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CONTACT US

Section Chair
Polly McNeill

pollym@summitlaw.com

Newsletter Submissions
Eileen M. Keiffer

emkeiffer@gmail.com

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Worthy of Belief: Evaluating the Credibility of Witness Testimony

By Courtney Beebe

During a hearing conducted under the Administrative Procedures Act (RCW 34.05), the focus is primarily on the admissibility of evidence without (for the most part) reliance on the rules of evidence. Is the evidence relevant? Authentic? Hearsay? Is the witness competent? These are the threshold questions that evidence must first pass to be admitted into the record in an administrative hearing. After the hearing, however, the heavy lifting begins for the presiding officers, who must enter findings of fact that are supported by the evidence in the record and specifically address the credibility of the witnesses when conflicting testimony is presented.

In Washington, RCW 34.05.461(3) provides that "any findings (of fact) based substantially on credibility of evidence or demeanor of witnesses shall be so identified." Credible testimony is that quality in a witness which renders the testimony worthy of belief and presiding officers must objectively consider the sum of all the testimony and any available corroborative evidence when determining whether a witness is credible.

By way of demonstration, presume that a claimant in an unemployment benefits appeal was terminated for misconduct. The former employer alleges that the employee violated the employer's attendance policy by coming to work late on two occasions, and not coming to work at all on the final occasion. The claimant testifies that she was late on two occasions. However, regarding the final occa-

sion, the claimant testifies that she "did not receive her schedule and did not know she was scheduled to work." The employer, however, testifies that the claimant "knew the time she was supposed to start work because her schedule was emailed to her." The presiding officer notices that the claimant's voice shakes when she testifies and that the employer appears to be disorganized when referring to the exhibits admitted into the record.

Who is worthy of belief? Both of the witnesses' testimony is subject to an expression of bias and self-serving interest: the claimant wants to obtain unemployment benefits and the employer wants to achieve denial of the claim. Such influences alone are not enough to find that either witness's testimony is lacking in credibility, but merely a reflection of the adversarial nature of the proceeding.

Focusing on the "demeanor" of the witness similarly has little, if no place in assisting the presiding officer in determining whether a witness is credible. There is no analytical support for a finding that the claimant's nervous demeanor was reflective of untruthful testimony, or the judgment that because the employer was disorganized at the hearing the employer's testimony lacked accuracy.

Practitioners and presiding officers alike should instead focus on more objective factors when evaluating whether a witness can offer or has offered credible testimony: 1) presence or absence of corroborative evidence; 2) whether the witnesses'

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The Administrative Law Section welcomes articles and items of interest for publication. The editors and Board of Trustees reserve discretion whether to publish submissions.

Send submissions to: Eileen M. Keiffer (emkeiffer@gmail.com).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

Desktop Publisher • Ken Yu/Quicksilver • k.yu@earthlink.net

Worthy of Belief: Evaluating the Credibility of Witness Testimony *continued from page 1*

statements have changed over time; 3) the level of detail of the testimony and/or recall of witnesses; 4) duration of time between event(s) and the hearing; 5) differences in behavior before and during the hearing; 6) discussion of events prior to the initial report and prior to the hearing; and 7) presence of suggestive or leading questions during investigation or at the hearing.

In the hypothetical posed above, a copy of the emailed schedule would corroborate the employer's testimony. Notably, the claimant's admission that she had been late on two previous occasions shows that she is willing to accurately testify and reveals the difference between her behavior on the two occasions when she was late and during the final incident, lending credibility to her claim that she did not know she was scheduled to work on the final day in question.

Using more objective factors to challenge or enhance witness testimony provides practitioners the opportunity to frame conflicting versions of events in their client's favor. Presiding officers similarly benefit by making findings of fact based on sufficient evidence and explanation, while avoiding reliance on demeanor judgments and bias. Therefore, despite the common perception that credibility is subjective, use of objective factors provides solid evidence by which to weigh competing and conflicting witness testimony in administrative proceedings.

RPC 4.2's "No Contact" Rule: When Can You Directly Contact Government Officials and Employees?

By Clara Park

The (fictional) law firm of ABC, LLP is a well-respected firm in Washington with a strong reputation for representing clients before government agencies and boards in administrative and land use matters. ABC's lawyers are accustomed to directly contacting government officials and employees, an approach that they believe often expedites action and decision-making. The lawyers often do not contact government counsel, believing they have a constitutional right to directly petition government officials on their clients' behalf. Much to their surprise, however, government attorneys have begun asking them not to contact officials or employees directly, citing Rule of Professional Conduct ("RPC") 4.2.

RPC 4.2 states, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." This rule undoubtedly applies to government officials and employees who are represented by counsel. Although Washington has some relevant guidance on the rule (see, e.g., WSBA Advisory Opinion Nos. 1363, 1668, 201502), the guidance does not fully address all of the circumstances under which the rule may apply, leaving room for uncertainties and differing interpretations such as those illustrated in the above hypothetical. Other jurisdictions around the country have issued numerous ethical opinions and rule modifications with various approaches to the issue. A detailed look at other jurisdictions' approaches is beyond the scope of this article, but an overview of the varying approaches helps highlight some of the grey areas within Washington's rule.

