THE COUNCIL ON
LICENSURE, ENFORCEMENT & REGULATION
Promoting Regulatory Excellence

Administrative Law and The Regulatory Process
Understanding The Basics
Day One
8:30 – 9:00 a.m.  Registration
9:00 – 9:15 a.m.  Introduction and Welcome

Module I - Fundamentals
9:15 – 11:15 a.m.  i. Sources & Functions
                     ii. Purposes of Administrative Agencies
                     iii. The Regulatory Process
               11:15 – 12:15 p.m. iv. Limits on Administrative Agencies
                     v. Sufficiency of Evidence in Administrative Proceedings

12:15 – 1:15 p.m.  Lunch

Module II - The Role of Agency General Counsel
1:15 – 3:00 p.m.  i. Principles of Administrative Agencies, Boards and Colleges
                  ii. Role as Board Counsel
                  iii. Rulemaking
   3:00 – 3:15 p.m.  Break

Module III - Adjudication of Administrative Cases
3:15 – 5:00 p.m.  i. The Role of the Attorney in Compliance and Discipline
                  ii. Adjudication of Administrative Cases

Wednesday, September 13

Module IV - Litigation
9:00 – 10:30 a.m.  i. Initiating the Hearing Process as a Disciplinary Prosecutor
10:45 – 11:00 a.m.  Break
10:45 – 11:45 a.m.  ii. Administrative Hearing Process
11:45 a.m. – 1:00 p.m.  Lunch
1:00 – 3:30 p.m.  iii. Preparing for Formal Hearing
3:30 – 3:45 p.m.  Break
4:00 – 5:00 p.m.  iv. Adjudication of Formal Hearings

*This schedule is subject to change.*
Welcome

Welcome to the Administrative Law and the Regulatory Process, provided by the Council on Licensure, Enforcement and Regulation (CLEAR). We hope you enjoy this course, and look forward to being of service to you and your organization for your future regulatory educational needs.

Please take a moment to read through the following information regarding our organization, and what we can offer you as a student, and/or member of our organization.

Background

CLEAR was conceived over 30 years ago as a resource for any entity or individual involved in the licensure, non-voluntary certification or registration of the hundreds of regulated occupations and professions. Since its inception, CLEAR’s membership has included representatives of all governmental sectors, the private sector, and many others with an interest in this field.

A neutral forum to encourage and provide for the sharing of best practices, CLEAR serves and supports the international regulatory community and its vital contribution to public protection. CLEAR’s hallmark is its inclusiveness. Since it does not lobby or adopt positions on debatable matters, CLEAR offers neutral ground to those holding diverse viewpoints. This holistic approach serves its members well, and permits unusual responsiveness to a necessarily varied and changing constituency.

Mission Statement

CLEAR is an association of individuals, agencies and organizations that comprise the international community of professional and occupational regulation.

CLEAR is a dynamic forum for improving the quality and understanding of regulation in order to enhance public protection.
Through conferences, services and publications, CLEAR provides the resources for ongoing and thorough communication of international licensure and regulation issues among all those interested in the field.

CLEAR’s purpose is to bring together the professional regulatory community for:

- The exchange of information
- Education and training
- A central information clearinghouse
- The identification of best practices

CLEAR meets its mission through:

- Conferences and training
- Publications
- Answering inquiries
- Consulting
- Providing Networking Opportunities

**Programs**

CLEAR promotes regulatory excellence through conferences, educational programs, networking opportunities, publications, and research services for those involved with, or affected by, professional and occupational regulation.

There are four core areas of substantive inquiry that CLEAR supports through its annual conference and other venues:

- Compliance and discipline
- Testing and examination issues
- Entry to practice issues
- Administration, legislation and policy

**Education and Training**

In addition to this program, CLEAR offers the National Certified Investigator/Inspector Training Program; both Basic and Specialized Courses. CLEAR also offers training programs for regulatory leaders in executive positions and regulatory board/council members.
Administrative Law and The Regulatory Process

Module 1 - Fundamentals

PARTICIPANT GUIDE
Upon completion of the session, you will be able to:

- Identify the sources and functions of Administrative Law
- Understand the purpose of Administrative Agencies
- Understand the Regulatory Process
- Understand the limits on Administrative Agencies
- Understand sufficiency of evidence in Administrative Proceedings
Sources and Functions of Administrative Law

- Administrative law is a branch of statutes, rules, policies, and court decisions that tell us how government agencies are established and function.

- Initially what is termed as "Administrative Law" could be broadly defined as procedural and not substantive.

- It is not really classified as Civil Law and it is different from Criminal Law, although:

  - It is different from civil law because it has its own very special rules usually including at least slightly different rules of evidence and discovery.

  - While different from criminal law, some jurisdictions classify it as quasi-criminal.
Sources and Functions of Administrative Law

- Functions
  - Sets forth the powers that may be exercised by administrative agencies.
  - Lays down the principles governing the exercise of those powers.
  - Provides legal remedies to those aggrieved by administrative action.

Purpose of Administrative Agencies

- Regulation is only justified as a way to protect the public from harm.
- Criteria for regulating a profession:
  - unqualified practice poses a serious risk;
  - such risks are likely to occur;
  - the public cannot accurately judge a practitioner’s qualifications; and
  - benefits outweigh potential harmful effects of regulation.
### Purpose of Administrative Agencies

- To set standards, maintain standards, and promote the maintenance of standards with the ultimate objective of protecting the public, determine violations of standards, adjudicate violations, and impose penalties.
  - Licensing requirements.
  - Standards of practice.
  - Standards of conduct.

---

### Purpose of Administrative Agencies

- To carry out functions of government on a day-to-day basis.
- To control entry into a profession by requiring a license to undertake specified activities.
  - Registration
  - Certification
  - Licensing

---

### Purpose of Administrative Agencies

- To inspect and regulate facilities.
- To dispense grants, subsidies, or other incentives.
- Other Reasons for Administrative Agencies.
  - Population increase.
  - Expansion of government responsibility.
  - Need for flexibility in administering programs.
### Purpose of Administrative Agencies

- Other Reasons for Administrative Agencies. (cont.)
  - Development of expertise.
  - Inability of Legislature to respond quickly.
  - Inability of judiciary to handle all cases and controversies.

