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TRAILS THROUGH THE WASHINGTON JUNGLE

MANLY FLEISCHMANN

It has long been a recognized and pleasant prerogative of the Bench to instruct the Bar in the practice of law. Articles by trial judges on the science of cross examination, and lectures on appellate argument by judges of higher courts are commonplace in our profession. It appears to be generally believed that judicial experience develops a peculiar competence in the field of legal instruction, so that even a judge who was never noted for his forensic triumphs prior to donning the ermine always enjoys a respectful audience for his observations on the arts of advocacy once he ascends the bench.

Since it seems unlikely that the present writer will ever command such a forum, I have decided to take advantage of a different, although comparable, experience of my own for the purpose of advising those of my fellow lawyers who may wish to work in a less familiar and somewhat neglected field—that of federal administrative law. My sole qualification for such an undertaking is the fact that as administrator of two emergency agencies during the Korean period I was on the receiving end of the efforts of scores of lawyers who sought to secure some benefit or escape some penalty for their clients through the exercise of their professional talents. In the course of that experience, I developed certain ideas about the way to get things done in the Washington bureaucracy which may be of some interest to those who occasionally have to thread their way through that tangled maze.

Let me make it clear at the outset that I have not attempted either to cover the field of administrative practice as a whole, nor any particular aspect of it in detail. These subjects have been adequately treated by others.¹ My task is a more pedestrian one, the scope of which might be illustrated by an alternative title which I had in mind, "A Washington Primer for Out-of-Town Lawyers." In short, I think there are more effective methods of advocacy than the procedure frequently used by lawyers unacquainted with Washington who literally throw themselves on the mercy of the agencies which they would persuade to action, completely ignorant of the statutory powers, operating procedures or personnel with which they must deal.

1. I do not intend to be the author of the first law review article to appear in print without a single footnote. Accordingly, I take this opportunity of recommending the useful treatise of Charles A. Horsky called *The Washington Lawyer* (1952) for a comprehensive review of the mechanics of federal administration practice, and the article by John Foster Dulles entitled *Administrative Law: A Practical Attitude for Lawyers*. 25 A. B. A. J. 275 (1939), for a most helpful discussion of practice before quasi-judicial tribunals.

It is widely believed that administrative action can hardly be obtained in Washington except through the medium of personal relationships or by the exercise of what is known as "influence." A story attributed to the late Senator James Watson of Indiana, possibly apocryphal, illustrates this feature of our national folklore. After his retirement from the Senate, Mr. Watson practiced law in Washington. During the course of a speech he took occasion to define the characteristics necessary to a successful Washington law practice somewhat as follows. "To be successful," said Senator Watson, "a Washington lawyer must have three qualifications: first, he must have an encyclopedic knowledge of the law; second, he must have a very high standard of professional ethics; and, third, he must know the right people. In a pinch," added the senator, "all but the last may be dispensed with."

No one who has been in Washington for a long period of time would deny the pertinence of this last observation. Nevertheless, I am convinced that it is possible for a lawyer not particularly versed in administrative practice, and having no personal acquaintance with any of the officials with whom he must deal, to represent a client effectively and successfully in the Washington arena.

It need hardly be pointed out that the lawyer has peculiar and unequalled qualifications for practice before administrative agencies. The materials with which he must work are familiar to him. The rules and regulations and directives of administrative agencies are essentially only legislative enactments of a particular kind—sub-legislation as they are sometimes called. They are drafted by lawyers to cover general situations, and the task of the advocate, as always, is simply to apply them to the particular facts of his own case. Again, just as in a court proceeding, the ultimate goal is persuasion—to bring about a conviction in the mind of the official having the power of decision that the client is entitled to the relief he seeks.

Under these circumstances, it is somewhat surprising that our profession has so neglected this vast and potentially remunerative field. Far more cases are presented to emergency agencies, at least, by laymen—often so-called "Washington representatives"—than by members of the bar, to the detriment, very often, of the applicant as well as the profession. A business concern which would not think of presenting its own case to the Tax Court does not hesitate to send its second vice president to Washington in an attempt to get a five year accelerated amortization certificate, although the issues involved are frequently no less

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complicated. Whether the profession is to blame for this situation I do not know, but it is clear that we have only scratched the surface with respect to the potentialities of profitable and interesting practice before administrative tribunals.

It is now too late for the legal profession to secure an exclusive franchise for administrative practice comparable to that it enjoys in the courts. Nevertheless, if we demonstrate our superior qualifications in such matters we hardly need fear the competition of laymen who lack any particular competence in this field. I have seen applications for administrative action ably presented by laymen as well as by lawyers, and I have seen lawyers utterly fail in understanding the scope of administrative authority and discretion under the emergency statutes. Nevertheless, I am convinced beyond a doubt that no one approaches a trained lawyer in his ability to obtain prompt and favorable administrative action, if only he will use the experience and principles which he applies in his more frequent and familiar court activity.

