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## Evidence - Rules of Evidence in Disbarment, Habeas Corpus, and Grand Jury Proceedings

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## COMMENTS

EVIDENCE—RULES OF EVIDENCE IN DISBARMENT, HABEAS CORPUS, AND GRAND JURY PROCEEDINGS—With the development of liberal trends in the admission of evidence,<sup>1</sup> and an increase in the number of non-jury type proceedings, exclusionary rules of evidence based on the theory of preventing the jury from being misled have been frequently disregarded. The disregard of some of these rules in administrative hearings,<sup>2</sup> particularly workmen's compensation proceedings<sup>3</sup> and deportation hearings,<sup>4</sup> points the way to an examination of their value in other similar proceedings. Many statutory tribunals have taken the approach that they will admit all offered evidence, and let the appellate court disregard what it desires.<sup>5</sup> Appellate courts have responded with the so-called "residuum rule," holding that if, when all the incompetent evidence is disregarded, there still remains a residuum of competent evidence to support the finding, the appellate courts will affirm.<sup>6</sup> This liberal approach has been created, for the most part, by statutes governing the tribunals concerned.<sup>7</sup> It is the purpose of this comment to examine three common-law proceedings in which rules of evidence are generally not governed by statute, to determine whether the liberalism expressed in administrative hearings has extended to non-statutory areas. Specifically, to what extent have the exclusionary rules of evidence, which rest on the

<sup>1</sup> See Davis, "Evidence," 30 N.Y. UNIV. L. REV. 1309 at 1314, 1319 (1955); comment, 46 ILL. L. REV. 915 (1952); note, 60 YALE L.J. 363 (1951); Thompson, "Federal Rule 43 (a)—A Decadent Decade," 34 CORN. L.Q. 238 (1948). But see Bridges v. Wixon, 326 U.S. 135 at 154 (1945). On the theory behind exclusion, see Cooper, "The Admissibility of Hearsay in Hearings before Workmen's Compensation Commissioners," 31 DICTA 423 at 424 (1954).

<sup>2</sup> See Vanderbilt, "Proof before Administrative Tribunals," 24 IOWA L. REV. 464 (1939); Henoch, "Evidence before Administrative Tribunals," 22 I.C.C. PRACTITIONER'S JOURNAL 395 (1955); Norwood, "Administrative Evidence in Practice," 10 GEO. WASH. L. REV. 15 (1941).

<sup>3</sup> See Cooper, "The Admissibility of Hearsay in Hearings before Workmen's Compensation Commissions," 31 DICTA 423 (1954); 2 LARSEN, WORKMEN'S COMPENSATION 287 (1952); Barnes, "Hearsay in Compensation Cases," 4 U.S.C. SELDEN SOC. YEARBOOK 40 (1940); Norwood, "Administrative Evidence in Practice," 10 GEO. WASH. L. REV. 15 (1941).

<sup>4</sup> See VAN VLECK, ADMINISTRATIVE CONTROL OF ALIENS (1932); notes, 3 GEO. WASH. L. REV. 104 (1934); 23 TEX. L. REV. 386 (1945). But see note, 33 GEO. L.J. 108 at 110 (1944), calling for strong rules of evidence in denaturalization proceedings. See also Bridges v. Wixon, 326 U.S. 135 (1945).

<sup>5</sup> See McCORMICK, EVIDENCE 137 (1954); Davis, "Evidence," 30 N.Y. UNIV. L. REV. 1309 at 1315 (1955).

<sup>6</sup> Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916). See Davis, "The Residuum Rule in Administrative Law," 28 ROCKY MT. L. REV. 1 (1955).

<sup>7</sup> Administrative Procedure Act, §7 (c), 60 Stat. 241 (1946), 5 U.S.C. (1958) §1006 (c). For state statutes, see HANDBOOK OF NATIONAL COMMISSIONERS ON UNIFORM STATE LAWS 332 (1944).

theory of preventing the jury from being misled (the "jury theory"), been abandoned in disbarment, habeas corpus, and grand jury proceedings?

## I. WHO HEARS THE EVIDENCE? APPLICATION OF RULES

### A. *Disbarment Proceedings*

1. Although right to trial by jury is given in a few states, the trier of facts in a disbarment proceeding usually consists of one or more judges or selected members of the local bar.<sup>8</sup> The proceeding is generally regarded as civil in nature,<sup>9</sup> despite the fact that a few courts make reference to the punishment aspects of disbarment,<sup>10</sup> and most require a quantum of proof similar to that needed for conviction in criminal proceedings.<sup>11</sup>

Interpreting the proceeding as civil in nature removes constitutional jury requirements and permits a more liberal approach to the exclusionary rules than if disbarment were considered criminal in nature. Further justification for liberality of admission of evidence comes from frequent reference to disbarment as a *sui generis* action regulating the conduct of the court.<sup>12</sup>

2. Although some courts stringently apply the common-law rules of evidence to disbarment,<sup>13</sup> and others take an extremely liberal approach,<sup>14</sup> it can generally be said that the common-law ex-

<sup>8</sup> See Potts, "Trial by Jury in Disbarment Proceedings," 11 TEX. L. REV. 28 (1932)

<sup>9</sup> Ex parte Wall, 107 U.S. 265 (1882); In re Kohler, 240 App. Div. 501, 270 N.Y.S. 634 (1934); Houtchens v. State, (Tex. Comm. App. 1933) 63 S.W. (2d) 1011, reversing 47 S.W. (2d) 679 (1932). Holding it "quasi-civil," see Board of Law Examiners v. Brown, 53 Wyo. 42, 77 P. (2d) 626 (1937). Holding it "quasi-criminal," see Ex parte Messer, 228 Ala. 16, 152 S. 244 (1933).

<sup>10</sup> See In re Harris, 88 N.J.L. 18, 95 A. 761 (1915); Lantz v. State Bar of California, 212 Cal. 213 at 220, 298 P. 497 (1931), speaking of disbarment as "adequate punishment"; State v. Quarles, 158 Ala. 54 at 57, 48 S. 499 (1909).

