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THE ROLE OF THE PRIVATE PRACTITIONER IN FEDERAL REGULATION

HENRY H. FOWLER*

I. *Introduction.*

One who undertakes to discuss a broad subject such as mine to-day runs considerable risk of winding up by saying nothing at all.

As Mr. Charles Horsky of the District of Columbia Bar wrote in his recent and excellent book "The Washington Lawyer":

Most of what lawyers do is too well known to be worth re-statement. What remains is so *ad hoc*, so tailored to the needs of the particular problem confronting the particular client that any generalization may be as misleading as it is enlightening. We shall see whether there is any path between the Scylla of tedious platitude and the Charybdis of professional inhibitions.

My remarks will be on a very mundane level and addressed to those of you in my hearing who are less interested in scholarship, expertise and the finer points of practice and judicial precedent in this field and more in the material questions—"What is this business? How do I get in on it? What do I do about it if I am fortunate enough to be retained?" I would not assume that I could add anything to the experience and knowledge of many of the outstanding lawyers at this bar who have long ago found themselves happily involved in counseling or representing clients subject to one or another phase of Federal regulation. So I will deal largely with some hornbook fundamentals on the nature of this practice and how to deal with it for those who have had less good fortune or experience in this specialized field.

II. *Federal Regulation and the Lawyer's Practice.*

At the outset I would like to make several points about Federal statutes and regulation of business and the lawyer's practice.

Extensive Federal regulation of business and commerce seems here to stay. The broadening impact of the Federal government on national life is nowhere more evident and compelling than in South Carolina. Here as elsewhere the astonishing, dynamic development of industry for the national and international market is bringing the power and authority of the Federal government over our economic life in its wake and into the private practice of law.

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After all, lawyers perhaps more than members of any other profession reflect the character of the society in which they operate. The economic, social and political forces which have shaped so much of recent American history are bound inevitably to modify, enlarge and shape the character of our private practice. I shall only suggest the nature of these forces. They are usually referred to as the "industrial revolution", economic integration, or a highly complicated and diversified economic, business and financial structure. Undoubtedly the marked feature of this modern American economy is the increasing relationship and interdependence of its various component parts. This is not only true in industry and commerce but also the service field, banking and retail marketing. Even in agriculture, the individual producer has been forced by circumstances increasingly to forego "rugged individualism" and employ collective self regulation, area crop specialization and farm and market cooperatives. Put bluntly and simply, what the economic man in the United States does today makes a great difference in the lives of his fellow men.

I submit that the lawyer and the legal profession in South Carolina or any other state can not and will not, ignore these forces or, in turn, remain unaffected professionally by them, because, while increasing interdependence they generate human conflict, actual or threatened, which must be settled in the public interest without the loss of our traditional freedom. A spate of Federal statutes and regulations have been one of the consequences of this change which has been so marked over the last 50 years. Since it is the business of the lawyer to deal with and reconcile or settle human conflicts and represent the point of reconciliation between the government and the individual, the practice of law in South Carolina, as in other states, is responding and will continue to respond increasingly to this change in our society.

In addition to the specific fields to be covered by other speakers there is a large area of Federal regulations based upon a substantial and growing mass of statutory law.

For purposes of our discussion, these laws break down into two categories. In one category, to quote a contemporary observer:

The lawyer is presumed to practice the arts of government in the legislature or in the courts where rules of conduct are hammered out on the anvil of litigation." (See Austern, "The Formulation of Mandatory Food Standards") 2 Food Drug Cosmetic Law Quarterly 532, 533 (1947).

The discussions of the Sherman Act, the Clayton Act and the Food and Drug Act will delineate the role of the private practitioner in dealing with Federal regulation where the lawyer's function is to defend his client's interest before a court of law when the government prosecuting authorities of the national government have brought a proceeding to enforce the law as embodied in the statute and judicial decisions interpreting it.

The second and far more pervasive area of Federal regulation of business brings the lawyer to the practice of what is called administrative law. In 1927 Justice, then Professor, Frankfurter, described that term in its broader sense as follows:

The broad boundaries and far-reaching implication of these problems may be indicated by saying that administrative law deals with the field of legal control exercised by law administering agencies other than the courts, and the field of control exercised by the courts over such agencies . . . In administrative law we are dealing preeminently with law in the making.

This definition takes in the exercise of authority by the Federal department or agency to particularize or amplify statutory provisions and to apply the general rules contained in the statutes and regulations to specific cases.

It is not my purpose to indulge in a political, economic or social analysis of whether this development of Federal regulation of business is good or bad from the standpoint of our constitutional history and our heritage of dislike for distant authority. That analysis and that debate perforce must be left to other occasions for those who speak as statesmen when they reflect our views and those who speak as politicians when they voice opinions contrary to our own. I like very much the cue provided in the program note for this meeting which reads:

The Committee on the fall quarterly meeting, recognizing a demand by the members of our Bar to know more about statutes and that, whether we care for Federal regulations or not, nevertheless, these are upon us, have provided this Institute.

This development presents at least two challenges to the private practitioner. First, by earnestly devoting himself to the development of knowledge and know-how concerning the procedures and method of Federal regulation, he can discharge a time-honored responsibility of the bar for preserving that measure of freedom and justice that are the very basis of the American system of government and society.

In contemplating this new form and growth of government which finds its strongest embodiment in so-called Federal administrative law, we of the bar should consider, in the furor over theories of government and the wisdom of specific regulations, the prophesy and advice of Elihu Root, uttered as early as 1916 in his famous address on "Public Service by the Bar" printed in 41 American Bar Journal, 355. Mr. Root said so well so much of what there is to say on this subject that one can do no better than repeat his prophetic advice:

We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method . . . Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation. Yet the powers that are committed to those regulatory agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers, these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed . . .

But, there is a second aspect of the role of private practitioners in Federal regulation. Alongside this nobler professional responsibility already described, which I shall not dwell upon further in my remarks today, the Bar of South Carolina as well as most other states is presented with an opportunity for a livelihood in the growth

and emergence of the Federal regulation of business as a fact of life for the lawyer as well as the businessman or farmer.

Your reaction may well be that this possibility is too remote for more than idle speculation. You are wrong. Federal statutes and regulation are no longer the exclusive monopoly of the businessman himself, his Congressman or Senator, or even the lawyer in Washington.

The challenge to develop an individual and collective competence in a given State Bar to deal with the problems of Federal regulation is a present joint responsibility of the Law School and the Bar. Hence it is peculiarly fitting that this Institute should be sponsored jointly by the South Carolina Bar Association and the University of South Carolina Law School.

Only by competence and awareness can the lawyers in South Carolina discharge their adequate, proper and logical role in this area. A business executive who would not think of presenting his case or his company's case to a Tax Court, doesn't hesitate to go himself or send a lesser non-legal employee or consultant to some Federal agency in an attempt to protect a right or establish a privilege of far greater value than the tax in question and involving far more complicated mixed questions of law, public policy and administrative procedure.

Many businessmen and far too many lawyers, when consulted locally, assume that the answer to every problem of Federal regulation as applied to the individual concern is to seek out the office of his harassed Congressman or Senator. In dire extremes, when the retention is equivalent to the proverbial call from the courthouse door, all too many seek the answer from the practitioner in Washington who, if he is entirely honest, can not adequately handle the problem if brought in at too late a juncture except by pursuing the laborious and expensive course of going back over the ground which should have been initially traversed.