Most treatises on trial and appellate practice assign first importance to preparation; in fact, I suppose it is generally agreed that proper preparation of a case outweighs all other factors in the successful conduct of litigation. Why should this not be true in the handling of administrative matters? Why is it that a lawyer who would not dream of going to court without an extensive study of his client's case and all of the applicable statutes and precedents, does not hesitate to take the first train for Washington after his initial interview with his client?

I suppose the reasons are to be found in the unfamiliarity of most lawyers, other than specialists, with the vast field of federal regulation. In my view, however, such a lack of familiarity is no adequate excuse for the presentation of an important case to an administrative agency by one who knows less about his particular matter than the government official with whom he is talking. Yet this situation is a commonplace one in Washington every day.

Preparation for effective presentation of a client's case to an administrative agency does not differ in any essential respect from the preparation of a court case. Proper preparation of either kind takes time—usually plenty of time—but why should this not be so? The matters which are currently decided by federal administrative agencies are regularly larger, more complicated and infinitely more important to the client than the occasional litigation in which he may be involved. If careful preparation is universally acknowledged to be indispensable to successful presentation of a court case, it seems self-evident that

it is equally essential to attain the similar goal of successful persuasion of an administrative official.

How can this preparation be accomplished by the average practitioner with no particular experience in the administrative field? So far as the marshalling of the facts is concerned, it might be supposed that this work would be wholly familiar to every lawyer. Where a business question is involved, no trial lawyer worth his salt goes into court unless he knows as much about that particular business problem as his own client. The lawyer who prepares his case in that fashion for an administrative agency, I have found to be the exception, however, rather than the rule. Such easily ascertainable facts as the size of the company, the number of employees, its position in the industry (big or small business?), the products which it makes and can make with its facilities, its relationship to the mobilization effort, the interest of the military services in the particular application, the size of the requirement for scarce material—subjects like these are nearly always germane to an application for a loan, a tax amortization certificate, a price increase, or an additional allocation of materials. Without such knowledge, it is hardly possible to make an effective presentation of the client's case, but I have seen it attempted time after time.

Turning to the legal preparation, it should hardly be necessary to suggest that no lawyer should approach an administrative agency without a knowledge of the exact legal powers and limitations of that agency. Yet it was not unusual to find lawyers handling matters in the National Production Authority who had never read the Defense Production Act of 1950. Needless to say, an understanding of the statutory basis of the agency's authority is indispensable to proper preparation of any kind of case.

Federal statutes are easy to find, but a more genuine dilemma confronts the practitioner with respect to the formidable spate of administrative regulations with which he must deal. It is true that services are available which collect and explain the bulk of this material. However, I am fully aware that federal regulations are usually lengthy, complicated and difficult of comprehension. If the services are inadequate or unavailable, there is a ready substitute to be found in the legal staff of the particular agency. In my own practice, I have usually found it desirable to consult the general counsel of an agency or one of his assistants in the first instance, when I was not acquainted with the regulations of the particular agency. Of course this should be done before the presentation to the administrator is made, and in my experience

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willing and capable assistance can readily be obtained in this manner.

One final preparatory step needs to be emphasized. Just as the New York lawyer knows that if he is defeated in the Supreme Court he can go to the Appellate Division, and thereafter attempt to get to the Court of Appeals, so the administrative practitioner must understand the organization and procedure of the particular agency with which he is dealing. To use the example of an amortization certificate, he must know that such an application may start in any one of a dozen agencies, but that final approval rests with the Defense Production Administration (which I note is currently being abolished). He must also know that some place along the way it may be helpful, or even essential, to obtain the concurrence of the Department of Defense. Every appellate lawyer learns the names of every justice on the bench before he appears before them. In the same way, it is certainly advisable for the administrative lawyer to understand the procedure which must be followed in the handling of his application, the various approvals which must be obtained, and the names of the officials who must be persuaded to action or concurrence. All of this information is readily ascertainable either through the general counsel's office or in the public information office maintained by every agency.

Let us now suppose that our hypothetical attorney from Dubuque, Iowa, has thoroughly mastered his client's case and the rules and procedures applicable to it. I will assume that during the course of his preparation he has also accomplished the much easier task of convincing himself of the merits of his client's cause. He is now ready to commence the assault upon the citadel.

From my own experience, it might be supposed that the normal and most effective first step in securing administrative action would be to seek out the client's senator or representative for an introduction to the head of the agency. Such a course is not necessarily harmful, but it is seldom desirable and occasionally gets the bureaucratic back up with unfortunate results. As I shall point out later, stimulated congressional intervention in such matters is sometimes very useful, as well as proper. But I do not recommend it at the outset of the ordinary proceeding.

