

EVIDENCE
IN
TRIALS AT COMMON LAW

by
JOHN HENRY WIGMORE

In Eleven Volumes

VOLUME XI

INDEX
by Dorothy Thomas

TABLE OF AUTHORS CITED
by Lucille Boorstein



ASPEN LAW & BUSINESS

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Introduction to the Index

In order to best understand the exigencies peculiar to the task of creating an Index to *Wigmore on Evidence*, it is useful to have some knowledge of both the creator of the treatise and the influences that shaped the work's structure and language.

Born in California in 1863, John Henry (Harry) Wigmore was recognized for his intellectual prowess at a very young age. In 1887, he was graduated from the Harvard Law School and admitted to the Massachusetts Bar. He had studied under James Bradley Thayer, had written for the law review, and had been published in the *American Law Review*, but his efforts at practicing law met with little success.

Two figures stand out as influences on the work of Wigmore: Charles Doe and Professor Thayer. Doe, chief justice of the New Hampshire Supreme Court, was considered by many to be one of the greatest jurists of the nineteenth century. Wigmore was recommended to him as a researcher, and although they never met in person, a close relationship developed that lasted until Doe's death in 1896. Thayer was a professor of evidence at the Harvard Law School whose *Preliminary Treatise on Evidence at Common Law* was published in 1898 while Wigmore was deep in his work on the first edition of his own treatise. Thayer read Wigmore's early chapters, and Wigmore later noted that the professor "had accepted them," novel language and all.

It was Wigmore's misfortune to lose both these most valuable advisor-counselors within six years. One can sense the depth of his loss from his dedication to them in the *Treatise on Evidence*.

The first edition of the *Treatise on Evidence* was the result of 15 years' labor; most of it was completed after Wigmore started teaching at Northwestern University Law School in 1893. It was eventually published in 1904. The third and last of Wigmore's editions was published in 1940. Since then, the treatise has been completely revised and updated by John T. McNaughton, James H. Chadbourn, and Peter Tillers.

Wigmore was blessed with the physical and mental stamina to carry out his writings while sustaining an active professional and social life. He could work anywhere, was interested in everything, and above all had the gift of foresight, which was a major element of his success. It is for this reason that today, some eighty years after the first edition of the *Treatise*, the legal profession still asks, "What does Wigmore say?" And indeed, many of his recommendations that seemed most far-fetched at first glance have been adopted, and the law is turning more and more in the direction he believed it should take. But what distinguished Wigmore from other writers on evidence was the vigor, humor, and, always, the literary eloquence of his writings, to say nothing of the depth of his authorities.

INTRODUCTION TO THE INDEX

Wigmore was a fine linguist and had the intellectual confidence that enabled him to take on the whole of evidence law, create a system of classification, and then devise what he called “scientific terms” to better describe and analyze legal concepts. It was his expectation that the vocabulary he used would be adopted by the legal community and thus make the law of evidence a body of scientifically organized rules and principles.

His terms are, after a fashion, a new shorthand. In Wigmore language, for example, “auxiliary policy” replaced the “exclusionary doctrine,” thereby covering in two words the concepts of confusion of issues, undue prejudice, and undue surprise. Similarly, “privilege” became “optional exclusion,” “contradiction” became “proof of material error.” While many of these *Wigmoreisms* did not survive, one that is still frequently discussed is “autopic proference,” his term for real evidence.

People who heard Wigmore lecture still speak of him with awe and admiration; and lawyers researching in the *Treatise* are still drawn by his magnetic writing to read on long after they have found their points of law. Such is the power of John Henry Wigmore and his *Treatise on Evidence*, which continues to influence the law of evidence as we move into the twenty-first century.*

It is axiomatic that the author of the index cannot rewrite the text *in* the index. Neither, however, can the index fill gaps in the text left by the author. Nevertheless, the index can perform the vital task of connecting different parts of a work to create a cohesive body of information that enables the user to take fullest advantage of the material. The result is synergistic in the best sense of the word.

The task of creating an Index to *Wigmore on Evidence* involved balancing the responsibility of providing to the user the fullest and easiest retrieval of references with the need to keep the Index a reasonable size. Matters were, of course, complicated by the complex mosaic of the work: Wigmore the author; *Wigmoreisms*; three subsequent revisers; eight decades of societal, linguistic, and legal change since the first edition; and, most obviously, the size of the work with its 10,000 pages and thousands of footnotes. The net result is an index of approximately 25,000 entries.