<sup>11</sup> Thus, "clear and convincing" evidence is required by Florida ex rel. Florida Bar Assn. v. Bass, (Fla. 1958) 106 S. (2d) 77; demanding "cogent and compelling proof," see In re McDonald, 204 Minn. 61, 284 N.W. 888 (1939), 208 Minn. 330, 294 N.W. 461 (1940).

<sup>12</sup> See Potts, "Disbarment Procedure," 24 TEX. L. REV. 161 at 163 (1945); Leimer v. Hulse, 352 Mo. 451 at 462, 178 S.W. (2d) 335 (1944), cert. den. 323 U.S. 744 (1944).

<sup>13</sup> Sheiner v. State, 9 Fla. Supp. 121, 82 S. (2d) 657 (1955) (rejecting incompetent evidence); People ex rel. Kent v. Denious, 118 Colo. 342, 196 P. (2d) 257 (1948) (rejecting immaterial evidence); In re Felton, 60 Idaho 540, 94 P. (2d) 166 (1939) (rejecting privileged evidence); People ex rel. Chicago Bar Assn. v. Amos, 246 Ill. 299, 92 N.E. 857 (1910) (rejecting trial transcript as sole evidence); Lenihan v. Commonwealth, 165 Ky. 93, 176 S.W. 948 (1915) (rejecting prejudicial affidavit); In re Reed, 207 La. 1013, 22 S. (2d) 552 (1945) (rejecting hearsay but only if clearly inadmissible); In re Sizer, (Mo. App. 1939) 134 S.W. (2d) 1085.

<sup>14</sup> Werner v. State Bar, 24 Cal. (2d) 611, 150 P. (2d) 892 (1944) (admitting hearsay); State v. Dawson, (Fla. 1959) 111 S. (2d) 427 (stating at 431 that the "referee is not bound by technical rule of evidence," and admitting hearsay conversations); In re Scott, 53 Nev. 24, 292 P. 291 (1930) (admitting letters without foundation).

clusionary rules are only moderately relaxed in disbarment proceedings. The attitude varies somewhat depending upon who hears the evidence. When a jury is employed, common-law rules are employed virtually to their full extent;<sup>15</sup> when a committee of attorneys or a judge hears the case, a more relaxed approach can be expected.<sup>16</sup>

Thus in an Alabama jury trial, the appellate court affirmed the lower court's rejection as hearsay of a statement made by a witness that defendant had effected a sale of property for her.<sup>17</sup> Defendant had tried to get the statement in as an admission against interest, but the court followed the usual rule in noting that there was no showing by defendant that the conversation was a deliberate statement by the speaker of any fact *then* appearing to be against her interest. A concurring judge felt the statement was clearly against her pecuniary interest, for if she deeded the property it was clearly beyond her recall.<sup>18</sup> Moreover, she had died before the trial, and the concurring judge felt that declarations by decedents should be admitted, if deceased had a peculiar means of knowing the matter stated, if the statement was opposed to her pecuniary interest, and if she had no intention to misrepresent it.<sup>19</sup>

On the other hand, a more liberal approach was apparent in a recent Florida disbarment hearing before a Board.<sup>20</sup> The Board admitted hearsay conversations between defendant's aide and various clients. The appellate court affirmed the disbarment order, and said that the hearing is not "circumscribed by technical rules of evidence, usually attendant on the trial of an action in the courts. It is more nearly in the nature of a quasi-judicial administrative hearing until it reaches this court for decision."<sup>21</sup>

No matter who adjudicates the facts, the quantum of evidence required for conviction remains the same.<sup>22</sup> Although all the courts pay lip-service to the theory that only "legal" and "com-

<sup>15</sup> *Thomas v. Georgia*, 95 Ga. App. 699, 99 S.E. (2d) 242 (1957) (excluding correspondence as hearsay); *McCord v. State ex rel. Allen*, 220 Ala. 466, 126 S. 873 (1930) (rejecting conversation as hearsay); *Lenihan v. Commonwealth*, 165 Ky. 93, 176 S.W. 948 (1915) (forbidding reading of *ex parte* affidavits to jury).

<sup>16</sup> *Werner v. State Bar*, 24 Cal. (2d) 611, 150 P. (2d) 892 (1944); *In re Disbarment Proceedings*, 321 Pa. 81, 184 A. 59 (1936); *In re Scott*, 53 Nev. 24, 292 P. 291 (1930).

<sup>17</sup> *McCord v. State ex rel. Allen*, 220 Ala. 466, 126 S. 873 (1930).

<sup>18</sup> *Id.* at 478.

<sup>19</sup> *Ibid.*

<sup>20</sup> *State v. Dawson*, (Fla. 1959) 111 S. (2d) 427.

<sup>21</sup> *Id.* at 431.

<sup>22</sup> See 105 A.L.R. 976 (1936) for a review of the quantum of evidence required for conviction.

petent" evidence should be admitted,<sup>23</sup> the terms are sufficiently ambiguous that any evidence which the court feels should be admitted can usually qualify. Some courts will admit all tendered evidence, and leave it to the appellate court to strike what it considers incompetent.<sup>24</sup> This reliance upon the appellate court, coupled with the appellate court's confidence in lower court findings of fact, presents a paradox. An Arkansas court seems to have fallen into the trap in a case in which the appellate court noted that much of the evidence admitted below was incompetent and irrelevant but admitted with a view to later appellate review.<sup>25</sup> After so stating, the appellate court held that since the lower court had the opportunity to observe the demeanor of the witnesses, its conclusion should be respected. The result seems to be that the decision was founded on the lower court's opinion of the demeanor of the witnesses rather than on what the witnesses had to say.