Suppose the practitioner knows personally a high official of the agency—in such a case is it wise to start there? Here again I think the answer is generally in the negative. I trust I am not being naive on this subject; such an acquaintance may be useful at a later date if the application goes badly in its earlier stages, but I would reserve it for that purpose. No administrator who

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values his organization will do more in the first instance than refer such an inquiry to the appropriate official down the line, and even such an interference is occasionally resented as an attempt to obtain special consideration.

Instead of such activities, I suggest that the normal procedure is apt to be the most effective, that is, that the attorney should first learn where the particular application is pending for decision and then arrange an interview with the official whose approval is required in the first instance. This is not always easy, as it has been said with some truth that every emergency agency is entitled to lose the file at least once in any particular case.

Once the appropriate official is located, however, the advocate will need two qualifications above all others in order to accomplish his mission, namely persuasiveness and persistence. This is not intended to be a treatise on the art of advocacy, but it can certainly be said that the same qualities which make a good argument in court are required for the adequate presentation of a case to an administrative official. Many lawyers have a low opinion of the whole administrative process which they do not trouble to conceal. It need hardly be pointed out that such an attitude is not likely to win cases and influence administrators. Most of the officials in the lower echelons are career employees who work hard and take their responsibilities very seriously. They think their particular jobs are important and they want to decide their cases in accordance with what they believe to be the agency's policy. Above all, they are human beings and should be treated with the same courtesy and respect that a lawyer instinctively accords any judicial officer. Any indication on the part of the applicant that he regards the whole proceeding as semi-farcical or that he does not expect to get fair play is not likely to produce desirable results. This should go without saying, but every public official has seen such elementary principles of advocacy disregarded on many occasions.

I need hardly add that it is not necessary or desirable to attempt to capture the special consideration of the official by such obvious blandishments as free lunches and theater tickets, let alone mink coats. In fact, recent Washington history demonstrates that such a course is fraught with peril. An orderly and vigorous presentation of the merits of the case with emphasis on the need for prompt action is generally far more effective.

One particular point in presentation of the case needs mention. The skillful advocate always calls attention to the weak points of his case as well as the strong, and answers the opposing arguments

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in his own presentation. Nothing is more dangerous than to permit the official the thrill of discovering weak points in the applicant's case when the attorney is absent and cannot argue the matter. I know of no rule which is more regularly violated by administrative practitioners, with ensuing disastrous results. A calculated frankness in discussing all aspects of the case is clearly the policy to be pursued.

I have referred to persistence as being the second most important quality for the administrative practitioner. It is here that the Washington lawyer has a great advantage over his out-of-town brethren. The average official in an emergency agency is overburdened with work and cannot pass upon all of the cases before him with any promptness. Nothing is so effective in getting a matter decided as courteous but repeated inquiries about the fate of the particular case. Here again, we have an application of the ordinary rules of human nature; there need be nothing improper implied in the adage "the squeaking wheel gets the grease."

There is no getting around the regrettable fact that continued and persistent efforts are necessary to move a matter through administrative channels. This is particularly true when the case, as often, has to pass through several successive levels of administrative action and may have to receive the concurrence of other federal agencies. In such a case, counsel may have to present the same matter to five or ten different officials at different times. If the matter is important enough to the client, it will have to be handled either with the assistance of Washington counsel or by repeated visits and continuous correspondence. I have heard lawyers express fear that officials will resent continuous pressure for the decision of a particular matter, but I think that the risk of a particular case getting into the inactive backlog is far more real. Many a vexing administrative decision has been made in a month instead of a year, primarily because a harassed administrator (or his secretary) wanted to get that persistent man out of the reception room.

One step which can be useful in nearly every case is to follow up the first interview with a written presentation. This is particularly desirable in emergency agencies where the necessity of handling a very large number of cases makes it difficult for the official to bear in mind the particular facts presented in oral discussion. In addition, the second presentation has the advantage of bringing the matter to the attention of the agency for a second time, thereby increasing the likelihood of a prompt decision.

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The ingenuity of counsel is boundless, and many ways have been discovered to reactivate an apparently moribund case. A favorite device, much in vogue during the past three years, has been to obtain the assistance of a high-ranking officer of the armed forces. This is a much simpler matter than might be supposed. In the vast reaches of the military establishment, it is nearly always possible to find a general or an admiral, sometimes retired, who can be persuaded of the absolute necessity of almost any kind of project from the standpoint of national defense. On one occasion I received a retired general's forceful endorsement of an application for more structural steel to be allocated to the building of private swimming pools, upon the grounds that they would be very useful in the event of an atomic attack. Such endorsements are easy to obtain, but are generally effective only with new and inexperienced administrative officials. The seasoned administrator knows that the only military recommendation to which he can give much weight is that which comes through official channels.