What follows provides the user with a detailed guide to the style and structure of the Index.

CHOICE OF HEADINGS

As far as possible the Index maintains fidelity to the original text so that section headings can be easily located. At the same time, every effort has been made to bring the language up to date. This has been accomplished by *See* and *See also* cross-references.

INTERNAL CROSS-REFERENCES

There are topics in the law of evidence that generate numerous entries, for example: **DOCUMENTARY ORIGINALS**, **PRODUCTION OF**, and **TESTIMONY**. Internal cross-references, such as *See this heading* and *See also this subheading*, have been used so that the number of indentations is controlled. All the references

*For further reading on Wigmore, see W. Roalfe, *John Henry Wigmore: Scholar and Reformer* (1977). For more on Doe, see J. W. Reid, *Chief Justice: The Judicial World of Charles Doe* (1967).

INTRODUCTION TO THE INDEX

pertaining to the indicated heading are kept, as much as possible, in one place, thereby eliminating the need to search through the Index.

REFERENCES

All references are to sections. However, section 4 and sections 4a, 4b, 4c, and so on each contain so many subsections that it was deemed necessary to indicate the subsection in the index reference. Without this additional indicator the user would need to spend an inordinate amount of time trying to locate the desired information in a considerable mass of material. A parenthetical reference following a section number is used to indicate a subsection within a main section. For example: Contempt proceedings, 4(4b), is a reference to subsection 4b of section 4, **MISCELLANEOUS PROCEEDINGS**. A reference to section 4b, without a parenthetical reference following, is to the main section 4b, **ADMINISTRATIVE PROCEEDINGS: HISTORY AND POLICY**.

FOOTNOTES

Material in the footnotes has also been referenced. As a general rule, cases in footnotes are not indexed unless they contain unique information that would otherwise be lost.

WIGMORE LANGUAGE

Wigmore's terminology for particular rules and policies has been included in the Index. This is in fidelity to the text, and is intended as an aid to understanding Wigmore language. The user will find **AUTOPIC PREFERENCE**, **AUXILIARY PROBATIVE RULES**, and various **RULES** accompanied by the appropriate references or cross-references.

DOROTHY THOMAS

August 1985

Table of Contents

<i>Introduction to the Index</i>	<i>vii</i>
Index	1
Table of Authors Cited	537

INDEX

ABBREVIATIONS

Judicial notice, 2582

ABDUCTION

Injury to spouse by, marital privilege exception, 2239

Prostitution as purpose, nature of corroborative evidence, 2062

ABORTION

Accessory before fact to, an accomplice, 2060 n.5

Corroborative evidence, nature of, 2062

Death from

admissibility of dying declaration, 1432

medical testimony as to cause, 1975; 1976

Necessary to save life, opinion testimony, 1951

Objects relating to, exhibition in court, 1157 n.3

Physician-patient privilege, 2380a; 2385

Procedural due process protection, 7.1 n.42

Procurement of

corroboration, 2061

indicating consciousness of procurer's paternity, 282

Similar acts or other offenses, evidence of

design, 349; 359

intent principle, 349; 359

knowledge, 359

ABSENCE

Attesting witness, unavailable for testimony

from jurisdiction, 1312; 1506

attestation hearsay rule exception, 1506

in unknown parts, 1313

preliminary question to as to contradictory statement and, 1030; 1033; 1039

proof of, sufficiency of, 1312

search required, 1313

Continuous for five years, presumption of death, 2531; 2531a

Declarant's from jurisdiction

statements about family history, hearsay rule exception, 1481

statements of facts against interest, hearsay rule exception, 1456

Entrant of regular entries, hearsay rule exception, 1521

Entry, effect on duty to make statement

official statement hearsay rule exception, 1633

Need not be shown, spontaneous exclamations hearsay rule exception, 1748

Opponent or documents, notice to produce, 1207

ABSENCE

[Vol. 1, §§1-21; Vol. 1A, §§24-218; Vol. 2, §§219-686; Vol. 3, §§687-867; Vol. 3A, §§874-1046;
Vol. 4, §§1048-1357; Vol. 5, §§1360-1684; Vol. 6, §§1690-1913; Vol. 7, §§1917-2169;
Vol. 8, §§2175-2396; Vol. 9, §§2400-2597]

