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Roy D. Brenner

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HEARSAY IN FEDERAL ADMINISTRATIVE ADJUDICATIONS: AN ALTERNATIVE PATH TO RELIABILITY

by Roy D. Brenner

I. INTRODUCTION

The federal administrative law judge ("ALJ") considering proffered hearsay evidence faces a difficult balancing test. Since hearsay can be both reliable and unreliable,¹ the ALJ must weigh the inefficiency and confusion of admitting unreliable hearsay against the unfairness and possibility of reversal for excluding reliable hearsay. Unfortunately, no bright-line test for evaluating hearsay reliability exists.² Current standards for reliability have been criticized as either too vague for fair application or too cumbersome for efficiency in the administrative process.³

Federal ALJs need a simple, functional standard to gauge hearsay reliability. The standard must provide a reasonably predictable result, as well as recognize the particular demands of administrative adjudications.

This article first explores the fundamental rationale for the hearsay rule and its application to current administrative practice. It then reviews the various standards now employed to determine admissibility of hearsay in formal administrative adjudications. Finally, the article proposes forming a simpler standard by synthesizing the foundational requirements of the Federal Rules of Evidence residual hearsay exceptions⁴ and case law tests of equivalent circumstantial guarantees of trustworthiness.

II. BACKGROUND

The underlying rationale for the hearsay rule and the administrative process is relevant to a discussion of how hearsay evidence might be handled best in an administrative setting. The principal evidentiary dangers of admitting hearsay, while elementary, provide the primary lenses through which any theory of admission must be viewed. Since the goals and practices of administrative procedure are notably different from those found in a judicial setting, an explication of the administrative process, as it relates to admission of hearsay evidence, supplies the focal limits of any such theory. Finally, the statutory and common-law mechanisms for establishing hearsay reliability add the analytical background from which an administrative picture of hearsay reliability may emerge.

A. Hearsay Dangers

Hearsay is commonly defined as an out-of-court statement offered as evidence to prove the truth of the matter asserted by the declarant at the time the statement was made.⁵ Admission of hearsay denies the opposing party the opportunity to test the truthfulness of the statement by cross-examination.⁶

The inability to effectively cross-examine the declarant leaves unanswered questions as to the declarant's narration (and sincerity), perception and memory — the three traditional hearsay dangers.⁷ The

¹Kenneth C. Davis, *Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689 (1964) ("[T]he reliability of hearsay ranges from the least to the most reliable.").

²Calhoun v. Bailar, 626 F.2d 145, 149 (9th Cir. 1980).

³See generally Davis, *supra* note 1.

⁴FED. R. EVID. 803(24), 804(b)(5).

⁵CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 246 (John W. Strong ed., 4th ed. 1992); see also FED. R. EVID. 801(c).

⁶JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1362 (James H. Chadbourn ed., 1974).

⁷MCCORMICK, *supra* note 5, § 245. Dean McCormick considers lack of sincerity a defect in narration while acknowledging that

declarant may have been lying or may have been misunderstood by the testifying witness (narration).⁸ The declarant may not have had first-hand knowledge (perception), or may have forgotten the details of the underlying event (memory).⁹

The hearsay rule and its exceptions, viewed together, represent a balancing between the hearsay dangers and the search for the truth.¹⁰ While the general rule prohibits hearsay evidence because its reliability cannot be tested by cross-examination, the exceptions recognize that statements made under some circumstances, as well as certain types of documents, are probably nonetheless reliable.¹¹ In essence, the exceptions provide a circumstantial shortcut to reliability, bypassing cross-examination.¹² This idea is central when brought into the realm of formal administrative adjudications,¹³ where the fact that evidence is hearsay is not determinative.¹⁴ Instead, evidence is admitted based on “its probative value, reliability and the fairness of its use.”¹⁵

B. Administrative Practice

Despite the apparent similarities, formal administrative adjudications¹⁶ are institutionally distinct from federal court trials.¹⁷ The rationale for establishing

other commentators consider sincerity and narration as separate concerns. *Id.*; see also FED. R. EVID. art. VIII advisory committee’s note (“Sometimes a fourth is added, sincerity, but in fact it seems merely to be an aspect of the three already mentioned.”).

⁸MCCORMICK, *supra* note 5, § 245.

⁹*Id.*

¹⁰James L. Rose, *Hearsay in Administrative Agency Adjudications*, 6 ADMIN. L.J. AM. U. 459, 459 (1992).

