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## IMPEACHMENT IN ADMINISTRATIVE CASES

The Following Article, Addressed to Counsel  
Who Appear at Administrative Hearings, is  
Commended to the Attention of  
Presiding Administrative Law Judges-Ed.

Calvin William Sharpe \*/

The lawyer for the union is putting on his case-in-chief. Part of his evidence is the testimony of one Jimmy Crisp, an employee in the production and maintenance bargaining unit. Crisp claims that your defendant's president, James A. Miller, threatened to fire him if he continued his union activity.

Your defense is that Mr. Miller never threatened Crisp for union activity, but rather discharged him for cause. Miller says Crisp was an unreliable employee who would often show up late for work. Miller says Crisp is just raising the supposed threats concerning union activity as a smoke screen. Your case is simple; the problem will be in proving it.

Unfortunately, you do not think you will get any worthwhile admissions from Crisp or make any headway attacking his perception or memory on cross-examination. So you start scratching around for ways to impeach Crisp, hoping to discredit his testimony in the eyes of the administrative law judge.

That evening you get the kind of present trial lawyers appreciate. You interview Joe Long, Crisp's fellow employee in the production department. Long tells you that Crisp has a reputation in the department as a liar. Should you call Long to discredit Crisp? It would work in a jury trial. Bad reputation for truth and veracity is a classic way to attack a witness who has testified, and under Rule

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608(a) of the Federal Rules of Evidence, the evidence may be in the form of an opinion as well as reputation. Since the rules of evidence are relaxed in administrative hearings, there is no reason not to use the evidence, so long as the administrative law judge thinks it is worth listening to.

Joe Long also tells you that Crisp stole money from the company's petty-cash box. Can you have Long testify about the theft as well? This looks even stronger than the information about Crisp's reputation. Here are facts, not just opinions, and it looks like they reflect directly on Crisp's credibility.

But if this were a jury trial, the specific facts about Crisp's theft would be inadmissible. Not that vague generalities are thought of as being more valuable than details. Instead, the common law rules of evidence recognize that while Crisp's credibility is important, it is just one of the issues, and to keep the trial on course, the rules forbid having one trial inside another on details like this. So when a witness's credibility is attacked in a trial, opinion and reputation--but not extrinsic evidence of specific acts of conduct--are admissible in evidence. The common law rule applies in federal courts as well, Fed. R. Evid. 608(b).

But administrative hearings are different. The administrative law judge's discretion is what keeps the trial on the proper subject, not mechanical rules of evidence. So if the administrative law judge thinks the theft has enough bearing on Crisp's credibility, there is no rule that would keep you from asking Long about it--or cross-examining Crisp himself about it.

These two examples make an important point: In administrative hearings, you must unlearn your traditional trial habits. Administrative law judges do not apply strict evidentiary rules. Generally, they may consider any "oral or documentary evidence . . . [that is not] irrelevant, immaterial, or unduly repetitious." 5 U.S.C. Sec. 556(d). This means that there is a whole list of evidence that would be objectionable in a formal trial that may be admissible in an administrative hearing. It includes:

- hearsay;
- extrinsic evidence contradicting a witness's testimony on "collateral" matters;
- prior convictions;
- arrests; and

-- bad acts.

The point is not that this evidence will necessarily be admitted, but rather that it will not necessarily be excluded. The reason for this flexibility is the administrative law judge's presumed competence to ignore improper evidence and to weigh the rest on the scales of his good judgment.

Some agency statutes are more restrictive than the Administrative Procedure Act and similar state statutes. The National Labor Relations Act, for example, goes further than most agency statutes by requiring the application of the Federal Rules of Evidence "so far as practicable." Still, courts interpret this qualifying language as expanding admissibility rather than contracting it. Agencies may not exclude evidence that would be admitted under the rules, and administrative law judges must, "if in doubt, let it in." Multi-Medical Convalescent and Nursing Center of Towson v. NLRB, 550 F.2d 974 (4th Cir. 1977).

The lawyer accustomed to trying cases in court should be aware that when he sets foot in an administrative hearing room, he enters a different arena with different rules. By keeping the flexibility of the evidentiary rules in mind, the lawyer trying an administrative case will find that he has more--and sometimes more damaging--weapons to use.