### The Regulatory Process

- Adjudication – process for determining facts or applying law from which an agency formulates and issues an order.
- Agency – a government entity authorized to:
  - make rules, regulations, or policy, or
  - formulate or issue decisions or orders

### Definitions
Definitions

- Agency action
- Agency head – individual or members in which vested with the ultimate legal authority of an agency.
- Contested case – an adjudication in which the opportunity for an evidentiary hearing is required.

Definitions

- Emergency adjudication – an adjudication when the public health, safety, or welfare requires immediate action.
- Evidentiary hearing – proceeding for the receipt of evidence on issues on which a decision of the presiding officer may be made.
- Final order – the order issued

Definitions

- Law – a written provision passed by a legislative body.
- License – a permit, certificate, approval, registration, charter, or similar form of permission required by law and issued by an agency.
- Licensing – the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.
Definitions

- **Notice** – a record containing information required to be sent to a person.
- **Notify** – reasonably required steps taken to inform a person, regardless of whether the person actually comes to know of the information.
- **Order** – an agency decision determining the rights, duties, privileges, immunities, or other interests of a specific person.

Definitions

- **Rule** – a provision of general application promulgated or adopted by the agency applicable basic laws.
- **Force of law** – affecting the rights or conduct of individuals and businesses.
- **A rule may:**
  - establish a requirement,
  - set a standard,
  - establish a fee or rate, or
  - provide a procedure for interactions with agency.

Definitions

- **Guidance document** – developed by an agency or staff (i) stating the agency’s interpretation of law, or (ii) describing how and when the agency will exercise discretionary functions.
- **Policy memoranda** – documents that pertain only to the internal management of the agency agencies.
An administrative agency is a creature of statute and is only entitled to act within the jurisdiction created by legislation and in a manner prescribed by the statute that created it.

Powers of Administrative agencies – Many agencies operate under statutes that give them:
- Legislative (rule-making)
- Executive (enforcement)
- Judicial Power (adjudication)

Statutory Authority

The board shall have the authority to levy and collect fees for certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the regulatory board and a proportionate share of the expenses of the Department

The board shall promulgate regulations necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners and to effectively administer the regulatory system administered by the regulatory board

Sample Regulation

The board shall examine, or cause to be examined, the qualifications of each applicant for certification or licensure, including when necessary the preparation, administration and grading of examinations

The board shall certify or license qualified applicants as practitioners of the particular profession or occupation regulated by such board

The board shall receive complaints concerning the conduct of any person whose activities are regulated by the regulatory board and to take appropriate disciplinary action if warranted
Sample Regulation

• "The board may, in considering the totality of the circumstances, fine any licensee, certificate holder, or permit holder, and to suspend or revoke or refuse to renew or reinstate any license"

Limits on Administrative Agencies

Legislative

• Initial grant of authority
• Revoke or narrow the authority it granted through legislation
• Report and Wait Procedure – effective date of an agency's proposed rules is delayed for a period of time
• Sunset law – a given agency will go out of existence after a fixed period of time
### Legislative
- Interim oversight – periodic legislatively mandated review of some or all agency regulations
- Authorization for appropriations
- Annual/Biennial Report – requiring agencies to report back periodically on their activities

### Executive
- Derived from the executive office of government
- Power to appoint
- Removal powers for the same staff
- Executive orders or formal directive
- Modification of an organizational structure
- Oversight of rule-making proceedings
- Power to control litigation affecting the agencies

### Judicial
- When an agency’s final action causes harm or threatens harm to someone, the agency action ordinarily can be challenged in court.
- A court will review the agency action to make sure the action itself and the process that the agency followed when taking the action were proper.
- May uphold the agency action, remand it to the agency for further action, or strike it down.
Most jurisdictions have enacted statutes that (i) place restrictions on the activities of administrative agencies and (ii) codifying some procedures. Most APAs are comprehensive, establishing minimum requirements concerning four main areas:

- Public access
- Rulemaking procedure
- Adjudication Procedure
- Judicial Review

Administrative Procedures Act (APA)

- Public access
  - Agency laws, regulations and policies
  - Agency meetings (notice of fact and substance)
  - Agency records
- Agency rule making procedure
- Agency adjudication procedure
  - Requirement for the agency to provide due process prior to reaching a final decision and instituting sanctions
- Judicial review of agency actions

Other General Controls

- The Public
- Open meeting laws
- Freedom of Information Act (FOIA)
- Ombudsman
- Prosecutorial Discretion
- Agency Discretion
Sufficiency of Evidence in Administrative Proceedings

**Burdens of Proof**
- Who must present sufficient evidence in order to prevail at hearing
- Generally rests upon the state to demonstrate that a violation has taken place

**Standards of Proof**
- How much credible and persuasive evidence must be provided in order to meet the burden of proof

There are two standards of proof used in professional discipline cases or licensing cases:

- **Preponderance of the Evidence**
- **Clear and Convincing Evidence**

**Preponderance of the Evidence**
- Establishing that the elements of the violation are more probably true than not
- Most administrative adjudications in the United States use the preponderance of evidence standard
Sufficiency of Evidence

• “Even Stephen, plus a feather”

• Means that all things being equal, the tiniest piece of evidence that pushes judgement one way or the other is what wins, or loses, the case

• A criminal defendant may be found not guilty in a criminal trial, but “guilty” in a civil action on the exact same evidence

Sufficiency of Evidence

• Clear and Convincing Evidence
  • Mostly used in fraud cases
  • Established when it is highly probable that the elements of the violation occurred
  • In the United States, this standard is used for some agency actions

Section Review
## Learning Objectives Review

You should now be able to:

- Identify the sources and functions of Administrative Law
- Understand the purpose of Administrative Agencies
- Understand the Regulatory Process
- Understand the limits on Administrative Agencies
- Understand sufficiency of evidence in Administrative Proceedings

---

## Questions

---
Administrative Law and The Regulatory Process
Module 2 - Role of the Agency General Counsel

PARTICIPANT GUIDE

© 2017 The Council on Licensure, Enforcement and Regulation (CLEAR)
Learning Objectives

Upon completion of the section, you will be able to:
- Understand the principles of Administrative Agencies, Boards and Colleges
- The role as Board Counsel
- Rulemaking