¹¹*Id.*

¹²*Id.*

¹³*Id.* at 460.

¹⁴Calhoun v. Bailar, 626 F.2d 145, 149 (9th Cir. 1980).

¹⁵*Id.*

¹⁶As defined by the Administrative Procedures Act, 5 U.S.C. § 554 (1994).

¹⁷Ernest Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 4-6 (1971). These distinctions include the expertise of the ALJ and that the

rules of evidence is altered by these distinctions.¹⁸ The principal difference is that the ALJ is the trier of fact.¹⁹ While the rules of evidence in a jury trial serve to insulate jurors from unreliable evidence, the rules “promote fairness” to the parties in an administrative setting.²⁰ Fairness intersects with reliability, however, in the decision to admit or exclude hearsay evidence.²¹

Formal administrative proceedings are governed by the Administrative Procedures Act (“APA”).²² The APA provides the minimum procedural rules which agencies must follow.²³ An agency may expand these rules to suit its specific needs *sua sponte*,²⁴ but reviewing courts may not impose additional procedural requirements on the agency.²⁵

The APA rules of evidence, which are used in the majority of federal administrative proceedings,²⁶ provide for liberal admission of evidence, including hearsay.²⁷ Specifically, the APA states:

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 evidence. A sanction may not be imposed

ALJ is always the trier of fact, the policy-making function of administrative agencies, and the efficiency demands of the administrative process. *Id.* But see Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. ILL. L. REV. 353, 353 (1991) (arguing they are equivalent to federal civil non-jury trials “in all significant respects”).

¹⁸Gellhorn, *supra* note 17, at 5.

¹⁹*Id.*; see also Rose, *supra* note 10, at 462.

²⁰Rose, *supra* note 10, at 462.

²¹*Id.* at 464 (“Reliability is the critical consideration, and the threshold issue is whether the proffered evidence is probably reliable.”). But see Davis, *supra* note 1, at 689 (“The guide [for admission] ought to be the probative effect of the evidence.”).

²²5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1994).

²³*Id.* §§ 554, 556 to 557.

²⁴Rose, *supra* note 10, at 470.

²⁵Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524-25 (1978).

²⁶Graham, *supra* note 17, at 369.

²⁷*Id.* at 355.

or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative, and substantial evidence.²⁸

In other words, a proceeding is fair when evidence is freely admitted, provided that final decisions of the ALJ are based only on evidence deemed "reliable, probative and substantial."²⁹ The usefulness of this standard as applied to proffered hearsay evidence poses the central problem at hand.

C. Federal Rules of Evidence Residual Hearsay Exceptions

The Federal Rules of Evidence ("FRE") are generally inapplicable to the administrative process.³⁰ The foundational requirements of two hearsay rule exceptions, however, can provide part of a useable standard for evaluating hearsay evidence in administrative proceedings.³¹ Rules 803(24) and 804(b)(5) are the "catch-all" or "residual" hearsay exceptions. They are identical, except that in the case of the former, the availability of the declarant is immaterial, while in the latter, the declarant must be unavailable.³²

The residual exceptions provide that hearsay, inadmissible under any other hearsay exception, "but having equivalent circumstantial guarantees of trustworthiness,"³³ is admissible under the following conditions: (1) the evidence relates to a material fact; (2) the evidence is more probative than other evidence reasonably available on the same point; and (3) admission is in the interests of justice and the goals of the evidence rules.³⁴ Advance notice to the adverse party of the proponent's intent to offer the evidence is

also required.³⁵ These foundational requirements are consistent with the general view on admission of hearsay in administrative practice.³⁶ The rules rely on case law development with respect to what properly may be considered "equivalent circumstantial guarantees of trustworthiness."³⁷

D. Case Law Circumstantial Guarantees of Trustworthiness

Numerous cases have examined the question of what may constitute circumstantial guarantees of trustworthiness. The following review is not exhaustive. A sampling is sufficient for the purposes of this article, since the focus is on primary hearsay dangers, as will be explained in Part IV.

In *Ohio v. Roberts*,³⁸ the United States Supreme Court established a two-part test to determine whether hearsay could meet the stringent requirements of the Confrontation Clause.³⁹ The dual requirements set forth by *Roberts* were the unavailability of the declarant and particularized guarantees of trustworthiness.⁴⁰ Ten years later in *Idaho v. Wright*,⁴¹ the Court added that the guarantees of trustworthiness should be shown from the totality of the circumstances, specifically "those that surround the making of the statement and that render the declarant particularly worthy of belief."⁴² The Court was divided on whether the use of corroborating evidence satisfied this requirement. The majority ruled that corroborating evidence could not be used to "support a finding that the statement

²⁸5 U.S.C. § 556(d) (1994).