Proceeding to a more particular analysis of the individual exclusionary rules, it appears that the greatest controversy centers upon hearsay. The area is not settled. Some courts will speak in language indicating that they will admit any hearsay; but then they admit only that evidence falling in well-recognized exceptions to the hearsay rule.<sup>26</sup> Other courts will occasionally indicate strict adherence to the common-law rules, but in deciding the case view the evidence with a liberal eye. One New York court threw out all the evidence going toward disbarment, except some hearsay testimony falling within an exception to the hearsay rule.<sup>27</sup> The court affirmed the conviction. If a general rule had to be drawn, it would be that despite the liberal statements by the courts, few of them will admit evidence clearly objectionable as hearsay. In one case the investigating committee attached an affidavit to the

<sup>23</sup> *In re Felton*, 60 Idaho 540, 94 P. (2d) 166 (1939); *Ex parte Montgomery*, 244 Ala. 91, 12 S. (2d) 314 (1943); *In re Richardson*, 209 Cal. 492, 288 P. 669 (1930).

<sup>24</sup> See *Hurst v. Bar Rules Committee*, 202 Ark. 1101, 155 S.W. (2d) 697 (1941); *In re Richardson*, 209 Cal. 492, 288 P. 669 (1930), where the lower court struck what it felt was incompetent evidence at the end of the hearing. The appellate court, at 498, felt sufficient competent evidence remained thereafter to support the finding. See also *Louisiana State Bar Assn. v. Sackett*, 231 La. 655 at 659, 92 S. (2d) 571 (1957), holding that lower court could admit all evidence, provided objections made and reservations taken by either side were preserved in the record.

<sup>25</sup> *Hurst v. Bar Rules Committee of the State of Arkansas*, 202 Ark. 1101, 155 S.W. (2d) 697 (1941).

<sup>26</sup> *In Werner v. State Bar*, 24 Cal. (2d) 611, 150 P. (2d) 892 (1944), the court admitted conversations because it said the hearsay rule did not apply when the statement is not admitted to prove the truth of its contents; *In re Durant*, 80 Conn. 140, 67 A. 497 (1907), admitting transcript of former trial, because the issues and the parties were the same as in the instant proceedings, without mention of unavailability.

<sup>27</sup> *In re Eldridge*, 82 N.Y. 161 (1880).

complaint;<sup>28</sup> the reading of the affidavit to the jury was severely criticized on appeal.<sup>29</sup> Attempts to admit a conversation clearly not within any of the hearsay exceptions,<sup>30</sup> or other testimony not subject to cross-examination,<sup>31</sup> have met with failure. In one case letters attached to the record were sent to the appellate court, in support of defendant's integrity.<sup>32</sup> This was labelled a reprehensible practice and called hearsay. In actual practice, then, disregarding the surplus of liberal statements, only a few courts will admit statements clearly hearsay.<sup>33</sup>

The usual exceptions to the hearsay rule, such as the admission against interest,<sup>34</sup> are allowed to about the same extent as in regular civil proceedings. In the area of admission of prior recorded testimony, however, the courts have become quite liberal in allowing proffered testimony.<sup>35</sup> In a Missouri disbarment proceeding, the hearing officer admitted the entire bar committee transcript, although defendant objected to it in its entirety;<sup>36</sup> the committee said that the transcript contained at least some competent evidence, and so it was not necessary "to separate the wheat from the chaff. . . . The inquiry (in disbarment cases) should not be limited, or circumscribed, by the strict rules of evidence."<sup>37</sup> Despite the liberality in this area, the opportunity for cross-examination, as a principle, is given much lip-service.<sup>38</sup>

<sup>28</sup> *Houtchens v. State*, (Tex. Comm. App. 1933) 63 S.W. (2d) 1011, reversing 47 S.W. (2d) 679 (1932).

<sup>29</sup> *Id.* at 1014.

<sup>30</sup> *In re Felton*, 60 Idaho 540, 94 P. (2d) 166 (1939); *In re Gorsuch*, 147 Kan. 459, 78 P. (2d) 12 (1938).

<sup>31</sup> *Sheiner v. State*, 9 Fla. Supp. 121, 82 S. (2d) 657 (1955).

<sup>32</sup> *Allen v. State Bar*, 218 Cal. 19, 21 P. (2d) 107 (1933).

<sup>33</sup> *Matter of Pollack*, 246 App. Div. 211, 285 N.Y.S. 344 (1936); *Matter of Solovei*, 250 App. Div. 117, 293 N.Y.S. 640 (1937) (disbarment dismissed), *affd.* 250 App. Div. 876, 297 N.Y.S. 160 (1937); *Campbell v. Third Dist. Comm.*, 179 Va. 244, 18 S.E. (2d) 883 (1942).

<sup>34</sup> Admissions against interest: *In the Matter of Pate*, 232 Mo. App. 478, 107 S.W. (2d) 157 (1938); *In re Gladstone*, (S.D. N.Y. 1939) 28 F. Supp. 858 at 871 (*dicta*); *In re Gorsuch*, 147 Kan. 459, 78 P. (2d) 12 (1938). See also *McCord v. State ex rel. Allen*, 220 Ala. 466, 126 S. 873 (1930).

<sup>35</sup> *In re Donaghy*, 393 Ill. 621, 66 N.E. (2d) 856 (1946) (*re character of witness*); *State v. Mosher*, 128 Iowa 82, 103 N.W. 105 (1905) and *In re Wellcome*, 23 Mont. 259, 53 P. 711 (1899) (allowed under statute because held "special proceeding"); *State v. Bomer*, 179 Tenn. 67, 162 S.W. (2d) 515 (1942) and *Ex parte Messer*, 228 Ala. 16, 152 S. 244 (1933) (admissible because disbarment not considered a criminal proceeding).

<sup>36</sup> *In the Matter of Pate*, 232 Mo. App. 478, 107 S.W. (2d) 157 (1938).

<sup>37</sup> *Id.* at 482-483.

<sup>38</sup> *In re Melin*, 410 Ill. 332, 102 N.E. (2d) 119 (1951); *In re Eaton*, 14 Ill. (2d) 338, 152 N.E. (2d) 850 (1958) (upheld against defendant); *State ex rel. Nebraska State Bar Assn. v. Bachelor*, 139 Neb. 253, 297 N.W. 138 (1941) (testimony without cross-examination admissible only for purpose of credibility).