Principles of Administrative Agencies, Boards and Colleges

- Regulatory Board is a Creature of Statute
- Regulatory Board - different designations
- Creation of the Board -
  - Typically created by statute
  - Authority is limited to those powers expressly delegated
  - Implied powers are only those derived by necessary implication from express statutory authority granted to the board
### Principles of Administrative Agencies, Boards and Colleges

- Board's purpose is to protect the public
- Protects the public by regulating the profession
  - Ensure professional competence and fitness
  - Promulgate rules
  - Investigate allegations of misconduct
  - Conducting hearings
- Regulation
  - Subject matter
  - Factors

### Regulatory Boards

- Subject matter
- Structure of a Regulatory Board
  - Board composition
  - Citizen members
  - Centralized agencies/ Umbrella boards

### Regulatory Boards

- Board Selection
  - In most instances, individuals appointed by the chief executive
  - In some instances the appointments must be confirmed by the state legislature
- Types of Board
  - Autonomous boards
  - Centralized agencies
  - Semi-Autonomous agencies or boards
**Role as Board Counsel**

- **Advisory Functions**
  - Rulemaking
  - Board meetings
  - General counsel

- **Prosecutorial Functions**
  - Investigations
  - Contested Cases

**Advisory Functions**

- **Rulemaking**
  - Procedural requirements of the APA
  - Advises on statutory authority and other issues
  - May draft rules and proposed advisory opinions

- **Board meetings**
  - Public meetings
  - Conflicts of interests and ethical concerns
  - Disciplinary process

**Advisory Functions**

- **General Counsel**
  - Policies and procedures
  - Records and open meeting requirements
  - Injunctions for unlicensed practice
  - Enforcement actions and collection activities
  - Personnel issues
  - Hiring
  - Issues handled by outside counsel
Prosecutorial Functions

- Investigations
  - Disciplinary or application matters
  - Provide information and documentation for upcoming board meetings
  - Assist investigators in the collection of evidence
- Contested cases
  - Prosecution of disciplinary and application contested cases

Rulemaking

- Types of Rules
  - Procedural
  - Substantive
  - Interpretive Rules
- Oversee the Drafting Process
  - Delegated from the legislature to regulatory boards
  - Properly promulgated, rules have the force and effect of law

Rulemaking - Advice to the Board

- Statutory authority to promulgate rules.
- Whether the rules are within the board’s scope of authority and legislative intent.
- Whether the rules meet the applicable statutory and constitutional standards.
- Whether the rules should be promulgated by the regular rulemaking process or emergency.
Rulemaking

- Ensure rulemaking procedure is followed
  - Written public notice of the intention to make a rule and publication of the proposed rule itself
  - Opportunity for public comment/hearing
  - Consideration of comments
  - Publication of the final rule
- Defend rule if challenged

Section Review

Learning Objectives Review

You should now be able to:

- Understand the principles of Administrative Agencies, Boards and Colleges
- The role as Board Counsel
- Rulemaking
Administrative Law and The Regulatory Process

Module 3 - Adjudication of Administrative Cases

PARTICIPANT GUIDE
Learning Objectives

Upon completion of the section, you will be able to:

- Understand the role of the Attorney in compliance and discipline
- Understand adjudication on administrative cases

The Role of the Attorney in Compliance and Discipline
**Investigations**

- Case Assessment
- Legal Counsel – support to investigators
  - The investigator is the front-line contact with the respondent and the witnesses.
  - May be asked for insight or counsel on proper procedure, records or statements needed from the respondent or witnesses.

**Preparation of Evidence**

- Classifications of Evidence
- Evidence is generally classified as:
  - Direct
  - Circumstantial

**Direct Evidence**

- Tends to establish a fact in issue without the need for an inference or presumption
- Generally requires an eyewitness
- May also take other forms, such as photographs, records, or signed statements
  
  *Example: In a drug diversion hearing, a nurse testifies that she saw another nurse take narcotics from the medication cabinet at the end of her shift, place the bottle into her purse, and walk out of the facility. That would be direct evidence of drug diversion.*
Circumstantial Evidence

- Proof of a fact, or series of facts, from which the existence or nonexistence of other facts may reasonably be inferred.
- Cases may lawfully be built entirely from circumstantial evidence.
- The difficulty in building successful circumstantial cases

Circumstantial Evidence

Example: In a drug diversion case, there are no eyewitnesses that place a suspected nurse in contact with the medication. Instead:
- there is evidence that drugs are missing only on dates when the nurse was on duty
- only at the end of her shift, that only she had access to the medicine cabinet during those times,
- patients complained that they had not received those medications from that nurse toward the end of the shift or that the medications administered by that nurse did not relieve pain, and that
- the nurse had slurred speech at points during her shift

Forms of Evidence

- Evidence can take many forms at hearing
  - Real
  - Testimonial
  - Demonstrative
- Each form has its own strengths and challenges
- You must use all forms to develop a strong case
Real Evidence

- Evidence that consists of tangible objects
  - Documentary Evidence: a form of real evidence that "speaks for itself" as to the content. Includes:
    - Public Records
    - Personal Records
    - Medical Records
    - Electronic communications
    - Other documents

Real Evidence

- Physical evidence – a form of real evidence that was part of the event in question. Includes:
  - Objects seized at the scene
  - Security camera footage
  - Garments worn during the event
  - Hard drives, CDs or DVDs
  - Scientific evidence: the lab tests

Testimonial Evidence

- Evidence supplied through witnesses testifying about an event, rather than through the presentation of objects.
- Types of witnesses include lay or expert.
- As a general rule, testifying witnesses must
  - have personal knowledge of the topics to which he or she will testify
  - be willing to testify under oath or affirmation
Demonstrative Evidence

- Evidence created after the incident to illustrate/support testimonial evidence or make other evidence more understandable to the trier of fact
- Includes
  - Maps
  - Photographs
  - Diagrams
  - Models
  - Summaries of voluminous evidence

Discovery

- Goals of Discovery
  - Prevent "trial by ambush"
  - Reach a fair result
  - Provide more information to encourage settlement of cases prior to trial
- Discovery Methods
  - Depositions upon oral examination or written questions
  - Production of documents or things or permission to enter for inspection
  - Physical and mental examinations
  - Requests for admissions

Scope of Discovery

- Unless otherwise limited, parties may obtain discovery regarding any matter that:
  - is not privileged
  - is relevant to the subject matter of the pending action
- Whether it relates to
  - the claim or defense of the party seeking discovery or the claim or defense of any other party.
  - existence, description, nature, custody, condition, and location of any, documents, or other tangible things
  - identity and location of persons having knowledge of any discoverable matter
Claims of Privilege and Protection as trial preparation material

- When a party withholds information otherwise discoverable by claiming that it is privileged or subject to protection as trial preparation material
- The claim must be express and describe the nature of the documents, communications, or things not produced or disclosed
- Must be done in a manner that will enable other parties to assess the applicability of the privilege or protection.