²⁹*Id.*

³⁰*Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980).

³¹*Id.*

³²See FED. R. EVID. 804(b)(5) advisory committee's note.

³³FED. R. EVID. 803(24).

³⁴*Id.*

³⁵*Id.*

³⁶*Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980); see also Nat Stern, *The Substantial Evidence Rule in Administrative Proceedings: Restrictions on the Use of Hearsay Since Richardson v. Perales*, 36 ARK L. REV. 102, 121 (1982).

³⁷FED. R. EVID. 803(24) advisory committee's note.

³⁸448 U.S. 56 (1980).

³⁹U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

⁴⁰448 U.S. at 66.

⁴¹497 U.S. 805 (1990).

⁴²*Id.* at 820.

bears 'particularized guarantees of trustworthiness.'⁴³ Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Blackmun, dissented, arguing the use of corroborating evidence should be permitted.⁴⁴ "It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence."⁴⁵

Circumstantial guarantees of trustworthiness are not limited to corroborating evidence. *Richardson v. Perales*,⁴⁶ decided by the United States Supreme Court in 1971, is generally considered the leading opinion on determining hearsay reliability in administrative proceedings.⁴⁷ *Perales* involved a Social Security disability claim dispute in which the claimant challenged, on hearsay grounds, written reports of examining physicians who did not testify and the testimony of one doctor who had not examined the claimant. The ALJ upheld the agency's denial of benefits, but was reversed by the district court.⁴⁸ In reversing the Fifth Circuit, the Supreme Court listed nine factors to "assure underlying reliability and probative value."⁴⁹ Principal among those factors were: (1) the apparent independence and lack of bias on the part of the doctors; (2) the consistency of the reports; (3) the non-adversarial nature of the social security system; and (4) that the reports were based on standard and thorough examinations.⁵⁰ The Court also noted the administrative burden and expense of live testimony.⁵¹

Additional factors for finding trustworthiness are recognized by other courts. A commonly cited factor

is the lack of contradiction.⁵² Facial credibility of the evidence also can be considered, including whether documents are signed and sworn or anonymous.⁵³ Routinely prepared documents are generally found to be reliable.⁵⁴ The apparent credibility of the witness testifying to the hearsay has been considered.⁵⁵ Perhaps even double hearsay may be deemed reliable.⁵⁶

⁵²*Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980)(finding reliable affidavits entered into evidence without objection); *School Bd. of Broward County v. Department of Health, Educ. & Welfare*, 525 F.2d 900 (5th Cir. 1976) (holding hearsay evidence of racial bias reliable where uncontradicted); *Jacobowitz v. United States*, 424 F.2d 555 (Ct. Cl. 1970) (finding hearsay evidence unreliable when objected to and contradicted by direct evidence).

⁵³*Calhoun*, 626 F.2d 145 (holding reliable affidavits later disavowed); *Martin-Mendoza v. Immigration & Naturalization Service*, 499 F.2d 918 (9th Cir. 1974)(finding sworn statement by alien unavailable to testify at deportation hearing reliable, although declarant later recanted); *McKee v. United States*, 500 F.2d 525 (Ct. Cl. 1974) (rejecting as unreliable a photograph caption identifying the land in dispute because the identifying party was unknown).

⁵⁴*Richardson v. Perales*, 402 U.S. 389 (1971) (finding routine medical reports reliable); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601 (D.C. Cir. 1987) (holding authentication of routine invoices not required to prove reliability). *But see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984) (ruling that *ex parte* medical reports were insufficient to overcome the statutory rebuttable presumption of disability due to pneumoconiosis from coal mine dust contained in the Black Lung Act, 30 U.S.C. § 921(c)(4) (1994)); *Bethlehem Steel Corp. v. Clayton*, 578 F.2d 113 (5th Cir. 1978) (finding *ex parte* medical reports improperly admitted because the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994), preserves the right to cross-examine witnesses in disability proceedings).

⁵⁵*Johnson v. United States*, 628 F.2d 187 (D.C. Cir. 1980) (finding statements reliable where declarants were disinterested parties and their statements were consistent); *Reil v. United States*, 456 F.2d 777 (Ct. Cl. 1972) (dismissing the testimony of a witness who made multiple inconsistent statements).

