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Professionalism: A Call to Excellence

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PROFESSIONALIZATION, EDUCATION, AND
CERTIFICATION OF ADMINISTRATIVE LAW JUDGES

PROFESSIONALISM: A CALL TO EXCELLENCE

by

Gina L. Hale*

Part I. The Professionalization of the Administrative Judiciary

I. Introduction

Administrative Law Judges have long been referred to as the hidden judiciary[1] However, whether we are known as hearings officers, referees, or Administrative Law Judges, it is clear that our impact has been and continues to be felt at every level of American life in very real and fundamental ways.

> In a dissenting opinion, Mr. Justice Robert H. Jackson stated:
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> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart.[2]

Administrative Law scholar, Kenneth Culp Davis, also notes the prevalence of administrative law:

> The average person is much more directly and much more frequently affected by the administrative process than by the judicial process. The ordinary person probably regards the judicial process as somewhat remote from his own problems; a large portion of all people go through life without ever being a

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[1]Felter, *Administrative Adjudication Total Quality Management: The Only Way to Reduce Costs and Delays Without Sacrificing Due Process*, 15 J.NAALJ 1, 5 (1995).

[2]*Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

party to a lawsuit. But the administrative process affects nearly every one in many ways nearly every day.[3]

One true mark of a profession is self-governance, and self-governance can be evidenced in many ways. Where professions have failed to govern themselves and the membership has failed to take part in shaping the profession, legislatures and other similar bodies have stepped in to make the necessary choices for the profession. When individuals who lack a true understanding of the professional's world begin to use their judgment as to professional behavior, the profession often suffers. The history of the professionalization of the administrative judiciary is a history of the growth of the American government and an attempt on the part of that government to become more responsive and equitable.

This paper will examine the development of professionalism within the administrative judiciary and the role Administrative Law Judges can play in shaping that evolution through education, training, and certification.

Administrative Law Judges are part of a noble profession, and each Administrative Law Judge has a role to play in fostering professionalism. As Administrative Law Judges we are part of a system which is as old as organized government and our call to excellence through that sense of professionalism is as timeless as the law itself.

II. Beginnings - Brief History of the Administrative Judiciary

A. A Profession as old as the Nation

In 1789, the First Congress enacted three laws which gave birth to the administrative hearing process.[4] Two of these acts involved the appointment of customs officers to determine duties payable on imports, and the third established a program of pension benefits for disabled revolutionary war veterans.[5]

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[3]K. DAVIS, ADMINISTRATIVE LAW TEXT §1.02, at 3 (3rd ed. 1972).
[4]B. SCHWARTZ, ADMINISTRATIVE LAW, at 16 (2d ed.1976).
[5]Id. at 16-17.

In 1810, Chief Justice John Marshall characterized customs hearings officials as "quasi" judges.[6] In 1838, "inspectors" decided cases involving ship's hulls and boilers and in 1840, "registers" had decision-making power for General Land Office hearings.[7]

"The title of 'examiners' was first authorized by the Interstate Commerce Commission (ICC) Act of 1906. Within a year, the ICC had appointed eight 'special examiners.'"[8] In 1914, the Federal Trade Commission (FTC) was created by Congress and conferred "authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties."[9]

In 1893, Frank J. Goodnow published a book on Comparative Administrative Law. He argued that administrative law had been in existence in both England and the United States long before the term "administrative law" was used. This situation had resulted because English and American legal writers had failed to classify the law.[10] Goodnow wrote a second book in 1905 entitled *Principles of Administrative Law of the United States,* and in 1911, Ernst Freund wrote a casebook on administrative law.[11] In 1927, Mr. Justice Frankfurter wrote a thoughtful law review article entitled "The Task of Administrative Law." Frankfurter applauded Goodnow and Freund but also noted that their work "was for many years unheeded by bench and bar."[12] However, as the nation grew and changed, so too did the acceptance of the role of the administrative judiciary.

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[6]*Id.* at 17.

[7]Palmer, *The Evolving Role of Administrative Law Judges,* New England L.Rev. 755, 756 (1984).

[8]*Id.*

[9]KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE §17.11, at 313 (2d ed. 1980).

[10]GOODNOW, COMPARATIVE ADMINISTRATIVE LAW, 6-7 (1893).

