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Evidence for Administrative Law Judges

Christine McKenna Moore

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When I arrived this morning and went to the coffee table, I overheard the following comment: "we're administrative law judges. Do we really care about the rules of evidence? Why are we here?" I take this opportunity to give you my thoughts about that very question.

I used to teach trial advocacy at various institutes for both practicing private and government attorneys – this included the rules of evidence. The single most important lesson I tried to convey to the student was this: that a lawyer must identify the one thing in the case that she wants her jury to know, and then SAY IT, right out of the blocks in opening statement, clearly, no waffling, within the first sixty seconds when she holds her audience's attention. I have tried to follow my own advice today, asking myself what that single, most important thing is that I have to say to you as you begin your review of evidence in administrative trials.

That message is this: that the interests protected by the rules of evidence exist in every litigated dispute, whether that dispute takes place in a court of general jurisdiction or an administrative tribunal, before a jury or before a judge. Rule 102 of the Federal Rules of Evidence provides:

> *These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of*

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** Christine McKenna Moore is an administrative law judge for the U.S. Department of Labor in Washington, D.C., and a former ALJ with SSA's Office of Hearings and Appeals.

evidence to the end that the truth may be ascertained and proceedings justly determined.

Those principles underlie the reason that, in my view, the rules of evidence belong in your courtrooms.

How have I arrived at this conclusion? First, though my experience as a litigator, trying criminal and civil cases, to juries and to judges. I became a lawyer in 1976, first as a federal prosecutor and in subsequent years in private practice. The Federal Rules of Evidence were promulgated and effective in 1975. As a result, certain fundamentals are burned in my brain, never to be erased. I will never, for example, forget the foundation for a business record exception. Second, through my personal experience as a U.S. Administrative Law Judge, initially for the Department of Health and Human Services and now for the Department of Labor. Third, by the scholarly work of Professor Michael Graham, who has approached the subject historically, theoretically, practically, and in terms of policy. I owe him considerable credit in making my remarks today.

My central thesis is that the interests protected by the rules of evidence exist in all litigated disputes, regardless of the tribunal. What are some of those interests. (1) Every court in the United States is overburdened. Consequently, we must restrict evidence to that which is relevant and not cumulative or unduly wide-ranging, in order to use judicial and litigant time wisely, assuring all a fair but not endless day in court. Hence, Rule 403, and Rule 201, allowing a short-cut for fact-finding by way of judicial notice. (2) Evidence used in deciding the claims of individuals must be reliable, and thus assurances that it is authentic and the declarant trustworthy are required. Hence Rules 803, 804 and the 900 series on authenticity, as well as Rule 611 governing the interrogation of witnesses. On the other hand, we want our experts to rely on what they normally rely

on in coming to an opinion, and therefore we relax the rules against hearsay to accommodate that reality. Hence, the 700 series regarding experts. (3) Society wishes to protect and foster confidentiality in certain relationships, and thus assures a privilege against disclosure to attorney-client or physician patient communications. Hence, Rule 501. A number of other examples abound. Society wishes to foster rehabilitation of criminals, and not call convicted persons to task once their convictions are years in the past. Hence, Rule 609, disallowing impeachment for convictions more than ten years old, with exceptions under limited circumstances. We need to encourage the confidentiality of settlement negotiations by precluding their admissibility as to liability. Hence, Rule 408. We also want the trier of fact not to be swayed by the fact that a defendant may be insured, because acquiring insurance is usually a responsible thing for most defendants – corporations and professionals, for example – to do. Hence, Rule 411.

Much of this seems so very obvious to me and undoubtedly to many of you. So why are we talking about it? We are talking about it because the debate has swirled for years about whether formal rules of evidence belong in an administrative tribunal. At this point, it is worthwhile reviewing some history.

In 1946, Congress delegated to federal agencies the authority to adjudicate controversies by enacting the Administrative Procedure Act (APA), codified at 5 U.S.C. In doing so, it allowed agencies to receive virtually any evidence, the theory being that the rules of evidence are designed for juries, not for agency experts sitting without juries. When this resulted in huge records, Congress enacted §556(d) of the APA, which allowed administrative law judges [or hearing examiners, as they were

known back then] to exclude irrelevant, immaterial, or unduly repetitious evidence.