⁵⁶*Stern, supra* note 36, at 114 (suggesting double hearsay can "constitute substantial evidence if it carries sufficient assurances of probativeness and reliability"). *But see Browne v. Richardson*, 468 F.2d 1003, 1007 (1st Cir. 1972) (concluding that "none of the individual pieces of evidence are substantial evidence. Nor can we say that when these meager scraps are

⁴³*Id.* at 822.

⁴⁴*Id.* (Kennedy, J., dissenting).

⁴⁵*Id.* at 828 (Kennedy, J., dissenting).

⁴⁶402 U.S. 389 (1971).

⁴⁷*Stern, supra* note 36, at 105-06.

⁴⁸*Perales v. Secretary of Health, Educ. & Welfare*, 288 F. Supp. 313 (W.D. Tex. 1968), *aff'd sub nom. Cohen v. Perales*, 412 F.2d 44 (5th Cir. 1969), *rev'd sub nom. Richardson v. Perales*, 402 U.S. 389 (1971).

⁴⁹*Richardson v. Perales*, 402 U.S. 389, 402 (1971).

⁵⁰*Id.* at 402-06.

⁵¹*Id.*

In summary, the three hearsay dangers, coupled with the inability to cross-examine, form the basis of all hearsay objections.⁵⁷ But the goals and practices of the administrative process militate against excluding hearsay evidence if it is deemed reliable.⁵⁸ Even in judicial proceedings, the residual exceptions allow a more general admission of hearsay.⁵⁹ Finally, case law does provide reasonable examples of circumstantial guarantees of trustworthiness to guide an ALJ's evaluation of hearsay evidence.⁶⁰

III. CURRENT MODELS AND STANDARDS

As a practical matter, only two basic standards exist for the admission of hearsay in administrative adjudications: the APA and the FRE. Each has its adherents and detractors. In addition, the United States Department of Labor has adopted a modified version of the FRE, which some argue should be applied across the federal administrative board.⁶¹ Finally, Professor Davis advocates admitting all hearsay, regardless of its perceived value.⁶²

A. The APA Standard

The APA standard has two parts and, consequently, two distinct lines of problems. The first part applies to admissibility of evidence, while the second part limits the evidence that may be relied upon by the ALJ in making a ruling or order.

Under the first part, hearsay is admissible provided it is relevant, material and not unduly repetitious.⁶³ While these terms are generally understood,

gathered together the total pile may be called substantial").

⁵⁷See *supra* text accompanying notes 5-15.

⁵⁸See *supra* text accompanying notes 16-29.

⁵⁹See *supra* text accompanying notes 30-37.

⁶⁰See *supra* text accompanying notes 38-60.

⁶¹Graham, *supra* note 17, at 383-84; Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 25 (1987).

⁶²Davis, *supra* note 1.

⁶³5 U.S.C. § 556(d) (1994).

the relatively free standard of admissibility has been criticized as too permissive.⁶⁴ Moreover, remand is more likely for an ALJ's failure to admit evidence, than for a failure to exclude particular testimony or documents.⁶⁵ The likelihood of remand can pressure an ALJ to admit evidence of little probative value, creating delay and an unduly inflated record.⁶⁶

Once admitted, hearsay evidence alone can be dispositive provided it is reliable, probative, and substantial.⁶⁷ While these terms are somewhat vague, the concept of reliability is distinct from probative value.⁶⁸ Probative value relates to relevancy, while reliability relates to veracity.⁶⁹ The terms, however, are sometimes used interchangeably.⁷⁰

Embracing both reliability and probative value is substantial evidence. It has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁷¹ A substantial evidence standard is "less demanding than that of preponderance of the evidence, and the ALJ's decision need not constitute the sole inference that can be drawn from the facts."⁷²

⁶⁴See Graham, *supra* note 17, at 369-70; Rose, *supra* note 10, at 476-77.

⁶⁵Graham, *supra* note 17, at 369-70 ("Generally there is no cause for remand for allowing evidence to be admitted in error."); Pierce, *supra* note 61, at 6-7 ("[I]t seems impossible for an agency action to be reversed on the basis that the agency erroneously admitted evidence.").

⁶⁶Graham, *supra* note 17, at 369-70.

⁶⁷5 U.S.C. § 556(d) (1994).

⁶⁸Richardson v. Perales, 402 U.S. 389, 407-08 (1971) (referring to "administrative reliance on hearsay irrespective of reliability and probative value"); see also Rose, *supra* note 10, at 468.

