



# ADMINISTRATIVE LAW: Ethical Considerations in Law's Most Mysterious Jurisdiction

Presented by:  
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# Administrative Concerns

► What to consider:

1. Administrative Practice Rules/Procedure

Statutes

Administrative Practice Act for Agency/Board

Rules of Civil Procedure/Evidence

Case Law – often limited

2. Agency Structures

Commissioner/Director

Boards:

- Appointed?

- Elected?

- Advisory or Binding?

3. Know What You Don't Know!

See #1 and #2 above or know how to find out.



# Conflicts – Know Your Role

## ❑ Representing an Agency/Board:

- ❑ General Counsel
- ❑ Prosecutor
- ❑ Hearing Officer/ALJ
- ❑ Rule 1.7, Comment [34] ... the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client...
- ❑ Rule 1.13, Comment [9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole... Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority...

## ❑ Representing Clients Against Agency/Board:

- ❑ Rule 1.6 (Confidentiality), Rule 1.16 (Declining or Terminating Representation), Rule 1.9 (Duties to Former Clients)
- ❑ Finally, Rule 3.9 is just for you – Advocate in Nonadjudicative Proceedings
  - ❑ A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), and 3.4(a) through (c).

# Multiple Roles CAUTION!



- If you represent the Agency/Board:
  - Know where one role stops and another begins.
    - Seek definition of roles in writing – statute/rule/other written directive.
    - Watch for scope creep.
  - Make sure your “client” knows the same.
    - Educate the Agency or Official of the activities of each role.
    - Reinforce need for separation.
  - If acting as both Advocate and Counselor, avoid prosecuting a case and sitting in deliberation of the same matter.
    - Recuse as necessary.
    - Don't be afraid to leave the room during decision-making meetings!

# Pro-se Encounters

- As Opposing Counsel
  - State your role.
  - Guide but don't advise.
  - Have support – i.e. a “prover” present.
- As Co-Respondent/Defendant
  - See above.
  - Be vigilant of harm to YOUR client.
  - Sever if necessary.
- As Hearing Officer/ALJ
  - Right to counsel?
    - Check Admin. Rule.

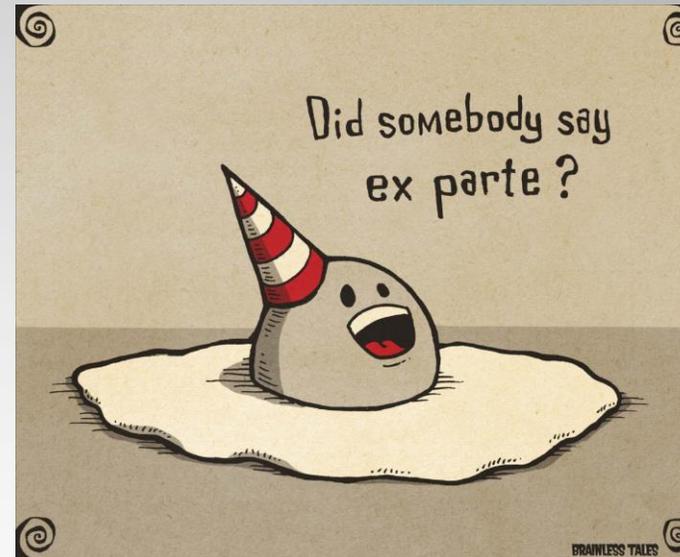


# Taking the 5th

- Witness' refusal to answer a question in an administrative hearing has implications
  - Can invoke 5<sup>th</sup> Amendment right against self-incrimination in administrative proceeding.
  - Hearing Officer/Panel may (and likely will) treat the refusal to testify as a negative inference:
    - The constitutional guarantee against self-incrimination protects a witness from being forced to give testimony leading to the imposition of criminal penalties, but it does not insulate a witness from every possible detriment resulting from his testimony. - *Douglas v. Daniels*, 64 Ill. App.3d 1022 (1978).
    - The board is not constitutionally forbidden from drawing an adverse inference if a doctor refuses to testify at a disciplinary hearing. - *Arthurs v. Stern*, 560 F. 2d 477 (1977).

# Ex Parte

- Who?
  - Board Members
  - Agency Officials – political posts
  - Outside practice
  - Rule 4.2 – Communication with Person Represented by Counsel still applies!
- How treated?
  - A court will not reverse an agency's decision because of improper ex parte contacts without a showing that the complaining party suffered prejudice from these contacts. *E & E Hauling, Inc. v. Pollution Control Bd*, 116 Ill. App.3d 586, 603 (1983) citing *Fender v. School District No. 25*, 37 Ill. App.3d 736, 745 (1976).
- Regardless, seek to avoid *ex parte* communications.



# Bias

The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. - *Withrow et al. v. Larkin* 521 U.S. 35, 55 (1975).

Review of a claim of bias on part of an administrative agency or official begins with the presumption that administrative officials are objective and capable of fairly judging an issue. *Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 Ill.App.3d 1023, 1040 (1988).

Bias by an administrative agency may be shown only if a disinterested observer would conclude that the agency, or its members, had adjudged the facts and law of the case before the matter was heard. *Id. at 1040*.

# Unauthorized Practice



- Corporate representation:
  - A corporation must be represented by counsel in legal proceedings.- *Nixon, Ellison & Co. v. Southwestern Insurance Co.*, 47 Ill. 444, 446 (1868).
  - No automatic Nullity Rule - See *Downtown Disposal Serv. Inc. v. City of Chicago*, 979 NE 2d 50 (2012).
- Non-licensed advocates:
  - CPA
  - Appraiser
  - In Illinois, only licensed attorneys are permitted to practice law. (705 ILCS 205/1)
  - The legislature has no authority to grant a nonattorney the right to practice law even if limited to practice before an administrative agency. *People ex rel. Chicago Bar Association v. Goodman*, 366 Ill. 346, 352 (1937).

# Bio-Contact Information

10

Craig Capilla is a trial lawyer, concentrating his practice in a wide range of civil litigation, including professional liability and commercial claims. He has successfully defended residential and commercial appraisers and appraisal firms accused of negligence or improper activity in their valuation services. Craig has also represented numerous licensed professionals in state licensing matters including real estate brokers, real estate appraisers, and medical doctors, process servers, mortgage loan originators and brokers. He has appeared for clients in various courts throughout Illinois in both state and federal matters. He has also assisted professionals with licensing proceedings in Wisconsin, Iowa, and Missouri.

Craig earned a B.A. from the University of Michigan in 2004, majoring in History and Political Science. He then earned a Juris Doctor from the DePaul University College of Law in 2007. Craig is authorized to practice law in the State of Illinois and is a member of the trial bar of the United States District Court for the Northern District of Illinois.

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