Whether the profession is to blame for this situation I do not know, but it is clear that we have only scratched the surface of potentialities of profitable and interesting practice before Federal administrative tribunals and accommodating the operations of business concerns to Federal public policy and laws in a skillful and professional manner. I am convinced beyond a doubt that a good lawyer, permitted to obtain an adequate knowledge of the particular phase of his client's business that is involved in Federal regulation, can, due to his background and training and instinct, render a very great service both to his client and to the public if he will but use the experi-

ence and principles which are applicable to his more traditional forms of professional activity.

Perhaps it is too late for the legal profession to secure that recognition and happy monopoly for Federal administrative practice comparable to that which it enjoys in the courts. The business executive, accustomed to solving his own problems with his own staff, all too often thinks of the lawyer as the man to turn to only when you are in dire trouble under Federal statutes and regulation. He tends to rely on himself or on outside engineers, economists, accountants, political operators, so-called "influence" men, public relations people and a wide variety of other professions, semi-professions and cults. However, to the degree that we are able to demonstrate our superior qualifications in such matters, we hardly need fear the competition of laymen who lack any particular competence in this field.

Many members of the profession assume that any and all such practice necessarily gravitates to the large number of Washington firms specializing in this field. This is not the case. Five years ago the history of one of the largest and best-known firms in New York City engaged in general practice had this to say:

By far the greatest single part of the practice of the firm since 1928 has had to do with the efforts of clients to comply with Federal legislation and to accommodate their businesses to the vagaries of the many regulatory agencies and departments. (Swain, the Cravath firm, 713 (1948).)

This has become the general characteristic of the larger firms not only in New York and Chicago but in many urban concentrations throughout the country. Yet there is no logic or reason why this need be the exclusive province of the large firm. Actually, in Washington where there is still the greater concentration of this practice many smaller firms numbering from 2 to 7 attorneys have been able to establish themselves successfully, because, in my judgment, in this area, personal and personalized service is of great importance. The smaller firm can service adequately a very large business if one or more of the partners are sufficiently skilled and grounded in areas of Federal regulatory practice. The smaller firm has a natural affinity for the smaller business concern, be it corporation, partnership or individual proprietor, that is engaged in activity within the scope of the concept of "interstate commerce" which in our modern era has come to have such a different meaning and application from that of our fathers and forefathers.

III. *Some Substantive Areas of Federal Regulation.*

A historical resume of several of the important statutory highlights will serve as a broad outline of the typical substantive areas of Federal regulation some of which are of increasing importance to the private practitioner as a source of business. While Federal regulatory statutes and administrative agencies are generally considered a recent invention coming into important focus since 1933, an examination of history will prove that this aspect had much earlier roots and beginnings. Its origin in our system of government traces back as early as 1789. The Final Report of the Attorney General's Committee on Administrative Procedure (Senate Doc. No. 8, 77th Cong. 1st Sess. (1941) pages 7 *et seq.*) in 1938 discloses that of the fifty-one administrative agencies or subdivisions which at that time had the power to determine, either by rule or decision, private rights and obligations, no less than eleven had beginnings in statutes enacted prior to the close of the War Between the States.

For example, the first session of Congress enacted three statutes conferring important Federal administrative powers, two of which are antecedents of statutes now administered by the Bureau of Customs in the Treasury Department and the third of which initiated a long series of pension laws, now in charge of the Veteran's Administration. At about the same time acts and agencies which were the progenitors of the Patent Office and our patent laws, the Office of Indian Affairs, administering regulations dealing with the Indians, and the Bureau of Internal Revenue were established. Six other agencies can be fairly dated to the period prior to the War Between the States.

The most spectacular development of the period from 1865 to the turn of the century was, of course, the creation of the Interstate Commerce Commission established by the Act of February 4, 1887. That legislation laid the pattern for many later regulatory acts.

Of even greater importance in its longer term impact on our economy and system of business was the enactment in 1890 of the Federal regulation of business practice and organization known as the Sherman Anti-Trust Act. Even before the turn of the century there were statutes and administrative law relating to mail frauds, plant quarantine, immigration and naturalization, animal industry, and fisheries.

From 1900 to the end of World War I, the real beginnings of the modern administrative process and the Federal regulation of business were firmly established. During that period, Congress

created, for example, the Federal Trade Commission, and the Federal Reserve Board, established the Labor Department and imposed new limitations on business activity by the Clayton Act. The present Pure Food and Drug Administration goes back to the Pure Food and Drug Act of 1906. The Public Health Service was created in 1902 to administer quarantine statutes and regulations and in 1917 was given additional important powers. In 1916 the United States Tariff Commission and the predecessor of the present U. S. Maritime Commission were established. Also this period marked the proliferation of Federal regulation of business in the field of agriculture with the firming up of the Bureau of Biological Survey in the Department of Agriculture and the enactment of numerous statutes whose current manifestations are administered by the Agricultural Marketing Service.

Although we are conditioned to remember the period from the end of World War I to 1930 as a time in which the Federal government paused and relaxed its grip upon the economy, the fact is that there were noteworthy extensions of the regulatory power of existing agencies and nine new agencies were created. The Federal Power Commission was established in 1920, the Grain Futures Act of 1922 was the beginning of what is now the Commodity Exchange Administration in the Department of Agriculture. The Federal government entered irrevocably into the regulation of labor relations in the railroad industry during this decade, while the Air Commerce Act of 1926 and the Radio Act of 1927 provided the basis for the present day Civil Aeronautics Administration and Federal Communications Commission.

Of course the full flowering of Federal regulation and the Federal Administrative process occurred in the 1930's with the flood of new alphabetical agencies, most of them administrative, and all of them endowed with wide discretion and broad rule-making power. Not only did Congress create these new agencies and endow them with authority, it also conferred broad and important new powers on established agencies through such statutes as the Fair Labor Standards Act, the Robinson-Patman Act, and the Food, Drug and Cosmetic Act of 1938. Moreover, expanding constitutional concepts of interstate commerce brought large segments of the economy under regulation for the first time. In the period from 1930 to 1940 sixteen of the fifty-one important administrative agencies with rule-making and decision-making power existing at the end of that decade were created. Listed in chronological order, they are:

The Federal Home Loan Bank Board (1932)
 The Surplus Marketing Administration (Department of Agriculture) (1933)
 The Federal Deposit Insurance Corporation (1933)
 The Securities and Exchange Commission (1934)
 The Grazing Service of the Department of Interior (1934)
 The Social Security Board (1935)
 The National Labor Relations Board (1935)
 The Commodity Exchange Commission (1936)
 Public Contracts Division of the Department of Labor (1935)
 The Board of Tax Review of the Treasury Department (1936)
 Bituminous Coal Division of the Department of Interior (1937)
 The Railroad Retirement Board (1937)
 The Sugar Division of the Department of Agriculture (1937)
 The Wage and Hour Division of the Department of Labor (1938)
 The Division of Controls of the Department of State (1939)
 The Selective Service Administration, Department of War (1940)

These agencies and the statutes creating them and their powers of government did not result from any broad over-all plan about the ideal structure of government. Every one owed its existence to an attempt by Congress and the Executive to meet some concrete problem.