Departure from rules requiring relevancy and materiality is rarely permitted.<sup>39</sup> However, a California court held in one case that the local commissioner, and the board of governors, can consider any past conduct of defendant in determining his integrity.<sup>40</sup> Facts disclosed on prior investigation by the state bar of complaints filed and regularly brought before it could also be considered. Another California court granted defendant the right to prove the integrity of his practice in another state.<sup>41</sup>

Character evidence is acceptable and used,<sup>42</sup> but evidence regarding similar transactions meets the same limitations imposed in other proceedings. Thus evidence of similar transactions has been admitted only to show scienter, or intent and a common plan.<sup>43</sup> For example, when a New York lawyer was charged with false representations regarding his ownership of stock, and with causing a loss to a broker he refused to pay, the referee in a disbarment proceeding admitted evidence of similar transactions by defendant.<sup>44</sup>

### B. *Habeas Corpus Proceedings*

1. The evidentiary problems created in habeas corpus differ somewhat from disbarment, in that the trier of the facts is always a judge; and, unlike the dispute over the nature of disbarment, habeas corpus is universally considered a civil proceeding.<sup>45</sup> This holds true even in habeas corpus proceedings related to criminal cases, such as extraditions and writs requesting release from imprisonment.

2. In general the usual rules of evidence designed for an ordinary civil trial are followed in habeas corpus. The liberal tendencies found in disbarment do not appear in habeas corpus.

Turning to an analysis of the cases, it appears that rules govern-

<sup>39</sup> *Thomas v. Georgia*, 95 Ga. App. 699, 99 S.W. (2d) 242 (1957) (evidence subsequent to relevant act excluded); *In re Welansky*, 319 Mass. 205, 65 N.E. (2d) 202 (1946) (holding court cannot retry criminal conviction); *In re Sizer*, 134 S.W. (2d) 1085 (1939) (exhibits regarding suits pending elsewhere excluded); *In re McDonald*, 112 Mont. 129, 113 P. (2d) 790 (1941) (holding mental capacity of prosecutrix immaterial).

<sup>40</sup> *Hennessy v. State Bar*, 18 Cal. (2d) 685, 117 P. (2d) 326 (1941).

<sup>41</sup> *State Bar v. Rollinson*, 213 Cal. 36, 1 P. (2d) 428 (1931).

<sup>42</sup> See notes 40 and 41 *supra*.

<sup>43</sup> *In re Kohler*, 240 App. Div. 501, 270 N.Y.S. 634 (1934).

<sup>44</sup> *Ibid.*

<sup>45</sup> *People ex rel. Borelli v. Lohman*, 13 Ill. (2d) 506, 150 N.E. (2d) 116 (1958); *State v. Court of Common Appeals*, 136 N.J.L. 380, 56 A. (2d) 562 (1943), *affd.* 1 N.J. 14, 61 A. (2d) 503 (1948).

ing relevancy and materiality provide most of the problems. Generally they are rigidly enforced.<sup>46</sup>

Extradition hearings raise peculiar problems, as defendants often submit evidence of their innocence, which is not at issue in extradition. Courts have consistently rejected evidence of this type, as they have rejected evidence going to the motives of a complaining witness.<sup>47</sup> A New Jersey court explained the reasons as follows:

“ . . . Such an inquiry [into motive], if allowed, might well result in endless trials on vague, and ill-formed issues, requiring witnesses and depositions from distant points, testifying to no conclusive purpose. The end result might well be to embarrass the enforcement of the constitutional provision and, in many cases, would have the effect of total abrogation thereof.”<sup>48</sup>

In habeas corpus requesting release from imprisonment, attempts are often made to go outside the scope of the writ.<sup>49</sup> In one case petitioner called as his witness the officer in charge of the police station where he was booked.<sup>50</sup> The lower court refused to allow the officer to be questioned as to why he was no longer on the force, holding that this was outside the scope of the writ of habeas corpus granted. The appellate court agreed that the proffered evidence was immaterial, and affirmed the lower court decision. The result is typical of judicial approach to the relevancy rule in this area.

The one area in which the relevancy rule is relaxed is in custody proceedings, where a wide scope is given admission of character and reputation evidence to prove fitness of a parent to receive the child.<sup>51</sup> An Indiana court stated that inquiry could be

<sup>46</sup> *People ex rel. Johnson v. Ruthazer*, 198 Misc. 1044, 102 N.Y.S. (2d) 39 (1950), *affd.* 278 App. Div. 95, 105 N.Y.S. (2d) 394 (1951); *Bond v. Norwood*, 195 Ga. 383, 24 S.E. (2d) 289 (1943); *McDowell v. Gould*, 166 Ga. 670, 144 S.E. 206 (1928); *Chambers v. State*, 235 Wis. 7, 291 N.W. 772 (1940); *State ex rel. French v. French*, 182 Tenn. 606, 188 S.W. (2d) 603 (1945).

<sup>47</sup> *In re Cohen*, 23 N.J. Super. 209, 92 A. (2d) 837 (1952), *affd.* 12 N.J. 362, 96 A. (2d) 794 (1953).

<sup>48</sup> *Id.* at 224.

<sup>49</sup> *United States ex rel. Daverse v. Hohn*, (3d Cir. 1952) 198 F. (2d) 934 (holding immaterial allegation that juror was given a gun as reward for his services, calling this, at 939, “far-fetched and an after-thought”); *Salter v. Delmore*, 50 Wash. (2d) 603, 313 P. (2d) 700 (1957); *Ex parte Noble*, 78 Okla. Cr. 105, 144 P. (2d) 122 (1943) (fact co-defendant allowed to plead guilty to manslaughter excluded).

<sup>50</sup> *Commonwealth ex rel. Miller v. Maroney*, 179 Pa. Super. 305, 116 A. (2d) 755 (1955).