While the notion that the rules of evidence do not belong in administrative cases remains stubbornly entrenched to this day, in truth things have changed mightily in the United States since the 1946 passage of the APA. First, administrative law judges are no longer hearing examiners. We are lawyers with considerable practical experience who go through a daunting process of merit selection in order to be placed on the register of ALJs in the federal system. Second, our experience is not specialized. Both the American Bar Association and the U.S. Office of Personnel Management have consciously chosen not to rate agency-specific experience highly, on the theory that those best qualified to try administrative disputes are trial lawyers, those who have actually tried cases in the real world and know litigation, rather than agency attorneys or program people. Third, administrative litigation has exploded. As professor Graham points out, between 1960 and 1976, the number of federal agencies grew from 34 to 83 and the number of pages in the Federal Register tripled. And that was before the EPA even got around to promulgating its Clean Water Act and Hazardous Waste regulations [interim, interim final and final]. In his new best seller, *The Death of Common Sense*, author Philip Howard describes the extent to which regulatory laws impact our lives. At ones point, he says, OSHA had 140 regulations on wooden ladders, including one specifying the grain of the wood:

> *"...The agencies created by Congress have multiplied ... statutory dictates, like fishes and loaves, into many more thousands of rules and regulations. EPA alone has over 10,000 pages of regulations. The result, after several decades of unrestrained growth, is a mammoth legal edifice*

unparalleled in history: Federal statutes and formal rules now total about 100 million words." ... [at p. 26]

Fourth, administrative practice now involves a multitude of sophisticated issues and often talented trial counsel who practice what is in essence a full trial practice. As a result, as the Supreme Court recognized in *Butz v. Economou*, administrative adversarial hearings are the functional equivalent to federal civil nonjury trials. As a judge for the U.S. Department of Labor, this is certainly my experience.

Additionally, the original notion – that the rules of evidence do not belong in agency disputes – rests on a somewhat false premise. Recall that agencies have three primary functions: (1) rule-making; (2) informal or policy decision making; and (3) adjudication. It goes without saying that the rules of evidence cannot and should not apply in the first two functions. When an agency makes rules, it takes in all kinds of information, both from its own experts, those in the public arena, and the public itself, in order to make effective policy. The essence of a comment period in rule making is to allow free comment, period, without restraints other than decency. The same can be said in informal decision making, where the agency head must be free to sift information from advisors, treatises, any source that he or she feels called upon to use. This is not the case at all when two litigants come before an administrative tribunal to have their respective claims decided. The interests to be protected are, as I posited in the beginning, identical to the interests protected in any court of law.

Various federal agencies have responded in various ways to this question. Because I come from the Department of Labor, I shall refer you to that model. In 1990, after considerable study and consultation with Professor Graham, DOL promulgated rules of procedure and evidence. These rules were modeled specifically on the Federal Rules of Evidence

but, significantly, they were modified to meet the needs of DOL cases. They can be found at 29 C.F.R. "18.101-1103. They are used primarily in what we call our traditional cases. DOL's caseload consists of two types of cases: compensation or benefits adjudication under the Longshore and Black Lung Acts; and traditional labor disputes from 50+ statutes, involving union pension matters, whistleblower actions, affirmative action compliance, child labor laws, funding for various job training programs, and the like.

I note here that several other agencies have incorporated and employ the FRE "so far as practicable," whatever that means. This includes the National Labor Relations Board, the United States Postal Service, and the Federal Communications Commission. I might also add that I come from the Social Security system, where the rules of evidence have little meaning and are applied only in the roughest fashion. While there is an argument to be made that the rules should be relaxed or non-existent in benefits cases [and indeed the DOL rules recognize as much], where the claimants are often disabled and unrepresented, I am not entirely ready to subscribe to that argument. I have experienced administrative litigation with and without the rules of evidence. And it reminds me of that saying "I've been rich and I've been poor, and rich is better." Using the rules is better.

