

Appendices

Some General Rules of Evidence

Hearsay - One of the most common objections raised at a trial is that a statement is hearsay. This usually consists of a remark or statement made outside the courtroom, and offered as proof. Conversations made in the presence of the defendant may be admissible if a showing is made of the date, time, place of the statement and who was present. But the persons involved in the conversation should be present as witnesses, where possible, to corroborate the testimony. Unrecorded verbal discussions are not to be relied upon. Even if the person who made them is present, he may "forget" or flatly deny ever having said it. You can see the importance of the written statements taken in the field.

As an aid to enforcement, and simply as good office procedure, it is best to request written responses from the people from whom you wish to obtain information. If this is not possible, then the next best alternative is to send a letter reciting the elements of the conversation or agreement to the person from whom the information was obtained. Use certified mail with a return receipt requested and ask that if the information contained in the letter is not correct that the addressee please notify you within a reasonable, specified period of time.

Exceptions to Hearsay Rule:

- A very important exception to the hearsay rule is a statement of fact made by a person or the representative of a business, if it is against the defendant's interest. For instance, refusal to allow tests, evasive or equivocal answers, and attempts to avoid detection are considered to be such admissions. A party can make an admission against his interest by agreeing with statements of others or even by silence; failure to complain, that the person should have mentioned matter when it would have been appropriate to do so or even mere failure to answer or deny a given fact.
- Business Entries - Here again the importance of regular routine business practices can be seen. Such records are made in the regular course of business at or near the time of occurrence of the event recorded. This includes field trip records as well as office memoranda. The advantage to having a regular procedure or system is that our lawyer, in order to introduce the record as evidence, need only call as a witness one person from the office (not three or four), familiar with the procedure, who can identify records, testify they were kept in the regular course of business and explain the mode of preparation.
- Public Records - The Department of Natural Resources is governed by laws that specify our records are public records and must be open and available for free examination. In court such records are admissible if entries are made in the usual course of business, and under the general supervision of a recording official. There are special rules as to opinions expressed in such records, depending on whether the opinion is based partly on observation and partly on the statements of others. (Special confidential data submitted as required under EPA rules may be an exception. Such cases are rare.)
- A person is generally competent to testify as a witness to those matters that are within his or her knowledge and may give opinions on matters of common knowledge, when they are arrived at through their own independent observations.

Best Evidence Rule - This means that only the best available evidence shall be used at trial. For example, if the original of a document is known to be in existence, then no copies of it may be used in evidence. This applies to the department in that it requires where scientifically possible, that actual, original data from laboratory tests be produced in evidence. The person doing the testing or any qualified expert would then be free to testify as to the interpretation and measuring of the results.

Informants and Confidentiality as They Apply to Civil Suits

An informant or complainant is generally any person who provides information to an enforcement agency that aids in an investigation. Informants or complainants are perhaps the most valuable investigative tool at an agency's disposal. They may be the most volatile and difficult to manage. An informant or complainant must feel he or she is dealing with an honorable and credible agency. However, department employees cannot legally make any promises of confidentiality to any informant or complainant. While the employee may commit to not personally disclose any information to outside parties such as the news media or through routine public contact without prior consent of the informant or complainant, the Sunshine Law Act specifies legal responsibilities. Remember, a judge can order you to divulge the source of your information, so don't make promises you cannot keep. Be sure to tell a potential informant as soon as the subject is raised that you may not be able to keep their identity confidential.

The right of a prosecutor not to reveal the identity of their informant in a case is generally recognized in criminal law. Such a right is based upon public policy to encourage citizens to inform the government of crimes, not for the informer's protection.

Missouri has no applicable statute or case law pertaining to the "informer's privilege" in civil cases. There are a few cases from other jurisdictions, but the majority of the case law on the subject is found in the federal courts. The leading federal decision is *Rovaro v. The United States*, a criminal case, in which the Supreme Court held that the privilege is limited and where the disclosure of the contents of the informer's communications would not include their identity, the contents are not privileged. This court also found that once the identity of the informer is disclosed to those who would resent him or her for it, their identity is no longer privileged.

