

10-15-2009

Administrative Hearing Opinion

E. Barrett Prettyman

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#)

Recommended Citation

E. Barrett Prettyman, *Administrative Hearing Opinion*, 29 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2009)

Available at: <http://digitalcommons.pepperdine.edu/naalj/vol29/iss2/5>

This Speech is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

Administrative Hearing Opinion

By E. Barrett Prettyman*

JUDGE PRETTYMAN: I thank you very much, Dean Kramer.¹

First off, I would like to say this is going to be totally informal. I do not have a prepared text or manuscript before me. I have notes, and I am just going to talk. It will be informal—totally informal.

In the next place, I would like to say that, really, I ought not to be here. I, as you know, am retired and kind of last year's business.

* The building housing both the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit in Washington, D.C. is named the "E. Barrett Prettyman Courthouse." Appointed to the United States Court of Appeals for the District of Columbia Circuit by President Harry S. Truman in 1945, Judge E. Barrett Prettyman served as chief judge from 1953 to 1960 and as senior judge on the court until his death in 1971. See H.R. REP. NO. 104-871, at 28 (1996), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_reports&docid=f:hr871.104.pdf. Among his other accomplishments, Chief Judge Prettyman was influential in the development of administrative law. In 1953, President Dwight D. Eisenhower appointed him as chairperson of the President's Conference on Administrative Procedure, which operated from 1953 to 1954. In 1961, President John F. Kennedy appointed him as the first chairperson of the (1961-1962) Administrative Conference of the United States (ACUS). These two temporary conferences led to the enactment of legislation to create the "permanent" ACUS in 1964. In 1963, Chief Judge Prettyman gave this speech on opinion writing to a group of federal administrative law judges (or "hearing examiners" as they were then called). Following the speech, he took part in a panel discussion on opinion writing. Ward & Paul, Inc., court reporters, transcribed the speech and panel discussion but the transcript has not been widely distributed. It was found in the stacks of the Tarlton Law Library, University of Texas School of Law, Austin, Texas, and rescued from obscurity. Aside from whatever historical significance these materials may have, they contain a comprehensive discussion of opinion writing in an administrative adjudication.

1. Robert Kramer, then Dean of the George Washington University Law School, introduced Judge Prettyman.

I really do not have any business intruding myself in the live, going organizations or ventures, but I could not resist, really, for two reasons:

In the first place, because this is one of my favorite audiences. I do not know all of you personally, but I sort of feel like I am among old-time friends here. We are fellow fighters in this area, and I could not very well resist the temptation to come down and be with you.

And the next thing is that I am utterly in favor of this program.² I think it absolutely magnificent. I think it is bound to increase and go on, and, as it does, I am absolutely certain it is going to be a major factor in the improvement of government.

As you know, my own view is that the best hope of achieving practical results in improving the operations of the government in these complicated days is in the increased status of the Hearing Examiners in the regulatory processes.

Regulatory processes, of course, cut every phase of our life. You are the people that make the basic decisions on contested points, contested matters, rulemaking, adjudications. If we are going to improve the processes of government in a major way, our best hope lies in improving the stature of the Hearing Examiner.

Now, while I hold that view, I am absolutely convinced—as I suggested to you a couple of years ago—that the Hearing Examiners, themselves, must hammer out the higher status. No use going around asking people to raise your status. That will not get you anywhere.

The way your status is going to be raised is the same way the status of other parts of government have been raised and reached high levels. It is that the people involved, themselves—in this case, the Hearing Examiners—create such a situation, that the people—and that includes government and outside people as well—come to have such a high regard for the work of the Trial Examiners that the status just rises.

There is no way to keep it down once you create that situation. Your status will go higher when your work goes higher in the esteem of the people and the bar and everybody else.

Now, let me say this before I launch into what I really have to say. The views that I am going to express to you and the notions that

2. Judge Prettyman spoke to a program billed as the "Federal Hearing Examiners' First Annual Seminar," held in Washington, D.C., September 23-25, 1963.

I am going to present are my own. This is no review of somebody's study of the subject. I am not going to cite what somebody else thinks about it or what somebody said about it or something like that. You can read all that yourself. What I am going to talk about is based on my own experience—experience in trial and administrative law.

Therefore, you might expect that my personal eccentricities, of which there are many, will loom large in the course of what I have to say.

I mention that so you can discount from the start.

This fact is made plenty apparent by the pitiful little bibliography that is attached to my remarks. There was not anybody for me to cite but myself.

In the next place, and the last in the way of preliminary remarks, I guess what I have to say is eighty-five percent idealistic. It is the way I think it ought to be done, and not the way that I say it is done; not even the way I say I do it, but this represents the way I think it ought to be done.

The subject, as your program indicates, is opinion writing. Now, we are talking about opinions, at the trial level; opinions written by the Trial Officer, similar to the opinions written by a trial judge in a non-jury case in a District Court.

An opinion at this level has preliminary requisites, that is, preliminary essentials. An opinion is not just a vague scratching in a vacuum. It is not just taking up a pencil and a piece of paper and writing a lot of things. Opinion writing at the trial level is not just writing. It is hard work, and you just have to get that in your head.

I repeat, if you are going to write good opinions, if you are going to amount to anything as a Trial Examiner, it takes hard work. But if you work hard, you can do it.

