Intentional Program Violation Hearings:
The Issue Is Proof
Part 2: Evidentiary Burdens

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EVIDENTIARY BURDENS:

To understand the kinds of evidence that the county should submit at an ADH, it is necessary to review evidence in general, the obligations that the law places on the parties to a dispute regarding the submission of evidence and the consequences of failing to meet such obligations. We will also discuss how presumptions and inferences may properly be used by a party. For convenience purposes only, reference will be made to the California Evidence Code. It should be recognized that the following discussion of the law of evidence has been simplified for purposes of this endeavor.

The term "evidence" represents those items of proof that are offered by the parties to prove that their contentions are true. Such proof will fall generally into one of two categories, that is, direct evidence or circumstantial evidence. The Evidence Code defines "direct evidence" in Section 410 as:

> "...evidence that directly proves a fact, without an inference or presumption, and which in itself, if true conclusively establishes that fact."

Circumstantial or indirect evidence is not defined in the Evidence Code. Black's Law Dictionary (Fifth Edition) defines "circumstantial evidence" as:

> "Evidence of facts or circumstances from which the existence or nonexistence of fact in issue may be inferred...
>
> "Process of decision by which court or jury may reason from circumstances known or proved, to establish by inference the principal fact..."

The difference between direct and circumstantial evidence can be shown effectively if one examines the following proof that might be presented, e.g., in a criminal trial, where one of the essential facts that must be proven is that X shot Y. Suppose the prosecution rests its case on the testimony of only one of the following four witnesses:

> Witness (1): I saw X point a gun at Y's head, pull the trigger and saw Y fall to the ground bleeding from the head after the gun discharged with a loud bang.
>
> Witness (2): I saw X with a gun in his hand walking around the building. I then heard a shot. I ran around the corner approximately ten seconds later and saw Y lying on the ground bleeding from the head. I also saw X standing over him with a smoking gun in his hand.

Witness (3): At 5:00, I saw X with a gun in his holster and he asked if I had seen Y. Two hours later, I heard on the radio that Y had been shot.

Witness (4): I saw X and Y have a fist fight the day before Y was shot.

It should be clear that the testimony of Witness (1) is direct evidence on the issue of X shooting Y. Witness (1) was basically an eyewitness to the fact of X shooting Y and has testified as to what he/she saw. There is no need to draw upon any inference or presumption to prove that X shot Y.

The testimony of Witnesses (2), (3) and (4) represents circumstantial evidence since none of these persons actually saw X shoot Y. To prove that X shot Y, one must draw inferences from the evidence offered by each of the witnesses. On this issue, the circumstantial evidence provided by Witness (2) and the inference that is drawn appear to establish that X shot Y while Witness (3)'s testimony is much weaker since this witness cannot testify that he/she actually saw X with Y at or about the time Y was shot. As for Witness (4)'s testimony, while it is circumstantial in nature, it is too remote to draw an inference to show that X shot Y.

Based on the above, the prosecution would have the best chance of proving that X shot Y based on the direct evidence from Witness (1). If Witness (1) were not available, the prosecutor should seek the circumstantial evidence provided by Witness (2). The circumstantial evidence provided by Witnesses (3) and (4) would clearly be insufficient to prove that X shot Y.

In the ADH process, most cases will be proven on the basis of circumstantial evidence and the inferences drawn from that evidence, as opposed to direct evidence. Some ADH examples are as follows:

(1) Respondent (R) completes the CA 7 (Monthly Report) without listing any income and has checked the box indicating that no income was received in that month. County's evidence shows that R received $400 from earnings in that month.

The inference that R intended to conceal such income or misrepresented his situation can properly be drawn.

(2) The county's evidence shows that R deposited his spouse's weekly paychecks, with X Company's name on them, into their joint checking account.

The inference that R knew his spouse was employed by X Company can properly be drawn.

(3) R lists only three paychecks on his CA 7 and the EW believes that an additional check should have been listed.

> The EW calls R and specifically asks "Did you receive another paycheck in the month since there should have been four paydates?" R answers that he did not work one week in the month and therefore did not receive a fourth paycheck. The county's evidence shows that R did, in fact, receive the fourth paycheck that was not listed.
>
> The inference that R intentionally made a false statement may properly be drawn.