⁶⁹Rose, *supra* note 10, at 478; cf. FED. R. EVID. 401 advisory committee's note ("Problems of relevancy call for an answer to the question whether an item of evidence . . . possesses sufficient probative value . . .").

⁷⁰See Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 342 (1961) (discussing "a tendency to admit hearsay where there can be no serious doubt of the credibility of the extra-judicial declarant — i.e., where probative force is high").

⁷¹Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

⁷²Avondale Indus., Inc. v. Director, Office of Workers' Compensation Programs, 977 F.2d 186, 189 (5th Cir. 1992).

Hearsay alone may constitute substantial evidence, although this was not always the case.⁷³ In *Consolidated Edison v. NLRB*,⁷⁴ the United States Supreme Court stated: "Mere uncorroborated hearsay or rumor does not constitute substantial evidence."⁷⁵ Some thirty years later, the Court in *Richardson v. Perales*⁷⁶ clarified that statement by saying that a "blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value," was not the intended legacy of *Consolidated Edison*.⁷⁷

The *Perales* Court also put to rest the "legal residuum" rule regarding reliance on hearsay in administrative proceedings.⁷⁸ The rule, first stated in *Carroll v. Knickerbocker Ice Co.*,⁷⁹ allowed for admission of hearsay but provided "there must be a residuum of legal [non-hearsay] evidence to support the claim before an award can be made."⁸⁰ Prior to the *Perales* rejection, the rule had been widely condemned as an illogical restriction on hearsay evidence.⁸¹

B. Federal Rules of Evidence

The Federal Rules of Evidence (FRE) were adopted in 1975 for use by federal courts to "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."⁸² The FRE provide for the exclusion of

hearsay, subject to a number of exceptions.⁸³

Of the 280 sets of regulations governing admissibility of evidence in federal administrative adjudications, only thirty-seven mention the FRE.⁸⁴ Where statutes or agency regulations make reference to the FRE standard, the standard is to be employed only "so far as practicable."⁸⁵ The vagueness of this qualification on the FRE standard creates a great deal of uncertainty at the agency level and leaves reviewing courts with inconsistent application and direction.⁸⁶

Opponents to the use of the FRE hearsay rules in administrative proceedings have cited the lack of a jury as negating the necessity for protective evidentiary rules.⁸⁷ In fact, the Administrative Conference of the United States⁸⁸ recommended against adopting the FRE to administrative practice, principally because of the hearsay rules.⁸⁹

On the other hand, proponents of the FRE hearsay rules have argued that formal adjudications are quite similar to federal civil non-jury trials.⁹⁰ Indeed, the Supreme Court found that an ALJ performs a role "functionally comparable" to a trial judge.⁹¹ Nevertheless, the FRE still present problems of complexity and provide only a limited ability to

⁷³*Richardson v. Perales*, 402 U.S. at 402.

⁷⁴305 U.S. 197 (1938).

⁷⁵*Id.* at 230.

⁷⁶402 U.S. 389 (1971).

⁷⁷*Id.* at 407-08.

⁷⁸Stern, *supra* note 36, at 112. Professor Stern notes, however, that some courts continue to rely on the rule's underlying premise. *Id.* at 114-15.

⁷⁹113 N.E. 507 (N.Y. 1916).

⁸⁰*Id.* at 509.

⁸¹Stern, *supra* note 36, at 113.

⁸²FED. R. EVID. 102.

⁸³FED. R. EVID. 802 to 805.

⁸⁴*Pierce*, *supra* note 61, at 5. *But see* Rose, *supra* note 10, at 461 (estimating some 200 informal procedures within the federal system).

⁸⁵Graham, *supra* note 17, at 372.

⁸⁶*Id.* at 383; *Pierce*, *supra* note 61, at 7.

⁸⁷Gellhorn, *supra* note 17, at 5; Graham, *supra* note 17, at 360; Stern, *supra* note 36, at 103 ("Many, if not most, rules limiting the admission of evidence are designed not so much to aid the search for truth as to prevent consideration of certain types of relevant evidence by those thought incapable of assigning such evidence its proper weight.").

⁸⁸5 U.S.C. §§ 593-596 (1994). Funding for the Conference was terminated by a House-Senate committee on September 13, 1995. *See* William Funk, *R.I.P. A.C.U.S., ADMIN. & REG. LAW NEWS*, Winter 1996, at 1, 11.

⁸⁹Graham, *supra* note 17, at 359. The Conference's 1986 recommendation is codified at 1 C.F.R. § 305.86-2 (1995). For a discussion of the recommendation, see *Pierce*, *supra* note 61.