With all this flexibility, the irony is that many lawyers who try administrative cases fail to use even traditional impeachment techniques because the informality of the proceedings seems somehow inconsistent with the drama of cross-examination by old standby techniques, such as confronting the witness with a prior inconsistent statement. By forsaking both traditional and innovative impeachment techniques, some lawyers who try administrative cases are less effective than they could be. Here are some more examples of what can be done.

Even under the most liberal rules (like the Federal and Revised Uniform Rules of Evidence), judges exclude extrinsic evidence to impeach witnesses' testimony on "collateral" matters. Here is how it works: While the common law permits witnesses to be cross-examined on collateral points, that is where things halt. A witness cannot be contradicted on a collateral point by calling another witness to the stand or introducing some other contradictory

evidence. That is "impeaching a witness on a collateral matter."

Administrative law judges, in contrast, have broad discretion to receive extrinsic evidence on collateral matters.

Now suppose that Crisp had been passed over for a promotion recently, and then he told his foreman that when the National Labor Relations Board proceedings began, he would "pay the company back." You confront him with the remark on his cross-examination, but he denies it. Can you call Crisp's supervisor to contradict him?

It depends. In a jury trial, the judge might not let you prove Crisp's former statement. Normally, bias is never collateral, and you should be permitted to use this evidence in a trial. But there is the danger that the trial judge might not understand how importantly this information touches on bias. In that case, he might exclude Crisp's former statement as simply being "impeachment on a collateral matter."

But the administrative hearing is different. Since the judge is not caught between two different rules, the evidence should be admissible whether or not the judge thinks it is "collateral." You should be able to put in the damaging statement through Crisp's supervisor, effectively undercutting Crisp's credibility.

Here is another example. Some trial judges are pretty sticky about whether a prior statement can be used to impeach a witness. These judges are fond of keeping cross-examiners from using prior contradictory statements on the grounds that they are not damaging enough. The typical adverse ruling is that the prior statement is "not a material variation" from the testimony on direct examination.

You are not nearly as likely to encounter this problem in administrative cases. If the prior statement will aid the administrative law judge in assessing the witness's credibility, it will be admitted.

Let us change the Crisp case again. Say Crisp had given an affidavit to a labor board investigator, stating that company president Miller had threatened to fire him if he continued to solicit votes for the union. On direct examination, Crisp testified to important details that were not in his affidavit, including a remark he now says Miller

made to him. Your cross-examination of Crisp might proceed as follows:

Q. [In a nonintimidating manner calculated to elicit his cooperation] Mr. Crisp, let me see if I understand your testimony. You said on your direct examination that Mr. Miller walked up to you in the maintenance department while you were talking to another employee?

A. That's right.

Q. This was on November 12, 1983?

A. That was the date.

Q. After he walked up, he asked to have a private word with you?

A. That's correct.

Q. After the two of you moved about 30 feet from where you were having the conversation, he said to you, and I quote, "I'm gonna fire you if you keep trying to run this union game on my employees." Is that right?

A. That's right.

Q. You remembered those exact words, because it was a serious threat and it made quite an impression upon you, right?

A. It sure did.

Q. [Now that you have recommitted Crisp to his statement on direct examination, you change your tone.] But Mr. Crisp, you didn't say anything in your statement to the board agent about Mr. Miller requesting a private word with you, did you?

A. I don't remember.

Q. No? I'm showing you what has been marked for identification as Respondent's Exhibit 1. That is your affidavit, isn't it?

A. [No answer.]

Q. [Persisting] That's your signature at the bottom?

A. Yes.

Q. Let me direct your attention to the third paragraph, where you describe what happened. [Pause] There is nothing there about Mr. Miller asking to have a private word with you, is there?

A. Not in this affidavit.

Proper cross-examination? In a jury trial, the judge might sustain an objection to the questions about the affidavit, finding "no material inconsistency." That risk is much lower in an administrative hearing. The evidence should come in to undercut Crisp's credibility.

Unfortunately, the relaxed rules in an administrative case can hurt you as well as help you. Hearsay provides a good example. In an administrative proceeding, hearsay may be offered against your client. If the hearsay is relevant, it should come in. How do you impeach hearsay statements offered against you?