<sup>51</sup> *Sweeney*, “Habeas Corpus — Custody of Children,” 22 *TEMPLE L.Q.* 289 at 291 (1949); *In re Harville*, 233 La. 1, 96 S. (2d) 20 (1957); *Sturkie v. Skinner*, 214 Ga. 264, 104 S.E. (2d) 417 (1958).

made into the standing of the parties in the community, proximity to schools, and other advantages for the child.<sup>52</sup>

The hearsay rule is universally enforced in habeas corpus,<sup>53</sup> with the exception of the deportation area.<sup>54</sup> Even though there was no objection to the hearsay in one Georgia case, the appellate court curtly overruled a lower court finding that a father had lost the right to his child;<sup>55</sup> the lower court had admitted testimony by the grandmother that her daughter told her that her son-in-law beat their children. Similarly, the right to cross-examination is rigidly protected.<sup>56</sup> Much litigation arises over the admission of reports and investigations, which are generally held inadmissible as hearsay.<sup>57</sup>

In submitting written evidence, rules requiring the best evidence<sup>58</sup> and authentication<sup>59</sup> are enforced. The more specific rules regulating oral testimony are also followed; opinions<sup>60</sup> and conclusions<sup>61</sup> are forbidden, and competency<sup>62</sup> is always investigated. In one case a witness' testimony as to a judge's ability was ruled incompetent, because he based his opinion upon his casual observance of the judge as he saw him in the court house.<sup>63</sup>

<sup>52</sup> *Johnson v. Smith*, 203 Ind. 214 at 220, 176 N.E. 705 (1931).

<sup>53</sup> *Ex parte Nicely*, 116 Tex. Cr. 143, 28 S.W. (2d) 147 (1930) (excluding wires, letters, and prison record as hearsay); *Ex parte Foote*, 106 Tex. Cr. 672, 294 S.W. 851 (1927); *Walker v. Warden of Maryland House of Correction*, 209 Md. 654, 121 A. (2d) 714 (1956) (letter of trial judge excluded).

<sup>54</sup> *United States v. Brough*, (2d Cir. 1926) 15 F. (2d) 377 at 379 (admitting hearsay statements for what they are worth, with "knowledge of the fact that there was no cross-examination"). See also *Bridges v. Wixon*, 326 U.S. 135 (1945).

<sup>55</sup> *Camp v. Camp*, 213 Ga. 65, 97 S.E. (2d) 125 (1957).

<sup>56</sup> *In re Dubina*, 311 Mich. 482, 18 N.W. (2d) 902 (1945); *Cobas v. Clapp*, 79 Idaho 419, 319 P. (2d) 475 (1958).

<sup>57</sup> *Sweeney*, "Habeas Corpus — Custody of Children," 22 *TEMPLE L.Q.* 289 at 298 (1949); *United States ex rel. Eshoc v. Fluckey*, (6th Cir. 1927) 19 F. (2d) 64 (official landing certificate admitted); *United States ex rel. Lawrence v. Commanding Officer*, (D.C. Neb. 1945) 58 F. Supp. 933 (Department of Agriculture War Board Report to Local Selective Service Board that defendant was a "slacker" not admitted); *United States ex rel. Leon v. Shaughnessy*, (S.D. N.Y. 1956) 143 F. Supp. 270 (admitting certificates of supervising psychiatrist).

<sup>58</sup> *United States ex rel. Eshoc v. Fluckey*, (6th Cir. 1927) 19 F. (2d) 64.

<sup>59</sup> *State ex rel. Hall v. Skeen*, 136 W. Va. 805, 68 S.E. (2d) 683 (1952); *In re Dubina*, 311 Mich. 482 at 486, 18 N.W. (2d) 902 (1945); *Berry v. Gray*, (Ky. 1957) 299 S.W. (2d) 124.

<sup>60</sup> *United States ex rel. Lawrence v. Commanding Officer*, (D.C. Neb. 1945) 58 F. Supp. 933.

<sup>61</sup> *Little v. Gladen*, 202 Ore. 16, 273 P. (2d) 443 (1954).

<sup>62</sup> *Cottrell v. McLeod*, (Okla. Cr. 1959) 342 P. (2d) 240 (allowing officials with personal knowledge of testimony to supplement record); *Ferguson v. Hoffman*, 180 Kan. 139, 299 P. (2d) 596 (1956).

<sup>63</sup> *United States ex rel. Feeley v. Ragen*, (7th Cir. 1948) 166 F. (2d) 976.

### C. *Grand Jury Proceedings*

1. The nature and purpose of a grand jury hearing differ markedly from disbarment and habeas corpus. A grand jury hearing is not aimed at a determination of guilt or innocence, or investigation of a particular fact or facts. Rather a grand jury is to determine whether a particular situation merits criminal indictment. As a result, the investigation is often more broad and the issues more prevalent than in other hearings. The question arises as to the extent of the application of the exclusionary rules of evidence designed to aid a jury in achieving justice.

2. In general, exclusionary rules of evidence before a grand jury are considerably less stringent than in either disbarment or habeas corpus. Significantly, because the grand jury system is most widely used in federal courts, evidentiary rules are liberalized in the federal courts to a greater extent than in state courts.<sup>64</sup> A minority of jurisdictions adhere, at least nominally, to the customary rules.<sup>65</sup> Thus one Connecticut court held that a grand jury should not be restricted by the ordinary rules of evidence when questioning witnesses;<sup>66</sup> the court added, however, in a qualification of doubtful value, that in deciding whether to indict, only evidence admissible at a trial should be considered.

The courts universally agree that there must be some "legal" or "competent" evidence as a foundation for grand jury action,<sup>67</sup> but as in disbarment these terms serve little practical function.