Scope of Discovery

Protective Orders

- Upon motion by a party or by the person from whom discovery is sought
- For good cause shown
- The court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense

Protective Orders – scope

- that the discovery not be had
- that the discovery may be had only on specified terms and conditions, including a designation of the time or place
- that the discovery may be had only by a method other than that selected by the party seeking discovery
- that certain matters not be inquired into, or that the scope of discovery be limited to certain matters
- that discovery be conducted with no one present except persons designated by the court
Scope of Discovery

- Protective Orders – scope
  - that a deposition after being sealed be opened only by order of the court
  - that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way
  - that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened directly by the court

Discovery

- Experts
  - Routinely used to help establish a failure to meet a particular standard of care or practice
  - Discovery of facts and opinions held by experts, otherwise discoverable, may be obtained by interrogatories
  - A party may require any other party to identify each person whom the other party expects to call as an expert witness at trial

Discovery

- Any person disclosed by interrogatories or as a person expected to be called as an expert witness at trial may be deposed.
- A party may obtain the following discovery
  - The scope of employment in the pending case and compensation for such service
  - The expert’s general litigation experience
  - The identity of other cases in which the expert has testified by deposition or at trial
  - An approximation of the portion of the expert’s involvement
Experts

- NOT required to disclose earnings as an expert witness or other income derived from other services.
- Only under unusual or compelling circumstances would an expert be required to produce financial or business records.
- A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to testify at trial.

Discovery

- Experts
  - Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for the time spent in responding to discovery.

Discovery - Requests to Opposing Parties

- Interrogatories to Parties
  - Without leave of court, any party may serve upon any other party written interrogatories to be answered:
    - by the party to whom the interrogatories are directed
    - any officer or agent of a corporation or government agency
  - Interrogatories may be served on the plaintiff after commencement of the action.
  - Each interrogatory shall be answered separately and fully under oath unless it is objected to.
### Discovery - Requests to Opposing Parties

**Interrogatories to Parties**
- There usually exists a timeframe within which parties must respond to the interrogatories.
- Use of interrogatories at trial — the answers to interrogatories may be used to the extent permitted by the rules of evidence.
- Option to produce records

**Production of Documents.**
- any party may request any other party to produce and permit the party making the request to inspect and copy possession, custody, or control of the party to whom the request is directed

**Requests for Admissions**
- a party may serve upon any other party a written request for admission of the truth of any matters set forth in the request

### Sanctions for Failure to Make Discovery

**Motion for Order Compelling Discovery**
- Upon reasonable notice to other parties and all persons affected, a party may apply for an order compelling discovery as follows
  - Appropriate Court
  - Motion- Order to compel
Sanctions for Failure to Make Discovery

- Motion for Order Compelling Discovery
- Upon reasonable notice to other parties and all persons affected, a party may apply for an order compelling discovery as follows:
  - Motions to compel should include a certification
  - If a party continually refuses to respond, it is appropriate to file a Motion for Imposition of Sanctions

Exhibits- General Principles

- Relevance – The controlling issue for admissible evidence is relevance.
  - An exhibit is relevant if it tends to prove or disprove a material fact.
  - The material facts are found in the Administrative Complaint and the elements of the regulations that are alleged to have been violated.
- Foundation – The attorney must establish a foundation for the exhibit

Exhibits- Mechanics

- Most attorneys proffer exhibits one by one during the course of the hearing. An example of common technique for this process follows:
  - Have the exhibit marked (i.e. Please mark this as Petitioner’s exhibit 1 for identification)
  - Show exhibit to the responded
  - Ask permission to approach the witness (if applicable)
  - Show the exhibit to the witness
  - Lay the foundation for the exhibit
  - Move for admission of the exhibit into evidence
Exhibits- Mechanics

- Sometimes an attorney will choose to pre-mark and give the exhibits to the trier of fact at the beginning of the hearing.
- If the proceeding begins with the opportunity to address preliminary matters, the parties can use this time to offer exhibits before the hearing begins.
- The attorney may reserve the right to offer additional exhibits.

Exhibits- Practice Tips

- Review the Administrative Complaint and Investigative Report.
- Make sure the Administrative Complaint gives notice to the Respondent of what violations the agency seeks to prove at the hearing. If necessary, amend the Administrative Complaint.
- Identify potential witnesses and exhibits and make sure the witnesses are available.
- Consider whether there was substantial justification or reasonable basis in law and fact for filing the Administrative Complaint in anticipation of a motion for attorney’s fees.
- Troubleshoot the Administrative Complaint taking the opposition’s point of view.

Exhibits- Practice Tips

- Identify the Potential Exhibits and Witnesses Needed
  - Exhibits should be legible
  - Exhibits should really be needed to prove the case
  - Identify the evidentiary rule that supports admission
  - Objections to admissibility are identified and strategy to overcome developed
  - Need for testimony to lay a foundation
  - Identify witness through which the admission of an exhibit will be sought or needed
Hearsay

- Legal Definition: Hearsay is an out of court statement that is presented at hearing for the truth of the matter asserted. Under the normal rules of evidence, hearsay statements are generally barred unless one of the many exceptions to the hearsay rule applies.

- Hearsay is generally excluded from a truth-finding hearing
- A hearsay witness cannot be effectively cross-examined to determine the reliability of the original source of the information.

Administrative hearings generally permit the admission of hearsay evidence, if it is of sufficient reliability.

- Hearsay evidence, however, is generally viewed as weak evidence because of the difficulties in judging the reliability of the information.

- The prior statements of a party opponent are not considered to be hearsay.

