NJC Deskbook on Evidence for Administrative Law Judges

Chris McNeil

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Christopher B. McNeil
General Editor

The National Judicial College
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General Editor
Preface

In 1993, Professor Melvin B. Goldberg, a member of The National Judicial College and William-Mitchell College of Law faculties, authored the first edition of Goldberg's Deskbook on Evidence for Administrative Law Judges. With this groundbreaking publication dedicated to addressing the evidentiary issues encountered by administrative law adjudicators, Professor Goldberg made a significant contribution that would be a foundational learning resource in NJC's administrative law courses for many years.

This evidence deskbook became widely distributed as the premier learning guide for addressing evidence issues in administrative law settings. Due to changes in law, the book needed to be substantially revised. Professor Goldberg's untimely passing meant that this task would have to be taken up by someone else. Judge Christopher McNeil, an administrative law judge from Ohio, agreed to undertake the monumental task of revising this invaluable work of wisdom and knowledge, designed to have a practical application.

Judge McNeil has utilized and incorporated Professor Goldberg's work wherever it remains viable, but has contributed incalculable hours in researching, outlining, preparing, reviewing, editing and writing the text for this revision of the deskbook. The National Judicial College and administrative law judges and practitioners owe a debt of gratitude to Judge McNeil for his extraordinary dedication to making this revision.

In this revision, Judge McNeil was ably assisted by the outstanding contributions of chapters written by judges Gregory Holiday, Jack Staton, Allan Toubman and Jack Weil. The work of these dedicated jurists is in the tradition of NJC's volunteer faculty who toil innumerable hours to serve justice through judicial education.

Lastly, I would like to acknowledge and thank Professor Michael H. Frost, of the Southwestern University School of Law, for his permission to reprint, as the Appendix of this book, his article on Context, Organization & Style in Administrative Law Decisions, which appeared in the Administrative Law Journal. Once a judge has received the evidence and determined how to rule, Frost's article provides insight in writing the opinion. All together, I am certain administrative law judges will find this deskbook to be a useful reference tool.

William F. Dressel
President, The National Judicial College
Foreword

Justice Oliver Wendell Holmes, Jr., noted that “the life of the law has not been logic: it has been experience.”¹ When we preside over evidentiary hearings, we know Justice Holmes was right: we know that to effectively adjudicate we must bring to the bench a keen sense of experience, and we must be willing and able to apply that experience in an impartial and informed way, always striving for a just result.

This deskbook is dedicated to the principles of impartiality and fairness. It is the product of more than a decade of work, drawing its foundations from the outstanding work of Professor Melvin B. Goldberg, presented first in 1993 as Goldberg’s Deskbook on Evidence for Administrative Law Judges. That book itself was the product of more than six years of research and teaching by Professor Goldberg, during which time he became an active student in the art and science of executive-branch adjudication. He knew that administrative adjudicators are a diverse and highly experienced lot, many with exceptional backgrounds in complex and technical fields of study. He also knew many may not be formally trained in the law but were sufficiently experienced in presiding over evidentiary hearings to certainly have earned the title “judge.”

In 2003, a coalition of judges examined Professor Goldberg’s book to bring the book up to date. One of the ironies noted quite early on was the fact that almost immediately after the book was published, the United States Supreme Court announced its decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). In Daubert, the Court breathed new life into Federal Rule of Evidence 702, mandating that the trial judge take an active and informed role in evaluating expert scientific (and later on, technical) evidence. In keeping with an increasingly complex world, judges were now on notice that they too would have to be well-informed about scientific and technical evidence, and were not permitted to simply defer to the prevailing views of those who spoke for scientific and technical communities.

For this 2005 edition we have built upon Professor Goldberg’s work and redirected it in many ways. The contributing authors – judges Gregory Holiday, Allan Toubman, Jack Weil, and Jack Staton, met with me by telephone and in person at The National Judicial College in Reno. We divided sections of Professor Goldberg’s work among us, and went to work. Much to our relief, Judge Holiday took the bull by the horns and manually retyped the entire 1993 manuscript of Professor Goldberg’s work because the original manuscript could not be located. In addition, we were very happy to get permission from Professor Michael Frost, to use his excellent analysis of writing skills for the ALJ.

The authors agreed that the 2005 edition should have the following five goals:

¹Oliver Wendell Holmes, Jr., THE COMMON LAW, quoted in John Monahan & Laurens Walker, SOCIAL SCIENCE IN LAW 2 (2002).
1. Acquaint the reader with the concepts covered by each chapter, providing context that will aid the reader in understanding how the material covered in the chapter fits into the larger evidentiary framework.

2. Provide the reader with authorities that define the concept.

3. Supplement the authority with comments, drawing upon our insight and experience.

4. Supplement the comments with illustrations, drawn from our practices and experiences.

5. Offer checklists and tips for executive-branch adjudicators.

With these goals as our mandate, we have revised Professor Goldberg’s deskbook, with the overarching goal of providing executive-branch adjudicators with a useful, accurate, and updated resource that we hope will become a frequently used judicial tool.

Chris McNeil
June, 2005
Contributors
(in alphabetical order)

Professor Michael Frost

Professor Frost, author of the Appendix of this book, has taught legal writing at Southwestern University Law School since 1979. He has a Ph.D. in English from the State University of New York. He has served as a legal writing consultant to The National Judicial College, the California Office of Administrative Hearings, the Oregon Workers’ Compensation Board, the California Public Utilities Commission, and the Idaho Judicial Conference. Professor Frost has written numerous articles examining modern legal writing in the context of classical rhetorical principles. He has served as an NJC faculty member since 1992.

Judge Gregory Holiday

Judge Holiday, the author of chapters 3 and 4 of this book, has been an administrative law judge with the Michigan State Office of Administrative Hearings and Rules since its inception in 2005 and its numerous predecessors since 1981. Prior to that, he was a staff attorney and supervising attorney for the Oakland Livingston Legal Aid Society. He received a B.S. degree in 1974 from Eastern Michigan University and a J.D. in 1977 from the University of Detroit-Mercy School of Law. He taught administrative law practice at the Thomas M. Cooley Law School in Lansing, Michigan. Judge Holiday is a member of the State Bar of Michigan’s Administrative Law Section (where he has served as treasurer, secretary, chair-elect and chair of its elected council). He is a past president of the Michigan Association of Administrative Law Judges and edited the MAALJ Bulletin for seven years. He has been active as a member of the American Bar Association’s National Conference of Administrative Law Judges, serving on the Executive Committee and chairing its Judicial Technology, State and Local Government, and Minority Outreach Committees. He is past chair of the Standing Committee on Minorities in the Judiciary of the ABA’s Judicial Division. Judge Holiday is an NJC alumnus. He joined the NJC faculty in 1991 and served in 2001 as chair of NJC’s Faculty Council. He is a frequent speaker on administrative law practice at judicial seminars and conferences.

Administrative Hearing Examiner Christopher B. McNeil

Examiner McNeil is the deskbook’s general editor and author of five of the book’s 12 Chapters. He is an administrative hearing examiner for the state of Ohio, adjudicating complex administrative cases for the Ohio Department of Job and Family Services as well as occupational and professional licensing cases for healthcare boards, and high-volume cases for the Bureau of Motor Vehicles in the Ohio Department of Public Safety. Examiner McNeil is a graduate of the University of Kansas (B.G.S. 1978, J.D. 1981), and holds a Master of Judicial Studies from the University of Nevada, Reno (2004). He was a public defender in Kansas from 1981 to 1983 and was in private practice from 1983 to 1988. From 1988 to 1994, he
served as an assistant attorney general in Ohio. Examiner McNeil has written extensively on administrative law and due process and has been published in numerous law reviews. He is past chair of the Administrative Law Committee of the Ohio State Bar Association. He was the recipient of the 2001 and 2002 Fellowship of the National Highway Traffic Safety Administration and National Conference of Administrative Law Judges. He also received the 1997 Fellowship of the National Association of Administrative Law Judges. Examiner McNeil joined the faculty of Capital University Law School in 1995, where he teaches administrative law, legal reasoning, research and writing. He joined the faculty of The National Judicial College in 2000.

Judge Jack Staton

Judge Staton, author of Chapter 11 on Impeachment, has been an immigration judge in El Centro and Imperial, California, since 1990. He is a 1979 graduate of the West Virginia University College of Law. He previously served more than six years in the diplomatic service in the U.S. Department of State as a foreign service officer assigned to Algiers, London, and Washington, D.C. Judge Staton practiced law with Furbee, Amos, Webb & Critchfield in Morgantown, West Virginia, from 1979 to 1984, where he specialized in administrative law, including workers’ compensation and federal black lung benefits. He is currently an adjunct instructor in criminal law, evidence, and criminal procedure in the Administration of Justice Program at Imperial Valley College. Judge Staton is a former instructor of school law for the University of Redlands, in Redlands, California (Imperial Valley Extension). He is an alumnus of The National Judicial College.

Judge Allan A. Toubman

Judge Toubman, author of three chapters of this deskbook, has served as chief administrative officer for the Maine Department of Labor since 1983. During this period, the department has provided resolution services to a wide variety of agencies, including those with responsibilities in the areas of mental health, licensing, marine resources, and housing. Prior to joining the department, he directed a legal service office and served as assistant attorney general in Maine. He has a B.A. from the University of Connecticut and a J.D. from the University of Connecticut School of Law. He chairs the task force on Maine Administrative Law for the Justice Action Group and also serves as a mediator for the State of Maine Court System. He is the author of law review articles and has been invited to make presentations on administrative procedure to administrative law judges and attorneys on a broad spectrum of legal subjects, including unemployment, special education, welfare, workers’ compensation, farmer’s home administration, and motor vehicle law in numerous states. Judge Toubman joined the NJC faculty in 1990 and has participated in many ALJ courses conducted by The National Judicial College.
Judge Jack H. Weil

Judge Weil, author of Chapter 9 on Documentary Evidence, has been an immigration judge since October of 1994. He received his B.A. in 1995 and his J.D. in 1988, both from the University of Maryland, and is a member of the Maryland Bar. He was an associate counsel to the director at the Executive Office for Immigration Review, in Falls Church, Virginia, from 1990 to 1994. From 1988 to 1990, he was a judicial law clerk with the Immigration Court in San Diego, California. In 1988, he worked as a student intern with the Immigration and Naturalization Service in Baltimore, Maryland. Judge Weil also did internships with the U.S. Department of Commerce, the International Trade Administration, the law firm of Goldsobel, Permut & Co. in Haifa, Israel, and with counsel for CIGNA/AETNA. He joined the NJC faculty in 2001.
Acknowledgments from the General Editor

I would like to express my thanks to those who made this book possible, notably the contributing authors: Judge Allan Toubman, Judge Jack Weil, Judge Jack Staton, and Judge Gregory Holiday. Each dedicated a significant amount of time and energy in their contributions to this cause, doing so with good humor, patience and grace. I also am indebted to The National Judicial College Publications Consultant Felix F. Stumpf, whose guidance and vision set the tone for this revision. Felix is truly the institutional memory of the NJC, and we are all specially blessed to have him as our guide. Thanks too, Margaret Anne Walz for her expert editorial wizardry in Word formatting, which improved the quality of this book by, leaps and bounds. I also want to thank John P. Ward, a friend and colleague attending Capital University Law School. Not only did J.P. survive the year-long legal research and writing course I teach at Capital, he came back for more, volunteering to Shepardize and cite-check each of the citations in this book. And, I want to thank my wife, L. Camille Hébert, professor of law at The Ohio State University’s Moritz College of Law, and our three children, Amanda, Caitlin and Ian, all of whom now know what it was that I was doing in Reno all those weeks.

Chris McNeil
June 2005
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Chapter 1 – General Evidentiary Issues

Christopher B. McNeil
Administrative Hearing Examiner

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[1.1] DEFINITIONS

[1.1.1] ALJ

For convenience, executive-branch adjudicators are referred to here as administrative law judges, or ALJ's. For this deskbook, the term includes all who preside over evidentiary hearings conducted by the executive branch, and is used interchangeably with administrative hearing examiner, administrative judge, hearing officer, administrative magistrate, and commissioner.

[1.1.2] APA

The Administrative Procedure Act refers to legislation at any level of government setting forth the general procedures to be used by the executive branch when conducting an adjudication through fact-finding that takes place outside of the authority of the judicial branch. Most states and the federal government have enacted APAs which set forth the general procedures by which agencies conduct their adjudicatory hearings.

[1.1.3] Evidence

Evidence is "[a]ny circumstance which affords an inference as to whether the matter alleged is true or false" and includes "all the means by which any fact in dispute . . . is established or disproved." Everts v. Sch. Dist. Number 16, Fillmore County, 131 N.W.3d 487, 489-90 (Neb. 1963) citing O’Drien v. State, 96 N.W. 649 (Neb. 1903).
[1.1.4] Law of Evidence

The law of evidence is "the system of rules and standards regulating the admission of proof at the trial of a lawsuit." 1 MCCORMICK ON EVIDENCE § 1 (John W. Strong et al. eds., 1999). In the context of administrative hearings, the law of evidence regulates the admission of proof in adjudications conducted by the executive branch.

[1.1.5] Federal Rules of Evidence (FRE)

At the federal level, judicial branch courts are subject to the Federal Rules of Evidence. The rules are promulgated and revised by the Supreme Court and either amended or allowed to become law by Congress (see 28 U.S.C. § 2072 (2004)). The FRE were developed over several years by prominent scholars and practitioners. They are often used as a reference in creating and interpreting state rules of evidence. They are also used in most law school courses on evidence. In this work they will be used as a reference and starting point for those areas of evidence relevant to administrative law. They are not, however, binding on executive-branch adjudicators, unless adopted by the executive entity. For a discussion on ALJ use of the FRE, see Richard J. Pierce, Jr., ADMINISTRATIVE LAW, Scope § 4-22B (2004).

[1.2] THE LAW OF EVIDENCE FOR ALJ'S IN A NUTSHELL

[1.2.1] Relevancy

The ALJ is responsible to create a record that will permit the parties, the agency, the reviewing court, and the public at large, to understand the basis for agency action and the responses to that action. The ALJ accomplishes this by determining what evidence should be included and excluded from the record. Unless there is a specific reason for refusing to allow it, all evidence that is both material and probative should be received. See MCCORMICK ON EVIDENCE § 184 (John W. Strong et al. eds., 1999). Evidence is "probative" when it has the tendency to establish the proposition that it is offered to prove; and evidence is "material" when it helps prove or disprove a proposition that is "in issue." Id. Taken together, probative value and materiality are the means by which we determine relevancy (which is discussed in Chapter 4).

[1.2.2] Beyond Relevancy

In addition to determining relevancy, the ALJ must consider:

- The mechanics of admitting evidence, including marking and identifying evidence (see Chapter 2);
- The burden of proof, and who bears it (see Chapter 3);
- Whether to take official or judicial notice of facts not specifically introduced during the hearing (see Chapter 5);
- Whether hearsay evidence, that is, evidence of what is said outside the hearing room, can be admitted (see Chapter 6);
- Whether opinion evidence, either from a lay witness or an expert, can be considered (see Chapter 7);
- Whether there is a barrier to admitting otherwise admissible evidence, because of some privilege, such as confidences shared in the attorney-client relationship (see Chapter 8);
• If the evidence is admissible, how should it be received when it is in
documentary form (see Chapter 9) or presented through demonstrations during
the hearing (see Chapter 10); 
• In controlling the flow of evidence, are there restrictions that the ALJ must take
into account when one side attempts to impeach the other side’s evidence (see
Chapter 11); and
• Is there a bar to the use of evidence based on the body of constitutional
protections collectively known as exclusionary rules? (see chapter 12)

[1.3] COURT RULES OF EVIDENCE VS. ADMINISTRATIVE RULES OF
EVIDENCE

The rules of evidence were developed over the centuries to meet the
special problems of presenting evidence to a trial jury. The emphasis is on the
admissibility of evidence as a means for screening out evidence that is not
sufficiently reliable to form the basis of the lay jury’s findings of fact.
Administrative law, on the other hand, has developed with notions of efficiency,
without juries and, for the 21st century, with the notion that administrative
agencies are not bound by the formal rules of evidence.

[1.4] CHECKLIST: IDENTIFY THE SOURCE OF EVIDENTIARY RULES FOR
YOUR JURISDICTION

☐ Check to see whether the executive entity has adopted a set of evidentiary rules.
For example, proceedings before the National Labor Relations Board are to be
conducted “so far as practicable ... in accordance with the rules of evidence
☐ Check to see if there are exceptions allowing the ALJ latitude in applying the
rules. For example, in proceedings before the Consumer Product Safety
Commission, “[u]nless otherwise provided by statute or these rules, the Federal
Rules of Evidence shall apply to all proceedings held pursuant to these rules.
However, the Federal Rules of Evidence may be relaxed by the presiding officer
if the ends of justice will be better served by doing so.” 16 C.F.R. §
1025.43(2004).
☐ For jurisdictions subject to the Federal APA, “[a]ny oral or documentary
evidence may be received, but the agency as a matter of policy shall provide for
the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” 5
U.S.C. § 556(d) (2004). Thus, in the typical administrative hearing, the question
is not whether the proof should be admitted, but rather, if it is admitted what
weight it should be given.

[1.5] USE THE RULES FOR GUIDANCE

Even where the jurisdiction has not adopted the applicable rules of
evidence, the rules may still provide an excellent source of guidance for the ALJ
when presiding over an evidentiary hearing. Rules of evidence generally are
promulgated by the judicial branch of government for use by its courts, and given
that agencies are not part of the judicial branch and are not courts, the rules are not
expressly applicable. Nevertheless, the rules of evidence may guide an agency in
conducting a hearing. See, e.g., Petrilla v. Ohio State Bd. of Pharmacy, 794 N.E.2d
706, 711 (Ohio 2003).
CONTROL THE EVIDENCE (THE ALJ IS NOT A POTTED PLANT)
Even where the rules of evidence do not apply and the ALJ is presiding in the absence of express rules, the ALJ has an affirmative duty to control the flow of evidence presented during the hearing. Professor Mullins makes the point: “The ALJ must remain alert, and should strike, upon objection or upon his own motion, evidence so confusing, misleading, prejudicial, time-wasting, repetitious, or cumulative that its pernicious influence outweighs its probative value. Marginally relevant evidence is not merely useless; it is positively harmful because it inflates the record which the parties, the ALJ, and the agency must examine.” Morell E. Mullins, Manual for Administrative Law Judges, 23 J. Nat’l Ass’n Admin. L. Judges 87 (2004).

OTHER SOURCES OF AUTHORITY OVER EVIDENTIARY PROCEEDINGS

Constitutional Law
In tandem with or in the absence of a set of evidentiary rules as guidance, the ALJ should be alert to fundamental state and federal constitutional protections that apply to the evidence-gathering process in executive hearings. These include any federal or state rights in civil proceedings to confront witnesses and to call witnesses on one’s behalf. For example, in Willner v. Comm. on Character, the Supreme Court held that due process requires that a state bar association permit an applicant to cross examine and confront the witnesses against him or her in an administrative hearing to determine that applicant’s fitness for the practice of law. Willner v. Comm. on Character, 373 U.S. 96 (1963).

Agency Rules
Agencies often make rules or establish binding policies with regard to certain types of evidence. Consult with the agency at the time the case is assigned, and determine which rules apply to the proceeding.

FOUNDATION: PERSONAL KNOWLEDGE
Generally, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Steven Goode and Olin Guy Wellborn III, Courtroom Evidence Handbook 157 (2003). “The rule is designed to improve the reliability of evidence . . . by insisting that witnesses testify only as to their own observations and perceptions.” Id. Experts are exempt from the personal knowledge requirement. Id.

Points to Remember: Personal Knowledge
• The burden for laying the foundation by showing a witness had the opportunity to observe is on the calling party.
• The proponent is obliged to establish in the initial phase of direct examination that the witness was situated so that he or she could “personally observe the acts or occurrences about which he [or she] is to testify.” Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence, Second Edition, § 36 (1994).
• A witness may be uncertain yet still be possessed of a sufficient amount of firsthand knowledge to qualify to give testimony; but the ALJ should take care that qualifying phrases are not mere disguises for the fact that the witness actually lacks firsthand knowledge and is just speculating or guessing. Id.
• Whether a witness possesses a sufficient amount of personal knowledge is a preliminary question, and drawing from FRE 104(a) concerning the qualifications of a person to be a witness, the ALJ may wish to permit the opposing party an opportunity to question the witness on the state of the witness’s firsthand knowledge, as a precursor to allowing the witness to testify with respect to what was seen or heard.

[1.9] OBJECTIONS

Ordinarily, the failure of a party to raise a contemporaneous objection before an administrative agency, authorizes the superior court to deny review of that issue. See, e.g., Burnham v. Admin'r, 39 A.2d 1008, 1010 (Conn. 1941).

As a matter of sound practice, the ALJ should require objections to be made at the time the objectionable question is asked or answer is given. Drawing from FRE 103(A), the ALJ should require that in order for an objection to be timely, it should be made as soon as the ground of it is known, or reasonably should be known, to the objector. The objection should state the specific ground of the objection, if the ground was not apparent from the context.

When ruling on key evidentiary questions, the ALJ should explain the rulings on the record – both for the benefit of the parties arguing the cause, and for appellate review.
Chapter 2 - Conducting the Hearing and Preserving the Evidentiary Record

Christopher B. McNeil
Administrative Hearing Examiner

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[2.1] MARKING AND IDENTIFYING EVIDENCE FOR THE RECORD
[2.1.1] Marking Evidence for the Record

All physical, documentary or demonstrative evidence capable of being marked should be marked for the record, i.e., put a sticker on each document or piece of evidence showing who proposed it and identifying it by number or letter. This is done primarily to aid the reviewing body (agency or court) that reads a transcript of proceedings or listens to an audio recording. Each piece of evidence, whether or not officially accepted into the record upon which a decision is to be based, should be distinctly marked so that subsequent reviewers of the case will know precisely which evidence is being addressed.

Have the parties mark the exhibits before the hearing (rather than waiting for a court reporter to do so). The assignment of a marking system does not mean that the documents are admitted into evidence; it means only that each item is given a distinct notation to avoid confusion in the verbal record. The ALJ may find it useful to issue a prehearing order directing the government's representative to mark exhibits with numbers (e.g., State's Exhibit No. 1, etc.), and the responding party to mark exhibits using letters.

[2.1.2] Identifying Evidence for the Record

The identification of marked evidence is part of the process of laying the proper foundation for its introduction into the record. Identification can be done by agreement in advance of the hearing if the parties agree as to the authenticity of the evidence. If the opposing party is concerned about authenticity, then the party seeking to introduce the evidence must call someone who can authenticate it. In the
case of a written document, the maker or the recipient of the document is usually called.

[2.1.3] Self-Authentication

Authentication under FRE 902 is relatively straightforward, allowing for self-authentication of a number of different kinds of evidence. The effect of self-authentication is that the proponent need not present any authenticating evidence in order to introduce it. See, Steven Goode and Olin Guy Wellborn III, COURTROOM EVIDENCE HANDBOOK 283-84 (2003). Included are:

- Domestic public documents under seal;
- Certain domestic public documents not under seal but purporting to bear the signature in an official capacity of an officer having the capacity to present such documents;
- Certain foreign public documents (upon a reasonable opportunity to investigate the authenticity and accuracy of the document);
- Certified copies of public records;
- Official publications;
- Newspapers and periodicals;
- Trade inscriptions that indicate ownership, control, or origin;
- Acknowledged documents, typically through a notary public;
- Commercial paper and related documents;
- Presumptions under Acts of Congress;
- Certified domestic records of regularly conducted activity (if accompanied by an appropriate written custodian’s declaration);
- Certified foreign records of regularly conducted activity (if accompanied by an appropriate written custodian’s declaration).

[2.1.4] Challenges to Self-Authenticating Documents

An opponent may challenge the genuineness of self-authenticated documents, and the rule requires that the record be made available for inspection in advance of the offer to permit the opponent a fair opportunity to challenge them and “an opportunity to examine, not only the record offered but any other records or documents from which the offered record was procured or to which the offered record relates.” Comment to 1986 Amendment, FRE 902.

[2.2] INTRODUCTION OF THE EVIDENCE INTO THE RECORD

Properly marked and identified evidence may be introduced into the record if it is relevant and not cumulative or wasteful of the court’s time. The receipt of evidence does not indicate the weight it is to be given. Thus, the parties can often agree on the introduction of the evidence in advance of the hearing without waiving their rights to attack the evidence and argue that it should be given little, if any, weight in deciding the case. If the opposing party seeks to challenge the introduction of the evidence, the presenting party calls a witness who can identify the evidence and establish its relevance to the issues. The opposing party may voir dire (cross-examine) the witness on matters of authenticity or relevance.
[2.3] Objections

[2.3.1] Timing

At times a party may seek to have an exhibit admitted as evidence contemporaneous to the witness's identification of the exhibit. The ALJ may defer this decision, but the better practice might be to consider the motion to admit, and at the same time permit a voir dire by opposing counsel, limiting the scope of that examination to questions pertaining to the admissibility of the evidence. Doing so permits the parties to develop a full record of the merits of the proposed exhibit, and gives the ALJ the opportunity to consider the evidentiary value of the proposed exhibit.

[2.3.2] Preserving Unadmitted Evidence for Review

If the ALJ decides that the evidence has not been properly authenticated, is not relevant or is cumulative, the evidence need not be admitted. However, evidence which is not admitted must nevertheless be proffered, i.e., it must be preserved as part of the record in order that reviewing bodies may determine whether the decision not to admit was correct. Evidence, which is not admitted formally into the record, cannot be considered by the ALJ in rendering a decision. Physically, however, such evidence must accompany the files and materials of the case.

If testimony is irrelevant or is inadmissible for any other reason, the ALJ will need to determine how best to preserve the proffer of such testimony without unduly weighing down the record. Professor Mullins suggests:

When documents offered in evidence are rejected, they may, if requested by counsel, serve as offers of proof of the facts stated.

When an objection to the receipt of oral testimony is sustained, counsel should be permitted, as an offer of proof, to state orally the substance of the evidence to be offered; or if the offer is lengthy, the ALJ may require a written submission.


[2.4] Offers of Proof

Drawing from FRE 103, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . and a timely objection is made" in the case of evidence that is admitted. FRE 103(A) (1). The rule then provides for offers of proof, once such a ruling has been made to exclude evidence. The rule provides that the court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

The rule cited above summarizes the procedure to be followed when evidence is not admitted into the record for any reason (irrelevant, cumulative, unreliable, etc.). The offering party is given a chance to state for the record what the evidence would show if admitted. The ALJ, in turn, may add any additional statement about the offered evidence. Thus, the reviewing body, agency or court, can fully understand what evidence would have been introduced had the ALJ permitted it, and the reason the evidence was excluded.
[2.5] Preserving Physical Evidence

Presented with other than documentary exhibits, for example dental casts referred to by experts in a licensing hearing, the ALJ must ensure the exhibit remains (to the extent possible) intact throughout the hearing and that it is preserved for appellate review. If the exhibit itself is unstable or perishable, the ALJ should consider proposing a description of the salient features of the exhibit, doing so in the presence of the parties and on the record. After describing the features relevant to the proceeding, the ALJ should inquire of all parties whether they agree with the description and agree that such a description will make it unnecessary for the agency to retain the exhibit.

The same consideration needs to be given to any physical expression introduced during the hearing; e.g., where a witness states that the room where the alleged abuse occurred was about the same size as the hearing room. In these cases, the ALJ must take the initiative and describe for the record how large the hearing room is, and solicit the agreement of the parties (or invite the parties to offer their own characterizations of the room size).

[2.5.1] Checklist for Handling Exhibits

☐ In advance of the hearing, require the parties to mark their exhibits.

☐ Require the parties to exchange copies of exhibits with one another in advance of the hearing.

☐ Require the parties to bring with them a sufficient number of copies – one for the ALJ, one for the court reporter (if any), and one for the witness (and one for the opposing party if there has been no prior exchange).

☐ While still on the record at the close of the evidentiary proceeding, state where each exhibit will be kept while the matter is pending before the agency.

☐ Think twice before accepting custody of any original document; these should remain within the public domain or with the court reporter.

☐ Encourage parties to withdraw duplicate exhibits (i.e., if the state has an exhibit and it’s the same as the respondent’s exhibit, suggest the return of one, to avoid needless duplication in the record on appeal).

☐ During the hearing, be sure, when appropriate, to use spoken words to describe the condition of things being referred to by the witnesses — describe distances and other physical conditions when necessary to provide a complete record of what you’ve seen.

[2.6] Cumulative, Repetitive, and Prejudicial Evidence

[2.6.1] FRF 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the fact-finder (either the ALJ or the agency), or by the possibility of causing undue delay, waste of time, or needless presentation of cumulative evidence.

While the ALJ need not worry about problems of prejudice or confusion which would affect a jury, the ALJ should exercise discretion to exclude evidence that would either waste time or be cumulative. In Hamling v. United States, 418 U.S. 87 (1974) the Supreme Court affirmed a trial judge’s exclusion of relevant evidence that would have been cumulative in a pornography prosecution. “The
District Court retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative... 418 U.S. at 127.

The judge should guard against allowing relevant but cumulative evidence: We have reviewed the documents deemed inadmissible by the trial judge and find that he did not abuse his discretion in excluding them. To the extent that the documents did not refer only to the knowledge of the defendants but also to the propensity of aluminum to cause fires, they were relevant. They were, however, largely cumulative of plaintiffs' evidence respecting the characteristics of aluminum wire.

In Re Beverly Hills Litigation, 695 F.2d 207, 218 (6th Cir. 1982).

Charts and summaries referred to by witnesses are typical examples of cumulative evidence that can be excluded:

The trial court excluded the chart from evidence under FRE 403. It held that the chart had the potential to mislead the jury and that it was cumulative of other evidence that had been admitted. Without commenting on the chart’s potential to mislead, the record demonstrates that the chart was cumulative and repetitive. The information contained in the excluded exhibit was in fact received into evidence. One of plaintiff’s experts... whose videotaped deposition was shown to the jury, described the chart and testified at length and in detail about the information contained in the chart. [A]nother of plaintiff’s experts, also testified about the information contained in the chart and commented that the comparison depicted by the chart was useful.

Error may not be predicated upon the exclusion of cumulative evidence [citation omitted]. The facts reflected in the chart were explained to the jury in detail. Thus, its exclusion did not prejudicially affect any substantial right of plaintiff.


[2.7] LIMITATIONS ON THE POWER TO EXCLUDE EVIDENCE

In Secretary of Labor v. DeSisto, 929 F.2d 789 (7th Cir. 1991) the Court of Appeals reversed a district court’s bench trial determination of Fair Labor Standards Act violations by the defendants. The reversal was based in part upon the trial court’s limitation on the number of witnesses the parties could present:

We recognize that insufficiency of the evidence would ordinarily

call for a finding against the plaintiff. But this case is different. It

must be emphasized that this state of evidence arose at least in part
due to the limit on witnesses – one per party, plus the compliance
officer – imposed by the district court... Rule 403 of the Federal
Rules of Evidence enables a trial judge to exclude needlessly
cumulative evidence. Rule 403, however, requires a balance of
probative value against the negative consequences of using a
particular piece of evidence. Certainly, Rule 403 does not mean
that a court may exclude evidence that will cause delay regardless
of its probative value. If the evidence is crucial, the judge would
abuse his discretion in excluding it. WEINSTEIN’S EVIDENCE § 403(6) at 403-99 (1990).

The record here does not show any indication that the court undertook a balance before limiting the presentation of evidence to three witnesses in total. Indeed, there was nothing on which to base such a balance, as the parties had not even reached the stage of listing proposed witnesses. Thus there was no proffer of evidence and no exclusion of evidence, under Rule 403 or any other rule. Instead, there was an apparently arbitrary limitation imposed in the interest of conserving judicial resources.

See y of Labor v. DeSisto, 929 F.2d at 794-795.
Chapter 3 – Burden of Proof

Judge Gregory Holiday

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[3.1] WEIGHT OF THE EVIDENCE

In this context, weight is the relative value assigned to the credible evidence offered to support a party’s position on a given issue. It is not quantifiable in an absolute sense. “The weight of evidence is not a question of mathematics, but depends on its effect in inducing belief. . . . There is no rule requiring a court to determine an issue solely on the number of witnesses.” Hessler v. Suburban Propane Natural Gas Co., of Pa., 166 A.2d 880, 882 (Pa. 1961). In evaluating the weight of the evidence, the judge compares the evidence favorable to a finding of fact with the evidence unfavorable to that finding of fact. This weighing process occurs with each disputed fact where there is evidence both in favor of and opposing it.

[3.2] STANDARD OF PROOF

The standard of proof is the amount of evidence necessary for a party to prevail in a given case. “Preponderance,” “clear and convincing” and “beyond a reasonable doubt” are all standards of proof throughout courts and agencies in the United States.

In legal proceedings, including administrative hearings, a party having the burden of proof is required to prove each and every element of the claim or cause by the assigned standard of proof.

Example: In a criminal proceeding where a defendant has been charged with drunk driving, the government is usually required to show that (a) defendant was the driver of a motor vehicle, (b) the vehicle was being driven in a public area, and (c) defendant was intoxicated at the time. The People are required to prove each of the three elements beyond a reasonable doubt.