The *Rovaro* case is often used by the federal courts in civil cases as the authority for the general rules governing the privilege. As one court stated, "The fact that the case is civil rather than criminal is not dispositive." The policies behind the privilege and its exception extend to civil as well as criminal cases. There is no logical reason to set up two different privileges. The *Rovaro* balance should be struck in each case, civil or criminal, in deciding whether disclosure is essential to the fair determination of the case.

In determining whether disclosure should be made, the rule is that the public's interest in protecting the free flow of information must be balanced against the individual's right in being able to prepare a full and knowledgeable defense. If the identity of the informant is relevant and helpful to the defense or disposition of the case, material to the defense, or "essential to a fair determination of the case," then the privilege is relinquished. In several cases it has been held that, where the informant was directly involved and participated in the crime, the identity must be disclosed.

Response to Subpoenas

The department is frequently involved in administrative and judicial hearings and lawsuits. Employee may expect to be involved in these proceedings in a technical support role and as witnesses. As technical support, staff will provide assistance to the Attorney General's Office. Employee assistance would be based on education, training and expertise, knowledge of the particular situation and personal involvement in inspections and monitoring activities. Technical support may lead to further involvement as a witness.

Employee involvement as a witness may come through a request from the Attorney General's Office or through a subpoena issued by the court or a hearing officer. When a subpoena is delivered to the office, the following procedures should be followed:

1. If the employee is in the office, the subpoena should be received by the employee.
 - The regional director or program director should be informed immediately.
 - Department counsel should be contacted.
 - The subpoena should be sent to the legal office, both the Attorney General's Office and the Department of Natural Resources, Office of General Counsel, along with the envelope and any other indication of the day it was served, with a copy retained by the person served. It is important that
The department be able to provide the date that the department was served the particular legal instrument. This does not have to be a formal memo; a routine route slip stating that the documents were received on a certain date at a particular time and signed by the party who received it will be adequate. If an employee finds a subpoena at their desk and there is no indication of how it got there, that fact should be noted on a memo attached to the subpoena.
 - Appropriate information and file materials should be copied for use by the individual to support testimony.
2. In the absence of the employee, other staff should not accept the subpoena. The server should be advised of the date and time the individual is scheduled to return to the office.
3. Home addresses are not to be given out.
4. Any subpoena that includes the names of the department director or a division director should be immediately transmitted to them.

Occasionally, an attorney representing a client in a formal hearing before the department director or one of the commissions will call the program involved asking that subpoenas be issued for certain witnesses. Each commission secretary should have a standard form for use similar to the forms used by circuit court clerks. The attorney should make his own arrangements for service of the subpoena. In administrative hearings before the department director or one of the commissions where an attorney wants to subpoena a department employee, directors may agree to have the employee at the hearing without necessity of subpoena. This saves the time and trouble of everyone concerned. If it appears to the attorney that the attendance of the particular employee is wholly unnecessary, the attorney is still free to require that the subpoena be issued and served.

Additional information on subpoenas can be found in Chapter 4 of the Administrative Policies and Procedures Manual. To access this information please go to <http://dnr.mo.gov/policies/4.09%20Responding%20to%20a%20Subpoena.docx>.

Being a Witness

Unless an employee is called as a "professional" witness, being called as a witness may be a new experience that can carry considerable anxiety and apprehension. The best way to overcome this is to understand the procedures, something counsel will be glad to explain. In addition, there are a number of "do's" and "don'ts" that will make a staff member a better witness. The most important point to keep in mind is to answer only the question asked, clearly, and concisely. Don't volunteer additional information. Make the opposing attorney ask the right question. If not certain about the answer say, "I don't know." The supporting lawyer is there to assist staff and will object to any attempt by the opposing counsel to "harass" witnesses. The hearing

officer or judge is there to see that the rules are followed and that the hearing is fair. Witnesses are not alone on the witness stand.

