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Dwight A. Hamilton

THE RIGHT TO CROSS-EXAMINE ADVERSE WITNESSES AS A PART OF DUE PROCESS IN HEARINGS BEFORE COLORADO AGENCIES

DWIGHT A. HAMILTON*

INTRODUCTION

Many a lawyer has been shocked by a decision of an agency or commission that is completely opposed to the jury-trial rules of evidence as he has learned and applied them in a court of law. The same attorney feels crucified when the Supreme Court upholds the agency's ruling and condones the agency's act, announcing that such action is fair and adequate procedure for agencies and commissions. The particular problem discussed in this article concerns a vital feature of our law, and that is whether or not cross-examination of adverse witnesses in administrative hearings is a vital element in determining its fairness. This is controversial in nature and unsettled, and it is not the purpose of this article to settle the controversy. The purpose is, however, to discuss the law of Colorado pertaining to cross-examination of adverse witnesses in agency proceedings as distinguished from the absolute right to cross-examine under the jury-trial rules of evidence.

RULES OF EVIDENCE AS APPLIED IN ADMINISTRATIVE HEARINGS

In recent years the quasi-judicial hearing before administrative agencies and officers has become an important, if not a basic, part of the legal process. The courts have had to solve the new problems arising from the multiplication of administrative agencies without historical basis and systematic theory to guide them. Historically the common law rules of evidence arose from the process of the jury trial and consequently apply to the jury-court only. In Thayer's words, "Our Law of Evidence is concerned with the operations of courts of justice; and not with ordinary inquiries 'in pais'."[1] Wigmore tells us that the history of the jury-trial rules of evidence serve to warn us of the pitfalls in our path if these rules are strictly applied to administrative tribunals. He states:

> . . . any attempt to apply strictly the jury-trial rules of evidence to an administrative tribunal acting without a jury is an historical anomaly, predestined to probable futility and failure.[2]

Applying these historical lessons, the popular view of the day is best expressed by Wigmore in his treatise as follows:

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* Student, University of Denver College of Law.

[1] Thayer, James Bradley, *A Preliminary Treatise on Evidence at the Common Law*, p. 270 (1898).

[2] 1 WIGMORE ON EVIDENCE, 31 (3rd ed. 1940).

> The popular view . . . is that jury-trial rules have had their day in our system of justice; that their obstructive and irrational technicalities have made our system nauseous and futile in its native habitat; and that to transplant it to new fields would be an error amounting to folly.

The opposite view is advocated by most courts and practicing attorneys. They feel that the jury-trial rules of evidence are the only safeguards we have to insure a fair method of investigation in judicial or quasi-judicial hearings. Those who advocate this view feel that these rules as developed are essential fundamentals of a system of proof in a fair trial or hearing.

It is conceded by most practitioners, as a general rule, that administrative agencies conducting hearings are not bound by the strict or technical rules of evidence which are employed in jury-trials.[3] This rule is being adopted by the courts in a compromising attitude with the idea that the administrative tribunal need not be limited by the jury-trial rules as long as somewhere in the record there is sufficient evidence, legally acceptable by jury-trial rules, to sustain the finding.[4]

The state of the law in general is as it was at common law. However, if a state statute in creating an agency declares that the agency has the power to make its own rules of procedure, by implication any common law rule of evidence is of no effect. Some state statutes specifically declare that an agency need not be bound by the common law rules of evidence or by technical rules of evidence. This clearly destroys any previously existing problem. These principals have been summarized in Corpus Juris Secundum.[5]

> The rules of evidence are generally relaxed in administrative proceedings,[6] and it is generally held, frequently by reason of statute, that the rules of evidence applicable in a judicial proceeding are not binding or controlling in an administrative proceeding;[7] but this does not mean that the rules of evidence are abolished or abrogated [8] since the essential rules of evidence by which rights are asserted or defended must be preserved in administrative proceedings,[9] and under some statutes and the rules and regulations of some administrative bodies, the general rules of evidence applicable in judicial proceedings apply to administrative proceedings.[10]