ABSENCE (*continued*)

- Own party's, failure to cross-examine as affecting opportunity, 1392
- Regular entry, hearsay rule exception, 1531
 - parties' account books, 1556
- Reputation, land boundaries and land customs, 1582-1595
- Witness' from jurisdiction
 - effect on right of confrontation, 1404
 - depositions, use of, 1404
 - testimony at former trial accepted, 1404
 - or party's, statements of design or plan hearsay rule exception, 1725

ABSENT

- Interest or motive to misrepresent
 - deceased person's declaration about boundaries, hearsay rule exception, 1566
 - regular entries, hearsay rule exception, 1527
 - statement against interest, 1464
 - credit and debit entries, 1464
 - statements about family history, 1484
- Person's testimony, hearsay exceptions
 - confrontation and, 1398
 - witness' knowledge, means of required of person making statement, 670

ABSENTEE

- Estate of, presumption of death, 2531b; 2531c; 2532a. *See also* ESTATE

ABSTRACTS

- Burned records, production of recorded conveyances, 1227
- Secondary evidence, 1282
- Title
 - hearsay rule exception, 1705
 - lost or destroyed, satisfaction of completeness requirement, 2105
 - production of documentary originals, 1223
 - burned recorded conveyances, 1227

ACCEPTANCE

- Judicial admissions, 2591
- Words part of verbal act hearsay rule inapplicable, 1777

ACCESSORY

- Accomplice, 2060 n.5
- Trial of, admissibility of confession of principal, 1079

ACCIDENT

- Avoidance, opinion testimony as to, 1951
- Before death, similar acts as evidence of knowledge, design or intent, 367 n.9
- Claims cases, admissions in, 1051
- Deliberateness or wilfulness and, compared, 242
- Discovery for inspection, 1862
- Employer's
 - business record of, as third person admission, 1073
 - report of required by law, admissions in
 - admissibility, 1061
 - privileged, 1061; 2377
- Industrial
 - accident commission
 - conclusiveness of determinations, 1355
 - findings of, 1672

[Vol. 1, §§1-21; Vol. 1A, §§24-218; Vol. 2, §§219-686; Vol. 3, §§687-867; Vol. 3A, §§874-1046;
Vol. 4, §§1048-1357; Vol. 5, §§1360-1684; Vol. 6, §§1690-1913; Vol. 7, §§1917-2169;
Vol. 8, §§2175-2396; Vol. 9, §§2400-2597]

accident insurance. *See* WORKER'S COMPENSATION
inspection of parts of body, discovery for, 1862
reports, 1673

Insurance, burden of proof, 2510

Motor vehicle prosecutions, misconduct for impeachment exception, 987

Negligence of owner, presumption as to, 2509

Opinion testimony, cause of illness, 1976

Post-accident repairs, evidence of consciousness of negligence, 283

Probable result of, opinion testimony as to, 1976

Report

attorney-client privilege, 2218

employer's, admissions in, 1961

industrial accident, 1673

privilege against disclosure, 2377

remainder put in by opponent, same subject at same time, 2115

Result, opinion testimony as to, 1976

Same place, evidence of knowledge of dangerous character of place, 252 n.1

Tortious liability

admissions of agent, 1078

hearsay exception for spontaneous declarations, 1078; 1745

Vehicle, presumption

driver as agent of owner, 2519a

negligence, 2509

ownership, 2510; 2510a

Witness' experience, sufficiency as to, 571 nn.2, 5

ACCIDENT-PRONENESS

Admissibility, 65 n.3

Habit or, discussed, 65 n.4

Negligent character and, 65 n.3

Propensity rule, 65 n.4

ACCOMPLICE

Abortion, accessory before fact as, 2060 n.5

Alien entering illegally, 2060

Bettor, 2060

Bribery, 2058; 2060

Burden of proving witness, 2060

Buyer of

intoxicating liquor or narcotics as, 2060

lottery ticket is not an, 2060 n.5

Civil actions for penalty affected by, 2058

Confederate

original, 2060

pretended, 2060

agent for prosecution as, 2060

detective, decoy, paid informer, or spy is not, 2060

Corroboration of

accused's failure to produce testimony, 2059

confession of accused, 2059; 2071

false and contradictory statements by accused as, 2059 n.7

flight as, 2059 n.7

suspicious conduct by defendant as, 2059 n.7

wife, testimony of, 2059

ACCOMPLICE

[Vol. 1, §§1-21; Vol. 1A, §§24-218; Vol. 2, §§219-686; Vol. 3, §§687-867; Vol. 3A, §§874-1046; Vol. 4, §§1048-1357; Vol. 5, §§1360-1684; Vol. 6, §§1690-1913; Vol. 7, §§1917-2169; Vol. 8, §§2175-2396; Vol. 9, §§2400-2597]