The Federal Rules of Evidence provide a partial answer to that question. Rule 806 provides:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

In other words, when hearsay is offered in a trial, the declarant's credibility is in issue just as if he had been a witness. The whole range of impeachment is available. Prior inconsistent statements may be introduced in response to the hearsay, and the rule of confrontation does not apply.

### Rule 806 Is Powerful

Finally, if you decide to call the declarant yourself, rather than just attack paper with other paper, you can examine the declarant about the statement as if on cross-examination.

Rule 806 is a powerful (and surprisingly little known) provision. But it cannot cure every situation. What if the hearsay declarant's testimony cannot be contradicted, he has made no prior inconsistent statement, and his bias or interest in the case cannot be demonstrated? Is there anything left to do? Perhaps. Let us suppose a simple case.

It is a hearing before a corrections board. A prisoner is accused of inciting a disturbance in the prison.

The only evidence that the prison presents is a written statement of a corrections officer. The officer is not available for cross-examination. At stake is 30 days in punitive segregated confinement for this offense. The prisoner ought to be permitted to put on evidence that the corrections officer has a reputation for making false accusations against prisoners. A fellow inmate might be called to the stand for the following examination:

Q. Mr. Smith, you are an inmate at the Prairie View corrections facility, are you not?

A. Yes, I am.

Q. How long have you been an inmate at this facility?

A. For 20 years.

Q. Do you know Corrections Officer Jones?

A. Yes.

Q. How long have you known Mr. Jones?

A. Since he started working at the prison, 10 years ago.

Q. Are you familiar with his reputation for truthfulness in dealing with inmates?



A. Yes, I am.

Q. What is his reputation?

A. He has a bad reputation for dealing honestly with inmates.

So far this same examination could be used in a trial under Rule 806 of the Federal Rules of Evidence or under the relaxed rules of evidence in administrative hearings. But in the administrative case you can go even further:

Q. Are you aware of any cases where Mr. Jones falsely charged prisoners with wrongdoing?

A. I am aware of five cases involving other inmates, myself included.

Q. What happened in those cases?

In federal and state courts, even the most liberal rules on impeachment by proof of untruthful character limit the examination to the adverse witness's reputation for dishonesty or the testifying witness's opinion of the untruthful character of the adverse witness. They do not let the direct examiner prove specific conduct supporting the reputation or opinion. Nor do they permit the examiner to impugn the adverse witness's character by extrinsic evidence of specific misconduct. See, e.g., Fed. R. Evid. 608(a) and (b).

But the possibility that side issues about specific conduct of witnesses may distract and prejudice the fact-finder is not generally a concern in administrative hearings.

The flexibility of evidence in administrative cases can dovetail nicely with a sophisticated theory of the case. See what can happen with evidence of criminal convictions:

It is a worker's compensation case. The worker died as a result of a head injury, and the question is whether he hurt his head at work or somewhere else.

At the industrial commission hearing, the dead man's estate calls its star witness--a fast-food store clerk who testifies that, on the night before the worker died, he

told the clerk that he had hit his head two hours before on some machinery at work.

Your client, the employer, claims that the worker hit his head at an amusement park two days before his death. You have a witness who will testify that the worker admitted on the day that he died that he hurt his head at the amusement park. So your witness and your adversary's witness are engaged in a swearing contest.

It is worth thinking about whom to attack. You could impeach either the hearsay declarant (the dead man) or your adversary's witness (the clerk). Arguing that the dead man told two different stories and so he should not be trusted at all might not help. After all, you want the administrative law judge to believe your witness's story that the worker told him he hit his head at the amusement park. You may well decide it is better to go after the clerk. Now we are ready for his criminal record:

Q. Mr. Clerk, you've been in trouble with the law before, haven't you?

A. What do you mean, "in trouble with the law"?

Q. You have been convicted of a crime, haven't you?

A. I have a conviction on my record, yes.

Q. On June 24, 1970, you were convicted in Cuyahoga County Court for the theft of a watch that a customer left at the National City Bank in Cleveland, Ohio. Weren't you?

A. Yes.

If the clerk denied the conviction, you could introduce a certified copy of the judgment. The administrative law judge will take this evidence for what it's worth, but meanwhile you have called into question the basic character and integrity of the chief witness against your client.