Other suggestions are as follows:

- If an employee is to be a witness in a case involving testimony concerning the appearance of an object, place, condition, etc., staff should try to refresh the recollection by again inspecting the object, place or condition, etc., before the hearing or trial. While making the inspection, try to picture the item and recall, the important points of your testimony. Repeat the test until there is a thorough familiarization with the features of the testimony that will be given.
- Before testifying, visit a court trial or hearing and listen to other witnesses testify. This will bring a familiarization with the surroundings and help understand some of the things that may come up during the testimony. Another alternative is to arrive at the hearing early to listen to other witnesses testify.
- Wear neat, clean clothes when you are to testify. Dress conservatively.
- Do not chew gum while testifying or taking an oath. Speak clearly and do not mumble.
- Stand upright when taking the oath. Pay attention and say "I do" clearly. Do not slouch in the witness chair.
- Do not memorize the testimony. If there are prepared answers to possible questions, by all means do not memorize them. It is, however, very important to be familiar with the facts testifying about.
- Be serious at all times. Avoid laughing and talking about the case in the halls, restrooms and any place in the building where the hearing or trial is being held.
- While testifying, talk to the hearing officer, judge or jury. Look at him or them most of the time, speak frankly and openly as you would to any friend or neighbor. Do not cover your mouth with your hand.
- Speak clearly and loudly enough so that anyone in the hearing room or court room can hear easily. At all times make certain that the reporter taking the verbatim record of the testimony is able to hear and record what is actually say. The case will be decided entirely on the words that are finally reported as having been the testimony given at the hearing or trial. Always make sure the testimony is a complete statement in a complete sentence. Half statements or incomplete sentences may convey some thought in the context of the hearing, but may be unintelligible when read from the cold record many months later.
- Listen carefully to the questions asked. No matter how nice opposing counsel may seem on cross-examination, the counsel may be trying to hurt those testifying as witnesses. Understand the question. Have it repeated if necessary; then give a thoughtful, considered answer. Do not give a snap answer without thinking. Don't be rushed into answering, although it will look bad to take so much time on each question that the hearing officer, judge or jury would think the witness is making up an answer.
- Explain the answer if necessary. If a question can't be answered with a "yes" or "no" the witness has a right to explain the answer. If the judge will not allow it at the point, the lawyer will let you do so when that time comes.
- Answer directly and simply only the question asked you, and then stop. **Do Not Volunteer Information not actually asked for.**
- If an answer was wrong, correct it immediately.
- If an answer was not clear, clarify it immediately.
- The hearing officer, judge or jury wants only the facts, not hearsay, not conclusions, not opinions. A witness usually cannot testify about what someone else has said. If a witness is appearing as an expert witness they will probably be questioned about opinions and conclusions.
- Don't say, "That's all of the conversation," or "nothing else happened." Say, "That's all I recall," or "That's all I remember happening." It may be after more thought or another question there may be other important information recalled.
- Be polite always, even to the other attorney.

- Do not be a cocky witness. This will lose the respect and objectivity of the judge or hearing officer
- Witnesses are sworn to tell the truth. Tell it. Every material truth should be readily admitted, even if not to the advantage of the party for whom the witness is called. Do not stop to figure out whether the answer will help or hurt either side. Just answer the questions to the best recollection.
- Don't try to think back to what was said in a statement you made. When a question is asked, visualize the situation actually seen and answer from that. The jury thinks a witness is lying if the story seems too "pat" or memorized, or if the witness answers several questions in the same language.
- Do not exaggerate or embroider your testimony.
- Stop instantly when the judge or hearing officer interrupts, or when the other attorney objects to what you say. Do not try to sneak your answer in.
- Do not nod your head for a "yes" or "no" answer. Speak out clearly. The reporter must hear an answer to record it.
- If the question is about distances or time and your answer is only an estimate, be certain to say it is only an estimate. Before testifying, think about distances and intervals of time. Give estimates, not guesses.
- Give positive, definite answers when at all possible. Avoid saying "I think", "I believe", "in my opinion." If a witness does not know, that should be stated. Do not make up an answer. A witness can be positive about the important things which were naturally remembered well. If asked about little details a person naturally would not remember, it is best for a witness to say those are not remembered.
- Do not act nervous. Avoid mannerisms which will make a scared appearance, or not telling the truth, or all that a witness knows.
- Above all, it is most important a witness does not lose their temper. Testifying at length is tiring. It causes fatigue. A witness will recognize fatigue by certain symptoms:
 1. Tiredness.
 2. Crossness.
 3. Nervousness.
 4. Anger.
 5. Careless answers.
 6. Willingness to say anything or answer any question in order to leave the witness stand.

