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RELEVANCY OF EVIDENCE IN ADMINISTRATIVE LAW PROCEEDINGS

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INTRODUCTION:

The Federal Administrative Procedure Act provides "all relevant evidence shall be admitted". While this eliminates from administrative proceedings some of the more restrictive rules of evidence, a provision of this nature stops far short of being an exemption from the rules of evidence. Federal Rule of Evidence 401 defines "relevant evidence" as "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". Even in states which have not adopted the Federal Rules of Evidence, the general definition of relevancy is the same. While some states do not impose upon administrative tribunals the same rules of evidence used in courts of general jurisdiction, e.g., the hearsay rule, irrelevant evidence is inadmissible everywhere, even in tribunals which are said to be exempt from the "technical rules of evidence". The Judge must first consider whether the item of evidence tends to prove the fact sought to be proved by the evidence.

Also to be considered is materiality. Evidence, in order to be material, must prove a fact that either is in issue, or is appropriate for consideration to decide the issue in the proceeding. Therefore, to be material, a fact need not necessarily be in dispute. Background information which aids the Judge in deciding the case, but is not necessarily disputed, is nevertheless material. Such things as the address and personal history of a defendant may not be in dispute, but may be relevant and material, and as such admissible if these facts would aid the Judge or jury. However, the Judge must consider whether such information might be prejudicial, a separate issue.

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Materiality and sufficiency are not the same. Evidence may be both relevant and material if it tends to show a fact in issue or suitable for consideration to decide a question in issue, even though the item of evidence which is sought to be admitted is, by itself, not sufficient to establish that fact. When evidence is offered to prove a fact which is not germane to the case, the evidence is said to be immaterial.

In modern jurisprudence, the concepts of relevancy and materiality have become merged. Today, materiality is usually regarded as a subcategory of relevancy. Many attorneys do not always recognize the difference, objecting as "immaterial", to what is irrelevant and as "irrelevant" to what is immaterial. There are others whom every Judge can remember, who object: "Objection! Irrelevant, immaterial, and incompetent!". Many Judges take the position that such an objection is in fact no objection at all because it fails to clearly state a proper ground for the objection. However, if the objection is to offer evidence that is clearly inadmissible, it may very well be that the objection is proper, even though poorly stated, because of the obvious inadmissibility of the offered evidence.

Evidence is relevant not only when it tends to prove or disprove the ultimate fact in issue, but also when it tends to prove or disprove an evidentiary fact from which the existence or absence of the ultimate fact in issue can directly be inferred. Thus, there are two types of evidence: direct and circumstantial. Testimony by a witness that he saw a defendant shoot and kill the victim is direct evidence of homicide. No further inference or presumption is necessary to prove the event to which the witness testified. However, if the witness testifies that he heard a gunshot, saw the defendant run from the front door of the house carrying a revolver, and found the dying victim just inside the front door, this is circumstantial evidence. It is offered to first prove a fact, from which the fact in issue could be inferred or presumed. Circumstantial evidence is not inadmissible because it is circumstantial. Evidence may be introduced as circumstantial, from which inferences of other facts may be drawn by the finder of fact. The party may offer evidence of evidentiary facts, which would justify reasonable persons in inferring the existence of the ultimate fact to be proven.

LEGAL IRRELEVANCY:

Evidence may be excluded that is only of very remote value when its probative value is significantly outweighed by either unfair prejudice, confusion of issues, undue delay, waste of time, or unnecessary proliferation of the issues. This determination must rest within the sound discretion of the Judge, who must decide whether the relatively slight probative value is substantially and significantly outweighed by the prejudice, confusion, delay, or waste of time. An example of legal irrelevancy is mathematical probability. Theories of mathematical probability may not be used to draw inference of guilt against a criminal defendant.

SIMILAR HAPPENINGS:

One type of circumstantial evidence that is usually admissible, except in criminal matters, is evidence of similar events or transactions. However, such evidence is not always admissible. If the evidence raises too many collateral issues, or presents facts that are incapable of affording any reasonable presumption as to the ultimate facts in issue, it is inadmissible, under the rule of res inter alios acta. However, if there is substantial identity in the circumstances with the evidence offered and the ultimate facts, and the dangers of unfairness, confusion, or undue waste of time are not overwhelming, the trial Judge has the discretion to admit such evidence. Thus, such evidence is allowed only where the circumstances indicate a strong probability that the event that occurred in one instance would also occur in others, including the instance in question.

CHARACTER EVIDENCE:

The general rule is that character evidence cannot be used to prove specific conduct. Character evidence cannot be used to prove guilt of any offense, in either a civil or criminal proceeding, administrative or otherwise. This same rule applies in a criminal prosecution, a negligent tort case, a parole revocation proceeding, a misconduct-type unemployment insurance hearing, or any other type of civil, criminal or administrative proceeding. There are several reasons for this general rule. Character evidence has only remote materiality. It is difficult to ascertain, because at best it is only the opinion of other persons.