ACCOMPLICE (*continued*)

Corroboration rule

- applicability, 2056

 - history and present state of law, 2056

 - instruction by judge as to, 2056; 2059

 - leniency factor, 2057

 - promise of immunity factor, 2057

 - statutory requirement, 2056

- civil actions affected by, 2058

- crimes affected by, 2058

Corroborative evidence

- nature of required, 2059

- proof of participation as corroboration, 2059

- rehabilitation, 1128; 2056

- several defendants, effect, 2059

- testimonial, 2059

Defined, 2060

- Disorderly house, keeper of, 2060

- Election offense, 2060

- Felonies, 2058

- Gambling house, keeper of, 2060

- House of ill fame, keeper of, 2060

- Impeachment of, evidencing interest for

 - pardon, existence of promise or just expectation of, as accomplice, 967

 - testifying for prosecution, 967

- Indictee for same offense as, 2060

- Joint principal as, 2060

- Murder, 2060

- Sexual crimes, 2060

 - adultery, 2060

 - child molestation, 2060 n.5

 - incest, 2060

 - pandering, 2060

 - pimping, 2060

 - rape, 2060

 - statutory rape, 2060

 - seduction, 2060

 - sodomy, 2060

- Subornation of perjury, 2060

- Thief in receipt of stolen goods not an, 2060

- Uncorroborated, 2056

 - counsel of caution by judge to jury, 2056; 2058; 2059

- Witnesses, number required, 2056-2057

ACCOUNTANT

- Privileged communications, 2286

ACCOUNT BOOKS

- Entries in

 - nonexistence of, provable without documentary originals, 1244

 - regular, hearsay rule exception, 1521; 1555

- Maker of testifying as witness, book as record of past recollection, 1521

 - regular entries, hearsay rule exception, 1521

[Vol. 1, §§1-21; Vol. 1A, §§24-218; Vol. 2, §§219-686; Vol. 3, §§687-867; Vol. 3A, §§874-1046;
Vol. 4, §§1048-1357; Vol. 5, §§1360-1684; Vol. 6, §§1690-1913; Vol. 7, §§1917-2169;
Vol. 8, §§2175-2396; Vol. 9, §§2400-2597]

Original book, production of
 regular entries, hearsay rule exception and, 1532
 daybook, 1558
 ledger, 1558
 party's account book, 1558
 trustworthiness, 1546-1552

Parties, regular entries, hearsay rule exception, 1517; 1518; 1536-1561b
 history, 1517; 1518

Record books
 entries on report of other person, verification, 1530; 1555
 regular entries, hearsay rule exception, 1530