There are effective practices. Just as there are effective practices in laying brick to build a brick wall, there is an effective way to do it. If you do it the effective way, it takes a lot of time and a lot of trouble, but if you do it that way, you will build a good wall, and it is so about writing a opinion.

Now, the two requisites:

The first requisite is that there be issues and that you know what the issues are. In an adjudicatory proceeding there are issues.

I think that you cannot try a case unless you have issues. It sounds like a silly thing to say, but there are some people—really—

there are some people who think you try cases with no issues. You just go in and everybody puts in whatever they want and they talk about whatever they want to talk about and you go along, and after a while, when you get tired, you call it off, and that is it.

That is not an adjudicatory process. You are supposed to try an issue. What is an issue?

Now, this is the first requisite. You are not going to write an opinion—you know, when you start, the opinion is going to be no good—unless you know what the issues are.

Now, a funny thing about that situation is, it is a very—of course, you fellows know better than I do—it is a very difficult job to make lawyers state what the issues are.

That always strikes me as being a very, very peculiar thing. Of course, it is terribly difficult to do at the trial level when you start out: "Well, what are we here to decide? What are you going to present to me for me to decide?"

It is awfully hard to make a lawyer do this. Strange as it is, it is hard to make him do it at the appellate level. I often say it is almost as hard for an appellate court to find out what the question is in the case as it is to decide it after you know what the question is.

Lawyers have excuses always and kind of slant it one way or the other and do not come to the point of the thing.

But the first requisite for writing a good opinion is to have the issues defined in the first place—what the questions are. And the place where you do this nowadays is in the pre-hearing conference.

Now, I think you have had some discussion of pre-hearing conferences, and you know all about that. But, at any rate, in the pre-hearing conference is where you begin to work on the ultimate writing of the opinion. That is the place where you define issues.

And if you are going to be any good as a Trial Examiner, you have got to be very tough at that point. You have got to make the lawyers define what the issues are so that you know what the question is that you are ultimately going to have to decide. To know that in the beginning is one of the requisites of a good opinion.

Now, the second requisite for a good opinion is the facts. The second requisite is the facts.

I am pretty much a nut on this subject. The facts of the lawsuit that is what the lawsuit is. Once we get the facts established, why, then, generally speaking, the rest of it is a breeze. It is the facts that are the requisite to a good opinion. A good opinion in a lawsuit, in

an adjudicative proceeding, is not a law review article on some general subject of the law. It is an opinion on this controversy, this controversy between A and B, between the government and Joe Doaks, and the opinion is directed to that controversy, and that controversy consists of facts. It is premised upon facts.

An absolute essential, an absolute, indispensable essential to a good trial opinion is a good set of findings of fact.

Now, making a good set of findings of fact is a lot of work. Here, again, we stumble into this matter of work; it is a lot of work.

There are certain essentials to a good set of findings of fact, I list three:

One is impartiality, one is completeness, and the other is accuracy.

But the most important of these three essentials is accuracy. That is the absolute, indispensable essential of good findings of fact—accuracy. You will never come into high regard of anybody unless your findings are accurate. You will never contribute to the administration of justice to any measurable extent unless your findings of fact are accurate.

Now, if you have a short case, a case that only takes a day or two, or something like that, it is not too complicated a matter to make up your own mind as to what the facts are pretty much out of your memory and your odd notes.

You have got a right, of course, to reject anything you do not believe. Any evidence you do not believe, you have to reject it. But your findings ought to be premised on all the credible evidence in the record.

Of course, the rule is that your findings cannot be disturbed if they are supported by substantial evidence on the record as a whole, or in some cases, by the preponderance of the evidence, as by the civil rules, unless they are clearly erroneous. But those are minimum requirements. They are not the measurement of good findings of fact. The measurement of good findings of fact is that they are accurate.

Now, as I say, in a short case, you listen to some witnesses for, say, a couple of days, and you know pretty well what you believe, and you write your findings without too much difficulty and it will be accurate.

But in a long case, writing the findings is quite a chore.

I had some experience while I was practicing law, trying my own cases, and I had a method that I followed for preparing proposed findings, and when I went over on the Third Circuit to take evidence with Judge Soper and Judge Mahoney in the *Universal Oil* case,³ I got them to let me use that system over there. Then I wrote the initial draft on "the facts of the case," which is now in the handbook on protracted cases.⁴ I am going to take the time to describe that system for you. As a matter of fact, I have been wanting a chance to describe this for a long time.

When we went over to try the *Universal Oil* case, we took testimony for ten days. I do not know how many witnesses there were, but there were over 300 exhibits, I think, and at the end of ten days (the hearing started on May 10, the end of ten days was May 20), we said "Gentlemen, we would like you to argue the facts in this case. We will give you a little time. Come back in ten days."

So they came back after the May 30 holidays, and argued the case, argued the facts, for three days. Every lawyer in the case—and there were five different groups of lawyers involved—everybody in the courtroom had exactly the same record references before him. The case came to us on about the 3rd of June. On the 6th of July, Judge Soper filed the findings of fact and an opinion which took up twenty-five pages of F. 2d, complete on July 6, which is less than thirty days after we got the case. In the original filed copy of the findings, every finding was keyed to every place where the subject had been mentioned in the record.

It is not an earth shaking idea or anything like that, but here is the way we do it. Maybe some of you have heard me explain this before.

Let us assume in this case that we got daily copy. If you do not get daily copy, you follow the same system except that you must wait until you get the transcript. But let us assume we have daily copy.