When a witness feels these symptoms, the witness should recognize them and strive to overcome fatigue. Remember that some attorneys on cross examination are trying to wear out the witness so the witness will lose temper and say things that are incorrect or will hurt the witness' testimony. Do not let this happen.

- If a witness does not want to answer a question, do not ask the judge or hearing officer whether it must be answered. If it is an improper question, your attorney will object. If the judge or hearing officer then says to answer it, do so.
- Do not look at your attorney or at the judge or hearing officer for help in answering a question. A witness is going solo. If the question is an improper one, the attorney will object. If the judge or hearing officer then says to answer it, do so.
- Do not argue with the opposing attorney.
- There are several questions which are known as "trick questions". That is, if the witness answers them the way the opposing attorney hopes, the attorney can make the answer sound bad. Here are two of them:
 1. "Have you talked to anybody about this matter?" If the witness says "no," the hearing officer, judge or jury will know that is not right because good lawyers always talk to the witnesses before they testify.

If you say "yes," the lawyer may try to infer the witness was told what to say. The best thing to say is there was a discussion with Mr.?, your lawyer, to the appellant, etc., and the witness was just asked

what the facts were. All that is asked for is simply tell the truth.

2. "Are you getting paid to testify in this appeal?" The lawyer asking this hopes the answer will be "yes," thereby inferring the witness is being paid to say what one side wants the witness to say.

The answer should be something like, "No, I am not getting paid to testify, I am only getting compensation for my time off from work, and the expense it is costing me to be here."

- When leaving the witness stand after testifying, wear a confident expression, not a downcast one. Witnesses find that there is really nothing to be frightened or nervous about in testifying. If witnesses relax and remember they are just talking to some neighbor or friend, they will get along well.

Criminal Investigations and Prosecution

Investigations of potential violations of the criminal provisions of Missouri law are coordinated and conducted by the department's investigators and legal counsel. Employees who suspect a criminal violation has occurred should take prompt steps to inform the department's investigators and legal counsel. Inspection, assistance and enforcement staff must be aware of the legal and practical aspects of a simultaneous criminal and civil or administrative investigation or prosecution involving the same party.

A case may involve both civil and criminal violations. In general, criminal violations are those where a party knowingly and willingly violates the law. Negligence may also be a crime. While civil violations may be committed by a person, corporation, business or other entity, a crime is always the act of an individual. Similarly, there are different remedies sought for different types of violations. Civil remedies may include injunctive relief, damages and penalties, where criminal relief may include personal sanctions, incarceration, restitution and penalties. Neither a criminal nor a civil remedy necessarily negates the need for the other, because they have differing purposes. Thus, in any given case, it is possible for a criminal investigation or prosecution to be going on while a civil proceeding is occurring, both involving the same subject matter. Civil and criminal actions pursued simultaneously against the same party and relating to the same subject matter are called "parallel proceedings." Several potential pitfalls exist for the department during parallel proceedings of civil and criminal prosecution, and this section provides guidance to avoid them.

The main purpose of civil enforcement of environmental laws is remedial – bringing about corrective actions to abate an environmental problem. The payment of damages, costs and penalties may also be imposed, and they are normally necessary but secondary to the primary goal. Criminal prosecution, on the other hand, has as its main purpose punishment of the offender, with the related goals of securing restitution and deterring others from engaging in similar illegal conduct. Though the purposes of civil and criminal enforcement are different, they are compatible. In appropriate cases, both types of actions may proceed simultaneously.