Example: In a civil case where a plaintiff sues a defendant for negligence, the plaintiff is normally required to prove (a) the existence of a duty owed to the plaintiff, (b) a breach of that duty by the defendant, (c) injury or damage to the plaintiff, and (d) a proximate causal relationship between the breach of duty and the injury or damage. The plaintiff is required to prove each of the four elements by a preponderance of the evidence.

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Example: In an unemployment insurance hearing where the claimant is contesting the denial of benefits after leaving employment, the claimant is required to prove (a) the claimant was an employee of the employer, (b) the claimant worked a sufficient number of weeks to qualify for benefits, (c) the claimant left the employment, (d) the claimant had good cause to leave the employment, and (e) the good cause was attributable to the employer. The claimant is normally required to prove each of the five elements by a preponderance of the evidence.

[3.2.1] The Preponderance of the Evidence Standard

The United States Supreme Court in Steadman v. SEC, 450 U.S. 91 (1981) held that unless Congress has specifically prescribed a different standard of proof, the Federal APA requires that the standard of proof in an administrative proceeding is a "preponderance of the evidence." This same concept is equally applicable in state administrative law proceedings. That is, unless the legislature (by statute) or the agency (by rule or regulation) prescribes a different level of proof, the standard of proof is a "preponderance of the evidence."

The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51 percent of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder, both the presiding officer and any administrative appeal authority, must be convinced that the factual conclusion it chooses is more likely than not.

Charles A. Koch, 1 ADMINISTRATIVE LAW AND PRACTICE 491 (1985).

This means that when the evidence is evenly balanced, the party bearing the burden of proof loses. See Dir., Office of Workers' Comp. Programs, Dept of Labor v. Greenwich Collieries, 512 U.S. 267 (1994).

[3.2.2] Clear and Convincing Evidence

Statutes and rules occasionally call for the "clear and convincing" standard. See, e.g., MGM Supply Co. v. Industrial Claims Appeal Office, 62 P.3d 1001 (Colo. Ct. App. 2002), where by statute, the burden of proof in a disability determination hearing is upon a party disputing an independent medical examination impairment determination by clear and convincing evidence. Oftentimes when fraud is alleged as a claim, it is required to be proven by clear and convincing evidence for public policy reasons. The apparent thinking behind this requirement is that allegations of fraud should not be made casually since even an allegation of fraud can be extremely damaging. As a result, the party claiming fraud should be prepared to prove it clearly and convincingly.

In Woody v. Immigration and Naturalization Service, 385 U.S. 276 (1966) the Supreme Court imposed the clear and convincing standard of proof in an immigration case because it felt that the traditional preponderance standard was not high enough given the quasi-criminal effects of a deportation hearing -- i.e. banishment.
[3.2.3] Points to Remember on Standards of Proof

- For each claim or charge, the ALJ and the parties should know at the outset whether the applicable standard is preponderance or clear and convincing.
- Many ALJ’s and hearing officers maintain benchbooks that set forth the most common statutory claims, charges and defenses and the standard of proof required.

[3.3] Burdens of Proof

The burden of proof is the duty of a party to prove a certain issue by the assigned standard of proof. It is a composite of two distinct evidentiary concepts: the burden of going forward with the evidence, and the burden of persuasion. While the burden of proof is frequently set forth in agency statutes or administrative rules or regulations, it is sometimes found in case law.

[3.3.1] Burdens of Persuasion and Going Forward

Generally, the burdens of persuasion and going forward with the evidence initially rest with the party seeking to change the status quo or the party pleading the existence of a fact.

Where a statute, rule, regulation, or case law specifies a different burden of proof, then of course that authority is controlling. See, e.g., Baltimore Gas & Elec. Co. v. Hendricks, 693 A.2d 773 (Md. 1998).

In proceedings to determine whether to sustain an administrative license suspension based upon a DUl charge, the state has the burden of presenting sufficient evidence to prove that the driver either violated the applicable DUl law or refused to conform to the applicable implied consent law. Generally, a driver’s refusal to take a breathalyzer or other chemical test upon demand by a police officer, after the police officer has provided notice to the driver of the driver’s chemical test rights, is considered a violation of the implied consent law. Under either theory, the state would have the burden of establishing each element under state law.

[3.3.2] Burdens of Going Forward

The burden of going forward with the evidence is the duty of a party to present sufficient evidence on an issue in order to have the issue considered by the fact finder. It is commonly referred to as presenting a prima facie case. Absent a prima facie case, the opposing party need not present any evidence in order to prevail. It is also referred to as the “burden of proceeding,” North Sanitary Landfill, Inc., v. Nichols, 471 N.E.2d 492 (Ohio Ct. App. 1984); the “burden of production,” Gelof v. Papinau, 648 F. Supp. 912 (D. Del. 1986). In a jury trial, if the burden of going forward has not been met, the judge may decide the issue without sending it to the jury.

[3.3.3] Burden of Persuasion

The burden of persuasion is the duty of making the trier of fact believe sufficient facts that have been asserted by the party seeking to prove an issue:

The burden of persuasion entails more than merely producing evidence which would tend to put the court’s mind in a state of equilibrium with respect to whether a certain fact exists or not and if, at the close of the evidence, this is the situation, then the
decision must go against the party who has the burden of persuasion on the particular issue in question.


3.4 Assigning the Burdens

The Federal APA section 556(d) and most state APAs assign the burden of proof to “the proponent of a rule or order.” In other words, the party initiating the action that creates the need for a hearing has the burden of proving that grounds exist to grant the relief requested. Where appropriate, tribunals modify the assignment of burden of going forward with the evidence so as to require the party with the most knowledge of the facts involved to present the evidence regardless of which party has the burden of persuasion.

3.4.1 Example

In Ponte v. Real, 471 U.S. 491 (1985) the Supreme Court considered a prisoner’s complaint that the prison had not produced the witnesses he wished to be present at an administrative disciplinary hearing and had failed to state the reasons why the witnesses were not produced. The Court recognized that there were circumstances related to prison safety that would justify the prison’s refusal to call the inmate’s witness. Since the prisoner had initiated the court proceeding, the prison argued that he had the burden of proving that the prison official’s refusal to call his witnesses was arbitrary and capricious. The Court rejected that notion and shifted the burden of going forward with the evidence on that issue to the prison:

Given [the] significant limitations on an inmate’s right to call witnesses, it may be that a constitutional challenge to a disciplinary hearing such as [in] this case will rarely, if ever, be successful. But the fact that success may be rare in such actions does not warrant adoption of the [prison’s] position, which would in effect place the burden of proof on the inmate to show why the action of the prison officials in refusing to call witnesses was arbitrary and capricious. These reasons are almost by definition not available to the inmate; given the sort of prison conditions that may exist, there may be a sound basis for refusing to tell the inmate what the reasons for denying his witness request are.

Ponte v. Real, 471 U.S. at 499.

3.5 Checklist for Assigning the Burdens

- Determine the elements of each claim, and identify the bearer of both the burden of going forward with the evidence and the burden of persuasion.

- Ensure the burdens have been identified prior to the commencement of the evidentiary hearing, because this identification is needed to correctly set the order of proof for the hearing: The party with the burden of proof or persuasion normally proceeds with evidence first.

- Decide whether or not to issue a prehearing order announcing the allocation of burdens, particularly in cases where one side will bear most of the burdens, but where from the prehearing assessment of the case it appears the other side will have significant burdens as well, e.g., where the State seeks an administrative driver license revocation based on a DUI stop, the State will bear the burden of establishing cause for the license suspension or revocation; and the respondent
driver will bear the burden of going forward with claims in support of any affirmative defenses, such as claims that the stop violated Fourth Amendment protections.

Note one likely departure from the rule that the agency bears the burden of going forward: In most jurisdictions, a rejected applicant for a license (in contrast with a licensee who faces suspension or revocation of an existing license) bears the burden of going forward, to establish her or his credentials for the license.

In disciplinary cases the State generally has the burden of establishing cause for any proposed disciplinary action. This means that the State must present sufficient evidence on each element of each charge pending against the licensee in order to have the issue considered by the fact finder. The State must, by at least a preponderance of the evidence, meet its burdens on each element of the charges. “The burden of persuasion entails more than merely producing evidence which would tend to put the court's mind in a state of equilibrium with respect to whether a certain fact exists or not and if, at the close of the evidence, this is the situation, then the decision must go against the party who has the burden of persuasion on the particular issue in question.” Johnson v. Barton, 251 F. Supp. 474, 476, (W.D. Va. 1966 quoting McCORMICK ON EVIDENCE, supra § 307).

Anticipate questions about the relative burdens of proof, particularly where parties have made claims or charges against each other.

If at all possible, assure that the burden of proof or persuasion is adequately set forth either in the Notice of Hearing or in a document appended to the Notice of Hearing.

In appropriate cases, provide the parties with a prehearing order that establishes where the burdens of proof or persuasion reside.
Chapter 4 – Relevant and Material Evidence

Judge Gregory Holiday

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[4.1] LOGICAL RELEVANCE

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. FRE 401.

In other words, relevant evidence must have some tendency to prove or disprove an issue of fact in the case. It is a qualitative concept, not quantitative. The evidence need not be sufficient to prove or disprove a fact of consequence. It need not rise to the level of being convincing. It need only tend to make the existence of the fact more likely or less likely.

[4.2] LEGAL RELEVANCE

Under FRE 402, all relevant evidence is admissible unless it is specifically excluded by constitution, statute, rule or case law. Examples of excluded evidence include:

- Information protected by statutory privileges such as attorney-client, physician-patient, priest-penitent, etc.
- Information protected by constitutional privileges such as the Fifth Amendment right against self-incrimination, and the Fourth Amendment right against unreasonable search and seizure.
- Cumulative evidence resulting in a waste of time under FRE 403.
- Evidence of remedial measures taken after an occurrence, based upon the public policy of encouraging remedial measures.

For example, admissions made to one’s spouse concerning participation in criminal activity could be relevant to that person’s prosecution for that criminal activity. While relevant, it may be excluded by virtue of a marital privilege which protects the privacy of communications between spouses. (See generally, Chapter 8, Privileges).

[4.3] MATERIALITY

Historically, materiality has been defined as [relevant] evidence which bears some relationship to the issues in the particular case. Because courts and lawyers have tended to use the concept as if it were synonymous with "relevance," the concept has been included in the FRE definition of relevance and is no longer defined separately under federal law or rules.

[4.4] THE ALJ’S ROLE IN DETERMINING RELEVANCE

In the administrative law arena, administrative law adjudicators are authorized to determine the relevance of proffered evidence. Southern Foods Group v. Meadow, 974 P.2d 1033 (Haw. 1999).
The Federal APA and most state APAs allow for the exclusion of irrelevant evidence at the discretion of the ALJ. The ALJ should exclude irrelevant evidence when offered in the hearing in order to:

- Make a clear record.
- Avoid having to "weigh" irrelevant evidence against relevant evidence when deciding a case.

See, e.g., in Gulbranson v. Duluth Missabe and Iron Range Ry., 921 F.2d 139 (8th Cir. 1990), the Court of Appeals held that the trial court erred in admitting the minutes of a union safety committee in a damage action brought by an employee under the Federal Employer's Liability Act because the minutes were irrelevant:

[1]he minutes have no tendency to make the existence of any fact that is of consequence more or less probable because the evidence is too remote in time from the date of the accident. . . . The fact that the railway may have been aware of a continuing problem in April 1985 is not probative of its knowledge in July of 1984. Moreover, Gulbranson offered no evidence to establish that the reference to a continuing problem related back to the date of the accident.

Gulbranson v. Duluth Missabe and Iron Range Ry., 921 F.2d at 141.

[4.5] Points to Remember on Relevancy Objections

- When faced with a relevancy objection, the administrative law judge must determine:
  - Whether the evidence relates to the issues to be proved or disproved;
  - Whether the evidence tends to prove or disprove a fact of consequence; and
  - (If the answer is "yes" to each of these) whether the evidence is excludable under constitution, statute, rule or case law?
- It is incumbent upon the party offering the evidence to demonstrate that it is logically relevant, that is, that the evidence has some tendency to make the existence of a fact of consequence more probable or less probable than it would be without the evidence.
- It is incumbent upon the party opposing the evidence to demonstrate that, despite its logical relevance, the evidence is excludable because it is not legally relevant, that is, despite its logical relevance, admission of the evidence would be contrary to a specific constitutional provision, statute, rule or case law.
- Even where there is no objection to the evidence, the administrative law judge may require a party to show its relevance before allowing it.
- When the issue is a toss-up, it is prudent to err on the side of admitting evidence against a relevancy objection in administrative proceedings, rather than excluding it.
Chapter 5 – Official Notice

Judge Allan A. Toubman

[5.1] INTRODUCTION

Not all evidence needs to be produced at the time of the hearing. Certain facts may be recognized as true and relied upon as evidence, even when no party has formally placed the evidence into the record. The date the twin towers in New York City were destroyed, for example, is a historical fact appropriate for such treatment because this date is so widely referred to by the media and the general public, and can be checked by many available sources such as newspapers, and magazines.

[5.2] JUDICIAL NOTICE VS. OFFICIAL NOTICE

Official notice includes both what is traditionally recognized as “judicial notice” of adjudicatory facts by trial courts, and evidence based upon specialized agency facts. In jurisdictions controlled by the federal APA:

Official notice, rather than judicial notice, is the proper method by which agency decision makers may apply knowledge not included in the record. The Administrative Procedure Act allows a decision maker to take official notice of material not appearing in the evidence in the record. 5 U.S.C. § 556 (e). Official notice is a broader concept than judicial notice. See 4 Jacob A. Stein et al., ADMINISTRATIVE LAW § 25.01 (1986). Both doctrines allow adjudicators to take notice of commonly acknowledged facts, but official notice also allows an administrative agency to take notice of technical or scientific facts that are within the agency's area of expertise.

[5.3] TAKING NOTICE OF ADJUDICATORY FACTS

[5.3.1] Points to Remember for Exercising Official Notice

[5.4] AGENCY RECORDS

[5.5] AGENCY EXPERTISE

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[5.6.1] Example: Entertainment

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[5.8] OFFICIAL NOTICE ALONE WILL NOT SUFFICE

[5.9] PROCEDURES FOR TAKING OFFICIAL NOTICE

[5.10] PROCEDURES FOR TAKING NOTICE OF SCIENTIFIC EVIDENCE

Some state APAs expressly provide for official notice, allowing the ALJ to take notice of facts within the agency’s area of expertise. For example, Oregon Revised Statute § 183.450(4) (2003) (Evidence in Contested Cases) provides:

The hearing officer and agency may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts within the specialized knowledge of the hearing officer or agency. Parties shall be notified at any time during the proceeding but in any event prior to the final decision of material officially noticed and they shall be afforded an opportunity to contest the facts so noticed. The hearing officer and agency may utilize the hearing officer's or agency's experience, technical competence and specialized knowledge in the evaluation of the evidence presented.

Parties must receive notice that the ALJ is considering application of official notice and an opportunity to contest its use. The decision to take official notice is discretionary.

[5.3] TAKING NOTICE OF ADJUDICATORY FACTS

In jurisdictions guided by FRE 201, “adjudicatory” facts are those that answer what, where, when, how, and why, and are admissible if they meet a two-part test: The fact must be “one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

“Judicial notice applies to self evident truths that no reasonable person could question, truisms that approach platitudes or banalities.” Wooden v. Missouri Pacific R. Co., 862 F.2d 560, 563 (5th Cir. 1989). (Rejecting fact inhaling silica dusts could lead to lung disease).

[5.3.1] Points to Remember for Exercising Official Notice

- Each ALJ should determine whether the agency or state law expressly allows the ALJ to take official notice of scientific or technical facts within the agency’s expertise.
- Official notice may be taken on the ALJ’s own initiative.
- Due process requires that the ALJ provide all parties advance notice of the intention to take official notice.
- Official notice is broader in scope than judicial notice: It includes all matters which may be judicially noticed, plus agency-specific facts falling within the specialized knowledge of the ALJ or the agency.
- Just because you know it, does not make it a fact. “The judge is not to use from the bench, under the guise of judicial knowledge, that which he knows only as an individual observer outside of court.” Government of Virgin Islands v. Geveau, 523 F.2d 140, 147-148 (3rd Cir. 1975).
- In contrast to official notice, an ALJ’s sound reasoning based on experience as the decision-maker is not official notice of facts.
[5.4] AGENCY RECORDS

Official notice permits an agency to dispense with the conventional process of proof when the matter in question is some document or record that is in the agency’s files.

In Market St. Ry. v. R.R. Comm’n, 324 U.S. 548 (1945) the Supreme Court upheld an agency’s findings that a lower fare would stimulate increased usage based upon the agency’s expertise and upon the monthly reports filed with the commission.

Taking notice of agency records does not necessarily mean the ALJ can also take notice of information that was gathered by the agency in the process of making a decision. A statement of a third party included in the agency file is hearsay, subject to exclusion for lack of reliability. Heal v. Maine Employment Sec. Comm’n, 447 A.2d 1223 (Me. 1982).

[5.5] AGENCY EXPERTISE

An agency is presumed to be an expert in the regulatory or other field of administration committed to it and thus may expressly find facts in relation to matters within its expertise. This is specific to the agency.

An agency is permitted to take official notice not only of facts that are obvious and notorious to the average person but also of those that are obvious and notorious to an expert in a given field.

[5.5.1] Example: Public Utility Law

A public utilities commission took official notice of the fact that a well-managed gas company loses no more than 7 percent of its gas through leakage, condensation, expansion, or contraction where its regulation of gas companies over the years has made the amount of “unaccounted for” gas without negligence obvious and notorious to it as the expert in gas regulation. West Ohio Gas Co. v. Pub. Util. Comm’n, 294 U.S. 63 (1935).

[5.5.2] Example: Workers’ Compensation Law

A workers’ compensation commission rejected a claim that an inguinal hernia was traumatic in origin where the employee gave no indication of pain and continued work for a month after the alleged accident. The commission had dealt with numerous hernias and it was as expert at diagnosing them as many doctors. The commission’s experience taught it that where a hernia was traumatic in origin, there was immediate discomfort, outward evidence of pain, observable to fellow employees, and at least a temporary suspension from work. Franz v. Bd. of Med. Quality Assurance, 642 P.2d 792 (Cal. 1982).

[5.5.3] Example: Immigration Law

Immigration judges could take official notice of the likelihood of being tortured if returned to the country of origin. Zubeda v. Ashcroft, 333 F.3d 463 (3rd. Cir. 2003).

[5.5.4] Example: Professional Licensing Law

In a medical licensing disciplinary proceeding for negligence in failing to detect prostate cancer, the issue was whether a physical exam of an adult male always includes a prostate exam. Although the board may be made up of experts, i.e., physicians, the standard of practice must be established by evidence that is subject to cross examination. This is because the standard of practice may be an
ultimate question determining the outcome of the proceeding. Also, without evidence, a court, on review, cannot determine whether there is substantial evidence in the record.

[5.6] LEGISLATIVE FACTS: ASCERTAINING THE LAW

It is appropriate for the ALJ to take judicial notice of:

- State and federal statutes within the ALJ’s jurisdiction.
- State and federal regulations within the ALJ’s jurisdiction.
- Legislative history of statutes.

Judicial notice of [legislative facts] occurs when a judge is faced with the task of creating law, by deciding upon the constitutional validity of a statute, or the interpretation of a statute, or the extension or restriction of a common law rule, upon grounds of policy, and the policy is thought to hinge upon social, economic, political, or scientific facts.

2 MCCORMICK ON EVIDENCE § 328 (John W. Strong et al. eds., 1999).

[5.6.1] Example: Entertainment

The United States Supreme Court, in City of Erie v. Pap's A.M., 529 U.S. 277, 298 (2000), applied the concept of agency expertise to a city council judgment of the impact of nude dancing in a neighborhood: “[I]t is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such legislative facts within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment.” See FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); 2 Richard Pierce, ADMINISTRATIVE LAW TREATISE § 10.6 (4d ed. 2002).

[5.6.2] Example: Unemployment Law

In an unemployment hearing, the issue was whether the ALJ could take judicial notice of Federal USDOT, 49 C.F.R § 395.3, regulations that set the maximum time a trucker could drive a tractor-trailer. Judicial notice may be taken of federal regulations: They are legislative facts, and readily available in the Code of Federal Regulations to accurately determine their contents. Fleeger v. Un. Comp. Bd. Of Rev., 107 Pa. Commw. 84, 89 (1987) 528 A.2d 264 (Court taking official notice of federal safety regulations when claimant left employment to avoid violating federal safety regulations, 49 C.F.R. § 395.3(a)(1) and (2)).

[5.6.3] Example: Average Wage Statistic

An ALJ may take notice of welfare law in a state Department of Welfare hearing to determine whether the applicant refused employment at the average wage: where the average wage statistics are kept by the state Department of Labor for people of similar skill, age and education as the applicant. Official notice may be taken of facts that are within the expertise of the agency, provided the facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In this case the statistics are kept pursuant to law and on a regular basis to determine the average wages within a state, and may be noticed pursuant to FRE 201.
LIMITATIONS ON AGENCY EXPERTISE

An agency decision must be supported by evidence, not merely a "common sense" view without support in the record. *Green Bay R.R. Co. v. United States*, 644 F.2d 1217 (7th Cir. 1981). In *Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292 (1937) the Supreme Court struck down the official notice the agency took of price trends, land value trends and labor trends after the close of the record in a valuation proceeding for rate-making purposes:

From the standpoint of due process – the protection of the individual against arbitrary action – a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown, there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, "I looked at the statistics in the Library of Congress, and they teach me thus and so." This will never do if hearings and appeals are to be more than empty forms.


OFFICIAL NOTICE ALONE WILL NOT SUFFICE

Like the residuum rule in the hearsay doctrine, courts have held that an agency must have something more than officially noticed facts to support the agency's burden of proof. In *Lightfoot v. Mathews*, 430 F. Supp. 620 (N.D. Cal. 1977), a disability case, the Secretary of Labor was not permitted to rely on "administrative notice" to establish that the claimant could perform certain work and that such work existed. To do so would enable the Secretary to avoid the burden of proof placed on him: "To allow the Secretary to prove his case by administrative notice of key particulars is to rubber-stamp his determination." 430 F. Supp. at 622.

PROCEDURES FOR TAKING OFFICIAL NOTICE

The parties must be given notice of the proposed facts that the ALJ is considering placing into the record, and generally have the right to challenge the decision to take such notice. Under the federal APA, for example, "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." 5 U.S.C. 556(e) (2004). Also, FRE 201(e) provides that a party is entitled "upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken."

Judicial notice may be taken at any stage of the proceeding. FRE 201(f).
[5.10] Procedures for Taking Notice of Scientific Evidence

Judicial or official notice of scientific facts requires two tests: (1) Validity of the underlying principle: Does the principle really work? Does the test procedure measure what it is supposed to measure? Is it an accurate measure? (2) Reliability of the principle: Are the same results obtained in each instance in which the test is performed. Is it a consistent measure?

Scientific and technical principles that have been accepted, include radar detectors, State v. Tomanelli, 216 A.2d 625, (Conn. 1966):

Judicial notice can extend, however, only to the scientific accuracy of the Doppler-shift principle as a means of measuring speed if the principle is correctly applied. Judicial notice does not extend to the accuracy or efficiency of any given instrument designed to employ the principle. Whether the instrument itself is accurate and is accurately operated must necessarily be demonstrated to the satisfaction of the trier in order to render the evidence produced by it admissible.

State v. Tomanelli, 216 A.2d at 629.


The Drunkometer is sufficiently established and accepted as a scientifically reliable and accurate device for determining the alcoholic content of the blood to admit testimony of the reading obtained upon a properly conducted test, without any need for antecedent expert testimony by a scientist that such reading is a trustworthy index of blood alcohol, or why.

State v. Miller, 165 A.2d at 832.

Fingerprints: Piquett v. United States, 81 F.2d 75, 81 (7th Cir. 1936). But see, United States v. Mitchell, 365 F.3d 215 (3d Cir. 2004), where at the trial stage fingerprint theories were tested under the gatekeeper requirements of Daubert and Kumho and at the trial level were found to be not sufficiently reliable to permit the use of fingerprint evidence at trial. The trial court then reversed itself, and the appellate court upheld the conviction based on fingerprint evidence.
Chapter 6 – Hearsay

Judge Allan A. Toubman

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[6.1] INTRODUCTION TO HEARSAY

Hearsay is one of the most common and vexing evidentiary issues in administrative hearings. Particularly when there are pro se parties, the ALJ must navigate between the shoals of excluding all hearsay and admitting all hearsay. It places a great responsibility on the ALJ to determine the reliability of the evidence while evidence is being taken, without waiting until the decision is written.

Most ALJ's admit hearsay and determine whether it should be given any weight when they write their findings of fact. The problem with this approach is that it is too late to further question the witness. The better practice is to carefully analyze the hearsay as it is offered. It is only at that point that an ALJ can question the witness as to matters which will have an impact on the weight assigned. These factors include the ABCs of hearsay: Availability, Bias and the Competence of the declarant, discussed in more detail on page 44.

Rather than become proficient in understanding the 24 exceptions to the hearsay rule, an ALJ who asks questions regarding the declarant's ABCs, will be in a much stronger position to write findings of fact in which hearsay is relevant.

[6.2] EVALUATING THE USE OF HEARSAY

- If there is no dispute of fact, there is no reason to bar the use of hearsay.
- If the determinative factor is the credibility of the testifying witness rather than the reliability of what is being related, then hearsay is not a material factor.
- Exclude patently unreliable evidence that is based on speculation, rumor, gossip and most third-hand declarations.
- The admissions of parties, their agents and representatives are generally regarded as reliable and admissible, even if considered hearsay, as are declarations against interest by any declarant.

25
[6.3] Definition of Hearsay

In F.R.E. 801(c), hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." Further, a "statement" is defined as "an oral or written assertion" or "nonverbal conduct of a person, if it is intended by the person to be an assertion." Thus, the assertion contained in the hearsay can be oral, written or nonverbal conduct.

- The hearsay is oral if the witness testifies as to what he or she heard someone say and if that testimony is offered for the truth of the matter asserted.
- The hearsay is written if the witness testifies as to what he or she has read and if it is offered to prove that what the witness has read is true.
- The hearsay is based on nonverbal conduct if the conduct is intended as an expression supporting the truth of what is being asserted, e.g., "he nodded his head yes," "he answered in sign language." A staged photo or film could be deemed to be an assertion, i.e., a person on crutches pointing to the ladder with the broken rung could be a hearsay photo if offered to prove that the broken rung caused the injury.

[6.3.1] Nonassertive Expressions

- Nonassertive utterances – "Hello," "Thank you," and "Look out," are not expressions of fact.
- Nonassertive writings – A sign that says "keep off the grass" or "slow down" can be admitted for what it implies. Similarly, betting slips are hearsay and they imply bookmaking, but are admissible because they are not introduced to prove the accuracy or truth of the numbers on the slip.
- Nonassertive nonverbal conduct may be hearsay, for example, when a witness testifies to seeing a man limp in order to prove the man was injured. In this case the limping was not done to express the injury but may constitute circumstantial evidence proving the injury.

[6.3.2] Offered to Prove

Assertions by out of court statements may also be offered to prove something other than the truth of the matter and may be offered to prove what they imply rather than what they directly assert. For example:

- Statements with direct legal significance, such as the terms found in a contract or will; statements constituting threats, defamatory language, or evidence of repudiation of a contract.

- Circumstantial evidence, including out of court statements offered to prove a fact by inference, for example, out of court false statements introduced to prove fraud. See, e.g. United States v. Gibson, 690 F.2d 697 (9th Cir. 1982) (defrauded investors’ testimonies as to what they had been told by the defendant’s agents regarding an investment scheme).

- Letters or correspondence, when offered to prove the relationship between the parties, not the truth of the contents.

- Any statement offered to prove the state of mind of the declarant – guilt, knowledge, motive, mental health, etc. Note that the state of mind exception has been the source of much litigation.
• Prior inconsistent statements are admissible, when offered not to prove the truth of the matter contained in the prior statements but rather that the witness is a liar.

[6.4] HISTORY OF HEARSAY

By the 17th century, hearsay was excluded from evidence in the common law courts because the judges felt that it was untrustworthy or unreliable. Yet, the common law developed a lengthy list of exceptions. These were premised on the theory that the exceptions have indicia of reliability to substitute for in-court testimony. The exceptions have nearly swallowed up the rule.¹ The federal catch-all standard in FRE 803 (24): Equivalent Circumstantial Guarantees of Trustworthiness allows for hearsay provided (1) there is prior notice to the other party that it will be offered; and (2) the evidence is more probative than any other evidence the proponent can procure through reasonable efforts. This is similar to the administrative agency standard of reliability.

[6.5] AGENCY APPLICATION OF HEARSAY RULES

Administrative agencies do not follow the hearsay exceptions but do consider the reliability of hearsay. They have much more relaxed standards of admissibility.

"... the only limit to the admissibility of hearsay evidence is that it bear satisfactorily indicia of reliability. We have stated the test of admissibility as requiring that the hearsay be probative and its use fundamentally fair." Callahan v. Bailar, 626 F.2d 145, 148 (9th Cir. 1980).

Although there is a relaxed standard for the admission of hearsay in many administrative law jurisdictions, this can be a trap for the unwary. When making findings of fact, ALJ's are subject to the substantial evidence rule, which requires an analysis of the reliability of the hearsay to determine whether it will support a finding of fact. Consequently, if not alerted at the hearing, pro se parties may be surprised to learn their hearsay evidence is given little or no weight.

[6.6] STATUTORY AUTHORITY OVER HEARSAY

The ALJ should know whether there is statutory authority addressing the admissibility of hearsay. For example, the federal APA at § 556 (d) provides that any “oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. . . .” Under this rule, Judge Learned Hand provided this guidance for evaluating hearsay:

No doubt . . . mere rumor will [not] serve to support a finding, but hearsay may do so, at least, if more is not conveniently available.

and if in the end the findings are supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

NLRB v. Remington Rand, 94 F.2d 862, 873 (2d Cir. 1938) (overruled on other grounds at Art Metals Const. Co. v. NLRB, 110 F.2d 148, 150 (2d Cir. 1940)).

THE ABCS OF RELIABILITY: AVAILABILITY, BIAS, COMPETENCE

The exceptions to the trial court hearsay rules have at least three underlying principles to compensate for the inability to cross examine the declarant. These elements can provide an easy checklist to remember when questioning a witness who has offered hearsay.

1. Inquire as to the declarant’s availability: Will the party offering the testimony exercise control over whether the declarant is available? Has a subpoena been issued? Is the witness incapacitated?

2. Examine the witness for possible bias, including bias based on financial, personal, or family relationships; check to see if there are collateral pending legal matters, or if there is a professional relationship or one based on agency; and check to see if there are philosophical factors that may indicate bias.

3. Determine the declarant’s competency to give testimony: Could the declarant accurately perceive what was reported? Accurately remember it? Accurately communicate the perception? Accuracy here includes the sense of hearing, feeling, seeing, smelling, and tasting. Does the declarant have sufficient education, experience, or training to accurately relate what is being offered?

[6.7.1] Checklist for Weighing Hearsay

☐ Was the statement written and signed?
☐ Was the statement sworn to by the declarant?
☐ Was the declarant a disinterested witness or did the witness have a potential bias?
☐ Was the hearsay statement denied or contradicted by other evidence?
☐ Was the hearsay corroborated?
☐ Does the case hinge on the credibility of this witness or the out of court declarant?
☐ Did the party relying on the hearsay offer an adequate reason for failing to call the declarant to testify?
☐ Did the party against whom the hearsay is used have access to the statements prior to the hearing or the opportunity to subpoena the declarant?


[6.8] SUBSTANTIAL EVIDENCE

Substantial evidence is necessary to support an agency’s finding of fact. What is substantial evidence? “Although the phrase ‘substantial evidence’ is difficult to define precisely, it has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Velasquez v. Dir., Office of Workers’ Comp. Programs, 835 F.2d 262 (10th Cir. 1987).

[6.9] RESIDUUM RULE

The residuum rule was announced in Carroll v. Knickerbocker Ice Co., 113 N.E. 507 (N.Y. 1916): In construing the New York Workman’s Compensation Act, the New York Court of Appeals announced the rule that “still in the end there must be a residuum of legal evidence to support the claim before an award can be made.” It held that when substantial evidence is required, “hearsay testimony is not evidence.” Many states, but not all, still follow the rule. For a comprehensive survey
of states that follow the rule, see Ernest H. Schopler, Comment, Hearsay Evidence in Proceedings Before State Administrative Agencies, 36 A.L.R.3d 12 (2004). The rule has been criticized as inconsistent with administrative decision making. Pierce, ADMINISTRATIVE LAW TREATISE, supra §10.4 (2004).2

Some states accept hearsay as sole basis of a finding of fact. These courts will still carefully review the record for admissible evidence. Federal courts will accept hearsay as a basis of a finding. Pascal v. United States, 543 F.2d 1284, 1289 (Ct. Cl. 1976) Hoonsilapa v. INS, 575 F.2d 735, 738 (9th Cir. 1978).

[6.10] DUE PROCESS, RELIANCE UPON HEARSAY, AND SUBPOENA AUTHORITY

Hearsay is admissible provided that there are other safeguards to assure that the evidence is trustworthy and reliable. In Richardson v. Perales, 402 U.S. 389 (1971), the Court held that a finding could be based exclusively on hearsay.