You have an indexer, who is a young law clerk or a deputy clerk or a law student, but somebody has got to pay attention and has to do this job. His first duty is to be in on some of the preliminary stuff,

3. *Universal Oil Co. v. William Whitman Co.*, 169 F.2d 514 (3d Cir. 1948), *cert. denied* 335 U.S. 912 (1949).

4. HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, JUDICIAL CONFERENCE OF THE UNITED STATES, 25 F.R.D. 351 (1960).

particularly at the pre-hearing conference, so that he knows what the questions of fact are going to be in the lawsuit.

When he gets the daily copy the first day, he sits down and takes a big-card and a pen, and he opens it to where the first witness goes on, and at the top of this card he writes the name of that witness.

Let us say that this fellow happens to be—his name happens to be Morris. So he writes "Morris" at the top of this card. Then he starts reading Mr. Morris's testimony, and as he reads along, he finds Mr. Morris begins to discuss "the *Universal Oil* patent litigation"—page 26.

Then he reads along, and he finds that the next thing Mr. Morris talks about is the *Crew-Levick* case. So he writes that down, *Crew-Levick*, and the page. He reads through Mr. Morris's testimony, and he writes down on the card every topic that Mr. Morris talks about.

Now when he gets through that first day's work or at some point along, he takes another card. If he has an assistant so much the better.

He picks up the Morris card, and the first topic that Morris talked about is *Universal Oil* patent litigation. So he entitles the first card "*Universal Oil* patent litigation." So he entitles this fresh card "*Universal Oil* patent litigation." Then he writes on this card, "Morris—that is the witness's name—page 26," and puts that in his intended file box.

Then he gets another card, and the next topic Mr. Morris talks about is the *Crew-Levick* case. So he puts the title on the new card, "*Crew-Levick*," and he puts "Morris," the witness's name and then he puts page 26." He puts that card in the box.

Now, he goes along down, and he comes to another witness. We will say that witness's name is Hall. Our indexer opens another witness card for Hall, and he writes on it every topic discussed by Hall. He finds that Mr. Hall finally gets around to talking about the *Crew-Levick* case. As soon as he sees that, he pulls the card headed about "*Crew-Levick*" out of the file box, and he puts on it "Hall, page 150." And then he puts it back in the box. He goes on with Mr. Hall's testimony.

Then, let us say the next witness is Mr. Height. He entitles a card for Mr. Height. He puts down the topics that Mr. Height discusses, and lo and behold, Mr. Height gets to talking about the *Crew-Levick* case. So our indexer puts "*Crew-Levick*" down on Mr. Height's card,

with the page number—and he pulls the "*Crew-Levick*" card out of the box and puts "Height, page 340."

He reads carefully along through the transcript and puts on one set of cards under the witness's names every topic discussed by each witness. On the other set of cards with topic headings, he puts the name of each witness who discussed that topic, with the page number.

Now, the result of that is that at any minute in the hearing, if the hearing lasts two weeks or two months or six months, you know by an instant reference every page in the record where the *Crew-Levick* case has been mentioned and the names of all the witnesses that mentioned it and the page numbers on which they mentioned it. And also you know in the other set of cards every topic that every witness discussed and the pages at which he discussed it.

The witness set becomes of less importance as the case goes on. The topical set becomes of importance, because, as all of you know, in all of these big cases, along about the second or third week somebody says "Why, Mr. Height said that about the *Crew-Levick* case and so on and so on." And some other lawyer will say "Why, he did not say that at all."

Then the other says, "He did. He was on the stand last Wednesday a week ago, and that is what he said."

And the other fellow comes back with, "He said no such thing at all."

Then everybody scrambles in all those little blue books they all have. With this index I have described, in front of them, no such question as that arises. Everybody in the courtroom can turn instantly to exactly what Mr. Height said about the *Crew-Levick* case.

Now the case comes to an end. Let us look at the second index I brought along. Since we were talking about the *Crew-Levick* case, let us see if I can find it here. There it is, "*Crew-Levick* case." Everything that was said during that whole hearing on the subject of the *Crew-Levick* case is indicated on these cards with that heading. The witness that talked about it and the page at which the witness talked about it is right there.

Now, if you are going to write the findings of fact about what the evidence shows concerning the *Crew-Levick* case, you just run through the record and put in a marker at each one of these page numbers shown on the topic card, and when you read that evidence, you will have read everything that was said in the record about the

Crew-Levick case. And you base your findings on all of the evidence in the record.

And when you make such a finding, you cite, not necessarily every one of the pages, but every important place, every important page, in the whole record where that subject is mentioned. Then you have an iron-bound, copper-riveted set of findings.

I advise strongly against digests. I think trying to keep a current digest of the record is a vast mistake, because you characterize the evidence at that point. You ought not do that. You ought not to characterize the evidence or draw inferences until all the evidence is before you.

This index only shows the places in the record where the topic is mentioned and you draw your inferences by looking at all the evidence in the record.