Of course from 1940 to the present there have been two occasions of war and national emergency. These brought on an additional wave of Federal regulation necessary to adequate economic and industrial mobilization for the purpose of meeting the challenge to our national security which came from the aggressions of Germany and Japan in 1941 and, latterly, the implacable hostility and threat to our way of life from the expansion and aggressive actions of the Soviet Union and its satellites. Vast powers were bestowed on new temporary agencies during both of these periods: powers to control the allocation of materials and facilities, the construction of plants and other structures, the charging of prices and wages, the renting of property, the export and import of materials and finished products, and other elements in so-called economic and industrial mobilization.

Because the starting point in every instance has been a specific problem rather than a theory, the organization and operation of the

different departments and agencies charged with responsibility of regulation and, indeed, the various statutory forms, reflect little symmetry but rather great diversity. Only in recent years have there been attempts to deal with the subject of Federal regulation and administrative law comprehensively in such a manner as to provide the private practitioner who holds himself to be in general practice, even corporate business practice, with the tools and means of practicing his profession and adequately representing a client. Even in the decided cases where the law of administrative action was developed in the judicial review of administrative conduct, adjudications concern for the most part the interpretations of specific statutes, the powers and duties of specific agencies under a specific statute, and to a considerable measure the individual standards of propriety and action which the agencies ought to respect to give some semblance of due process of law.

The so-called physical elements of administrative law and procedure likewise have added to the general sense of confusion and difficulty of the private practitioner. Each of the more active agencies developed its own body of literature composed of statutes, rules, regulations, orders, bulletins, interpretations, opinions of counsel, advisory opinions, press releases, and other material.

Nor would a visit by the practitioner strange to the field serve to clear up much of the confusion and give any adequate understanding. Many of these agencies took on the appearance and atmosphere of vast business organizations with complex internal structures and superstructures, difficult to fathom by anyone not working closely therein. There was no ready contact for the private practitioner with the Administrator, Commissioner, Board Member or other person in whom responsibility for initial decision was actually lodged. That individual, if once isolated, proved not to be the person to whom the data ought to be presented and the argument made. Ofttimes, the client and his lawyer, seeking to resolve a practical difficulty of an existing regulation or to obtain a decision as a part of the administrative process, left the field with the feeling that it was hopeless to cope with this irresistible or immovable force, depending upon the circumstances.

While what has been said of the past difficulties and confusion may be fairly attributed to some of the current manifestations of Federal regulation of business and the Federal administrative process, a beginning has been made which is a boon to the practitioner and a phase of both historical development and the present statutory situation on which great emphasis is properly placed. The passage

of the Administrative Procedure Act of 1946 (5 U. S. Code 10,001) "to improve the administration of justice by prescribing fair administrative procedure" and applying, with limited exceptions to certain war agencies and military authorities, to every Federal agency and authority, is the beginning of an effort to codify the substantive and procedural principles of Federal administrative law.

Simply stated, this act (a) prescribes publication by agencies of their internal organization, procedures and rules; (b) requires public participation in rule-making; (c) establishes uniform standards for the conduct of rule-making and adjudicatory proceedings; (d) sets up guides for judicial review; and (e) establishes procedures for the qualification and appointment of examiners (often the equivalent of trial judges) subject to the jurisdiction of the Civil Service Commission.

While there has been considerable controversy over that Act, it has served as a real beginning. Administrators in the various agencies are being taught that they can operate and operate effectively under its limited procedural restraints. Lawyers have learned that it is possible to live with these new bodies of government although the profession is still very much in the process of discovering how best to do it.

For the remainder of the time allotted me I shall concentrate on this phase of the subject assuming that there is a client subject to Federal regulation in one or more phases of his or its activity, a lawyer anxious to serve his client and educate him or it on the value of those services, earn a fee, and do a good professional job under the still difficult circumstances.

IV. *Suggested techniques of practice in the field of Federal statutory regulation and administrative law.*

1. Scope of Discussion — Exclusion of situations where enforcement is limited to judicial action and cases of judicial review of administrative action.

For two reasons I will exclude a discussion of that phase of practice in the field of Federal regulation where the lawyer's role is limited to the defense of his client in an action brought directly in the Federal courts. First, the practice in this area of Federal law enforcement is similar to that commonly carried on under the Federal Rules of Procedure in the Federal courts. It involves fundamentally the techniques that any good lawyer develops between the hammer, and anvil of litigation. Secondly, to the extent that special com-

mentary on procedure and noteworthy precedent are called for in this Institute, the discussions you will hear from the other members of the panel involving the conduct of litigation particularly in the areas of the Sherman Act, the Clayton Act, and the Food and Drug Act will serve adequately to point up that phase of the practice.

Although I will advert briefly to that phase of private practice in the field of Federal regulation which is concerned with judicial review of administrative action, time will not permit any full development of the doctrines and cases which are not unfamiliar to many practicing lawyers and easily within the grasp of one who has had any recourse to the courts, access to the cases, and any of the many excellent textbooks and case books on administrative law.

This discussion will be directed primarily to actual techniques of practice in the area of the Federal administrative process.

Many techniques of administrative practice can be learned only by experience, just as the skill in the trial of court cases is developed, but there are some safeguards and patterns of practice which, if observed, may be helpful while experience is being acquired, and should be recalled and emphasized often if the more experienced practitioner is to retain his best form.

These techniques of actual practice in the administrative process will vary with the individual, and personal judgments about what is best for me may not be the same as your judgment about what is best for you. What I shall try to do here is simply mention some of the methods or approaches which have the blessing of experienced and learned commentators which have been confirmed by my own experience. Here, in this phase of the discussion, originality by your speaker would prove to be a fault rather than a virtue, so I have sought outside advice.

While there are many worthwhile works of scholarship in the field of administrative law in the form of general textbooks, casebooks, and articles in legal periodicals, for the most part they deal primarily with the law of the cases or particular problems. Discussions of actual techniques of practice, as is usually the case in literature of the law, tend to be technical or obscure.

However, there are a few excellent general statements on what I would call the "common sense" of administrative law practice geared for the general practitioner. I have borrowed from some of them for this discussion and commend them for your further detailed examination. They are:

1. The Practicing Law Institute publication on "Administrative Agencies" by John Schulman.
2. A series of lectures by Charles A. Horsky of the District of Columbia Bar on "The Washington Lawyer", now available in book form, particularly Chapter II.
3. A recent article in the University of Buffalo Law Review by Manly Fleischmann, my colleague in emergency defense agency administration, entitled "Trails Through the Washington Jungle".
4. An article, somewhat older, but still to be commended, by John Foster Dulles entitled "Administrative Law: A Practical Attitude for Lawyers" in 25 American Bar Association Journal at 275.

2. The pattern of the administrative process.

Despite the complexity and variety of administrative action which will be of concern to the practicing lawyer, the pattern of the Federal administrative process itself is not complex. Congress enacts a law, usually prescribing a policy to be pursued and the means of its accomplishment. Generally, to carry out its purpose Congress invests authority in an agency which may be an established department of the government, an established agency, a new agency, or a single government official or a group of officials acting as a unit. What is involved is a broad delegation of legislative power accompanied by some recital of the substantive standards and procedures which the courts have determined to be necessary as a minimum to legalize delegations of legislative power.