We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician. Richardson v. Perales, 402 U.S. at 402.

Yet, in Cuellar v. TEC, 825 F.2d 930 (5th Cir. 1987) the application of a three part due process analysis from Mathews v. Eldridge, 424 U.S. 319 (1976) resulted in a reversal of the District Court that upheld the reliance upon hearsay. The distinction was the nature of the hearsay. The court distinguished Richardson on the basis that a neutral physician's opinion is more reliable than a co-worker's recollection of events when he or she has an interest in the outcome of the unemployment compensation proceeding. The failure of the Texas ALJ to issue a subpoena for the co-worker resulted in a denial of due process for the claimant. Demoniac v. HHS, 913 F.2d 882 (11th Cir. 1990); Lidy v. Sullivan, 911 F.2d 1075 (5th Cir. 1990). Further, the failure to grant a continuance to allow the claimant to subpoena a witness is reversible error when the inconvenience of delay is minor.


[6.11] HEARSAY AND CREDIBILITY

When resolving a conflict between first-hand testimony and the hearsay evidence, the majority rule is that the first-hand testimony will prevail. Even in states that follow the minority rule, the burden is on the hearsay proponent to persuade the decision maker that the hearsay is more reliable than the first-hand testimony. Trujillo v. Employment Sec. Comm'n of New Mexico, 610 P.2d 747 (N.M. 1980).
1 Hearsay Exceptions
Hearsay exceptions where the availability of the declarant is immaterial:
1. Present Sense Impression [FRE 803 (1)]
2. Excited Utterance [FRE 803 (2)]
3. Assertion of Then Existing Mental, Physical or Emotional Feeling [FRE 803 (3)]
4. Statements for Purpose of Medical Diagnosis or Treatment [FRE 803 (4)]
5. Recorded Recollection [FRE 803 (5)]
6. Records of Regularly Conducted Activity [the business records exception [FRE 803 (6)]
7. Absence of Entry in Records Kept in Accordance With the Provisions of #6 Above [FRE 803 (7)]
8. Public Records and Reports [FRE 803 (8)]
9. Records of Vital Statistics [FRE 803 (9)]
10. Absence of Public Record or Entry [FRE 803 (10)]
11. Assertion of Pedigree in Records of Religious Organizations [FRE 803 (11)]
12. Marriage, Baptismal, and Similar Certificates [FRE 803 (12)]
13. Assertion of Pedigree in Family Record [FRE 803 (13)]
14. Records of Documents Affecting an Interest in Property [FRE 803 (14)]
15. Statements in Documents Affecting Interest in Property [FRE 803 (15)]
16. Assertion in Ancient Documents [FRE 803 (16)]
17. Market Reports, Commercial Publications [FRE 803 (17)]
18. Assertion in Learned Treatises [FRE 803 (18)]
19. Reputation Concerning Pedigree [FRE 803 (19)]
20. Reputation Concerning Boundaries or General History [FRE 803 (20)]
21. Reputation as to Character [FRE 803 (21)]
22. Criminal Conviction Offered to Prove Fact Essential to Sustain Conviction [FRE 803 (22)]
23. Judgment Offered to Prove Matter of Pedigree, General History, or Boundaries Essential to Judgment [FRE 803 (23)]
24. Other Assertion with Circumstantial Guarantees of Trustworthiness [FRE 803 (24)]
Hearsay exceptions only when the declarant is unavailable (in other words, less reliable exceptions than those above):
1. Former Testimony [FRE 804 (1)]
2. Dying Declarations [FRE 804 (2)]
3. Statement Against Interest [FRE 804 (3)]
4. Statement of Personal or Family History [FRE 804 (4)]
5. Other Assertion With Circumstantial Guarantees of Trustworthiness [FRE 804 (5)]
2 Residuum rule in various jurisdictions that apply the rule:
A. By Statute:
California: Cal. Gov. Code § 11513(c) (Matthew Bender 2004): The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in

Florida: Fla. Stat. Ann. Ch. 120.57(c) (Matthew Bender 2003).

Nebraska: Neb. Rev. Stat. § 84-914 (2003) provides in pertinent part: “Any party to a formal hearing before such agency, from which a decision may be appealed to the courts of this state, may request that such agency be bound by the rules of evidence applicable in district court by delivering to such agency at least three days prior to the holding of such hearing a written request therefore.”


By Case Law:

Arkansas: Carder v. Hemstock, 633 S.W.2d 384, 389 (Ark. 1982): “While hearsay standing alone is not substantial evidence it may be considered by the agency in reaching its determination if supportive of other non-hearsay evidence.”

Georgia: Code 50-13-15 provides in part: “The rules of evidence as applied in the trial of civil non-jury cases in the superior courts shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under such rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.” In Finch v. Caldwell, 273 S.E.2d 216 (Ga. App. 1980), the Georgia Court of Appeals reversed a trial court’s affirmance of an unemployment compensation tribunal’s denial of benefits to a claimant discharged for use of intoxicants. “We will not conclude . . . that what clearly is hearsay is commonly relied upon by men in the conduct of their affairs.” Finch 273 S.E.2d at 218. [But see Idaho, below.]


Maine: Ingerson v. State, 491 A.2d 1176 (Me. 1983): “In the hearing before the Parole Board, the hearsay evidence was neither ‘unreasonably abundant’ nor ‘highly suspect.’ In addition, the hearsay declarant testified at the parole revocation hearing and the parolee thus had a full opportunity to confront her and to cross-examine her on her statements that had come into the hearing through hearsay testimony. The admission of that minor amount of hearsay testimony at the parole hearing was not reversible error.” Ingerson, 491 at 1181.


Jurisdictions that reject the rule:

A. By Statute:

The 1981 Model State APA § 4-215(d) (15 Uniform Law Annotated): Findings of fact must be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a civil trial. See Model State Admin. Procedure Act (1981) located at the website address http://www.mncpr.state.nm.us/acr/presentations/1981msapa.htm (last visited
April 11, 2005). The Uniform Commissioners’ Comment to that section specifically rejects the residuum rule: “Findings may be based upon this type of evidence, even if it would be inadmissible in a civil trial. Thus, this Act rejects the ‘residuum rule,’ under which findings can be made only if supported, in the record, by at least a ‘residuum’ of legally admissible evidence.” (15 U.L.A.)


B. By Case Law:


States that have not clearly stated their position on the residuum rule:
Idaho: Hoyt v. Morrison-Knudsen Co., Inc., 603 P.2d 993 (1979). With a statute virtually identical to Georgia’s [previous page], the court concluded (contrary to the Georgia Court of Appeals) that hearsay was admissible, and that there was “substantial and competent” evidence in the record. The court did not discuss the nature of the evidence that made up the record. Specifically, it never stated that hearsay evidence alone could constitute substantial evidence.


Minnesota: State ex rel. Ind. Sch., Etc. v. Dept. of Educ, 256 N.W.2d 619 (Minn. 1977) (in informal due process hearings Minnesota does not follow the residuum rule).

Chapter 7 – Opinion and Conclusion Evidence

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[7.1] INTRODUCTION

[7.1.1] What is Opinion Evidence?

As a general rule, evidence from a witness is restricted to facts within the
witness’ personal knowledge, observation, or recollection. Courts recognize,
however, that some testimony may call upon something other than pure recitation of
“who, what, where or when” and may instead require the opinion of the witness. In
this context, consider as useful guidance the provisions of FRE 701: If the witness
is not testifying as an expert, the witness’ testimony in the form of opinions or
inferences “is limited to those opinions or inferences which are (a) rationally based
on the perception of the witness, (b) helpful to a clear understanding of the witness’
testimony or the determination of a fact in issue, and (c) not based on scientific,
technical, or other specialized knowledge within the scope of Rule 702." The ALJ then must examine the role of inference or conclusion in determining whether offered testimony is opinion testimony.

If, for example, the witness said the driver appeared to be drunk, the ALJ would understand that this conclusion is a result of the witness’ interpretation of objective facts known to give rise to a conclusion: The driver staggered, slurred his speech, smelled of beer, etc., all of which led the witness to conclude the driver was intoxicated. When the probative value of the testimony depends on conclusions or inferences, the ALJ must evaluate the evidence to determine its probative value and thus its admissibility.

[7.1.2] Distinguishing Lay and Expert Opinions

The ALJ, while often exempt from the rules of evidence applicable to the courts of the judicial branch, nonetheless will benefit from a rational template for evaluating offers of opinion or conclusion. That template is suggested in the FRE, including rules that control the admission of lay witnesses (Rule 701), and those controlling offers from persons having "scientific, technical, or other specialized knowledge" that will "assist the trier of fact to understand the evidence or to determine a fact in issue" (Rule 702). Using this dichotomy, the ALJ can resolve questions involving opinion or conclusion by first asking whether the offered testimony requires the application of "scientific, technical or other specialized knowledge."

Evidence not requiring such knowledge can be tested against traditional measures for determining the reliability of lay witness opinions, i.e., is the opinion one generally recognized as useful to the trier of fact, coming from a layperson, or if scientific, technical, or other specialized knowledge is called for, then the ALJ can test the probative value and admissibility of the evidence using a checklist designed to ensure the record contains valid and trustworthy expressions of expert opinion and conclusion.

[7.2] AFTER DAUBERT: THE ALJ’S ROLE AS GATEKEEPER

As the presiding officer over the executive adjudication, the ALJ is expected to produce a decision or recommendation based upon a record that consists of reliable, probative and substantial evidence. A concomitant obligation is that the ALJ exclude evidence that is either not trustworthy or not probative of material facts in controversy. Contained within this obligation is the duty to exclude from the record opinion evidence that is unqualified or sufficiently lacking in evidentiary stature so as to warrant its rejection during the hearing. While it may be a convenient expedient to let all colorable opinion testimony in, doing so diminishes the quality of the ALJ’s record and shows disregard on the part of the ALJ toward his or her responsibility to preside over the hearing, and not just serve as its scrivener. The federal APA expects more than that, dictating that the agency “as a matter of policy shall provide for the exclusion of immaterial, or unduly repetitious evidence.” 5 U.S.C. § 556(d) (2004).

Like trial court judges in the judicial branch, ALJ’s can be guided by the jurisprudential changes in the gatekeeper role attributed to the courts by the U.S. Supreme Court’s decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Articulating the role of the trial court using language long present
but underutilized in FRE 702, the Court in Daubert made it clear that trial judges have a responsibility to act as gatekeepers, and to only allow scientific opinion if it is shown to be reliable, as measured by the standards of proof in Rule 702. That standard was then applied with equal vigor to technical and other specialized knowledge in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Taken together, these two cases have generated a substantial retooling of the approach trial courts take when evaluating expert testimony. In many jurisdictions, the role of the judge has significantly expanded, allowing (and compelling) increased scrutiny into the process of qualifying expert opinion testimony.

The gatekeeper role of the ALJ may be tempered, however, by the general notion that questions of the competency of evidence are not to serve as the guide to determining admissibility, suggesting that the ALJ as fact finder may more liberally allow opinion testimony, and then attribute to it the weight deemed appropriate by the ALJ. Jacob A. Stein, et al. ADMINISTRATIVE LAW § 28.01 (2003) (citing Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div. of Dep't of Labor, 312 U.S. 126 (1941). See also, Brockton Taunton Gas Co. v. Sec. & Exch. Comm'n, 396 F.2d 718, 721 (1st Cir. 1968). (“[T]he traditional opinion rule does not apply in administrative proceedings.”)

Whether this remains true in light of Daubert and Kumho Tire and their progeny remains an open question. Several jurisdictions have expressly rejected the Daubert doctrine in administrative proceedings, opting instead to retain Frye as the means by which ALJ’s should evaluate proposed expert testimony. See, e.g., Banks v. IMC Kalium Carlsbad Potash Co., 77 P.3d 1014 (N.M. 2003) (holding the Daubert standard for the admissibility of expert testimony does not apply to proceedings under the Workers' Compensation Act or the Occupational Disease and Disablement Act, and citing to Alice B. Luster, J.D., Annotation, Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts, 90 A.L.R. 5th 453 (2001) for a review of jurisdictions that have accepted or rejected Daubert in administrative proceedings).

[7.3] OPINIONS AND CONCLUSIONS OF THE LAY WITNESS

[7.3.1] Preliminary Factors in Admitting Lay Opinions

Generally, a witness may only testify to facts perceived by the senses. The ALJ must keep in mind that the witness' conclusions are based on his or her own perceptions. For example, the witness observed the car approaching, and based on all of the circumstances surrounding the situation, can testify the car was traveling in excess of the posted speed limit. Over time and through common law, courts have recognized the probative value of a fluid set of common conclusions or opinions, and have allowed the lay witness to express those conclusions. Preliminary factors considered when presented with lay opinion testimony are:

- Is the witness able to express himself or herself in no other meaningful form?
  Most persons would probably find it difficult to describe the odor of a rose, whiskey, beer or limburger cheese, but this difficulty could scarcely be regarded as affecting the value of their testimony that they were familiar with and recognized the particular odor. People v. Reed, 164 N.E. 847 (Ill. 1929).

- Does the witness have a personal observation that forms a total impression but will not disclose all of the underlying details?
Would telling the details not usefully convey the total impression?

Even if a witness were able to precisely observe and describe what he or she saw, no one would want him or her to do so. To describe a man walking down the street would require a detailed description of all his parts moving at angles and speeds relative to each other that would provide an interesting joint exercise for choreographers, orthopedists and others but that would hardly help a juror or judge visualize the event. The abstraction: 'He was walking' or 'He was walking slowly,' is enough in most cases .... How much in the way of unconscious or conscious inferences the witness will be permitted to communicate is the practical problem for the trial court.

3 WEINSTEIN'S EVIDENCE MANUAL ¶ 701[01] at 701-06 (2d ed. 2003).

[7.4] THE LAY WITNESS OPINION RULE

[7.4.1] FRE 701

If the witness is not testifying as an expert, his or her testimony, in the form of opinions or inferences, is limited to those opinions or inferences, which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his or her testimony or the determination of a fact in issue. "The primary purpose of FRE 701 is to allow non-expert witnesses to give opinion testimony when, as a matter of practical necessity, events which they have personally observed cannot otherwise be fully presented to the court or the jury."

Randolph v. Collectramatic, Inc., 590 F.2d 844, 846 (10th Cir. 1979).

[7.4.2] Checklist for Lay Opinion Testimony

Thus, lay opinion testimony is admissible if:

☐ It is based on the perception of the witness.
☐ It is helpful to a clear understanding of the witness's testimony or to a fact in issue.

[7.4.3] Prohibition Against Lay/Expert Opinion

After the Supreme Court made it clear that courts have a gatekeeper duty with respect to not only expert scientific opinion testimony but also expert opinions involving "technical or other specialized knowledge" within the scope of FRE 702, there was some effort to circumvent this judicial role by asserting testimony was lay, rather than expert, and therefore subject only to the qualifications required of lay opinion evidence. In response, FRE 701 was amended in 2000 "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness's testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

FRE 701, Advisory Committee Notes (2000).

One consequence of this amendment may be to suggest ALJ's reexamine prior decisions in which opinion testimony is based on matters involving technical or other specialized knowledge. Where such knowledge is required to support the opinion, the witness should be tested against the more rigorous inquiries called for under Rule 702, rather than as a lay witness.
Admissible Lay Opinions

The following are areas in which non-expert witnesses’ opinions are usually permitted:

a. The physical or mental health of another person.
b. The sanity, competency, or mental state of another person.
c. Alcohol intoxication.
d. Measures of speed and distance, including the speed at which a vehicle was traveling.
e. The size or weight of a person or an object that the witness saw.
f. The nature of sounds that the witness heard, e.g., the noise was a gunshot.
g. The smell experienced by the witness, e.g., the smell of dynamite following an explosion.
h. The appearance of persons or things, including manners of conduct and the demeanor of persons, “The person was nervous.”
i. The value of property.
j. The witness’s own intent, motive and knowledge.
k. Age and parentage.
l. Ownership and possession.
m. Value of services provided by the witness.
n. The identity of persons.
o. Degrees of light and darkness.


EXPERT OPINION EVIDENCE

FRE 702

Given the technical nature of many, if not most, administrative proceedings, it stands to reason that the ALJ will be presented with opinion evidence requiring “scientific, technical, or other specialized knowledge.” That phrase is used in FRE 702 and frames the analysis an ALJ should consider when presented with an opinion drawing upon such knowledge. FRE 702 has evolved, most recently through amendments in 2000, written in response to decisions of the Court in Daubert and KumHo Tire. The Rule now provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FRE 702

Distinguishing Expert and Lay Opinions

Unlike opinions drawn from lay witnesses, expert opinions need not be based upon the general personal knowledge of the witness, but of the facts being offered as evidence. Where the lay witness is limited to giving testimony based on
his or her own observation of the thing or event that gives rise to the opinion, the expert opinion may be based on facts made known to the expert witness at or before the hearing. See, WEINSTEIN'S FEDERAL EVIDENCE, § 702.02[2] (2d ed. 2003).

[7.5.3] Checklist for Admissibility of Expert Evidence

☐ Expert opinion must be based on scientific, technical, or other specialized knowledge.

☐ The opinion must be useful to the finder of fact in understanding the evidence or in making factual determinations necessary to the ultimate issue.

☐ The opinion must be reliable or trustworthy, established by showing that:
  • The testimony is based on sufficient facts or data.
  • The testimony is the product of reliable principles and methods.
  • The witness has applied the principles and methods reliably to the facts of the case.

It is these three conditions that meet the gatekeeping burden imposed on the adjudicator by the Court in Daubert and Kumho Tire. See, WEINSTEIN’S FEDERAL EVIDENCE § 702.02[3] (2d ed. 2003).

[7.6] QUALIFICATION OF EXPERTS

As a general rule, an ALJ has “great discretion” in making a determination of the admissibility of an expert witness. See, e.g., Posey v. United Methodist Senior Serv., 773 So.2d 976, 979 (Miss. 2000).

[7.6.1] A “Preliminary Question”

The process of qualifying an expert is considered to be a “preliminary question.” In jurisdictions drawing their procedural protocols from the FRE, the ALJ, in making the determination, “is not bound by the rules of evidence except those with respect to privileges.” See, FRE 104(a).

[7.6.2] Risk of Confusion or Unfair Prejudice

Likewise, the ALJ must examine the offer of opinion testimony against the requirements of FRE 403, and exclude the testimony if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FRE 403.

[7.7] HISTORIC LIMITATIONS REGARDING EXPERT TESTIMONY

Many historic limitations on expert testimony focus on the role of the jury, a role not relevant to administrative proceedings. The ALJ, of course, presides without a jury and as a result may consider evidence beyond that which properly would go before a jury.

[7.7.1] Matters of Common Knowledge

Historically, an expert was not permitted to render opinions on matters within the common knowledge of the trier of fact, on ultimate facts, or on matters of law. To allow the expert to give such testimony would usurp the function of the trier of fact and the trier of law. In 1877, the United States Supreme Court held that a fire insurance expert could not testify as an expert on the question of whether two buildings were far enough apart so one would not be considered a fire risk to the other. "The subject of the proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard
to such matters, experts are not permitted to state their conclusions." Milwaukee &

Today, however, Judge Weinstein explains that prohibiting an expert from
testifying about matters within the common knowledge of a fact-finder is
unwarranted:

Before the enactment of the Federal Rules, courts might have
rejected expert testimony unless it related to an issue ‘not within
the common knowledge of the average layman.’ Such a rigid
approach is incompatible with the standard of helpfulness
expressed in Rule 702. It assumes wrongly that there is a bright
line separating issues that are within the comprehension of jurors
from those that are not. It also ignores the possibility that even
when jurors are well equipped to make judgments based on their
common experience, experts may be able to add specialized
knowledge that would be helpful.


[7.7.2] Testimony Regarding the Ultimate Issue of Fact
Historically, testimony regarding the ultimate issue of fact was excluded
because the jury, not the witness, was to determine the ultimate facts in a case. In
United States v. Spaulding, 293 U.S. 498, 506 (1935) the Supreme Court held in a
disability benefits case that the testimony of three doctors called by the plaintiff as
expert witnesses, who said the plaintiff could not work without damaging his health
and shortening his life, was inadmissible because the experts ought not to have been
asked or allowed to state their conclusions on the whole case.

While preventing the witness from usurping the role of the jury is
appropriate, the implementation of the policy is difficult, and should be of
substantially less concern when the finder of fact is a trained adjudicator, not a lay
juror. In complex cases it is often impossible to decide which facts are ultimate, and
it is by no means certain that lay jurors, let alone ALJ’s, feel that their role has been
usurped and blindly follow the expert’s facts.

[7.7.2.1] The Ultimate Issue of Fact Rule Today
FRE 704 settles this question with respect to civil and administrative
matters. FRE 704(a) states: “Except as provided in subdivision (b), testimony in the
form of an opinion or inference otherwise admissible is not objectionable because it
embraces an ultimate issue to be decided by the trier of fact.” The exception, in
704(b), applies only to those instances where the expert is testifying with respect to
the mental state or condition of a defendant in a criminal case. This exception
should be rare, because administrative proceedings typically are not operated under
criminal procedure rules. If FRE 704(b) does apply, and if the defendant’s mental
state is a condition or element of the crime, then the ALJ should not permit an
opinion or inference as to whether the defendant did or did not have the mental state
or condition. Such ultimate issues are matters for the trier of fact alone. Given that
in administrative proceedings the ALJ is generally the trier of fact, this exception
should be of limited utility.

Not all courts have viewed Rule 704 as dispositive of the ultimate issue of
the district court, after acknowledging Rule 704, nevertheless excluded the report of a labor lawyer introduced as an expert in an employee dismissal suit. The court held:

Review of the report shows that it does not simply embrace an ultimate issue; it consists almost entirely of the proposed expert's opinion on the ultimate issue. The report is a far cry from the typical form of expert's report which largely concerns itself with complex or disputed facts. The trier of fact does not need an expert to determine the facts of this labor case. All that need be done is to unravel the chronology of conduct among the parties during the period in question.


[7.7.3] The Ultimate Issue of Law

"In theory, the judge is the sole authority on the law and its interpretation. This simple proposition is so basic to the common law system that it scarcely needs repeating. The corollary of this truism is that an expert witness may not give an opinion to the court or the jury on an issue of law." Note, The Admissibility of Expert Witness Testimony: Time to Take the Final Leap? 42 U. Miami L. Rev. 831, 862 (1988).

Rule 704 does not distinguish between ultimate issues of fact or law. It appears to allow experts to testify to both. However, as the advisory committee points out, the rules of evidence tend to exclude legal opinions on the ultimate issues of law (because the witness will not ordinarily be qualified as an expert on law) but they do not exclude opinions based upon the facts necessary to reach a legal conclusion.

"Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1215 (D.C. Cir. 1997). The same is true of administrative hearings: The ALJ is the legal expert, and it is his or her province alone to articulate and apply the relevant legal standards.

[7.8] THE BASIS OF THE EXPERT'S OPINION

[7.8.1] Historic Limitations on the Basis of the Opinion

Historically, the admissibility of an expert's opinion was determined by examining the basis upon which the opinion was formed. Experts were permitted to express opinions based upon their personal experience (examination of a person or an object) or upon facts made known to them at trial. This assured that the trier of fact could understand the basis of the opinion.

At common law, the evidence upon which the opinion was based would itself have to be admissible and admitted into the record before the opinion could be given. The facts made known to the expert at trial were presented in the hypothetical question format containing the facts admitted into evidence. This approach avoided problems of hearsay. It also assured the trier of fact that the expert had fully considered the underlying facts upon which his opinion was based.

Strict application of the restriction on expert opinions prevented the expert from relying upon the opinion of other experts whose opinions were not first
admitted into evidence. Eventually, an exception to hearsay evolved to address this difficulty.

Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. It has long been the rule of evidence in the federal courts that an expert witness can express an opinion as to value even though his opinion is based in part or solely upon hearsay sources . . . . The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion.

Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert’s opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise."

*United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971).

[7.8.2] The Basis of the Opinion Today

Drawing from FRE 703 as amended in 2000, the ALJ may exercise substantial discretion when considering the basis leading to an expert’s opinion:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

FRE 703.

Rule 703 thus broadens the common law approach to the expert’s opinion:

1. The expert is permitted to base his or her opinion on evidence not admitted into evidence if it is the type of evidence reasonably relied upon by experts in the field.
2. The opinions of others are evidence and the expert may rely upon those opinions in formulating the one expressed in court.

[7.8.3] Evaluating the Basis of the Expert’s Opinion

While Rule 703 allows the expert to base an opinion on other opinions and evidence not otherwise admissible into evidence, there is still the question of whether there must be some evaluation by the court of the facts upon which the opinion is based.

Courts are split on whether a threshold foundation must be made (as a matter of law) before the opinion can be considered by a trier of fact, or whether a qualified expert testifying in his or her area of expertise may express an opinion subject to cross-examination without a prior showing of the opinion’s underlying factual basis. Under Rule 703, the court must:
Determine the "reasonable reliance" question: Whether the expert relies on information which, though inadmissible, is the information that other experts in the field reasonably rely on. If the expert takes into account inadmissible information that other experts in the field would not rely upon, the opinion is subject to exclusion under the rule.


For the administrative law judge serving as both trier of fact and law, this controversy is still significant. Since some courts will not allow a jury to hear an expert opinion where the factual basis is not clear, it should at least be a basis of caution going to weight when the ALJ is considering such an opinion. This is true even in light of the express language of Rule 703 which says that the facts or data relied upon need not be admitted into evidence if it is reasonably relied upon by experts in the particular field. Judge Weinstein writes:

Since Rule 703 is concerned with the trustworthiness of the resulting opinions, the proponent of the expert must establish that experts other than the proposed witness would act upon the information relied upon, and would do so for purposes other than testifying in a lawsuit.

1-13 WEINSTEIN'S EVIDENCE MANUAL § 13.03 (2d ed. 2003) (citing, e.g., Schude v. General Elec. Co., 120 F.3d 991, 996-997 (9th Cir. 1997) (two experts testified that material was of a type toxicologists consider reliable and regularly rely upon; it was therefore admissible under Rule 703); In re Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348, 1356 (N.D. Ga. 2000) (plaintiffs adequately demonstrated frequent reliance on regression models by economists to explain changes in prices; plaintiff's expert, therefore, could rely on regression analysis to show collusive pricing); but see United States v. Carbor, 270 F.3d 731, 735 (8th Cir. 2001) (absent evidence to the contrary the court can properly assume the materials the expert witness relied on in formulating his or her opinions are of the type ordinarily relied upon by experts in the same field)).

[7.9] NOVEL SCIENTIFIC OPINIONS – THE FRYE TEST

The Court of Appeals in Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923) sought to limit the expert's use of novel theories (i.e., the theories supporting the use of the systolic blood pressure deception test – polygraph evidence – in criminal proceedings) by requiring that they be generally accepted before submission to the trier of fact. The underlying scientific principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." 293 F. at 1014. The Frye test requires proof that the majority of experts in the field accept the scientific principle. This greatly restricts the introduction into evidence of new, not-yet-generally-accepted concepts.

As noted above, many jurisdictions abandoned the Frye standard – but by no means have all done so. The impact of FRE 702 on the Frye test has been mixed under Daubert and Kumho in administrative decisions. Consider this decision from Kentucky.
The Kentucky Rules of Evidence govern workers' compensation proceedings, Ky. Admin. Regs. 25: 010E § 14 (2004), and

**Daubert** governs the admissibility of expert testimony under FRE 702. . . . Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 578 (Ky. 2000) (adopting principles enunciated in Kunho Tire Co. v. Carmichael, 526 U.S. 137 (1999)). Virtually every state that applies the rules of evidence to workers' compensation proceedings holds that either **Daubert** or **Frye** v. United States, 293 F. 1013 (D.C. Cir. 1923), whichever it has adopted, governs the admissibility of expert opinion testimony in workers' compensation proceedings. E.g., United States Sugar Corp. v. Henson, 823 So.2d 104, 107 (Fla. 2002); K-Mart Corp. v. Morrison, 609 N.E.2d 17, 26-27 (Ind. Ct. App. 1993); Bethley v. Keller Constr., 836 So.2d 397, 401-03 (La. Ct. App. 2002); Case of Canavan, 432 Mass. 304, 733 N.E.2d 1042, 1048 (2000); Wells v. Howe Heating & Plumbing, Inc., 677 N.W.2d 586, 592 (S.D. 2004). The only case found holding otherwise is Banks v. IMC Kalium Carlsbad Potash Co., 134 N.M. 421, 77 P.3d 1014, 1018-20 (2003), which held that application of **Daubert** was precluded by a separate New Mexico statute governing standards for the admission of medical testimony in workers' compensation cases.

**City of Owensboro v. Adams**, 136 S.W.3d 446, 450 (Ky. 2004).

Whether the jurisdiction follows **Frye** or **Daubert** makes a difference in the role of the ALJ: In State Bd. of Registration for Healing Arts v. McDonagh 123 S.W.3d 146 (Mo. 2003), the court explained the distinction:

**Daubert** held “[t]hat the **Frye** test was displaced by the [Federal] Rules of Evidence,” 509 U.S. at 589. It found that FRE 702 provides a more “flexible” standard for admissibility focused on “the scientific validity and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission.” Id. at 594-95 (noting that “[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate”).

**Daubert** set out a non-exclusive list of factors for consideration in determining whether the evidence in question meets the flexible standard, including: (1) “whether [the theory or technique] can be (and has been) tested”; (2) “whether the theory or technique has been subjected to peer review and publication”; (3) “the known or potential rate of error”; and (4) “general acceptance.” Id. at 593-94.

The Supreme Court summarized its holding by emphasizing the difference between **Daubert** and the **Frye** test that the federal courts had previously employed, stating: “‘[g]eneral acceptance’ is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence . . . .” Id. at 597.
explained the difference this way:

In their recent treatise, professors Faigman, Kaye, Saks and Sanders have explained the differences between Frye and Daubert thusly:

In fact, if Daubert is a significant break from the past, the departure lies in the changed focus of the admissibility determination. Frye asks judges to decide the admissibility of scientific expert testimony by deferring to the opinions of scientists in the ‘pertinent field.’ Thus, under Frye, judges need not have any facility with scientific methods to make the admissibility decision. They must merely have some basis for knowing what scientists believe. Under Daubert, the trial court itself is initially responsible for determining the admissibility of scientific expert testimony by determining that the science supporting that opinion is valid.

Berry v. CSX Transp., Inc., 709 So.2d at 556.

Thus, the ALJ must first be alert to whether the administrative action is subject to either Frye or Daubert (or neither), and then be prepared to apply the appropriate scrutiny to the expert’s qualifications and methodology when presented with expert testimony.

[7.10] CROSS-EXAMINATION OF THE EXPERT

[7.10.1] The Learned Treatise

Under the common law, treatises were not admitted into evidence because they were hearsay. They could be used for impeachment purposes. Some jurisdictions began to recognize the treatises as having sufficient indicia of reliability to be admitted into evidence as an exception to hearsay. Treatises are prepared by and for professionals and are subject to review by editorial boards and members of the profession.

FRE 803(18) recognizes the reliability of the treatise and allows statements from the treatise to be admitted into evidence through the direct or cross-examination of an expert witness. The physical treatise itself is not admissible as an exhibit. Thus the treatise is not only useful for impeachment purposes, but its statements may be regarded as another expert opinion, provided that it is introduced through a live expert witness.

An expert’s theory of causation should find support in medical literature. An expert’s opinion is suspect if it conflicts with the views expressed in leading treatises and studies. The same is true if the expert is not even familiar with the relevant literature. To the extent an expert discounts the findings of studies contrary to his or her conclusion, the expert should be required to articulate rational reasons for doing so. An expert is not free to disregard the findings of objective expert committees formed by prominent independent organizations, including the National Academy of Sciences and the FDA.

[7.11] **COURT APPOINTED EXPERTS**

Although FRE 706 provides for the appointment of court experts, this is not the usual practice. Thus each side finds and retains one or more experts. In trials before juries, counsel often object to the fact that the expert is paid by the party that presents him or her. The implication, of course, is that the expert’s opinion is simply that of a hired gun. Administrative law judges, however, know and understand that most experts, who are qualified as such by their professional training, charge for their time and opinions.
Chapter 8 – Privileges

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[8.1]  **OVERVIEW**

While the evidentiary hearing is widely regarded as a search for the truth, not all evidence rules work toward that goal. When a person charged with a crime confides in his or her attorney, he or she does so hoping that what is told to the attorney in confidence will be held as a secret. If confronted with a demand that this secret be revealed in an administrative proceeding, the ALJ is required to apply rules regarding the attorney-client privilege, and where warranted is obliged to enforce the privilege, thereby restricting the amount of information in the administrative record. Privileges thus act in derogation of the public record: Known and true facts are deliberately kept out of the record, usually in order to advance a societal goal deemed to be more important than the interest we have in presenting “the truth, the whole truth, and nothing but the truth.”

When presiding over an evidentiary hearing, the ALJ is obliged to correctly apply these restrictions. To do so, the judge must understand the nature of the privilege, anticipate who is likely to assert the privilege, and craft restrictions on the introduction of evidence in a way that ensures due process for the parties while still seeking as complete and accurate a record as the law permits.

