Admitting Evidence in an Administrative Hearings: Exclusionary Rules That Aren’t

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Introduction

The rules of evidence developed over the centuries to meet the special problems of presenting evidence to a trial jury. The emphasis in a trial court is on 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 has developed with notions of efficiency, without juries and, from 1946 into this point in the 21st century, with the notion that administrative agencies are not bound by the formal rules of evidence.

The Federal APA sets out a deceptively simple standard that has been followed in most states: It provides for the admission of all evidence which is not “irrelevant, immaterial, or unduly repetitious.”

Thus, in the typical administrative hearing the question is not whether the proof should be admitted but, if admitted, what weight is should be given.

As the formal rules of evidence do not apply, the rules of evidence for administrative hearings are found in the:
- State or Federal Administrative Procedures Act
- Agency’s Enabling Legislation
- Agency’s Formal, Binding Rules
- U.S. or State Constitution

This document and the accompanying lecture will attempt to address the most common objections to the admission of evidence that are heard in, but typically don’t apply to, administrative proceedings.

I. Privileges That Protect the Rights of Citizens

Evidence determined to be privileged as a matter of law is evidence that is otherwise admissible but which is excluded from a judicial hearing to protect other societal interests.

There are three types of privileges:
- Privileges that arise out of or protect relationships;
- Privileges that protect government information; and
- Privileges that protect the rights of citizens.
Whether and to what extent privileges that protect relationships and government information apply in the various administrative venues is an appropriate subject for a semester, not an hour-long workshop. The applicability of those privileges to individual hearings is determined by a state’s statutes, regulations, and case law or, if you’re a federal ALJ or AJ, the federal APA, federal regulations specific to a given agency, and federal case law.

**Because privileges act to exclude the truth, all privileges, whether created by statute or case law, are to be construed narrowly.**

**Trammel v. United States, 445 U.S. 40, 50 (1980):**

“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 permitting 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).”

**A. Fourth Amendment**

The application and development of the 4\(^{th}\) Amendment in the area of administrative law has differed from the criminal law, even when law enforcement officers are involved. The following assortment of cases demonstrates the courts’ position on this privilege as it is applied to civil, administrative law.

1. **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 of the homeowner for failure to admit the health inspector was affirmed on the theory that a search warrant was only required in criminal actions.

   The Supreme Court reversed its position on administrative warrants and held that the Fourth Amendment required a warrant for the search of a dwelling.

3. **See v. Seattle, 387 U.S. at 543.**  
   The Supreme Court again reversed its position on administrative warrants and held that a business could not be entered for inspection without a search warrant.

   An OSHA inspector attempted a search without a warrant. The Supreme Court affirmed the obligation to obtain a warrant and elaborated on the requirements necessary to acquire an administrative search warrant:
“Probable cause in the criminal law sense is not required. 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 administrative standards for conducting an inspection are satisfied with respect to a particular establishment.”

The Supreme Court found that a unique problem existed with respect to “closely regulated businesses” that had a long tradition of close government supervision. In those instances, the Court ruled that a search may be conducted without a search warrant because it was in the interest of the public to maintain close supervision:

   Supreme Court recognized “liquor industry was long subject to close supervision and inspection.” Allowed searches without warrants pursuant to several federal statutes authorizing inspection of premises of liquor dealers.

   Supreme Court allowed warrantless inspection of pawnshop federally licensed to sell weapons. Held: “[T]he warrantless inspections authorized by the Gun Control Act would pose only limited threats to the dealer’s justifiable expectations of privacy. 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”.

   The Supreme Court applied the “closely regulated business” exception to the warrant requirement to Federal Mine Safety and Health Act Inspections.

   Expanded “closely regulated business” exception to include warrantless inspection of junkyards; formulated 3-step approach to warrantless inspections:
   a. There must be a substantial government interest that informs of the regulatory scheme pursuant to which the inspection is made.
   b. Warrantless inspections must be necessary to further the regulatory scheme.
   c. Statute’s inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant that advises the business owner that the search is being made pursuant to the law, has a properly defined scope, and limits discretion of inspecting officers.