In each of the above examples, inferences have been drawn from the noted evidence. These inferences are both reasonable and logical based on the evidence.

Throughout this **HANDBOOK**, reference has been made to the evidentiary burden of proof that is placed on the county at the ADH. This "burden of proof," or "burden of persuasion" as it is also called, is defined in Evidence Code Section 116 as:

> "...the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require... that the existence or nonexistence of a fact be established by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt..."

In the ADH process, the requisite degree of belief that must be satisfied by the county's submitted evidence is that of clear and convincing evidence. While one may understand that the county has the burden of proof, it is sometimes not so clear as to what facts must be proven in order to meet a burden of proof. Evidence Code Section 500 notes that:

> "...a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief..."

An easy way to determine what the essential facts in a case may be is to ask "What are the facts that I need to show in order to prove the case?" The starting point for this analysis is to read the regulations carefully in order to know what is required. This should be supplemented by an analysis of the case to see if there are any other facts that must be established. Once all essential facts are identified, the county should obtain the best necessary evidence on each one. Some examples of essential facts that will arise in ADH cases include the following:

(1) For purposes of establishing that the respondent was employed and received earnings, the county shall strive to obtain the best available evidence. For example, after the county obtains the earnings clearance system information, the county should contact the employer for more detailed verification of such employment information. In obtaining

this verification, the county should consider requiring the employer to submit the information under penalty of perjury. The county should also request that the person completing the form clearly identify his/her position at such place of business.

(2) The county must prove that the respondent knew his/her reporting responsibilities before it can show that the respondent's action or failure to act was intentional.

(3) When the county is alleging a respondent's intentional failure to report information pertaining to another member of the household, the county must first show that the respondent knew of that information.

For ADH purposes, the county will prevail when the ALJ has concluded that the county's evidence on each and every essential fact satisfies the clear and convincing burden of proof. Failure to meet this threshold level of proof on any essential fact shall result in a decision against the county even when there is sufficient proof introduced on the other essential facts. During the course of the hearing, the burden of proof will not shift to the respondent. The respondent has no burden of proof that has to be met. Such burden is placed exclusively on the county.

Another evidentiary obligation (sometimes confused with the burden of proof) is the "burden of producing evidence". Evidence Code Section 110 defines this burden as:

> "...the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue."

Section 550 explains which party to a proceeding has the burden of producing evidence as follows:

> "(a) The burden of producing evidence as to a particular fact is on the party against whom a finding of that fact would be required in the absence of further evidence.
>
> "(b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact."

Since the county has the burden of proof as to all essential facts of its case, it also initially has the burden of producing evidence as to those facts. Thus, where a respondent fails to attend an ADH, the distinction between burden of proof and the burden of producing evidence becomes very cloudy since they appear to be the same thing. In this situation, many people confused the purposes of these two separate burdens and believed that since the respondent failed to appear and therefore would not be in a position "to introduce evidence sufficient to avoid a

ruling against him on the issue" that a ruling in favor of the county should be made. As should be evident by now, such an analysis is in error.

The burden of producing evidence is an excellent tool for understanding the mechanics as to how the evidence component of the ADH process works. The reason for this is that while the burden of producing evidence is initially on the county which has the burden of proof, the burden of producing evidence can be shifted to the other party. In fact, during the course of a hearing, the burden of producing evidence can shift back and forth a number of times depending on the evidence that is introduced by the parties or is discovered by the ALJ in the case file. This last aspect needs to be emphasized because it will frequently occur in ADHs when the respondent is not present. In reviewing the case file or in the questioning of the county representative or witnesses, evidence may come to light that seriously weakens the county's case. Such evidence may have the effect of causing the burden of producing evidence to shift back to the county.

Therefore, in order to present its most effective case, the county should strive to introduce the best evidence that it possesses on all essential facts. By presenting evidence that fully supports its contentions, the county will be able to meet its burden of producing evidence. Once met, the burden will shift to the respondent. If the burden has shifted to the respondent and the respondent is not present, the respondent will lose if the evidence in the case if sufficient to meet the clear and convincing test.

