
8-1939

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Recommended Citation

Morris, George M. (1939) "The Nature of Administrative Agencies and Practice Before Them," *Indiana Law Journal*: Vol. 14 : Iss. 6 , Article 1.

Available at: <https://www.repository.law.indiana.edu/ilj/vol14/iss6/1>

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INDIANA LAW JOURNAL

Volume XIV

AUGUST, 1939

Number 6

THE NATURE OF ADMINISTRATIVE AGENCIES AND PRACTICE BEFORE THEM

By GEORGE M. MORRIS*

I

For most persons the picture of a lawyer in action is laid in a court room. Presiding is a judge. His function is to hear the contentions of the rival parties, rule upon the questions of law and, upon occasion, to determine questions of fact. Sometimes the decision on the facts is left to a jury. In the case of the judge he is supposed not to forge his own theories of the law but to interpret the law as he knows it or as his knowledge is aided by the researches of counsel for the contending parties. Questions of policy of the law are not for him. He must say what the legislature meant or what the law as interpreted by the courts is. If those who have made the law have made mistakes, it is they who should correct them, not he.

Above all, the judge must bend his greatest effort to be unbiased between the parties, their causes and their counsel. This is the essence of the judicial function.

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When a jury is used, its members likewise are expected to have no preconceived attitude on the issues, or toward the parties. Their function is to find the facts as fairly as they can without fear or favor.

The personnel of the court and the court rules are designed to permit the parties to contend, as nearly as humanly possible, on an equal footing.

Counsel on one side come forward with their evidence and contentions. Counsel on the other side, or possibly on more than one side, reply with their proof and argument. The judge, or judge and jury, then decide between the parties. These officers must *decide*: that is important.

In such a scene the lawyers are, in a sense, enemies. With the accepted weapons of logical and emotional appeal, they strive to overcome each other: be the key high or low, the contest is recognized as a forensic one. Within the limits of propriety each cares not what his adversary may think of him or of his case. The eyes of the contending counsel are wholly on the trier of the law and the trier of the fact. It is to these alone that the counsel look for the decision that will dispose of the dispute or start the matter on the way to disposition.

With modifications and exceptions these are most of the elements of the trial of a litigation as it has been known for centuries. It is the method developed in a relatively simple society in which government controls through law were few. It is the method which made a separation of the judicial power from the legislative and executive powers not too difficult, by and large, to achieve.

II

With this rather simple concept of the judicial process the ever growing complications of human relationships have played some odd tricks. Within the last century, just when is not important now, attempted governmental controls of human affairs began to take on a noticeable acceleration.

The authoritative source of such increased controls was, of course, our legislatures. It was not long, however, before, in exercising certain of these controls, the simple process of passing a statute and expecting the executive to carry it out as enacted with such interpretative aid as the courts might give broke down. Legislatures discovered that they were not wise enough, did not have enough information and could not give each subject sufficient attention to enact laws that would include foresight of all the rapidly multiplying contingencies. The court machinery could not move fast enough to satisfy popular demands for action. It was thought that experts and men of more specialized experience in the field than legislators or jurists could be secured to get the jobs done and they were given the task.

In discussing the history of governmental control of the erection of bridges over navigable waters, Mr. Justice Frankfurter has epitomized the causes for this type of development in the line:

“Congress was interested and incompetent: the Courts were disinterested but incompetent; whereas, the Army Engineering Corps, acting for the Secretary of War, was both disinterested and competent.”

Hence, the broad powers of the Secretary of War concerning bridges over navigable streams.

Your studies have probably informed you much better than is possible in the time now available concerning both the history of this development and of its extent in national, state and local government. You know that administrative agencies have been developing of late in almost geometrical proportions. They are probably here to stay for many years at least. Their importance in the professional lives of most lawyers is almost impossible to over-emphasize. A lawyer's failure to know all one can absorb about them may be a first-class introduction to a career as an attendant at a filling station.

III

Let us consider the essential qualities of the administrative agency. In the first place, it is usually charged with the en-

forcement of the law: that is why it is called administrative. In the second place because it is supposed to be manned by experts and specialists, substituting for legislators not equipped to do the job in detail, the agency is expected to issue the regulations which fill in the interstices of the law. This, of course, is a legislative function prohibited by the courts only when the pronouncements of the agency clearly transcend its maternal statute or are contrary thereto. In the third place, the personnel of the agency engaged in applying the statute, asserts the judicial quality in interpreting that statute.