Now, that method is recommended to the judiciary in the *Handbook Of Recommended Procedures For Protracted Cases*.⁵ Professor A.J. Priest, a professor down at Virginia, is writing a handbook of recommended procedures for protracted administrative agency cases as you know. He is writing that for the Administrative Conference. I see that he is on the program tomorrow, and he is going to talk about that handbook that he is writing, and he has a description of that index in his recommended procedures.⁶

Now, there is a lot of work involved in that, but a big case involves a lot of work. If it is not a case where you get—if it is not big enough to get daily copy, if you are well advised, when you get your record before you, don't try to just make up your mind about things. If you will sit down, take a couple of days and do exactly what I have described to you, taking that record and doing that; if you

5. *Id.*

6. Apparently never published. The University of Virginia Law Library website shows that A. J. Priest left his papers to the library. Among them are materials labeled, 1962-1964 HANDBOOK COMMITTEE - RECOMMENDED PROCEDURES FOR PROTRACTED HEARING BEFORE ADMINISTRATIVE AGENCIES. See Virginia Law Library, Inventory of the Papers of A.J.G. Priest (1979), <http://www.law.virginia.edu> (search "A.J.G. Priest"; then select "Priest, Professor AJG - University of Virginia Law School" hyperlink). The Committee on Information and Education, Administration Conference for the United States, published a second draft of this work in 1963, but apparently the work was never adopted in final form.

make cards by witnesses and, from them, index cards by topics; then you start to do your concluding. In this way you start making the findings based on all the evidence just as it is in the record.

Now, that is a mechanical method to achieve accuracy—and accuracy is the object.

Now, let me stop a moment and just remind you that you should keep in mind there are two different kinds of findings of fact, and the way people mix them up is something terrible. You find the basic facts and you find the ultimate facts and they are different.

The basic facts are facts that you find in the evidence. The evidence is so and so, so and so, and I make a finding based precisely on the evidence—that is a basic fact.

Now, with the basic facts before you, you can then draw some inferences from the basic facts, and they are the ultimate facts. Ultimate facts are inferences from the basic facts. Basic facts are directly drawn from the evidence.

The rule as to basic facts is that they must be supported by substantial evidence in the record.

The rule as to ultimate facts is that they must be a rational deduction or a reasonable deduction from basic facts.

You should always have in mind what it is you are doing. If you are making basic findings at the moment, have in mind what it is you are doing and base them straight on the evidence.

And there has to be substantial evidence to support them.

If what you are doing is making an ultimate finding, you are inferring something from basic facts. All I say to you is: Have in mind just what it is you are doing. Do not just infer some, draw some; you will get all mixed up. Know what it is you are doing.

Now, one word about proposals. I very, very strongly advise against having lawyers, especially winning lawyers, prepare findings for you to sign. I am absolutely and totally opposed to that.

I am in favor of having lawyers submit to you proposed findings just for your assistance, if you require in those proposed findings record references that tell you the place in the record where the facts are stated. That can be of some assistance.

This book I now show you came to my desk today. It is the record of a seminar for newly-appointed United States District Judges, just exactly the same thing as you are doing now. It was just held. These seminars began approximately three years ago. This last one was held—I do not know which one this was. They held one this

year in Monterey, California, and one in Norfolk, Virginia, and one in Dearborn, Michigan. I do not know exactly which one this particular one is, but the subject matter discussed in the seminar of United States District Judges is very, very similar to the subject matter that you are talking about. And my successor on the bench, who talked to you this morning, Judge Skelly Wright, made a speech on findings of fact, conclusions of law, and opinions. He made the talk to the District Judges exactly along the same subject that I am talking about to you at this time. I suggest that if you are interested in the subject, you read Skelly Wright's talk to the new District Judges about how to make findings and how to prepare opinions.⁷

He gives the objects, and I was fascinated by how he told them to make findings and how he told them to make accurate findings.

One suggestion that he made here—this is a long story to call your attention to this—one suggestion that Judge Wright made to the United States District Judges, in non-jury trials, which is just what you are handling, is that the judge require the lawyers to submit proposed findings of fact before the trial begins and even before the pre-hearing conference.

Now, I must admit this was a bit of a radical idea to me, but Judge Wright says that he has used it—of course, he was on the District Court bench for 15 years—and used it very effectively. It certainly is a very effective procedure for making the lawyers find out what the lawsuit is about, so that when they go in to actually try the lawsuit, they do not go all over the landscape.

Whether you require them before the trial begins or whether you require them after the trial has ended, the proposed findings by both sides with record references is very helpful.

If the lawyers would try facts, if lawyers knew how to try facts more than they do and if you Hearing Examiners made the lawyers try facts more than you do, lots and lots of problems would be simplified.

It is when you get way off on Cloud 15, arguing about some theoretical problems of law which have no relation to any facts whatsoever, that is when you really get in trouble.

7. See J. Skelly Wright, *The Nonjury Trial-Findings of Fact, Conclusions of Law and Opinions*, Address Before the Committee on Pretrial Procedure, Judicial Conference of the United States (1963), in *SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES* 159.

I will tell you a personal story. When I was practicing law, the war came on, and I had a client who made cough drops, and he wanted to get some sugar. The Office of Price Administration changed its mind two or three times about whether cough drops were candy or not. If it were candy, you could not get sugar. If it were medicine, you could get sugar. They wrote a rule saying some cough drops were not candy, and then they changed their minds and wrote a rule saying some cough drops were candy.

At this point this company came in to see me, and I said to them, "Get a couple of your boys and send them all over town and buy me a package of every cough drop on the market. Every kind of cough drop on the market, I want a package of them."

So they assembled them all, and I had quite a sack full of them. I went down to the hearing, it was a conference, and I went into the conference room, and I just took the sack and dumped it on the table.

