Evidence Column

Paul Troeh Jr.

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It even sounds like a law book should sound! Twelve years after Professor W. Cleary's first "re-write" of Dean McCormick's 1954 book, his second update appears. McCormick's Third Edition, with Professor Cleary as General Editor, will be the quick and ready reference when the inevitable "evidence question" is raised.

The volume is of special interest to those interested in all aspects of Administrative Law, especially adjudication. Rule making and rate making matters are not without their share of knotty evidence questions, but in the day-to-day hearing and decision "game", a one-volume evidence book is highly useful. The "ALJ" who deals with "regular" attorneys is (as we all know) constantly bombarded with "evidence questions" to which the attorney wants an answer. (Of course the "rules of evidence" don't usually apply, but parts of them, like the "hearsay rule" usually do, and it's a little tough if you don't understand "hearsay" in the first place.)

Lawyers (and appellate judges?) hate to hear "objection overruled; admitted, the formal rules of evidence don't apply". How much better to dispose of an evidence question with a discussion of why the proffered evidence would be "admissible" via an "exception," or why it wouldn't be let in, but that you'll give it such weight as it may deserve.

McCormick's Third Edition provides theory, which is too often lacking in books of this type. The theory comes in through concise history and gives the "why".

Administrative Evidence is the title of Chapter 37. Its 30 pages are worth close study. The text
takes pains to recognize the expertise of the ALJ. A six-page segment of the chapter presents "official notice" a/k/a "administrative notice", the twin of "judicial notice". The latter is discussed in Chapter 35 and is most comprehensive. The administrative evidence chapter recognizes that a "hearing" is a form of investigation, an all too seldom mentioned circumstance.

Many of the Chapter 37 sections can serve as a reference back to primary chapters of the book. The complete list of Chapter 37 sections follows:

- Introduction to Administrative Adjudication.
- Law Governing Administrative Evidence.
- Admissibility of Evidence.
- Evaluation of Evidence.
- The Substantial Evidence Rule.
- Opinion Evidence and Expert Testimony.
- Privilege in Administrative Proceedings.
- Presentation of the Case; Burden of Proof and Presumptions.
- Presentations of the Case; Written Evidence and Cross-Examination.
- Official Notice.

Of special interest to many will be the "Jencks rule" discussed on page 1027, in the administrative evidence chapter. That always bothersome and often confusing rule is discussed in its usual criminal law setting elsewhere in the book. Thanks to legislative love of those "misdemeanor" provisions at the end of nice, neat regulatory statutes, we in the "ad law" game must face "Jencks" all too often. 1/

1/ Jencks v. United States, 353 U.S. 657 (1957), held that (Footnote Continued)
The book might be subtitled "Relevancy". No topic is more relevant to the administrative process. If an ALJ has one "inherent power", it's to protect the record from non-relevant material. The discussion of that topic will hone most anyone's ability to express reasoning as to why or why not offered material is relevant.

If you haven't been subjected to a typical evidence course, consider reading McCormick like a novel; cover to cover. It won't put you to sleep. Professor Cleary is at the top of most anyone's list of good writers. His writing, editing and style are evident throughout. Some of the other editors involved have worked with Professor Cleary

(Footnote Continued)
the United States, as prosecutor, waives any privilege which might exist for reports of a confidential nature to the extent that the reports are relevant to the accused's defense, irrespective of their admissibility in evidence. In response, Congress enacted the Jencks Act, 18 U.S.C. § 3500, and the Federal courts adopted Rule 612 of the Federal Rules of Criminal Procedure. The Jencks Act provides, in essence, that statements made by a government witness or prospective government witness (other than the defendant) are immunized from inspection in a Federal criminal proceeding until a prosecution witness has testified upon direct examination. Rule 612, which may apply to civil as well as criminal proceedings, is somewhat broader. As an Advisory Committee note points out, the Jencks Act:

  applies only to statements of witnesses; but the rule is not so limited. The Jencks statute applies only to criminal cases; the rule applies to all cases. The statute applies only to government witnesses; the rule applies to all witnesses. The statute contains no requirement that the statement be consulted for purposes of refreshment before or while testifying; the rule so requires.

See 11 Moore's Federal Practice § 612.04.

In addition, Rule 612 expands the Federal court's power, in civil cases, by authorizing the judge to require a non-party witness to make available to an adverse party a document which the witness used, before testifying, to refresh his recollection. Id. § 612.05--Ed.
for years, and perhaps his style has rubbed off on them. In addition to Illinois Evidence Code preparation, Professor Cleary was the "reporter" on the Federal Rules of Evidence, now also adopted more or less whole by 28 states. He wrote the comments to the original proposed rules, and those comments appear to be the heart of McCormick's Second Edition, circa 1972.

There are several "mega-volume" evidence services, if further development of a narrow point is needed. But the "McCormick in the Courts" index of opinions citing McCormick's Second Edition could well be the best source of case law leads available on a given point. It's indexed section by section, and is an incredibly useful tool. Those using this book at the desk while writing decisions will doubtless annotate this unique index with citations from their own jurisdictions.

On balance, treating evidence questions in ways familiar to attorneys and courts is a proven and useful technique for an ALJ. Professor Cleary and West Publishing have made that task, and other evidence-related work, a lot easier with McCormick's Third Edition. Try it, you'll like it!