In many of these agencies a sincere effort is made to assign different men to the different functions of the body but so long as the group as a whole is autonomous there is an inherent human tendency of each individual to feel himself charged with fulfilling the mission of the whole group.

When the affairs of the lawyer's client come before one of the agency personnel for consideration the setting may be one which resembles a court room, or the place may be the business office of the administrator, or even the business office of the client. The place of contact will depend largely upon how far up the staff of the agency the officer encountered happens to be located. He may be a field man, he may be a division chief or he may be the chief administrator or one of the commissioners at the head of the enterprise. In any event, when he is exercising the judicial function of the agency, board or commission, his manner of operating induces comparison with that of a judge.

In the field of fact the agent is not once conceded a latitude not accorded to judge or jury. The theory is that he is an expert in the field and as such has powers of interpreting evidence that we do not accord to non-experts.

In the field of law the agent is, of course, conceded a greater latitude than that given a judge because, unlike a judge, he is not expected to declare the law as he sees it but is expected to see that the law is interpreted in the fashion which accomplishes the objective of the legislature. If there is a gap here and there, provided it is not too great a gap, he is ex-

pected to fill it up. He is not expected to divorce himself, as a judge should do, from interest in the policy of the law. On the contrary, he is expected to have a deep attachment to the policy of the statute under which his agency operates. It is to that attachment that he owes, in part at least, his employment. Loyalty and his own welfare require him to further that policy.

Now as to the matter of the bias of the trier of the law or fact toward the parties. Occasionally proceedings come before these administrative bodies which are raised by disputes between private parties in which the government has no interest except in a peaceful determination of a dispute between its citizens. In such a situation the officer who is exercising the judicial function of his agency has no more inducement to take sides than the human nature of a judge exerts upon him. Such situations, however, are very rare. Normally the matter would not be before the agency for consideration if that body is not charged with looking after the government's interest in such disputes. Most frequently it is because someone, usually one of the agency's staff, has suspected a violation of a law or regulation that the inquiry has been undertaken. At the outset, therefore, some associate, even though remote, of the man who presides has raised a question as to the conduct of the lawyer's client or has opposed something the client is asking permission to do. Under such circumstances the presiding officer does not always enjoy the absence of interest in the outcome of the contest which normally attaches to him who presides over a court.

It has been pointed out that in a court of law every effort is made to put the contesting parties on an even footing. We do not anticipate, in the absence of uncontrollable circumstances, that the judge or jury will have a relationship with any of the parties which may affect the point of view of the judge. In administrative proceedings, however, this objective is exceedingly difficult of attainment. In those proceedings which are formal this is true: it is even more true where the proceedings are informal.

IV

A typical informal proceeding is the sort one encounters in the administration of the federal tax laws. There a taxpayer files his return in which he computes his tax. A revenue agent may make an audit of the taxpayer's books and propose an additional tax. The revenue agent's supervisor then notifies the taxpayer that unless he appears and makes successful protest he is about to have a greater tax imposed upon him. The taxpayer and his counsel appear and protest. Their appearance is before an associate, or associates, of the revenue agent who has already charged the taxpayer with error. Those who hear the protest are operating under the same rules and instructions as is the man who makes the charges. Their training gives them the same approach that he has. They know him: usually they know that they can rely upon him because if he were not reliable he would not be holding his post. The hearers of the protest probably do not know the taxpayer and only occasionally know his counsel. Would these hearers of the protest be anything but human if they, perhaps unconsciously, lean toward the position of the man whom they know and who has been trained to think as they do in contrast to the ideas of strangers? The stage is hardly set to put both parties on an even footing.

Consider a formal administrative hearing. Here sit the members of the Board or Commission or whatever they may be titled. There stands the attorney for their Board. Here stands the lawyer for the citizen. The attorney for the Board they know. If they did not think well of him he would hardly be permitted to appear before them. He presents his case in the manner they have approved. While each precedent making decision must have a first hearing, normally the presentation of their attorney is of a point of view with which the Board members are in accord. Usually the only question of importance is whether their own attorneys, investigators, examiners, and so forth, are to be believed on the facts or whether the citizen (whom the Board members probably see and hear for the first time) and his witnesses (usually per-

sons under some obligation to him) are to be believed in preference.

The footing on which the parties stand is, to say the least, hardly uniform.