I said, "Now, here is a package of every cough drop on the market. If you will take a look at them, you will see that some of them are candy, and that some of them are medicine."

So the conferee looked at them and some of them were just candy. They had some sugar and a little bit of seasoning. Some of the others were real, sure enough doses, prescription doses, of antiseptics, or an anesthetic.

I said, "That is all my case. That is it. Some of them are candy, and some of them are not candy."

Well, he thought that over a bit. He said, "Mr. Prettyman, I have been here two years sitting at this conference table, and you are the first lawyer that has been in here that has presented the case on the facts."

All right, now we come to some more on the opinion. The preparation of the opinion—this is the opinion part now, apart from the facts. We will talk about that.

Legal reasoning generally is one or the other of two sorts.

You either reason from authority or you just reason by a process of reasoning.

The important thing for the Examiner in that respect is that he should know what it is he is doing. If he is deciding his case on the basis of authority, he ought to have that in mind and write an opinion accordingly.

If you are not deciding the case on the basis of authority, if there is no applicable authority or for some other reason and if you are

reasoning out your conclusion, you ought to know that you are reasoning out your conclusion and proceed accordingly.

That is the important part; that is, in the preparation of the opinion, know and be totally conscious, as you think the opinion out, as you work through to your answer, what it is you are doing, whether you are relying on authorities, whether you are relying on reasoning.

If you get the two all mixed up, you are going to be all mixed up and the opinion is going to be all mixed up. Keep clearly in mind what it is you are doing and do just exactly that.

Now when you come to an authority, all authorities—that is, case authorities—have four parts: the facts, the question, the decision, and the reasoning.

The case is authority for the decision of the question upon the facts involved. It is persuasive, helpfully persuasive, for the reasoning by which that authority got from the facts to the decision on the question involved.

Now, those are two totally different things.

This thing of just taking a case and quoting a sentence out of it and saying in such and such a case, the court said so and so is absolutely nothing. We all do it; I do it; everybody does it, but we ought not to do it, unless you just want a phrase or something.

We decide too much litigation by slogans—"clear and present danger," some slogan and just slap in. We don't take time to look and see what the facts are or what the question is, or anything of that sort. That is not the way to do it; that is not the way to decide lawsuits. You should not do it. And if you are basing an opinion on authority, on an authority, look at that authority and say to yourself, "Now, there are the facts. On those facts, this is the question: the court or the commission, or whatever, reached this decision, and the way it reached that decision was by this process of reasoning."

Now, if you have got similar facts and the same question that will be an authority for you. If you have got somewhat different facts but the reasoning is persuasive, it is persuasive in your case, but the decision, itself, is not authority.

Now, the important thing to the Hearing Examiner writing an opinion, again, is the same thing: He ought to know what it is he is doing. When he uses an authority, he ought to be conscious of what it is in the authority he is using and how he is using it.

Just as those are the four elements of an authority, those ought to be the four elements of your opinion, when you are through with it.

When you get your opinion written, you should have the facts, you should have the question, you should have your decision on that question on those facts, and it should recite the reasoning by which you got that decision from those facts. That is what your opinion ought to be.

Now, the composition, the composition of your opinion. The outstanding requisite for writing the opinion -- this is just the writing part, now -- is clarity. There is no other requisite comparable to clarity. Clarity is the thing.

In a sort of second place is simplicity.

But the outstanding virtue of an opinion, of a good opinion, is clarity. How are you going to be clear?

Well the way you will be clear on paper when you write it is to be clear in your own head before you write it. That is what you have to do.

The first thing you ought to do, you ought not to sit down to write an opinion with a pad of paper and a pencil. You ought to sit down at some point, preferably after you have made your findings and your findings are all accurate and down, and you have examined your authority, and then you sit back and say to yourself, "Now, what am I going to say? What am I going to say?"

Think. Make up your mind what you are going to say before you touch that pencil to the paper.

Say, "Well, what I am going to say is this," and then write it down, just exactly what you want to say.

Now, that is not the way you do it. That is not the way I do it, either. Well, what I do, what I find out that I do, is that I start writing, I write and write and write, and then, eventually, the last thing I finally come to is what it is I want to say.

Then, I just take that whole business and tear it up in little pieces and throw it in the wastebasket. It is awfully tough to do, and you may have to go off and take a little leave from the office or the desk, get your mind off it, and come back, but by that time you know what it is you want to say, you know exactly what it is you want to say.

Then you write down on the piece of paper what it is you want to say, and you do not say anything else. Now, you have got a good opinion. That is the way you get a good opinion.

You think it through first, and then, when you think it through, you pick up a pencil and write it down.

I know that is the way to do it. I say I do not do it, but I learned early in the game that that is the right way to do it.

I have a secretary who has been with me for 25 years. She came in one day and said, "Judge, I do not understand this paragraph," in an opinion she was typing. "What does that mean? I do not understand it."

I said, "Well, that is perfectly simple. It means so and so and so and so."

She said, "Well, is that what that means?"

I said, "Yes."

She said, "Then, why don't you say it?"

You ought to say what you mean exactly, and the only way to do so is if you think it out first and know yourself what you mean. You cannot be clear on paper if you are not clear in your own mind.

You write and you rewrite it and you rewrite it and you rewrite it. You do not do that just for literary style either. You do that for clarity. You look at it. That is not clear. That sentence is not clear. Throw it in the wastebasket and write it again.