Admission of character evidence would always lead to proliferation of the issues, making hearings much longer. More than most evidence, character evidence is readily subject to fabrication and manufacture. Friends produce favorable evidence and enemies produce unfavorable evidence. There are, however, some exceptions to the general rule that character evidence is not admissible. For example, in some cases such as libel or slander, character may be an ultimate fact in issue. In cases of this nature, opinion evidence of nonmoral traits and reputation is allowed. Evidence of specific acts is also allowed. The majority of jurisdictions, however, do not allow opinion evidence as to moral traits. A similar situation exists where reputation, or knowledge of a person's character, is an ultimate fact in issue.

In criminal cases, the prosecution, in its case in chief, may not produce evidence of the character of either the defendant or the victim. However, a defendant may place his own character in issue by attempting to prove himself a person of good character and therefore unlikely to commit the offense, and may also produce evidence of the character of the victim. However, evidence of specific acts is not allowed as character evidence for three reasons: 1. too time-consuming, 2. confusion due to proliferation of a large number of collateral issues, and 3. danger of prejudice would exceed probative value. See Federal Rule of Evidence 405(a) and such states as California, Evidence Code sections 1102 and 1103. The Federal Rules permit specific acts to be discussed on cross examination. However, Federal Rule of Evidence 412 prohibits the use of reputation or opinion evidence of the past sexual behaviour of the victim in rape or rape assault cases; unless such evidence is either constitutionally required to be admitted or is introduced as evidence of sexual relations with another, to question whether the accused was the source of semen or injury, or is offered on the issue of whether the victim had consented to the sexual act. In this situation, under the Federal Rules of Evidence, prior motion to use this evidence must be made and a hearing on its admissibility must be conducted by the trial Judge.

Once the defendant has placed his character in issue by putting forth evidence of good character, the prosecution may cross examine character witnesses about rumors or reputation of the defendant, and may put on rebuttal evidence to impeach the defendant's evidence. However, both cross examination and rebuttal character evidence are limited to the same character traits asserted

by the defendant's evidence. For example, if the defendant puts on character evidence of truthfulness and honesty, the prosecution could not rebut with evidence of drunkenness or violence.

Prior misconduct by the defendant can be shown by the prosecution, if produced for reasons other than to show defendant's character. These purposes may include:

A. To complete the story of the crime. (Res Gestae)

B. To prove the existence of a common plan, scheme or design.

C. To prove other similar crimes that are so unusual and distinctive that they appear to be committed by the same person. (Modus Operandi)

D. To show passion, lust or propensity for illicit sexual relations with this same victim.

E. To show motive.

F. To show that the act in question was neither accidental, unintentional, or without guilty knowledge.

G. To establish identity of the defendant.

H. To prove malice aforethought, deliberation or that specific intent which is an element of the crime in question.

I. Acts committed by the defendant which constitute an admission by conduct.

HABIT AND CUSTOM:

Evidence of habit and custom is not classified as character evidence. A habit is a regular response to a repeated specific situation. Consequently, evidence of specific habit is generally admissible to prove conduct, where it is to be inferred that the actor performed in a particular way, in a certain situation, because the actor habitually, always, or usually performs in that specific situation, in that certain manner. For example, if an employee, who regularly works five days per week, and has not missed work in the last three years, is shown to

regularly drive from home to work north on Main Street, this habit may be shown to infer that the employee drove from home to work north on Main Street on the day in question. To constitute a habit, the act must be specific, routine and continuous. Custom evidence is similarly admissible about business establishments. The custom evidence is evidence to establish a course of business conduct, from which it may be inferred that the business establishment conducted the transaction in question in the same manner as it usually conducts such transactions.

SIMILAR HAPPENINGS:

In accident cases, evidence of other accidents has been admitted to show existence of a dangerous condition at the time of the accident, knowledge by the defendant of the danger, or that the defendant, in the exercise of reasonable care, should have learned of the dangerous conditions. Similarly, evidence of the absence of any such similar accident is also admissible. This can be used to show that the defendant had no knowledge and should not have reasonably known of the existence of the dangerous condition. While the majority of jurisdictions allows such evidence, a minority rejects such evidence on the basis that such absence does not tend to prove any fact.

EVIDENCE OF COMPROMISE:

The general rule is that compromise or settlement negotiations or offers thereof may not be proven as evidence of liability. However, for other purposes such as the tort of bad faith by insurer, evidence of compromise may be relevant and admissible. Because of the nuisance value of litigation, guilt, negligence, or liability cannot be inferred from an offer of settlement. Also, as a matter of public policy, in order to encourage settlements, courts prohibit the disclosure of settlement attempts. States split as to whether an actual admission of liability made in connection with settlement negotiations is admissible, but the majority of jurisdictions will admit the admission of liability if actually made by a party. (Parties generally avoid making any such admissions when offering to settle.) Also, such admission may be used to impeach subsequent inconsistent statements. Similarly, with criminal matters, the withdrawal of a plea of guilty by the defendant may not subsequently be used against him. Federal Rule of Evidence 410 so provides, for the following reasons: 1. a

withdrawn plea is, as a matter of law no plea, thus, it is also no evidence; 2. the plea may be withdrawn because it was unfairly obtained. Thus, its use would be similarly unfair; 3. such evidence is highly prejudicial, and outweighs its probative value; 4. the defendant may have entered a plea for reasons other than guilt (North Carolina v. Alford) or may have bargained the case down to an inconsequentially small sentence. This is of particular note in parole revocation where a parolee may, not realizing the parole revocation implications, plead guilty for a minor sentence, or time served, rather than remain in custody awaiting trial, and then move to withdraw that plea upon learning that the conviction thus obtained establishes a parole violation and will result in revocation of parole, or drivers license or business license, etc.