[8.2]  **BENCHMARKS IN PRIVILEGE JURISPRUDENCE**

Privileges exist because of societal perceptions – of the need, for example, to preserve open communication between married persons, or to encourage confession between a member of the clergy and a penitent. Those perceptions are by no means fixed; rather, they evolve and erode over the years. There are, however, benchmarks to bear in mind when attempting to resolve evidentiary problems involving claims of privilege:

- Privileges are restrictions on a complete and accurate record, and accordingly must be narrowly construed.

Testimonial exclusionary rules and privileges contravene the fundamental principle that “the public . . . has a right to every man’s evidence.” United States v. Bryan, 339 U.S. 323, 331 (1950). As such, they must be strictly construed and accepted “only to the very limited extent that permitted a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

• The ALJ should bear in mind the social goal that gives rise to the privilege, and recognize that that social goal may be at odds with the ALJ’s overarching responsibility to create a complete evidentiary record. As society’s needs change, so too might the expectation of secrecy. A privilege is the instrument for implementing an extrinsic social goal (unrelated to the need to conduct a fair hearing).

• Many privileges are the result of legislative action, and can be eroded by legislative action; others are the product of judge-made law, requiring that the ALJ know and apply common law applicable in the controlling jurisdiction. Matters kept confidential 20 years ago may no longer have protected status, and it remains the ALJ’s duty to understand and apply current restrictions, as dictated by the courts and the legislature.

[8.3] PRIVILEGE CHECKLIST

Essential elements of privilege jurisprudence suggest the following checklist:

☐ Who can make the claim? Is there a necessary “party A” – a lawyer, doctor, cleric, spouse?

☐ Has society recognized a new relationship worthy of the protections of a privilege – e.g., a journalist or social worker?

☐ Is there a necessary “party B” – a client, patient, penitent, news source?

☐ What has society protected through the privilege?

☐ Has there been a communication between the parties, and if so, is the substance of the challenged communication within the scope of the protections of the privilege?

☐ Was the communication expressed in a manner intended to preserve its confidential character?

☐ Was the communication made in the context of the interests being advanced – e.g., was the client actually engaging her attorney as her attorney, and not in some context not within the scope of the privilege?

☐ How is the privilege being asserted, and by whom?

☐ Is the person seeking to restrict the presentation of evidence authorized to do so?

☐ Is there an exception to the privilege applicable to this situation?

☐ Has the privilege been waived, and if so, was it waived by someone authorized to do so?

☐ Are the rules different for administrative proceedings?

☐ When applying the jurisprudence of privilege, are there distinctions to be made when the presiding officer is in the executive branch and the proceedings are administrative rather than judicial branch proceedings?

☐ Notably, are there inferences that may be drawn from the exercise of a privilege, and may those inferences be available to the executive adjudicator but not to the judicial branch judge?

☐ Also, when assuming the inquisitorial role, may the ALJ raise the question of the existence of a privilege, even in the absence of such a claim by one entitled to it?
[8.4] **THREE TYPES OF PRIVILEGES**

There are three types of privileges recognized in varying degrees. The first are those that arise out of, or protect, relationships. This type includes:
- Attorney-client (see 8.10.1)
- Attorney work-product (see 8.10.2)
- Husband-wife (see 8.10.3)
- Doctor-patient (see 8.10.4)
- Clergy-penitent (see 8.10.5)
- Journalist-news source (see 8.11.4)
- Accountant-client (see 8.11.2)

The second type are those that protect government information. Examples include:
- Opinions expressed during agency policymaking (see 8.12.1)
- Investigative material for law enforcement (see 8.12.1)

The third type are those that protect the rights of citizens, such as:
- The right not to be forced to testify against oneself (see 8.14.5)
- The right to be free of unreasonable governmental searches and seizures (see 8.15.2)
- The right to counsel at critical stages of criminal proceedings (see 8.15.1)

[8.5] **FINDING THE LAW OF PRIVILEGES**

Because privileges are construed narrowly, an ALJ considering whether a privilege exists should first demand clear proof that the jurisdiction has clearly recognized the privilege asserted. An SLJ should ask the proponent of the privilege to assist in making a clear record of the source of the privilege. These sources may include:
- The United States Constitution
- State constitutions
- Case law
- Statutes
- Treatises summarizing the common law
- The Uniform Rules of Evidence – proposed by ALI-ABA but not the law in any jurisdiction unless enacted into legislation or adopted by court rule.

States are divided on the issue of which branch of government is the appropriate source of new privileges. In at least 20 states, common law innovation in this area has been foreclosed by statute or rule of court. In at least 10 other states, common law jurisdiction in this area has been expressly sanctioned by statute or rule of court.

Although the FRE, as proposed by the Advisory Committee and approved by the Supreme Court, expressly recognized certain relationship-based privileges, congressional reaction led to the deletion of these provisions. See McCORMICK ON EVIDENCE, Ch. 8 § 75 (John W. Strong ed., 5th ed. 1999). Afterward, the National Conference of Commissioners on Uniform State Laws promulgated the Revised Uniform Rules of Evidence (1974), which are based almost entirely on the FRE, but the Revised Rules included the privileges which had been proposed for the FRE, including nine non-constitutional privileges: Required reports, attorney-client,
psychotherapist-patient, husband-wife, clergyman-communicant, political vote, 
trade secrets, secrets of state and other official information, and identity of informer. 
See id., citing deleted Rules 502-510 and Revised Uniform Rules of Evidence 
(1986), 502-509. According to McCormick, the “failure of Congress to enact 
specific rules of privilege for the federal courts effectively precluded any immediate 
prospect of substantial national uniformity in this area.” MCCORMICK supra, Ch. 8 § 
76.

According to McCormick, privileges between husband and wife, attorney 
and client, some forms of government information, and clergy and penitent are 
recognized in all 50 states. Id. Ch. 8, § 76.2, p. 316. Most, but not all states 
recognize a privilege between physician and patient. Some states recognize a 
communication privilege between accountants and their clients, and journalists and 
their sources. Id., p. 319. Less widely recognized but emergent are privileges 
pertaining to the deliberations of medical review committees, although an attempt to 
extend this to peer review materials of academic institutions was rejected by the 
Supreme Court. Id., p. 320, citing Univ. of Pennsylvania v. E.E.O.C., 493 U.S. 182 
(1990). Other instances where a privilege has been recognized either by statute or 
common law include confidences between a rape victim and counselor, 
communication between clerks, stenographers and other “confidential” employees, 
between a parent and a child, and in communications with school teachers, school 
counselors, participants in group psychotherapy, nurses, marriage counselors, 
private detectives, and social workers. MCCORMICK ON EVIDENCE, supra Ch. 8, § 
76.2, p. 319.

When determining the law applicable in federal court proceedings, FRE 
501 provides that “in civil actions and proceedings, with respect to an element of a 
claim or a defense as to which state law supplies the rule of the decision, the 
privilege of a witness, person, government, state, or political subdivision thereof 
shall be determined in accordance with state law.”

[8.6] ASSERTING THE PRIVILEGE

When evaluating a proponent’s claim of privilege, the ALJ needs to note 
the role of the proponent: Is it the witness, a lawyer (or the ALJ acting to protect 
the interests giving rise to the privilege), or a third party whose protected interests 
are at risk in the proceedings?

[8.6.1] Persons Who May Claim a Privilege

[8.6.1.1] Privilege Asserted by the Witness

• A witness may refuse to disclose oral, written or physical evidence which is 
privileged or, under some circumstances, even if it has already been disclosed, 
the witness may insist that the evidence be excluded from the record and not 
considered in the decision-making process.

• Parties generally assert evidentiary rules in order to exclude irrelevant, 
incompetent or otherwise untrustworthy evidence. Witnesses are not generally 
allowed to object to such evidence. However, a witness may assert a privilege to 
exclude highly relevant, competent and trustworthy evidence for public policy 
reasons unrelated to the proceeding.
[8.6.1.2] Privilege Asserted by the Lawyer or Judge
The assertion that evidence may be privileged can also be raised on behalf of the witness by the witness’s lawyer or the judge acting to protect the witness’s interest.

[8.6.1.3] Privilege Asserted by the Holder of the Privilege
The law of privileges allows the person designated by society as the holder of the privilege, even if that person is not a party or a witness, to prevent a witness from disclosing oral, written or physical evidence.

[8.7] CLAIMS OF PRIVILEGE FOR DOCUMENTS CHECKLIST
A procedure should be followed when considering a privilege for written documents – the privilege documents log. In order to allow opposing counsel the opportunity to challenge the asserted privilege without being able to see the document, the ALJ should require the party asserting the privilege to prepare a complete list of the documents which should include, for each claimed privilege:

- A separate number on each document.
- The date the document was created and the purpose for which it was created.
- The identity of the maker(s) of the documents listing all who participated in its creation.
- The recipient(s) of the document by copy, and those who may have received a summary, reading, or saw it exhibited.
- A summary of the contents of each document, and if it is a summary of an interview, the identity of the person interviewed.
- The precise privilege asserted.
- In addition to allowing opposing counsel to challenge the asserted privilege, this process will assist your review and evaluation of each document in light of the asserted privilege.

[8.8] IN CAMERA INSPECTIONS
The in camera inspection is the typical means of determining whether to grant a privilege or whether an exception to the privilege exists which requires disclosure of the information.

- Definition – in camera literally means in the judge’s chambers. It is used to distinguish the normal, public, on-the-record proceedings from private, off-the-record, fact-finding. When a claim of privilege is asserted, or when a claim that privileged evidence must be disclosed because it is within an exception to the rule of privilege, the judge must consider the evidence in camera.
- Of necessity, the judge must also consider the evidence ex parte (without the parties – or at least without those parties or witnesses who do not hold the privilege).
- Generally, the rules of evidence are suspended while the court conducts its in camera consideration of claims of privilege or exceptions thereto. The suspension of the rules when determining the existence of a privilege is consistent with the doctrine of “preliminary questions.” FRE 104 (a) provides that: “Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court. ...
In making its determination [the court] is not bound by the rules of evidence except those with respect to privileges.”

- **FRE 1101 (c) Rule of Privilege:** The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.
- **California Rule of Evidence 915:** Disclosure of privileged information in ruling on a claim of privilege: “[T]he presiding officer may not require disclosure of information claimed to be privileged . . . in order to rule on the claim of privilege [except for official information, the identity of an informer and trade secrets].”

**[8.9] Points to Remember for In Camera Inspections**

- **Federal Rules:** *United States v. Zolin*, 491 U.S. 554 (1989), construed the FRE to permit disclosure of privileged information *in camera* under the following conditions: An *in camera* review may be used to determine whether allegedly privileged attorney-client communication falls within the crime fraud exception. 491 U.S. at 574. “[B]efore a district court may engage *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception’s applicability [and] the threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.” *Id.* at 574-575. The Supreme Court in *Zolin* also said that the California Rules of Evidence 915A are apparently more restrictive than the FRE.

- **State Cases Construing In Camera Procedures:** Alaska: *Central Construction Co. v. Home Indem. Co.*, 794 P.2d 595 (Ak. 1990) (follows Zolin); Illinois: *In re Marriage of Decker*, 562 N.E. 2d 1000 (Ill. App. 1990) (follows Zolin); New York: *In the Matter of Grand Jury Subpoena of Lynne Stewart*, 545 N.Y.S. 2d 974 (N.Y. Sup. 1989) (rejected Zolin, holding that the minimal showing of good faith required under Zolin would place the defense in an unacceptable position. Instead, the court required that the proponent of the evidence must “present a *prima facie* case that the attorney was retained for this improper purpose.” 545 N.Y.S. 2d at 980). Colorado: *A. v. District Court*, 550 P.2d 315 (Colo. 1976) (regarding the use of otherwise sealed grand jury evidence: “A *prima facie* showing is not required before the judge can order a document produced for his *in camera* inspection to determine whether the privilege applies. The judge may order a document or documents produced when the privilege is first contested by the other party. However, there must be a *prima facie* showing that the exception applies to each document before the document is actually stripped of its privilege and admitted into evidence.” 550 P.2d at 326). Washington: *Whetsone v. Olson*, 732 P.2d 159 (Wash. 1986). The court discussed and rejected the Colorado rule (above) because the rule “affords too little protection to the attorney-client relationship . . . and *in camera* review is not warranted whenever a bare allegation of fraud is asserted.” The court adopted a Zolin type rule: “[I]n camera inspection of the communication itself is warranted upon a showing of a factual basis adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the crime or fraud exception to the privilege has occurred.” 732 P.2d at 161. Oregon: *State ex. rel. North Pacific Lumber Co. v. Unis*, 579 P.2d. 1291 (Ore. 1978). The court ruled that an *in camera* hearing
should be held after extrinsic evidence and information gleaned from a question concerning the general purpose and nature of the parties’ consultation provide some support for an allegation of unlawful purpose. 579 P.2d at 1295 (quoting Comment, The Future Crime or Tort Exception to Communications Privileges, 77 Harv. L. Rev. 730, 738 (1964)).

[8.10] RELATIONSHIP PRIVILEGES

[8.10.1] Attorney-Client

Among the oldest of privileges, there are two core areas of protection: communication between the attorney and client, and protection of the attorney’s work product.

For federal proceedings, the privilege is set forth in section 502, Revised Uniform Rules of Evidence, as amended in 1999, generally providing that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client . . . .”

The societal interest protected by the privilege is the protection of communication between legal advisers and their clients by removing the apprehension of compelled disclosures by the legal adviser, and is based on the assumption that the adversary system works best if the attorney has all of the facts and that society is benefited if citizens understand their legal rights. The purpose of the privilege:

is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.


*Upjohn* is not based on constitutional principles, and as a result it is not binding upon the states. See, MCCORMICK ON EVIDENCE, supra, Ch. 10, § 87.1. Nevertheless, “it has had considerable influence outside the federal system.” *Id.* at n. 17. The opinion addresses whether the privilege is available to corporations, answering in the affirmative if the information given to the attorney (1) is communicated for the express purpose of securing legal advice for the corporation; (2) relates to the specific corporate duties of the communicating employee; and (3) is treated as confidential within the corporation itself. *Id.*, citing *Upjohn*, 449 U.S. at 394.

[8.10.1.1] Checklist for the Attorney-Client Privilege

☐ Is there a lawyer? Check the license – the privilege applies to a licensed attorney – whether within the jurisdiction or not. A person authorized or reasonably believed by the client to be authorized to practice law qualifies, but the privilege is not applicable to unsupervised paralegals, law students and other knowledgeable lay people. See, e.g., *Dabney v. Investment Corp. of America*, 82
F.R.D. 464, 465 (E.D. Pa. 1979) (privilege held not applicable to communication
with unsupervised law student).

☐ Is there a client? Clients include natural persons, corporations, and governmental
entities. See Upjohn Co. v. United States, 449 U.S. 383 (1981) for a full
discussion of the scope of the attorney-client privilege in the corporate context.
McCormick writes that while traditionally the privilege extended only between a
lawyer and a private client, “more recently the privilege has been held to extend
to communications to an attorney representing the state.” MCCORMICK ON
EVIDENCE, supra, Ch. 10 § 88, citing Uniform Rule 502 (a) (1) (amended 1999).
However, a government attorney acting as a regulation decision-maker or in a
purely administrative capacity does not cloak the information he or she handles in
the attorney-client privilege. Mobil Oil Corp. v. Dep’t of Energy, 102 F.R.D. 1
(N.D. N.Y. 1983).

☐ Has there been a communication between them? The privilege applies to the
communication, not the information per se. Under some circumstances, even
the identity of the client may be a privileged communication. In Corry v. Meggs, 498
So.2d 508 (Fla. Ct. App. 1986), the Florida District Court of Appeals held that
the “identity of the unnamed fee-paying client . . . is privileged under the ‘last-
link’ exception to the general rule. This exception . . . applies where the identity
of the client, if disclosed, would supply the last link of incriminating evidence in
an existing chain and would likely lead to the filing of criminal charges.” 498
So.2d at 510. The communication can be through authorized agents of the client
or the attorney. A lawyer’s agent is “one employed to assist the lawyer in the
rendition of professional legal services.” Burlington Industries v. Exxon Corp., 65

☐ Was the communication confidential? Confidential means not intended for
disclosure to others: “We hold that the trial court erred in deciding that the
attorney-client privilege . . . applies only if the presence of a third person, who
overhears a confidential communication, is necessary for . . . urgent or life-saving
procedures. The proper standard is whether the third person’s presence is
reasonably necessary under the circumstances . . . . The record establishes that
the presence of petitioner’s hospital nurse was reasonably necessary under the

[8.10.1.2] Disclosure and Waiver Checklist

Under common law, once the communication was disclosed to third parties,
even by illegal eavesdropping, it was no longer confidential. Today, most
jurisdictions permit the assertion of the privilege to bar disclosure of the information
if the confidence was not intentionally waived.

☐ Was the communication related to professional as opposed to personal dealings?
The privilege only applies to communications that the client could reasonably
presume were related to the purpose for which the attorney was retained. Pure
business communications are not protected even if the lawyer is a corporate
counsel. Administrative communications made to an attorney representing a
governmental agency are not protected. If the communication has both legal and
nonlegal components it must be predominantly legal to be privileged.
Has the privilege been claimed by one authorized to do so? In order to carry out the purpose and policy assumptions behind the privilege, the attorney-client privilege belongs to the client, not the attorney. The privilege can be asserted or waived by the holder of the privilege [i.e., the client] or someone authorized by the holder to assert or waive it [often the attorney].

The client may assert the privilege when: The holder is called as a witness; the lawyer is called as a witness; or, if the client is not present at the hearing, the privilege may be called to the attention of the court by anyone present, or the court may protect the privilege sua sponte. See MCCORMICK ON EVIDENCE, supra, Ch. 10 § 92, p. 370.

Does one of the exceptions to the privilege exist?

[8.10.1.3] Exceptions to Attorney-Client Privilege

Each privilege has certain exceptions enumerated in either the statute or case law defining the privilege. There are four exceptions to the attorney-client privilege:

- Fraud or crime. No privilege exists where the communication is made in furtherance of a fraudulent act or a crime.
- Joint clients. No privilege exists for communications made by former clients represented jointly by the attorney, where one of the joint clients later brings an action against the other client.
- Breach of duty. No privilege when the attorney is sued by the client. The privilege is also deemed waived by the client who brings administrative proceedings against the attorney before the Board of Professional Responsibility.
- Suit for Fees. The privilege is deemed waived if the communication is relevant to a suit brought by the attorney against the client to collect fees for services rendered.

The ALJ should note the similar but legally distinct set of rules for lawyers and the duty of confidentiality as expressed through the Model Code of Professional Responsibility. D.R. 104-1 prohibits a lawyer from revealing information relating to representation of a client and was amended by an action of the American Bar Association in 2002, but these amendments do not affect the different roles that are fulfilled by the evidentiary rules of privilege and the professional disciplinary rules. See MCCORMICK ON EVIDENCE, supra, Ch. 10, § 87, note 13 (2003 Pocket Part).

Has the privilege been waived by one authorized to do so? Because the client holds this privilege, the client likewise may waive its protection. Under modern law there is no implied waiver. McCormick writes that in cases where there may be a voluntary yet inadvertent disclosure of privileged material, some courts adhere to a strict approach and consider the waiver to be effective, while other courts “have considered factors such as the excusability of the error, whether prompt attempt to remedy the error was made, and whether preservation of the privilege will occasion unfairness to the opponent.” MCCORMICK ON EVIDENCE, supra, Ch. 10 § 93, p. 372.

[8.10.2] The Attorney Work-Product Doctrine

In Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court defined the Work-Product Doctrine where one party had requested the other to provide the oral and written statements of witnesses whose identities were known and who were
accessible to either party. The Court held that the memoranda, statements and
mental impressions of counsel represented by this request were outside the scope of
the attorney-client privilege:

In performing his various duties . . . it is essential that a lawyer
work with a certain degree of privacy, free from unnecessary
intrusion by opposing parties and their counsel. Proper preparation
of a client’s case demands that he assemble information, sift what
he considers to be the relevant from the irrelevant facts, prepare
his legal theories and plan his strategy without undue and needless
interference . . . . This work is reflected . . . in interviews,
statements, memoranda, correspondence, briefs, mental
impressions, personal beliefs, and countless other tangible and
intangible ways — aptly though roughly termed . . . ‘the work
product of the lawyer.’


[8.10.2.1] Rationale for the Work-Product Doctrine
Were such materials open to opposing counsel on mere demand,
much of what is now put down in writing would remain unwritten.
An attorney’s thoughts, heretofore inviolate, would not be his
own. Inefficiency, unfairness and sharp practices would inevitably
develop in the giving of legal advice and in the preparation of
cases for trial. The effect on the legal profession would be
demoralizing and the interests of the clients and the cause of
justice would be poorly served.

Hickman v. Taylor, 329 U.S. at 511.

[8.10.2.2] Limitations on the Doctrine
Work-product prepared by counsel for litigation is not always protected by
the doctrine:

Where relevant and non-privileged [referring to the attorney-client
privilege] facts remain hidden in an attorney’s file and where
production of those facts is essential to the preparation of one’s
case, discovery may properly be had. Such written statements and
documents might, under certain circumstances, be admissible in
evidence or give clues as to the existence or location of relevant
facts. Or they might be useful for purposes of impeachment or
corroboration. And production might be justified where the
witnesses are no longer available or can be reached only with
difficulty....But the general policy against invading the privacy of
an attorney’s course of preparation is so well recognized and so
essential to an orderly working of our system of legal procedure
that a burden rests on the one who would invade that privacy to
establish adequate reasons to justify production through a
subpoena or court order.


The Hickman rule has been codified in the Federal Rules of Civil
Procedure, which provide in pertinent part:
[A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation . . . .

Fed. R. Civ. P. 26(b) (3).

The Work-Product Doctrine applies to the work of governmental agency attorneys: In FTC v. Grolier, Inc., 462 U.S. 19 (1983) the Supreme Court held that an FTC attorney’s work-product fit within exception 5 to the Freedom of Information Act, 5 U.S.C. 552(b)(5) which exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency . . . . It is well established that this exemption was intended to encompass the attorney work-product rule.” 462 U.S. at 20.

The Work-Product Doctrine applies to work prepared for any trial or litigation even if used by the parties in a different proceeding:

Rule 26(b) (3) itself does not incorporate any requirement that there be actual or potential related litigation before the protection of the work-product doctrine applies. As the Court notes, “the literal language of the Rule protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation. A contrary interpretation . . . would work substantial harm to the policies that the doctrine is designed to serve and protect.

FTC v. Grolier, 462 U.S. at 29 (Brennan, J., concurring).

[8,10.3] Marital Privilege

The “basis of the immunity given to communication between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marital relationship as to outweigh the disadvantage to the administration of justice which the privilege entails.” Wolfe v. United States, 291 U.S. 7, 14 (1933).

If marital privilege is raised in an administrative proceeding, the ALJ must determine whether the controlling authority recognizes such a privilege in civil proceedings. Uniform Rule of Evidence 504 recognizes the privilege in both civil and criminal proceedings. The Uniform Rule may, however, represent a more expansive view than that taken in many states, which very often limit the privilege to criminal proceedings. For a listing by state, see Note, The Marital Privilege in the Twenty-First Century, 32 U. Mem. L. Rev. 137, 169-77 (2001), cited in MCCORMICK ON EVIDENCE, supra, Ch. 9 § 78, note 10 (2003 Pocket Part).
At common law, one spouse was prohibited from testifying against the other for any reason:

The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of the husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now.


[8.10.3.1] Checklist for Marital Communications

☐ Determine whether the privilege is applicable in administrative proceedings in your jurisdiction.

☐ Was there a valid marriage at the time of the communication? See In re Marriage of Bozarth, 779 P.2d 1346, 1351 (Colo. 1989) (distinguishing termination of marriage from a temporary separation).

☐ The non-testifying spouse may invoke the privilege. In re Grand Jury Investigation of Hugle, 754 F.2d 863, 864 (9th Cir. 1985).

☐ The privilege may be invoked even after the dissolution of the marriage. United States v. Lustig, 555 F.2d 737, 747 (9th Cir. 1977), cert. denied, 434 U.S. 926 (1978).

☐ There must be an actual communication, not just an observation by a spouse of the activities or appearance of the other spouse. 2 WEINSTEIN’S EVIDENCE MANUAL 505-32 (1991).

☐ The communication must be made in confidence.

☐ Determine who holds the privilege.

☐ If in your jurisdiction the rationale for the privilege is that society is well-served by policies that encourage free and open communication between spouses, then the speaker should be entitled to claim the privilege, even if the receiving spouse is the person testifying. See MCCORMICK ON EVIDENCE, supra, Ch. 9 § 83.

☐ When one spouse is willing to testify against the other in a criminal proceeding – whatever the motivation – their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace. See Trammel v. United States, 445 U.S. 40, 52 (1980).

☐ Is there an exception to the privilege, or are these proceedings of a nature in which the privilege does not exist? The latter includes cases involving crimes of one spouse committed against the other spouse, actions involving family desertion, pandering, and domestic actions. See MCCORMICK ON EVIDENCE, supra, Ch. 9 § 84.

☐ Has the privilege been waived? In one case, albeit in criminal proceedings and not an administrative action, where the husband was on trial for murder and his attorney in opening statement accused the wife of committing the murder, the privilege was deemed waived. See Cummings v. People, 785 P.2d 920 (Colo. 1990), cited in MCCORMICK ON EVIDENCE, supra, Ch. 9 § 83, note 3, but see Brown v. State, 753 A.2d 84, 98 (Md. 2000) (defendant did not waive privilege
by claiming that his wife committed the crime), cited in MCCORMICK ON EVIDENCE, supra, Ch. 9 § 83, note 5 (2003 Pocket Part).

[8.10.4] Doctor-Patient Privilege

The Doctor-Patient privilege is not as widely accepted as some of the other communication privileges.

The physician-patient privilege, unlike the attorney-client privilege, did not exist at common law. It is a purely statutory innovation which, since it was first enacted in New York in 1828, has spread in some form to about three-fourths of the states. Legal scholars have been virtually unanimous in their condemnation of it. They argue that a general medical privilege fosters fraud, and that the absence of a privilege would not deter a person from seeking medical help, since in only rare instances are the facts communicated genuinely confidential.

2 WEINSTEIN'S EVIDENCE MANUAL 504-09 (1991) (internal citations omitted).

No testimonial privilege exists at common law concerning information obtained from a patient by his physician. The privilege, insofar as it exists, arises solely by virtue of Iowa Code . . . . The essential elements of communication privileged under the doctor-patient relationship are: (1) the relation of doctor-patient; (2) information acquired during this relation; and (3) the necessity and propriety of the information to enable the doctor to treat the patient skilfully in his professional capacity.

State v. More, 382 N.W.2d 718, 720 (Iowa 1985).

The privilege has been limited in the face of more compelling societal needs. See, e.g., Whalen v. Roe, 429 U.S. 589 (1977) (upholding a New York statute requiring that the names and addresses of all persons who obtained certain drugs, pursuant to a doctor’s prescription, be submitted by the doctors to the state for entry into a centralized computer database).

States that do not recognize a general doctor-patient privilege may nevertheless have limited statutory privileges for some doctor-patient matters. See, e.g., Oswald v. Diamond, 576 So.2d 909, 910 (Fla. 1991) (protecting against discovery of petitioner’s medical records upon her claim of the psychotherapist-patient privilege).

[8.10.4.1] Checklist for Physician-Patient Privilege

☐ Parties: Is the person claiming the privilege truly a patient? The benchmark supporting the privilege is whether the patient is consulting with the physician seeking treatment or diagnosis. If not, there is no physician-patient relationship and thus no privilege. E.g., when the driver is directed to a physician for a blood test in a DUI investigation or pursuant to provisions of an implied consent statute, or when the physician is appointed by the court to make a physical or mental evaluation of a patient, no privilege exists. State v. Fears, 715 N.E.2d 136, 150 (Ohio 1999) (privilege did not attach where licensed psychologist consulted in preparation for testimony at criminal trial), cited in MCCORMICK ON EVIDENCE, supra, Ch. 11 § 99, note 5 (2003 Pocket Part).
Is the health care professional one included in the privilege? Uniform Rule of Evidence 503 was amended in 1999 so that in addition to physicians and psychotherapists, mental health providers are included in the scope of the privilege. Mental health providers include “a person authorized, in any state or country, or reasonably believed by the patient to be authorized, to engage in the diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs.”

Has there been a communication between the patient and physician? Given that the physician relies on non-verbal cues and observations, all of which may deserve protection against disclosure, the scope of the privilege extends beyond the spoken or written word.

Is the communication one covered by the privilege? The information communicated must be for the purpose of treatment. In State v. Irish the driver’s statements to his physician, that he had four beers and lost control of his vehicle, were not privileged because they were not necessary to enable the physician to properly discharge his duties. State v. Irish, 391 N.W. 2d 137, 140-142 (Neb. 1986).

Was the communication confidential? If a third person is present, consider the reasons: if the person is present as a needed and customary participant in the consultation, the circle of confidence may reasonably be extended preserving the confidential nature of the communication. The privilege is lost, however, with the presence of a “casual third person [who is] present with the acquiescence of the patient at the consultation . . . .” MCCORMICK ON EVIDENCE, supra, Ch. 11, § 101, p. 407.

Was the communication related to professional services as opposed to personal dealings?

Has the privilege been claimed by one authorized to do so? The privilege is designed to encourage the patient to freely disclose secrets in consultation with the physician, so it is the patient’s privilege, not the doctor’s. However, case law has developed permitting the health care provider to invoke this claim of privilege on behalf of the patient in the patient’s absence, thereby shielding provider records from disclosure. See, e.g., State v. Jaggers, 506 N.E.2d 832 (Ind. Ct. App. 1987) (chiropractor could assert privilege of patients in suit to enjoin him from practicing acupuncture), cited in MCCORMICK ON EVIDENCE, supra, Ch. 11 § 102, note 7.

Is there an exception to the privilege applicable in this situation? Some administrative proceedings are by nature unable to recognize the privilege, such as worker’s compensation hearings. Id. §104, p. 418.

If the patient’s purpose is an unlawful one, there is no privilege – e.g., seeking to obtain narcotics in violation of law. see State v. Garrett, 456 N.E.2d 1319 (Ohio Ct. App. 1983); and the discussion in MCCORMICK ON EVIDENCE, supra, Ch. 11, § 99.

Has the privilege been waived by one authorized to do so? Generally, “a patient voluntarily placing his or her physical or mental condition in issue in a judicial proceeding waives the privilege with respect to information relative to that condition.” Id. Ch. 11, § 103, p. 413.
Note that the list of statutory exceptions continues to grow, evincing a societal expectation that the physician will report information obtained in the course of professional duties, including the treatment of gunshot wounds, sexually transmitted disease, mental illnesses, and fetal deaths. See, e.g., Crawford ex rel. Goodyear v. Care Concepts, Inc., 625 N.W.2d 876, 882-83 (Wis. 2001) (information concerning assaults by nursing home resident against other residents was not confidential under physician-patient privilege statute), cited in McCORMICK ON EVIDENCE, supra, Ch. 11 § 191 (2003 Pocket Part)

[8.10.5] Clergy-Penitent Privilege

[8.10.5.1] The Privilege Defined

This privilege protects communications to a member of the clergy, in his or her spiritual or professional capacity, by persons who seek spiritual counseling and who reasonably expect that their words will be kept in confidence. As is the case with the attorney-client privilege, the presence of third parties, if essential to and in furtherance of the communication, does not vitiate the clergy-communicant privilege.

In Re Grand Jury Investigation, 918 F.2d. 374, 377 (3rd Cir. 1990).

The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. The privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.

Id., at 382 (internal citations omitted).

A clergy-penitent privilege is recognized in statutes in all 50 states. McCORMICK ON EVIDENCE, supra, Ch. 8, § 76.2, citing Comment, Striking Down the Clergyman-Communicant Statutes: Let Free Exercise of Religion Govern, 62 Ind. L.J. 397 (1987). The federal courts use the definitions of proposed FRE 506 (not adopted by Congress but not rejected either) that reads as follows:

Communications to Clergymen

a. Definitions, As used in this rule:

(1) A “clergyman” is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him or her.

(2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

b. General rule of privilege: A person has a privilege to refuse to disclose and to prevent another from discerning a confidential communication by the person to a clergyman in his or her professional character as spiritual adviser.
c. Who may claim the privilege? The privilege may be claimed by the person, by his or her guardian or conservator, or by his or her personal representative if the person is deceased. The clergyman may claim the privilege on behalf of the person. This authority is presumed in the absence of evidence to the contrary. Proposed FRE 506, 56 F.R.D. at 247. See In Re Grand Jury Investigation, 918 F.2d. 374, 379-380 (3rd Cir. 1990).

[8.10.5.2] Checklist for Clergy-Penitent Privilege

After consulting the controlling applicable statute, consider the following when determining whether to recognize a claim of clergy-penitent privilege:

☐ Is the penitent qualified under the applicable statute? Some jurisdictions recognize the privilege only for communications made to a clergy member in the course of discipline enjoined by the rules or practice of the denomination. See generally, Claudia G. Catalano, Annotation, Subject Matter and Waiver of Privilege Covering Communications to Clergy Members or Spiritual Advisors, 93 A.L.R. 5th 327 (2001) (Supp. 2005).