[11]See DAVIS *supra* note 4, §1.04 at 7.

[12]Frankfurter, *The Task Of Administrative Law,* 75 Univ. Of Pa. L.Rev. 614, 616 (1927).

When Roscoe Pound addressed the American Bar Association in 1906, he decried the "prevailing sporting theory of justice." "He argued the various cases then heard by courts could be more efficiently disposed of by administrative tribunals."[13] While not everyone agreed with Pound, the fact that he had stated such an idea gave it more weight. Elihu Root used the term "administrative law" in his 1916 American Bar Association presidential address. President Root noted the importance of administrative law and called for a systematic study of administrative procedure.[14]

> There is one special field of law development which has manifestly become inevitable. 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. . . . 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. . . . A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect.[15]

The role of the Administrative Law Judge has evolved year by year taking on more and more importance. And although President Root called for the

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[13]Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258, 264, 265 (1978).

[14]Root, Presidential Address, 41 A.B.A. Rep. 356, 368 (1916).

[15]Id.

systematic study of administrative law, there was no time for that type of study before the "deluge of regulation" coming from the legislation of the Great Depression.[16] In an effort to manage the myriad federal agencies created in the New Deal legislation, the Administrative Procedures Act[17] was passed on June 11, 1946, and this landmark act forever changed the legal landscape by institutionalizing the administrative state.

The focus in administrative law is procedure, including due process, rather than substance or choice of forum. Administrative law in this sense refers to the "law controlling administrative agencies, not the law produced by them."[18] From the starting point of business regulation, administrative law has expanded to include entitlements and new definitions of "property."

The fundamental difference between administrative law and private law cases is that in private law there is an assumed equality among the parties. In administrative law, the individual is in opposition to an agency of the government. "The starting point is the basic inequality of the parties. The goal of administrative law is to redress this inequality -- to ensure that, so far as possible, the individual and the state are placed on a plane of equality before the bar of justice. This is also a yardstick by which to measure the adequacy of a system of administrative law."[19]

B. "A Role 'Functionally Comparable' to a Judge"

When Administrative Law Judges act, they act with judicial power. "The power to hear and decide cases is judicial power, whether it is exercised by a court or an administrative" tribunal.[20] "It is erroneous to assume that none but courts may exercise judicial power;[21] due process is not necessarily judicial process."[22] Even

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[16]See Palmer *supra* note 6, at 758.

[17]Administrative Procedure Act of 1946, Pub. L.No.79-404, 60 Stat.237 (codified as amended at 5 U.S.C. §§501-554 (1982)).

[18] Schwartz *supra* note 3, at 3.

[19]Id. at 29.

[20]*Id.* at 63 (emphasis added).

[21]Id at 61 quoting *Hunter v. Colfax*, 154 N.W. 1037, 1061 (Iowa 1915).

the United States Supreme Court stated in the famous *Butz v. Economou:*[23] "There can be little doubt that the role of the modern . . . hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge."[24]

III. The Qualities of a Judge

A. Qualities to Strive for and Cultivate

But now that we have earned the right to be called judges, what does it mean to "be a judge?" What are the ideals to which one should aspire? What are the qualities one should strive to cultivate? The National Judicial College publishes a handbook for judges entitled *The Judge's Book* which I think provides some answers.

The opening pages of the book include a quote from *I Too, Nicodemus* by Curtis Bok. Bok states that a judge must have "an enormous concern with life . . . and a sense of its tempestuous and untamed streaming." He warns of the danger of being impatient with trivial matters.

> Show me an impatient judge and I will call him a public nuisance to his face. Let him be quick, if be must be, but not unconcerned, ever. Worse than judicial error is it to mishandle impatiently the small affairs of momentarily helpless people, and judges should be impeached for it.[25]

The book also includes a chapter on the "Qualities of a Judge," which begins with a quote from Ptah Hotep, an Egyptian official writing in 3550 B.C.

> If thou be a leader, be gracious when thou hearkenest unto the speech of a suppliant. Let him not hesitate to deliver himself that

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[22]*Id.* at 61 quoting *Reetz v. Michigan*, 188 U.S. 505,507 (1903).

[23]438 U.S. 478, 513 (1978).

[24]*Butz v. Economou*, 438 U.S. 478, 513 (1978).