Analysis of specific cases indicates that the clearest violation of ordinary rules is found with regard to hearsay.<sup>68</sup> The federal courts admit hearsay,<sup>69</sup> and the Supreme Court has supported an indictment based solely on hearsay.<sup>70</sup> In *Costello v. United States* the Court indicated that incompetent evidence alone is sufficient for an indictment. Defendant in that case argued that the Fifth

<sup>64</sup> *United States v. Scully*, (2d Cir. 1955) 225 F. (2d) 113 at 116, cert. den. 350 U.S. 897 (1955); *United States v. Garnes*, (S.D. N.Y. 1957) 156 F. Supp. 467 at 470; *Cain v. United States*, (7th Cir. 1956) 239 F. (2d) 263 at 270.

<sup>65</sup> EDWARDS, *THE GRAND JURY* 142-143 (1906); *In the Matter of Cole*, 208 Misc. 697 at 699-700, 145 N.Y.S. (2d) 748 (1955) (referring to statute requiring legal evidence); *Royce v. Oklahoma*, 5 Okla. 61 at 65 (1897) (hearsay testimony ruled out); *Stern v. Superior Court*, 78 Cal. App. (2d) 9 at 18, 177 P. (2d) 308 (1947) (dicta).

<sup>66</sup> *State v. Kemp*, 126 Conn. 60 at 71-72, 9 A. (2d) 63 (1939).

<sup>67</sup> *In the Matter of Cole*, 208 Misc. 697 at 699, 145 N.Y.S. (2d) 748 (1955); *Royce v. Oklahoma*, 5 Okla. 61 at 65 (1897); *Gore v. State*, 22 Ala. App. 136 at 137-138, 114 S. 791 (1927), cert. den. 217 Ala. 68, 114 S. 794 (1927); EDWARDS, *THE GRAND JURY* 144 (1906).

<sup>68</sup> *Cain v. United States*, (7th Cir. 1956) 239 F. (2d) 263 (examiner's report); *United States v. Smyth*, (N.D. Cal. 1952) 104 F. Supp. 283 (writings).

<sup>69</sup> *Costello v. United States*, 350 U.S. 359 (1956).

<sup>70</sup> *Id.* at 363.

Amendment was thereby violated, but the Court stated that to so hold would cause great delay in grand jury hearings, and in effect give defendant a preliminary trial, which is not required by the Fifth Amendment.<sup>71</sup> Although the state courts do not go this far, some do admit hearsay.<sup>72</sup> Moreover the defendant is generally denied the right to cross-examine,<sup>73</sup> and the grand jury need not hear his witnesses.<sup>74</sup> Perhaps the most extreme exception to the usual rules of evidence permits the jurors to use their own knowledge in evidence.<sup>75</sup>

Relevancy and materiality are extremely broad in a grand jury hearing because of the breadth of the examination; yet honest attempts are made to confine the evidence within the established scope of the investigation.<sup>76</sup> In 1953 a federal grand jury was considering possible violation of conspiracy and perjury laws, with reference to non-communist affidavits executed by leaders of unaffiliated labor unions. The grand jury's attempt to learn of the leaders' religious attitudes was sharply rebuked as irrelevant, "highly improper," and "entirely out of order."<sup>77</sup>

The *subpoena duces tecum* has provided difficult problems of relevancy, and yet it too has been curtailed.<sup>78</sup> In one case a grand jury had been investigating criminal abortions in the county; a *subpoena duces tecum* issued by the grand jury, demanding hospital records of all abortions, was held to be too broad.<sup>79</sup> The subpoena would have uncovered other than criminal abortions.

It appears, therefore, that despite the fact that the grand jury is composed of men unsophisticated in legal analysis, and despite

<sup>71</sup> *Ibid.* Burton, J., concurring, stated, at 364, that to indict a person on evidence not "rationally persuasive robs the Fifth Amendment of much of its protective value."

<sup>72</sup> *Maddox v. State*, 213 Ind. 537, 12 N.E. (2d) 947 (1938) (testimony); *Hope v. People*, 83 N.Y. 418 (1881) (ex parte affidavits); *People v. Lambersky*, 410 Ill. 451, 102 N.E. (2d) 326 (1951) (reading of confession, apparently hearsay, allowed).

<sup>73</sup> *People v. Fernandez*, 172 Adv. Cal. App. Rep. 920, 342 P. (2d) 309 (1959). See also *People v. Blair*, 33 N.Y.S. (2d) 183 (1942).

<sup>74</sup> *People v. Gibson*, 15 Misc. (2d) 642, 183 N.Y.S. (2d) 52 (1959) (based on statute); *Commonwealth v. McNary*, 246 Mass. 46, 140 N.E. 255 (1923); *State v. Cox*, 218 La. 278, 49 S. (2d) 12 (1950) (based on statute).

<sup>75</sup> *Hale v. Henkel*, 201 U.S. 43 at 65-66 (1906) (dicta); *Goodman v. United States*, (9th Cir. 1939) 108 F. (2d) 516 at 520 (dicta).

<sup>76</sup> *Ex parte Morris*, 252 Ala. 551, 42 S. (2d) 17 (1949); *In re Pillo*, 11 N.J. 8, 93 A. (2d) 176 (1952), holding matters in doubtful relevance to be resolved in favor of the grand jury.

<sup>77</sup> *Application of United Electrical, Radio and Machine Workers*, (S.D. N.Y. 1953) 111 F. Supp. 858 at 870.

<sup>78</sup> *People v. Allen*, 410 Ill. 508 at 516, 103 N.E. (2d) 92 (1952), cert. den. 344 U.S. 815 (1952), stating that breadth of subpoena duces tecum is measured by scope of investigation.

<sup>79</sup> *In the Matter of the Investigation into Alleged Commission of Criminal Abortions in the County of Kings*, 286 App. Div. 270, 143 N.Y.S. (2d) 501 (1955).

the fact that exclusionary rules are enforced in certain areas, the exclusionary rules in the important area of hearsay are greatly relaxed in a grand jury proceeding.

### III. PHILOSOPHY BEHIND JUDICIAL CONCLUSIONS

In examining the application of the usual exclusionary rules of evidence in three *sui generis* proceedings, our findings have been apparently inconsistent with the "jury theory" as to admission of certain evidence.