Could you use this same cross-examination in a trial? Many courts would exclude the evidence of this conviction on one or both of the following grounds: (1) It may not be considered a crime of dishonesty and, since it is a misdemeanor, would not be serious enough to be used for

impeachment; or (2) the conviction is more than ten years old. See e.g., Fed. R. Evid. 609. In a formal trial, there are also restrictions on the use of felony convictions and pleas of nolo contendere, and the examiner could not ask about the facts underlying a conviction or any aggravating circumstances. In an administrative proceeding, there are no such constraints.

Corrupt character is not the only way to impeach a witness. Evidence of a witness's sensory or mental defect may also make his testimony suspect. For example, the Securities and Exchange Commission brings a disciplinary action against your client, a registered investment advisor. The SEC wants to suspend your client for violating antifraud provisions of the Securities Exchange Act.

The SEC claims that your client advised a mutual fund to open an account at a particular bank, but failed to disclose that the bank had made substantial loans to her. Your client's liability turns on her conversations with one of the fund's directors, who testifies for the SEC. You want to impeach his testimony that your client failed to disclose her relationship to the bank.

During your case-in-chief, you produce a witness who can testify that the fund director who testified against your client is an alcoholic. You also produce a psychiatrist specializing in alcoholism who will testify that long-term alcoholism severs the alcoholic's relationship with reality and can render him unreliable.

It is easy to see that this evidence could undercut the director's credibility, depending on how adroitly it is used. The strategic danger in this kind of attack on the person is that the administrative law judge may think you are off on a tangent. But in a case where the credibility of an adverse witness is important, and the consequences of an unfavorable finding would be dire for your client, the benefit of an attack on the mental competence of the witness can be worth its costs.

#### Scientific Link

Many courts exclude impeachment evidence of chronic alcoholism or drug addition, unless the proponent can show that it affected a witness's credibility in the particular case. But there is some scientific evidence linking addiction to untruthfulness, so the testimony on the director's alcoholism should have some probative value. Cf.

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Note, Testimonial Reliability of Drug Addicts, 35 N.Y.U.L. Rev. 259, 270 (1960) (arguing that evidence of cocaine addiction should be admissible to impeach witnesses' credibility). This is the sort of counterattack that you may be able to use in an administrative hearing, even though you might not in a formal trial. The list of such possibilities is bounded only by the lawyer's imagination.

What is true for impeachment techniques should be equally true for rehabilitative devices. For example, the general rule is that courts will not admit evidence of good character unless the witness's character has first been attacked. But evidence of truthful character should always be admissible at an administrative hearing. Similarly, prior consistent statements--which, in many jurisdictions, are admissible only if made before a motive to fabricate arose and if offered after a statement on the same subject made at trial has been called into question--should be more freely admissible in administrative proceedings to shore up the credibility of your witnesses.

As administrative hearings become more formal, there is a tendency for administrative law judges to follow the rules of evidence more faithfully. You may run up against an administrative law judge who is reluctant to hear unorthodox forms of impeachment of the sort recommended here. What should you do to overcome an administrative law judge's resistance to creative impeachment?

Persuade.

Remind the judge of his obligation to make findings based on "relevant, reliable, and probative" evidence. Point out that your impeachment will help him to assess the witnesses' reliability and weigh the credibility of the evidence offered against you. Explain to the judge how impeachment will enhance the reliability of his findings of fact.

Impeachment is a weapon aimed at discrediting the witness by impugning his honesty, integrity, or capacity. It is a personal attack. Often impeachment is the only device that will deliver the discrediting blow to damaging but apparently credible testimony.

As in a formal trial, how you use impeachment in an administrative hearing will depend on the objectives of your cross-examination. If you want to draw out favorable admissions and also to impeach the witness's credibility on

other points, your timing must reflect these purposes. Get the helpful admissions out while the witness is still credible--immediately after his direct. Attacks on the character of the witness should usually be saved until the end of the examination. At that point, you no longer need the witness to give helpful testimony and you can let him have it.

Often you must choose between seeking concessions and impeaching the witness's credibility. Though technically permissible, mixing constructive cross-examination and impeachment is usually persuasive. You need to decide whether you want the trier of fact to believe the witness or not. Once you resolve to discredit a witness in an administrative hearing, though, you ought to do the job with all the zeal you would bring to a cross-examination in a formal trial. At the same time, you should keep in mind the bigger arsenal of impeachment weapons that you have when the rules of evidence are loose generalities to which you can usually make an exception.