What must be understood is that the burden of producing evidence will not shift to the respondent, unless and until, the county meets its initial burden of producing evidence. If the evidence that is submitted by the county on an essential fact is insufficient to establish what the county is alleging, the respondent is under no obligation or necessity to challenge, clarify or even submit evidence.

For example, suppose a county alleges, in part, that the respondent "intentionally" failed to report his/her earnings in November and December 1984. However, the only evidence the county submits is a letter from the employer stating that the respondent worked there in the "latter half" of 1984. The respondent does not appear at the hearing. Assuming the case is scheduled, the ALJ's analysis of the case should be as follows:

(1) The county has the burden of proof as to the issue of IPV as well as all essential facts, based on the standard of clear and convincing evidence.

(2) The county also has the burden of producing evidence on each fact that is necessary to prove the IPV. This includes the essential fact that the respondent received

earnings in November and December 1984.

(3) Since the county's evidence does not specify the precise months when the income was received, the county has failed to meet its initial burden of producing evidence that establishes that the respondent received earnings in the alleged months.

(4) As the county has failed to meet its burden of producing evidence regarding when the earnings were received, the burden of producing evidence as to the receipt of November and December earnings did not shift to the respondent.

(5) Having failed to shift the burden of producing evidence to the respondent on this essential fact, the county has also failed to meet its burden of proof. A decision must be rendered against the county notwithstanding the respondent's failure to appear at the hearing.

The point that must be fully appreciated is that when the county does submit evidence regarding an essential fact, the burden of producing evidence on this fact will shift to the respondent only if the county's evidence establishes this fact by the required standard of clear and convincing evidence.

When the respondent actually attends the hearing, the county will still have to meet its ultimate burden of proof and its burden of producing evidence on all essential facts. The respondent may present evidence which rebuts or seriously weakens the county's evidence. If the respondent does this, he/she will meet the burden of producing evidence and the burden will shift back to the county for additional proof if it wishes to prevail.

It is the ALJ who will decide whether the county's evidence is sufficient to meet the parties' respective burdens of producing evidence on the essential facts and whether the county has met the ultimate burden of proof.

Since the parties will not be advised by the ALJ when a burden of producing evidence has been met and has shifted to or back to a party, it will be up to the county representative to determine when such burden has, in fact, shifted. It is at that point that the county may wish to submit additional evidence or to request that the record remain open for the county to obtain new evidence to challenge the evidence that caused the burden to shift back to it.

An important point to remember is that it is not necessarily the quantity of evidence that will be controlling but rather the "probative value" (tending or actually proving what is at issue) of each item of evidence that is introduced. An example from the regular state hearing process will highlight this point:

Suppose the county is alleging that A, an AFDC claimant,

was overpaid as a result of failing to report that the aided children's absent father, B, was actually living in the claimant's home during January through November 1989. At the hearing, A submits twenty unsworn statements from individuals stating only that "B was not living with A in 1989."

This evidence would be clearly outweighed, in terms of probative value, by the county's evidence from one witness who testifies that he resided next door to A during 1989, that he observed B leaving A's apartment each morning at 6:30 and returning each evening at 5:30, that he saw B parking a car in the common driveway next to the two apartments and that he visited A and B at least twice a week at their apartment.

Based on the evidence submitted by A and the county, it should be apparent that the precise testimony of the one witness is more persuasive in terms of probative value than the general unsworn statements from individuals who were not present at the hearing to explain how they knew that B was not living with A or exactly what they meant in their statements. Therefore, under the preponderance of the evidence standard used in the regular state hearing process, one could find that the county has introduced sufficient evidence to prevail, absent other evidence.

To provide an illustration as to how A may shift the burden of producing evidence back to the county so that it should seriously consider obtaining additional evidence before resting its case, let us assume that A challenges the testimony of the county's witness by alleging that such individual was biased against her and, in addition, perjured himself at the hearing. A then introduces into the record a copy of her signed complaint that resulted in the arrest of the witness for the burglary of A's apartment two years earlier. Further A also submits a certified letter from a state prison warden indicating that the county's witness was in jail for ten months of 1989.