One other difference from a court proceeding should be emphasized. In a court the lawyers talk to the man or men who decide and who must decide. In an administrative proceeding the man before whom counsel appear may either decide nothing and merely pass the matter along to a superior before whom counsel may appear later or the conferee may recommend to a superior, who, considering the record of the facts and argument presented by counsel to the conferee, makes his decision without ever hearing the lawyer or seeing his client.

V

Faced with these essential differences (and they could be much more sharply outlined) what are the problems of the lawyer who is acting as advocate before one of these administrative organizations as distinguished from the man who appears for his client in a court?

Fundamentally, of course, the problem of the advocate is always the same. His job is to convince, to persuade, to move to action. As Professor Robinson put it in his "Forensic Oratory" written in 1893:

"The movement of the human mind toward any action is, in its great outlines, usually the same. Indifference or hostility yield to favor, favor to conviction, conviction to persuasion, persuasion to determination. In their great outlines, also, all orations are alike. They first conciliate, then convince, and then persuade."¹

While it may be something of a stretch to imagine one's self performing as an orator when he is sitting at a pine top table quietly talking to a couple of government conferees on the other side, if he knows his job he is in fact following the same path that the orator follows. He has merely adapted his tech-

¹ Robinson's "Forensic Oratory", 1893, p. 57.

nique to the circumstances. The essential difference is that he has to get a much greater degree of response from his listeners than he does in a court room or on a public platform. Other, or additional, skills are, therefore, required.

In a court, as already pointed out, counsel for one party is usually not greatly concerned over establishing the merit of his case in his opponent's estimation. It is the good opinion of the judge, or the jury, that the suitor woos. It is their opinion, and not that of opposing counsel, which is important. In administrative proceedings, however, the situation is materially different.

Let us take first the case where one is appearing before some subordinate officer, or officers, who must make report to a superior official who is charged with the ultimate responsibility of decision. Such subordinates are familiarly called examiners, supervisors, conferees, or by some similar terms. Across from you at the conference table they sit possessed not only of the evidence you have adduced but usually of evidence gathered by themselves or their associates. A part of this evidence you may be shown: a part you may not be shown. You may be talking against a "confidential report" of which you have no knowledge.

In such a meeting the men opposite you are both judges and adversaries. Tactics which would defeat adversaries before a neutral judge are not so well adapted to this tribunal. These men have a duty to follow the law, it is true, but it is also their duty to see that the interests of the agency for which they are functioning are fully served. Incidentally, the conferee may conceive it to be his duty to himself to see that his record is not marred by his being criticized for being too liberal with the government's interests.

A government conferee in such hearings can nearly always terminate the discussion by saying "No" to the citizen's claim: it is not necessary for the conferee to decide between the parties on the merits as a judge must do. He can pass the task of an affirmative decision on to his superiors. Hence, what is called for from the citizen's lawyer is not the combative skill required in a court trial but a facility for both con-

vincing and persuading a listener whose mental attitude does not afford a scale which may easily be tipped by the processes which would be weighty with a neutral listener.

Throughout the contact the attorney for the citizen must bend every effort to demonstrate his own good faith, his honesty of purpose. He must have brought himself to a point of view somewhat broader than that of his client's interest alone. He must not only realize, but show that he realizes, that his listeners are thinking in terms of a pattern; the pattern which the administrators are trying to make to the end that all who are similarly situated shall be treated in the same fashion. They are not deciding cases on their merits without regard to other pending cases but are trying to develop a consistency of decision which is essential to their own continuance in office. Frequently their private views may coincide with yours but the policy of their agency may limit their agreement unless it can be shown to them that the policy and your views coincide, or are not in conflict.

In such hearings, establishing the trustworthiness and accuracy of the lawyer's representation advance his cause materially. Frankness and a willingness to recognize the merit of the opposing case smooth out temperamental obstacles. A spirit of helpfulness, of willingness to get any evidence or material available, both at and after the hearing, inevitably develop a desire to cooperate on the part of the opposing conferee, limited only by his duty and his judgment.

If the citizen's lawyer is to get an ultimately favorable decision, it must be remembered that he not only has to convince the conferees that his client's case is sound but must persuade the conferees to act upon that conviction. That is to say, he must convert them into advocates for his cause. They must be so stimulated that they will go before their superior, announce to him their conversion, and, in the apostolic spirit, convert him also.

