



Recommendation 86-2

Use of Federal Rules of Evidence in Federal Agency Adjudications

(Adopted June 20, 1986)

Federal agencies have adopted hundreds of different sets of rules governing admission of evidence in formal adjudications. While those rules vary in their details, they can be placed in three general categories: (1) Rules that reflect the wide open standard of APA section 556(d); (2) rules that require presiding officers to apply the Federal Rules of Evidence (FRE) "so far as practicable"; and (3) rules that permit presiding officers to use the FRE as a source of guidance in making evidentiary rulings. In a few instances, Congress has required the agency to adopt a standard that refers to the FRE; in other cases the agency voluntarily adopted such a standard.

Presiding officers vary substantially in the extent of their use of the FRE as a source of guidance in making evidentiary rulings. Presiding officers at agencies whose rules refer to the FRE rely on the FRE as a source of guidance much more frequently than presiding officers at agencies whose rules reflect only the APA standard. Presiding officers at agencies with rules that refer to the FRE are more satisfied with the rule they apply than presiding officers at agencies with rules that reflect only the APA standard. The relative dissatisfaction expressed by many presiding officers in the latter group seems to be based on their perception that the APA standard does not accord them sufficient discretion to engage in responsible case management. Because they perceive that they do not have the discretion to exclude evidence they consider clearly unreliable, they must devote valuable hearing and opinion-writing time to reception and consideration of such evidence.

Because the APA evidentiary standard is broadly permissive, courts routinely decline to reverse agencies that have adopted this standard on the basis of alleged erroneous admission of evidence. However, courts seem confused by the FRE "so far as practicable" evidence standard. Some courts apparently interpret it to accord near total discretion to agencies. Other courts interpret it as a mandate to comply with the FRE except in unusual circumstances. Still others apparently view the standard as a mandate to admit evidence inadmissible under the FRE except when unusual circumstances require application of the FRE.

Independent of the evidentiary standard adopted by the agency, reviewing courts apply three general rules: (1) An agency must respect evidentiary privileges; (2) an agency can be



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reversed if it declines to admit evidence admissible under the FRE; and (3) an agency will be reversed if it bases a finding on unreliable evidence.

The FRE "so far as practicable" standard has four significant disadvantages: (1) Courts seem confused as to what it means or how to enforce it; (2) instructing presiding officers to exclude evidence based on the standard forces them to undertake a difficult and hazardous task; (3) excluding evidence on the basis that it is inadmissible in a jury trial is totally unnecessary to insure that agencies act only on the basis of reliable evidence; and (4) agencies, like other experts, should be permitted to rely on classes of evidence broader than those that can be considered by lay jurors. Yet the APA standard alone has the disadvantage that presiding officers perceive it as an inadequate tool for effective case management, despite the fact that it permits presiding officers to use relevant parts of the FRE and scholarly texts as sources of general guidance in making evidentiary rulings in formal adversarial adjudications. Federal Rule 403 can be particularly valuable to presiding officers in discharging their case management responsibilities. That rule authorizes exclusion of evidence the probative value of which is substantially outweighed by other factors, including the consideration of undue delay. In addition, under any set of evidentiary rules, an agency can assist presiding officers in their evidentiary decision making by specifying, insofar as they can be foreseen, the factual issues the agency considers material to the resolution of various classes of adjudications and the types of evidence it considers reliable and probative with respect to recurring factual issues.

Recommendation

1. Congress should not require agencies to apply the Federal Rules of Evidence, with or without the qualification "so far as practicable," to limit the discretion of presiding officers to admit evidence in formal adjudications.¹

2. Agencies should adopt evidentiary regulations applicable to formal adversarial adjudications that clearly confer on presiding officers discretion to exclude unreliable evidence and to use the weighted balancing test in Rule 403 of the Federal Rules of Evidence, which

¹ The term "formal adjudications" refers to adjudications required by statute to be determined on the record after opportunity for an agency hearing in accordance with the Administrative Procedure Act, U.S.C. 554, 556 and 557, and also includes agency adjudications which by regulation or by agency practice are conducted in conformance with these provisions. The recommendation does not apply to nonadversarial hearings, *e.g.*, many Social Security disability proceedings.



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allows exclusion of evidence the probative value of which is substantially outweighed by other factors, including its potential for undue consumption of time.

3. To facilitate the efficient and fair management of the proceeding, when otherwise appropriate, an agency should announce in advance of a formal adjudication as many of the factual issues as the agency can foresee to be material to the resolution of the adjudication.

Citations:

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