In habeas corpus proceedings, which are heard by a judge, the usual exclusionary rules have been strictly followed. In grand jury hearings, held before a group of laymen, the rules have been greatly liberalized. Only in disbarment cases has there been a measure of consistency: when heard by a judge or a group of attorneys, rules of evidence have tended toward liberality.

It seems that factors other than who hears the case are affecting application of the exclusionary rules of evidence. These factors may be briefly considered.

#### A. *Disbarment Proceedings*

An overriding factor in disbarment cases is the oft-expressed judicial feeling that the right to practice law is a privilege bestowed by the state, which the state can take away.<sup>80</sup> Only a few courts limit this approach by stating that the privilege is not a mere indulgence bestowed by the state, revocable at will.<sup>81</sup> The courts feel that when an attorney fails to adhere to standards required for practice, that privilege, like a license, can be summarily revoked. Analogy is made to the necessity of meeting standards before an attorney is allowed to practice.<sup>82</sup> One court likened an attorney's good character to the virtue of a woman, it being his "chief jewel, and when he loses it he becomes a moral bankrupt."<sup>83</sup> Obviously it is but a short step from this reasoning to the conclusion that what the state has given, the state can take away—and can do so unfettered by rules of evidence designed to protect the ordinary citizen in the ordinary case.

<sup>80</sup> *In re Brown*, 64 S.D. 87 at 96, 264 N.W. 521 (1936); *State v. Mosher*, 128 Iowa 82 at 89, 103 N.W. 105 (1905); *Kingsland v. Dorsey*, 338 U.S. 318 at 320 (1949), referring to the privilege to practice before the Patent Office.

<sup>81</sup> *State ex rel. Nebraska State Bar Assn. v. Bachelor*, 139 Neb. 253 at 255, 297 N.W. 138 (1941).

<sup>82</sup> *In re Wilson*, 76 Ariz. 49 at 53, 258 P. (2d) 433 (1953); *Smith's Appeal*, 179 Pa. 14 at 22 (1897).

<sup>83</sup> *Campbell v. Third District Comm.*, 179 Va. 244 at 249, 18 S.E. (2d) 883 (1942).

A second line of thought often advanced by the courts is that it is the court's privilege to supervise its officers.<sup>84</sup> The courts say that judicial integrity,<sup>85</sup> and the public welfare,<sup>86</sup> require strict application of these supervisory powers. Frequently the courts have revealed an abiding fear that they will be accused of favoring their own unless they deal harshly with attorneys.<sup>87</sup> The attitude seems to be that the conglomerate of public welfare and judicial integrity, coupled with internal supervisory powers, gives to the courts the right to relax evidentiary rules when dealing with "one of their own."

Only a few courts base any liberalism shown upon the fact that a trained individual is hearing the facts.

Although a lengthy discussion of the wisdom of the philosophy motivating any liberal trend in the area is beyond the scope of this comment, suffice to say that the generally-expressed rationale is not free from question. While it is true that in order to practice law certain standards should be met, to call the practice of law a privilege is somewhat misleading. An attorney cannot constitutionally be denied the right to practice if he has met the standards set. This "privilege" is not a mere grace bestowed out of the pure benevolence of the state, for the state—the public—benefits from a practicing lawyer's efforts. It seems that whatever it is called, the right or privilege once bestowed should not be revoked except under the most strict guides.

Although labelled "civil," disbarment inflicts upon the attorney results frequently more severe than criminal conviction. Livelihood, honor, and self-esteem suffer just as swiftly from disbarment as from a criminal conviction. Since the rationale behind evidentiary rules in criminal cases is also present in disbarment, to call disbarment a civil proceeding or not really a punishment, and hence susceptible to more liberal rules, appears to be but a costly game of semantics.

The real significance of judicial explanations for any relaxation of the usual rules lies in their general failure to consider who hears the case.

<sup>84</sup> *In re Day*, 181 Ill. 73, 54 N.E. 646 (1899), and *In re Cannon*, 206 Wis. 374, 240 N.W. 441 (1932), holding void statutory attempts to deprive the courts of this function.

<sup>85</sup> *In re Sutt*, 281 Ky. 724 at 728, 137 S.W. (2d) 398 (1940); *Leimer v. Hulse*, 352 Mo. 451 at 462, 178 S.W. (2d) 335 (1944), cert. den. 323 U.S. 744 (1944).

<sup>86</sup> See *In re Sutt*, 281 Ky. 724 at 728, 137 S.W. (2d) 398 (1940); *Board of Law Examiners v. Brown*, 53 Wyo. 42 at 50, 77 P. (2d) 626 (1937).

<sup>87</sup> *In re Ashbach*, 13 Ill. (2d) 411 at 419, 150 N.E. (2d) 119 (1958); *Kingsland v. Dorsey*, 338 U.S. 318 at 326 (1949), Jackson, J., dissenting, said "courts lean backwards to avoid suspicion of partiality to men of our own profession."

### B. *Habeas Corpus Proceedings*

The rationale for the stringent enforcement of rules of evidence in habeas corpus proceedings cannot be gathered from judicial decisions alone, for the courts have rarely considered the reasons for their stringency. Their only explanation is that habeas corpus is a civil proceeding, and hence the usual rules apply.

Undoubtedly there is an unexpressed rationale underlying this stringent enforcement in habeas corpus. The original and main purpose of the writ is to prevent illegal confinement of the petitioner.<sup>88</sup> It has always been considered a fundamental safeguard of personal liberty,<sup>89</sup> and is incorporated in the federal<sup>90</sup> and most state constitutions. Indeed the writ has developed into a basic means of protection of all constitutional rights, for the issue in many habeas corpus writs is whether due process has been violated. Since the writ is not only a constitutional guarantee aimed at protecting personal liberty, but has become a foundation of protection of other rights, the courts may have been reluctant to deviate from rules intended to aid in the search for truth. Further, habeas corpus is generally permitted only after all other remedies have been exhausted;<sup>91</sup> the realization that this is the petitioner's "last resort" might well influence the judiciary toward a careful scrutiny of all evidence submitted against petitioner. The difficulty with this reasoning, of course, is that careful scrutiny is a two-edged sword, affecting evidence advanced by petitioner as well.