Based on this new evidence, the probative value of the county's evidence has been seriously weakened with the burden of producing evidence having shifted back to the county on the essential issue of proving that B resided with A during the period under review. If the county does not come forward with additional evidence to prove that B lived in A's home during 1989, the county's case should fail. Since the county's evidence was successfully challenged and there is no other evidence to prove its claim, the county would lose the case. The county would lose because at the close of the hearing, it had not met its burden of producing evidence on an essential fact.

Up until now, this discussion of the burden of proof and the burden of producing evidence has focused on the obligation of the county to submit evidence that would persuade the ALJ that certain essential facts are true. As already noted, the normal

way that one establishes the existence or nonexistence of a fact is by submitting evidence with high probative value. The following are recognized exceptions to the normal process of having to submit evidence to establish a fact:

(1) Stipulations can be used when both parties voluntarily agree as to the existence or nonexistence of a fact.

(2) The ALJ may take "official notice" or "judicial notice" of certain facts. (See MPP Section 22-050.4)

(3) The party may rely on a presumption to establish a fact. A "presumption" is defined in Evidence Code Section 600 as:

> "...an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action."

Our focus is on the administrative convenience presumption which is defined in Evidence Code Section 603 as:

> "...a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied."

It is the presumption affecting the burden of producing evidence that requires our special attention. If such a presumption were applicable, it would, under Evidence Code Section 604:

> "...require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence without regard to the presumption..."

Finally, it should be kept in mind that presumptions can only exist <u>if specifically established by law</u>.

(4) The party may rely on an inference to establish a fact. An "inference" is defined in Evidence Code Section 600 as:

> "... a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."

While our experience has shown that the counties do not ordinarily use stipulations or official notice in the ADH process, it appears that reliance has been placed on the use of certain <u>nonexistent</u> presumptions and <u>improper</u> inferences, rather than

evidence, in order to prove the county's contentions. The following are examples of inappropriate presumptions:

(1) Once a respondent has been advised of his/her reporting responsibilities, a failure to meet those responsibilities is presumed to be intentional.

(2) The individual who signs a CA 7 is presumed to know of all income received by all other household members.

(3) Any information not reported on the CA 7 is presumed to have been intentionally not reported.

In those counties where the above inappropriate presumptions (or variations of them) are consistently applied, practically every IHE overissuance could be classified an IPV. The requirement that the county establish by evidence (let alone by clear and convincing evidence) that a respondent committed an IPV is simply dispensed with because these nonexistent "presumptions" are erroneously treated as providing sufficient evidence to establish the county's case. This certainly is contrary to both the purpose and requirements of the ADH process.

Although it is not appropriate to establish or apply presumptions that do not in fact exist, it is appropriate to draw inferences from one or more evidentiary facts. However, there has been a similar problem in incorrectly drawing "selected" inferences to support an unproven allegation. Under Evidence Code Section 600, a fact may be inferred only if it can logically and reasonably be drawn from another fact or group of facts. However, a so-called "inference" drawn from <u>insufficient</u> evidence will not support a finding based on the required clear and convincing evidence standard. When the county's circumstantial evidence is weak and there is more than one logical and reasonable "possibility", the drawing of an "inference" becomes nothing more than mere speculation, surmise or conjecture.

These two ADH examples illustrate the problem:

(1) The respondent has correctly completed CA 7s for four years by listing each and every one of his 208 weekly paychecks. However, on the next CA 7, he fails to report one paycheck.

(2) The respondent applies for FS benefits on January 2, 1989, signs the application papers, including the reporting responsibilities form, and is certified for one year. There are no CA 7s in this case. The respondent has no contact with the county until he reapplies for program benefits in January 1990. The respondent never reports that he worked for two weeks in June 1989 and earned $100.

In both situations we do not know why the information was not reported. In example (1), it might be concluded by many that the respondent obviously made a "mistake" because of the prior

reporting pattern. Others might conclude that the respondent was trying to "put something over" on the county. Perhaps he needed extra money that month. Perhaps he knew a new Eligibility Worker (EW) was about to handle his case and felt that this "mistake" would not be found.