I do not hesitate about rewriting, rewriting, and rewriting.

We have had drafts as many as ten or twelve in the same opinion.

Do not ever try to be cute in writing an opinion. Do not try to be smart. Try to be clear about what you are saying.

And another thing is: Do not ever, in writing an opinion try to please everybody. If you are going to be a good Trial Examiner, you have got to have a tough skin.

And, you know, the funny part about that is if you do not try to please anybody, if all you try to be is cold-bloodedly accurate in your findings of fact and clear in your opinions, that is all you tried to do, you will please everybody.

That is the way the bar and the public, the people, come to have a high regard for the people that are charged with the terrific responsibility of making decisions in disputed controversies.

Dean Kramer, I am through. I thank you all very much.

(Judge Prettyman received a standing ovation.)

DEAN KRAMER: Thank you very much, Judge. We are most grateful to you, and at this point I think it would be anticlimactic to

start anything else, so I suggest that we take an adjournment for a coffee break.

We will take a fifteen-minute adjournment.
(Whereupon, a short recess was taken.)

PANEL DISCUSSION

DEAN KRAMER: Ladies and gentlemen, I suggest we come to order because we have all too little time left.

Quite a few people have indicated to me that what they would really like to do would be to fire questions at the people up here on the stage.

For that reason, I am going to depart from the formal program.

We have three handsome young men there with writing paper, and they are going to pass this paper to you, and, if you will write your questions out, they will pick them up and bring them up here and we will shoot the questions, as long as time permits, at these gentlemen over here to my right.

If you will just write your questions out, we will proceed in that manner.

While that is happening, I will just say a word about the panel. The chairman of the panel is well known to you. He is the Honorable Frank McCulloch from the National Labor Relations Board.⁸ Then we have Mr. Bertram Stillwell from the Interstate Commerce Commission.⁹ We were to have Mr. Ganson Purcell, but, unfortunately, Mr. Purcell has been unexpectedly called out of town by a death in the family. Judge Prettyman has very kindly consented, not to be a substitute, shall I say, but to be an addition to our panel.

So we have three experienced men up here, and between them I think they can field almost any question you can throw at them.

Let us have your questions and we will proceed on that basis.

MR. McCULLOCH: Dean Kramer, if I can just take advantage of the pause while you are getting the questions, I should perhaps say that I suspect that, as on the platform of any temperance lecture, you

8. Chairman of the National Labor Relations Board during the Kennedy and Johnson Administrations.

9. High ranking staff member, Interstate Commerce Commission.

usually have a man with a red nose who is being a kind of bad example of whatever happens if you do not follow the advice of the man who is giving the lecture. Perhaps this is why I am here on the platform this afternoon.

I am only glad we are talking about your opinion writing and not mine. This is by way of saying that I hope that [I] can field the questions for the most part by sending them in other directions.

It had been my expectation that I would be primarily a semaphore signal here this afternoon, and that the experts, one of whom you have just heard and the other two who were to be your panelists, would be the main ones to share with you their knowledge.

I can only say that I believe I feel the same thing that you feel about the man who has addressed us. I am sure we all wish we could be as fresh as the man who misdescribed himself as "last year's business." And I also think that probably all of us wish that we could, in the same degree that he can, lean over upon our intellectual pasts without falling over.

These are merely by way of introduction in my hope that he and Mr. Stillwell will largely field the questions that you may present to us.

DEAN KRAMER: We have enough to get started. I will read the question and then I will see if anyone on the panel volunteers. If not, I will put the heat or the finger, the moving finger, on one of these gentlemen.

QUESTION: Is it more important to write clear opinions which require much time and care or to write quickly and not so clearly in order to reduce backlogs?

ANSWER: In the first place, you do not have to write a very long opinion on a simple question. On a simple question at the trial level you do not need a long opinion. All you need is a simple, short opinion, clearly stated, and that is it.

Now, then, if it is a question that requires an opinion, you do not reduce any backlog by writing a quick, lousy opinion, because the probability is all you do is to cause the given case to have a flock of kittens, and you have more cases on your hands than you had in the first place.

ANSWER (from another member of the panel): There is not any doubt in my mind that the correct thing to do is to write a good opinion. A good opinion from the Hearing Examiner opens the way for prompt disposition of the case by the agency. Where the opinion is no good, then the trouble starts. The agency has a lot of difficulty of disposing of the case promptly and effectively.

ANSWER (from another member of the panel): One of our Trial Examiners answered a question not unlike this by saying that it should be like a Siamese gown, long enough to cover the salient points but short enough to be interesting.

QUESTION: When one lifts bodily from the brief of counsel a pithy epigram, should he credit it to counsel or may he use it as his own?

ANSWER: That should be addressed to the clergy and not to us.

QUESTION: A speaker at the Trial Examiners' Conference, a former Trial Examiner, said, deprecating long opinions, "One should not discuss issues of law. Instead, let him simply cite a case."

Would any of you care to comment on the suggested technique?

ANSWER: I think he is absolutely wrong. An opinion written by merely citing a case probably is not worth very much. A good opinion is one that convinces somebody of something, that the final conclusion is right. And sometimes it is necessary to discuss the law.

Just to give a reference to a case, and say it holds so and so, without relating it to the ultimate conclusion, seems to me quite silly.