Apart from this general pattern which applies to all administrative agencies we return to the fundamental characteristic of diversity. Not all agencies have the same functions or the same powers. Limitations imposed upon them differ from law to law. The statute is the charter and one must examine carefully in every detail the material within the four corners of the statute to determine powers and duties, extent of jurisdiction, authority to act, and limitations on powers.

Nomenclature of the administering body is of little significance. It will not matter whether it is called a commission, bureau, a board, an authority, an administration, an administrator or an office. Whatever they are called and whatever their composition, these agencies merely constitute the governmental mechanism by which the law is executed.

The wide variation in agency powers and duties stretches from the mere function of enforcing legislation or the exercise of rather automatic licensing power to the opposite extreme where the agency has a multitude of powers and a duty of constant supervision. Of this last and most important type, the Interstate Commerce Commission is a good example. It has many counterparts even in normal times and in war and emergency periods there are regulatory bodies which cut much deeper into the decision-making and action phases of the private conduct of business. Some of these powers are addressed to a particular industry or industries which are subject to regulation by a special agency. Others cut horizontally or functionally across all activities of a given nature without reference to particular industries so long as they are within the scope of Federal power.

Powers exercised by Federal administrative bodies are sometimes classified into those which are quasi-legislative and quasi-judicial, although these terms are difficult of exact application. The quasi-legislative function is the exercise of authority to make substantive rules and regulations which have the force of law and are usually of general application to all within the purview of the regulation. These rules and regulations carry the same consequences as though each provision had appeared in the statute as adopted by Congress. The controlling statute and the order issued must be read together to ascertain the rights and obligations of private individuals subject to them.

By way of distinction, the exercise of administrative authority in the form of an order or action applying to an individual or concern in a particular manner in a particular case involves the quasi-judicial process. It is normally accompanied by formal or informal notice and hearing, opportunities for advocacy in its various forms, rights of appeal from determinations of sub-delegated agents to those in higher or final authority.

Ofttimes some of these attributes of the judicial process accompany the exercise of the quasi-legislative or general rule-making power. The agency notifies all generally concerned that it is considering a general rule or regulation along certain lines and an opportunity for hearing on the propriety, wisdom and advisability of the regulation is provided. There are opportunities for presentation of facts and arguments in oral or written form. Sometimes the hearings are similar in many aspects to a court proceeding in which the parties present offer testimony through witnesses, are entitled

to cross-examine witnesses, and employ the practices that usually accompany a judicial or quasi-judicial proceeding.

One usually thinks of these administrative proceedings of both types as essentially contests between the government acting in the public interest and an individual acting in furtherance of a private interest. This is not always the case. Frequently it is the function of the administrative agency to grant some privilege, benefit or assistance.

In other cases it is the responsibility of the administration to adjudicate the relative rights of private individuals. In this latter category Federal administrative practice pertains to private controversies in the sense that the public interest is indirect. Contest between unions and employers or contests between rival unions before the National Labor Relations Board are examples which readily come to mind. Contests before the Federal Communications Commission for the right to a particular channel for radio or television broadcasting or contests between interstate gas companies for rights to service a given area before the Federal Power Commission are other examples.

Sometimes the administrative agency has the power to enforce its decision through its own act or order, while in other situations, the administrative agency may have recourse to judicial authority to enforce adequately its determination or penalize a violation of its rules or interpretation of the statutes confided to its care.

If these observations have created an impression that the diversity that exists in subject matter and procedure in the administrative process precludes the development of any formula by which practicing lawyers may guide themselves, I wish to correct it immediately. There are techniques in this branch of practice by which we can learn to advise competently our clients on what they may or may not do or what their rights and obligations are; there are procedures that we may employ to obtain adequate and proper determination of their rights and obligations; there are methods of seeing to it that the law and procedure as applied to our specific case or situation accommodates to the maximum possible the public and private interest.

3. Some comments on Investigation of Law and Facts and Advance Preparation in Federal Administrative Practice.

It is possible for a lawyer not wholly specialized in a particular phase of administrative practice and having no personal acquaintance with the officials or agencies with whom he must deal, to represent a client effectively and successfully in this field.

The lawyer has peculiar and unequalled qualifications for this practice in comparison with the other professions and types of personnel mentioned earlier. The materials with which he, the lawyer, must work are of the type which are familiar to him because they resemble in many ways the state and local administrative process in which he must necessarily have become proficient. The rules and regulations and directives of Federal administrative agencies are essentially only legislative enactments of a particular kind — sub-legislation or subsidiary legislation of the type also employed at the state and local level. They are drafted by lawyers to cover general situations. It is the task of the counsel and advocate, as always, to apply these laws and regulations 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 or privilege he seeks or that the public power need not be directed against him.

We could all agree without debate that preparation of a case outweighs all other aspects of the successful conduct of litigation. There is a superstition current in some quarters which ought to be laid to rest at once that the same is not true in the handling of administrative matters. As an administrator, I have had the experience which is common to many others who have served in that unhappy capacity, of being confronted by lawyers, who by their professional reputation, I knew would not think of entering the court without an extensive study of the facts of his client's case and all of the applicable statutes and decisions, but who did not hesitate to come in for a conference after a brief and casual interview, sometimes by telephone, with their clients.

There is no real excuse for the lack of adequate preparation for the presentation of an important case to an administrative agency. A good rule of thumb is to feel that you know more about the facts of the particular matter in hand than the government official who will handle it and, for the occasion, as much law. Of course that kind of preparation for effective presentation takes time. This too is logical and proper because matters which are currently decided by Federal administrative agencies, quite regularly, can be more complicated and more important to the client than the occasional litigation in which he may be involved.

Perhaps it will be sufficient to leave this by saying that no standard of preparation less than that the practitioner employs in the conduct

of litigation should characterize his preparation for a given situation in Federal administrative practice.

(a) *Investigation of the law.*

It is important to recognize, in investigating the law, that the Federal administrative process is founded on a statutory code, governing both procedural and substantive aspects. This is contrary to our training in the method of the common law. Lawyers who practice actively before the Federal administrative agencies will often agree that the first stage in developing an "administrative law" approach to preparation is to free oneself from the "case book consciousness", in which resort is first to the decided cases and afterward to the legislative codification in the form of a statute. The method must be reversed in the administrative process and the statute and regulations constituting subsidiary legislation are the first subject of reference.

The inquiry in each instance must be "What does the statute provide? What rights or liabilities are created and what is the statutory method of accomplishing the result that will affect the client?" General principles, logic, political or philosophical judgment, historical development or analogy are secondary considerations. We must think in terms of the legislative declaration or rule. Good habit in this field is to reach for the statute first to see what it says and only later search for what a court or someone else has said or could say about it.

Of course, it is essential for this approach that one knows that the case falls within the terms of a statute and the particular statute within which it falls. Very few, if any, lawyers can conceivably read every act which is passed or retain an adequate mental picture of the existing Federal code. But by general reading or familiarity with the laws affecting our client's business, we get to know the various statutes that are applicable. For general retainer work, an initial imaginative review of the United States Government Organization Manual to formulate an outline of all of the present and hypothetical impacts of Federal regulation will be helpful, particularly if the check list is reviewed with the client or appropriate company personnel to sift out the more active areas. This may well be refreshed by a review of currently enacted legislation at the end of each session of Congress to determine where likely applicability requires further examination.