In example (2), probably no one would say that the failure to report was "obviously" a mistake because of the lack of reporting history. One could guess that the respondent forgot to report the information, or forgot that he was required to report it. Or one could guess that the respondent intentionally failed to report.

In both examples there is more than one reasonable and logical possibility that can be drawn from the limited facts set forth. Since a possibility is based on speculation, one could only guess, not "infer", whether mistake or intent was present from the limited facts.

One area of circumstantial evidence, consisting of so-called presumptions and inferences that requires special mention is the sufficiency of the county's proof as it relates to those cases where the county is alleging that a respondent has intentionally failed to report the income, employment, property etc. of another household member. In these cases, counties rely on a combination of a "presumption" which is not present in the law (i.e., that one household member knows of another's circumstances) and an "inference" which is really a guess (i.e., that based on the fact that a person received income or possessed property, the head of the household would logically and reasonably have known of that income and property). These invalid presumptions and inferences do not provide an essential link in the county's case.

The necessary link (essential fact) which is missing is that the respondent actually knew of the other person's income, employment, property, etc. As there is no presumption applicable to the FS program that would permit the conclusion of knowledge simply by showing that the respondent lived in the same home or that the respondent is married or related to the individual with the unreported income, the obligation to prove this essential fact remains with the county. To prove any contention in this regard, DSS will require the county to provide evidence that shows that the respondent had knowledge of such information. Expertise in the area of the kinds of evidence that can be used to prove knowledge can be obtained from fraud investigators who frequently encounter this issue in their welfare fraud prosecutions. The following are examples of the kinds of evidence which can be used to prove this knowledge:

(1) Copies of checking or savings account deposit slips signed by or made by the respondent for paychecks earned by the other person; or

(2) Affidavits from employers showing that they met or dealt with the respondent regarding the employed individual; or

(3) Copies of state income tax records signed by the respondent which include the unreported income; or

(4) Affidavits of friends, neighbors, or other family members indicating that respondent knew of the other person's income or information at issue; or

(5) Admissions by the respondent.

It is understood that the necessity of submitting evidence that the respondent knew of the other person's situation may result in fewer of these cases being sent to the ADH process because the county may lack the investigative resources to obtain the necessary minimum evidence. The point, however, is that in setting up the ADH process, the federal government set high standards which must be met before a respondent can be disqualified for alleged improper conduct. Those requirements may not be lessened or excused merely because of the difficulties they might present to the initiating county.

The above requirements (regarding the need to establish actual knowledge) apply to spouses who live in the same home, as there is no presumption which can be used to dispense with the county's need to submit evidence that one spouse knows of the other spouse's circumstances. While the probability of the respondent's knowledge of his/her spouse's employment might increase as the number of hours worked increases, that "knowledge" is still based on speculation unless there is additional evidence.

Absent evidence establishing the spouse's knowledge, a county's contention that the respondent "had to know" represents speculation based on an argument or someone's belief as to what generally is the case. As already emphasized, a burden of proof is not satisfied nor does a shifting of the burden of producing evidence to the respondent occur based on arguments or conjecture. Even if the county firmly believes that a respondent knows of another person's situation, it will still be necessary to prove it with evidence.

We have seen cases where a respondent spouse failed to report the spouse's income and the county has alleged knowledge based on the fact that both were employed by the same employer. In this instance, the county might have obtained testimony from the employer showing that the respondent would have known of the other spouse's employment, because the respondent picked up checks for the spouse, because the spouses worked the same shifts at the same locations, or because the spouses traveled on the same bus or truck with other people (agricultural employees), etc. The point is that in many instances, such evidence can be obtained. If credible, this kind of evidence will shift the

burden of producing evidence to the respondent.

