Definition of Evidentiary Hearing

I have tried, without success, to find authority, from any source, for the proposition that an "evidentiary hearing" requires live testimony from witnesses [unless waived].

If you have any such authority or can point me in the right direction, I would appreciate it.

Thank you.

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What a trippy question. Since some evidence is self-authenticating, you'd think it would be possible by definition to have an evidentiary hearing without witnesses.

Michael Kaczynski

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I cannot think of any source, but the point of an evidentiary hearing is to take evidence. That would be done through submitting certain documents that would not be hearsay and through witnesses. How else does the court take evidence?

The alternative is what we refer to here as by representation. The attorney represents what the evidence is. Here, they are done a lot with contempt and restraining order hearings. All too often the judge presumes the hearing is waived and have the attorneys proceed.Phil A. Taylor, Massachusetts

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I get Roger's question, though I don't have an answer for him. Something like a summary judgment motion is based on evidence, but (typically) it isn't an evidentiary hearing.

James S. Tyre, California

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Hearings on a MSJ are not evidentiary as you can use an affidavit, however, the evidence contained in the affidavit must be admissible at trial and there cannot be "much" conflicting evidence.

Phil A. Taylor

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From a Google search:

An evidentiary hearing is a formal examination of charges by the receiving of testimony from interested persons, irrespective of whether oaths are administered, and receiving evidence in support or in defense of specific charges which may have been made.

And then there is

40 CFR § 78.14 Evidentiary hearing procedure.

(a) If a request for an evidentiary hearing is granted, the Presiding Officer will conduct a fair and impartial hearing on the record, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. For these purposes, the Presiding Officer may:

(1) Administer oaths and affirmations.

(2) Regulate the course of the hearings and prehearing conferences and govern the conduct of participants.

(3) Examine witnesses.

(4) Identify and refer issues for interlocutory decision under § 78.19<https://www.law.cornell.edu/cfr/text/40/78.19> of this part.

(5) Rule on, admit, exclude, or limit evidence.

(6) Establish the time for filing motions, testimony and other written evidence, and briefs and making other filings.

(7) Rule on motions and other pending procedural matters, including but not limited to motions for summary disposition in accordance with § 78.15<https://www.law.cornell.edu/cfr/text/40/78.15> of this part.

(8) Order that the hearing be conducted in stages whenever the number of parties is large or the issues are numerous and complex.

(9) Allow direct and cross-examination of witnesses only to the extent the Presiding Officer determines that such direct and cross-examination may be necessary to resolve disputed issues of material fact; provided that no direct or cross-examination shall be allowed on questions of law or policy or regarding matters that are not subject to challenge in the evidentiary hearing.

(10) Limit public access to the hearing where necessary to protect confidential business information. The Presiding Officer will provide written notice of the hearing to the parties, and where the hearing will be open to the public, notice in the Federal Register no later than 15 days (or other shorter, reasonable period established by the Presiding Officer) prior to commencement of the hearings.

(11) Take any other action not inconsistent with the provisions of this part for the maintenance of order at the hearing and for the expeditious, fair and impartial conduct of the proceeding.

(b) All direct and rebuttal testimony at an evidentiary hearing shall be filed in written form, unless, upon motion and good cause shown, the Presiding Officer, in his or her discretion, determines that oral presentation of such evidence on any particular factual issue will materially assist in the efficient resolution of the issue.

(c)

(1) The Presiding Officer will admit all evidence that is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Evidence relating to settlement that would be excluded in the Federal courts under the Federal Rules of Evidence shall not be admissible.

(2) Whenever any evidence or testimony is excluded by the Presiding Officer as inadmissible, all such evidence will remain a part of the record as an offer of proof. The party seeking the admission of oral testimony may make an offer

of proof by means of a brief statement on the record describing the testimony excluded.

