their disbelief of testimony or the reasonableness of a party's actions. The Hearing Officer is charged with the responsibility of determining the credibility of witness testimony and evidence and any expressions regarding the credibility of a party or witness should be reserved for the written decision.

The Hearing Officer should not argue with witnesses or parties and should not allow them to argue with each other. It is not proper for the Hearing Officer to ask leading questions unless dealing with an unsophisticated or reluctant witness.

While Hearing Officers have the authority to expel participants whose intentional and repeated disruptions of the hearing preclude a fair hearing, this action should be taken as a last resort and after consultation with a supervisor. The Hearing Officer should handle unruly parties by first instructing them that such behavior will not be tolerated and that you will expect all parties and witnesses to show the same courtesy of not interrupting one another or disrupting the proceedings.

Any disruptive individual should be first given a warning on the record, of the possibility of their expulsion from the hearing, should their behavior persist. A disruptive party can also be muted so that their statements do not interrupt the currently testifying witness, but they can still hear the proceedings. A warning can be given to that party before they are unmuted that further disruptions could lead to them being expelled from the hearing. If the problem continues, you may consider taking a brief recess (five minutes), to allow the participant to calm down and reflect on their behavior. If these measures are not successful, the disruptive individual may be expelled.

The Hearing Officer should not ask questions that call for conclusions, such as: "Was claimant intoxicated?" Rather, the Hearing Officer should ask detailed questions which will allow him/her to decide whether the claimant was intoxicated or not. Examples are: "Was claimant staggering at the time?" "Did his breath smell of liquor?" "Was his speech thick or incoherent?"

The fact that most hearings are conducted via the telephone makes it particularly important for the Hearing Officer to identify to whom he/she is addressing a question and to ensure that the parties are identified when speaking.

The examination of persons should proceed in an orderly manner. It is the duty of the Hearing Officer to see that testimony of each witness is exhausted as nearly as possible before the next witness is questioned. The examination of witnesses should not skip from one to another.

When dates are mentioned, the day, month, and year should be given.

If the testimony refers to form numbers, code numbers, symbols, abbreviations, or technical terms, the Hearing Officer should have these spelled out and explained in language simple enough for any ordinary individual to understand.

The Hearing Officer is in charge of the hearing and should not permit the parties to use profane or vulgar language indiscriminately in giving their testimony. If the alleged profane or vulgar language is relevant to the issues, it should be allowed in, but this will be unlikely in a Rule 13 hearing.

When relevant and material documents necessary to decide a case have not been provided to the Hearing Officer or the opposing side, the Hearing Officer may schedule a continuance to obtain the evidence if other measures have been unsuccessful.

Some principles of good listening are as follows:

(1) Stop Talking. You cannot listen if you are talking.
(2) Put the witness at ease. Help them feel comfortable to relate their testimony.
(3) Let the talker know you are interested in what they have to say.
(4) Be patient. Do not interrupt, except to maintain control.
(5) Do not put the talker on the defensive. Encourage their candor.
(6) Ask questions that indicate you have been listening to what they have said.
(7) Stop talking! This is the first and last principle of good listening.

Section 301.073 of the Texas Unemployment Compensation Act grants immunity from prosecution for any criminal matter, if a party or witness is compelled to testify after having invoked their 5th Amendment privilege against self-incrimination.

> If the hearing involves a potential criminal matter and the party or witness expresses reluctance to testify concerning a matter for which they could be criminally prosecuted, the Hearing Officer should make them aware that their failure to present testimony in the hearing may result in their failure to present the preponderance of credible testimony and the loss of the case, however, they will not be compelled to testify if they wish to invoke their 5th Amendment rights against self-incrimination. The Hearing Officer should never compel a person to answer a question who has invoked Fifth Amendment rights.

XXVII. Commission Personnel as Witnesses

In Rule 13 cases, Tax personnel are witnesses and representatives of the Commission Tax department which is considered a party to every Rule 13 case. Commission personnel should be called as expert witnesses when their testimony would be relevant and material to the issue. For example, when there is an allegation of misinformation on behalf of a commission representative,

an attempt should be made to determine the name of the commission employee and arrange for them to offer testimony on that issue.

The Tax department receives Notice of the hearings and makes arrangements for their witnesses to participate.

Although it is rare, there have been cases in which TWC representatives have refused to testify. If this occurs, it should be pointed out to the representative the necessity of having his/her testimony. If the representative still refuses to testify after the matter has been fully explained and the testimony is essential, the hearing should be postponed and the Director notified. The case will be reset and steps taken to secure the testimony of the needed witness.

The Hearing Officer must administer the oath to the TWC witness and inquire as to his/her job title. Both parties have the right to cross-examine the TWC witness. However, a Commission witness is not a party to the proceeding and should not be accorded party rights such as the opportunity to question witnesses.