On specific spot problems very often the statutory nature of the

case is apparent from the statement of the situation or the client knows in which area his case falls.

But there will be times when the relevance of a Federal statute will not be evident. There is no escape in this situation and it is good insurance in any involved problem to examine the pertinent areas of the subject index of the U. S. Code Annotated.

If the pertinent statutory provision, once identified and located, is not clear and has not been adequately construed, resort to the legislative history may be required. The reports of the Senate and House Committees and the Conference Committee on the statute in question carry great weight and are often quite illuminating. Statements of the floor managers in debate are also of value where legislative meaning is of importance. On occasion, general debate as reported in the Congressional Record and records of the legislative hearings may bear some helpful examination. Prior legislation and special investigative studies are also secondary materials for examination in special cases.

Of course an essential element in this study of the statutory materials is the extent to which the statute is applicable to the concrete situation at hand. A number of factors are involved which may be determined from the statute itself. While it may cover entirely some phase of the economy, its applicability to a particular situation may depend upon the relationship of that person or transaction to interstate commerce or the use of interstate or postoffice facilities or the number of employees in one employer's service or the nature of the business in which the person is engaged. Sometimes what appears to be the basic or controlling statutory enactment may not tell the whole story concerning the extent and scope of regulation of a particular business and other statutes must be combed to get the entire picture.

For example, while the Interstate Commerce Commission regulates the railroad transportation system, another agency and other legislation than those pertaining to the Interstate Commerce Commission govern employer-employee relationships in the railroad field and such matters as employee benefits.

The second point of cardinal importance in law preparation is that reliance upon the statute in the administrative field is not likely to be sufficient. An examination of the full scope of the law requires the study of the rules and regulations issued by the agency under the authority confided to it by the statute. Here we encounter the difficult problem of sorting out the rules, regulations, orders, licenses, bulletins and agency documents which may include part of the law

covering our problem. To a very considerable extent previous defects of lack of uniformity, terminology, adequate publicity and availability have not been cured by the Administrative Procedures Act. This problem of adequate library or source materials is a serious one.

An almost indispensable aid in coping with this difficulty is the Code of Federal Regulations which, with the current supplements since 1949 have served admirably to complement the statutory materials appearing in the United States Code and the U. S. Code Annotated. The titles of the Code of Federal Regulations correspond to the titles of the U. S. Code Annotated containing the statutory material and annotated cases. Hence, the two can be read together in many cases to provide a reasonable picture. However, the Federal Register issued on a daily basis with its current indexes is necessary to make current the regulatory picture on any day-to-day, week-to-week or month-to-month basis since the cumulative pocket supplements to the Code of Federal Regulation are issued annually.

For example, the pocket supplement for 1952 of the 1949 edition of any one of the 50 titles contained in the Code of Federal Regulations bears this statement which sometimes proves to be important and controlling for the practitioner:

For changes subsequent to December 31, 1952, see the daily issues of the Federal Register.

There are other distinct aids upon which the lawyer may rely if experience or anticipation suggests he may have continuing business involving a particular agency. He will find that the use of a 3c stamp and a polite letter requesting that he be placed on the mailing list for all printed material indigenous to a specific agency will augment considerably the volume of his mail and the problems of his library custody. While unfortunately I have no profitable arrangement with any of the publishing concerns, I am bound to say that the administrative law services and the services on special subjects published by such companies as Matthew Bender & Co., Commerce Clearing House, the Prentice Hall Company and Pike and Fischer, Inc. have great utility as do the weekly and daily services of the Bureau of National Affairs.

If this all sounds too formidable for the practitioner confronted for the first time by a single problem in this field which does not promise to be repetitive or, if the printed word available seems inadequate, there is a ready substitute to be found in the legal staff of the particular department or agency. It is a good practice to consult the general counsel of an agency or one of his assistants as a

preliminary matter, when one is not acquainted with the regulations of a particular agency. This preliminary consultation should avoid any discussion of the merits of the client's position but be revealing enough to elicit adequate guidance to pertinent or controlling published materials of the agency. My experience has been that there is no more friendly or cooperative group of public servants anywhere than those on the legal staffs in both the central offices and the regional offices of the various departments and agencies when a lawyer feels the need of being introduced adequately to the material coverage of his problem. Finally, of course, court and agency decisions construing or applying the statutes and regulations are worthy of examination to ascertain whether they are controlling or illuminating on the practitioner's specific case.

One additional preparatory step in the law investigation should be underscored. Just as you would determine carefully which of several courts you might enter in a judicial proceeding and what the course of appeal would be should you be unfortunate enough to lose in the first phase, so administrative practitioners must understand the *organization* and *procedure* of the particular agency with which he is dealing. Just as you might learn the name of every Justice on the bench if you were appearing before a panel, in the same way it may be advisable for the administrative lawyer to understand procedure which must be followed in the handling of his application or petition, the various approvals which must be obtained, and the names and titles of the various officials who must be persuaded to act or concur. This type of information too is readily obtainable through the office of the counsel of the agency or the lawyer in the regional office or through the public information office always maintained.

Upon one's *initial* venture into a new subject in the administrative process it should not be too much of a burden to get a working knowledge of the plan of the statute and of the regulations, the nature of the coverage, the ends sought to be accomplished, and the means of accomplishment. This can be done by cursory examination of the statute and regulations which the agency customarily is compelled by law or by the Administrative Procedures Act and good practice to maintain in published form along with the organization and procedure. After this is done the practitioner may isolate the provisions which he believes to be of immediate and most searching importance to his case.

A final phase of the law investigation, if the nature of the retention is likely to require representation of the client before the agency,

is to ascertain whether special admission to practice before the particular agency is covered by its existing rules. If that is the case it will usually be accompanied by a set of procedural rules and regulations which serves as the equivalent to the rules of practice before a court. Usually if he is an attorney in good standing before the highest court of his state he will be able to make arrangements for general admission or special appearance without great difficulty.

(b) *Preparation on the facts.*

Of more importance than preparation of the law in most administrative matters is a thorough knowledge of the facts and surrounding circumstances of the transaction or situation at hand. The marshalling of facts surrounding a particular issue or set of issues is work wholly familiar to every lawyer. It is more important to be able to present the facts in the administrative process than in many law cases because of the wide area of discretion delegated by many statutes to the administering officials. Many of those in responsible authority in Federal administrative agencies advise, wisely, "Be sure you've got all of the pertinent facts to present to us, the law will take care of itself."

Like all generalizations, this too must be discounted in the particular situation where differences on the interpretation of the statute or existing regulations are controlling. However, this much is true: In this area of practice, the importance of the facts and their correlation with the law cannot be over-emphasized. In the administrative process, rights, liabilities, obligations or privileges may depend on minutia and on various circumstances surrounding a single transaction which might not ordinarily be material to it.

There is an ancient superstition, which has considerable applicability to private practice in Federal administrative law, namely: That where a business question is involved, the objective of the proficient trial lawyer will be to go into court knowing as much about the particular business problem as his client. That should be the prevailing fashion in preparation for the handling of a case or problem before an administrative agency.