The above quotation makes it clear that the laws are not uni-

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[3] Carroll v. Knickerbocker Ice Co., 169 App. Div. 450, 155 N.Y.S. 1 (1915).
[4] 1 WIGMORE ON EVIDENCE, 39 (3rd ed. 1940).
[5] 73 *C.J.S.* 441, Sec. 122.
[6] U. S.—N.L.R.B. v. Lightner, 113 F. 2d 621.
[7] Durkin v. A. H. Luecht & Co., 379 Ill. 227, 40 N. E. 2d, 67.
[8] U. S.—N.L.R.B. v. Bell Oil & Gas Co., C.C.A. 5, 98 F. 2d 870.
[9] U. S.—Bridges v. Wixon, Cal., 326 U. S. 135, 65 S. Ct. 1443.
[10] U. S.—Pittsburgh S. S. Co. v. N.L.R.B., 180 F. 2d 731, affirmed 340 U. S. 498.

form as created by the legislatures or applied by the courts, but vary according to the kind of administrative agency and the surrounding circumstances.

THE OPPORTUNITY TO REBUT OR CROSS-EXAMINE

It is a general belief among lawyers that cross-examination is the only safeguard for testing the truthfulness and value of human statements. It has been said by many authorities that cross-examination is the greatest and most permanent contribution of the Anglo-American system of law to the methods of trial procedure. It is a fundamental test of truth and as such has been used and praised by attorneys for generations. It is said in Corpus Juris,[11]

> A party has a right to cross-examine witnesses who have testified for the adverse party, and this right is absolute and not a mere privilege, and, unless subject to cross-examination, a witness cannot testify, and it is not within the discretion of the court to say whether or not the right will be accorded.

It is apparent from this general statement that at common law the cross-examination of an adverse witness was essential to the elucidation of truth. Testimony that is offered cannot be admitted into evidence until an opportunity has been had for cross-examination.

An administrative hearing, particularly where the proceeding is quasi-judicial, must be full, fair, and adequate. There must be adequate notice of the issues and the issues must be clearly defined. All parties must be apprised of the evidence so that they may explain or rebut it. Some courts say that they must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. In the case of *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*,[12] the U. S. Supreme Court, after stating that the commission as an administrative body is not bound by the strict rules of evidence used in jury trials even where it acts in a quasi-judicial capacity, continued as follows:

> In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. *All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.* In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest

[11] 70 *C.J.* 611, Sec. 779.
[12] 227 U. S. 88, 33 S. Ct. 185 (1913).

> deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. (Emphasis added)

As a result of this decision, in order that all hearings before the Interstate Commerce Commission be full and fair, all parties must be apprised of the evidence presented, given an opportunity to cross-examine adverse witnesses and to present evidence in explanation or rebuttal. In Pennsylvania, in hearings before the Public Utility Commission the same requirements are mandatory for a fair hearing. The court said:

> In no other way can a party maintain its right, or make a defense, or test the sufficiency of the facts to support the finding.[13]

Further documentation for this rule is found in *Automobile Sales Co., Inc. v. Bowles*,[14] where an action was brought to enjoin the Office of Price Administration from carrying out a suspension order revoking plaintiff's gasoline ration for a period of one year. The court said:

> The introduction of an accusing affidavit to form the basis of proof of the truth of its contents, without the right afforded to cross-examine the person purportedly making it, violates every known rule of evidence except in ex parte proceedings. Even the liberal rules recognized in administrative proceedings do not countenance such proof.

Similar decisions have been rendered as to hearings before the National Labor Relations Board,[15] and before zoning boards in the state of Connecticut.[16] These cases give a general application of the right to cross-examine witnesses in administrative hearings in the federal and state courts.

The specific problem in Colorado has seldom been attacked on all fours. The Colorado Constitution has no article or provision which specifically requires cross-examination in hearings before Colorado administrative agencies. There is little statutory or case law upon the subject. However, Colorado seems to fall among those states which allow the administrative agencies or commissions to use their own prerogative in determining whether or not to adopt the common law jury-trial rules of evidence. Whether or not the agencies and courts should protect the fundamental right to cross-examine witnesses is the major question. To determine the answer, a synopsis of the statutes and decisions pertaining to

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[13] In re Shenandoah Suburban Bus Lines Inc., 355 Pa. 521, 50 A. 2d 301 (1947).

[14] 58 F. Supp. 469 (Ohio, 1944).

[15] N.L.R.B. v. Prettyman, 117 F. 2d 786, 6th Cir. (1941).

[16] Wadell v. Board of Zoning Appeals of City of New Haven, 136 Conn. 1, 68 A. 2d 152 (1949).

a few of the Colorado administrative agencies and boards will be helpful.