A very small sampling of the cases in accord with the foregoing cases:

- **George v. Dept. of Fire**, 637 So.2d 1097 (La.App. 4 Cir., 1994)
- **Grames v. Illinois State Police**, 625 N.E.2d 945 (Ill.App. 4 Dist., 1993)
History/Rationale of Administrative Hearing Exceptions to 4th Amendment

1. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the U.S. Supreme Court held that exclusion of illegally obtained evidence was the best way to deter state law enforcement officers from violating the rights of citizens. Following *Mapp*, obtained evidence was excluded from state administrative proceedings.

2. In *United States v. Janis*, 428 U.S. 433 (1976), a balancing test was announced for purposes of applying the exclusionary rule where federal authorities seek to use evidence illegally obtained by state law enforcement officers. The probable deterrent effect of suppression is to be balanced against the need for the evidence.

3. The *Janis* “balancing test” was first expanded to the area of administrative law in *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1052 (1984) to allow illegally obtained statements to be used in an immigration deportation proceeding even though the evidence was taken by the same agency of the same sovereign. In *Lopez-Mendoza*, the Court found the social costs of excluding the illegally seized evidence far outweighed any possible deterrent effect.


5. Other states are admitting illegally seized evidence in administrative proceedings where the agency seeking to use the evidence does not directly control the actions of the offending officer, such as in administrative license suspension hearings. The “deterrent” effect, in these cases, is the exclusion of the evidence in the criminal proceedings. See *Westendorf v. Iowa Dept. of Transportation, Motor Vehicle Division*, 400 N.W. 2d 553 (Ia. 1990) and *Commonwealth Dept. of Transportation v. Wysocki*, 535 A.2d 777 (Pa. 1987) where the Pennsylvania court held that the legality of a stop was irrelevant because “the driver’s guilt or innocence of a criminal offense is not at issue in the license suspension proceedings.”

6. In *Ascher v. Commissioner of Public Safety*, 519 N.W.2d 183 (Minn. 1994), the Minnesota Court of Appeals did not discuss the balancing test as applied in *Janis* and *Lopez-Mendoza*. The *Ascher* court concluded that applying the exclusionary rule to exclude evidence that a petitioner had violated a condition of his licensure by driving under the influence of alcohol was “inimical to public safety” and would not deter future unlawful police conduct to any significant degree.
Criminal v. Civil/Administrative Application of 4th Amendment Exclusions

   Birchfield was convicted of misdemeanor refusal to submit to a chemical blood test. The basis for his criminal prosecution was his refusal of a warrantless blood draw. The “search” he refused could not be justified as a search incident to his arrest or on the basis of implied consent. North Dakota presented no case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search. As there was no basis to justify a warrantless test of Birchfield’s blood, he was threatened with an unlawful search and the judgment affirming his conviction was reversed. However, the Court also held: “Our prior opinions have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply…Petitioners do not question the constitutionality of those laws and nothing we say here should be read to cast doubt on them.”

2. **Beylund v. Levi, Director of the North Dakota Department of Transportation**, 889 N.W.2d 907 (N.D. 2017)
   After the Birchfield remand, the North Dakota Supreme Court held that the exclusionary rule did not require exclusion of results of unconstitutional warrantless blood tests in civil administrative proceedings.

B. Fifth Amendment Exclusion Against Self-Incrimination

5th Amendment to the U.S. Constitution provides: “No person…shall be compelled in any criminal case to be a witness against himself…”

1. 5th Amendment Privilege, even in criminal trials, is limited to testimony.
      The United States Supreme 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.”
      “The prohibition of compelling a man in a criminal court to be a 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… material.”
2. Because the 5th Amendment Privileges is limited to testimony, the privilege does not prohibit:

a. Forcing defendant to put on an article of clothing to determine if it fits.
b. Forcing defendant to stand in a line up.
c. Forcing defendant to give fingerprints.
d. Photographs of a defendant taken while in custody
e. Removal of clothing or a toupee for identification purposes
f. Forced handwriting samples.
g. Speaking in a line-up for voice identification purposes.
h. Reading a transcript to provide a speech/voice pattern.