(3) When two or more parties have substantially similar interests and positions, the Presiding Officer may limit the number of attorneys or authorized representatives who will be permitted to examine witnesses and to make and argue motions and objections on behalf of those parties.

(4) Rulings of the Presiding Officer on the admissibility of evidence or testimony, the propriety of direct and cross-examination, and other procedural matters will appear in the record of the hearing and control further proceedings unless reversed by the Presiding Officer or as a result of an interlocutory appeal taken under § 78.19<https://www.law.cornell.edu/cfr/text/40/78.19> of this part.

(5) All objections shall be made promptly or be deemed waived; provided that parties shall be presumed to have taken exception to an adverse ruling. No objection shall be deemed waived by further participation in the hearing.

Walter D. James III, Texas

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Few thoughts:

The word "hearing," when couple with "evidentiary," implies taking in evidence live.

To take in evidence (in any form), you need materially disputed facts.

Most local rules of courts require materially disputed facts before the court would agree to take in evidence or further evidence from the parties.

Val Loumber, California

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OK, so I'm being compelled (by myself) to tell a relevant war story. (I've told it here before, but probably not in the last decade).

One major independent oil company sued another major indie and a Big Oil company for antitrust and various other alleged sins. All three had their own

regular counsel. But the complaint alleged (frivolously) that the reason why Big Oil made a deal with Defendant indie without even giving plaintiff indie a chance to bid was that the officers in charge of the deal for Big Oil were bribed. So they needed independent counsel, and I was retained to represent one of the officers.

It was years before the litigation ever got within a country mile of the merits. That's because defendant indie made a motion to disqualify counsel for plaintiff indie, on the basis that counsel had represented defendant in the past (not disputed) and that the nature of the representations created a conflict (disputed).

The federal district judge considered all of the evidence in support of and against the motion, then denied the motion to disqualify. Not satisfied, defendant indie took it up to the 9th Circuit. It reversed and remanded, finding that the district judge hadn't given sufficient consideration to certain factors, and ordering the judge to hold an (wait for it) evidentiary hearing.

The district judge had an extremely well-deserved reputation for being a major curmudgeon. He did what only a district judge can do: he ordered the evidentiary hearing to begin at 5 pm on Friday of a three-day holiday weekend. I might not have cared, I had no dog in that hunt. But he ordered further that all counsel of record be present.

So, I go to the hearing, planning on doing nothing other than registering my appearance. It drags on, and on, and on. And on. Around 8 pm, the star witness, the senior partner of plaintiff's law firm, finally takes the stand. He's a force of nature, and the unenviable task of doing his direct falls to a junior partner in the firm. One might think that those two would have gone over the questions and answers in great detail. But, whatever happened, senior partner was getting frustrated, and repeatedly answered the questions he had wanted asked instead of the ones actually asked.

No doubt in a moment of temporary insanity, fueled by the fact that I didn't have a chance to grab a bite to eat before, I stood up.

"Your Honor, the witness is leading the attorney."

I said that the judge was a major curmudgeon, didn't I? He gave me the Stare of Death, I knew my life was forfeit. But then, after what seemed like several eternities,

"Mr. Tyre, did you mean to object on the basis that the answers of the witness are not responsive to the questions?"

"Yes, Your Honor, that's EXACTLY what I meant."

"OK then, objection sustained."

I sat down quickly uttered nary a peep for the rest of the long hearing.

And that, my friends, is an evidentiary hearing.

James S. Tyre

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Roger, perhaps you could analogize to Family Code section 217(a), which provides, " At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties.

And you should definitely read the discussion in (Elkins v. Superior Court (2007) 41 Cal.4th 1337, about the differences between declarations and live testimony to help you come up with a definition. FC 217 was enacted in response to Elkins, but the principles the Supreme Court stated in Elkins continue to be relevant.

Wendy C. Lascher, California

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I think your phrasing of the objection was perfect. That judge must have really upset many court staff with the scheduling as well.

Phil A. Taylor

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