Remainder put in by opponent, same subject at same time, 2118

Suppletory oath for, marital disqualification exception, 612

Third person's documents adopted by party as admissions, 1074

ACCOUNTS

Items affidavit, hearsay rule exception, 1710

Mode of keeping, production of books required, 1249 n.6

Original writing under parol evidence rule, 1241

Rendered, failure to dispute as admission, 1073

Summary statement of voluminous, provable without originals, 1230; 1244

ACCUSED

Admissions, silence as assent to third persons' statements, 1073

Capacity of, opinion testimony as to, 1958

Character of. *See also* CHARACTER

 rule against using, historic development, 8

 voluntariness of confession, 826

Confessions. *See also* CONFESSIONS

 applicability of rule, 815

 before magistrate

 under oath, 849; 852

 without oath, 848; 852

 corroboration, 2070

 accomplice's, 2071

 corpus delicti, and, 2070; 2071; 2073

 English rule, 2070

 sufficiency of, 2070

 U.S. rule, 2071

 criminal cases, admission insufficient proof of facts, 1055

 discovery resulting from statement of, 858

 preliminary question as to contradictory statement not required, 1039

 statement of accused

 characterized as, in jury charge, 821 n.18

 volunteered, for and against accused, admitted, *Miranda* warning, 826a

 voluntariness of, character of accused factor, 826

 written, discovery before trial, 858; 1850

Confrontation, right of. *See* CONFRONTATION OF WITNESS

Corroborating accomplice's confession, 2059

Criminal cases

 evidencing interest for impeachment, 969

 failing to testify indicating unfavorable tenor of evidence, 289; 290

 testimonial qualification, 579; 580

ACCUSED

[Vol. 1, §§1-21; Vol. 1A, §§24-218; Vol. 2, §§219-686; Vol. 3, §§687-867; Vol. 3A, §§874-1046;
Vol. 4, §§1048-1357; Vol. 5, §§1360-1684; Vol. 6, §§1690-1913; Vol. 7, §§1917-2169;
Vol. 8, §§2175-2396; Vol. 9, §§2400-2597]

ACCUSED (*continued*)

Cross-examination of, 1895. *See also* CROSS-EXAMINATION
preliminary rulings on voir dire, 1385

Defendant. *See* DEFENDANT; HOMICIDE

Discovery, exception to rule, 1847

Evidence offered by, exclusion grounded on undue prejudice, 10a

Failure to produce testimony, accomplice corroborated by, 2059

Found with stolen goods; hearsay rule applicability, 1781

Guilt, negated by evidence of design or plan, 304

Identification, 786; 786a

examination of witness, 786a

police line-up, 786a

Impeachment of

application of rule, 891

as ordinary witness, 890

Inspection by

chattel, 1850; 1862

notes of testimony before grand jury, 1850

premises, 1850; 1862

reported testimony or depositions, 1855a

Oath taking by, 1825

Offer by, to pay money or settle prosecution, admissibility, 1061

Presence of at view by jury, 1167

testimony taken in presence, 1167

Prior consistent statements identifying, for rehabilitation, 1130

Recognition of by witness at former time, corroboration, 1130

Self-incrimination privilege waiver by, 2276

Statement, magistrate's report of, 1325-1329

prior testimony, preferred reports, 1325-1329

written examination, usable as

oral acknowledgment by accused, 1328

written confession, 1328

Statements by, 1732

as confession in injury charge, 821 n.18

hearsay rule exceptions, 1732

volunteered, admitted, 826a

written, discovery before trial, 858; 1850

Testimony by, failure of, 289; 290

Unfair prejudice to, inspection of evidence limited by, 1157

Voluntary surrender, as evidence of consciousness of innocence, 293

Waiver

cross-examination by, 1398

privilege against self-incrimination, 984

Witnesses for

consultation with before trial, 1850

list of, right to inspect, 1855b

ACID

Effects of on paper, sufficiency of witness' experience as to, 571 n.5

ACKNOWLEDGEMENT

Deed's certificate of, conclusiveness, 1346; 1352

Married woman's

deed's certificate of signed by, conclusiveness, 1346

[Vol. 1, §§1-21; Vol. 1A, §§24-218; Vol. 2, §§219-686; Vol. 3, §§687-867; Vol. 3A, §§874-1046;
Vol. 4, §§1048-1357; Vol. 5, §§1360-1684; Vol. 6, §§1690-1913; Vol. 7, §§1917-2169;
Vol. 8, §§2175-2396; Vol. 9, §§2400-2597]

voluntary, of deed at privy examination and integration of document under
parol evidence rule distinguished, 2453

Oral, by accused of magistrate's written report of statement, 1328

ACQUITTAL

Self-incrimination privilege, effect of, 2279

ACTION

Civil. *See* CIVIL ACTIONS

Criminal. *See* CRIMINAL ACTIONS

Stages of presentation for whole case, 1866; 1867; 1869-1875. *See also* ORDER
OF PRESENTING EVIDENCE

ACTS. *See also* types of acts, *i.e.* **FORGERY; LARCENY; SIMILAR ACTS**

Communications and acts, distinguished, 2306-2309

Creation of legal, parol evidence rule, 2401; 2404-2449. *See also* PAROL EVIDENCE
RULE