STATE INDUSTRIAL COMMISSION

The statute which provides the rules of evidence and procedure to be followed in hearings before the State Industrial Commission is as follows:

> Such commission or person by it duly designated, shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein or by the rules of the commission provided; but may make such investigations in such manner as in its judgment are best calculated to ascertain the substantial rights of the parties to carry out justly the spirit of this article.[17]

Section 37 of the same chapter provides that in hearings before the Commission:

> . . . either party shall have the right to be present at any hearing in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the commission, and shall have the right of cross-examination; provided, that the commission may with or without notice to either party cause testimony to be taken, or an inspection or investigation to be made; the testimony so taken shall be reported to the commission for its consideration upon final hearing. All ex parte testimony taken by the commission shall be reduced to writing and either party shall have opportunity to examine and rebut the same on final hearing . . .[18]

In the establishment of the Workmen's Compensation Commission, the Colorado legislature provided for cross-examination of adverse witnesses in hearings before that Commission:[19]

> All parties in interest shall have the right to be present at any hearing, in person or by attorney or by any other agent and to present such testimony as may be pertinent to the controversy before the commission and shall have the right to cross-examine.

After giving the commission the right to make examinations without notice, the statute continues as follows:

> All ex parte evidence received by the commission shall be reduced to writing and any party in interest shall have the opportunity to examine and rebut the same by cross-examination or by further evidence.[19]

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[17] COLO. STAT. ANN., c. 97, Sec. 24 (1935).
[18] COLO. STAT. ANN., c. 97, Sec. 37 (1935).
[19] COLO. STAT. ANN., c. 97, Sec. 373 (1935).

The reported law in Colorado is very meager and inadequate. No case seems to be decided on the exact point in question. In one Colorado case the Industrial Commission concluded that the claimant had failed in four years to establish any error, mistake, or change of condition so as to enable claimant to show greater disability than originally determined. Then without an additional hearing or evidence, the Commission awarded additional compensation on the ground of a change in condition. This was held to be error and was reversed. It is clear that to allow the second award would have deprived the employer the right to explain or rebut the new evidence and the right of cross-examining the declarant of said evidence.[20]

Another and more recent Colorado case indirectly implies that there is a right to cross-examine witnesses in Workmen's Compensation cases. In this case a written report of the employer's doctor was not made a part of the case by formal order, because of a statement of the employer's representative to the referee that they wished to present the doctor for oral examination at a hearing to be held in Denver, which they did not do. Claimant's counsel had already waived cross-examination of the doctor and introduction of the doctor's report had in fact been consented to. Any proper objection to its consideration had been waived, and it could be considered by the commission, even though not formally offered into evidence.[21]

There must be a right of cross-examination before it can be waived. The case therefore implies that the statute establishes a right to cross-examine adverse witnesses, and that this claimant waived that right. If such reasoning is followed the statute is properly applied.

With respect to proceedings before the Commission, sections 24, 37 and 373 of the statute, as quoted above, give the Commission a free reign in making its investigations and conducting its hearings. The technicalities of the common law are abolished, but it is clear that the legislature did not intend to discard all safeguards. Cross-examination of adverse witnesses, one of the most important safeguards, is protected except in the case of certain ex parte evidence which the Commission is given the power to obtain. In such a case the right to cross-examine witnesses is not guaranteed, but its use is advocated if possible. If it is not possible, the party interested is entitled to examine the evidence and is given a right to explain or rebut and the spirit of fair play is kept intact. The cases cited, although not on all fours with the problem, bear out this theory by implication.

PUBLIC UTILITIES COMMISSION

Following the popular rule, the Legislature provided that the

[20] Allan v. Gadbois, 100 Colo. 141, 66 P. 2d 331 (1937).

[21] Montgomery Ward & Co. v. Industrial Commission, ... Colo. ...., 263 P. 2d 52.

Public Utilities Commission would not be bound by the technical jury-trial rules of evidence in its hearings.[22] Statutory authority to cross-examine witnesses is established for all interested parties participating in a hearing before said commission. The section states:

> At the time fixed for any hearing before the commission, any commissioner or an examiner, or, at the time to which the same may have been continued, the applicant, petitioner, complainant, the person, firm, or corporation complained of, such person, firms, or corporations as the commission may allow to interview, and such persons, firms, or corporations as will be interested in or affected by any order that may be made by the commission in such proceedings shall be entitled to be heard, examine and cross-examine witnesses, and introduce evidence.[23]

Contra to the statute controlling hearings before the Industrial Commission,[24] the above quoted statute contains no retained right of reasonable cross-examination, with a concurrent right to explain or rebut if cross-examination is impossible, in cases where the commission makes examinations and investigations without notice and uses the ex parte evidence adduced as a result of said investigation.