- It is fair to discuss what a party has said previously because the party will always be present to explain or contest such evidence.

Privileges

- Evidentiary privileges recognized in civil actions apply in administrative proceedings.

- Business and Public Records. Even though documents produced by or for an agency are usually public records, these documents are typically not admissible under the hearsay exception for public records, but rather as business records.

- Documents Prepared by your Witness. Often this relates to reports or documents drafted by expert witnesses which are still, technically, hearsay even if the witness is on the stand.
### Exhibits: Frequently Encountered Evidence Issues

#### Judicial Notice and Stipulations
- Information that is accepted as true without the need to present other forms of evidence to substantiate the fact.
- Appropriate when the fact is commonly known or easily ascertainable as true without requiring formal proof.
- Stipulations are agreements between the parties. These agreements can cover any of the information that would normally be included in a hearing.

#### Authentication of Evidence
- Before any evidence is admitted at hearing, a proper foundation for the admission must be built.
- When the evidence is in the form of real evidence, such as documents or physical evidence, the foundation requires the authentication of that evidence.
- Authentication means that the party offering the evidence establishes that the evidence is what the party claims it to be.

- Authentication normally requires that a witness who has first-hand knowledge of how the evidence was collected.
- Authentication requirements mean that the collection of evidence must be thorough enough, and maintained well enough, to permit the authentication of each piece of evidence.
Best Evidence Rule

- General rule: The most original document is best.
- The rules of evidence generally require that an original writing, recording, photograph, or other document in which legitimacy is in issue, should be proven by admission of the original version of that document.
- Secondary evidence is acceptable when:
  - The original is unavailable; or
  - The party presenting it did not destroy or make the original unavailable or, if it did make the original unavailable, did not do so with bad intent.

Exhibits: Frequently Encountered Evidence Issues

Impeachment Evidence
- Impeachment is a technique used to attack the truth-telling capacity of a witness. Impeachment may be accomplished by:
  - Demonstrating bias
  - Self-contradiction
  - Evidence of poor character as to truth-telling
  - A defect in perceptive capacity
  - Prior convictions or bad acts
  - Presenting evidence contrary to the version presented
Exhibits: Frequently Encountered Evidence Issues

- Impeachment Evidence
  - Does not directly address the substantive issues in a case.
  - Presented to demonstrate why the fact finder should hesitate to accept the testimony of a witness as true and correct.
  - A thorough investigation should include investigation of credibility of witnesses.

Adjudication of Administrative Cases

- Every final action that produces an "order" is technically an adjudication.
- Consent Orders and Negotiated Settlements
  - Admission of violation
  - Waiver of right to hearing
  - Agreed imposition of monetary penalty
  - May have the ability to fashion a range of resolutions
Adjudication of Administrative Cases

- Summary suspension
  - Must be allowed by statute or regulation
  - Showing a degree of harm to the public
- Requires prompt due process after suspension is taken or court approval for summary action
- May involve quality of care grounds, physical or psychological impairment, certain criminal convictions, fraud, or other substantial economic or health and safety threat to public

Section Review

Learning Objectives Review

You should now be able to:

- Understand the role of the Attorney in compliance and discipline
- Understand adjudication on administrative cases
Questions

[Image of question mark]

---

---

---

---

---
Litigation
Are You Ready For Battle?

Learning Objectives
Upon completion of the section, you will be able to:

- Understand how to initiate the hearing process as a disciplinary prosecutor
- The administrative hearing process
- Preparation for formal hearings
- Understand the adjudication of formal hearings

Initiating the Hearing Process as a Disciplinary Prosecutor
Initiating the Hearing

- What must be done to initiate the action?
  - Notice and Opportunity to be heard – Basic Due Process

Evaluating The Strength of your Case

- Do you have a case that you can bring that meets the burden of proof?
- Are there any jurisdictional bars to bringing the action?
  - Any statutorily imposed time limits?
  - Any deadlines that must be met?

Evaluating The Strength of your Case

- Need to Match the Expected Evidence to Your Elements
  - Many different methods are used
  - Simple two column method - list elements on one side and to the other side place evidence/witness that will be used to establish the element
  - Do you need an expert witness to assist?
Using Expert Evidence Effectively

- Recognizing if There Is a Need for Expert Testimony
  - Establish standard of care violation
  - Perform analysis of results or other evidence

So you have hired an expert – now what?

- Are you a Frye jurisdiction or a Daubert jurisdiction?

Source: https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/

Frye Standard

- Frye vs. US, 29 F 1013 (D.C. Cir 1923)
  - The 1923 case revolved around the use of a blood pressure polygraph test.
  - Result is that the opinion of experts or skilled witnesses is admissible when the matter of inquiry does not lie within the range of common experience or knowledge.
Daubert Standard

- A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
  - the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue
  - the testimony is based on sufficient facts or data
  - the testimony is the product of reliable principles and methods
  - the expert has reliably applied the principles and methods to the facts of the case.

Daubert Standard

- Other factors considered in determining reliability of expert testimony:
  - If the testimony is related to the expert’s independent research
  - The analytical gap between the data and expert opinion
  - Accounting for obvious alternative explanations

Daubert Standard

- Other factors (cont.):
  - Expectations regarding the expert’s level of care and professionalism as a litigation consultant
  - The reliability of the expert’s field of expertise or subjects outside of the expert’s field
  - Considerable leeway is given to the trial judge
Using Expert Evidence Effectively

- Evaluating Whether Your Expert Opinion Is Sufficient
  - Standard the court uses for admissibility
  - Look at this issue count by count; each count that is going to require expert testimony should be supported by the expert opinion.
  - Experts in professional licensure cases should explain what actions (or inactions) should have been performed by the Respondent

Evaluating The Strength of your Case

- Determine if Your Case Involves Direct Evidence or Circumstantial Evidence or a Mixture:
  - The key to a circumstantial case is to rule out the other possibilities that could explain the conclusion you wish the court to draw.
  - The key to a direct evidence case rests on the credibility of the witnesses. Evaluate the credibility of each witness carefully to determine the possible landmines in your evidence.