[25]NATIONAL CONFERENCE OF STATE TRIAL JUDGES OF THE JUDICIAL ADMINISTRATION DIVISION OF THE AMERICAN BAR ASSOCIATION AND THE NATIONAL JUDICIAL COLLEGE, JUDGE'S BOOK, at iii (2d ed. 1994).

> which he hath thought to tell thee but be desirous of removing his injury. Let him speak freely that the thing for which he hath come may be done.[26]
>
> Listen attentively to the petitioner, for a good hearing is soothing to the soul.[27]

Some of the other qualities, in addition to knowledge of the law, include: graciousness, moral courage, a reputation for fairness, mercy, patience, the ability to communicate, decisiveness, innovation, open-mindedness, brevity, dignity, honesty, and integrity.[28]

The American Bar Association believes these qualities important enough to include in their guidelines for performance evaluations. They expand the list to include: preparation, attentiveness, and control over proceedings; managerial skills; punctuality and prompt disposition of the pending matters; service to the profession, including attendance at and participation in continuing legal education; and effectiveness in working with other judges.[29]

B. Duties of a Professional

Law therefore is an honorable profession, and administrative law judges, like other judges, should strive to be professional. But what is a profession? The term refers to a vocation requiring specialized training in a field of learning, art, or science. A profession has its own code of conduct to police the behavior of its members. Failure to abide by the code can result in sanctions by the profession. All the components taken together create a culture by which the professional community characterizes the members. Character, spirit, and methods distinguish a professional

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[26]*Id.* at 41.

[27]*Id.* at 42.

[28]*Id.* at 41 - 50.

[29]White, *Professionalism and the Administrative Law Judge*, Admin & Reg L. News Vol. 21, No. 1 (Fall 1995). White quotes ABA guidlines.

from an amateur.[30]

Part II. Training, Education, and Development

IV. Learning is Lifelong

A. Identifying the Problem

What is the role of education? In a recent edition of the Washington State Bar News, Attorney Robert Cumbow identifies a problem with current law school education. He notes:

> [A] young lawyer today obtains from law school little or no sense of the foundations of law as practiced and applied in the United States; no sense of the Mosiac, Egyptian, Hammurabic, Roman, Islamic, Ecclesiastical, or Napoleonic law -- and very little sense even of English Common Law, the primary model for our own system. Today's law school graduates have no notion of the philosophical, cultural, and theological underpinnings of law and justice as those concepts have come down to us. They do not know what to make of the concept of Natural Law -- if indeed they have ever heard of it at all. They read cases, few of them more than a century old. They do not read the Book of Job, or Plato's *Republic*, or Aristotle's *Ethics*. They do not read Paul, Augustine, Aquinas, Machiabelli, Hobbes, Montesquieu, Locke Madison, Jefferson, Paine, Thoreau, Marx, or any of the thinkers whose work has informed our notion of individual and social justice.
>
> Sir Walter Scott wrote that 'A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.'

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[30] *Lexicon Webster Dictionary*, (Vol. 2, Delair Publishing Company, Inc. (1981).

> Today's law students are trained to be masons. The law is presented to them not as an institution, a way of life, the embodiment of the ethos of our society, but rather as a tool to achieve whatever end is desired."[31]

B. A Possible Solution

Law schools do well teaching analytical and objective ways of thinking. They do less well in developing "the abilities required to see a case in its context and to take action consistent with the multilayered nature of so many legal situations."[32] An education system that trains only "masons" is inadequate to train future lawyers or to sustain those currently in the profession where the complexities have increased geometrically. Lifelong professional development is one method for assisting Administrative Law Judges as they "adapt to change and prepare for the future."[33]

Dr. Peter Senge, uses the term "learning organizations" to describe organizations that "perceive and foster learning as an integral part of the organizational culture." In his book *The Fifth Discipline: The Art and Practice of the Learning Organization*,[34] Senge states that the "rate at which organizations learn is their only source of competitive advantage," and that "organizations that are heavily knowledge intensive must become learning organizations to survive."[35] Court systems easily qualify as "heavily knowledge intensive" and could benefit from the 'learning organization' model."[36]

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[31]Robert C. Cumbow, *Educating the 21st-Century Lawyer*, Washington State Bar News, Vol. 49, No. 3 (March 1995).