By a strict interpretation of the statute, the right to cross-examine adverse witnesses is an absolute right and to deny an interested party this right would be to deny him a fair hearing. In all its hearings, the commission must act strictly within the authority conferred upon it by statute and must do so in a lawful manner.[25] Generally speaking, a hearing before the Commission may be regarded as an administrative investigation, the purpose being to make findings of fact. Such a hearing must be fair and open, with suitable opportunity being given to object to evidence offered, to cross-examine witnesses, and to offer evidence in explanation or rebuttal.[26] Again, there is a dearth of support from decisions by the Colorado Supreme Court. However, in *Snell v. The Public Utilities Commission*[27] the Court indirectly protected the right to cross-examine witnesses and explain and rebut evidence by reversing the order of the Commission, which modified a previous order. The carrier applied to the Commission for a permit to operate sight-seeing buses and cars from Colorado Springs to Stead's Ranch in Rocky Mountain National Park. The permit was originally granted with no limitation to the number of vehicles to be used. A petition for rehearing was denied but in the order

[22] COLO. STAT. ANN., c. 137, Sec. 38 (1935).
[23] COLO. STAT. ANN., c. 137, Sec. 46 (1935).
[24] COLO. STAT. ANN., c. 97, Sections 37 and 373 (1935).
[25] Snell v. Public Utilities Commission, 108 Colo. 162, 114 P. 2d 563 (1941)
[26] *In re* Shenandoah Suburban Bus Lines, *supra* note 13.
[27] Snell v. Public Utilities Commission, *supra* note 25.

denying a rehearing the Commission modified its first order. On appeal, the Court in reversing the modified order held as follows:

> It is elementary that a public utility commission derives its authority wholly from constitutional or statutory provisions, and possesses only such powers as are thereby conferred. Thus, it is certain, under the facts alleged here, that the commission was without authority to amend or modify the original order, as was essayed, as a part of its action in passing upon the application for the rehearing sought.

It is apparent that the Commission was changing its mind without granting a rehearing. The aggrieved party should have been granted a further hearing. The Court indicates that the Commission must strictly follow the statutory provisions which govern its hearings. In rehearings, the interested parties are entitled to be heard and to examine and cross-examine witnesses, just as in the original hearings.[28] The substantive issues were not discussed in the opinion.

The State Railroad Commission, referred to in COLO. STAT. ANN., c. 29 Sec. 11 (1935), was replaced by the Public Utilities Commission in 1913. The powers formerly exercised by the Railroad Commission are now exercised by the Public Utilities Commission. As a result, the statutes concerning hearings before the Public Utilities Commission apply to the railroads. In a rate making case, *Denver & Salt Lake R.R. Co. v. Chicago, Burlington & Quincy R.R. Co.*[29] the statutory provision granting the right to cross-examine adverse witnesses was applied and upheld. The case dealt with a petition to review an order of the Public Utilities Commission fixing an apportionment of through rates on coal to be shipped from points in northwestern Colorado on the road of the petitioner to points in eastern Colorado on the road of the respondent. In the hearing documentary evidence was introduced after the arguments and the Commission admitted it into evidence and examined and used it in its decision. The aggrieved party's counsel objected as no opportunity was given to produce evidence, to explain or to rebut. They were also denied the right to cross-examine the author of the evidence used against them. This was a denial of a fair hearing as required under due process. The Colorado Supreme Court cited *I.C.C. v. L. & N. R. R. Co.*[30] as a case to sustain the objection. It is a case in which it was sought to sustain an order of the Commission on the basis of secret evidence, that is information gathered outside of the hearing. The Court said:

> The more liberal the practice in admitting testimony,

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[28] COLO. STAT. ANN., c. 137, Sec. 38 (1935).

[29] Denver and Salt Lake R. R. Co. v. Chicago, B. & Q. R. R. Co., 64 Colo. 229, 171 P. 74 (1918).

[30] Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, (1913); Atchison, Topeka & Santa Fe R. R. Co. v. Commerce Commission, 335 Ill. 624, 167 N. E. 831 (1927).