⁹⁰*Id.* at 360. *But see supra* note 21.

⁹¹*Butz v. Economou*, 438 U.S. 478, 513 (1978).

distinguish between reliable and unreliable hearsay.⁹²

C. The Department of Labor Modifications

Rejecting the FRE “so far as practicable” scheme, as well as the APA evidence rules, the United States Department of Labor (“DOL”) developed its own set of evidence rules for formal hearings.⁹³ The DOL adopted the FRE hearsay rules while adding exceptions relating to documents and written reports of experts to accommodate application in the administrative arena.⁹⁴

The DOL standard’s permissive use of the FRE avoids the problems reviewing courts have with the “so far as practicable” application of the FRE.⁹⁵ At the same time, an ALJ has the support of the FRE to expedite the administrative proceeding.⁹⁶ The FRE are widely known and have a substantial body of case law interpretation, making rules predicated on the FRE familiar to the litigants.⁹⁷

D. Another View: Admit All

Standing alone in many respects, Professor Kenneth C. Davis has long maintained the position that there should be no distinction drawn between hearsay and nonhearsay.⁹⁸ Whether evidence is admitted or excluded, and the weight it is accorded, should be determined by its probative value.⁹⁹ “[T]he guide should be a judgment about the reliability of particular evidence in a particular record in particular circumstances, not the technical hearsay rule with all

its complex exceptions.”¹⁰⁰ Professor Davis argues for the application of a reasonable person standard to determine whether evidence is sufficient to support a finding.¹⁰¹ This judgment, however, must take into consideration the record and the type of proceeding.¹⁰²

Davis’ approach is criticized on the bases of fairness and predictability. “Any free-wheeling, open admission of all proffered evidence ‘for whatever it is worth,’ regardless of reliability, is neither fair nor predictable.”¹⁰³

E. Summary

Despite these apparent conflicts, the admission of reliable evidence and the exclusion of unreliable evidence remain the common goals.¹⁰⁴ Implicit in each of the foregoing standards is the tension between an efficient administrative process and fairness to the parties involved.¹⁰⁵ While the APA standard provides the parties with a broad opportunity to support their cases, it does so at the risk of an inflated and unwieldy record.¹⁰⁶ The FRE promote fairness with a more predictable, albeit complex, set of rules, but in the process, the FRE’s standards may exclude some reliable evidence.¹⁰⁷ The DOL modifications ease some of those restrictions, but the complexity largely remains.¹⁰⁸ Professor Davis’ thesis provides for simplicity, but simplicity comes at the expense of predictability.¹⁰⁹

⁹²FED. R. EVID. art. VIII advisory committee’s note.

⁹³Graham, *supra* note 17, at 373. The rules are codified at 29 C.F.R. §§ 18.101 to 18.1104 (1995).

⁹⁴*Id.* at 376-82.

⁹⁵Pierce, *supra* note 61, at 25. Reviewing courts have interpreted “so far as practicable” inconsistently. *Id.* at 16; Graham, *supra* note 17, at 383.

⁹⁶Pierce, *supra* note 61, at 25.

⁹⁷*Id.*

⁹⁸Davis, *supra* note 1, at 689.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.* at 695 (“A finding may be supported by the kind of evidence on which reasonable people are accustomed to rely in serious affairs, whether or not the evidence would be admissible before a jury.”).

¹⁰²*Id.* at 698.

¹⁰³Rose, *supra* note 10, at 478.

¹⁰⁴Rose, *supra* note 10, at 479 (“There is no real dispute that unreliable evidence ought to be excluded.”).

¹⁰⁵*Cf.* Gellhorn, *supra* note 17, at 5-6.

¹⁰⁶*See supra* text accompanying notes 63-81.

¹⁰⁷*See supra* text accompanying notes 82-92.

¹⁰⁸*See supra* text accompanying notes 93-97.

¹⁰⁹*See supra* text accompanying notes 98-103.

IV. AN ALTERNATIVE PROPOSAL

Perhaps the principal dispute underlying the hearsay issue is not how to judge reliability, but when. The APA and Professor Davis favor admission followed by a reliability determination. The FRE standard requires a demonstration of probable reliability before admission. Each view is supported by substantial reasoning. It is possible to satisfy the requirements of each view through a synthesis of the foundational elements of the residual hearsay exceptions and the case law tests of circumstantial guarantees of trustworthiness. The result is a two-part test designed to minimize the hearsay dangers and to satisfy the APA requirements while remaining relatively simple to apply.