3. Administrative Law Exceptions to Fifth Amendment Privilege

   Mother accused of child abuse refused to produce her child at the order of the Dept. of Social Services, asserting her 5th Amendment privilege against self-incrimination. Court held production of child would be a testimonial act but held mother couldn’t assert her privilege against self-incrimination once child became the object of the state’s regulatory interests. Mother had accepted custody of child pursuant to a court order and had submitted to routine operation of the regulatory system. Since the order to produce the child was made for compelling reasons (child’s safety) unrelated to criminal law enforcement and as part of broadly applied regulatory regime not directed at a selective group inherently suspect of criminal activities, privilege was not available. The order finding the mother in contempt of court for failure to produce the child was upheld.

   By order of court, father accused of sexually abusing his child was ordered into therapy. Father claimed this would compel self-incrimination. Held: Because California Constitution requires immunity for statements made during therapy, the statements could not be used in criminal proceedings. Compliance with court-ordered therapy didn’t violate 5th Amendment.

   Supreme Court held incriminating answers given to police in response to booking questions were not obtained in violation of a defendant’s Fifth Amendment rights even though he was not Mirandized. Defendant’s answers to questions fell within a ‘Routine Booking Question’ exception to Miranda’s coverage that was aimed at biographical data necessary to complete booking or pretrial services.

   Admission of a defendant’s refusal to submit to alcohol testing doesn’t violate right against self-incrimination (not fundamentally unfair and doesn’t violate due process rights) even if police failed to so warn him.
3. Failure to Testify Can Be Basis for Adverse Inference in Civil Hearings


II. Admitting Hearsay: Inapplicability of FRE 802 to Administrative Hearings

A. Hearsay Described

1. Testimony of what a person said other than while in the current proceeding;
2. Offered as proof of the truth of the matter asserted;
3. May exclude if its reliability can’t be determined without cross-examination;
4. May be non-verbal if it is a substitute for verbal communication;
5. Is usually inadmissible in a criminal trial unless it is within one of the recognized exceptions.

B. Hearsay Defined

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.

C. Standard to Determine Reliability & Admissibility of Hearsay

Evidence is generally admissible in administrative hearings providing it is otherwise reliable:

*Hearsay may be admitted in an administrative proceeding if it is of a type commonly relied upon by reasonable and prudent people in the conduct of their affairs.*

The Federal Administrative Procedures Act (Sec. 556(d)) pointedly omits “incompetent” evidence, such as hearsay, from the list of evidence that should not be received:

“…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.”
As a result, **hearsay that would be inadmissible in court is routinely accepted in a formal administrative adjudication.** Its exclusion may even be reversible error.

Sampling of Administrative Law Cases Supporting Hearsay Admission

1. **Rispoli v. Waterfront Commission of New York Harbor**, 104 A.D.3d 461, 961 N.Y.S.2d 105 (App.Div. 1, 2013): A longshoreman appealed a judgment denying his petition to annul the Waterfront Commission’s determination to revoke his registration as a special craft longshoreman. Held: “The admission of hearsay statements at the administrative hearing did not violate petitioner’s due process rights to a fair hearing or cross-examination. It is well-established that hearsay evidence can be the basis of an administrative determination. (Matter of Gray v. Adlucci, 73 N.Y.2d 741, 742, 536 N.Y.S.2d 40, 532 N.E.2d 1268 (1988). In addition to presenting the hearsay testimony, respondent presented the testimony of co-conspirator Cangelosi, which corroborated the hearsay testimony, and provided significant detail about petitioner’s involvement in the marijuana grow operation. Petitioner was able to cross-examine Cangelosi, as well as Agent DiPasquale, who was called to introduce the hearsay statements made by others which implicated petitioner. Petitioner’s inability to cross-examine his brother, one of the individuals who made the statements implicating petitioner, does not require a different result. The Administrative Law Judge issued a subpoena in accordance with respondent’s rules to compel the brother’s attendance in order to give petitioner the opportunity to cross-examine him. The fact that the subpoena may have been ignored was not the fault of respondent or the ALJ, and constitutes good cause for failing to produce petitioner’s brother, who was incarcerated at the time.”