[32]Claxton, *Characteristics of Effective Judicial Education Programs*, Judicature, Vol. 76, No. 1, at 12 (June-July 1992), quoting Wangerin, *Objective, Multiplistic, And Relative Truth In Developmental Psychology And Legal Education*, 62 Tul. L. Rev. 1237-1301 (1988).

[33]Justice Christine M. Durham, Leadership Institute in Judicial Education Opening Session (April 13, 1993).

[34]PETER SENGE, THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION, (1990).

[35]*Id.* at 349.

[36]Durham *supra* note 34, at 5.

Professors Charles S. Claxton and Patricia H. Murrell understood the potential of ideas such as Senge's. With their knowledge of learning theory they explored how and why adults learn as they do. Claxton and Murrell expanded the concept of the learning organization to include organizations involved in judicial education. Through the Leadership Institute for Judicial Education (LIJE) which was co-sponsored by the Women Judges' Fund for Justice of the National Association of Women Judges, Claxton and Murrell introduced the concept of "Education for Development" as a new paradigm for judicial education.[37]

Education for Development "is not so much an approach as a way of thinking about the judiciary and judicial education."[38] In a more traditional legal education program the focus is on content, a specific problem at a specific point in time. Education for Development focuses "not only on helping judges to master content but also on helping them develop the more generalized abilities they need in order to meet the complex demands placed on them."[39] This type of educational program requires a fundamental shift in how we think about the problems we will face in the future. The starting point is a basic understanding of the needs of adult learners.

Claxton and Murrell associate the process of lifelong change with the "Ages, Stages, and Styles" of the adult learner.

> By "ages," they mean the life-cycle stages in our lives that we can typically link with ages. For example, most people leave home in their late teens, marry in their twenties, and retire in their sixties. "Stages" refers to stages of cognitive and intellectual development. 'As we grow older, we go through predictable and

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[37]C. Claxton & P. Murrell, *Education for Development: Principles & Practices in Judicial Education*, (JERITT Monograph No. 3, at 4, 1992).

[38]*Id.*

[39]*Id.*

> qualitatively different stages in terms of how we see the world. For example, we move from relative simplicity of thinking to greater complexity.' Finally, by "styles", they are talking about different styles individuals develop for receiving information and for processing it -- in short, preferred methods of "learning."[40]

Effective judicial education must view the professional as a "whole" person. Where the educational format takes into account the "ages, stages, and styles" of the professional participants, there is a better likelihood that the learning experience will "enhance the developmental process."[41] The goal is not just "informational" teaching, but rather "transformational" teaching. "A metaphor for the former is the process of 'filling' an empty vessel; when transformational teaching goes on, the shape of the vessel itself is changed in some way."[42]

Professor Claxton identifies seven characteristics of an effective judicial education program:

> Planners of judicial education programs need to bear in mind that curriculum can't be developed simply with the "judge as judge" in mind. What is important is the *person who also happens to be a judge*. Good judicial education starts with the realization that, *fundamentally, we are dealing with a person*. This person-centered approach suggests there are seven characteristics of good judicial education programs: a clear and compelling purpose; helping judges think in qualitatively richer ways; helping participants become more competent; promoting active learning; adequate resources; a sound, integrated curriculum; and

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[40]Durham *supra* note 34, at 6, quoting [Claxton & Murrell, *Preparing Ourselves for the Future: Judges, Judicial Education and Adult Development*, March 1, 1992 (unpublished)].

[41]*Id.* at 7.

[42]*Id.* at 8.

commitment and support of administrative leadership.[43]

Traditional learning theory focuses on behavioral theories, while Education for Development focuses on experiential learning. Professor David A. Kolb has pioneered much of the thinking in this area.