The kind of preparation on the law and the facts described should take place at the early inception of the case or proceeding. The administrative process often starts when, it seems to the private practitioner accustomed only to the judicial process, it is in a very informal stage. It may start with an inquiry from an inspector or a representative of the agency, or a simple application or registration.

It is easy to be misled by the appearance of informality which is one of method and not of consequence. When an agency begins an

investigation, and one's client has his operations subjected to any individual scrutiny, it is wise to assume that the inquiry follows a definite plan and will result in a definite outcome. For example, in the field of the Federal Trade Commission, where there is a stipulation proposed for a concern to agree to discontinue a particular practice complained of, one can assume that a preliminary investigation has been completed and that the Commission is prepared to proceed with a complaint. The terms may be subject to negotiation and the discussions which take place may have the appearances of conferences wherein private litigation is settled, but the stipulation, if signed, carries serious consequences. Or, when an investigation is in its preliminary stage or information is requested, the request should not be treated casually. A casual response, without a knowledge of the statute and regulations to which the inquiry is referable, will lead to either an unsatisfactory answer or a misconception of the client's position because of the agency's failure to receive the essential information upon which the outcome of a case or administrative decision may depend. The furnishing of information to an agency, whether in response to an inquiry or in connection with filing of documents, should be treated with the same respect as one treats a complaint and bill of particulars. It is this process that tells the client's story for the record, and carelessness or failure to do the job properly is not only sloppy practice, but may lead to unhappy consequences for both client and practitioner.

(c) *Analysis of Available Procedures.*

The lawyer is on familiar grounds in the administrative process where questions of formal procedure are concerned. You here in South Carolina are accustomed to following codes of procedure and rules of practice in your work before State and Federal courts and State and local administrative bodies. You are well qualified by that experience to utilize the procedures available in the Federal administrative process.

Again, however, it should be realized that the procedural methods and requirements may be found in some part in both the statute and in the rules and regulations promulgated by the administrative agency. In addition to the details of procedure prescribed specifically for a particular agency by its statutory charter and its own rules, the practitioner should consult the Administrative Procedure Act. This serves as a general guide or yardstick against which he can measure later whether the procedures to which his client's problems are committed include proper and adequate conformity to the stan-

dard of administrative due process of law which are codified in a limited way in that piece of legislation enacted in 1946.

A great deal of the future conduct of the case at hand will depend upon whether or not the substantive rules and regulations of the agency are pursuant to a broad discretionary authority given by the statute to establish or administer a given policy, or a situation in which the Congress has withheld any broad element of discretion and has entrusted to the administrator only the duty of comparing the conduct in individual cases within specifications of the statute.

As is true with the substantive law in the administrative process, the starting point for analysis of available procedures is the statute. Here one determines what the individual may or must do to preserve his rights, or become entitled to benefits, or to avoid liabilities. In some instances there is a choice between administrative determinations and recourse to the courts. But, by and large, administrative remedies must or should be exhausted before seeking the aid of the courts or establishing adequate standing to sue.

The procedural rules and regulations promulgated by the various agencies will differ all the way from brief statements of essentials to elaborate codes. Some agencies issue manuals of practice and procedure, such as the Interstate Commerce Commission. Here again the Code of Federal Regulations, as supplemented by the Federal Register, both printed by the Government Printing Office, is the convenient official compendium.

4. Some Comments on Methods of Actual Practice in the Federal Administrative Process.

Let us suppose that our hypothetical attorney from Columbia or Charleston or Greenville has mastered his client's case and finished the advance preparation described and is ready to commence his conquest of the particular administrative post, thoroughly convinced in the process, as all good lawyers are, of the merits of his client's cause—not maybe as the client views it but in his interest just the same. How does he go about the contact with the agency in question?

(a) *Congressional Introductions to the Head of the Agency—Not Usually Necessary or Advised.*

Many harassed department heads and agency administrators will swear that the most used first step in securing administrative action by private practitioners is to seek out the client's Senator or Representative for an introduction to the head of the agency. This approach, while not necessarily harmful, is seldom necessary or de-

sirable, and occasionally gets the bureaucratic back-up *in the levels below* with unfortunate or abortive results. At a later stage in the administrative process, particularly where serious injustice, discourtesy or inattention is encountered, stimulated Congressional intervention is sometimes very useful, as well as proper, but it is not recommended as the best first step at the outset of the ordinary administrative proceeding.

(b) *The Personal Contact with High Officials of the Agency at the Beginning — Not the Place to Begin.*

It is a natural, although lamentable, fact that a second approach frequently used by the practitioner before the administrative agency is to seek out a high official that he knows personally or, less desirable, to locate someone reputedly of influence who does, to effect initial entry. Is it wise to start in this manner? The answer is generally in the negative. This is not wholly an expression of a moral evaluation.

Personal contact with a high official of the agency known to the practitioner may be useful and proper, but where proper, it should be reserved until the latter stages of the proceeding. No administrator or high official who values his organization and its morale, or has the proper respect for the administrative process, will do more in the first instance than refer such an inquiry to the appropriate official down the line. If he does more, or even sometimes if he properly and discreetly does just that, it is construed elsewhere in the organization, and particularly in the channels below, as an interference with the proper procedure and resented as an attempt to obtain special consideration.

(c) *The Right Point to Start.*

The most normal procedure is apt to be the most effective. The attorney should learn where the particular application or matter is pending for decision at the initial or operating level or is to be initiated under the rules or practice of the agency, and arrange for an interview with the official whose approval is required in the first place if the process is an informal one, or for a preliminary conference preparatory to hearing if the process is a more formal one.

This is not always as simple as it sounds, particularly in most of the emergency agencies in their earlier and less organized phases. A former colleague of mine has said with truth that every emergency agency is entitled to lose a file at least once in any particular case.

(d) *Persuasiveness and Persistence — The Two-Edged Sword.*

Once the appropriate official is located, the practitioner calls upon two qualifications that he undoubtedly possesses—persuasiveness and persistence.

Generally, the same qualifications and mannerisms of advocacy that make for a good argument in court are required for adequate presentation of a case to an administrative official. The purpose of advocacy is to convince someone else to come to a particular decision and act on it. The do's and don'ts are not surprising.

There is no purpose in arguing with the agency representative that a given statute should not have been passed or that it is unfair. There is little or nothing he can do about it. If there is a regulation in effect that is consistent with the statute and it has been properly issued with the force of law and it affects your client adversely, nothing can be accomplished before the agency personnel by taking the attitude that the agency should be abolished. Likewise, action that indicates that one has a very low view of the administrative process and the personnel they employ is not likely to win cases and influence administrators.

Most of the officials in the lower or working level are career people who work hard and take their jobs seriously. They think their jobs are important and they want to decide the matters at hand in accordance with what they believe to be the agency's policy. If they do not have these admirable qualities, but operate on other principles, one is not likely to win their favor by acting in such a manner as to reveal that appraisal. The right attitude is the one you would use in meeting a judicial officer—an extension of courtesy and respect to the office, whether or not the man deserves it. Any indication on the part of the practitioner that he regards the whole proceeding as ridiculous and unnecessary or that he does not expect to get fair treatment is not likely to produce desirable results.

