EVIDENCE BASICS FOR HEARING OFFICIALS

Mary Long, Administrative Law Judge
Pennsylvania Public Utility Commission

Richard Murrell, Administrative Judge
Tennessee Administrative Procedures Division

2

OBJECTIVES

- Identify categories of evidence
- Develop an understanding of key elements of admissibility
  - Admissibility
  - Foundation
- Nevah Mynd v. Unsure Power: Scenarios for practice
- Consider pre-hearing strategies for complex cases and high-volume caseloads

3

WHAT IS THE PURPOSE OF EVIDENCE?

Proves (or helps to prove) the existence or the non-existence of a fact using:

- Testimony
- Documents
- Tangible objects

4

Evidence can be

Direct:
Will prove a fact without interpretation or circumstances

Indirect:
Circumstantial evidence interpretation is required to prove the fact

TYPES OF EVIDENCE

5

Testimonial evidence

Documentary evidence

Real (physical) evidence

Demonstrative evidence

6

ELECTRONIC EVIDENCE

Electronic evidence is this same probative information, but viewed, stored, or transmitted digitally.

7

3 Rs FOR ADMISSIBILITY

- Reliability
- Relevance
- Not Repetitious

8

RELEVANT

Tends to make the existence of a fact that is of consequence to hearing either more or less probable.

9

RELIABILITY

Refers to the degree of trustworthiness of the evidence: Is it the kind of evidence responsible persons rely on for the conduct of their serious affairs?

10

NOT UNDULY **R**EPETITIOUS

The federal APA and most state APAs say evidence must be excluded if it's "irrelevant, immaterial, or unduly repetitious."

11

FURTHER LIMITATIONS ON ADMISSIBILITY

CASE SPECIFIC

12

FACTORS TO CONSIDER:

Substantive law applicable to the case

Context: the specific circumstances related to the case and the parties

Pleadings i.e. charges in notice of action, hearing notice or similar document

Potential or actual questions of credibility

LAYING A FOUNDATION FOR EVIDENCE

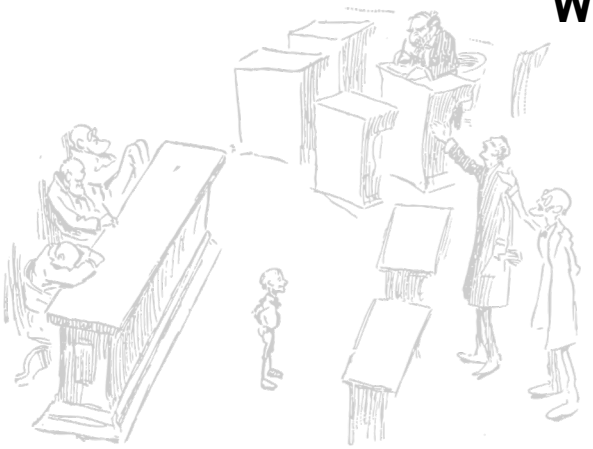
14

FOUNDATION

Preliminary requirement that must be met before evidence can be admitted related to the *source* of evidence.

15

WITNESSES



16

ESTABLISHING A FOUNDATION:

- Is the lay witness "competent"
- Can or should the witness is qualified to be an expert witness
- Determine the authenticity of documentary, real, or demonstrative evidence

17

FOUNDATION FOR LAY WITNESSES

Must be able to:

- Testify from personal knowledge about facts relating to issues in the case.
- Perceive events through one or more senses.
- Recall what they perceived.
- Report what they recall, whether by speech or other means.
- Understand obligation to tell the truth and must take an oath to do so.

18

FOUNDATION FOR DOCUMENTS

19

WHAT IS THE SOURCE OF THE DOCUMENT?

- Documents kept in the ordinary course of business may be authenticated by a live witness who has seen the document or by a custodian of the document.
- Foundation for government documents may be satisfied by a certificate from the document's custodian.
- "Self-authenticating documents" are those for which admission is required by statute.

20

FOUNDATION FOR OBJECTS

21

- An object may be identified by a live witness as *the* object referred to in the testimony of that witness.
- If the object is one of many that are the same or similar or one that could easily be altered, it may be necessary to establish the "chain of custody" of the object.
- Some objects, though not *the* object in a case, can be useful for illustrative purposes.

22

NEYVAH MYND V. UNSURE POWER

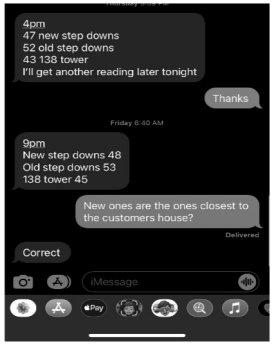
SCENARIO I:

23

Complainant, Neyvah Mynd, has filed a complaint with the Public Utility Commission. Ms. Mynd, contends that Unsure Utility recently installed a new electricity pole outside her home. The transformer attached to the pole is so noisy that she can hear it inside her house. She wants Unsure Power to replace the transformer.

24

UNSURE UTILITY EXHIBIT 1



DLC-1

25

DISCUSSION

DID ATTORNEY RAYDER ASK THE RIGHT QUESTIONS?

DOES UTILITY EXHIBIT 1 SEEM RELIABLE? WHY OR WHY NOT?

DO YOU ADMIT THE EXHIBIT INTO YOUR RECORD or DO YOU NEED MORE INFORMATION?

26

SCENARIO II

27

DISCUSSION

- DID ATTORNEY CHEATAM ASK THE RIGHT QUESTIONS TO HELP YOU TO DECIDE WHETHER TO ADMIT UTILITY EX. 1?
- IS MS. KNOH'S TESTIMONY RELIABLE? WHY OR WHY NOT?
- WOULD YOU ASK THE WITNESS ANY QUESTIONS AS THE PRESIDING HEARING OFFICER BEFORE DECIDING WHETHER TO ADMIT THE EXHIBIT?

28

SCENARIO III: PHOTOGRAPH

Neyvah Mynd filed a second complaint with the Public Utility Commission. Ms. Mynd complained that UNSURE Utility broke a fence on her property when UNSURE Utility workers came to repair her utility lines.

29

UNSURE UTILITY EXHIBIT 3

30

DISCUSSION

DID ATTORNEY RAYDER ASK THE RIGHT QUESTIONS TO LAY A FOUNDATION FOR EXHIBIT 2?

IF HE DIDN'T, SHOULD THE HEARING OFFICIAL STEP IN? WOULD IT MATTER IF NEVAH MYND WAS SELF-REPRESENTED?

DO YOU ADMIT THE EXHIBIT INTO YOUR RECORD?

SCENARIO IV: TESTIMONY

31

Neyvah Mynd's counsel, Dewey Cheatem, calls Ms. Mynd's neighbor Sam D'im to the stand….

32

DISCUSSION

- YOU ARE GETTING READY TO WRITE YOUR DECISION – CAN YOU RELY ON SAM D'IM'S TESTIMONY TO CONCLUDE THAT UNSURE UTILITY KNOCKED DOWN MS. MYND'S FENCE?
- DO YOU CONCLUDE THAT UNSURE UTILITY KNOCKED DOWN THE FENCE? WHAT DO YOU RELY ON TO REACH YOUR CONCLUSION?
- WHAT FACTORS DO YOU CONSIDER TO WEIGH THE TESTIMONY?

33

STRATEGIES FOR SUCCESS

34

QUESTIONS?