This synthesis begins with the residual hearsay exceptions.¹¹⁰ The rules allow hearsay to be admitted as substantive evidence provided: (1) it relates to a material fact; (2) it is more probative than other evidence reasonably available on the same point; and (3) admission of the evidence is in the interest of justice.¹¹¹ The evidence must also embody circumstantial guarantees of trustworthiness equivalent to an identified hearsay exception.¹¹²

The first part of the test is drawn from the elements of the residual exception: Hearsay is admissible when it has probative value concerning a material fact and is not obviously unreliable.

To determine that hearsay evidence is not obviously unreliable, two requirements should be satisfied. First, the evidence cannot be "so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it."¹¹³ This requirement

mirrors the clearly erroneous standard of review.¹¹⁴ Second, the source of the evidence must be known. This requirement excludes mere rumor and documents of an unknown author or origin.¹¹⁵ Support for this construction can be found in Irving Younger's proposal to allow admission of hearsay provided the evidence reasonably could be accepted as trustworthy by the trier of fact as an initial question.¹¹⁶

Thus, the first prong of the test satisfies relevancy requirements fundamental to the APA and FRE standards.¹¹⁷ This preliminary test also quickly disposes of clearly unreliable evidence. The second part of the test is drawn from the case law determinations of trustworthiness. While hearsay constitutes reliable, probative, and substantial evidence when it meets the requirements for admissibility in the test's first part, the second part of the test guarantees the trustworthiness of the evidence in light of the three hearsay dangers, as explained below.

Drawing from case law, the indicia of trustworthiness are many.¹¹⁸ They include apparent independence of the declarant, lack of contradiction by direct evidence, lack of objection to admission, corroboration, and standard or routine practices or documents.¹¹⁹ Creating a list for an ALJ's reference merely mimics the often confusing FRE hearsay exceptions. Additionally, it is highly unlikely that such a list could be sufficiently comprehensive.

Instead, an ALJ should look directly to the three hearsay dangers — narration, perception, and memory — and view the evidence within the context of each

States, 456 F.2d 777 (Ct. Cl. 1972) (rejecting testimony involving multiple inconsistent statements).

¹¹⁴*Id.*

¹¹⁵*Anderson v. United States*, 799 F. Supp. 1198, 1203 (Ct. Int'l Trade 1992) (noting with approval ALJ's rejection of testimony referring to unnamed declarants); *McKee v. United States*, 500 F.2d 525, 528 (Ct. Cl. 1974) (excluding identifying photo caption where caption's writer was unknown).

¹¹⁶Irving Younger, *Reflections on the Rule Against Hearsay*, 32 S.C. L. REV. 281, 293 (1980).

¹¹⁷U.S.C. § 556(d)(1994); FED. R. EVID. 402.

¹¹⁸*See supra* text accompanying notes 38-60.

¹¹⁹*Id.*

¹¹⁰*See supra* text accompanying notes 30-37.

¹¹¹*Id.*

¹¹²*Id.* The residual exception also requires advance notice. But this aspect of the rule is inapposite to the efficiency of the administrative process and is not a part of this proposal.

¹¹³*Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985); *United States v. Saunders*, 973 F.2d 1354, 1359 (7th Cir. 1992) ("We must accept the evidence unless it is contrary to the laws of nature . . . or is so inconsistent or improbable on its face that no reasonable factfinder could accept it."); *see also Reil v. United*

one. Is there a reason to believe the declarant was insincere or misunderstood? Did the declarant have first-hand knowledge? Do circumstances suggest the declarant's memory would weigh against the truthfulness of the evidence? In asking these questions, the ALJ applies the same criteria justifying any recognized hearsay objection. Accordingly, the ALJ should be able to determine whether the evidence bears sufficient reliability to use fairly in reaching a decision.

The second prong of the test minimizes the hearsay dangers by requiring a demonstration of reliability equivalent to the basis for a hearsay exception. It also satisfies the APA requirements for substantive evidence in accord with the *Perales* opinion.¹²⁰ Finally, a circumstantial guarantee of trustworthiness satisfies the FRE residual hearsay exception requirement.

Viewed as a whole, the test provides a relatively simple application an ALJ could employ to minimize the dangers of relying on hearsay, while satisfying due process and the APA requirements. Since the test satisfies the FRE residual exception in all but the advance notice aspect, the test could be used by agencies required to follow the FRE either "so far as practicable" or with a change in agency rules to eliminate the advance notice requirement.