PRIOR JUDGMENTS AND CONVICTIONS:

Generally, a plea of guilty which is not subsequently withdrawn constitutes a judicial admission of the commission of the act in question, and is therefore relevant and admissible on the issue of liability in a subsequent civil action against that person for committing the same act. This judicial admission falls under a recognized exception to the hearsay rule, and is therefore admissible even in tribunals which are subject to the hearsay rules. An exception to this general rule has been recently created in the United States Supreme Court Case of Alford v. North Carolina, 400 U.S. 25, 91 S.Ct. 160, 27 L. Ed. 2d 162, 1970, where the Court allowed defendant to enter a plea of guilty without acknowledging to the Court that he committed the offense. Where a criminal defendant has entered a guilty plea under North Carolina v. Alford, known as an Alford plea, the judgment of conviction may be subsequently used against the defendant, but the plea itself may not constitute a judicial admission. The general rule, for non-Alford pleas, is that while the plea is admissible as a judicial admission, it is not conclusive in a subsequent civil action. The defendant may attempt to explain away the plea to the civil jury.

Judgments of acquittal in a criminal case cannot be used to show the non-occurrence of the act in a subsequent civil case, because an acquittal only means that the prosecution failed to prove, to the higher standard of proof of beyond reasonable doubt, the guilt of the accused. This same rule applies to parole revocation proceedings. As in a civil case, a parole violation must only be proven by a

preponderance of the evidence, or by substantial evidence. This standard is far less than the beyond reasonable doubt standard. Consequently, a parolee who is acquitted of a new crime committed while on parole in an original prosecution may nevertheless receive revocation of parole for committing the crime of which he was acquitted. This is true solely because of the difference in standards of proof required. Similarly, a parolee who is discharged for misconduct upon accusation of a criminal act, prosecuted and acquitted in criminal court for that act, may not use the judgment of acquittal either for job reinstatement in a personnel or civil service proceeding, or for eligibility for unemployment insurance in a UI proceeding. A Merit Systems Protection Board or Civil Service Commission Administrative Law Judge, an Unemployment Insurance Administrative Law Judge, or a Parole Board Administrative Law Judge, is not bound by a criminal court acquittal and may very well find, in the administrative law proceeding, that the defendant did commit the criminal act. On the other hand, a valid judgment of conviction in parole revocation proceedings is conclusive because the conditions of parole specifically prohibit criminal conduct and in most states, specifically prohibit receiving a new conviction. Again this is true because the standard of proof in the criminal proceeding is higher, rather than lower, than the standard in the administrative proceeding. This is an example of collateral estoppel, the subject of another portion of this seminar.

Many states do not allow pleas of nolo contendere. In states that do, a defendant does not plead guilty, but avoids trial and accepts conviction and punishment, without acknowledgment of guilt. This is similar, but not the same as an Alford plea. Federal Rule of Evidence 410, California, and a number of other states, which allow pleas of nolo contendere, prohibit the use of a conviction upon plea of nolo contendere in a subsequent civil proceeding.

SUBSEQUENT REPAIRS OR PRECAUTIONS:

Evidence of subsequent repairs or precautions is not admissible to prove negligence, regarding a dangerous condition. This is a rule not of evidence or of credibility, but rather a rule of public policy. If evidence of repairs following an accident were admissible against the property owner, property owners would be extremely reluctant to repair a dangerous condition before the conclusion of litigation or settlement. This would frequently result in additional accidents, which would have been avoidable had

the dangerous conditions been repaired. Because the repair is made for different reasons--prevention of future accidents--it does not constitute an admission. This is another instance where the prejudicial nature of the evidence outweighs its probative value. There are, however, three purposes for which evidence of subsequent repairs may be admitted: 1. to impeach inconsistent evidence, 2. to show that the defendant owned or controlled the property, because a stranger would not repair or bother someone else's property, 3. to demonstrate cautionary measures, where the defendant has denied any such feasibility.

RESIDUUM:

There are a number of states which impose upon administrative tribunals the requirement that the decision of the administrative tribunal--the agency--must be supported by a "residuum" of competent evidence. Competent evidence is defined as evidence which falls within all of the rules of evidence. In those jurisdictions, Administrative Law Judges must be aware of all of the rules of evidence, not just those of relevancy, and must consider whether there is evidence supporting the decision which would withstand attack upon the basis of any rule of evidence recognized by the law of that state. There is considerable question as to whether this is a rule of evidence or a standard of appellate review, but in either case, it must be foremost in the minds of the Administrative Law Judge sitting in such a state.