☐ Is the cleric qualified? Not everyone involved with spiritual matters qualifies as clergy for purposes of the privilege.

Appellant contends the trial court erred in letting evidence of a letter Manous wrote to a spiritual advisor/psychic, inasmuch as his communication to this spiritual advisor was a privileged communication under OCGA s 24-9-22 [Georgia Statute]. This Code section makes privileged any communication “made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called.” We do not find the “spiritual advisor” or “psychic” to be included in these terms, under the evidence in this case. Manous v. State, 407 S.E.2d 779 (Ga. Ct. App. 1991).

☐ Where the penitent confesses to committing a crime in discussion with a member of the clergy, the privilege did not attach because the cleric was not the defendant’s minister but was consulted as a family friend and father figure, and the penitent did not seek spiritual counseling from the cleric. Morris v. State, 571 S.E.2d 358 (Ga. 2002). See also, Eckmann v. Board of Education, 106 F.R.D. 70 (E.D. Mo. 1985) (observing that the priest-penitent privilege has clearly been recognized by federal courts, and holding that a Catholic nun could invoke the privilege with respect to communications made to her in her capacity as a spiritual advisor); See Claudia G. Catalano, Annotation, Who Are “Clergy” or Like Within Privilege Attaching to Communications to Clergy Members or Spiritual Advisors, 101 A.L.R.5th 519 (2002) (Supp. 2005).

☐ Has there been a protected communication between the penitent and the cleric? Courts construe the communication aspect of the privilege narrowly. See United States v. Dubé, 820 F.2d 886 (7th Cir. 1987) (acknowledging existence of clergy-penitent privilege, but holding that privilege did not apply to communications...
made to clergyman to obtain assistance in avoiding tax obligations, not spiritual relief); United States v. Gordon, 655 F.2d 478 (2d Cir. 1981) (holding that defendant’s business communications to priest he employed in a nonreligious capacity were not protected by priest-penitent privilege); cf. Seidman v. Fishburn-Hudgins Educational Foundation, 724 F.2d 413 (4th Cir. 1984) (holding that relative could not invoke clergyman-communicant privilege on decedent’s behalf and observing that privilege has no firm foundation in common law); United States v. Webb, 615 F.2d 828 (9th Cir. 1980) (court found that prisoner’s confession to crime in presence of a minister and security officer was not confidential, but did not reach question whether clergy-communicant privilege applies in federal proceedings).

☐ Was the communication confidential? The privilege may apply even if more than one party is present during the communication and they are not related by blood or marriage. See, e.g., In Re Grand Jury Investigation, 918 F.2d 374, 386 (3rd Cir. 1990) (group or family counseling clergy privilege is not lost if the third party’s presence is essential to and in furtherance of the clergy communication).

☐ Was the communication related to the role of the communicants as clergy and penitent? Some jurisdictions require the communication to be penitential in nature; others include all conferences where the clergy is consulted in the professional capacity of a spiritual advisor. See Claudia G. Catalano, Annotation, Subject Matter and Waiver of Privilege Covering Communications to Clergy Members or Spiritual Advisors, supra 327.

☐ Has the privilege been claimed by one authorized to do so? According to McCormick, the privilege belongs only to the penitent in some jurisdictions, while other jurisdictions recognize that both the clergy and the penitent may invoke the privilege. See MCCORMICK ON EVIDENCE, supra, Ch. 8, § 76.2, p. 317.

☐ Is there an exception to the privilege applicable in this situation? Courts may differentiate between what is said and what the clergy member observes. Thus, the privilege is not available to prevent a clergy member from describing the demeanor of the penitent, without describing the actual words exchanged during a confessional period. See State v. Kurtz, 564 S.W.2d 856 (Mo. 1978).

☐ Has the privilege been waived by one authorized to do so? It is possible for either the penitent or the clergy member to waive the privilege, by revealing the confidential information to others. See State v. Szemle, 640 A.2d 817 (N.J. 1994) (minister waived the privilege by telling the defendant’s relatives of the defendant’s confession).

[8.11] EMERGING AND LIMITED PRIVILEGES

[8.11.1] Peer Review Privilege

Peer review materials are not privileged in either private or public universities if they are relevant to charges of racial or sexual discrimination in tenure decisions. Univ. of Pennsylvania v. EEOC, 493 U.S. 182, 201 (1990) (Court rejects University’s claim of privilege even where peer evaluations traditionally have been provided with either express or implied assurances of confidentiality).
[8.11.2] Accountant-Client Privilege

The Supreme Court has consistently refused to recognize an accountant-client privilege. In *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), the Supreme Court considered whether the tax accrual work papers prepared by an independent auditor in the course of a routine review of corporate financial statements should be protected by some form of work-product immunity from disclosure. However, the work of an accountant retained by an attorney may be protected under the attorney-client privilege. *See* Gene A. Peterson, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 Minn. L. Rev 67 (1969). 67 (1969).

26 U.S.C. § 7525(a)(1) protects communications between taxpayer and federally authorized tax practitioner to the extent communication would be considered privileged communication if it were between taxpayer and attorney; however, there is no common law accountant's or tax preparer's privilege and, rather, information that a person furnishes the preparer of his tax return is furnished for the purpose of enabling preparation of return, not preparation of brief or opinion letter, and is not privileged. *Long-Term Capital Holdings v. United States* (2002, DC Conn.) 2003-1 USTC P 50105, 90 AFTR 2d 7446, on reconsideration, mod (2003, DC Conn.) 2003-1 USTC P 50304, 91 AFTR 2d 1139.

[8.11.3] Parent-Child Privilege


[8.11.4] Journalist-Source Privilege

The concept of a limited reporter source privilege, based in part upon First Amendment considerations, has been recognized by some courts and enacted into legislation in some states. See, e.g., Am. Sav. Bank, FSB v. UBS PaineWebber, Inc., 330 F.3d 104 (2d Cir. 2003) (recognizing but limiting statutory and common-law journalistic privilege). See also, Branzburg v. Hayes, 408 U.S. 665 (1972), (privilege did not apply to newsmen subpoenaed to testify before a grand jury investigating criminal matters).

[8.12] Government Information

The government’s privileges with respect to disclosure of information are based upon both statutory and constitutional doctrine. Most states have statutory provisions similar to the Freedom of Information Act (FOIA) discussed below (with the exception of foreign affairs and national security privileges). In its several forms ("executive" or "deliberative" or "planning" privileges) the governmental information privilege has its roots in the common law, now codified through the Freedom of Information Act (FOIA), which is part of the Administrative Procedure Act, 5 U.S.C. § 552 (2005). The general presumption is that all data is available to the public upon request unless it falls within one of the nine enumerated exceptions to disclosure.

[8.12.1] Exemptions From Disclosure Under the FOIA

Exemption 1: National Security or Foreign Policy

In 1974, following the Supreme Court’s decision in EPA v. Mink, 410 U.S. 73 (1973), FOIA was amended to require that before documents could be labeled a state secret, the data must be specifically authorized under criteria established by an Executive Order to be kept secret in the national interest and in fact properly classified. 5 U.S.C. § 552(b)(1) (2005). See also the discussion, below, about major and minor government secrets.

Exemption 2: Internal Personnel Rules and Practices of the Agency

In Air Force v. Rose, 425 U.S. 352 (1976), the Supreme Court narrowed this exemption to exclude summaries of honor code violations from the Air Force Academy sought by law review editors. “Exemption 2 is not applicable to matters subject to such a general and significant public interest . . . the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matters in which the public could not reasonably be expected to have an interest.” 425 U.S. at 369-370.

Exemption 3: Information Protected by Separate Statute

When the Supreme Court upheld a broad provision of the Federal Aviations Act which authorized the non-disclosure when the agency determined at its discretion that disclosure “would adversely affect the interests of [a] person and is not required in the interest of the public,” FAA v. Robertson, 422 U.S. 255 (1975), FOIA was amended in 1976 to provide for the withholding of information where a
specific statute requires it without any discretion or, where discretion is given to the agency, the criteria upon which the discretion is exercised is spelled out.

Exemption 4: Trade Secrets and Commercial or Financial Data

The data protected by this provision are received from businesses and individuals regulated by the government. Business competitors often seek this sort of data in so-called reverse FOIA suits. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Supreme Court held that FOIA was a disclosure statute and thus did not give Chrysler a private right of action to enjoin the government from releasing contractors’ reports on compliance with affirmative action requirements. “Enlarged access to governmental information undoubtedly cuts against the privacy concerns of non-governmental entities, and, as a matter of policy, some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure,” 441 U.S. at 293.

Exemption 5: Inter-Agency or Intra-Agency Memoranda or Letters

- This exemption includes:
- Executive privilege [see ¶ 8.13, below]
- Attorney-Client Privilege
- Attorney-Work Product Privilege

Exemption 6: Personnel and Medical Files, the Disclosure of Which Would Create an Unwarranted Invasion of Privacy

Congress’ primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information: … [I]nformation about an individual should not lose the protection of Exemption 6 merely because it is stored by an agency in records other than ‘personnel’ or ‘medical’ files.


Exemption 7: Investigatory Records Compiled for Law Enforcement Purposes

The Supreme Court in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), held that pursuant to Exemption 7, the NLRB could withhold the statements of witnesses it intended to call at an unfair labor practices hearing because they were investigatory records compiled for law enforcement proceedings.

Exemption 8: Reports of Agencies Regulating Financial Institutions

FOIA Exemption 8 provides for the withholding of matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. See, e.g., *Nat’l Cmty. Reinvestment Coalition v. NCUA*, 290 F. Supp. 2d 124 (D.D.C. 2003).

Exemption 9: Geological and Geophysical Information Concerning Wells

FOIA disclosure does not extend to "geological and geophysical information and data, including maps, concerning wells." 5 U.S.C. § 552(b)(9). Thus, where the government withheld portions of a preliminary draft of supplemental environmental assessments and redacted documents to exclude information in table and narrative form about ground water inventories, well yield in gallons per minute, and the
thickness of the decomposed granite aquifer, the court concluded that this is the type of information sought to be exempted under exemption (b)(9), *Starkey v. United States DOJ*, 238 F. Supp. 2d 1188 (S.D. Cal. 2002).

[8.13] **EXECUTIVE, DELIBERATIVE OR PLANNING PRIVILEGE**

[8.13.1] **Nature and Rationale of the Privilege**

[There is a] valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.


The privilege is not absolute:

[The] the deliberative-process privilege is a qualified privilege. Its application depends on the balancing of the agency’s interest in non-disclosure against the “interest of the litigants, and ultimately of society, in accurate judicial fact finding” and the “public interest in opening for scrutiny the government’s decision making process” [citation omitted]. The factors to be balanced include: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the “seriousness” of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.


The information covered by the privilege:

For the qualified deliberative-process privilege to be invoked, a document must be both “pre-decisional” and “deliberative.” It is “pre-decisional” if it was prepared in order to assist an agency decision maker in arriving at his or her decision . . . . It is “deliberative” if it is actually related to the process by which policies are formulated. Thus, the focus of the privilege is on advisory opinions, recommendations and deliberations constituting part of a process by which governmental decisions and policies are formulated. The privilege does not extend to purely factual materials, even if they are used in the determination of policy. It also does not protect factual findings and conclusions, as opposed to opinions and recommendations, nor does it protect factual materials which may be severed from a deliberative report. The exercise of judgment in the formulation of a factual statement is not sufficient to lift it to the level of deliberation. The privilege also does not extend to materials related to the explanation,
interpretation or application of an existing policy, as opposed to the formulation of a new policy.


The privilege belongs to the government and may only be claimed by the head of the agency. The head of an agency’s regional division may, however, be of sufficient rank to achieve the necessary deliberateness in order to qualify for the deliberative process or law enforcement privilege. *Landry v. F.D.I.C.*, 204 F.3d 1125, 1136 (D.C. Cir. 2000).

Not all jurisdictions have recognized the privilege once policy has been made. In *Babets v. See Y Executive Office of Human Services*, 526 N.E.2d 1261 (Mass. 1988), the Supreme Judicial Court, found that there was no state constitutional requirement for a post-decisional privilege under a separation of powers argument and it declined to use its common law authority to create one.


- Whether the government is asserting the right type of privilege;
- Whether the assertion is made by the head of the governmental department; and
- Whether the information is a military or state secret.


Minor government secrets possess a qualified, not an absolute, privilege. The privilege attaches to the deliberative functions of the executive branch, restricting the use of “intragovernmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions are formulated.” *Ackerly v. Ley*, 420 F.2d 1336, 1340 (D.C. Cir. 1969); see also Imwinkelried, *Evidentiary Foundations*, supra, § 708, which offers the following checklist for the court when presented with a claim for minor government secrets privilege.


To establish a *prima facie* case for invoking the minor government secrets privilege, the party opposing discovery or use at the hearing must show these foundational elements:

- The party asserting the privilege (here, the government agency receiving the information) is the holder. The judge will usually permit any government agent, including the prosecutor, to invoke the privilege.
- The party is asserting the right type of privilege. The government may refuse to disclose the information and prevent a third party from making the disclosure.
- The information is privileged.
- In federal court, the party must show:
  - The information reflects part of the decision-making process, and
  - The document was pre-decisional; and
The government has maintained the confidentiality of the document. In many state courts, the party must show:

- The government has a legitimate need for this type of information; and
- The government cannot obtain a free flow of this type of information unless it assures its sources of confidentiality.
- To defeat the privilege, the party seeking discovery must show:
- The information is logically relevant to the material facts of consequence in the case;
- The information is highly relevant to the outcome of the case. The party should argue that the information relates to the central or one of the pivotal issues in the case; and

- There is no reasonably available alternative source for the information.

See Imwinkelried, EVIDENTIARY FOUNDATIONS, supra, § 7.08[2].

[8.15] PRIVILEGES THAT PROTECT THE RIGHTS OF CITIZENS

[8.15.1] Characteristics of Privileges

The Constitution enumerates various rights that are protected in part by excluding evidence obtained in violation of those rights (see Chapter 12 – The Exclusionary Rule).

The Fourth Amendment is aimed at protecting a citizen from unwarranted governmental intrusions into his or her home or personal papers and effects. The Fifth Amendment is designed in part to protect the citizen from being compelled to testify against himself or herself in criminal prosecutions. The Sixth Amendment provides for the assistance of counsel in criminal proceedings (at least when there is the possibility of the loss of liberty).

Administrative law judges must confront many of the same issues, namely: what premises and documents are open to inspection and subpoena (under the Fourth Amendment), whether a person may be compelled to testify contrary to his or her interests (under the Fifth Amendment), and whether evidence wrongfully obtained must be treated as privileged and thus excluded from the hearing.

While historically Fourth Amendment, Fifth Amendment, Sixth Amendment and exclusionary rule issues have been addressed similarly in both criminal and administrative law, the law has evolved differently in each area during the latter half of the 20th century (with the exception of the Sixth Amendment, since there has never been a right to counsel in civil matters). The following sections discuss the substantive differences between administrative and criminal law in the Fourth and Fifth Amendment areas. Chapter 12 discusses the evolving application of the exclusionary rule in administrative law. Evidence obtained in violation of a party’s Sixth Amendment right to counsel may or may not be excludable in an administrative proceeding and hence subject to the law as discussed in Chapter 12. However, there is no significant case law distinguishing administrative and criminal cases on Sixth Amendment grounds. Thus, there is no discussion of the Sixth Amendment in this chapter.

[8.15.2] Fourth Amendment

The Fourth Amendment to the Constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon
probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The Fourth Amendment is intertwined with the constitutional right of privacy made applicable to the states in the Fourteenth Amendment. “The security of one’s privacy against arbitrary intrusion by the police is fundamental to a free society and as such protected by the Fourteenth Amendment” Frank v. Maryland, 359 U.S. 360 (1959) (citing Wolf v. Colorado, 338 U.S. 25 (1949)).

The application and development of the Fourth Amendment in the administrative context has differed from the criminal law even when law enforcement officers are involved.

[8.15.2.1] Warrant Not Required

In Frank v. Maryland, 359 U.S. 360 (1959) the Supreme Court held that a warrant was not necessary when a health inspector, acting on a tip, sought to enter a home. The defendant was charged and convicted of a misdemeanor for refusing to admit the inspector pursuant to the Baltimore City Health Code. The conviction was affirmed on the theory that a search warrant was only required in criminal actions. Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area searches or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts.

Frank v. Maryland, 359 U.S. at 372.

[8.15.2.2] Warrant Required

In Camera v. Municipal Court, 387 U.S. 523 (1967) and See v. Seattle, 387 U.S. 541 (1967) the Supreme Court reversed its position on administrative warrants and held that the Fourth Amendment required a warrant for the search of a dwelling (Camera) and the search of a business (See).

As we explained in Camera, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

See v. Seattle, 387 U.S. at 543.

Marshall v. Barlow, 436 U.S. 307 (1978) involved an attempted warrantless OSHA inspection. The Supreme Court affirmed See, supra, (the warrant requirement for most business inspections) and elaborated on the requirements necessary to obtain an administrative search warrant:

For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing
that “reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular (establishment).” [citing See] A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer’s Fourth Amendment rights.


[8.15.3] The Closely-Regulated Business Exception

The Court first examined the unique problem of inspections of closely-regulated businesses in two enterprises that had a long tradition of close government supervision. In Colomade Corp. v. United States, 397 U.S. 72 (1970), it considered a warrantless search of a catering business pursuant to several federal revenue statutes authorizing the inspection of the premises of liquor dealers. Although the Court disapproved the search because the statute provided that a sanction be imposed when entry was refused, and because it did not authorize entry without a warrant as an alternative in this situation, it recognized that:

[T]he liquor industry (was) long subject to close supervision and inspection. Id., at 77. We returned to this issue in United States v. Biswell, 406 U.S. 311 (1972), which involved a warrantless inspection of the premises of a pawn shop operator, who was federally licensed to sell sporting weapons pursuant to the Gun Control Act of 1968 ... While noting that federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, 406 U.S. at 315, we nonetheless concluded that the warrantless inspections authorized by the Gun Control Act would ‘pose only limited threats to the dealer’s justifiable expectations of privacy.’ Id., at 316. We observed: ‘When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.’


[8.15.4] Fifth Amendment

The Fifth Amendment to the United States Constitution provides in part: “No person ... shall be compelled in any criminal case to be a witness against himself . . . .”

• Purpose of the privilege: The privilege “protects the private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.” Couch v. United States, 409 U.S. 322 (1973).

The Fifth Amendment privilege against self incrimination is founded on our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our
preference for an accusatorial rather than an inquisitorial system of
criminal justice; our fear that self-incriminating statements will be
elicited by inhumane treatment and abuses; our sense of fair play
which dictates a fair state-individual balance by requiring
government to leave the individual alone until good cause is
shown for disturbing him and by requiring the government in its
contest with the individual to shoulder the entire load . . . our
respect for the inviolability of the human personality and of the
right of each individual to a private enclave where he may lead a
private life . . . our distrust of self-deprecatory statements; and our
realization that the privilege, while sometime a shelter to the guilty
is often a protection to the innocent.

(internal citations omitted).

Early cases extended the protection to witnesses as well as defendants in
criminal proceedings. Later cases expanded coverage from quasi-criminal
proceedings to civil cases *McCarthy v. Arndstein*, 266 U.S. 34 (1924) and
Amendment to the states through the Fourteenth Amendment due process clause.

[8.15.5] Assertion of the Privilege

The privilege is asserted in one or more of the following ways:

- A blanket refusal to submit to interrogation. An accused in a criminal case may
  refuse to take the stand.
- A challenge to the use of information obtained in violation of the Fifth
  Amendment.
- A motion to exclude the illegally obtained evidence as a substantive defense to a
  particular criminal or civil charge.
- The privilege is personal—it belongs to the person whose testimony would be
  self-incriminating. The privilege does not protect the witness against non-
governmental sanctions.
- Conviction of a crime does not preclude the assertion of the privilege in relation
to facts determined by that offense. In *In re Grand Jury Proceedings*, 763 F.2d
321 (8th Cir. 1985) the Court of Appeals held that a witness who had been
convicted of federal narcotics offenses could invoke the privilege against self-
incrimination as a basis for refusing to testify where there was a possibility of a
state prosecution.

[8.15.6] Business Records

Business records are generally not protected by the privilege against self-
icrimination if the purpose of the records is something other than an effort to trap
law violators. The Fifth Amendment privilege against self-incrimination is not
applicable to corporations. *Hale v. Henkel*, 201 U.S. 43 (1906). The privilege is
unavailable because corporate records are believed not to contain the requisite
degree of privacy or confidentiality necessary for the privilege to attach.

Other collective entities such as labor unions also do not have Fifth
custodian of the records may not assert the privileges. In *Braswell v. United States*,
487 U.S. 99 (1988) the Supreme Court held that the custodian of corporate records may not resist a subpoena for the corporation’s records on the ground that the act of production would incriminate him in violation of his Fifth Amendment rights.

The business records of a sole proprietor are protected by the privilege. In United States v. Doe, 465 U.S. 605 (1984) the Supreme Court held that the owner of several sole proprietorships, on whom a grand jury had served five subpoenas for business records in connection with a criminal investigation, could assert the Fifth Amendment privilege because the act of producing the documents was privileged. The act would be testimonial self-incrimination. Specifically, the act would admit the records existed, that they were in his possession and they were authentic. Therefore, the court concluded, the document’s production could not be compelled absent a grant of statutory use immunity to the respondent. Use immunity would protect the respondent from incrimination with respect to the production of the documents—not their contents.

[8.15.6.1] Required Records Rule and Exceptions.

In general, there is no Fifth Amendment privilege for records any individuals are required to keep for the government. Shapiro v. United States, 335 U.S. 1 (1948). Records required to be kept by appropriate legislation, having an unquestioned relevance to a lawful purpose, acquire a public aspect and are thus not prohibited from disclosure by the Fifth Amendment. An exception is that the privilege is applicable when the sole purpose of the required record is to incriminate the record keeper. In Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) the court held unconstitutional a statute that required Communists to register with the government because the act was self-incriminating. It suggested three factors to consider in applying the privilege to records required to be kept by an individual for the government:

- Whether the statute was directed at a specific group;
- Whether the group was inherently suspect of criminal activity; and
- Whether the statute was in an area permeated with criminal statutes.

In Marchetti v. United States, 390 U.S. 39 (1968) the Supreme Court followed the Albertson guidelines and struck down registration and occupational tax laws applicable only to gamblers. The Ninth Circuit applied the Albertson and Marchetti principles in United States v. Flores, 729 F.2d 593 (9th Cir. 1983). The defendant was charged with a violation of a statute requiring that individuals give notice to an air carrier before shipping firearms in foreign commerce. The court held that the required disclosure concerned information that the defendant might reasonably suppose would be available to prosecuting authorities and it would furnish a significant link in the chain of evidence tending to establish a violation of federal law. The conviction was overturned. See, also, Sisson v. Triplett, 428 N.W.2d 565 (Minn. 1988) (upholding the marijuana tax requirement that provides for anonymous payment of tax).

The Fifth Amendment privilege may be applied to required records that may incriminate but also have a non-criminal purpose. In California v. Byers, 402 U.S. 424 (1971) a plurality of the Supreme Court modified the Albertson criteria when it held that a statute requiring a person to report any traffic accidents in which they were engaged was not a violation of the Fifth Amendment because driving a
car is not per se an illegal activity, and not all accidents are criminal in nature; therefore, the disclosures with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination required to justify Fifth Amendment protection. See also, Brown v. Dep't of Inland Fisheries and Wildlife, 577 A.2d 1184, 1186 (Me. 1990) (upholding disclosure requirement as part of a statutory scheme that is overwhelmingly regulatory and not criminal in nature); and Craib v. Bulmash, 777 P.2d 1120, 1122 (Cal. 1989) (same).

8.15.6.2 Privilege Limited to Testimony

In Schmerber v. California, 384 U.S. 757 (1966) the Court held that blood extracted from a non-consenting suspect “although an incriminating product of compulsion was neither his testimony nor evidence relating to some communicative act or writing by him. “In order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a “witness” against himself.” Doe v. United States, 487 U.S. 201, 210 (1988). Justice Holmes in Holt v. United States, 218 U.S. 245 (1910) said “the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence when it may be material.”

8.15.7 Fifth Amendment Exclusions

The Fifth Amendment protections do not cover:

- A defendant forced to put on a specific shirt to determine if it fit him.
- A defendant forced to stand in a line up.
- A defendant forced to give finger prints.
- Photographs of a defendant while in custody.
- Removal of clothes or toupee for identification purposes.
- Reading a transcript to provide a voice exemplar. See United States v. Dionisio, 410 U.S. 1 (1973).

8.15.8 Public Employees

In Gardner v. Broderick, 392 U.S. 273 (1968) the Supreme Court held that if the public employee is compelled to waive his Fifth Amendment right he must be granted immunity. If he is not granted immunity the employee can be discharged for failing to answer the employer’s questions providing the questions are directly and narrowly focused on the employee’s official duties. Therefore, he cannot be forced to waive his Fifth Amendment right, but he may lose his job for failure to waive it if he is granted immunity from prosecution. See also, Jones v. Franklin County Sheriff, 555 N.E.2d 940, 942 (Ohio 1990) (public employee’s refusal to answer questions constituted grounds for removal after assurances were given that the answers would not be used in any subsequent criminal proceeding).

8.16 PRIVILEGE APPLIED IN ADMINISTRATIVE LAW

The Supreme Court appears to be creating an administrative law exception to the Fifth Amendment. In Baltimore Soc. Serv. v. Bouknight, 493 U.S. 549 (1990) the Supreme Court held that a mother who had custody of her child pursuant to a
juvenile court order which found the child to be a “child in need of assistance” because of child abuse could not successfully assert her Fifth Amendment privilege and refuse to produce the child when ordered to do so. The Court found that the production of the child would be a testimonial act. However, the mother could not assert her privilege against self-incrimination once the child became the object of the state’s regulatory interests. When the mother accepted custody of the child pursuant to the court order she submitted to the routine operation of the regulatory system. Since the order to produce the child was made for compelling reasons (the child’s safety) unrelated to criminal law enforcement and as a part of a broadly applied regulatory regime not directed at a selective group inherently suspect of criminal activities, the privilege could not be asserted. The order finding the mother in contempt of court for failure to produce the child was upheld. See also, In re Lamonica H., 270 Cal. Rptr. 60, 70 (1990) (statements made during court-ordered therapy for sexual abuse could not be used in criminal proceeding); Pennsylvania v. Muniz, 496 U.S. 582, 602-04 (1990) (answers to routine booking questions and statements made when asked to submit to breathalyzer examination are exempt from Miranda coverage).

[8.16.1] Negative Inferences

A refusal to answer can serve as the basis of a negative inference in an administrative law proceeding even though it cannot be treated that way in a criminal proceeding. See, e.g., DeBonis v. Corbistiero, 547 N.Y. S.2d 274 (N.Y. App. Div. 1989). There, a licensed owner and trainer of thoroughbred horses had his license revoked after invoking his Fifth Amendment right not to testify at an administrative hearing. The court held that although invocation of the Fifth Amendment during criminal proceedings cannot be used against the accused, in a civil or administrative proceeding, such invocation “may form the basis of an adverse factual inference.” 547 N.Y.S. 2d at 276 (citing Baxter v. Palmigiano, 425 U.S. 308 (1976)).

[8.16.2] Limitations of the Privilege

The Fifth Amendment may not be asserted in response to a relevant question asked of a party bringing an action. In re Marriage of Fellers, 789 S.W.2d 153 (Mo. Ct. App. 1990). In a dissolution of marriage proceeding, wife sought and was granted an award of maintenance from her spouse. The respondent had previously worked for her husband’s company as bookkeeper, but her employment was terminated for allegedly misappropriating company funds. Id. at 154. During discovery, the respondent was questioned regarding the alleged misappropriation, but refused to answer these questions instead asserting her Fifth Amendment privilege. Id. The court of appeals rejected the trial court’s ruling stating that it is a well settled rule that a party who asserts the Fifth Amendment privilege against self-incrimination is not entitled to affirmative relief for himself or herself against others. Id. at 155. The court reasoned that the purpose was to promote fairness and ensure that a civil plaintiff is not able to obtain relief from a party and, at the same time, conceal from the civil defendant relevant evidence. Id. In response to the defense that the information was not relevant, the court held that the availability of funds were pertinent to the issues involved. Id. at 156-57.

Chapter 9 – Documentary Evidence

Judge Jack H. Weil

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[9.1] WRITINGS AND RECORDINGS
[9.1.1] Overview

The goal of each party in an administrative proceeding is to persuade the adjudicator that the evidence of record weighs more heavily in favor of his or her side of the issue in question. One type of evidence that may be offered by the parties to achieve this goal is writings and recordings. The ALJ needs to consider the mechanical steps for receiving writings and recordings into the evidentiary record and should know how to determine which writings and recordings should be admitted into evidence. The rules regarding writings and recordings will vary from jurisdiction to jurisdiction, however, the central concepts addressed in this chapter will apply in most jurisdictions.

[9.1.2] Writings and Recordings Defined

Writings and recordings consist of letters, words, numbers, or their equivalent (e.g., sounds, symbols, pictures, or a combination of the above), set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data.
compilation. FRE 1001(1). Photographs, including still photographs, X-ray films, video tapes, and motion pictures, fall under writings and recordings. FRE 1001(2).

The inclusion of the phrase “or other form of data compilation” in the definition of writings and recordings makes it clear that the definition is broad and covers audio or sound recordings, maps, diagrams, inscribed chattels (e.g., monogrammed clothing, a grave marker, an inscribed chest or piece of furniture, a credit card) or any other writing or recording on a tangible thing that is not specifically mentioned but similar to those included in the definition. The definition of writings and recordings further makes it clear that computers and other modern reproduction systems such as CDs, DVDs, MP3s, and other similar future technological advances are considered to be writings and recordings. FRE Manual, Editorial Explanatory Comment 1001.02[1], The Best Evidence Rule: Proving the Content.

[9.1.3] Mechanical Steps for Receiving Writings and Recordings Into Evidence

A writing or recording offered into evidence by a party must be clearly marked and identified for the record. Clearly marking and identifying a writing or recording is important for three reasons.

- First, the writing or recording can be referred to without confusion during the proceeding.
- Second, clear marking allows the judge to keep better track of the evidence that has been offered and admitted when making a decision on the merits.
- Third, the appellate tribunal will understand what writing or recording is being referred to in the written record or transcript on review.

Unless a writing or recording has been marked in advance of the hearing, the first time that a writing or recording is referred to in a hearing the judge should mark the writing or recording by stamp, label, or inscription (e.g., Plaintiff’s Exhibit No. 1 for Identification).

The marked writing or recording should then be identified or briefly described for the record. Depending on the tribunal, the writing or recording may be identified by the judge or, if the authenticity of the writing or recording is in question, the offering party may ask a witness to identify the item. If the document is identified or authenticated by a witness, opposing counsel should be given an opportunity to examine the witness.

[9.1.3.1] Points to Remember for Receiving Writings and Recordings Into Evidence

- For clarity of the record, since the identifying mark on a documentary exhibit is generally made only on the first page, it is often helpful to identify the total number of pages in a multiple page exhibit so that concerned parties can tell where in the record the exhibit ends. For example, the judge might state “Government’s Exhibit Number 1 for Identification is a certified record of a June 16, 2003, conviction for robbery consisting of eight pages.”
- Unless there are very few writings or recordings in the record and each has a clear title, the judge should require the parties to refer to all writings and recordings during the hearing by their exhibit mark or number.

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[9.1.4] Determining Whether to Admit a Writing or Recording Into Evidence

Once a writing or recording has been marked and identified for the record, a party may introduce the writing or recording and ask the judge to admit the writing or recording into evidence. If the offered writing or recording has not been shared in advance of the hearing, it should, at this point, be served on the opposing party and the opposing party should be afforded an opportunity to review it. After review, the opposing party may:

- Challenge the identity and authenticity of the writing or recording;
- Object on the ground that a proper foundation has not been laid for admission of the writing or recording;
- Argue that the writing or recording is not relevant or material to any issue in the case; or
- Argue that the writing or recording is otherwise not admissible.

[9.1.5] General Rule on Admissibility

The general rule is that if a writing or recording is authentic, relevant and material, and has a proper foundation, it should be admitted into evidence unless it is rendered inadmissible by some other provision of law. FRE 402 and 403.

[9.2] Identification and Authenticity

A writing or recording will not be admitted into evidence unless it has been identified and authenticated. FRE 901(a). To properly identify and authenticate a writing or recording, the proponent of the writing or recording must offer sufficient evidence for the trier of fact to reasonably find that the writing or recording is what the proponent claims it to be and that the writing or recording was made or signed by the person represented by the party proponent to be the maker or signer of the writing or recording. The rationale for this rule is that only a genuine or authentic writing or recording is relevant to an issue in dispute. FRE MANUAL, Editorial Explanatory Comment 901.02[1], Authentication: The Basic Rule. Failure of the offering party to meet this degree of proof will result in the writing or recording being excluded from the evidentiary record.

Example: In an action to terminate medical life support for a wife, counsel for the husband offers into evidence a living will purportedly signed by the wife in which the wife states that “if no brain activity is recorded, all life support and intravenous feeding is to cease.” For the living will to be admissible into evidence, counsel must satisfy the judge that the living will is what it purports to be and that the document was signed by the wife.