> the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners cannot act, upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the facts, for otherwise even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the commission had before it extraneous, unknown but presumptively sufficient information to support the finding.

This well-reasoned opinion is excellent and the Colorado Supreme Court could well afford to cite it as its authority. It clearly summarizes the law as it should be in all jurisdictions and as it is in hearings before the Colorado Public Utilities Commission.

LICENSING BOARDS FOR THE PROFESSIONS

There is no statutory right to cross-examine witnesses by persons brought before the Board of Medical Examiners, the Board of Nurse Examiners, or the Board of Veterinary Examiners in hearings brought to revoke or refuse a license to practice. Nor is any right to cross-examine preserved by the Dental Practice Act in hearings before the Board of Dental Examiners.

The Board of Medical Examiners, when a complaint is filed against one holding a license to practice medicine or one applying for such license, must serve a copy upon the person accused. The statute goes on and says that it must be filed . . .

> . . . together with a notice of the time and place of the hearing thereon, advising him that he may be present in person, and have counsel if he so desires, to offer evidence and be heard in his defense . . . the board shall receive evidence upon the subject under consideration and shall accord the person against whom charges are preferred a full and fair opportunity to be heard in his defense and shall adopt a resolution finding him guilty or not guilty of the matters charged.[31]

No statement is made about the rules of evidence and nothing said about the requirements for a fair hearing. The requirements for hearings to withhold or revoke nurses licenses are very similar. That statute says:

> . . . before any license shall be revoked the holder thereof shall be entitled to at least thirty days notice in writing of the charge against him or her, and of the time and

[31] COLO. STAT. ANN., c. 109, Sec. 33 (18) (1935).

> place of the hearing of such charge against him or her, at which time and place he or she shall be entitled to be heard.[32]

The requirements for a fair hearing before the Board of Nurse Examiners do not establish cross-examination of adverse witnesses as a basic right.

The Dental Practice Law [33] and the act creating the State Board of Veterinary Medicine [34] provide fairer standards for hearings than the acts above mentioned, although no specfiic right to cross-examine witnesses is established. The statutes provide:

> Mere technicalities shall be disregarded and the board shall not be bound by rules of evidence or rules of procedure applicable to courts of law.

Little or no case law can be found determining a person's rights under these statutes. However, in proceedings before a board to revoke a license or certificate of a physician, dentist or nurse, in other states with statutes similar to the ones adopted in Colorado, the holder must be given an opportunity to cross-examine the witnesses who testify against him.

In a Michigan case involving the revocation of a license to practice medicine, the Supreme Court of Michigan said,

> Unless the right is waived, the person charged is at least entitled to:
> 1. Notice of a trial and place of hearing.
> 2. A hearing before a properly authorized body.
> 3. A reasonably definite statement of the charge or charges preferred against the accused.
> 4. The right to cross-examine the witnesses who testify against him.
> 5. The right to produce witnesses in his own behalf.
> 6. A full consideration and a fair determination according to the evidence of the controversy by the body before whom the hearing is had.[35]

The Nebraska Supreme Court in reviewing an action by the State Board of Health involving a license to practice medicine said:

> . . . if such license is cancelled by a board of health, it must be upon proper charges, with opportunity to appear and defend by the introducing of evidence and the cross-examination of those witnesses who testify against him at the hearing.[36]

A Massachusetts case held that physicians charged with professional misconduct are entitled to make reasonable cross-exam-

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[32] COLO. STAT. ANN., c. 114, Sec. 6 (1935).
[33] COLO. STAT. ANN., c. 52, Sec. 14 (1935).
[34] COLO. STAT. ANN., c. 171, Sec. 13 (1935).
[35] Hanson v. Michigan State Board of Registration in Medicine, 253 Mich. 601, 236 N. W. 225 (1931).
[36] Mathews v. Hedlund, 82 Nebr. 825, 119 N. W. 17 (1908).

ination of witnesses making accusations.[37] Since there are no Colorado cases in point, it is perhaps correct to speculate that these cases would be authority in applying our statutes to the case at hand in order to insure a fair hearing.