In general, each case is developed separately and independently. Each case should have a legitimate purpose and independent goals, and neither action is pursued solely to advance or strengthen the other. The use of separate staff to develop the criminal case and the civil case, while not ordinarily mandatory, enhances the agency's ability to prove the independent and separate purposes of the two types of proceedings. This avoids the appearance of a conflict in roles that might be perceived if the same staff are involved in both actions.

There is one situation where separation of staff for the criminal and the civil proceedings is mandatory. When a grand jury investigation has been initiated, personnel with access to grand jury materials must have no further involvement in the parallel civil action, because of the strict requirement for grand jury secrecy. In addition, grand jury material presented in a criminal proceeding may never be passed on or discussed with anyone working on a parallel civil or administrative proceeding. Apart from such grand jury material, it is permissible for information developed in criminal investigations to be passed on to other employees for their use. It is advisable that such information be clearly documented to show where and when it was obtained.

Information obtained in civil cases from subjects of a parallel proceeding may generally be furnished without restriction to personnel working on the criminal case. Staff should be aware that if the entity being investigated was not notified of the potential for a parallel criminal proceeding when the information was provided in the civil context, it may lead to a later allegation that the civil proceeding was merely a stratagem to obtain evidence for criminal prosecution. This should not be a problem, as long as provisions related to providing a notice to a common target is followed.

There is no requirement that the target of a criminal investigation be notified that an investigation has begun. However, EPA has urged staff to notify a violator when a potential for parallel civil and criminal proceedings exists. This is a preventive measure designed to defuse subsequent defense allegations of deception by government agents. It should be emphasized, however, that such notice is not required and is at the discretion of enforcement personnel.

Staff must be sure that they do not affirmatively mislead a target on the existence of the potential for a criminal case. Such a misrepresentation may lead to dismissal of the case or the suppression of statements given if a party relies on the misrepresentation. Staff cannot deny the existence of a criminal investigation or a criminal referral and cannot mislead the party into believing that cooperation with the civil action will preclude a criminal case if this is not true.

Just as notice of the existence of the parallel proceeding is not strictly required, neither is any Miranda-type warning when a target is being questioned. Nevertheless, a prudent approach is to inform the target (particularly when the person is not represented by counsel) that violations of environmental statutes may subject them to both civil and criminal sanctions and that statements made by the individual may be used against them in any further proceedings.

The primary obligation of all law enforcers is to promote compliance with the law. Even criminal prosecutions, with their emphasis on punishment and deterrence, are consistent with the goal of promoting law-abiding conduct. Sometimes the tactical needs of a criminal investigation may conflict with the goal of environmental protection. For example, investigators conducting surveillance of an ongoing criminal enterprise may benefit from a continuation of the illegal conduct, because it affords opportunity to gather more evidence in support of the criminal case. Compliance and enforcement staff, on the other hand, may legitimately fear that the ongoing illegal conduct poses an environmental threat that ought to be stopped at the earliest possible opportunity.

Meeting the dual needs of a parallel proceeding requires close coordination, cooperation and communication between all employees involved. Each must recognize and appreciate the purpose and the importance of the work completed by the other.

Parallel proceedings are fairly infrequent. As a matter of prudence, criminal and civil proceedings will typically move along different tracks and use separate staff. Excepting grand jury materials, information can ordinarily be exchanged between the two staffs. Two points of caution merit emphasis:

- Because of the potential for allegations of government misconduct during parallel proceedings, ongoing legal advice is a necessity for both compliance and enforcement staff, and investigative staff, and
- Both staffs must maintain open lines of communication (consistent with the requirements of grand jury secrecy) and must coordinate their activities so as not to interfere with each other's objectives.

Linked documents:

[Public Drinking Water Escalation Policy](#) PDF

[Memorandum of Implementation for Noncompliant Well Policy](#) PDF

[Implementation of Noncompliant Well Policy](#) PDF

[Noncompliant Well - Compliance Agreement](#) MS Word Doc

[Implementation of Water Total Residual Chlorine](#) PDF

[Criteria for Water Notices of Violation related to General Criteria](#) PDF

[Memorandum of Agreement on Pollution and Fish Kill Investigations](#) PDF

[Memorandum of Agreement on On-Site Wastewater Systems](#) PDF