There are numerous methods of authenticating a writing or recording. A writing or recording may be authenticated:

- By the proponent of the writing or recording offering direct proof of the authenticity of the writing;
- By the parties stipulating that a particular writing or recording is authentic;
- By a party opponent admitting that the writing or recording is authentic or, in some jurisdictions, failing to object to the authenticity of the writing or recording during a pre-hearing conference, pre-hearing request for admission, or responsive pleading;
- By operation of a presumption of authenticity;
• By any other method which convinces the trier of fact that the document is what it is purported to be. FRE 901(b), FRE 1007, Fed. R. Civ. P. 36(a), Fed. R. Civ. P. 37.

Direct proof of authenticity may include:

• Testimony by the maker of the writing or recording;
• Testimony by one who observed the making or execution of the writing or recording;
• Testimony of a handwriting expert or offering of a handwriting exemplar to prove the identity of the maker or signer of the writing or recording;
• Proof of a writing or recording which responds to a writing or recording whose authenticity is questioned;
• By the content of the writing or recording which reveals facts or details of which only the true maker or actor would be aware; or,
• A video tape or DVD of the making or execution of the writing or recording.

If a writing or recording is to be identified or authenticated by testimony of an expert or other witness, the opposing party should be afforded an opportunity to examine the witness. This list of methods of authenticating a writing or record is illustrative and by no means exclusive. FRE 901(b)(10).

Example: In a removal proceeding to deport the respondent from the United States, the government has the burden to prove that the respondent was knowingly bringing a controlled substance into the United States. In support of its burden, the government offers into evidence a written sworn statement purportedly bearing the respondent’s signature in which the respondent states that he accepted the offer to bring cocaine into the United States because he is facing foreclosure on his residence and needed the money. The respondent denies that he made or signed the sworn statement. The government may offer the testimony of the officer who took the sworn statement or of the officer who witnessed the respondent make and sign the sworn statement as direct evidence of the authenticity of the document. Alternatively, the government may offer into evidence a video tape or DVD of the respondent making and signing the sworn statement.

There are certain types of writings or recordings that carry a trustworthiness or likelihood of authenticity so great that these writings or recordings are deemed to be self-authenticating or presumptively authentic. Writings or recordings that are presumed to be authentic include, but are not limited to, certified copies of public or official government records, certain government issued publications such as law books, certain business records, certain documents acknowledged before a notary, certain instruments which are dispositive of an interest in real or personal property, certain ancient documents, and newspapers or periodicals. FRE 902. Many of the writings and recordings which are presumed to be reliable are those that fall under one of the exceptions to the hearsay rule. The burden is on the party proponent of the writing or recording to offer circumstantial evidence to establish that the writing or record does meet all of the requirements necessary to be presumptively reliable or self-authenticating.

For example, for a writing to be presumed authentic as an official governmental record, the party proponent must establish:
• That the writing was made as a record of an act, condition, or event and is offered to prove the occurrence of that act, condition, or event;

• That the preparation of the writing was within the scope of the public employee’s authority;

• That the writing was prepared at or near the time of the action, condition, or event recorded; and

• That the sources of information, method of preparation, and time of preparation all indicate trustworthiness. FRE 803(8).

In Espinoza v. I.N.S., 45 F.3d 308, 310 (9th Cir. 1995), the court of appeals held that a certified government record is properly authenticated and presumed to be reliable absent evidence to the contrary. The court reasoned that this rule is premised on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports.

If the party offering a writing or recording offers sufficient evidence to give rise to a presumption of authenticity, the opposing party should then be offered an opportunity to rebut the presumption of authenticity. In Espinoza, the court held that the burden of establishing a basis for exclusion of a certified government record from the evidentiary record falls upon the party objecting to admission of the certified government record. Id., 45 F.3d at 310.

If the objecting party is successful in proffering evidence that demonstrates that the writing or recording in question is not authentic, the party initially offering the evidence must prove by a preponderance of the evidence that the writing or recording is authentic and what it is purported to be.

[9.2.1] Point to Remember for Identification and Authenticity

• When a party contests the admissibility of an audio or video recording on the ground that the recording is not authentic or on other grounds, it is recommended that the judge initially review the audio or video recording. This allows the judge not only to rule on the genuineness of the recording, but it also allows the judge to rule on other objections such as lack of foundation, prejudice due to incompleteness or inaccuracy, or unintelligibility of the recording.

[9.3] Relevancy and Materiality

As with all types of evidence, a writing or recording must be relevant and material to be admitted into the evidentiary record. FRE 402. The rules concerning relevancy and materiality are applied to writings and recordings in the same fashion as they are applied to other types of evidence. The concepts of relevancy and materiality as applied to all types of evidence are addressed more completely in Chapter 4.

A writing or recording is relevant if a reasonable fact-finder could find that, assuming the writing or recording is true, it renders some fact that is properly in issue either more or less probable. FRE 401. In other words, the writing or recording need only increase or decrease the likelihood of the fact for which it is offered. It is then up to the trier of fact to determine the evidentiary weight or probative value of the writing or recording and to determine to what extent the evidence offered proves or disproves the existence of the fact in issue.

A writing or recording is material if it is offered to prove a fact that is of consequence to the determination of the action. FRE 401. The issues in dispute are
determined by the pleadings, admissions and stipulations of the parties, and applicable law. In other words, if a writing or recording is not probative of a fact or is probative of a fact not of consequence to resolution of the case, the writing or recording, even if authentic, should not be admitted into evidence. FRE 401.

[9.4] PROPER FOUNDATION

The requirement that there be a proper foundation for admission of a writing or recording means that the record of hearing contains factual proof that the offered writing or recording was correctly prepared, stored and retrieved. The foundation for admission of a writing or recording is frequently laid by testimony of the custodian of the writing or recording or other witness familiar with how the writing or recording was prepared, stored, and retrieved. In recent times, the question of whether the proper foundation has been laid is often considered when assessing the weight of the evidence rather than in determining whether the evidence should be admitted at all. See FRE 601. Additionally, some tribunals will permit writings or recordings to be conditionally admitted into evidence on the condition that a proper foundation for admission be laid at a later point in the proceedings. FRE Manual, Editorial Explanatory Comment 901.02[7], Conditional Rulings.

[9.5] OTHERWISE INADMISSIBLE EVIDENCE — GENERAL EVIDENTIARY OBJECTIONS, BEST EVIDENCE RULE, SECONDARY EVIDENCE RULE

Even if a writing or recording is identified, authentic, relevant and material, there may be other evidentiary bases for not admitting the writing or recording into evidence. For example, a party may object to an authentic, relevant, and material writing or recording being admitted into evidence on the ground that the writing or recording is hearsay, cumulative, prejudicial, opinion, privileged, or without proper foundation. FRE 403. These evidentiary objections are not specific to writings or recordings. This section will instead focus on evidentiary objections or grounds of admissibility that are specific to writings and recordings such as the Best Evidence Rule and the Secondary Evidence Rule.

[9.5.1] Best Evidence Rule

A party may object to the admissibility of a writing or recording on the ground that the writing or recording is not the “best evidence.” The Best Evidence Rule states that the content of a writing or recording can be proven only by offering the original of a writing or recording into evidence. FRE 1002. The Best Evidence Rule was developed during a time when documents were copied by hand and was a response to fears that handmade copies may be fraudulent or contain errors. Over time, numerous exceptions were carved out of the Best Evidence Rule such as in cases where the original either could not be found or was in the possession of the party opponent. FRE 1004.

With the advent of machine and other technologically advanced methods of copying writings and recordings, the Best Evidence Rule has become somewhat outdated and a large number of jurisdictions, realizing that the Best Evidence Rule was in many cases unduly burdensome and no longer effective in deterring fraud, have repealed, amended or replaced the Best Evidence Rule altogether.
[9.5.2] Secondary Evidence Rule

Many jurisdictions have replaced the Best Evidence Rule with the Secondary Evidence Rule or other similar evidentiary rule better designed to guard against unreliable, misleading and fraudulent writings or recordings in today’s more technologically advanced society. The Secondary Evidence Rule provides that the contents of a writing or recording may be proven by the original of the writing or recording as well as by otherwise admissible secondary evidence.

An “original” writing or recording is defined as the writing or recording itself or any counterpart intended by the person executing or issuing the original to have the same effect as the original. FRE 1001(3).

Example: The judge in a bail and custody hearing sets bail in a respondent’s case at $8,000. The clerk of the court prepares an order setting the bail at $8,000 on three-part paper in which all three sheets are attached and imprinted simultaneously. The judge signs the order and hands the second copy to the respondent’s counsel and the third copy to the government attorney. The copies of the bail order handed to respondent’s counsel and the government are considered to be “original” writings as they are counterparts of the original bail order which were intended by the judge to have the same force and effect as the original order. The bail order of the judge would therefore be admissible into evidence to establish the contents of the written bail order under both the Best Evidence Rule and the Secondary Evidence Rule.

Other examples of “counterparts” of originals which are considered to be originals include negatives or prints of a photograph. FRE 1001(3).

Admissible secondary evidence of the contents of a writing or recording may include true and correct or certified photocopies of original documents unless: 1) there is a genuine question as to authenticity of the copy, or 2) the offering of a copy would be “unfair.” FRE 1003, 1005. Acceptable duplicate copies may include any writing or recording prepared from the same impression or matrix as the original (including enlargements or reductions), or by mechanical or electric re-recording, chemical reproduction, or other equivalent technique that produces highly accurate copies. FRE 1001(4).

Any material alterations to the original writing or recording contained in or on the copy must be explained (e.g., handwritten notations in the margin of a document that were not contained in the original or a label affixed to a copy of a computer disc that was not on the original). If a party proffers evidence that a reproduction is inaccurate or unreliable, the proponent of the copy then has the burden to prove by a preponderance of the evidence that the reproduction accurately represents the existence and content of the original.

[9.5.3] Point to Remember for Evidence Rules

- It is always a good idea to require the parties in a proceeding to produce the original writing or recording, be prepared to produce the original writing or recording if called upon to do so, or be prepared to explain why the original writing or recording is not available. In addition, most rules of evidence allow for compilations or summaries of voluminous records to be offered where the originals are available for examination by the opposing party. FRE 1006
Evidentiary Treatment of Computer and Electronic Records

Increasingly, information that would have been traditionally recorded on paper and stored in a filing cabinet is being recorded and stored in an electronic format. This trend has created many new questions and issues regarding the admissibility of these electronically created and stored writings and recordings. Electronic records may include databases, operating systems, programs, computer-generated models, electronic mail and voice messages, or any other record that is made or stored in digital form.

Although the technology for the creation and storage of electronic writings or recordings is new and ever changing, the basic concepts of authentication and admission used for more traditional types of writings and recordings still apply. The data can be regarded as stored electronically instead of manually. For example, under FRE 902(4) certified copies of governmental computer records are self-authenticating and do not require any extrinsic proof of authenticity to be admissible at trial.

The requirements to authenticate an electronic writing or recording are evolving as society becomes more trusting and understanding of digital media. Currently, the rules for authentication of electronic writings and recordings vary from jurisdiction to jurisdiction and it would be wise to research what specific rules of authentication of computer records apply in your jurisdiction.

Today, most courts are willing to recognize the intrinsic reliability of a computer printout and many are willing to presume that computer printouts accurately reflect the data stored in the computer. Where the reliability or probative value of a computer record is questioned, parties have often been able to overcome doubts regarding the trustworthiness of the record by offering testimony of individuals who have worked with the computer system in question and are familiar with how the data is input, stored, and retrieved. If a party offers evidence that successfully draws into question the accuracy and reliability of a computer writing or recording, the proponent of the electronic writing or recording then has the burden of proving by a preponderance of the evidence that the printed representation accurately represents the existence and content of the electronically stored information. In certain circumstances, it may be necessary for the court to grant the opposing party access to a party’s computer system so the party can observe data entry, storage, retrieval, and maintenance procedures as well as the computer hardware used in order to allow the party to formulate questions and objections regarding the accuracy and reliability of computer records.

For the purposes of the Best or Secondary Evidence Rule, printouts of information stored on a computer or other output readable by sight are considered to be “original” writings or recordings. FRE 1001. For the purposes of the hearsay rules, statements entered by humans into a computer may be regarded as hearsay and may need to fall under one of the traditional hearsay exceptions to be admissible. For example, a computer printout may be admissible into evidence under the official records or business records exception. However, certain statements generated by the computer itself such as the time or date a record is created may not be regarded as hearsay.
[9.6.1] **Point to Remember for the Evidentiary Treatment of Computer and Electronic Records**

- The complexity of evidentiary issues concerning computer and electronic writings and recordings is often so great that it is advisable for the administrative adjudicator to address the admissibility of such records or at least narrow the issues regarding the admissibility of such records in advance of a trial.

[9.7] **EVIDENTIARY TREATMENT OF FOREIGN DOCUMENTS**

A writing or recording that is executed or attested to in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation and accompanied by a final certification as to the genuineness of the signature and official position is self-authenticating. The final certification may be made by a secretary of an embassy or diplomatic or consular officer of the United States. If a reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official foreign writings or recordings, the court may, for good cause shown, order that the foreign writings or recordings be treated as presumptively authentic without final certification. FRE 902(3).

[9.8] **DUE PROCESS AND FUNDAMENTAL FAIRNESS AS A GROUND OF INADMISSIBILITY**

The ALJ should keep in mind that in many administrative tribunals the formal rules of evidence do not apply. The sole test for the admissibility of evidence in many administrative proceedings is whether the evidence offered is probative and its admission is fundamentally fair. See, e.g., *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983). This does not mean, however, that these rules are without importance or application for administrative judges. Instead, the formal rules of evidence and their interpretations are very important for administrative judges as these rules guide the administrative judge as to what types of evidence are genuine, trustworthy, and reliable and also as to what probative value or weight to give a particular piece of evidence. Accordingly, while a particular piece of evidence may not be rendered inadmissible by the application of a formal rule of evidence, there is a point when an administrative judge may determine that considerations of due process and fundamental fairness mandate that a particular piece of evidence of questionable reliability not be received into the evidentiary record.

[9.9] **STEPS FOR ADMITTING A WRITING OR RECORDING INTO THE RECORD**

Once the decision has been made to admit a particular writing or recording into evidence, the notation on the exhibit “for identification” is removed and the document is now simply referred to as “[Plaintiff’s] Exhibit No. [1].” It is important that a document not admitted into evidence be preserved as part of the record so that the adverse evidentiary ruling can be reviewed by the appellate or reviewing body.

A writing or recording that is admitted into evidence becomes part of the evidentiary record of the hearing and must be considered by the trier of fact in making a decision in the case. The judge must next determine what evidentiary weight or probative value the admitted document deserves. Each piece of evidence admitted into the record must be carefully considered and properly weighed by the judge in deciding and resolving the disputed issue in a case. Failure of the trier of fact to consider or weigh a writing or recording that has been admitted into evidence
in rendering a decision will likely constitute reversible error or result in remand, a result that all administrative adjudicators wish to avoid.

[9.9.1] Points to Remember for Admitting Evidence

- If there are no formal discovery procedures or rules requiring sharing of evidence in advance of a hearing, it is often helpful and administratively efficient to enter a pre-hearing order requiring parties to submit lists of intended evidence in advance of the hearing and providing a date by which evidence must be exchanged and any objections to admission conveyed.
- In a case with multiple exhibits, it is helpful to keep a running list of all exhibits offered at the hearing with notations as to which exhibits remain for identification only and which exhibits have been admitted into the evidentiary record. Notations on the list indicating which exhibits have been admitted without objection and briefly describing what objection(s) have been raised are also extremely helpful in issuing a decision in the case.
- To avoid reversal or remand, the ALJ should include in the decision a summary of the evidentiary record so that the reviewing tribunal will know that the ALJ did not fail to consider a particular piece of evidence in reaching his or her decision in the case. For example, “The evidentiary record of this proceeding consists of documentary exhibits one through eight, the testimony of Mr. A and Ms. B, and a stipulation that . . . .”
- The practice of maintaining a running list of exhibits and evidence collected is mentioned in a Practice Point above. It is also recommended, when rendering a decision, that the adjudicator not only discuss each piece of evidence on that list in the decision but also make sure that the decision reflects the evidentiary weight that was assigned to each piece of admitted evidence. This is important in the event that a party on review argues that the judge gave a particular piece of evidence too much or too little weight. If the reviewing tribunal is unable to determine what weight the adjudicator attributed to a particular piece of evidence, the case may be remanded for clarification.

[9.10] The Totality of the Evidence

When a writing or recording is offered into evidence, the executive adjudicator should clearly mark the writing or recording for identification. If a prima facie showing of admissibility is made (i.e., the offered writing or recording is identified, authentic, relevant, material, and otherwise admissible), the writing or recording should be admitted into evidence. When faced with a question as to whether to admit a computer or electronic recording into evidence, the adjudicator should begin the analysis of whether to admit the electronic writing by looking at the rules of admissibility that apply to other more traditional types of writings and recordings. Once the decision has been made to admit a particular writing or recording into evidence, the “for identification” mark should be removed and the record should clearly reflect that the item of evidence has been admitted into the evidentiary record. It is highly advisable to maintain a list of evidence that has been collected with notations as to which items have been received into evidence and which have been excluded.

For all evidence collected and admitted, it is up to the ALJ to determine how persuasive the writing or recording in question is and assign each piece of
evidence a specific evidentiary weight. The ALJ must then consider the totality of the evidence and determine whether the party that carries the burden of proof has offered sufficient admissible evidence in the record to conclude that that party has met its burden of proof and accordingly prevailed in the action.
Chapter 10 – Demonstrative Evidence

Judge Allan A. Toubman

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[10.1] INTRODUCTION TO DEMONSTRATIVE EVIDENCE

Demonstrative evidence is evidence which is presented to aid the trier of fact but is not real evidence from the event. It may be rejected if it is not helpful. It includes summaries, models and other helpful exhibits. The presenter must demonstrate the relevance and accuracy of the evidence.

[10.1.1] Demonstrative Distinguished From Real Evidence

Real evidence includes the exhibition of such things as injured parts of the body while demonstrative evidence involves such things as models, maps and photographs, which have no probative value in themselves but serve merely as visual aids in understanding the testimony of a witness.

[10.2] ADMISSION OF DEMONSTRATIVE EVIDENCE

As with documentary evidence, the admission of demonstrative evidence is committed to the discretion of the ALJ. The considerations include:

- Time required for review.
- Relevancy of the purported evidence.
- Alternatives available:
  - Admit over objection.
  - Deny and preserve for the record.
  - If the evidence is denied admission, the submitting party may make an offer of proof. For purposes of judicial review, this provides an opportunity for the proponent to explain why the evidence should be admitted.
- An opportunity for the opposing party to voir dire the witness presenting the demonstrative evidence.

[10.2.1] Point to Remember for the Admission of Demonstrative Evidence

- At the pretrial conference, the ALJ should require the parties to identify and produce demonstrative evidence to allow for a ruling prior to trial. This will avoid surprise and unnecessary delay in determining if the evidence is helpful.
[10.3] **PHOTOGRAPHS**

Photographs are admissible only if identified by a witness as a portrayal of certain facts relevant to the issue and verified by the witness as a correct representation of those facts:

The standard to be applied by the trial court in ruling upon the admissibility of photographs is whether they fairly depict that which they purport to portray. The trial judge felt that the testimony of witnesses would be aided by reference to the photographs. Throughout the long trial, the questioning involved the nature of the services rendered by Slocum and the equipment he used. The district attorney did not represent that the photos represented the actual equipment used by Slocum. He stated the photos depicted similar equipment – not identical equipment.


[10.4] **VIDEO AND AUDIO RECORDINGS**

When properly authenticated, video and audio recordings are admissible along with other reproductions, so long as their value is not outweighed by the danger of unfair prejudice.

[10.4.1] **Point to Remember for Video and Audio Recordings**

- Require as a condition for the admission of recordings, that the parties submit them in advance for review. However, because the purpose of the recordings may be pivotal, *e.g.*, demonstrates activity a claimant in a workers’ compensation case, it should be shown in the presence of both parties. This would give the submitting party an opportunity to explain the tape. Bear in mind that digital recordings are easily edited after recording.

[10.5] **MAPS, CHARTS AND DIAGRAMS**

Maps, charts and diagrams are admissible for the purpose of illustrating testimony: *In United States v. Scales*, 594 F.2d 558 (6th Cir. 1979), the court concluded that FRE 1006, and “established tradition, both within this circuit and other circuits,” allowed the admission of maps, charts and diagrams. *Id.* at 563. Since these types of evidence are reproductions by nature, each must be authenticated by testimonial evidence showing that they are faithful reproductions of the object depicted.

[10.6] **COMPUTER SIMULATIONS**

Computer simulations are commonly available and include proprietary software that can provide information on zoning, environmental impact, economics, engineering, and demographics. Of critical importance are the assumptions that are inputted into these programs. However, programs can also be created for a specific purpose. Due to their unique character, computer simulations should meet two threshold levels prior to being admitted:

1. Since simulations are produced through the same or similar computer processes or systems as computerized business records, the proponent should satisfy authentication requirements with regard to the underlying procedure similar to those employed for computerized records.

2. Because the data output of a computer simulation has been held to be a form of scientific and demonstrative evidence, the data output itself must meet the
additional requirements established for both the scientific and demonstrative forms of evidence.

[10.7] EXPERIMENTS

An appellate court rejected the defendant’s claim that it was an error to admit an “O’Shea Bungee Cord Experiment”:

The purpose of the test was to have a fixed steer put into the vehicle rather than relying on the human driver and to find out what point the 1966 VW would roll over. The film demonstrates the speed and turning maneuver at which a Corvair and a 1966 VW would roll. The test consisted of putting a mechanical device in a car so as to cause it to make a sharp turn. The film first depicts a truck towing the Corvair and letting it go at 35 miles per hour and then at higher speeds. The same device was put in a 1966 VW; it was towed at 35 miles per hour, 40 miles per hour and 42 miles per hour; in the last run of the 1966 VW at 42 miles per hour, the VW rolled over.

Admissibility of experimental evidence depends upon proof of the following foundational items: (1) The experiment must be relevant; (2) the experiment must have been conducted under substantially similar conditions as those of the actual occurrence [citation omitted]; and (3) the evidence of the experiment will not consume undue time, confuse the issues or mislead the jury [citation omitted]. In the case of experimental evidence, the preliminary fact . . . necessary to support its relevancy is that the experiment was conducted under the same or similar conditions as those existing when the accident took place. The standard that must be met in determining whether the proponent of the experiment has met the burden of proof of establishing the preliminary fact essential to the admissibility of the experimental evidence is whether the conditions were substantially identical, not absolutely identical.

Chapter 11 – Impeachment

Judge Jack Staton

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[11.1] Overview
The executive adjudicator is the fact finder. Consequently, the adjudicator must evaluate the evidence to determine what witnesses are to be believed and what evidence is credible. As each party presses its own case, one party may try to undermine the evidence of the other party by casting doubt on the credibility or believability of the opponent’s evidence or witnesses, at least where the evidence is in conflict. To successfully resolve such conflicts, each party will try to elicit answers from the opponent’s witnesses or present other facts to impair or destroy the credibility of the witnesses. The parties may also present facts to try to discredit opposing evidence. This process is known as impeachment. State v. Johannesen, 873 P.2d 1065 (Or. 1994) ("Impeachment refers to the elicitation or presentation of any matter of fact for the purpose of impairing or destroying the credibility of a witness in the estimation of the trier of fact.").
Impeachment, like beauty, is in the eye of the beholder. Thus, it is not the mere introduction of impeachment evidence that amounts to impeachment; it is the degree to which the executive adjudicator is persuaded by that evidence that the witness or evidence is not credible.

[11.2] HISTORICAL BACKGROUND

The modes or methods of impeachment are historic, though there may be different names given a particular method. In this chapter, we will identify the historic methods of impeachment, relying particularly on the works of Professor Irving Younger, who suggests nine modes of impeachment. Irving Younger, *The Art of Cross-Examination*, (ABA/Litigation Section Monograph Series No. 1, 1976) (from a speech delivered at the ABA Annual Meeting in Montreal, Canada, on August 12, 1975).

The FRE suggest a different nomenclature and are certainly a good reference. Given that the formal rules of evidence do not strictly apply in administrative proceedings, Professor Younger’s conceptual approach seems to lend itself better to the purposes of this deskbook. Moreover, there are multiple administrative jurisdictions. Even within the states and the federal government, different agencies can, and do, have different substantive and procedural rules. Consequently, this chapter can only provide guidelines and conceptual points; it is not an exhaustive treatise on impeachment. It is incumbent on the adjudicator to know the rules of his or her jurisdiction. Before the modes or methods of impeachment are discussed, however, some basics ought to first be noted.

[11.3] BASICS OF IMPEACHMENT

[11.3.1] Unfounded Impeachment Questions

Unfounded questions intended to impeach need not be allowed. Impeachment is often accomplished by questioning a witness. However, the adjudicator should not allow unfounded questioning intended to impeach a witness. A party ought not to ask an impeachment question based on a mere hunch. Impeachment is not a fishing expedition. This prohibition protects witnesses from unfair attacks upon their characters and avoids filling the record with irrelevant and immaterial information. Questioning must be in good faith.

For example: Suppose an off-duty border patrol agent witnesses a man helping others through the international border fence. Shortly, a marked border patrol vehicle arrives on the scene and the off-duty officer identifies the smuggler who is detained for deportation proceedings. At the hearing in immigration court, the smuggler’s attorney seeks to impeach the off-duty officer’s identification by questioning the off-duty officer about marijuana, cocaine or other drug use. The point of such questions would be to show that the officer’s perception of the smuggler and the events was impaired.

The adjudicator would want to sustain any objection to such questioning. If there is no evidence to otherwise suggest the officer was using drugs or under the influence of drugs, such unfounded questions need not be allowed. It would be little more than a fishing expedition by the questioner who has only the hope that something helpful might be uncovered. *See In Interest of M. M.,* 690 A.2d 175 (Pa. 1997) (holding that questions about alcohol use or bar hopping cannot be asked without some minimal foundation).

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Even the party calling the witness can impeach that witness. Under the common law, a party calling a witness could not impeach the witness because the party calling the witness was deemed to vouch for the witness’s credibility. However, that rule has passed from favor, and it is now generally held that either party can impeach any witness, including the party who called the witness.

[11.3.2] Extrinsic Impeachment Evidence

An executive adjudicator should avoid the receipt of extrinsic impeachment evidence (i.e., evidence produced by calling another witness, introducing documents or other real evidence) which is merely an attack on a collateral matter. Impeachment can be accomplished by cross-examination, by calling other witnesses to contradict a witness or by the introduction of non-testimonial evidence. Impeachment evidence ought to be limited to relevant, material and non-cumulative evidence. This will avoid the waste of time.

For example: Officer Jones testifies he saw the driver weaving across the road and stopped the driver near a large oak tree. When the driver exited the car, he reeked of alcohol and exhibited such classic signs of intoxication as slurred speech and staggering. The driver may offer a witness to contradict Officer Jones by testifying that there are no oak trees along the road in that area, only maples trees. The purpose of such testimony would be to impeach Officer Jones by suggesting that since he was wrong about one matter, he might well be wrong about others. It is irrelevant whether the tree was a maple or an oak. If the only purpose in calling the witness is to simply contradict the officer about the species of tree, that testimony need not be received. The testimony is about a collateral matter.

[11.3.3] Relevance, Materiality, and Waste of Time

The common law collateral matter limitation on impeachment seems hinged conceptually on issues of relevance, materiality and waste of time. The modern approach is broader. Relevant evidence can be excluded from evidence where its admission would be unfairly prejudicial, confusing or misleading, or where it would cause unnecessary delay, waste time or be needlessly cumulative.

Other jurisdictions are less expansive in permitting the exclusion of evidence and tend to limit exclusion of evidence to irrelevant or immaterial evidence. Even in these jurisdictions, “unduly repetitious” evidence (even if relevant) can be excluded.

[11.3.4] Points to Remember on the Basics of Impeachment

- Do not allow either party to fill the record with repetitious evidence, whether on issues of impeachment or otherwise. However, the adjudicator must permit the party’s whose evidence is excluded to make an offer of proof so that the matter is preserved for review or appeal. An offer of proof permits a party to place the excluded evidence on the record.
- Some jurisdictions permit the party whose evidence is excluded to make a brief statement on the record by describing the testimony excluded.
- Other jurisdictions seem to require that the excluded evidence be included verbatim in the record. These jurisdictions seem to require that the testimony be taken and preserved even though the objection to it is sustained. E.g., D.C. Mun. Regs. Title 6 § 627 (relating to appeals by city employees).
• In some proceedings, Oregon allows the adjudicator to determine how the offer of proof should be made. See Or. Admin. R. § 138-085-0850 (permitting offer of proof to be “in a form determined by the administrative law judge” in hearings under the Safe Employment Act). Certainly by proceeding with the examination, even after having sustained an objection, the adjudicator best preserves the issue for appeal. However, this will consume much more time than simply allowing a detailed but brief statement on the record of what the evidence would be and why it is relevant.

• If the evidence about which an objection is sustained consists of documentary or other non-testimonial evidence, it should be marked for identification and included in the record.

• Another way to avoid the receipt of repetitious or cumulative evidence and to generally reduce the amount of testimony and time required is to seek stipulations from the parties. This can be done on the record during the proceeding to eliminate the need to hear from certain witnesses. For example, if a party has four different witnesses who will testify about another witness’s reputation for honesty, the adjudicator might ask the party to summarize what he or she expects each of the four witnesses to say, and then ask opposing counsel to stipulate that the witness would testify as described if he were asked.


Whether a given witness or evidence has been impeached is ultimately a question of fact. Although there is much jurisprudence about what can amount to impeachment or what might be used in evidence to impeach, the question is one of fact: Is the witness (evidence) worthy of belief or “credible?” The answer will depend on the degree to which the adjudicator has been persuaded by the impeachment evidence.

[11.4.1] Collateral Impeachment

Do not let the attorneys ask unfounded questions. The adjudicator has a duty to protect witnesses from unfounded questions and a duty to prevent a questioner on a fishing expedition from filing the record with irrelevant or immaterial information. Either side can attack the credibility of a witness, including its own witness. Do not let the parties produce evidence on collateral matters under the guise of impeachment.

Relevant evidence can be excluded when it is repetitive or cumulative. Whether a witness or evidence has been impeached is dependent upon whether the evidence diminishes the adjudicator’s belief in the credibility of the witness or evidence.

[11.5] MODES OF IMPEACHMENT

[11.5.1] Competence

To be a witness, every witness must be a competent witness (or as others say, have the capacity to be a witness). To be competent, the witness must have perceived the events about which the testimony is given, have a recollection or memory of it, and be able to communicate the memories to the fact finder. The witness must also take an oath or otherwise affirm that he or she will tell the truth.
[11.5.2] The Oath
The oath or affirmation impresses on the witness the purpose of testifying—telling the truth. The hearing is a search for truth, a fact-finding mission so that the law can be applied to the facts. The mission goes awry if the truth is subverted. So, the witness must tell the truth. The oath or affirmation also brings the witness within the reach of perjury statutes. Most, if not all jurisdictions require that testimony be given under oath or affirmation. If the witness will not take the oath or in some way affirm that he or she understands the obligation to tell the truth, then that person cannot be a witness.

[11.5.3] Checklist on Modes of Impeachment

☐ Ensure that the oath or affirmation is administered to every witness.
☐ Be flexible about the oath. If a witness will not swear, then the witness must be asked to affirm that he or she will tell the truth. If the witness expresses other objections to the specific language of the oath or affirmation, then an effort should be made to accommodate the witness. E.g., United States v. Ward, 989 F.2d 1015 (9th Cir. 1992, amended 1993) (holding court should have permitted witness to substitute “fully integrated honesty” for the word “truth” in the oath).
☐ When a young child or a person whose mental competence is in question appears as a witness, the adjudicator may feel compelled to inquire about the witness’s understanding of truth and falsehood. This inquiry or voir dire into the witness’s understanding of the oath may be undertaken at the outset of the testimony. If the witness does not understand the significance of and the difference between truth and untruth, then many will argue that the witness is not a competent witness. If that is the approach the adjudicator takes, then the child witness must be excused.

[11.5.4] Perception, Memory and Communication
To be a competent witness, the witness must have perceived or experienced that about which he or she will testify. Unless testifying as an expert, he or she must have seen, heard, smelled, tasted or felt it. Also, since hearsay is generally admissible in administrative proceedings, personal knowledge or personal experience is not strictly required. The witness likewise must have a memory of the experience.

Photographs may prove that the witness was present at the scene of an occupational accident, but if the witness has no memory of the event, the witness can say nothing of importance.

Likewise, the witness may have experienced the events at the scene of the accident and may have a definite memory but be unable to communicate the memory because of a stroke, for example. In such a case, the witness would lack the capacity to be a witness and would be incompetent as a witness on this point. In past practice, if voir dire of the witness showed the witness was unable to perceive, remember, or communicate, then the witness would be excused as incompetent.