Let us suppose that our practitioner has faithfully followed the precepts which we have outlined and appears to be up against a blank wall. He has been courteous, persistent and resourceful; nonetheless, his application has either been denied or appears to be permanently consigned to the bottom of the stack. What should he do about it? It is here that the practitioner must decide on the advisability of taking a calculated risk: whether to go over the head of the official who currently has the case before him. The problem is not so difficult when the official has actually made an adverse decision, since here the only recourse is an appeal to one of his superiors. A more troublesome dilemma is presented when there has simply been a failure to make any decision at all. In such a case, the attorney who appeals to higher levels runs the risk of antagonizing the official who still will have to make the decision; it must constantly be remembered that public officials are people.

If the decision is made that the matter cannot be made worse by intervention of higher authority, the attorney will generally find that the administrator or head of the agency has special assistants to run down cases which have been unjustifiably delayed, with the authority to go outside the usual channels for this purpose. These officials are usually competent and tactful and are able to get prompt action on a deserving case without prejudicing the applicant's position. In addition, while it is not always easy to obtain an interview with the head of an agency, most administrators are deeply concerned about the successful operation of their organization and will personally look into a matter which appears to have been mishandled.

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It is at this point that congressional assistance may sometimes be helpful. While no administrator worthy of holding his job decides a particular case in a particular way because a member of Congress demands such a decision (which hardly ever occurs), it must be said in all candor that congressional inquiries do get unusually prompt attention. Administrators of necessity value their good relations with the Hill, and special procedures are set up to see to it that matters in which congressmen have evinced an interest get promptly decided, even though the decision may be adverse. Perhaps this should not be so in an ideal system, but it is certainly true of every department in Washington that I know anything about.

Accordingly, if I had reached the end of my rope in representing a client and felt that I had been unjustly treated, if I had tried to arrange an interview with the administrator but had been unsuccessful, I would not hesitate to seek congressional assistance. It is usually sufficient for the congressman to request a personal interview for his constituent or his attorney; such interviews are granted as a matter of course either by the administrator or by the head of the appropriate division, and they are generally productive of results so far as obtaining a quick decision is concerned. I have never consciously decided a case in a particular way simply because a congressman favored such a decision, but like every other administrator I have frequently seen to it that a prompt decision was made in a matter in which a congressman showed particular interest. If there were a trade association of retired administrators, I suspect that I might be expelled from membership for giving this advice, but every experienced Washington lawyer knows that such steps must occasionally be taken. I might add that the vast majority of congressional requests are limited to a request for an interview or an early consideration of a particular matter. Congressmen, too, have outer offices which have to be cleared occasionally.

One other approach is sometimes available in a particular case, namely presentation of an entire industry. Occasionally a case of first impression involves the making of policy which may have far-reaching consequences for every member of the industry which is concerned. In such a case, it is often useful to see to it that the trade association knows of the case and that the policy question presented is considered by the appropriate industry advisory committee. These committees are set up under specific congressional authorization to present the viewpoint of a carefully selected cross section of a particular industrial group. Their recommendations are fully explored by the government agency to which they are attached and their opinion is often effective in

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bringing about a particular result. Trade associations can be helpful too in seeing to it that the views of an entire industry are forcefully presented at an appropriate time. A word of caution may be added, however. Some trade associations have an unfortunate history of questionable activity under the antitrust laws. Nothing so prejudices the presentation of a particular case by a trade association as a suspicion that the position which is urged is designed to benefit the members of the association as against non-members. Such a suspicion must be avoided at all cost.

It should be emphasized that no extraordinary appeal or outside intervention can possibly be substituted for earnest and persevering effort at the level where decision is customarily made. Not more than one out of twenty working level decisions is likely to be reversed by the head of the agency, just as comparatively few decisions of trial courts are disturbed on appeal. Any administrator who made it a practice to reverse his subordinates regularly would soon disrupt his organization. The vast majority of working level decisions are honestly made and follow generally accepted lines of agency policy. Accordingly, it is most difficult to secure a reversal at higher levels. It follows, of course, that every legitimate effort must be made to secure the right decision in the first instance.

I need hardly add that the adoption of the suggestions made in this article will not guarantee success in the handling of Washington administrative matters. But in conclusion I should like to emphasize again that there is nothing very mysterious about the operation of our vast federal bureaucracy; that most American lawyers can readily grasp and apply the governing policies and procedures, and, finally, that just as in other fields of professional endeavor the best recipe for success is a combination of preparation, resourcefulness and tenacity.