What are the advantages of using the rules rather than the broad scope of 5 U.S.C. §556(d)? First, they create predictability for both the admininstrative law judges and the litigants. When you have a free-wheeling rule such as that in §556(d) – where the standard is relevance, materiality, and undue repetition – how can the lawyers plan? And how can you protect one side or the other against abuse by introduction of marginally reliable evidence? The counter to such evidence must necessarily be introduction of equally questionable quality. So we end up

with high volume, low quality evidence. Second, they create a standard against which rulings can be judged on appeal, not to mention the record on appeal that the reviewing body must wade through. Not to mention the record before ME that I must wade through to write a decision. Third, the rules are easy to find and have now developed a body of case law around them. This means that if I want some guidance, I have a place to go rather than merely sticking a wet finger in the air to see which way the wind is blowing in the case at that particular moment. On a very personal albeit professional level, I am much more comfortable with rules than without them. Litigation is, after all, combat by the rules. It is our alternative to gladiators fighting to the death, our means of eking out the truth. By tradition and by my personal experience, I want very much to make an evidentiary decision based on an objective standard that has withstood the test of time and principle, rather than my gut feeling.

On the other hand, administrative proceedings are NOT precisely identical to courts of general jurisdiction and it would be foolish to contend otherwise. I am perfectly content with the notion that the formal rules can and should be adapted, to the particular caseload of an agency and within the context of a particular case. You as the judge are, after all, on the scene, for the purpose of using your judgment regarding the evidence. The rules should not be used in lockstep fashion. Quoting Aristotle, Philip Howard says:

> *"Aristotle, sometimes accused of being the father of rationalism, was the originator of the phrase "government by laws, not men." But the father of rationalism understood that reason only carries you so far and that implementation must always leave room for us to adjust for the circumstances: "[I]t is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars." ["The Death of Common Sense" at p. 50]*

So, for example, the DOL rules recognize five new exceptions to the hearsay rule that accommodate the needs of its cases. These allow for the admission of medical bills and reports of lost wages; written reports of expert witnesses, written testimony of lay witnesses made under oath, unless the opposing party insists on that witness's testifying at the hearing; prior depositions taken in the proceeding regardless of the availability of the witness. All of these exceptions are available, so long as opposing counsel has notified the other side of his intent to use them, and afforded an opportunity to confront the evidence proffered. This allows the parties to streamline the hearing evidence. It also recognizes that the ALJ is likely to have sufficient background to evaluate an expert's opinion without demeanor evidence and cross-examination. Additionally, the provision in §18.201(a)(3) for official notice allows the judge to notice facts "derived from a not reasonably questioned scientific, medical or other technical process, technique, principle or explanatory theory within the administrative agency's specialized field of knowledge." In my mind, this means that I can take notice of the fact that pneumoconiosis is a progressive lung disease, that longshore unions give preferential treatment to A men over B men. However, it has limits that must be recognized in the particulars of each case. Last Thursday I was asked to take judicial notice that a river "in the boonies" was not a navigable water of the United States. I could not go that far.

I would like now to turn to some of my own war stories as a judge to illustrate these points. I am currently in the middle of a docket in Seattle. Most of these issues are now before me in that docket, and some of them have arisen in other cases in recent weeks.