XXVIII. Adjournments, Continuances, and Postponements

The Hearing Officer will use his/her best judgment as to when to adjourn, continue, or postpone hearings to secure all the evidence that is necessary and to be fair to all parties. The Hearing Officer should always continue if the allotted time is used and the parties have not finished presenting their evidence. If a party requests a continuance or postponement, the Hearing Officer should ask the reason for the request for the record.

The Hearing Officer has the authority to order a continuance to allow parties to complete their case. The parties should never be limited to a set amount of time because the Hearing Officer has other hearings scheduled later. The Hearing Officer should not approach this issue in a manner which may discourage any party from adequately presenting their case.

If the Hearing Officer finds from information in the file that the hearing should never have been scheduled (e.g., the determination was not adverse to the appellant, the document identified as the appeal was not really an appeal, etc.), the Hearing Officer should cancel the hearing. Both parties should be notified as soon as possible.

XXIX. Concluding the Hearing

The Hearing Officer should, prior to adjourning, ask each side separately if they have any new additional relevant testimony to offer. If so, they should be allowed to present it and cross examination should be allowed immediately afterward. This procedure should be followed until neither side wishes to add any additional relevant testimony. If a party asks a question regarding the appeal procedure, the Hearing Officer should answer it, but questions regarding UI claims, collections or other matters should be referred to the appropriate departments where more knowledgeable persons can respond.

After final statements, the Hearing Officer should advise the parties that:

(1) The decision will be mailed once the Commissioners have made a decision.
(2) Finally, the Hearing Officer should note the time the hearing is concluded.

(Note: The Hearing Officer should make no promises as to when the decision will be mailed as there are factors outside the control of the Hearing Officer which affect when the decision is mailed.)

The Hearing Officer should also advise the parties of their right to further appeal. There should be no discussion of the merits of the controversy with the parties after the hearing is adjourned.

The hearing should not be adjourned until each side has had a distinct opportunity to add any additional relevant testimony. The opportunity for both parties to add testimony should not be combined in one question. The time the hearing is adjourned should be noted on the record and the parties should be advised of their appeal rights. Finally, the digital recorder should remain on, until the hearing has been adjourned.

After a decision is rendered, the Hearing Officer should not to discuss the merits of the case or the reasons for the decision with the parties. If a party disagrees, they should again be given information concerning further appeal rights. If a party contacts the Hearing Officer and states the party did not receive the decision, the Hearing Officer should have a copy mailed to the party by Staff. The Hearing Officer should not mail duplicate decision copies to parties.

If a party gives the Hearing Officer a change of address, it is the responsibility of the Hearing Officer to fill out a change of address form for Staff.

XXX. Supplying Parties Information from the Record

Commission Rule 18(2), 40 TAC §815.18(2) provides that orders for supplying information from the records of the Commission to a party to the appeal, or their representative, to the extent necessary for the proper presentation of a claim, shall issue only upon application of a party to the appeal which specifies as nearly as possible the exact nature of the information desired. It is the basis of a fair hearing that the parties are entitled to know allegations made against them in order that they may prepare an adequate defense.

Either party has the right to copies of any documents in a file that pertains to them. One or both parties may also request a copy of the recording of the hearing. No charge will be made for either request. All such requests must be made in writing by the party and sent to Texas Workforce Commission, Special Hearings Department 101 E. 15th Street, Room 414, Austin, Texas 78778 or faxed to the department's fax number.

The parties have the right to examine documents introduced into the record. It is permissible to allow parties to examine the file prior to the hearing if they request to do so. Attorneys will often make such a request. Although the Tax examiner's notes (if there are any) are technically hearsay, they may have evidentiary value (e.g. prior inconsistent statements). In this case the fact-finding statements should be marked as evidence in accordance with the proper procedure for admission of documentary evidence. The fact-finding statements should also be examined by the Hearing

Officer in advance of the hearing, as they often will assist in alerting the Hearing Officer to questions that should be asked during the hearing.

Requests for information from individuals not a party to an appeal or for cases that are no longer in Special Hearings should be referred to Tax or to the Open Records Department in the state office, through the Director.

XXXI. Telephone Hearings

On the whole, telephone hearings are conducted in the same manner as in-person hearings. Any differences pertain to the technical aspects rather than procedural aspects. Normally, in-person hearings are only held when a party or witness requires sign-language interpretation.

Requests for in-person hearings rather than telephone hearings will not be granted except under the most compelling circumstances. A party's desire to confront the opposing party or their witnesses will not warrant the scheduling of an in-person hearing in a case which would otherwise be scheduled as a telephone hearing.

If the parties have difficulty hearing each other because of a poor connection, it may be necessary to replace the call to improve the quality of sound. If there is continuing difficulty, the Hearing Officer has the following options:

(1) Reset the hearing on another day if convenient to both parties
(2) Postpone the hearing.