ANSWER (from another member of the panel): I would agree, except that if, perchance, there is a case which is what I would call an authority -- in other words, if there is a case where the facts are similar, the question is the same, and it was decided, which is very unusual, but, nevertheless, there is such a thing -- then, if you state and say, "Relying on this case as authority, I hold so and so," sometimes you can do that.

But just to cite a case and let the reader and the commission and the appellate court find its way around is very bad.

ANSWER (from another member of the panel): I suppose you have the danger of going into so much detail that the major facts almost get lost sight of, the controlling facts. Here again, I suppose one can put in some citations of precedent or things that seem close or to have persuasive value so that the controlling principle may not be lost sight of.

So that I should think, then, that threading your way between the two extremes is, once again, important, but I agree that to have the rationale and give the opinion a persuasive character is essential.

QUESTION: To what extent should agency format for opinions be disregarded in the interest of clarity and simplicity? And, I might add, in the interest of brevity?

ANSWER: Well, I would say that the use of the word "format" is misleading. Of course, any agency has a form of opinion which has grown up over the years. The form of that opinion is not what counts. What counts is what is written in the opinion. The format can be changed, but for certain purposes such as indexing, annotation, and so forth, it probably should be maintained. I do not think that many people experience any great difficulty in following the format of an opinion of a particular agency, the way they write their opinions.

I do find, however, that many of the Examiners find difficulty in writing what should be in the opinion, and they quarrel and say they cannot follow the format of the agency. I think that that has little to do with it.

The format is just the casing around the opinion, around the meat of what the Examiner is talking about, and, as far as I am concerned, he should follow the format and forget about quarreling with it, but spend his time and his effort and his thinking in writing what is within the format of that opinion.

QUESTION: Do you agree that full and fair findings can be made without casting them in the mold of a digest of testimony and exhibits?

ANSWER: Positively yes.

I do not think it is necessary to cast your findings in the mold of a recitation of the evidence. Your findings are what the evidence

shows. I mean, your evidence in the form of testimony, for example, long questions and answers, sometimes is partly revealed in the direct and partly in the cross and maybe again by redirect, and maybe three or four witnesses testify about the same subject matter.

What the Trial Examiner has to do is have all that in front of him and make a finding of what are the facts proved by this evidence. That is the way you ought to do it.

ANSWER (from another member of the panel): This gets back to that other question about the format whether the format is too restrictive.

My own hunch is that the format is selected as a rough way of trying to assure that there is a certain organization of the material, and certainly there can be nothing more important than this kind of analysis and organization of the material, both in terms of the parties whose rights are being decided and in terms of the agency, which, then, must use the opinion and the decision of the trier of the facts in determining whether this should become its decision.

I think the organization of the material is one of the most important factors. I would like to ask some of our own or other Trial Examiners, if they find that this suggested format or suggested organization of the material cramps them and makes it difficult to discharge their basic responsibilities.

This might be a place where others who have had more experience with this than I have could give a far better answer.

ANSWER (from another member of the panel): Maybe I misunderstood what is meant by a format of a report. To me, it is merely the shell around -- the shell surrounding the opinion. It is some form that has grown up in an agency. You start out, maybe, with a syllabus, put in the appearances, state your issues, and end up with a finding and order.

But, within that format, the Examiner is free to rearrange his material and to handle it any way he wants. That, to me, is the thing that should be done.

All the cases do not fall within any set pattern of the way they should be handled within the report. All of them differ. There are a few, I imagine, you can use a simple form for, but in the larger cases that is not so.

But within that form, however, he can express himself any way he wants to.

QUESTION: With the requirements of Section 7 of the APA¹⁰ in mind: namely, to recite all of the facts forming the basis of the Examiner's findings and conclusions, with these requirements in mind, how may recital of the record and evidence be stated with the requisite brevity?

ANSWER: Well, to go all the way back to almost everything I said this afternoon, you have the finding and you have a certain amount of evidence, and half a dozen witnesses testified on the points.

You make up your mind what you believe, what you conclude from that, and then you state that finding.

Now, if you add your record references at that point, you do not have to recite the evidence. As a matter of fact, it is bad to go on and recite the evidence unless there is some point involved in the conflict of evidence that you want to recite, and how come you found this way and not the other way.

But you state your findings. That is what you are supposed to state. You state your findings. Then, if you supply your reader with the record references, he can find what you base it on.

But, as I say, sometimes you want to say, "Now, so many witnesses say this and so many witnesses say that, and I just do not believe this second set of witnesses." And often you will feel called upon to say why. You do not think that they had the opportunity, or something or other, to learn this fact, and, therefore, you take the other set. Sometimes you have to explain things like that.

But I do not hold at all that the recitation of the evidence is a necessary part of the trier's duty. He must make findings. The findings that he makes must support his conclusions.

QUESTION: To what extent should a Hearing Examiner feel bound by the agency's prior decisions when he feels that it may be incorrect or he may personally disagree with them?

10. Administrative Procedure Act 5 U.S.C § 556 (2009).

ANSWER: Well, I think that it has been a practice in our agency for the Hearing Examiners to try to give deference to them, although occasionally they intimate between the lines that they may have doubts about them.

But the Board is going to be passing upon the Hearing Examiner's application of a legal principle, and if the Board is of a certain view, I think that the Hearing Examiner has some obligation to apply the law as the Board has tried to apply it until a higher authority has indicated that the Board is wrong in this matter.