Even in those situations where one does have an opportunity to appear before the men who are going to make the ultimate decision, he is far from the situation in a court trial. In the first place, he finds that the rules respecting the exclu-

sion of evidence are not those of a court. Members of such tribunals usually feel that they are competent to distinguish between the true and the false, between the reliable and the unreliable, without the aid of the common law rules of evidence. Why should they not be? They owe their appointments, in theory at least, to their expert knowledge in the field. They are particularly aware also of the handicaps their attorney, who is opposing you, is under in collecting evidence and they are correspondingly charitable in accepting his offers. In the second place, they may unconsciously assume that his evidence normally comes from unprejudiced sources while the origin of the citizen's evidence may not enjoy the benefit of such an assumption. He is presumptively pursuing his duty only while counsel for the citizen has, presumptively, a more personal interest in the outcome.

Busy tribunals have been known to lean rather heavily upon the trial attorneys of their agency. The other day I met one of these trial attorneys who said he was in danger of being over-worked. He stated that he not only was under great pressure in the preparation for trials, and the actual trial of cases, but in the last month he had been required "to write five decisions." While his statement is hardly to be interpreted literally, it would seem fair to interpret it to mean that there was a reference to him, by some superior, of the task of making the first draft of the opinion in the proceeding in which the attorney had been one of trial counsel. I venture the guess that this experience is not unique in administrative tribunals. The incident at least serves to illustrate the dependence which superior officers may place in the reliability and fairmindedness of their subordinates.

Many trial counsel have complained at the degree of confidence which judges sometimes impose in the representations of prosecuting attorneys who regularly appear before them and with whose accuracy and intellectual integrity the judge has opportunity to become familiar. To what extent this sort of thing goes in ordinary courts we cannot measure. It is not difficult to see, however, that in an administrative agency the condition may be exaggerated. The implications

of the illustration given should be clear. Is it not difficult to see why, even in the formal administrative hearings, it is important to the citizen's cause that the agency's attorney have a good opinion of the citizen's lawyer?

VI

The formula with which the lawyer for the citizen may meet this situation is not easy to devise. Before a formal tribunal such counsel does not have the opportunities of "selling" himself which the informal hearings afford. His best hope is that in nothing he has done or said in the process of getting up to the hearing has he given the agency's trial counsel or its staff any cause to doubt his complete integrity, his courtesy, his willingness to be as fair to their case as he wishes them to be to his. He must take care that so far as possible neither he nor his client has given any occasion for opposing counsel to prosecute the matter with any more zeal than attends the proper presentation of the matter. No opportunity must be afforded for the agency's attorney to feel that he is vindicating a personal affront in winning the case.

So far as the members of the tribunal are concerned the establishment in a single hearing of the integrity, fairness and good will of the citizen's lawyer requires an art which can hardly be defined. If, however, he treats the agency's trial counsel as a government officer who is trying to do his duty and one whose motive is wholly to present the best case for the agency as he sees it, the tribunal will not be unimpressed. If the citizen's lawyer concedes that there are two possible points of view or there would be no dispute and makes his argument without the appearance of a sense of outrage which one sees so frequently in court presentation, he is on a track which does not start with a criticism of the agency and its management. In short, if the attitude of the citizen's lawyer is that of a man who is zealous to see that every right of his client is protected but also is an officer of the tribunal (in the sense that a lawyer is an officer of the

courts), highly interested in its proper functioning at all costs, the reception of his contentions may be counted upon to reflect his attitude.

VII

In pointing some of these things out I am not purporting to criticize administrative agencies, tribunals, etc., or the men who man them. Some of the grandest, most unselfish and public-spirited citizens in our land are in the services of this arm of government. They are doing a needed job in the pioneering of ways of governing ourselves. Most of the conditions which I have endeavored to point out, however, are inherent in the system. I would be as prone to be affected by them as would any other man. Neither should the impression be left that the features of administrative procedure which we have been discussing are present in like degree before all government departments, boards, commissions, etc. Obviously, that is not true. This discussion has been qualitative rather than quantitative.

There are three aspects of administrative procedure which make an understanding of it essential for a lawyer. The first is that it is almost impossible in the practice to avoid contact with them. The second is that the vast majority of matters which come before them are concluded there either by settlement or by decision without appeal to the courts. The third reason is that the courts, either because of a prescriptive statute or of their own motion, are loathe to disturb the facts found by these administrative units. It is this last reason which makes adequate and understanding presentation of matters before the administrative body, in the first instance, of such great importance.