One grey area is how RPC 4.2 interacts with the constitutional right to petition the government, a right protected under the First Amendment. Washington's courts define this right as including the right to "complain to public officials and to seek administrative and judicial relief" and "petition any department of the government, including state administrative agencies," and the courts recognize that restrictions on this right could be an unconstitutional prior restraint.¹ The American Bar Association ("ABA"), recognizing the potential conflict between the right to petition and Rule 4.2's restrictions on contact with represented persons, has issued a formal opinion that allows direct communications with represented government officials under certain conditions, including a requirement that government counsel

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be notified in advance of all contacts.² Other jurisdictions have issued similar ethical opinions on this issue.³

Another grey area is determining when an agency or official is "represented" by counsel in a particular matter. Although government employees and officials have access to government counsel, the rule does not appear to hold that all government employees are automatically represented in all matters. The guidance in Comment (4) to RPC 4.2 states that "this RPC does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation." Thus, for example, if an applicant has two different projects seeking permits from the city, and one permit application is involved in ongoing litigation while the other is not, then the applicant's counsel may be able to directly contact city staff regarding the project that is not involved in litigation.

However, if the matter has become controversial though not yet in litigation (for example, if a project has received significant public opposition), it becomes less clear at what point the agency or official is represented. According to the ABA's opinion, Rule 4.2 is not implicated "unless and until the private party's lawyer learned the agency had sought counsel in connection with a particular controversy." Utah's modification to Rule 4.2 takes the approach that the rule is not implicated "unless litigation about the subject of the representation is pending or imminent."

The Washington State Bar Association's Committee on Professional Ethics is currently considering RPC 4.2's application to government employees and officials represented by counsel, and the committee is seeking input from public and private attorneys regarding potential amendments to the rule. In the meantime, practitioners should continue to be aware of the rule's application when contacting government employees. One simple practice tip for private attorneys is to contact government counsel and discuss with counsel how to handle communications when uncertainties arise.

1 *In re Marriage of Meredith*, 148 Wn. App. 887, 899, 201 P3d 1056, 1062 (2009).

2 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 408 (1997).

3 *E.g.*, Alaska Bar Association Ethics Opinion No 2017-2 (2017).

Caselaw Update

***Wash. Pub. Employees Ass'n v. Wash. State Ctr. for Childhood Deafness & Hearing Loss*, 404 P3d 111 (2017).**

By Chad Standifer

The Washington Court of Appeals, Division II, held that Article I, section 7 of the Washington Constitution protects state employees' full names associated with their corresponding birthdates from public disclosure under the Public Records Act, RCW 42.56 (PRA). The Freedom Foundation, a non-profit political organization, made public records requests to various state agencies seeking disclosure of union represented employees' full names, birthdates, and work email addresses. The state agencies determined that the records were subject to disclosure under the PRA. Several unions representing state employees sought temporary and permanent injunctions preventing disclosure, pursuant to RCW 42.56.540. The trial court determined no exemption applied and denied the motion for permanent injunction.

The Court of Appeals explained that applying Article I, section 7 requires determining: (1) whether the State unreasonably intruded into a person's private affairs, and (2) whether authority of law nonetheless justifies the intrusion.

With regard to whether there was an intrusion into private affairs, the court found that disclosing full names associated with corresponding birthdates subjects the employees to an ongoing risk of identity theft and other harms, and citizens would reasonably expect that such personal information remain private. The court reasoned that while people expose their names and corresponding birthdates to some extent, they typically do so at their own discretion and control.

The court discussed *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P3d 45 (2015), and *West v. Vermillion*, 196 Wn. App. 627, 384 P3d 634 (2016), finding that neither decision could be read to impose a categorical prohibition against claiming that information contained within public records may be constitutionally protected.

With regard to whether authority of law justified the privacy intrusion, the court determined that the purpose of the PRA is not served by public disclosure of employees' full names associated with their corresponding birthdates. Consequently, an intrusion into the state employees' constitutionally protected expectation of privacy was not justified.

The court concluded that the unions met the requirements set forth in RCW 42.56.540 for an injunction, as disclosure was not in the public interest and would irreparably harm the state employees. Likewise, the court concluded that the unions met the three general requirements for a permanent injunction. The employees had a clear and equitable right based on their privacy expectation, a well-grounded fear of invasion of that right, and disclosure would result in actual and substantial injury. The court therefore found the trial court erred by denying the motion for permanent injunction, and remanded the matter for further proceedings.

Presenting 2017's Homan Award Winner: Kim O'Neal

By Marjorie Gray

The Administrative Law Section presented the Homan Award to Kim O'Neal at a reception held on November 30, 2017 in Olympia. Ms. O'Neal served her professional life as a public servant in the administrative law arena. Those who nominated her lauded her professionalism, high ethical standards and brilliant legal mind.

Ms. O'Neal worked as a prosecuting attorney in Clallam County for four years, then spent two years in private practice, and clerked for the U.S. District Court, Western District of Washington. From 1990 until her retirement in July 2017, she served as an Assistant Attorney General. The bulk of her practice has been in administrative law, and she served as co-chair of the Attorney General Office's Administrative Law Forum. Ms. O'Neal was viewed by her colleagues as the resident expert on all things litigation and all things administrative law.

The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law.

The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law. He began practicing in Washington in 1968, serving

as an Employment Security Department hearings examiner from 1970 to 1974 and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993. He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent for the creation of a central hearings panel, and played an important role in the creation of the Office of Administrative Hearings.

Frank was generous with his time and expertise and is well-remembered for his sense of humor, his command of the English language, and his writing style — including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.

The reception was attended by many members of the Administrative Law Section, many of Ms. O'Neal's colleagues, and Chief Administrative Law Judge Lorraine Lee. Stephen Manning, the outgoing Chair of the Administrative Law Section, was also recognized for his outstanding service to the section at the reception.

Congratulations, Kim, and thank you, Stephen, for your leadership and hard work!



Kim O'Neal, the 2017 Homan Award Winner



Current Administrative Law Section Chair Polly McNeill and outgoing Section Chair Stephen Manning

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