But whether the conclusion is that the courts have not sought a rationale for their enforcement, have not even considered the problem, or that the nature of habeas corpus has subconsciously influenced their thinking, the noteworthy point is that the courts have not considered who is hearing the case. The "jury theory" results in certain rules of evidence intended to aid jurors in their search for truth. Yet courts have given no consideration to the fact that in habeas corpus a judge hears the petition. The result has been that rules designed to help juries are governing admission of evidence by trained triers of fact.

<sup>88</sup> Chafee, "The Most Important Human Right in the Constitution," 32 *BOST. UNIV. L. REV.* 143 at 143 (1952); comment, 51 *COL. L. REV.* 368 (1951); Tapley, "Use of Habeas Corpus," 4 *PORTLAND L. REV.* 8 at 8 (1955).

<sup>89</sup> Longsdorf, "Habeas Corpus—A Protein Writ and Remedy," 10 *OHIO ST. L.J.* 301 at 307 (1949); Chafee, "The Most Important Human Right in the Constitution," 32 *BOST. UNIV. L. REV.* 143 at 143 (1952).

<sup>90</sup> Art. I, §9.

<sup>91</sup> Notes, 47 *MICH. L. REV.* 720 at 721 (1949); 39 *J. CRIM. L.* 357 (1948); 97 *UNIV. PA. L. REV.* 285 (1948).

### C. *Grand Jury Proceedings*

As in disbarment, and apparently as in habeas corpus, the rationale of the courts for their approach to the exclusionary rules before a grand jury rests in the nature of the proceeding. Courts feel that it is the purpose of a grand jury to investigate, and since there are no issues formed prior to the hearing, the scope of the investigation should be quite broad. Moreover courts frequently express reluctance to grant defendants a "second trial" by imposing ordinary trial rules on the indictment level.

It seems both reasons advanced by the courts for their liberal attitude are open to question. With respect to the scope of a grand jury investigation, many authorities criticize the tendency of grand juries to go on "fishing expeditions."<sup>92</sup> Indeed, some writers feel that the grand jury has outlived its usefulness.<sup>93</sup> It is agreed that when a grand jury is investigating a broad subject, such as the prevalence of criminal abortions within its jurisdiction,<sup>94</sup> the relevancy rule is difficult to apply. However, in the indictment of an individual for a particular crime, where the area is relatively narrow and the issues fairly well formulated, this reasoning is less acceptable. In the latter case, just as in an ordinary civil trial, these issues can provide a measuring-rod for relevancy. The second reason advanced by the courts, that they do not wish in effect to grant defendants a preliminary trial, is also questionable. As in disbarment and habeas corpus, the courts have failed to consider who is hearing the case. Considering only the liberal approach taken with respect to hearsay, if hearsay were to gain probative value before a grand jury because of the nature of that proceeding, the attitude of the courts would be understandable. But it is clear that this is not the case. The objections to hearsay evidence before a petit jury should hold equal weight before a grand jury, since both are composed of men untrained in the art of analyzing evidence.

<sup>92</sup> See Lee, "The Powers and Duties of the Grand Jury," 8 BAYLOR L. REV. 194 at 196 (1956); Dession and Cohen, "The Inquisitorial Functions of Grand Juries," 41 YALE L.J. 687 at 691 (1932); comment, 37 MINN. L. REV. 586 (1953); Ex parte Morris, 252 Ala. 551 at 557, 42 S. (2d) 17 (1949); McNair's Petition, 324 Pa. 48 at 61, 187 A. 498 (1936); State v. Bramlett, 166 S.C. 323 at 328-329, 164 S.E. 873 (1932).

<sup>93</sup> See Konowitz, "The Grand Jury as an Investigating Body of Public Officials," 10 ST. JOHN'S L. REV. 219 at 228 (1936); REPORT OF NATIONAL COMMISSION ON LAW OBSERVANCE, AND ENFORCEMENT, "Prosecution," 35, 36 (1931); Kranitz, "Grand Jury: Past-Present — No Future," 24 MO. L. REV. 318 (1959); Canfield, "Have We Outgrown the Grand Jury?" 40 ILL. B.J. 206 (1952); White, "In Defense of the Grand Jury," 25 PA. B.A.Q. 260 (1954).

<sup>94</sup> In the Matter of the Investigation into Alleged Commission of Criminal Abortions in the County of Kings, 286 App. Div. 270, 143 N.Y.S. (2d) 501 (1955).

## IV. EVALUATION OF JUDICIAL APPROACH

It is beyond the scope of this comment to consider whether the "jury theory" has an essential validity to it. Indeed it might be argued that the rules designed to aid the jury should be applied before certain less qualified judges and tribunals. At any rate, rules arising from this theory are still recognized in ordinary civil and criminal jury trials, indicating judicial feeling that these rules do aid the jury. An analysis of only three non-statutory common-law proceedings has indicated that the question whether the rules should be enforced in a particular proceeding is given consideration by the courts. But it appears that in deciding the question, the courts have consistently made the determining factor the nature of the proceeding.

The nature of the proceeding should not be ignored. But it seems that the place for consideration of the nature of the proceeding should be in determining the quantum of evidence required for plaintiff to succeed, rather than in determining whether the evidence is admissible or not. If the "jury theory" has any validity, admissibility should be governed by who hears the case, and his or their relative capability to disregard misleading and irrelevant evidence.

Perhaps the time has come for judicial or legislative re-appraisal of the "jury theory." If it is determined that the theory has a rational basis even in light of the more educated juror of today, the nature of the proceeding should not be considered in determining the admissibility of evidence. Rather, universal application of the ordinary rules should be applied before all juries, and liberal admission policies followed in non-jury proceedings.

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