Evaluating The Strength of your Case

- After determining whether you can prove the case
  - What sanction or outcome will you be asking for?
  - What facts must be proven to support such a sanction or outcome?
  - Aggravating Factors versus Mitigating Factors
    - Have you pled them? Do you need to plead them?
Evaluating the Strength of your Witnesses

• Evaluating Witnesses for Credibility Purposes

• Questions to Consider
  • Did they have a reasonable opportunity to observe or hear what they say they did?
  • Do they have sufficient personal knowledge?
  • What about hearsay?

• Evaluating Witnesses for Credibility Purposes
  • Is there any corroboration available for their testimony?
  • Have they made inconsistent statements about the events in question in the past?

• Bias Considerations
  • What personal and business connections do they have to the respondent? What community do they live in? What biases for or against other potential witnesses or the respondent can you identify?

Evaluating the Strength of proposed expert testimony:

• Expert testimony should be evaluated both in terms of its ability to persuade as a technical analysis and its ability to persuade as credible testimony.
  • The most knowledgeable is not always the best witness.
Evaluating the Strength of your Witnesses

- Evaluating the strength of proposed expert testimony:
  - Bias and credibility considerations apply equally to the expert

Choices to be made if the case is not strong

- Pre-filing investigation & Pre-discovery inquiries
  - Can you obtain information or do more investigation?
  - Talk to witnesses including experts
  - Evaluate the evidence – do you need witnesses to have it admitted?

Choices to be made if the case is not strong

- Return to the client for further investigation:
  - Cases that require more extensive inquiry, or that would benefit from use of the investigative powers of the client, may be returned to the client for further investigation.
  - If available, an attorney-client protected memorandum describing the issues that should be explored would be helpful to focus the client on specific case needs.
  - Public Record Laws and Government in the Sunshine laws may apply
### Choices to be made if the case is not strong

- Use of the discovery process to fill in small blanks and determine how the opposing side will address the charges and evidence.
- A case is dynamic and must be constantly reassessed.

### Administrative Hearing Process

- You must always be willing to return the matter to the client as not prosecutable.
- If you don’t have the facts right or the charges right – look at amending the case.
Informal Hearings

- Usually less adversarial – can be done in writing only.
- May be used for formulation of settlements that address a wide range of conduct.

Informal Hearings

- Methods and types of resolution approaches:
  - Alternative dispute resolution
  - Mediation
  - Arbitration

Formal Hearings

- Nature of Proceedings:
  - Considered civil, but with different rules
  - Not criminal – most criminal procedures and defense do not apply
  - Rules of Evidence do not apply, but are usually followed
  - Hearsay Evidence – generally allowed, but not given great weight
### Formal Hearings

<table>
<thead>
<tr>
<th>Basic Requirements of the Proceeding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice and Opportunity to Be Heard</td>
</tr>
<tr>
<td>- Time and Place of the hearing</td>
</tr>
<tr>
<td>- Legal Authority the agency is relying on</td>
</tr>
<tr>
<td>- Facts asserted and alleged regulations or laws violated.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Basic Requirements of the Proceeding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discovery</td>
</tr>
<tr>
<td>Prehearing statement</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Basic Requirements of the Proceeding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Present and Contest Evidence</td>
</tr>
<tr>
<td>When do you know the result?</td>
</tr>
<tr>
<td>- Oral Pronouncement</td>
</tr>
<tr>
<td>- Written Decision</td>
</tr>
</tbody>
</table>
## Formal Hearings

### Basic Requirements of the Proceeding
- Appeal rights
  - Exhaustion of Administrative Remedies

### Motions
- The majority of administrative hearing processes permit the parties to request the hearing officer to issue specific orders. A request for the judge to issue a particular ruling is done through the filing of a motion. Typically requires you to confer with and state the position of the other side.

### Types of Motions
- Motion to Continue and Reschedule
- Motion to Compel/Motion for Sanctions
- Motion in Limine
- Motion for Default Judgement
- Motion for Summary Judgement or Summary Order
### Formal Hearings

<table>
<thead>
<tr>
<th>Common Objections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearsay</td>
</tr>
<tr>
<td>Irrelevant</td>
</tr>
<tr>
<td>Cumulative</td>
</tr>
</tbody>
</table>

### Formal Hearings

<table>
<thead>
<tr>
<th>Common Objections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Speculative</td>
</tr>
<tr>
<td>Leading Question</td>
</tr>
<tr>
<td>Compound and Confusing Question</td>
</tr>
<tr>
<td>Questions Assuming Unproven Facts</td>
</tr>
</tbody>
</table>

### Formal Hearings

<table>
<thead>
<tr>
<th>Common Objections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argumentative</td>
</tr>
<tr>
<td>Asked and Answered</td>
</tr>
<tr>
<td>Privileged</td>
</tr>
</tbody>
</table>
Preparing for Formal Hearings

Preparing your Trial Notebook

*Your trial notebook is your resource of information culled from both your case preparation and the case file.*

*Organization of the trial notebook*

Prepare a checklist

- Important dates
- Discovery dates
- Deposition dates
- Discovery cutoff dates
- Dates for dispositive motions
- Prehearing Order compliance dates

- Prepare a list of steps – what needs to be done first
- Identify witnesses for both sides of the case
- Identify experts
### Preparing your Trial Notebook

<table>
<thead>
<tr>
<th>Make a list of all tangible evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assess potential scope of electronically stored information</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Prepare notices to witnesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interview potential witnesses</td>
</tr>
<tr>
<td>Determine availability of witnesses for hearing</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Prepare checklist for final preparation for trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Required prehearing statements</td>
</tr>
<tr>
<td>Motions in Limine</td>
</tr>
<tr>
<td>Requests for Official Recognition</td>
</tr>
<tr>
<td>Subpoena and witness fees for hearing attendance</td>
</tr>
<tr>
<td>Witness and witness question preparation</td>
</tr>
<tr>
<td>Outline expected witness examination and cross examination</td>
</tr>
</tbody>
</table>
### Preparing your Trial Notebook

- Organizing your trial notebook
  - Hard copy and/or electronic
  - Trial Notebook programs and apps
  - Ease of Use is Key!

### Preparing your Trial Notebook

- Guidelines for trial notebook format
  - Necessary to have at the hearing
  - Indexed set of the pertinent pleadings, motions, responses and discovery
  - Miscellaneous

### Depositions

- What is a Deposition?
  - A form of discovery
  - Typically take place outside of a courtroom
  - Judge is not present
  - Counsel for each of the parties run the proceeding
What is a Deposition?