The first case is an action brought by the DOL Office of Compliance Enforcement against a company in an Eastern state. I have changed a few facts and names because the case is ongoing. The union has intervened. The government has negotiated and proposed a consent decree with the respondent company, but the union was not involved in the negotiations. I issued an order to the union to show cause why the decree should not be entered. The issue before me on a consent decree is whether it is fair and reasonable and adequately protects the public interest. The union responded to my order by requesting additional time and demanding production of all of the negotiating materials. Both the government and the respondent company refused to produce them, citing Rule 408 of the Federal Rules of Evidence. Had I been guided by merely the §556(d) standard of relevance, materiality, and undue repetition, I would have been at sea, having to reinvent the wheel and figure out whether the demand fit within any one of those categories. Fortunately, the DOL rules have incorporated Rule 408 and Rule 26 of the Federal Rules of Civil Procedure. Having done so, they allow me to resort to the entire body of case law concerning those rules. By its very terms, Rule 408 prohibits the introduction of statements offered in compromise only when they are offered on the issue of liability for, or invalidity of, the claim or its amount. It does not prohibit the introduction of such evidence when it is for another purpose. It also contemplates that such evidence may be discoverable, even when not admissible. The case law suggests that the balance to be struck is in favor of discoverability, and so I have ruled. Yet my order also recognizes the value that we put on offers in compromise, and the potential chilling effect if all such documents were simply disclosed at will. Thus, I have held that the government must produce them *in camera* so that I can

determine whether they are likely to lead to the discovery of relevant evidence, or whether the substance discussed in them has already been provided to the union in its original form.

Another case now pending before me, on which I will hear argument this afternoon when I return to Seattle, concerns a claim of privilege. The claimant's treating physician was approached before trial by the stevedoring company's claims manager. The claims manager showed the doctor a videotape depicting jobs on the waterfront, which he told the doctor were representative of the physical demands of longshore work in Seattle. As a result, the doctor wrote an opinion letter stating that the claimant could return to that type of work. The claimant cries foul, and says that there should have been no such contact with the treating physician. The claimant's memorandum refers to Rule 504, which in turn refers to the common law of the courts of the United States and to state law when an element of a claim supplies the rule of decision via state law. The claimant's memorandum acknowledges that state law does not apply to longshore actions, but cites state decisions on privilege anyway, along with a federal district court ruling. I have not heard from the defendant yet. The point I am making is that this issue arose two months ago, I invited briefing on it because the doctor's report is a potentially important piece of evidence for both sides, and because both the attorney-client and physician-patient relationships are deserving of protection. Frankly, I am not sure this is a question of privilege at all, but a matter of ethical trial practice.

In a case I tried last week, both parties attempted to make quite a stir about the existence or non-existence of longshore and harbor worker's insurance; the key issue in the case is jurisdictional, that is, whether the work is sufficiently connected with maritime commerce that the incidence

comes within the Longshore Act. It turns out the defendant employer did not have insurance at the time of the injury, because he did not view his work as longshore, but subsequently acquired such insurance when he acquired a company that does longshore work. The employer attempted to elicit from its president, as he testified, that the U.S. Navy had advised him that he did not have to have longshore insurance at the time of the accident in question, implying that the work done at the time was not maritime. Turning to counsel, I questioned, "do you know of any exception by which this evidence should be admitted?" And he responded with good humor, saying "I'm thinking, I'm thinking." I sustained the hearsay objection. The evidence was offered to prove the truth of the matter asserted -- it was from an out-of-court declarant who could not be cross-examined or even identified (it could have been the janitor at the naval shipyard for all I know), whose qualifications to make a legal conclusion were entirely indeterminable. Indeed, such a conclusion would have no relevance to my determination anyway, since I make a *de novo* decision on jurisdiction. At any rate, the well-established rules that preclude hearsay unless an exception renders it reliable stood me in good stead in sustaining the objection, and will be understood by the reviewing court if and when the case is appealed.

While I have many other war stories, I am sure they are matched or outdone by your own stories. Suffice it to say that in my legal experience, many things about the practice of law are downright capricious. But the rules of evidence have always made eminent sense to me. They are simple, straightforward, predictable, and with the codification of the Federal Rules of Evidence in 1975, easy to follow and look up. Employing them in

administrative practices serves the public and the litigants well. I commend you to your work in the next few days.

I also commend the work that you, I, all of us do as administrative law judges. Whether one perceives oneself as a bulwark against the government run amok with regulation, or against a recalcitrant, non-complying corporation, our society, is permeated by disputes over which we have jurisdiction. We are the guardians of administrative due process. Each litigant deserves our best, and in my mind that means resorting to the well-established principles of evidence that assure the interests of fairness for all.