The FRE, however, suggest an alternate approach. While the FRE are not directly applicable in administrative proceedings, they can be a valuable guide. FRE 601 says “every person is competent to be a witness . . . .” The rule makes the issue of the value of the witness turn on credibility, not competence. The witness is tested by cross examination and the testimony weighed against other evidence in the record. The witness’s ability to perceive, to remember and to communicate is not
explored by *voir dire* at the outset of the testimony but is instead developed by the
proponent of the witness. The opposing party attempting to impeach the witness
will then question the witness so as to expose failures of perception, memory or
communication. Thus, the issue is not one of competence, but credibility. However,
FRE 602 requires that the witness have personal knowledge to be a competent
witness. The requirement of personal knowledge is not as essential in administrative
proceedings because hearsay can generally be admitted in administrative
proceedings. Still, many jurisdictions require personal knowledge by the witness in
certain administrative proceedings. Generally, hearsay is admissible in
administrative proceedings, and the requirement of actual personal knowledge is
relaxed.

[11.6] IMPEACHMENT RELATING TO CHARACTER

These categories of impeachment relate to facts about the witness's own
bias, prejudice, interest, corruption, prior conviction, prior bad acts, and reputation
for veracity or honesty. Interestingly, in Illinois, "questions impeaching the
witness's character" are prohibited in certain mental health proceedings. Ill. Admin.
Code Title 59 § 112.10(a)(2)(B). Always know the specific rules of your
jurisdiction.

[11.6.1] Bias

Bias relates to whether the witness favors one side or the other. The wife of
the claimant may be biased in favor a worker compensation claimant. Of course, she
might also be completely objective and honest. A relationship does not necessarily
lead the adjudicator to conclude that the witness is unworthy of belief. However,
such a close relationship certainly raises the possibility of bias. The relationship
need not be familial. Human emotions can lead to bias. One may simply feel sorry
for another who is suffering and then color the testimony in favor of the sufferer.

Being members of the same club, alumni of the same law school or
members of the same religious sect may set the stage for potential bias and inquiry
could be fairly had into such relationships. Generally, a witness cannot be queried
about religious beliefs to impeach or rehabilitate the witness, but membership in the
same sect has been held as a permissible matter for inquiry for impeachment. *Malek
v. Federal Ins. Co.*, 994 F.2d 49 (2d Cir. 1993). Bias, like prejudice, can be an
inquiry into complex issues of motivations and feelings within the human psyche.

[11.6.2] Prejudice

Prejudice is the opposite of bias; it relates to the witness's predisposition
against one side or the other. If the Grand Dragon of the Ku Klux Klan testifies at a
driver's license suspension hearing that he saw a black Catholic priest weaving
from side to side while driving, the fact finder might suspect the credibility of that
witness. Prejudice plainly seems an issue. As above, prejudice may be the sour fruit
of many other experiences of associations, such as school rivalry, religious
chauvinism, racism, nationalism, ethnocentrism or gender prejudice.

[11.6.2.1] Point to Remember on Prejudice

- As a cross-examiner searches for bias or prejudice, the adjudicator will want to
  guard against being dragged along on a fishing expedition where the questioning
  is premised on a mere hunch. This need to control fishing by questioners will be a
  frequent point made in this chapter.
[11.6.3] Interest in the Outcome

Interest relates to a stake in the outcome. For example, in a worker compensation matter, the owner of the business likely has a stake in the outcome. A finding that the disease is an occupational disease may subject his business to more claims and increase the premiums that must be paid. An increase in such expense will affect the profit margin of the business. Consequently, the owner has a stake in the outcome even if the payment of the claim is out of a state financed fund. The claimant also has a stake in the outcome.

Interest may also be found in the case of experts who are paid by one party or another. Suppose the same doctor is called by a corporation in all of its worker compensation cases to dispute the presence of any occupational lung disease in coal miners. Suppose that same doctor, though in private practice, earns one-third of his income from examining claimants sent to him by the corporation. The adjudicator may well conclude that the doctor has a monetary interest in the outcome of the matter. Thus, the doctor’s credibility may be questionable.


Corruption relates to bribery or other similar improper motive. If a witness tells his or her tale because he or she has been bribed, then he or she is unworthy of belief. This method of impeachment, however, also involves the issue of perjury and interest. While experts are paid, they are not paid to testify in a given way, but rather to testify as to the conclusion to which their expertise leads them. Experts may have an interest in the case that affects their credibility, but typically this is not an issue of corruption or bribery.

[11.6.5] Prior Convictions

Prior convictions can reflect upon the credibility of a witness. Certainly, though, not every crime will do so. A person convicted of jaywalking is not likely to be incredible or unbelievable simply because of that conviction. However, the testimony of a witness convicted of perjury – lying under oath – will surely be suspect when he or she subsequently takes the witness stand.

Generally, for a prior conviction to affect credibility, the conviction must have involved dishonesty or false statements or be a crime of moral turpitude. FRE 609 permits the proof of any felony unless to do so would be unduly prejudicial. *Also see* 29 C.F.R. § 18.609 (2003) (U.S. Dept. of Labor).

How remote in time the conviction occurred will likely be a matter relating to the persuasiveness of such evidence. The testimony of a witness convicted of perjury last year is likely more suspect than that of a person convicted of false testimony 28 years ago, though in the totality of the circumstances even a remote conviction may be properly produced for impeachment. FRE 609 generally limits impeachment evidence to crimes no more than 10 years old, although it provides for the use of older convictions if the probative value outweighs the prejudicial effect.

[11.6.6] Prior Bad Acts

Prior bad acts which are immoral or criminal (relating to fraud, dishonesty or crimes of moral turpitude) can sometimes be used to attack the credibility of a witness. FRE 608; 29 C.F.R. § 18.608(b) (2003) (U.S. Dept of Labor); 33 C.F.R. 20.1309 (2003) (permitting the use of disciplinary record in formal administrative proceedings of the U.S. Coast Guard). For example, a witness who has previously
lied under oath and thereby committed perjury is of the same questionable character as the convicted perjurer. The lack of a conviction is not significant on the question of the witness’s credibility as long as the adjudicator knows that the perjurer was a perjurer.

The fact of conviction is not what bears on credibility; rather the fact of the witness’s character bears on the question of the witness’s credibility or worthiness of belief. Such would be the case whether the prior bad act was fraud, embezzlement, perjury, forgery or any other crime involving an element of fraud, deceit or falsehood. Prior bad acts can include bad acts which may not necessarily be crimes, such as cheating in law school or plagiarizing in a doctoral dissertation.

This method of impeachment poses several courtroom problems. First, there is the Fifth Amendment which allows a witness to decline to answer a question which might incriminate him or her. A witness is asked “Didn’t you push your mother down the basement steps and kill her to get the insurance and then lie to authorities about how it happened?” The question is objectionable as compound, but if the witness answers “yes,” one can fairly wonder about the witness’s character. Likewise, if the witness answers “yes,” a murder charge, among others, are apt to follow.

The witness can decline to answer by asserting his or her Fifth Amendment privilege against self-incrimination. If the witness declines to answer, however, some jurisdictions permit the adjudicator to take an adverse inference and conclude that had the witness answered, the answer would have been contrary to his or her interests, i.e., the witness would have answered “yes.” This inference will allow the adjudicator to fairly discredit the testimony of the now silent witness.

Second, questions about prior bad acts must be asked in good faith. This is a common requirement for questioning of any witness. There must be some basis or foundation for the questioner to pose such questions as “did you lie about your education on your state bar application?”

Third, questions about prior bad acts raise a collateral issue. If the witness denies the prior bad act, then the questioner is not allowed to produce other evidence to contradict the witness’s answer. Suppose the witness above denied that he pushed his mother down the stairs, but the questioner has a priest, a minister, a rabbi, and an imam waiting in the wings to say they saw the witness murder the poor woman. Those religious witnesses cannot be called. The case will not be turned into a mini-murder trial. Extrinsic evidence to prove prior bad acts is not generally allowed. FRE 608(b).

[11.6.6.1] Points to Remember on Prior Bad Acts

• If the adjudicator allows impeachment based on prior bad acts, the acts should amount to immoral activities and crimes of moral turpitude, dishonesty or fraud which are not so remote in time as to be of little weight.

• The adjudicator must ensure that such potentially scandalous questions are posed in good faith and are not merely the hunches of a questioner on a fishing expedition. The adjudicator also must protect the record from being filled with collateral matters.
[11.6.7] Reputation
Reputation for honesty or veracity or opinion about honesty can be examined for purposes of impeaching a witness. FRE 608(a); 29 C.F.R. § 18.608(a) (2003) (U.S. Dept. of Labor). A separate witness can be called to attack the first witness’s character by testifying that the first witness has a reputation for dishonesty. This method of impeachment requires that the reputation be within a community where the first witness lives, works, or goes to school. In other words, it must relate to a reputation within a community that has significant contact with the first witness. The issue is the reputation of the first witness in a community, not simply the personal opinion of the second witness.

The credibility of any witness’s truthfulness may be attacked by evidence in the form of either opinion or reputation testimony as to the character of the witness for truthfulness. FRE 608(a)(1).

[11.6.7.1] Point to Remember on Reputation
- The adjudicator must be sure to understand whether the attacking witness is testifying about the reputation of the first witness or simply giving a personal opinion about the character of the witness. One person’s opinion about another’s character may not be nearly as powerful as the community’s assessment of his or her character. Thus, the difference between reputation and opinion is important.

[11.7] IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT
If a witness testifies as to one fact and the evidence shows that the same witness has previously said or written something contrary to his or her testimony, then the credibility of the witness comes into question. FRE 613; 8 C.F.R. §1240.7 (2003) (permitting receipt into evidence of any prior oral or written statement material and relevant to any issue in immigration court proceedings); 49 C.F.R. §209.8 (2003) (permitting the use of prior deposition to impeach a witness under railroad safety enforcement procedures). This method of impeachment requires that the witness have made a prior inconsistent statement or adopted a prior inconsistent statement.

For example, suppose at a hearing, a worker compensation claimant says he was injured when he fell from a ladder while changing a light bulb at his work site. However, when he filed his accident report, he said he fell getting off the city bus which transported him to work. His injury might still be compensable, but his credibility is properly called into question by the adjudicator. The witness said one thing one day and something different on another day. The adjudicator must wonder about the witness’s honesty.

[11.7.1] Draw From the Answer, Not the Question
A questioner’s mere suggestion that there was a prior inconsistent statement is not enough. A question is not evidence. No doubt about the credibility of the witness ought to grow merely from the question; rather, the answer is the evidence. If the witness makes it easy and admits having made the prior inconsistent statement then there is no problem. But if the witness denies having made or adopted the prior inconsistent statement, the question then is whether the issue is collateral and whether extrinsic evidence can then be offered to disprove the witness’s answer.
[11.7.2] Collateral Claims and Extrinsic Evidence

In essence whether a matter is collateral or not depends on whether it is important or not. In the example above, it is important whether the injury occurred on the employment premises or not, or whether the injury occurred in the course of employment. If the witness denies making the prior statement, the opposing party can prove the inconsistent statement with extrinsic evidence. Another witness might be called to testify about having heard the prior inconsistent statement or the previously filed written accident report might be introduced.

On the other hand, if the witness testified that after his injury he went home, ate a cinnamon bun and went to bed, but had said in a prior inconsistent statement that he had eaten a candy bar, extrinsic evidence cannot be introduced to prove the prior inconsistent statement. If the witness denied having said he ate a candy bar, that is the end of the inquiry. Certainly the inconsistency, if proved, may show in some degree or another that the witness is not honest or is forgetful and thus incredible. But, whatever it was a candy bar or a bun is not important. It is a collateral matter. Whether he fell getting off the bus on the way to work or while installing a light bulb at work is important in a worker compensation claim, and therefore not collateral.

[11.7.3] Leading to the Prior Inconsistent Statement

Sometimes the use of a prior inconsistent statement raises objection because of the place the prior statement was made or how the prior statement was obtained. For example, a criminal defendant's illegally obtained statement about his role in a drug scheme cannot be used to prove the case in chief but can be used to impeach the defendant, if the statement is otherwise trustworthy. Harris v. New York, 401 U.S. 222 (1971). In considering an administrative deportation proceeding, the Supreme Court has suggested a balancing test weighing the probable deterrent effect of suppression of the evidence against the need for the evidence. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). The illegal evidence in Lopez-Mendoza was offered in the case in chief by the Immigration and Naturalization Service to prove an alien's deportability, not to impeach the alien. The balancing test of Lopez-Mendoza does not seem to apply when the issue is impeachment, but may nevertheless be of importance on the issue of admissibility of illegally obtained evidence which will be used to prove the administrative charge or meet the agency's burden in an administrative hearing. Given the Court's willingness to allow impeachment by an illegally obtained prior inconsistent statement in a criminal case, it seems unlikely that a different approach would be necessary in administrative proceedings.

[11.7.4] Points to Remember on Impeachment by Prior Inconsistent Statement

Impeachment tests credibility. Just because a witness has, for example, been convicted of crimes of dishonesty and also admits prior bad acts of fraud, it does not necessarily follow that the witness is incredible.

- The adjudicator must examine the totality of the evidence to determine who to believe or what evidence to credit. There can be honor among thieves. A convicted perjurer could be telling the truth in a subsequent matter. A mother could be honest about her son. A wife could be prejudiced against her husband.
In the end, the adjudicator has the very difficult task of determining whom to believe. These historic modes or methods of impeachment explore credibility, but do not in themselves answer the question of whether the witness or the evidence is credible. Answering that question is for the adjudicator based on the conclusions made from the evidence produced through the parties’ use of these impeachment modes.


4 E.g., Ala. Admin. Code R. § 34-24-173; Conn. Agencies Reg. § 22a-2a-6(s)(5) (relating to procedures before the Conn. Dept. of Environmental Protection); Ga. Comp. R. & Regs. § 616-1-2-18(6) (relating to hearings before OSHA administrative law judges); Ill. Admin. Code 62 § 300.70(g)(3) (relating to surface mine reclamation hearings); Tex. Admin. Code Title 4, § 1.20(4) (relating to hearings before the Tex. Dept. of Agriculture).


6 See, e.g., Cal. Admin. Code Title 2 § 1187.7(c) (requiring applicant for subpoena to swear that person to be subpoenaed has knowledge of matters being heard before the Commission on State Mandates); Conn. Agencies Regs. § 31-237g-22(a)
(requiring witnesses to have "actual personal knowledge" of facts in question in appeals to the referee in unemployment compensation claims).
Chapter 12 – The Exclusionary Rule in Administrative Proceedings

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[12.1] DEVELOPMENT OF THE RULE

The Supreme Court has addressed the rule that evidence obtained illegally in violation of a privilege or a constitutionally protected right cannot be used by the government in the prosecution of a criminal case even if the evidence is relevant and goes to the heart of the matter.

[12.1.1] Federal Law

In *Boyd v. United States*, 116 U.S. 616 (1886) the Supreme Court held that the doctrines of the Fourth and Fifth Amendments guard against governmental intrusion: “Any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation [of those amendments].” 116 U.S. at 630.

In *Weeks v. United States*, 232 U.S. 383 (1914) the Court adopted the exclusionary rule for federal criminal proceedings as an application of the principles of the Fourth Amendment, recognizing that the cost may be to invalidate certain governmental investigations.

The efforts of the court and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

[12.1.2] State Law

In *Mapp v. Ohio*, 367 U.S. 643 (1961) the Supreme Court held that the exclusionary rule was a part of the Fourth Amendment made applicable to the states through the Fourteenth Amendment. The Court not only recognized the significant deterrent effect of the rule, but also the fact that by not making it applicable to the states there was a real likelihood of connivance between state and federal law enforcement officers. Collusion between state and federal police and prosecutors was given as a reason for the doctrine:

In nonexclusionary states, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State’s attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been soon eliminated.


The Supreme Court in fashioning the exclusionary rule rejected arguments such as:

- Let the agent’s supervisor discipline the agent if he or she violates someone’s rights, but don’t exclude otherwise relevant evidence from the criminal prosecution. Justice Douglas, concurring, found that officers were rarely disciplined. 367 U.S. at 670.

- Let the injured party sue the agent and collect damages resulting from the violation of constitutional or statutory rights, but use the evidence in the criminal case. The Court found that officers were rarely sued. *Id.*

The Court held that the exclusion of the illegally obtained evidence was the best way to deter law enforcement officers from violating the rights of citizens, since the illegal evidence could not be used in court.

[12.2] GOOD FAITH EXCEPTION

Over time there has been an attempt to erode the application of the exclusionary rule by the creation of a “good faith” exception. Under the exception, the illegally obtained evidence would be admitted into evidence if the officer acted in good faith although in violation of the Constitution, when he obtained it. In 1984, the Supreme Court adopted a “good faith” exception in *United States v. Leon*, 468 U.S. 897 (1984). The Court held that evidence obtained in reasonable reliance on a defective search warrant was held admissible.

[12.3] APPLICATION OF THE EXCLUSIONARY RULE IN ADMINISTRATIVE LAW

[12.3.1] Federal Law

In *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923) the Supreme Court stated, “It may be assumed that evidence obtained by the Labor Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings.” 263 U.S. at 155. In *Wong Chung Che v. INS*, 565 F.2d 166 (1st Cir. 1977) the Court of Appeals held that papers obtained by INS agents in an unlawful search were inadmissible in deportation proceedings.
[12.3.2] State Law


[12.3.3] The Balancing Test – *Janis* and *Lopez-Mendoza*

In *United States v. Janis*, 428 U.S. 433 (1976), the Supreme Court addressed the question of whether to apply the exclusionary rule in a federal civil tax assessment proceeding following the unlawful seizure of evidence by state law enforcement officers. The Court announced a balancing test, requiring that the trial court weigh the probable deterrent effect of suppression against the need for the evidence.

The Court held that two factors suggested that the deterrent value of the exclusionary rule was slight in this type of proceeding:

- First, the Court found that state law enforcement officials were, in fact, "punished" because the illegally seized evidence was suppressed at the state criminal trial and therefore the additional deterrent effect was marginal; and
- Second, the evidence would likewise be excludable at any federal criminal trial.

In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) the Court interpreted the *Janis* balancing test in a new and restrictive fashion. The Court refused to suppress illegally obtained statements in an immigration deportation proceeding even though, unlike in *Janis*, the evidence was taken by the same agency of the same sovereign. The Court discussed *Janis* and its balancing test. "On the benefit side of the balance, the 'prime purpose' of the [exclusionary] rule, if not the sole one, is to deter future unlawful police conduct." *Id.*, at 446, quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974). On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." *Lopez-Mendoza*, 468 U.S. at 1041. The Court applied the *Janis* cost-benefit analysis test and determined that the exclusionary rule should not be applied to suppress illegally obtained evidence presented in civil deportation hearings because there are so few hearings and there are other remedies to curb abuses by INS agents. But, the Court noted that its conclusion might change if there is evidence that INS violates the Fourth Amendment on a widespread basis.

[12.4] EXCLUSIONARY RULE IN ADMINISTRATIVE LAW

[12.4.1] Federal Agencies

The courts have distinguished forfeiture cases from other federal administrative actions, finding in *United States v. $37,780 in U.S. Currency*, 920 F.2d. 159 (2d Cir. 1990), that "an illegal seizure of property does not immunize that property from forfeiture, that the property itself cannot be excluded from the forfeiture action, and that evidence obtained independent of the illegal seizure may be used in the forfeiture action." 920 F.2d at 162-163.

A number of immigration cases apply the *Lopez-Mendoza* balancing analysis, as in *United States v. Valdez*, 917 F.2d 466 (10th Cir. 1990). This was an
appeal from a criminal conviction of illegal entry where the respondent complained that the administrative law judges never advised him of his right to remain silent during the hearings in violation of both his constitutional rights and INS regulations. The court held that deportation proceedings are “civil in nature, not criminal, and various constitutional protections associated with criminal proceedings therefore are not required.” Id. at 467, citing Michelson v. INS, 897 F.2d 465, 467 (10th Cir. 1990).

The court of appeals in the case of In Re Establishment Inspection of Hrn Iron Works Dep’t of Labor OSHA v. Hrn Iron Works, Inc., 881 F.2d 722 (9th Cir. 1989) held that the exclusionary rule did not apply in contempt proceedings to enforce an administrative search warrant issued as part of a civil OSHA inspection.

Pa. Steel Foundry and Mach. Co. v. Sec’y of Labor, 831 F.2d 1211 (3rd Cir. 1987) held that even though an OSHA warrant procedure was defective, the exclusionary rule did not apply when the Secretary of Labor violated his own rules because the “violation of the regulations did not implicate any constitutional question and that therefore its ‘precedents enforcing the exclusionary rule to deter constitutional violations provide no support for the rule’s application in this case.’” 831 F.2d at1218-19, citing United States v. Caceres, 440 U.S. 741, 755(1979).

For a general discussion, see Marjorie A. Shields, Annotation, Admissibility, in Civil Proceeding, of Evidence Obtained Through Unlawful Search and Seizure, 105 A.L.R.5th 1, §§ 3, 11(b)(2003).

[12.4.2] State Law

[12.4.2.1] Exclusion Under State APA

A state may apply the exclusionary rule in administrative proceedings based upon the state’s constitutions. In Turner v. City of Lawton, 733 P.2d 375 (Okla. 1986) the Oklahoma Supreme Court considered the question of whether evidence obtained via a search warrant held invalid and suppressed in a criminal action may be admitted in a related civil administrative proceeding. The court relied on its own state constitution, in order to apply the exclusionary rule to suppress the evidence. But see Scott Meacham, Note, Evidence: The Exclusionary Rule in Civil Administrative Hearings: Turner v. City of Lawton, 40 Okla. L. Rev. 320 (1987) (criticizing the apparent scope of the Oklahoma court’s ruling in Turner). It appears that the Oklahoma decision is unique, having gained no foothold in other states.

[12.4.2.2] No Exclusion Under State APA

Some states follow the rationale of Lopez-Mendoza and refuse to apply the exclusionary rule in administrative proceedings. Dichtl v. Iowa Beer and Liquor Control Dept. Hearing Bd., 422 N.W.2d 480 (Iowa 1988) held that the exclusionary rule did not apply to the revocation of a liquor license:

[We] apply a cost-benefit framework in order to determine the propriety of the exclusionary sanction, balancing the potential benefits of excluding unlawfully seized evidence against the resulting costs to societal interests . . . see also INS, Lopez-Mendoza, 468 U.S. 1032, 1041 (1984); Kain v. State 378 N.W.2d 900, 901-02 (Iowa 1985) . . . . The imposition of an exclusionary sanction in this license suspension proceeding would have little force in deterring unlawful police action, the sanction’s purpose
[citations omitted]. This is because the suspending authority—here the Iowa Beer & Liquor Control Department—does not control the actions of either local police officers or the department of public safety.

Diehl v. Iowa Beer and Liquor Control Dept. Hearing Bd., 422 N.W.2d at 481.

Some states simply refuse to apply the exclusionary rule in administrative proceedings and do not discuss the Lopez-Mendoza rationale. In Commw. Dep't of Transp. v. Wysocki, 535 A.2d 77 (Pa. 1987) the Supreme Court of Pennsylvania held that a driver stopped at a road block who then displayed probable cause and was offered a blood alcohol test could not suppress the evidence of his refusal to submit to the test on the basis of a stop in violation of the Fourth Amendment. The court held that the legality of the stop was irrelevant because "the driver's guilt or innocence of a criminal offense is not at issue in the license suspension proceedings." 535 A.2d at 79. The Wysocki court does not discuss Janis or Lopez-Mendoza.

[12.5] THE COST-BENEFIT ANALYSIS

In applying Lopez-Mendoza and Janis, the ALJ will need to engage in the kind of balancing now commonplace in Fourth Amendment suppression analyses. Thus, in City of Omaha v. Savard-Henson, 615 N.W.2d 497 (Nebr. Ct. App. 2000), where a city employee's employment was terminated because of alleged drug use at work, the employee challenged the termination before the personnel board of review. The board excluded evidence said to be obtained illegally, and the employer appealed. In balancing the social benefits of excluding the evidence in the employment setting against the likely costs, the court of appeals found that there was minimal deterrent effect on police misconduct, but substantial benefit in accurately assessing appellee's employment status. Further, the good faith exception to the exclusionary rule strongly mitigated against using the rule in this administrative context. The court remanded the matter with instructions to order a new hearing before the board:

In INS v. Lopez-Mendoza the Court discussed its holding in United States v. Janis, supra, which provided for a balancing test to determine whether or not the exclusionary rule should be used in a particular proceeding. The Court stated:

The Court recognized in Janis that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side of the balance "the prime purpose of the [exclusionary] rule, if not the sole one, is to deter future unlawful police conduct... On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs."

Savard-Henson, supra, 615 N.W.2d at 570.

[12.6] JUDICIAL DISCIPLINARY ACTIONS

Judicial disciplinary actions may present different issues. In the matter of Honorable Leon Jenkins, 465 N.W.2d 437 (Mich. 1991), the Michigan Supreme
Court reviewed the Judicial Tenure Commission’s findings and conclusion that a judge was guilty of misconduct.

Respondent contends that the master erred by not suppressing the surreptitiously recorded conversations between respondent and Dikow, which were obtained with Dikow’s consent but without any warrant or finding of probable cause. Such “participant recordings” are not “searches or seizures” for purposes of the Fourth Amendment and are not covered by the federal exclusionary rule. See United States v. White, 401 U.S. 745 (1971). Respondent correctly notes, however, that these recordings would be inadmissible in a state criminal proceeding under Michigan’s exclusionary rule as set forth in currently prevailing case law . . . . Furthermore, while the federal exclusionary rule has generally not been applied outside the criminal context . . . Michigan’s exclusionary rule has in certain cases been applied to civil proceedings (citations omitted).

Judicial disciplinary proceedings, however, are fundamentally distinct from all other legal proceedings, whether civil or criminal. See In re Mikeshell, 243 N.W.2d 86 (Mich. 1976) . . . . The purpose of these proceedings is not to impose punishment on the respondent judge, or to exact any civil recovery, but to protect the people from corruption and abuse on the part of those who wield judicial power . . . . While the unique character and purpose of judicial disciplinary proceedings might incline us not to apply the exclusionary rule in this context, we need not reach that conclusion in this case. The record contains more than ample evidence, apart from the recorded conversations, to support the findings of the master and the commission.

Leon Jenkins, 465 N.W.2d at 322-323.

[12.7] MOTOR VEHICLE SUSPENSIONS IN DUI ACTIONS

Drivers appealing the administrative suspension of their driver’s license as a result of collateral DUI proceedings will often raise issues about unlawful stops. The ALJ must be alert to the possibility that the cost-benefit balancing required under Lopez-Mendoza may be beyond the scope of the administrative proceeding. In Powell v. Sec’y of State, 614 A.2d 1303 (Me. 1992), the trial court determined that the exclusionary rule associated with the Fourth Amendment applies to administrative license suspension hearings and that the hearing examiner should have considered whether the evidence presented in the administrative proceeding was obtained in violation of Powell’s constitutional rights.

On appeal, the Maine Supreme Court reversed, in part, based on a cost-benefit analysis suggested by Lopez-Mendoza, and, in part, because the inquiry into the admissibility of the evidence was not within the enumerated powers delegated to the agency in these administrative proceedings:

Because the constitutionality of Powell’s stop is not an issue that the applicable statute requires or even allows the hearing examiner to decide, and because we are unpersuaded by Powell’s contention
that the federal Fourth Amendment exclusionary rule must be applied in administrative license suspension hearings, we vacate the Superior Court judgment and remand for entry of a judgment affirming the decision of the secretary of state.


[12.8] EXCLUSIONARY RULES BENCH CHECKLIST

☐ When a party seeks to exclude evidence upon grounds that it is “fruit of the poisonous tree” or is tainted by illegal governmental conduct, determine first whether this issue can properly be raised and is within the scope of the ALJ’s authority and the agency’s authority. This is particularly true in administrative license suspension cases involving DUI.

☐ Determine whether the proceeding is quasi-criminal in nature, or tending to be more criminal in its design. The closer to criminal the proceeding, the more likely an exclusionary rule may apply.

☐ If issues about the constitutionality may properly come before you, conduct the cost-benefit analysis set forth in Lopez-Mendoza.

☐ Identify on the record the costs of exclusion: Will the case be dismissed? Will a regulatory provision be nullified? Will there be a continuing danger to the public, etc.?

☐ Identify the benefit: Generally, the benefit of the exclusionary rule is deterrence of impermissible governmental intrusion.

☐ Determine whether the jurisdiction recognizes a “good faith” exception, or possibly requires an affirmative showing of bad faith as a predicate to exclusion.

☐ Articulate a balancing of the costs and benefits in your decision.
Appendix: Context, Organization & Style in Administrative Law Decisions

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INTRODUCTION

Unlike appellate decisions, which abide by long-standing organizational and stylistic conventions, the form and vocabulary of administrative law decisions vary greatly from agency to agency. Granted, some basic consistency of content exists in that most federal and state agencies require "[a] final decision, determination or order adverse to a party in an adjudicatory proceeding [to be set forth] in writing [and to] state in the record . . . findings of fact and conclusions of law or reasons for the decisions, determination or order." Even so, administrative law decisions do not resemble one another nearly as much as appellate decisions do.

While there is substantial agreement among administrative law judges that "findings of fact" are based on various kinds of evidence and that "conclusions of law" are based on constitutional, statutory, procedural, or decisional law, there is little consensus regarding the proper form and content of findings or conclusions or on the proper vocabulary of a decision. As the following examples show, some administrative law judges write findings and conclusions with almost enigmatic concision.

Finding of Fact

“On January 5, 1980, the respondent had on its premises 100 transformers, none of which were labeled as required by law.”

Conclusion of Law

“Respondent Bear Paw Corporation is in violation of the law.”

Others write complex and lengthy findings and conclusions in an effort to help the litigants and reviewing courts understand the reasons for the decision. Some judges use enumerated findings, some use narratives, some write principally for the interested parties, others for multiple or secondary audiences. To complicate matters still further, ALJ’s often rule on mixed questions of fact and law, a practice that blurs the distinctions between the two. Frequently, it is nearly impossible to distinguish between a finding of fact (“Claimant’s decedent John Krawchuk, age 52, on or about May 10, 1973, was employed by the defendant, The Philadelphia Electric Company. At the time his average earnings were $473 per week.”) and a conclusion of law (“Claimant’s decedent was employed by the defendant, Philadelphia Electric Co., on or before May 10, 1973, earning average weekly wages of $473.”) And, just as frequently, findings and conclusions are organized in perplexing, seemingly random patterns.

These problems and others cause litigants, lawyers and agency reviewers to complain that they cannot understand the rulings and provoke reviewing courts to remand cases for clarification. Part of the problem is that the writing and organization of these decisions are controlled by unstated and sometimes inconsistent statutory requirements, agency regulations, supervisory fiats and personal preferences. Consequently, unless the judge clearly indicates how the decision is organized and written, readers must make those determinations for themselves.

Using a combination of on-the-job experience, in-house training sessions, format manuals, "model" decisions, professional seminars and publications, ALJ’s eventually acquire a workable approach to decision writing, but do so without the benefit of the well-understood and widely accepted conventions that control, for example, most appellate decisions. While no such generally observed conventions are feasible given the nature and number of administrative law decisions, many ALJ’s seem to be receptive to regularizing decision writing practices (if only on an intra-agency basis) and to discussing the problems common to them all. From time to time, the *Journal of the National Association of Administrative Law Judges* and other journals have published articles on findings and conclusions that discuss the problems summarized above and suggest some remedies. The following observations and recommendations are part of this ongoing dialogue on how to improve the quality and readability of findings of fact and conclusions of law.
Modern appellate decisions are generally organized in a predictable pattern. After identifying the parties, the decision writer begins by describing the procedural and jurisdictional history of the case. After that comes a description of the issue(s) giving rise to the appeal, a recitation of the relevant facts, an analysis of the relevant law and its application to the case. The decision concludes with the disposition of the case. Sometimes the disposition is also given at the beginning of the case and some writers use an “orientation” paragraph to provide a short overview of the main points in the decision. In multiple-issue cases, this standardized pattern is sometimes repeated several times.

This pattern has several virtues, not the least of which is that it is reader-friendly. That is, because the pattern is familiar, readers can quickly sift through even extremely long opinions and find the information they are seeking.

This conventional pattern has evolved to meet the reader's need for critical, context-providing information at certain junctures in the opinion. By placing critical information (procedural information, issue statements, facts) at the beginning of the opinion, the opinion writers identify their principal legal and factual themes and, just as importantly, narrow the scope of the opinion. Moreover, this pattern has the rhetorical virtue of controlling the reader's expectations and, to some degree, the reader's response.

While administrative law decisions include some of the same organizational features as appellate decisions, they frequently do not include a clear, context-providing opening to help readers get their bearings on the substantive issues of the case. Unlike appellate judges who provide readers with a substantive legal context by summarizing and analyzing the law before applying it to the facts of the case, ALJ's place their findings of fact before their conclusions of law or reasons for decision. In doing so, they fail to provide a clear or detailed legal context for their application of the law. Consequently, their decisions sometimes seem elliptical, allusive and disorganized. While the organizational differences between appellate and administrative decisions are attributable in part to the different functions of each court, these differences nonetheless make administrative law decisions hard to read because readers must digest the facts of the case without knowing the complete legal context.

Starting with the statement of the issue(s) and continuing throughout the findings and conclusions, this “lack of context” is one of the primary reasons administrative law decisions are hard to understand.