In the Colorado case of *McKay v. State Board of Medical Examiners*,[38] the Court held that a case to be appealed on certiorari to the Supreme Court must raise a question of whether or not the medical examiners regularly pursued their authority or greatly abused their discretion. The same test applies to determining the power of the district court to review decisions of the medical examiners and related boards.[39] Whether or not the decision on the merits is wrong is not within the issue.[40] Whether or not a denial to cross-examine witnesses under the statutes is action beyond the board's authority or an abuse of discretion has not been litigated. The court could well seize upon such a denial and with good reasoning conclude that it is an abuse of discretion. It is the opinion of the writer that the court would say, and rightly so, that the right to cross-examine adverse witnesses before such a board is an important safeguard and is necessary to insure a fair investigation into the merits of the charge for which revocation of the license is asked.

The same test was applied in a case in which the State Board of Dental Examiners revoked a license to practice dentistry. The Court, in speaking of the scope of review by certiorari, held that the inquiry should be limited to whether "jurisdiction has been exceeded, discretion abused, or authority regularly pursued". The same rule applies in cases before the Board of Nurse Examiners in that the court may review the evidence only to determine whether an abuse of discretion has been committed by the board.[41] In this case, *Hohn v. State Board of Nurse Examiners*,[42] the trial court's decision was affirmed. No mention was made in the opinion, the record, or the briefs of a denial of cross-examination of adverse witnesses. It does not appear whether or not cross-examination was allowed by the Board at the hearing. But from the opinion, it can be implied that the Court would look at the testimony and the facts to see if the hearing was full and fair when it said,

> Under the strict rule concerning certiorari, we are permitted to determine whether or not the board abused its discretion. How can we make such determination without considering the testimony and the facts before the Board, together with the charges made? Unless we are

[37] Ott v. Board of Registration in Medicine, 276 Mass. 566, 177 N. E. 542.
[38] McKay v. State Board of Medical Examiners, 103 Colo. 305, 86 P 2d 232 (1938).
[39] Dilliard v. State Board of Medical Examiners, 69 Colo. 575, 196 P. 866 (1921).
[40] State Board of Medical Examiners v. Noble, 65 Colo. 410, 177 P. 141 (1918).
[41] Hohu v. State Board of Nurse Examiners, ... Colo. ...., ... P. 2d .... (1954). 1953-43 C.B.A. Adv. Sh. No. 10, p. .....
[42] *Ibid.*

> free to make such determination from the recorded testimony and facts, there would be no occasion for any review of any acts of a Board with statutory power only. Courts are not to be impotent, stand idly by and allow unrestricted exercise of authority by Boards, not granted by statute, or permit the arbitrary and unjustified exercise of discretion.[43]

This opinion makes it clear that the Court will protect and uphold the rights of a party before any administrative board. To feature a court allowing an agency to conduct a hearing without permitting the parties to cross-examine adverse witnesses is beyond reason. Further, assuming that the right to cross-examine is justified, the nurse was denied the right to cross-examine adverse witnesses who were absent from the hearing and, as a result, the board members did not have an opportunity to observe the demeanor of the witnesses so as to satisfy themselves in their own mind as to the credibility of the witnesses. The theory was not brought out in the briefs or in the Court's opinion, but it is clearly an underlying fact of some importance and possibility.

CONCLUSION

The constitutional requirements for a fair hearing are limited to the sections requiring due process of law.

The Fourteenth Amendment of the United States Constitution states,

> . . . nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, Section 25 of the Constitution of Colorado is similar to the Fourteenth Amendment. It provides:

> No person shall be deprived of life, liberty or property without due process of law.

Due process implies that every individual shall have adequate notice, and an opportunity to be heard and defend his rights.[44] It is generally required that hearings to be valid must be fair and open.[45] Due process also requires that an opportunity be given to know the claims of the opposing party and to explain or rebut these claims.[46] These are the requirements for due process that are generally applied. However, most enlightened courts require that the parties be given an opportunity to cross-examine witnesses who testify against them.[47] Due process also requires, among other

[43] *Ibid.*

[44] In re Dolph, 17 Colo. 35, 28 P. 470.

[45] Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773.

[46] English v. City of Long Beach, 35 Cal. 2d 155, 217 P. 2d 22.