On the other hand, if the attorney is overawed by the apparent power of the agency or the apparently limitless authority of the person with whom he deals, and takes on an attitude of servility or excessive meekness or lack of confidence in the merits of his client's case, he obviously will err in the practice of advocacy on the other side.

Putting these personal attitudes towards the agency and its personnel to one side, the proper approach is to an instrumentality that must be dealt with for the accomplishment of a result. The attorney who knows his law and his facts will assume that the agency person-

nel knows the law but is totally unfamiliar with the facts of his particular case. The attempt should be made to present the facts in the language of the agency's statute or applicable regulations without stressing the language of those instruments separately as though it was necessary to acquaint the agency staff with its own charter and rules.

However, if the point is that the agency's interpretation of the statute is erroneous or that some regulation is improper because inconsistent with the statute, the point should be urged with the same firmness and full lawyerlike analysis that one would use in the courtroom.

More often, the attorney is likely to find that his objective can be most easily obtained or the matter at hand satisfactorily disposed of by arguing the facts that give rise to unusual hardships or unusual circumstances that require an exception in his particular case. When the regulation is squarely in the way a reconsideration of the existing regulation for the future with regard to cases on facts such as are present in his case is the preferred approach to one that centers upon its injustice in past situations.

Sometimes it will be apparent in the initial exchange with the administrative agency that there are aspects of fact important to its consideration which, despite prior diligence, have not been prepared and presented. Further opportunity to supplement should be requested and full advantage taken of the suggestions, comments or even hints that will be dropped in the course of the initial discussion concerning the kind of facts that are likely to produce the type of administrative decision desired.

There is another frequent reaction to the initial meeting, namely, that the case is not all on the side of one's client. The skillful advocate will always call attention to the weak points of his case as well as the strong, and answer the imposing argument in his initial presentation. Nothing is more dangerous than to permit the official or some reviewing official who must take supplemental or corollary action to discover the weak point in a case when the attorney is absent and cannot argue the matter. This rule of calculated frankness is regularly violated by administrative practitioners with ensuing disastrous results, sometimes in the form of extended delays while the situation is corrected, and sometimes more fatal.

Even with this calculated frankness there will often be occasions in which observations of the agency representative will disclose to the practitioner that his case has additional elements of weakness and is not nearly as black and white as he conceived it.

In these situations, the all-important quality of judgment enters into the working out of a practicable and just settlement. There will be times when, in the exercise of judgment, it is more beneficial to the client to yield in some particulars than to stand on what he believes to be all of his rights. This process of working out a reasonable settlement of the problem is quite similar to settling a case rather than going to the expense or risk of trial. Indeed, many administrative proceedings can be wisely and informally settled to the advantage of both the client and the public policy involved before following through the bitter end process of exhaustion of administrative relief and judicial review. The one danger to be avoided in these negotiations is the concession or stipulation which operates as an estoppel if formal proceedings or court action is required.

Your own good sense of propriety makes it unnecessary to add that any attempt to capture special consideration by the obvious blandishments of free lunches, theater tickets or other valuable favors is to be avoided. Such a course now, as always, is fraught with peril and may destroy the effectiveness of an orderly and vigorous presentation of the merits of the case. Wholly apart from the moral aspects of such practice, it is practically dangerous and oft-times will result in a serious backfire which will prejudice a case, however meritorious.

Having dealt at some length on the element of persuasiveness in initial and early presentations in the administrative process, we come logically to the other all-important quality of persistence. Assuming that the practitioner is unable to work out a satisfactory settlement of his problem in the initial overtures, which will usually be the case, he must not lose the benefits of a brilliant beginning for lack of a determined follow-through. The average official in regular or emergency agencies, but particularly the emergency agencies, will be overburdened with work and cannot pass on all the cases before him with promptness. Courteous, but repeated inquiries about the status of a particular pending case is effective, though boring to both the party calling and the party called. The ordinary rules of human nature apply here, so don't forget the old adage, "The squeaking wheel gets the grease".

In one's initial interview at the working level it is also well to determine what successive levels of administrative action involving concurrence or review, if any, will be necessary before favorable action can result. If it develops that there is need for reviewing or concurring action by others than the official with whom the initial contact is made, it is always diplomatic to ascertain whether there

is any objection to going over the same material with the other officials involved. Sometimes a request to convene them informally for simultaneous presentation will be in order. Sometimes that is not preferable.

In any event, repeated visits and continued correspondence are a part of making the administrative process work. It should be recognized that there is always the possibility that officials will resent continuous and unrelenting efforts to obtain a decision on a particular matter. Most experienced practitioners feel that the risk of a particular case getting into the inactive backlog is far more real, particularly in the emergency agencies. In the regular permanent and well-established agencies the follow-ups while regular, can be spaced at more respectable intervals. But let us not forget that many a vexing administrative decision has been made in a month instead of a year because the harassed agency official wanted to be rid of that pleasant but persistent fellow who kept calling on the long distance telephone or sitting in the reception room.

After the initial conference there should be a considered decision as to whether or not it should be followed up by a written presentation. This will be particularly desirable in many situations where the necessity of handling by the administrator contacted of a large number of cases makes it difficult for him to recall the particular facts presented in oral discussion. Such a written follow-up also has the advantage of bringing the matter to the attention of the agency for a second time and increasing the likelihood of prompt decision. It also serves as a useful written factual record.

I have stressed these rather ordinary elements of informal advocacy. You, as experienced practitioners, will be readily familiar with the more formal types of proceedings before agencies, which assume the appearance of a court trial. Or you can ascertain the best practice from the rules of procedure of the particular agency or one of several excellent generalized textbooks such as those by Professor Kenneth Culp Davis, Mr. Trowbridge Von Bauer and Messrs. Pike and Fischer.

When the procedure in an administrative action takes the form of a formal hearing the practitioner in the hearing will have a living adversary. In some cases, it will be the Government attorney. In other cases, it will be counsel for rival private litigants who are seeking the same privilege or asserting a grievance. There will be the usual elements of quasi-judicial due process: the notice which will usually resemble a complaint in a lawsuit, and responsive pleadings to delineate the issues. Generally, the hearing will take place

before a hearing examiner whose training and attitude will resemble a judge. Evidence will be presented through witnesses and documents, and the right of cross-examination of adverse witnesses is usually allowed. The rules of evidence are loose and, while objections of all the traditional sorts may be made, the decisions are likely to be with a view of lengthening or shortening the record rather than on the technical rules of evidence applicable in regular judicial proceedings. It will not be the function of the hearing official to make the ultimate decision, but to maintain order, regulate the construction of the record and make a report with tentative findings and opinion. Usually exceptions can be taken and the matter appealed.

There is a great deal of interest in Federal administrative circles in an effort to devise ways and means of shortening these formal administrative hearings. Often they are unduly burdensome to the Government and the private parties alike. It is felt that utilization of the so-called pretrial hearing procedures similar to those invoked in the Federal rules for the Federal Courts will effect this result. Practice in the formal hearings will vary somewhat from agency to agency as other procedures do, so it will be advisable to examine the particular rules of procedure of the particular agency in connection with these hearings, and the function of the hearing officer or examiner. There is a tendency to increasing uniformity of procedure, but it is not likely to ever reach the point where the habit and practice in a particular agency need not be taken into account.