Human acts, 43

character or disposition, 52-82.1

conduct, evidence to show

concomitant evidence, 130-144

conduct independently usable evidentially to prove fact other than
character, 215-218

emotion or motive, 117-119

physical capacity, skill, or means as evidence of, 83-113

retrospectant evidence, 148-177

Jural. *See* PAROL EVIDENCE RULE

Official, judicial notice, 2577

Overt

as evidence of intent

conspiracy, 370

sedition, 369

treason, 369

doctrine, 246; 247

Physical capacity, skill, or means as evidence of, 83-89

Prior or subsequent acts, evidence of emotion or motive, 396; 401

Purpose aimed at in act, motive in issue, 119

Similar, as evidence of knowledge, design, or intent, 300-373. *See also* SIMILAR
ACTS; individual headings, *i.e.* **FORGERY; LARCENY**

Specific acts, to show character or character trait in issue, 202

Verbal. *See* VERBAL, Acts

Violent. *See* VIOLENCE

Voidable on ground of error, parol evidence rule, 2423

ADMINISTRATIVE AGENCIES

Administrative processes before, judicial intervention in, 7.1

Commission findings as judgment of administrative body, 1672

Determinations by officer or commission as conclusive evidence, 1347; 1355

Evidence, rules of used by. *See* ADMINISTRATIVE PROCEEDINGS

Federal. *See also* individual agencies by name, *i.e.* **FEDERAL COMMUNICATIONS
COMMISSION; INTERNAL REVENUE SERVICE**

organic acts establishing as source of rules of evidence, 4c(12)

rulemaking authority, rules of evidence for proceedings, 4c n.5; 4c(2)

Power to

compel testimony, 2195

punish for contempt, 2195

ADMINISTRATIVE AGENCIES

[Vol. 1, §§1-21; Vol. 1A, §§24-218; Vol. 2, §§219-686; Vol. 3, §§687-867; Vol. 3A, §§874-1046;
Vol. 4, §§1048-1357; Vol. 5, §§1360-1684; Vol. 6, §§1690-1913; Vol. 7, §§1917-2169;
Vol. 8, §§2175-2396; Vol. 9, §§2400-2597]

ADMINISTRATIVE AGENCIES (*continued*)

Practitioners before, attorney-client privilege, 2300a

Regulations, judicial notice, 2572; 2573

Reports required by, admissibility, 2377

ADMINISTRATIVE COURTS

Evidence, rules of in, 4d n.45

Proceedings. *See* ADMINISTRATIVE PROCEEDINGS

ADMINISTRATIVE LAW

Administrative procedure legislation

Federal, Administrative Procedure Act (APA), 4c(14)

State

Model State Administrative Procedure Act (1946), 4c(14)

Revised Model State Administrative Procedure Act (1961), 4c(14)

Administrative proceedings under, 4c(14)

Proceedings, rules of evidence in, 4a-4e

ADMINISTRATIVE OFFICER. *See* ADMINISTRATIVE PROCEEDINGS;

ADMINISTRATOR

ADMINISTRATIVE PROCEEDINGS

Administrative adjudication proceedings

legislative proceedings and, distinguished, 4c n.35

rulemaking proceedings and, distinguished, 4c(14)

Administrative officers and officials

actions, number of witnesses required, 2056

personal knowledge testimony, hearsay rule applicability, 1805

private knowledge of facts, 2569

testimony before, power to compel, 2195

Administrative process,

character of as reform movement, 4c(14)(7)

economy and efficiency, need for, 4c(14)(9)

experimental and innovative purposes of, 4c(14)(3)

non-jury character of proceedings, 4c(14)(8)

Administrator's determination

conclusiveness, 1347; 1355

judicial review, 4a

Agencies, rules of evidence in

organic acts as source, 4c(12)

use of rulemaking authority to adopt, 4c(2)

administrative rules of practice, federal agencies, 4c n.5

Cross-examination, use of in, 4c; 1369; 1373-1375

Decision-making in

administrative decision-making, character of

legislative, policymaking, and discretionary, 4c(14)(2)

participatory and democratic, 4c(14)(6)

particularistic 4c(14)(5)

polycentric 4c(14)(1)

administrative decision-making, importance of expertise, 4c(14)(4)

theory of administrative expertise, 4c(14)(4)

Evidence, parties' right to present in, 4c(10)

Evidence, rules of in, 4a

administrative procedure legislation, effect on

Administrative Procedure Act (APA) (1976), 4c(14)