2. “The only limit to the admissibility of hearsay evidence is that it bears satisfactory indicia of reliability. We have stated that the test of admissibility as requiring that the hearsay be probative and its use fundamentally fair.” **Calhoun v. Bailar**, 626 F.2d 145, 148 (9th Cir. 1980).

3. “Hearsay evidence can therefore be ‘substantial evidence’ if it has sufficient probative force such that a reasonable man might accept it as adequate to support the conclusion reached by the agency.” **Schaefer v. United States**, 633 F.2d 945 (Ct. Cl. 1980).

4. Hearsay statements may be admissible in an administrative hearing, provided the evidence is determined to be competent. **Evans v. DeRidder Municipal Fire**, 815 So. 2d 61 (La. 2002)

5. An administrative agency may receive hearsay evidence where it is corroborated or where there is other satisfactory indicia of reliability. **McDerment v. Mississippi Real Estate Com’n.**, 748 So.2d 114 (Miss. 1999).

7. “The central issue in this appeal is thus whether Officer Wall’s testimony, in part consisting of the hearsay statements made by Officer Davis at the scene, constituted substantial evidence supporting the hearing officer’s determination that Kiffe was properly directed to submit to a test and refused to do so. Evidence may be admitted in an administrative proceeding, except where precluded by statute, if it is of a type commonly relied upon by reasonable and prudent men in the conduct of their affairs.” *State Department of Motor Vehicles v. Kiffe*, 101 Nev. 729, 732 (1985).

E. Systematic Admission of Hearsay As a Result of Recognized Exceptions

FRE 803(6): Records of Regularly Conducted Activity
A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information of the method or circumstances of preparation indicates lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FRE 803(8): Public Record and Reports
Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

F. Hearsay and the Right of Confrontation

Amendment 6 to the U.S. Constitution states, with emphasis added:

“In all *criminal prosecutions*, the accused shall enjoy the right… to be confronted with the witnesses against him….”

U.S. Supreme Court hasn’t extended the above right of confrontation to civil administrative cases, nor have other federal or state courts.

1. **Arnett v. Office of Administrative Hearings**, 49 Cal. App. 4th 332, 56 Cal. Rptr. 2d 774 (3rd Dist. 1996): There is no absolute right for the defendant to be present at an administrative hearing in order to confront his accusers.

2. **Peretti v. National Transportation Safety Board Federal Aviation Administration**, 999 F.2d 548 (1993): Where Defendant was denied the opportunity to cross-examine a key witness against him before the ALJ, Defendant’s 6th Amendment right of confrontation was not violated because that right only applies in criminal proceedings and is inapplicable to civil administrative hearings. U.S. Court of Appeals, Tenth Circuit, declared in Peretti, “By its own unequivocal terms, the constitutional right of confrontation applies only “in all criminal proceedings”.”

3. A very small sampling of the cases in accord *Arnett* and *Peretti*:

   - *Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir. 1983)
   - *Rosenthal v. Supreme Court of California*, 910 F.2d 561, 565 (9th Cir. 1990)
   - *Butera v. Apfel*, 173 F.3d 1049 (7th Cir. 1999)
   - *Davis v. Public Employees’ Retirement System*, 750 So. 2d 1225 (Ms. 1999)

### III. Inapplicability of Miranda Exclusions to Administrative Hearings

The purpose of exclusionary rules is to prevent the government from using evidence gathered in violation of the U.S. Constitution. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), prevents improperly elicited self-incriminatory statements gathered in violation of the 5th Amendment from being used in criminal trials and excludes evidence gained in situations where the government violated the defendant’s 6th Amendment right to counsel in a criminal context. *Miranda* provides that testimonial evidence gained from “custodial interrogation” may not be used to prosecute a defendant in a criminal trial unless procedural safeguards have been met. **The rule does not apply in civil cases.**

A. **State Dept. of Motor Vehicles v. McLeod**, 106 Nev. 852, 801 P.2d 1390 (1990): *Miranda* warnings aren’t required before evidence of a person’s admitted wrongdoing can be used in a civil hearing. Because a driver’s license revocation hearing is civil, statements made without *Miranda* warnings are admissible.