"Learning is the major process of human adaptation."[44] When learning is viewed from an experiential point of view, it can be appreciated as a much broader concept than mere classroom learning.[45] This type of learning is to be viewed as a "holistic adaptive process" which "provides conceptual bridges across life situations."[46]

Kolb defines learning as follows:

> Learning is the process whereby knowledge is created through the transformation of experience. This definition emphasized several critical aspects of the learning process as viewed from the experiential perspective. First is the emphasis on the process of adaptation and learning as opposed to content or outcomes. Second is that knowledge is a transformation process, being continuously created and recreated, not an independent entity to be acquired or transmitted. Third, learning transforms experience in both its objective and subjective forms. Finally, to understand learning, we must understand the nature of knowledge, and vice versa.[47]

Kolb designed a model called the "learning cycle" to describe his holistic learning process. Kolb's "learning cycle" has four phases. First, a learner will be involved in a concrete experience then they will process the experience by reflecting

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[43]Claxton *supra* note 33, at 12.
[44]KOLB, EXPERIENTIAL LEARNING, at 32 (1984).
[45]*Id.*
[46]*Id*, at 33.
[47]*Id.* at 38.

on it. From these reflective observations, the learner will develop abstract conceptualizations that can serve as generalizations. These generalizations help the learner integrate their observations and develop theories or principles. Finally, the learner uses the generalizations as their guide to further action by experimenting on their own. That experimentation becomes the basis for a new concrete experience and the process begins again.

> In a judicial education program the learning cycle might be used as follows: [D]irect experience, or activities that involve the learner in the experience either physically or emotionally (such as, role-play, demonstrations, observation, self-tests, films, interviews); reflections on experience, or activities that require the learner to step back and look at an experience, get the perspective of others, or make connections to other experience (such as, journal-keeping, group discussion, papers, Socratic dialogue); abstractions or principles, information from authoritative sources (such as, readings, guidelines, lectures, charts, documents); and application, or opportunities for learners to try out principles or theories in problem-solving (such as, projects, designing plans, problem-solving, practice sessions with feedback).[48]

The administrative judiciary has had only a few philosophers to speak on its behalf and many of those who have spoken out have not been heeded. The administrative judiciary must continue its forward movement towards increased professionalism from the inside out. Critical to this process will be the nature and quality of the education and training developed by and for the membership. It is clear that education is a lifelong process which has the potential to sustain, as well as, transform the individual. This ability to transform or reinvent oneself is a vital

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[48]Durham *supra* note 34, at 21-22.

component in the transformation and evolution of the profession.

Part III. An Eye to the Future

V. **Certification**

In 1995, the National Association of Hearing Officials (NAHO) took a significant step towards the professionalization of the administrative judiciary by implementing a certification program for Hearings Officials and Administrative Law Judges. Through this process, NAHO has begun to define itself and shape its future through its education process. Rather than allow those unfamiliar with the association to define its standards, NAHO has identified ten objectives of the certification program:

1. Develop uniform standards of excellence and professionalism for Hearing Officials/Administrative Law Judges (ADMINISTRATIVE LAW JUDGES).
2. Strengthen the administrative hearing process nationwide.
3. Provide fair and impartial judging to the public and the agencies served.
4. Establish curriculum of core courses to be completed as requirement for certification.
5. Comply with fair hearing requirements and promote due process in hearings.
6. Enhance professional and employer recognition as Hearings Officials/ADMINISTRATIVE LAW JUDGES.
7. Promote credibility and knowledge of the National Association of Hearings Officials

(NAHO) and its programs across the country.

8. Make the process affordable and obtain funding to cover the costs.

9. Coordinate efforts with the National Association of Administrative Law Judges (NAALJ) to develop a joint certification program.

10. Provide opportunities for and increase participation in continuing education by:

    a. Encouraging NAHO Annual Training Conference attendance.

    b. Certifying state agency training programs including core courses.

    c. Developing video and audio tapes and training manuals to sell or rent to state agencies for training in core courses.

    d. Planning and offering one day regional educational symposia at different locations and times throughout the year.

    e. Supporting and encouraging state agencies to grant administrative

> leave for hearings officials and judges who pay their own way to training conferences in this time of tight budgets.[49]

NAHO has taken this bold step towards using education as a means to foster professionalism. This program will be worth watching over time. I believe that the challenge will be to develop an educational system with a holistic approach. In that way the profession will be better able to support its members and move the entire profession forward.

We are members of a profession which has evolved quickly and without the benefit of any systematic theoretical or philosophical underpinnings. Therefore, it will be through the educational systems we develop that we will have a hand in shaping our own evolution. That is the essence of professionalism and the challenge for us all.

[49]National Association of Hearings Officials, *Summary of Proposal for Certification of Hearings Officials & Administrative Law Judges*, (unpublished).