[47] N.L.R.B. v. Prettyman, *supra* note 15; In re Shenandoah Bus Lines, *supra* notes 13 and 26.

things, that there be a finding in accord with some substantial evidence.[48] It appears from the authorities cited that cross-examination is not always a legal requisite for a fair hearing. The reasons given to uphold the denial of the right to cross-examine seem rather empty alongside the reasons given in support of the right. It seems to be clear to most practicing attorneys and to many courts that cross-examination of adverse witnesses is essential in obtaining the truth. In Colorado the law is not clear. As shown above, many of the statutes require cross-examination of adverse witnesses in hearings before the agency to which the statute appertains. Other statutes seem to leave it to the agencies to grant or deny the right to cross-examine witnesses at its own discretion. Examples of such statutes are those that do nothing more than grant the person the right to be heard at a full and fair hearing. Other statutes are a little more explicit and say that the board will not be bound by technical rules of evidence or procedure.

The decisions of the Colorado Supreme Court are just as confusing when it comes to a general rule of law. In a few cases, the right to cross-examine adverse witnesses has been upheld as a requirement for a fair hearing. All too often the issue appears to have been dodged and the cases decided upon another point. Perhaps the attorneys involved have been afraid to raise the issue, being fearful of the result. It appears to the writer that their fears are not supported because the trend seems to be that a denial of the right to cross-examine adverse witnesses is a flagrant abuse of discretion which the court would not tolerate if brought to its attention. A recent Colorado case supports this theory where the court held that due process had been preserved in a case where the injured party was represented by counsel and given an opportunity to cross-examine adverse witnesses.[49]

The question is always asked, "Should any changes be made in the law?" The answer to this question is, "Yes". The writer feels that hearings before all administrative agencies should be uniform. The list of administrative agencies is growing continually. More and more litigation is being brought before the bodies already existing. The confusion that exists today for party and counsel alike, not to speak of the members of the agencies, is tremendous. Consequently, the need for clarity and uniformity becomes very clear. The Federal Administrative Procedure Act[50] was adopted to assure all that the administration of government through administrative agencies be conducted according to established procedures, which adequately protect private interests and settle disputes in accordance with the law and evidence.[51] Section

[48] Denver Union Stock Yard Co. v. U. S., 21 Supp. 83; State Civil Service Commission v. Hazldtt, 119 Colo. 172, 201 P. 2d 610 (1948); Stork Restaurant, Inc. v. Boland, 282 N. Y. 256, 26 N. E. 2d 247 (1940); C. S. Card Iron Works Co. v. Radovich, 94 Colo. 426, 30 P. 2d 1108 (1933).

[49] School District v. Thompson, 121 Colo. 275, 214 P. 2d 1020 (1950).

[50] 60 Stat. 237, 5 U.S.C.A. 1001.

[51] GELLHORN, WALTER, ADMINISTRATIVE LAW, House Committee Report, p. 1086.

7(c) of the Act requires that,

> Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

This provision does not confer a right of unlimited cross-examination. The burden is put upon the presiding member of the agency to determine what is reasonable and what is required for a "full and true disclosure of the facts". The writer feels that this provision is not strong enough and leaves too much discretion in the hands of the presiding officer. The way is open for an abuse of discretion by the presiding officer and the chances for a successful appeal are great. The fact remains, however, that the law for all federal agencies is uniform and the right of reasonable cross-examination is provided for all, and an arbitrary denial of the right to reasonably cross-examine adverse witnesses would be grounds for reversal under the act.

The Model State Administrative Procedure Act was approved by the National Conference of Commissioners of Uniform State Laws. The act has been adopted in some form in Wisconsin, North Dakota, North Carolina, Ohio and California. In the model act there is no limit upon the right to cross-examine adverse witnesses as in the federal act, and for this reason is superior. Section 9(c) of the Model Act provides:

> Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.[52]

This is the law as it should be. Administrative agencies should be required to follow this rule in every hearing. It is the opinion of the writer that this model act should be adopted by every state legislature in order to have full and fair hearings as required by the due process clause of the Fourteenth Amendment. Cross- examination is essential in administrative quasi-judicial hearings, if the truth is to be elucidated, for it is by far the best safeguard yet found for testing the truthfulness and value of human statements. Our legislatures and courts must continue to protect this essential right if the requirements for a full and fair hearing are to be maintained. There is no better way to do so than by adopting the model act. If this seems impractical, every staute governing procedures of administrative hearings should contain a section requiring that all parties be given the opportunity to cross-examine all witnesses who testify against them. This would be a great step in the march toward the goal of fair and full administrative hearings for all.

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[52] Gellhorn, *op. cit.* note 51, Model State Administrative Procedure Act, p. 1122.