Both parties should be advised to speak up and speak distinctly. The Hearing Officer should caution the parties at the beginning of the hearing to notify the Hearing Officer immediately if they are having difficulty hearing the other party or the Hearing Officer.

Each party, or each party's primary representative, must have their witnesses ready to participate in the hearing at the scheduled time and must be prepared to provide the Hearing Officer, at the outset of the hearing, with the telephone numbers from which all their witnesses will be participating in the hearing.

Parties to a telephone hearing are directed by the hearing notice to either register online or to call in to a designated number during the 30-minute period prior to the scheduled hearing time. It is the parties' responsibility to place the initial call to the number designated on the hearing notice during the appropriate 30-minute period before the hearing starts. A party's failure to call in or register online as instructed prior to the hearing time may result in the party not being allowed to participate in the hearing.

It is the responsibility of each party, or their representative, to initiate contact for the hearing as indicated on the notice of hearing. Every effort should be made to ensure that the correct number was received; however, if the wrong number was given, the Hearing Officer should wait as long as reasonably possible before starting the hearing with the other party. The Hearing Officer should attempt to locate a correct number through file records. Pay telephones can pose a problem in that some pay phones cannot receive calls.

Added care is required in telephone hearings to identify different voices. Proper names should be used whenever possible. When given the oath, each party should be asked to answer separately.

The Hearing Officer shall ask all persons giving testimony to identify themselves by name.

The hearing should be identified on record as a telephone conference hearing.

The actual conduct of the hearing will follow the same procedures as in-person hearings.

The Hearing Officer shall grant any party's request to "invoke the Rule".

The Hearing Officer shall instruct each party and witness not to prompt testimony and not to refer to previously undisclosed documents.

Any party wishing to introduce a document for admission as an exhibit for the record in a telephone hearing must, prior to the hearing, fax or mail copies of the document to the Hearing Officer and the opposing party. If such copies have not been received by the opposing party prior to the hearing, and should a party, nevertheless, attempt to offer the previously disclosed document during the hearing, the Hearing Officer shall first determine the relevance of the document and then shall attempt to have the document faxed to the other party, ask for a waiver, or postpone the hearing.

The Hearing Officer shall label all proposed exhibits and consider objections regarding admissibility from any party. The Hearing Officer shall not consider evidence not admitted and shall make all proffered evidence available for Commission review. Any document read into the record shall be read in, or contemporaneously translated into, a language that each party can understand.

At an in-person hearing, a party may elect to have its primary representative and/or one or more of its witnesses participate by telephone from some other location. This will be permitted only if that party has at least one representative present in-person with the Hearing Officer. This in-person representative will have the responsibility for reviewing and possibly objecting to documents introduced as exhibits for the record. It will not be required that such in-person representative also perform the other functions of a hearing representative such as the examination of witnesses, the making of closing arguments and otherwise acting on behalf of the party.

These functions may be performed by a representative participating by telephone. It will be the responsibility of the party representative appearing in-person to be prepared to provide the Hearing Officer with the names and telephone numbers of each witness who is to testify by telephone.

Also at an in-person hearing, testimony may be taken by telephone from a witness who is a Commission employee or a disinterested witness (such as an expert witness) who has been summoned on the Hearing Officer's initiative; such witness will be deemed a Commission witness. An interpreter may also participate by telephone in an in-person hearing.

An interpreter or a Commission witness, as described above, may be permitted, at a telephone hearing, to give testimony or provide language services to parties or witnesses while physically

present with the Hearing Officer conducting the hearing. However, parties or party witnesses will not be permitted to be in the presence of the Hearing Officer during a telephone hearing unless at least one representative of each party is present.

The guidelines stated in this section are intended for parties, not individual witnesses. If a witness is not available by phone after repeated efforts, the Hearing Officer normally should proceed without the witness. However, if the opposing party presents a surprise issue, the Hearing Officer should consider a continuance if the witness is not available. A party may decide to present additional witnesses at any time during the hearing, and this must be allowed. Even though prior arrangements might not have been made for that witness to participate, the Hearing officer should make a good faith effort to call the witness before moving on. Sometimes the names of persons come up during the hearing who are not among the witnesses, but could have significant testimony. Under these circumstances, the Hearing Officer should take the initiative to ask the party if that witness is available at that time to testify. The Hearing officer should not delay the hearing excessively to run down the witness. If the witness is not available, the party should be asked whether the party tried to arrange for the witness' participation and why the witness is not available. This information could be important if there were a future appeal.

XXXII. Summary Judgment Authority in Timeliness Cases

In any hearing in which the threshold issue is timeliness of the Rule 13 request or Motion for Reconsideration, the Hearing Officer should not terminate the hearing upon the conclusion of all testimony on the jurisdictional issue alone.

XXXIII. The Decision

In Rule 13 cases, the Commission makes a decision on the case in an open meeting after reviewing the record of evidence.