Now, I do not know that this is unduly confining. It may be somewhat difficult in a period of some change. There have been intimations that the Board's own application of legal principles has been subject to some alteration. Yet, that, I think, is an obligation the Board members have to take upon themselves to reverse that past precedent. It is not unheard of in the decisions of the Board or other commissions.

I think that the Trial Examiners are bound, and I know of no other way of getting what Congress has sought for in terms of uniformity of decision across the country if we depart from that. We have a wonderful group of Hearing Examiners in the Labor Board. They are not all of one mind, and they have fine imaginations. They have fertile legal brains. They can hatch theories as well, and in some cases better, I suppose, than members of the Board could. I think it would throw the law into great difficulty if there were not this binding effect of Board decisions upon them until the Board has been changed.

ANSWER (from another member of the panel): Well, I sort of disagree with my colleague here. I think that the Hearing Examiner should feel free to disagree with agency policy or agency precedent, provided that he states what that precedent or policy is, and then gives good reasons for disagreeing.

I have been with the Interstate Commerce Commission for a long while. One of the fundamental principles we have always operated on in the Interstate Commerce Commission is that everyone has a right to express his opinion.

The difficulty people get in is that they are not right when they try to depart from the Commission's policy. But whether they can convince the Commission is another matter; that is pretty hard.

I tell everyone, for heaven's sakes express your own opinion. Back it up, if you can. Good luck to you. But sometimes people are not too successful in what they write, and, therefore, they get themselves a kind of bad reputation with the practitioners.

I still say, and I say it again, that every Hearing Examiner should have the right to express what he thinks should be done with a particular case.

(Applause)

ANSWER (from another member of the panel): The same problem comes up, of course, in judicial circles. It is a very difficult question any way you take it.

Let us take the supreme example. You have a question that has been decided by the Supreme Court. You think the way it was answered is bad. It should not be.

Now, there are a number of ways, there are certain essentials. You can say that in order to bring this matter before the court again or to bring it before the commission again, I am going to decide this contrary to this precedent, and I will state the reasons why I do it, and I do it so that it may come to the commission again for consideration.

Or you can say that I will follow this precedent, but I very respectfully suggest, however, that the commission might be well advised to reconsider this problem, and then give the reasons.

I have done both myself. In courts you will see sometimes one of these things and sometimes the other.

But the important part, of course, you should not do this just offhand. You should have a real, sure-enough basis. The important thing for you is to be very clear about what it is you are doing; that you know what you are doing; you know the precedent and you know whether you are following it or not following it and state it that way, so that the commission or the court will not be misled.

QUESTION: What suggestions do any of you gentlemen have about enabling Hearing Examiners to obtain the assistance necessary to keep the index which Judge Prettyman has mentioned?

And along the same line: Who will take the responsibility for preparing the card index?

And if it is prepared, should it be made available to all the parties in the case and to the court if the case goes to court?

ANSWER: Well, I think that in time perhaps the Congress will recognize the needs of the various agencies for some additional help which can be used to make card indexes and digests of the record and so forth.

But with the President insisting on increased production and the Budget Bureau insisting on giving us no more positions, we are pressed to move our work load, and move it promptly, and still try to supply what little help we can to the Hearing Examiner.

It is purely a budgetary question.

I do not think that the Budget Bureau or the Congress has recognized the problem, ever. They do not want to hear about it. They seem to be satisfied to accept the Budget Bureau position that we do not need any more help. So far as I am concerned, I think the Hearing Examiner should have help. He should have secretaries. However, until we get the appropriations, there is not much we can do about it.

ANSWER (from another member of the panel): Well, I suppose we have difficulty just trying to run fast to succeed in standing still. The conference committee on our appropriations meets this morning, probably this afternoon. If they adhere to the House figure, it will mean a reduction of 50 positions in the Labor Board's total staff.

If they adhere to the Senate position, it may enable us to take on about 10 or 15 additional persons. Yet a work load which we estimated would increase by about six per cent, case intake, has, in the months of July and August, increased over last year by 10 per cent.

So that we are being asked to do not only the same amount, but an additional amount of work, with very little additional funds. In the case of the House, there would be additional funds, but the increases would be completely absorbed by the Pay Act increases and by the in-grade increases and would result in a reduction in staff.

There are things that members of the agency and I, as a Board member, have an obligation to try to interpret to the Bureau of the Budget and the Congress, but I suppose they have so many people trying to interpret the same thing in connection with their work, in connection with the function that they think is important, the public function being performed by their department or by their agency, that, after a time, they become almost inured to it.

However, it is our obligation to continue to present those needs, not only in terms of the needs of an agency, but in terms of the function that needs to be performed, and of the public interest, as well as private interest, under the statutes, which needs to be protected.

QUESTION: This final question:

In your experience, in the decision of protracted cases, have you been able to formulate in your own mind immediately upon the close of the trial what the ultimate disposition of the case should be; and, if so, has your initial view squared with your ultimate disposition of the case.

ANSWER: The answer to that is very easy: sometimes yes and sometimes no.

(Applause)

DEAN KRAMER: I know I speak for all of us when I thank the three members of the panel, particularly Judge Prettyman, who has worked overtime.

We thank you all very much.

(Whereupon, at 4:30 o'clock p.m., the Conference adjourned, to reconvene at 9:00 o'clock a.m., Wednesday, September 25, 1963.)