The purpose of the above discussion is to show that clear and convincing evidence has not been submitted if the resolution of the case depends on the ALJ selecting one of several competing possibilities that are based on conjecture. The following definition of "conjecture" from Black's Law Dictionary (Fifth Edition) is particularly relevant to our review:

> "A slight degree of credence, arising from evidence too weak or too remote to cause belief.
>
> "Supposition or surmise.
>
> "The idea of a fact, suggested by another fact; as a possible cause, concomitant, or result.
>
> "An idea or notion founded on a probability without any demonstration of its truth; an idea or surmise inducing a slight degree of belief founded upon some possible, or perhaps probable fact of which there is no positive evidence.
>
> "An explanation consistent with but not deducible as a reasonable inference from known facts or conditions.
>
> "In popular use, synonymous with 'guess.'
>
> "Also, the bringing together of the circumstances, as well as the result obtained."

At this point we are ready to define "clear and convincing evidence" and to show what kinds of evidence will enable the county to establish an IPV.

CLEAR AND CONVINCING EVIDENCE:

The courts in California have defined clear and convincing evidence as follows:

(1) clear and explicit;

(2) so clear as to leave no substantial doubt;

(3) sufficiently strong to demand the unhesitating assent of every reasonable mind; and

(4) reasonable certainty.

While the above definitions appear similar in that they all require something greater than mere preponderance of the evidence, they begin to blur when one tries to precisely measure just how high is the standard. Definition (3) seems to require proof that is closer to the burden of proof of "beyond a reasonable doubt" that is used in criminal trials. The working definition that DSS is using will be "reasonable certainty" since we believe that this is most susceptible to understanding and blends the other definitions into it. The concept of reasonable certainty will permit one to focus on the kinds of evidence that will provide clear and convincing evidence in an ADH. Reasonable certainty requires proof that something more than a "possibility" or even a "probability" exists to establish that the county's allegation is correct. These two latter terms are defined in Black's Law Dictionary (Fifth Edition) as follows:

> POSSIBILITY. An uncertain thing which may happen.
>
> PROBABILITY. Likelihood; appearance of reality or truth; reasonable ground of presumption; verisimilitude; consonance to reason. The likelihood of a proposition or hypothesis being true, from its conformity to reason or experience, or from superior evidence or arguments adduced in its favor. A condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it.

As should be obvious, the term "probability" comes closest to our understanding of the preponderance of the evidence burden of proof. Proof that shows that a fact is only a "possibility" appears insufficient to support a decision based on even this lesser burden of proof.

One must move away from "possibilities" and "probabilities" in order to understand the standard imposed by clear and convincing evidence under a definition of reasonable certainty. Black's Law Dictionary (Fifth Edition) defines "certainty" and "certain" as follows:

CERTAINTY. Absence of doubt; accuracy; precision; definite. The quality of being specific, accurate, and distinct. See certain.

CERTAIN. Ascertained; precise; identified; definitive; clearly known; unambiguous; or, in law, capable of being identified or made known, without liability to mistake or ambiguity, from data already given. Free from doubt.

By adding the word "reasonable" to "certainty", the courts have determined that the finding of certainty must be reasonable in view of all the submitted evidence. While this qualifies the term, it does not permit a degree of doubt sufficient to reduce the degree of certainty to one of mere probability. If such a degree of doubt were introduced, the standard of clear and convincing evidence would not be met.

While we all might agree on "reasonable certainty" as the definition to be used for clear and convincing evidence, this may not mean that we would all agree with the ultimate determination of whether an IPV exists when that definition is applied to a particular fact pattern. Consider the following fact pattern (and variations):

Respondent (R) applies in January 1989 for FS benefits and is certified for one year. At the time of application, R is not employed. As this is a nonmonthly reporting household, there are no CA 7s to be filled out on a monthly basis. R has no contact of any kind with the county for the entire year and she does not reapply at the expiration of the certification period. During the certification period, R earns "X" number of dollars during the months of June, July and August, 1989 and does not report these earnings to the county.

(a) Would you conclude with reasonable certainty that R intended to commit an IPV if "X" equaled $26 for each of the specified months?

(b) Would your answer change, if "X" equalled $150 per month?

(c) Would your answer change, if "X" equalled $260 per month?

(d) Would your answer change, if "X" equalled $2600 per month?

While the above facts deal exclusively with the amount of monthly earnings, would other factors such as the months of employment make a difference in your response? Suppose the three months of employment were February, March and April 1989? Would your answer change, if the employment months were October, November and December 1989?