A deposition witness will be placed under oath.

Use of witness statements during deposition.

Purpose of a deposition in administrative prosecutions.

What does a Deposition entail?

Recorded by a court reporter, taped or both.

A deposition can affect the outcome of the case. Prepare for a deposition the same way that you prepare for a hearing.

A deposition witness will be placed under oath.

Depositions consist of counsel asking questions of the witness.

Objections to specific questions may be made by opposing counsel, but there is no judge to resolve the issue.

Depositions often last longer than hearing testimony, and will cover more material than hearing testimony.

Depositions can affect the outcome of the case. Prepare for a deposition the same way that you prepare for a hearing.
Preparing for a Deposition – Practice Tips

Preparing yourself
- Determine the purpose or goals of the deposition
- Prepare an outline of the questions
- Begin with the least controversial questions then move on to more pointed questions later in the deposition
- Items to bring with you

Administration of oath
- Instructions for deponents
- Ask broad questions in a casual manner, and then use follow-up questions to add details.
- Two purposes in taking a deposition:
  - gathering information
  - eliminating other versions of the story

Dealing with interruptions during questioning
- Remember the purpose of your questions
- Deponent review of documentation
- Review the transcript after the deposition
Preparing for a Deposition – Practice Tips

Dealing with Objections

- How to state your objections
- As a general rule, most objections are preserved
- Objection to the form of the question
- Avoid objections to the admissibility of testimony

Disclosure and filing of depositions

- Rights to attend or obtain transcripts of depositions
- Guidelines for filing depositions
- Providing documentation to both sides

Changes in testimony

- Transcription requirements and guidelines
- Deponent acknowledgement of transcript
- Making substantive changes to deponent testimony
Witness Preparation

Witness Preparation should proceed continuously from the date of the filing the case through the day of the hearing.

<table>
<thead>
<tr>
<th>Categories of Witnesses</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Lay (or non-expert) fact witnesses</strong> – allowed to testify only to facts that they personally observed</td>
</tr>
<tr>
<td>- Establishing personal knowledge</td>
</tr>
<tr>
<td>- Opinion testimony is generally not permitted unless rationally related to their observations</td>
</tr>
<tr>
<td>- Examples of lay witnesses include the complainant, respondent and individuals present during the events in question</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Categories of Witnesses</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Predicate Witness</strong></td>
</tr>
<tr>
<td>- Building code official who testifies whether permit was obtained.</td>
</tr>
<tr>
<td>- Agency employee who testifies about procedure for changing address of record.</td>
</tr>
<tr>
<td>- Records custodians</td>
</tr>
</tbody>
</table>
Categories of Witnesses

Character Witness

Character evidence may be offered through testimony on the reputation held by the witness.

Witness Preparation

Categories of Witnesses

Expert / Skilled Witness - Utilized when there is an issue not within the knowledge or common experience of people of ordinary intelligence.

Expert witnesses are commonly involved in cases involving technical issues, complex issues, or issues involving professional standards.
  
  • The court decides on whether or not to allow this type of testimony.
  
  • The competence of an expert witness is never presumed.

The demeanor of your witness will have an impact on your preparations and tactics

Friendly Witness

Adverse Witness

Reluctant Witness
**Witness Preparation**

- Preparing for the witnesses you intend to call:
  - Identify your witness
  - Determine if any of your necessary documents are self-authenticating
  - Testimony presented as stipulation
  - Determine the order to call the witnesses

- Know how to pronounce the witnesses’ names
- Special accommodations (i.e. issues of accessibility or managing the elderly)
- Be prepared!

- Meet with the Witnesses before the hearing
  - Expert, Lay Witness, Predicate Witness and/or Character Witness
  - Explain the case
  - Describe the process and give instructions
Witness Preparation

Do’s and Don’ts for witness testimony:
- Do not volunteer answers
- Do not guess
- Listen to the entire question before starting the answer
- Give counsel a chance to object by providing a short pause between the question and the answer
- Prepare the witness for how to respond to objections
- When you are expected to answer a question, provide your answer to the question that was asked and then stop.

Do’s and Don’ts for witness testimony: (cont.)
- Do not answer with head nods or gestures. Answer in a way that can be recorded in a transcript
- Avoid distracting mannerisms or personal habits
- Avoid inappropriate language
- Dress appropriately
- Use a conversational tone of voice and avoid using a monotone
- Use natural posture but don’t slump
- Don’t be afraid to say, “I don’t remember” or “I don’t know.”

Do’s and Don’ts for witness testimony: (cont.)
- Do not argue
- Maintain eye contact
- Pause and reflect before you speak
- Warn the witnesses that their credibility is likely to be attacked
- Above all else, answer the question and only the question
- Go over pertinent exhibits with witnesses
- Don’t put words into your witness’ mouth
- BE YOURSELF
Witness Preparation

- Meet with Expert Witness
  - Do’s and Don’ts for witness testimony:
    - Select the right expert
    - You can always find an expert to agree with you, so credibility is key
    - Know what your expert will say on each issue

- Meet with Expert Witness
  - Do’s and Don’ts for witness testimony: (cont.)
    - Consulting expert vs. testimonial expert
    - Getting your expert witness qualified
    - Discuss the importance of using lay language
    - Prepare them for questions about pay and experience

- Meet with Expert Witness
  - Do’s and Don’ts for witness testimony: (cont.)
    - Determine an expert’s temperament regarding testimony.
    - Conduct a dry-run with your expert.
Witness Preparation

• Practice Tips
  • Use of prior statements
  • Notice of deposition vs. subpoena
  • Notice of deposition vs. duces tecum
  • Adverse witnesses must be subpoenaed for trial
  • You cannot require a witness to compile or produce nonexistent documents

Witness Preparation

• Practice Tips (cont)
  • Any person who is subject to a subpoena must be paid for their appearance in accordance with the applicable rules
  • Nonparty witnesses can be excluded from trial by ‘invoking the rule’ of sequestration
  • All witnesses must be disclosed in response to a pretrial order
  • Every person is competent to be a witness, unless otherwise provided my statute
  • Use of leading questions during direct and cross examination

Witness Impeachment

• A witness can be impeached by showing:
  • prior inconsistent statements
  • bias
  • character
  • defect of capacity, ability or opportunity to observe, remember or recount
  • contradiction through proof by other witnesses that the material facts are not as the witness says they are
Witness Impeachment

Prior Inconsistent Statements - A party may attack the credibility of a witness by introducing statements which are inconsistent with the present testimony.