**Issue Statements**

When describing issues, for instance, appellate opinions are usually very specific about the legal or factual point in contention, as in this First Amendment case:

Does the First Amendment prevail over copyright in a fair use case, where the copyrighted material was soon to be published by the copyright owner?
Experts may differ as to what constitutes "fair use" or "copyright," but the legal (First Amendment, copyright, fair use) and factual (soon to be published) context are clear to most readers.

a. Generic Issue Statements

By contrast, administrative law decisions frequently contain generic issue statements. Given the volume of decisions revolving around the same or similar issues, administrative law judges naturally and understandably develop their own shorthand for stating the issues. For example:

- The issues to be resolved are as follows: Medical causation, liability for certain past medical expenses, and mileage to and from medical treatment.
- The question is whether the evidence in the record establishes that the separation was a disqualifying event.
- The matter in dispute concerns the agency's decision to accelerate the appellant's rural housing loan account.

Generic issue statements like these do not usually create problems for the parties to the dispute because they are familiar with both the relevant legal principles and the facts of the case. Moreover, they are usually the ones who raised the issues in the first place. But other readers - colleagues, agency superiors, reviewing courts, potential litigants and their representatives - often have difficulty determining the exact nature of the disputed case. Sometimes, they must read most of the decision to discover the key law and facts and to understand the special vocabulary of the decision. Even then they may not accurately identify the law and facts the judge used to reach a decision.

To remedy the problems created by caption-like or generic issue statements, ALJ's should, whenever possible, create more precise and case-specific issue statements. Since, at the time the opinion is written, judges know exactly which legal provision(s) or fact(s) the case turns on, no good reason exists for creating a generic issue statement even in a routine case. While the case is still fresh in the judge's mind, it does not take a great deal more time to add relevant statutory references or key facts to the generic statements. In the following wage dispute case, for example, the judge has tailored the issue statement so that even non-parties will have a clearer idea of what the case is about:

Is Food Services, Inc. liable for civil penalties under S.C. Code Ann. Section 41-10-80(B) for violations of S.C. Ann. Section 41-10-40(D) (Supp. 1995) by failing to pay wages due at the time and place required by S.C. Code Ann. Section 41-10-30(A) (Supp. 1995)?

While non-parties may not know the particular requirements of the cited statutory provisions, they can nonetheless see that the first controls civil penalties, and the second controls the time and place for paying wages. The overall legal
context of the case is clear before the judge makes any findings of fact.

Not all issue statements need to explicitly refer to specific statutory provisions. In the following workers' compensation case, the question is whether the employee was injured while acting in the course of his employment:

The sole issue in this case is whether the employee had deviated from the course of his employment when he was injured while playing football during an employer-sanctioned work stoppage.

This issue statement narrowly focuses on deviation (as opposed to abandonment, horseplay, intoxication, personal comfort, etc.) within the broad concept of "in the course of employment" and on key facts (playing football during an employer-sanctioned work stoppage). Again, the issue statement helps understand both the legal and factual context for the forthcoming findings of fact.

If, however, in the interest of efficiency or time-constraints, judges must use generic or boilerplate issue statements, they can improve that boilerplate by creating a fill-in-the-blanks issue template that has slots available for the essential information: the specific legal provisions and the key facts necessary for resolving the case. Templates like the following one can help judges tailor their issue statements to individual cases,

UNDER (insert reference to applicable law); DOES/IS/CAN (insert legal question); WHEN (insert most important legally significant facts). For example:

Under Mo. Rev. Stat. §287.140, which limits travel reimbursements to those incurred "in the local area," is claimant's mileage reimbursable when she received medical treatment in counties where she neither lived nor worked?

In those cases in which the issue is one of law rather than fact, the judge should, at a minimum, indicate precisely what aspect of the law is at issue.

b. Issue Lists

A different kind of problem arises when judges list all the issues that arise in a case. The virtue of issue lists is that they function as both a checklist and an informal table of contents for the decision. They insure that no potentially relevant legal point is omitted. The following issue lists are extreme examples, but illustrate the issue-list approach in many administrative decisions.

Example #1

1) Did the nonconformity of the Aqua Solarium, i.e. the absence of a sunlamp and timer feature, substantially impair the unit's value to the plaintiffs?
2) Did the defendants cure the nonconformity?
3) Did the plaintiffs revoke their acceptance within a reasonable time after they
discovered or should have discovered the ground for the revocation?
4) Did the plaintiffs revoke their acceptance before any substantial change in the unit?
5) Were the defendants guilty of acts proscribed by T.C.A. Section 47-18-101, et seq., the Consumer Protection Act?
6) If so, were the plaintiffs entitled to treble damages under the provisions of T.C.A. Section 47-18-109 (a)(3)?
7) Were the plaintiffs entitled to the cost of the unit and the cost of its removal from their house as their measure of damages?
8) Were the plaintiffs entitled to attorney's fees and costs pursuant to T.C.A. Section 47-18-109 (e)(1), a part of the Consumer Protection Act?
9) If the plaintiffs were entitled to attorney's fees and costs, was the trial court's award reasonable under the circumstances of this case?

Example #2

1) Did claimant suffer a 4 percent work disability as a result of her injury of April 14, 1990?
2) Did claimant aggravate, exacerbate or intensify the injury suffered in April of 1990 in stepping off the curb and thereby twisting her ankle upon leaving the seminar of 10/12/90? If so, is either of the injuries compensable?
3) Is claimant unable to perform her duties as LPN for the respondent within the restrictions imposed by Dr. Brown?
4) Are Dr. Shaw's restrictions reasonable and necessary?
5) Has claimant suffered a 71.03 percent work disability following her second accident, following the fall from the curb on October 12, 1990?
6) Are claimant's injuries of the nature and extent alleged by claimant or as found by Judge Smith?

Although issue lists like these do identify each issue in the case, they do not let readers know which issue is most important nor do they clearly indicate what organizing principle lies behind the list. Moreover, these lists are sometimes misleading. Often the listed issues are not the ones addressed in the decision, or they are not discussed in the order presented, thereby frustrating the table-of-contents function.

Issue lists can also burden readers with the task of deciding which issue(s) is dispositive. Whenever possible judges should use captions or verbal clues to indicate which issues are key and which are subsidiary. No "issue" should be listed if it is not subsequently treated in the decision. And, finally, all issues should be discussed in the order they are first presented in the decision. Since issue statements are very often the first substantive point made in a decision, judges should review and revise them after they have completed their decisions to insure that they focus on the main points in the decision.
CONTENTIONS OF THE PARTIES

As an alternative (or supplement) to issue statements, judges can orient readers by simply describing the contentions of the parties. This approach allows decision writers to precisely identify the key legal concepts, select key facts, summarize opposing arguments and, in some cases, implicitly suggest how the decision will be organized. The following case concerned whether a jail inmate was a “covered worker” under the Washington State Industrial Insurance Act:

The record establishes that Stevens County elected coverage for volunteers in 1987, pursuant to the provisions of RCW 51.12.035. This section provides that a volunteer, under certain circumstances, can be included as a worker for the purpose of industrial insurance.

Stevens County argues that the inmate/trustee meets the definition of volunteer under this section, and the county has elected coverage, paid the premiums, and thus, the claim should be allowed.

The department argues that the inmate/trustee is not a true volunteer under the meaning of volunteer as set forth in RCW 51.12.035, and since there is no other provision of coverage, the claim must be rejected.

This next case concerned the dates and nature of a claimant’s injury:

Mrs. Canfield contends that due to the residuals of her 1969 industrial injury, she was temporarily totally disabled between February 2, 1979, and October 9, 1981. She further contends that as of October 9, 1981, her condition was in need of further curative treatment. Alternatively, [if] her condition is deemed fixed and medically stationary as of October 9, 1981, Mrs. Canfield asserts she is entitled either to a greater permanent partial disability award for her left leg, hip and knee residuals, or to receive benefits as a permanently totally disabled worker.

The department counters that the claimant’s injury-related condition was fixed as of October 9, 1981, and constituted only permanent partial disability which was properly compensated in the department order closing the claim.

If argument summaries like these appear near the beginning of the decision, readers will have an easier time understanding the upcoming findings of fact and conclusions of law.
FINDINGS OF FACT

Lack of context also frequently creates readability problems in the findings of fact because the ALJ's principle of fact selection and organization may not be clear, especially in the case of enumerated findings. ALJ's organize their findings in a variety of ways — sometimes according to statutory requirements or agency convention; and sometimes by party, by issue or chronologically. Unless readers can quickly see a pattern, the findings can appear to be randomly organized and disconnected. What's more, ALJ's frequently use technical or specialized vocabulary and other stylistic conventions that present difficulties to untutored readers.

a. Enumerated Findings

To insure ease of reference and to encourage precision and specificity, agencies and courts frequently require ALJ's to enumerate their findings. Faced with a long list of findings, readers may have problems connecting one finding with another, assimilating the information included in the findings, understanding the relevant context for the findings, or determining which findings are most important to the ultimate disposition of the case. For example, a federal ALJ's decision to deny a loan contained the following findings:

1. March 31, the FmHA County Supervisor (decision maker) notified the appellants of the FmHA's decision to deny them Rural Housing Loan assistance due to the following reasons:

   "The quality of your credit history is currently at an unacceptable level to receive a loan from the Farmer's Home Administration as evidenced by an outstanding judgment filed in July of 1992 (ITT Financial Services v. Smith) and four rent payments currently past due."

2. A credit report from Credit Bureau of Joplin, Inc. dated March 24, 1994, reveals that the appellant possesses one collection account to ITT Financial Services that has not been satisfied.

3. A disclosure statement dated February 1, 1988, between ITT Financial Services and the appellant reveals that the appellant paid the note in full September 8, 1992.

4. A satisfaction of judgment was filed by ITT Financial Services on May 11, 1994.

5. Form FmHA 410-8, "APPLICANT REFERENCE LETTER," dated March 15, 1994, reflects that the appellant is $400 delinquent in his rental payments.

6. Form FmHA 410-8, "APPLICANT REFERENCE LETTER," dated March 15, 1994, reflects that the appellant's rental payments are $50 per month.

7. Form FmHA, "APPLICANT REFERENCE LETTER," dated March 15, 1994, reflects that the appellant has been 90 days delinquent three times previously.
Findings like these create problems for most readers. These findings may be properly based on the evidence, but it is not immediately clear why finding number one appears first rather than sixth. Nor is the organizing principle for the rest of the findings clear. Enumerated findings, like all lists, emphasize the separateness of each item in the list. Readers can guess why the findings are in this order, but may guess incorrectly. Moreover, unless the writer provides some clear clues about overall organization and connections among the findings, readers must impose order on what appear to be disconnected pieces of information. Unless readers already know which organizing principles or statute the ALJ is relying on, the organization may appear random and the logical connections among the findings may be unclear.

b. Narrative Findings

To remedy this problem, ALJ's can write quasi-narrative findings and, for ease of reference, insert periodic enumerations to isolate specific facts. Narrative findings exploit the natural story-telling patterns of context, chronology, and relationships, and can help readers understand what has taken place. Moreover, as the following modification demonstrates, grouping related facts is easier in narrative findings and the writer can use transitions, parallel structure and other verbal clues to emphasize connections which may be left implicit in enumerated findings.

1. On March 31, 1994, the FmHA County Supervisor (decision maker) notified the appellant of FmHA's decision to deny them Rural Housing Loan assistance because “the quality of your credit history is currently at an unacceptable level to receive a loan from the Farmers Home Administration as evidenced by an outstanding judgment filed in July of 1992 (ITT Financial Services v. Smith) and four rent payments currently past due.”

2. A credit report from the Credit Bureau of Joplin, Inc., dated March 24, 1994, reveals that the appellant possesses one collection account to ITT Financial Services that has not been satisfied. However,

3. a disclosure statement dated February 1, 1988, from ITT Financial Services to the appellant reveals that the appellant paid the note in full September 8, 1992.


5. Form FmHA 410-8, "APPLICANT REFERENCE LETTER," dated March 15, 1994, reflects that the appellant is $400 delinquent in rental payments, that

6. appellant's rent payments are $50 per month, and that

7. the appellant has been 90 days delinquent three times previously.

The emphasized words provide subtle verbal clues which, along with the narrative approach, make it easier to understand the findings. A similar technique in a routine Workers' Compensation case makes it easier to understand the chronology of the case:

Prior to 1978, the employee worked approximately five or six
years for Entenmann’s Bakery and drove for Sealtest. From 1978 to 1987 the employee did assembly and production line work, first for Wonderbread and then for General Motors. The employee went to work for New England Frozen Foods, Inc. in 1987. He continued to work for this company as a high lift operator until he was injured on April 11, 1991. He has not worked since.

c. Relationships and Computations

When enumerated findings are required (statutorily or by an agency or supervisor), ALJ’s can use clarifying phrases to make those findings easier to follow. If, for instance, the findings focus on a series of related dates, the ALJ can insert information to help readers understand or perceive those relationships.

(Original) The employer became a self-insurer in September of 1991, the date of injury was May 9, 1991, the disability was claimed from March 19, 1992 to May 31, 1992, and then from February 4, 1993 to date and continuing.

(Modified) The employer became a self-insurer in September of 1991, 7 months and nine days before the date of injury, May 9, 1991. The disability was claimed for 2 months and thirteen days from March 19, 1992 to May 31, 1992, and then again from February 4, 1993 to date and continuing.

While the modified version adds a few words to the findings, it clarifies relationships among the facts by explicitly making the computations that are left implicit in the original. And, while readers could undoubtedly make those same computations, the modified version saves them the trouble. Any time the findings require readers to do computations (of dates, wages, sequences, amounts, etc.), the judge can make the decision easier to follow by doing the computations beforehand.20

Even when findings are not substantively or topically related to one another, judges can insert short transitional phrases (“a second test,” “another expert,” “in a separate incident,” “a non-specialist,” “at the time of death,” etc.) near the beginning of each new finding to alert the reader to the changed focus. Again, while the additional phrase may add a few words to the decision, it will make the decision much more readable. Alternatively, the preceding phrases could be inserted as neutral, descriptive subheadings or captions.21

d. Orientation Paragraphs

Occasionally, judges can use thesis or “orientation” paragraphs22 at the very beginning of their findings of fact to provide a context for the individual findings and to give readers a clear thematic sense of what is forthcoming. In ruling on the validity of a “territorial agreement,” a public utilities commissioner began the
findings of fact section with the following paragraph:

The parties proposed the territorial agreement in order to avoid duplication of facilities, reduce the cost of providing water to the area, provide emergency backup service to the River View Manor Home, prevent future flood-related water outages, and enable some fire fighting service in the area. The agreement was designed in response to petitions from area residents to both the city and the district. Currently, the city duplicates water service for an area that falls outside the city limits and within the district’s water boundaries. 23

The bold words foreshadow the ALJ’s principal findings and let readers know what to focus on while reading those findings.

Orientation paragraphs such as this provide general information about the judge’s main findings and make all subsequent findings easier to follow. Although orientation paragraphs may duplicate findings made later in the same decision, the added clarity of focus more than offsets any potential problems caused by repetitions.

e. Summary Paragraphs

Short summary paragraphs provide still another way of helping readers understand the significance of each individual finding. Properly constructed summary paragraphs bring together the thematic threads that have been woven into the findings so that readers see the same pattern the judge saw. In a routine workers’ compensation case, an ALJ summarized the findings in the following way:

The weight of the evidence supports a finding that any complaints pertaining to Ms. Johannsen’s back are unrelated to her 1986 industrial injury and that the cervical problems are not disabling. I find that the employee is capable of earning her former wage of $354. Her high school and business school education combined with her work experience which involved reading, writing, notating, speaking, and filing enable the employee to perform substantial non-trivial work. Her skills and abilities are of value in the general labor market.

In a single concise paragraph, this summary emphasizes connections among the judge’s separate findings on causation, education, work experience and extent of injury in a way that the separate findings might not. Placed as it is at the end of the findings section, it also prepares readers for the upcoming conclusions of law section of the decision.

CONCLUSIONS OF LAW

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Conclusions of law arise from the basic facts contained in the judge’s findings of fact. They are the ultimate facts on which judges base their decisions. Theoretically, all readers of the decision should be able to see clear connections between the findings of fact and the conclusions of law.

In practice, however, conclusions of law are frequently written in ways that obscure or ignore those connections. That is, the conclusions are not clearly organized, do not have a clear focus, and are not explicit about the logical relationships, if any, among the separate conclusions. In addition, because the conclusions of law are frequently written in the technical language of specialized statutes, their vocabulary is sometimes obscure.

Because judges and the parties to the dispute are familiar with the relevant legal provisions, judges sometimes forget or ignore the needs of other potential audiences and simply list or quote the relevant statutory language without further explanation. Consequently, as was the case with findings of fact, readers must determine for themselves why a particular conclusion is included and why it is placed where it is.

Sometimes, of course, the need for a particular conclusion of law is self-evident, as is the conclusion’s connections with a particular finding of fact. For example, most decisions contain findings of fact and conclusions of law respecting the court’s jurisdiction over the parties and subject matter of the case.

**Finding of Fact**

1. This Division has personal and subject matter jurisdiction over the parties and issues presented.

**Conclusion of Law**


The connections between this finding of fact and conclusion of law are clear, in part because the connections are emphasized both by the repetition of the key word – “jurisdiction” – and by the numbering scheme which links Finding #1 to Conclusion #1. This principle of repeating key words can connect and unify comparatively straightforward findings of fact and conclusions of law. If, for example, an ALJ for a public utility commission makes findings on the time, location, duration, and volume of a toxic discharge, the ALJ can simply echo those same terms in the conclusions of law so that readers can easily see how the findings are related to the conclusions.

a. **Random or Juxtaposed Conclusions**
In lengthy or highly technical findings and conclusions, the underlying organizing principles and purpose of the individual conclusions of law are sometimes extremely difficult to see. Unfortunately, the key-word repetitions and numbering schemes that work in simple cases have only limited usefulness in complex cases. The following excerpt is typical in that it reaches a series of conclusions (about jurisdiction, standard adoption, inspection obligations, rule promulgation, etc.) but does so in a seemingly random fashion:

The Missouri Public Service Commission has arrived at the following conclusions of law: The Commission has jurisdiction over manufactured homes and manufactured home dealers pursuant to Chapter 700, RSMo 1986, as amended. In 4 CSR 240-120.100, the Commission adopted the Federal Manufactured Home Standards as set forth in 24 CFR 3280.

Section 700.040, RSMo Supp. 1993, states in pertinent part: “The Commission shall . . . perform sufficient inspections of manufacturing and dealer premises to ensure the provisions of the code are being observed . . . .”

Section 700.040.5, RSMo Supp. 1993, states that “[t]he Commission may issue and promulgate such rules as necessary to make effective the code and the provisions of Sections 700.010 to 700.115.” 4 CSR 240-120.060 states, in pertinent part, that “[t]he books, records, inventory and premises of manufacturers and dealers of new manufactured homes . . . shall be subject to an inspection . . . to ascertain if a manufacturer or dealer is complying with Chapter 700, RSMo as it relates to new manufactured homes, the chapter, the federal standards and the Housing and Urban Development regulations . . . .”

By simply juxtaposing one conclusion to another, the writer of these conclusions either assumes readers can see how they are interconnected or obligates them to make the connections on their own. Depending on their patience and resourcefulness, some readers may succeed, but they will have to make a concerted effort.

Some judges attempt to bridge the gap between findings and conclusions of law by adding a parenthetical notation linking individual conclusions to specific findings. For example:

The applicable statute in this case is Section 402: 123, RSMo Supp. 1993, which states in pertinent part: The Commission shall . . . perform sufficient inspections of manufacturing and dealer premises to insure the provisions of the code are being observed. (Findings 7, 8, 9).

b. Orientation Paragraph

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Still another way to make it easier to see a pattern within the conclusions of law is to use an “orientation” or “thesis” paragraph of the sort previously discussed. Occasional use of an orientation paragraph, especially when the conclusions of law are lengthy or extremely technical, can make the conclusions accessible even to readers who are unfamiliar with the legal principles involved in the decision. An orientation paragraph signals the writer’s legal themes and organizational scheme. In the following Public Utilities Commission decision, the ALJ used an orientation paragraph to describe the underlying purpose of a series of applicable statutes:

The Missouri Legislature enacted four statutes, commonly referred to as the “anti-flip-flop” laws, which assure electric suppliers the right to continue supplying retail electric energy to structures through permanent service facilities once service has commenced, except for certain limited circumstances under which the Commission may authorize a change of supplier. (Text of first two statutes is omitted) The two remaining statutes deal with a situation such as the one in the present case, where the customer seeking a change of supplier is currently receiving service from a rural electric cooperative. The two statutes state as follows: (Text of the relevant statutes is then provided)

This orientation paragraph concisely gives readers the context they need to read the quoted statutes meaningfully. Using only two sentences, the writer connects the statutes to one another and focuses readers' attention on the statutes’ “anti-flip-flop” purpose. By placing this paragraph at the beginning of the conclusions of law, the judge makes it easier for readers to follow the reasoning in the decision and to see the substantive and organizational principles that control it.

c. Technical and Obscure Language

Technical jargon and obscure allusions create problems in a great number of administrative decisions. Since so many administrative decisions require the use of medical, environmental, scientific, statistical or financial language, readers may be confused by the judges’ highly specialized vocabulary and shorthand references.

For example, most reviewing courts and even agency insiders might be confused by the scientific terminology in the following conclusions of law from two different environmental agencies:

The dioxin “end-of-pipe” effluent discharge limit in International Paper’s NPDES permit (27 ppq) is a scientific derivation of the human health based in-stream state water quality criteria of 1.2 ppq. As such, the 27 ppq is a water-quality based limitation. See 33 U.S.C. § 1312.
It is appropriate for OWR to allow a permittee to report non-detect or less than detection level where a parameter limit is below the method detection limit and the laboratory reports “non-detect.” It is appropriate that a permittee should not be subject to an enforcement action where the sample is reported as “non-detect” or "less than the method detection limit.”

The technical nature of these cases (and others like them) requires use of specialized vocabularies and the judge may be using terms required by statutory or regulatory language. But this language is usually difficult for non-specialists to understand. Moreover, long-term exposure to technical language frequently desensitizes judges to the need for explanations and definitions.

To compensate for this problem, judges who use specialized or professional terminology must educate their readers even as they write their decisions. Otherwise, the only readers who will understand their decisions will be the parties in the case or other specialists.

They can educate their readers in several ways. Near the beginning of their decisions, they can explain or define the key terms. They can also remind readers of those definitions and explanations by periodically repeating them and they can paraphrase technical language where possible.26

A related problem occurs when judges refer familiarly to statutory or regulatory language without quoting or explaining the pertinent parts of the statute or regulations. The following passage, for example, may be clear to other Workers' Compensation judges within the same system, but it is unclear to readers who are unfamiliar with the referenced statutory sections because they know nothing about the individual statute provisions or the significance of particular dates. That is, they need information about the "amendment" and about the dates that were material to the decision:

We are called upon to decide whether the Workers' Compensation Trust Fund as most recently amended by c.398, Sec.85 of the Acts of 1991, must pay claims under Sec. 37 and Sec. 37A to insurers seeking reimbursement under those sections when the date of the industrial injury is prior to December 10, 1985.

Understandably, judges who regularly employ the same statutes or regulations must decide whether to quote extensively from routine statutory or regulatory language, (which takes more time and space), or to merely refer to the statute provisions and dates (thereby ignoring the fact that some readers may be unfamiliar with their authorities). As was the case with technical language, judges can make their decisions clearer to all potential readers by defining and explaining key statutory provisions near the beginning of their conclusions. If the statute is one which is repeatedly or always used, judges can compose standardized parenthetical explanations or paraphrases (“requires applicant to show material changes to the location,” “requiring assessor to apply uniform assessment to taxpayer's property,”
"at time of hire employer must notify employee of normal hours") to be inserted or repeated where necessary.

SUMMARY AND CONCLUSION

Administrative law judges write for a great variety of audiences – litigants, lawyers, supervisors, agency heads and, occasionally, reviewing courts. The primary audiences – the litigants and their lawyers – usually have no trouble reading or understanding the decision, in part because the ruling has been made and explained from the bench. But other audiences – supervisors, agency heads, reviewing courts and others – do not share this advantage and frequently complain about the readability of administrative law decisions.

To make their decisions more readable, judges do not need to radically alter their present practice. However, they may need to reorganize their decisions so that critical information appears near the beginning of each important subsection. Placing key information in key locations provides all potential readers with the necessary context for understanding both findings of fact and conclusions of law.

At the macro level, judges can insert orientation and summary paragraphs in both findings of fact and conclusions of law. These paragraphs provide the gist of the factual and legal information the judge used to reach a decision and can help unify the entire decision. Judges can also consider the advisability of writing their findings in a quasi-narrative form to take advantage of a narrative’s ability to supply context, establish chronology, and illustrate causal connections.

In cases where enumerated findings are necessary, judges can use a variety of stylistic devices to emphasize relationships among the findings and overcome the disadvantages of merely listing information. By grouping similar or related facts and by placing short connecting phrases and clauses at the beginnings of individual findings, judges can help readers understand the findings more easily. And, in cases where dates, sequences, amounts, wages, and relationships are especially important, judges can make their findings easier to understand by doing the necessary computations for the reader instead of leaving them implicit.

Context is just as important on the micro level as it is on the macro level. At the sentence level, judges can insure that readers know the exact nature of the disputed case by creating case specific issue statements (precisely identifying key facts and law). Even when boilerplate or standardized issue statements are necessary, judges can rely on carefully devised templates to insure that all key information is included. To help unify both findings and conclusions, judges can use numbering patterns, parallel structure, and topic captions to emphasize the connections between individual findings and conclusions. And, when deciding highly technical and complex cases, judges can use carefully placed repetitions, paraphrases and definitions to insure that readers are not confused by scientific, medical or statistical terminology.

Of course, none of the preceding suggestions will make writing decisions easier or, in the short term, more efficient. In fact, adding these techniques to their existing writing practice will probably cost judges more time than they can easily spare. Moreover, some of the preceding suggestions may not be practical or
advisable for all judges or agencies. But a heightened awareness of the kinds of problems some readers have with their writing should impel judges to seek ways to improve the readability of their decisions. Like other professional writers who constantly seek to improve their writing skills, judges can selectively incorporate a few of the preceding suggestions into their decision-writing practice to test their effectiveness. If, in the interest of efficiency, judges can quickly master the intricacies of new technologies, they can surely master some of the time-honored writing techniques described above.

1 The West Virginia Administrative Procedures Act (On Orders or Decisions) is typical in its requirements. It states:

Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of a law. W.Va. Code Ann. §29A-5-3 (West, Westlaw through end of 2003 2d Ex. Sess.).

The Federal Administrative Procedure Act has similar requirements. It States:

All decisions, including the initial, recommended, and tentative decisions, are a part of the record and shall include a statement of:

(A) Findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law or discretions presented on the record; and

(B) The appropriate rules, order, sanction relief, or denial thereof.


4Ruggero J. Aldisert, OPINION WRITING §6.4 at 73 (1990) “The style of writing [judicial opinions] . . . must be for the primary markets. However, to achieve maximum understanding in the broad secondary market, the opening should also be designed to assist users – lawyers, judges, researchers and law students.” In addition to its other merits, Judge Aldisert’s book is a valuable compendium of received wisdom on the writing of judicial opinions.

5Nevin Van de Streek, Why Not “Findings of Law” and “Conclusions of Fact” and Opinions About Both? 70 N.D. L. REV. 109 (1994) (rejecting attempts to observe rigid and artificial distinctions between “findings of fact” and “conclusions of law.”)

6Stander, supra, note 2, at 165-167.

7Morell E. Mullins, MANUAL FOR ADMINISTRATIVE LAW JUDGES 103 (1993) “No rigid structure can be prescribed for all written decisions, but some uniformity in basic outline is customary. Every decision should contain certain preliminary material, including a title page with the name of the case, the type of decision (e.g. initial decision or recommended decision), the date of issuance, and the name of the judge . . . . The form of the text depends largely on the nature of the case, agency practice, and the judge’s style.” Having made this last observation, Professor Mullins then offers 10 different suggestions about the organization and content of administrative decisions. Id. at 103-4.

8Stander, supra note 2 at 165-167; Patrick Borchers, Making Findings of Fact and Preparing a Decision, 11 NAALS 85 (1991); Patrick Hugg, Professional Legal Writing:

Some opinions are preceded by a "syllabus" listing the principal points covered in the opinion.

ALDISERT, supra note 4, §6.6 at 75.

Id. at §§9.5 at 136-139.

For example, like appellate decisions, most administrative law decisions begin by providing jurisdictional and procedural information and a statement of the issues (sometimes couched indirectly in the form of the litigants' competing claims or contentions).

ALDISERT, supra note 4, §10.1 at 151.

Judges who want to avoid the appearance of having pre-judged the case by identifying the issues before making any findings of fact may find the following wording useful: “Based on the forthcoming findings of fact, the issues in this case are . . . .”

Guy J. Avery, DECISION WRITING: A HANDBOOK FOR ADMINISTRATIVE LAW JUDGES 2 (1996) Judge Avery takes a different view and maintains that “[t]here is no need to cite specific regulatory or statutory provisions, or to go into detail about any other aspects of the case . . . .”


The necessity for being precise about the statutory language at issue is treated in greater detail in the Conclusion of Law section of this article.

Greene, supra note 3, at 93-94 (recommending the inclusion of the parties’ contentions). But see, Mullins supra note 7, at 103. “Although the relief requested by the parties may be described in the introduction, detailed contentions should not be recited.” (Emphasis in the original.)

See preceding comments on Issue Lists.

Fearing that they may make a mistake in their computations, some judges object to this practice. However, since judges are responsible for being precise about every aspect of their decisions, this is an unwarranted objection.

Mullins, supra note 7, at 104. In a case involving many issues or complicated facts, the decision can be divided into labeled sections and subsections, with appropriate titles and subtitles. This will usually make reading, studying, and analysis of the decision easier and quicker.

ALDISERT, supra note 4 at 73.

The advantages of a clear orientation paragraph can be better appreciated when compared with the findings in another Public Utilities Commission decision. Like the decision on the validity of the water district “territorial agreement,” this decision also concerns an agreement. The opening paragraph states:

[The parties have agreed that Southwestern Bell Telephone Company (SWBT) should be directed to file a new tariff (with a 10 day effective date) substantially similar to the tariff presently pending but with the exception that the language regarding early termination of this service by a customer shall be changed to provide that under such circumstances the customer would incur termination charges calculated as follows: billed monthly rate X number of months remaining in the service period X a 50 percent time termination percentage. The agreement provides that when SWBT is requested to provide interconnection to an independent company SWBT shall provide such]
interconnection to such customer using ATM, DSO1, DS-3 or analog
technology depending upon the customer's request.
Aside from the problems caused by sheer sentence length and cryptic terminology, this
paragraph does not provide readers with any strong clues about how the rest of the
findings will be organized.

24"The ultimate finding is a conclusion of law or at least a determination of a mixed
question of law and fact." Aldisert, supra note 4, at 55 (quoting Halverson v. Tex-Penn Oil
Col, 300 U.S. 481, 491 (1937)).

[The findings of fact required by statutes] are usually called 'basic'
facts, the conclusions 'ultimate' facts. The distinction was explained in a
federal case as follows: (1) From consideration of the evidence, a
determination of facts of a basic or underlying nature must be reached;
(2) From these basic facts the ultimate facts, usually in the language of
the statute, are to be inferred.]

Bernard Schwartz, ADMINISTRATIVE LAW § 7.28, 427 (3rd ed.1991) (referring to Saginaw
Broadcasting co. v. FCC, 96 F.2d 554 (D.C. Cir. 1938), cert. denied, 305 U.S. 613 (1938).
(Emphasis added).

25The widespread practice of merely juxtaposing conclusions of law in an apparently
random fashion can also be seen in the following list of conclusions in a water pollution
case:

1. The Administrative Law Judge Division has subject matter
jurisdiction in this action pursuant to S.C. Code Ann. Sections 1-23-
2. S.C. Code Ann. Section 48-1-50 (1987) authorizes the Department of
Health and Environmental Services (DHEC) to take all necessary or
appropriate action to secure for South Carolina the benefits of the
Federal Water Pollution Control Act, and any other federal and state
acts concerning water pollution control.
to revise or modify NPDES permits in South Carolina.
4. S.C. Code Ann. Section 48-1-30 provides the authority for DHEC to
promulgate regulations carrying out the provisions of Chapter 1 of Title
48 of the 1976 Code.
5. S.C. Code Ann. Regs. 61-9 (Supp.1994) were promulgated by
DHEC as the applicable regulations governing the NPDES permit
program of the state.

In this particular decision, the ALJ lists a total of 17 conclusions in support of the final
decision. Readers must determine for themselves why each conclusion is necessary and
how or if each is connected to any particular findings of fact.

26Mullins, supra note 7, at 121. Professor Mullins suggests that judges should "use words
and expressions comprehensible to a lay reader. If that is impossible, unusual words and
phrases should be defined. This can be done in a footnote or a special section for
definitions. Alternatively, the judge may summarize in the main text and put the technical
details and computations in an appendix." Id. Professor Mullins’ best suggestion is to
summarize (or paraphrase) in the main text because footnotes, definitions sections and
appendices are inconvenient for readers. Moreover, they relegate critical information to a
subordinate position instead of providing that information in the text where it is needed.
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