Some additional comment is necessary on the practitioner's approach in these administrative hearings. Whatever the procedure, it is the written record that is most important. Oratory, forensic skill, jousting with rival attorneys, and other mannerisms that still make the jury trial colorful have little place in these hearings. A good factual record on the point or law or regulation involved, clearly presented, is the test of adequate counsel. Extensive use of the opportunity to present data and facts in written form is preferable to the laborious examination of witnesses. Stipulations of fact, as a part of the pre-hearing procedure, can serve to shorten and give clarity to the record. Expert witnesses are often a requisite, particularly when technical facts are important.

The kind of skill required for trying cases before an administrative agency is similar to the aptitude essential in preparing factual briefs. The object is to prepare good reading rather than put on a good show. The interest of the examiner and officials who will re-

view and pass upon his report is in a logical, detailed exposition of the facts.

Despite the fact that conventional rules of evidence are not observed, cross-examination may play an important part in an administrative hearing. Where the memory of witnesses on events is important, or, where statistical information or opinion evidence is biased or fallacious, cross-examination may be employed to advantage. Useful admissions may be sought. But collateral attacks on the witnesses' credibility or examination to embarrass him is not of much practical consequence in an administrative hearing. It is also important to remember that the usual statute setting up an administrative agency will provide that judicial review of factual findings in administrative proceedings will not be given to the facts if there is reasonable support for them in the record. This is no arena for attempting to win the first round with a *prima facie* case or an *ad hominem* argument.

The course of appeal from an adverse ruling in the more formal type of administrative proceeding usually is clearly outlined. The more important area for judgment will come where there is no decision forthcoming in the more informal administrative process and there must be a determination by private counsel as to whether or not he will go over the head of the official who currently has the case before him. In such a situation, the attorney who appeals to higher levels runs the risk of antagonizing the official who still will have to make the decision. If the decision is made that the matter cannot be made worse by intervention of higher authority, the attorney will have to decide whether to go one layer above or all the way to the top. The first course is preferable unless the head of the agency has specially trained assistants in his office to run down cases which have been unjustifiably delayed, with the authority to go outside the usual channels for this purpose.

Another point of recourse is Congressional assistance, particularly in the informal administrative proceedings. While the administrator worthy of holding his job will not decide a particular case in a particular way because a Member of Congress demands such a decision, and Members of Congress rarely are so dogmatic and unreasonable as to demand a given decision, Congressional inquiries that a matter be promptly attended to and disposed of do receive attention.

Many agencies have established Congressional liaison channels with special informal procedure 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. As a practitioner, if I had reached the end of my string in representing a client and felt that I had been reasonably treated, I would not ask or expect the Congressman or Senator to do the impossible or the improper. If, on the other hand, it was felt that the client had been unjustly treated and efforts had been made to arrange an interview with appropriate reviewing officials, including the administrator, but the efforts had been unsuccessful, there should be no hesitation in seeking Congressional assistance to arrange an informal audience or hearing.

It will usually be sufficient for Congressmen to request the personal interview for his constituent or his attorney. Such interviews are granted as a matter of course by most agencies and administrators. They tend to produce some result, particularly where a matter has lagged for decision due to no fault or failure of the practitioner or his client to supply the necessary information.

This recourse to Congressional intervention is wholly unnecessary in the well-established, permanent administrative agency unless there is a particular area, regional or special industrial interest in which and for which the Congressman has a duty or right to be concerned about. Here we get into an area where the point of appeal outside the agency must be considered. The Congress has established committees with specific authorization to review the viewpoint of sizeable cross-sections of business, industry, labor and other groups where there is a feeling that the fault with the administrative process goes back to the basic controlling statute. The other point of outside review, of course, is to the courts. This question of judicial review of the administrative process is a separate and distinct subject from the one I have attempted to outline today. For purposes of complete understanding, however, some comments on it are necessary.

V. Some brief comments on preparation for and use of judicial review.

The subject of judicial review of administrative conduct, while one of the most intriguing and appealing to the practitioner's best instincts, involving as it does the fundamental constitutional doctrines, is better approached from the textbook or the casebook rather than this brief and kaleidoscopic seminar. Therefore comment will be limited to the mention of some of the basic principles:

(1) Where the statute under which the agency is acting is attacked as being unconstitutional or the agency is charged with exceeding the powers created by the statute, there can be an appeal to

the courts for judicial action as well as to the Congress for remedial legislation.

(2) But, administrative remedies ought to be exhausted before court proceedings are your resort, that is all steps provided for in the procedural rules in the statute and regulations should be exhausted.

(3) Attacks on administrative determination of fact are not likely to prove successful because the courts will treat as conclusive such determinations so long as they are supported by substantial evidence.

(4) Administrative determinations of law are persuasive but not binding.

(5) There should be a careful examination of the statute to determine whether the type of agency action to be attacked is made non-reviewable.

It should be realized that judicial review of administrative action is an extremely costly process and that it is successful only in limited instances. These practical considerations, however, ought to be weighed against the public interest of keeping administrative action within proper constitutional or statutory lines. This element, if fully disclosed to the client who must pay the bill, ought to weigh heavily in favor of court action where there is a clear and flagrant case of unconstitutional or illegal administrative action.

Except for this factor, which affects the lawyer's responsibility to his oath and the nobler aspect of his profession, all the other factors are tending to give decreasing importance to the right of judicial review. The practitioner can not expect the courts to deliver his client's cause from all of the exercises of administrative discretion, properly confided in the agency, which are not favorable to his client. The fact that you are more at home before the courts should not induce you to contemplate them as the final resort in solving the ordinary administrative problem. For the cases themselves on delegation of power, on the scope of the record under review, on the role of the judiciary in reviewing administrative determinations of fact, on insisting on the exhaustion of administrative remedies, on deference to administrative discretion, have all tended to narrow the availability and the scope of judicial review.

Sometimes a successful challenge will result only in a "Pyrrhic" victory. The administrator will remedy the defects singled out by your review and the court holding and arrive regularly at the same result putting the parties back where they started except for the expenses and enjoyment of judicial review and the dubious consolation

to the client that he has paid for making important administrative law. The experienced practitioner in Federal administrative law has come to realize that his best opportunity to protect his client is at the agency level; he can not forget about judicial review, but neither can he afford to rely upon it.

In conclusion, let me reiterate that the Federal regulatory and administrative process has become a large factor in our social and economic system; whether we like it or not a good part of our professional work in the future may be in this field.

Practicing law in this field is hard work; it requires attention to detail, in excess of that necessary in many other branches of practice; it lacks glamor; it requires constant study and application to stay current and up to date. Yet experience in this field, as in other fields, makes the statutes and professional approach more familiar, and procedures of preparation and actual conduct of the practice more routine. The adoption of suggestions made in my remarks will not guarantee success in the handling of Federal administrative matters; nor will they assure that all-important element—the approach of the client to the practitioner for professional counsel and assistance. Nor is there any tried and true formula for the other all-important aspect of handling clients properly once a professional relationship has been established. Those elements will depend, as always, on the individual reputation, ability and performance.

Let me emphasize there is nothing mysterious about the operation of Federal regulation to the trained and energetic American lawyer; most general practitioners can readily grasp and apply the important professional procedures, and just as in other fields, the best formula for success is the combination of preparation, resourcefulness and tenacity.