This test should yield results consistent with current case law. For example, in *Perales* the hearsay evidence consisted of medical reports from four examining doctors and the direct testimony of a fifth doctor whose testimony was based on other doctors' written reports — not a direct examination of *Perales*.¹²¹ Applying this test's first prong, an ALJ would find medical opinions regarding a claimant's physical condition probative of a material fact. Next, the ALJ would determine that reports were from known sources and did not present evidence which was impossible to believe or internally inconsistent — even though they were in conflict with the direct

testimony of *Perales*' personal physician.¹²² The evidence, therefore, would be admissible after the first prong of the test.

Applying the test's second prong, the ALJ would look to the nature of the reports for indicia of trustworthiness in light of the three hearsay dangers. The ALJ would find: (1) that narration posed no problem since the evidence consisted of written medical reports; (2) perception posed no problem as the doctors writing the reports had examined *Perales*;¹²³ and (3) since no evidence suggested the reports were written long after the examination, memory posed no problem. By allaying the three hearsay dangers, the evidence would be deemed reliable, probative, and substantial. Therefore, the evidence would satisfy the second prong of the test. Since both parts of the test were satisfied, the evidence could be used to support the ALJ's decision, as was held by the *Perales* Court.

A similar result occurred in *Woolsey v. NTSB*.¹²⁴ In that case, *Woolsey* objected to several documentary exhibits proffered by the government to prove that *Woolsey*'s company was holding itself out to the public.¹²⁵ The evidence included published magazine ads, promotional materials, several facsimile transmissions from persons known to the FAA investigator, and several bank checks from customers.¹²⁶

Applying the two-prong test proposed by this article, the *Woolsey* evidence would have been admissible. First, all of the evidence was probative of material facts. Second, none of the evidence was improbable. Third, all of the items came from identified sources. Thus, under the first part of the test, all the evidence would be admissible. Next, the evidence

¹²²*Id.* at 402.

¹²³The fifth doctor did not examine *Perales*, but was subject to cross-examination.

¹²⁴993 F.2d 516 (5th Cir. 1993) (affirming emergency revocation of a commercial pilot certificate), *cert. denied*, 114 S. Ct. 1829 (1994).

¹²⁵*Id.* at 519. *Woolsey*'s license was revoked for operating as a common carrier while following the less stringent safety rules applicable to private aircraft. *Id.* at 517.

¹²⁶*Id.* at 519.

¹²⁰*Richardson v. Perales*, 402 U.S. 389 (1971).

¹²¹*Id.*

would be deemed trustworthy because none of the materials present serious concerns of narration, memory, or perception.¹²⁷ Consequently, the evidence propounded in *Woolsey* would constitute substantial evidence, as was found by the Fifth Circuit.

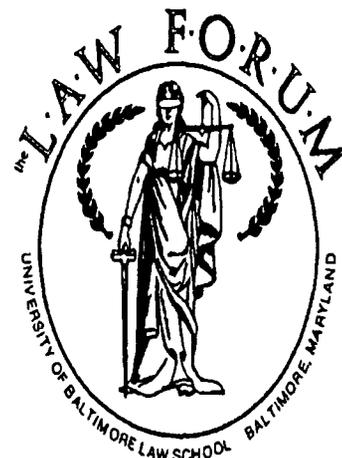
V. CONCLUSION

Federal ALJs need a simple, uniform standard to weigh hearsay evidence. This standard must comply with the specific requirements of the APA. It must minimize hearsay dangers while promoting the efficiency goals of the administrative process. It must be fair.

To construct such a standard, the foundational requirements of the FRE residual exceptions can be meshed with the circumstantial guarantees of trustworthiness, as developed in recent case law. The result is a two-prong test capable of meeting the APA and due process requirements while maintaining a high level of admissibility of hearsay evidence.

Utilizing this test, the ALJ would first exclude evidence that is either irrelevant, immaterial or facially unreliable. If admissible, the ALJ would analyze the evidence with regard to the three hearsay dangers. If the evidence poses no significant hearsay concerns, it could be admitted and relied upon as substantial evidence.

About the Author: Roy D. Brenner is a 1997 Juris Doctor candidate at the University of Baltimore School of Law. Mr. Brenner is planning a career in administrative law.



¹²⁷While a "fax" may be garbled in transmission, *Woolsey* did not object to the accuracy of the documents, only to their hearsay nature. *Id.*