- This is the most common method of impeachment.
- It is used to discredit the witness by showing contradicting statements.

Addressing prior inconsistent statements

- Common examples of prior inconsistent statements are tax returns, letters, depositions, medical records, and previous trial testimony.
- Use the following four-step approach to impeach using prior inconsistent statement.

Step one: Lock in the testimony
Q. "Mr. Jones, you just testified that the homeowner fired you, correct?"
A. Yes

Step two: Accredit prior statement
Q. "Did the Department take your deposition in this case?"
A. Yes
Q. "Is this a copy of the transcript in that deposition?"
A. Yes
Q. "Were you under oath?"
A. Yes
Q. "Was your lawyer present?"
A. Yes
### Witness Impeachment

**Step three: Confront witness about prior statement**

Q. I would like to refer you to page 7, line 23 of the deposition transcript. Do you see that?
A. Yes

Q. Page 7, line 23 says "Q. did you quit the job? Line 24 A. Yes, I quit because the homeowner would not advance the fourth draw. Do you remember making that statement?"
A. Yes

**Step four: Compare the two statements**

Q. "You just testified that you were terminated, correct?"
A. Yes, well um, I don't know, um I guess, kinda

Q. "But during your earlier deposition, you stated under oath that you quit?"
A. Um, well I forgot.

### Other methods of witness impeachment

- Bias – relates to the interest of the witness, favoritism and corruption
- Character – credibility can be attacked or supported by reputation
- Use of Prior Crimes or Bad Acts
  - May be used if witness has been convicted of certain crimes, while others are inadmissible
**Witness Impeachment**

- Other methods of witness impeachment (cont.)
  - Defect of Capacity
    - Evidence of a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified is admissible to impeach.
    - Must relate to the lack of capacity at the time of the occurrence of the facts that the witness is testifying to (ability to observe) or the capacity at the time of trial (ability to remember).
  - Contradiction
    - Testimony of other witnesses
    - Contradiction within the statements given by the witness

**Opening and Closing Statements**

- Thinking like a story teller
  - Provide a context for your position in a way that is understandable to your listeners.
- Develop a theory of the case
  - A good theory of the case presents a thoroughly plausible explanation for events.

**Opening and Closing Statements**

- The time to develop a theory is when trial preparations begin.
- Develop the theory of the case using both your point of view and the opposing party’s point of view.
- Trial preparations should reflect and emphasize your theory of the case.
### Direct Examination

- Maintain witness control by using a logical theme to organize the material covered.
- You may orient the witness through the use of somewhat leading preliminary questions.
- Provide the witness with some background and context.

### Direct Examination

- Use simple questions.
- Allow your witness to paint the scene of an occurrence before describing an event.
- Have the witness explain any confusing testimony.

### Direct Examination

- Admit weaknesses prior to cross-examination.
- Listen to the answers that are being given.
- Have the witness authenticate exhibits at a point where it does not interrupt the flow of his or her testimony.
- Allow the story to flow.
Preparation for cross examination at trial begins when preparing for the deposition.

**Deposition**
- Test questions that will be asked of the witness at trial.
- Plan to ask only leading questions of the witness.
- Plan to ask for one fact per question.

Cross Examination

**Deposition**
- Do not argue with the witness.
- Explore the ultimate question — a deciding question for the case during deposition and before the hearing.
- If a favorable answer is received, accept it quietly and move on.

Cross Examination

**Trial Preparation**
- Summarize the information gathered in the depositions.
- Develop a section for cross examination in the trial notebook.
  - Create a cross examination outline for the questions that will be asked of the witness. A two column chart is helpful in setting up this outline.
  - Place questions for the witnesses in the left column.
  - Place the source of the answer in the right column.
- **Trial Preparation**
  - Place all materials that will be used as source materials behind the questions chart in the notebook.
  - Do not ask a question to which you do not know the answer.
  - When setting up questions for the opposition's witness, it is a good plan to start strong and finish strong.
    - Sometimes the best cross examination is to ask no questions at all.

- **Helpful Hints**
  - An extra copy of the pages to be used for impeachment should be available and marked as impeachment exhibits in the trial notebook.
  - Watching the body language and demeanor of a witness is crucial to a successful cross examination. Eye contact is very important with the witness, and particular attention should be paid to the voice of the witness and the phrasing of the questions for the witness.

- **Helpful Hints**
  - As to expert witnesses, no question should ever be asked that is so broad that it gives an expert an opportunity to expand on his own views and allow him to cover a point that opposing counsel had been unable to make on direct examination.
  - Remember that the professional witness is always partisan and willing to serve the party that called him. In cross examination, encourage the witness to betray this bias. Keep in mind that he is being paid to do damage to your case and will take advantage of the opportunity to do so.
### Cross Examination

**Helpful Hints**
- In the *Art of Cross Examination*, Mr. Wellman says in his closing paragraph on the "Golden Rules for the Examination of Witnesses":

> "But in cross examination every question that does not advance your case injures it. If you have not a definite object to attain, dismiss the witness without a word. There are no harmless questions here: the most apparently unimportant may bring destruction or victory."

### Adjudication of Formal Hearings

**Adjudication**

- Interagency Agreements
  - Cooperation
  - Coordinated Action
  - Referral of cases for criminal action or unlicensed activity
- Final Agency Decision
Adjudication

- Appeals
  - Judicial Review - Using three standards, one of which is “Arbitrary, Capricious or Abuse of Discretion,” courts must always assure that the agency has:
    - Acted constitutionally
    - Acted with the scope of its authority
    - Used the correct constitutional or statutory procedures
    - Reached a decision that is supported by the facts
    - Instituted a justified penalty

Section Review

Learning Objectives Review

You should now be able to:

- Understand how to initiate the hearing process as a disciplinary prosecutor
- The administrative hearing process
- Preparation for formal hearings
- Understand the adjudication of formal hearings