How to Convince an Agency

A Handbook for Policy Advocates

James V. DeLong

FOR BETTER OR WORSE, ours is a society that does much of its business through paid advocates—people whose function is not necessarily to seek truth but to make the best argument they can on behalf of a particular interest. This is especially true in Washington, where there is a major industry involving efforts to extract benefit for, or prevent harm to, particular constituencies and to adjust the competing claims produced by these efforts.

When one thinks of advocacy one generally thinks of lawyers and courtrooms. But as the government has grown—as the number of areas of national life in which it is involved and the intensity of that involvement have increased—the proportion of professional advocacy oriented toward questions of government policy rather than of law has expanded. While the decisions may appear "legal" in the sense that they involve some statute and are implemented through formalized rules, they are fundamentally questions about what a government agency *should* do to promote some general and often amorphous goal or to reconcile conflicts among competing goals, not about what it *must* do under the statutes and precedents.

At first, this distinction may appear pedantic, but it is in fact both necessary and important. A body of principles for legal advocacy has been built up over generations of experience in courtroom litigation. These principles range from the formal canons of statutory construction to doctrines about the appropriate use of judicial precedent to folk wisdom on persuading a jury. To a very large extent, legal education is a process of absorbing these principles to the point where their application becomes automatic. In the words of Yale Professor Anthony Kronman (from his recent *Yale Law Journal* article), "the most important skill the law teacher imparts is the skill of advocacy, the ability to construct and defend a convincing legal argument."

A legal argument is not the same thing as a policy argument, though, and as advocates become increasingly concerned with the policy arguments, a problem arises: the principles of legal advocacy are only partially applicable to policy advocacy, and in places where they are not applicable they can be misleading and downright harmful. Even so, when a problem

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shifts to the policy arena there is a lawyers' reflex that "advocacy is advocacy"—and this invites wholesale importation of litigation principles into that arena.

This is not universal, of course, because many lawyers learn through experience that policy making is a game played by different rules. But they learn it by experience and apprenticeship, not formally or systematically. Nor is there relevant formal and systematic teaching in other disciplines, largely because these lack the orientation toward advocacy that characterizes the bar. Economists, for example, tend to think of establishing truth by rigorous argument within the confines of a particular set of premises, and public policy analysts see themselves as decision makers or (at the very least) special assistants rather than advocates.

But there are some general canons for advocating policy to a government agency, and what follows is a suggested preliminary list. Some of these canons are strategic and some tactical. Some are addressed to the advocate and some to the client. The common denominator is that all are based on the assumption that the policy advocate, like the litigation lawyer, is dedicated to furthering the interests of his client, so the emphasis is on advocacy, not on disinterested analysis or attaining any abstract ideal of public good.

Concentrate on the Agency's Problems, Not on Your Own

That an agency's policy or proposal causes you a problem may be a matter of regret to the agency staff, but this does not make it a matter for action. Most policies cause trouble for someone and that the particular someone objects is rarely cause for surprise or for changing course. It is much more persuasive if you can show how the policy will damage the interests of the agency itself—how it will fail to promote the agency's mission, inhibit attainment of the agency's goals, damage other agency purposes that have not received adequate consideration, or cost the agency long-term legitimacy or political support.

This does not mean you should deny or conceal your own self-interest or pretend that your only desire is the public good. Doing this would only make the agency staff suspicious. But solution of your problems is best depicted as a natural by-product of the agency's solving its own. Even if the principal cost to the agency is that the action is so damaging to you that you must fight it to the bitter end in the agency, the courts, and Congress, it is best to explain clearly why this is so (to avoid appearing purely obstructionist) and to propose solutions that would mute your opposition.

Concentrating on the agency's problems is more than a simple rhetorical device. It improves your understanding of the agency's position and highlights issues that are secondary from your point of view but crucial to the agency's. This not only increases the number of possible arguments, but also keeps you from pushing when you need not or should not. It also helps identify those situations in which you are being harmed to no good agency purpose—cases where the agency can eliminate your opposition without compromising its goals.

Understand Bureaucratic Processes

In a lawsuit, a judge personally hears the evidence and argument and reaches a decision with the help of, at most, a clerk. Decisions on format, on balance between written and oral argument, and on the nature of evidence introduced are all influenced by the fact that everything is ultimately funneled through one intelligence. In contrast, government policy processes are fragmented both horizontally and vertically, and decisions on different aspects of a problem may all be made by different people. It would not be unusual, for example, for a policy to be made through the combined efforts of units for operations (program knowledge), policy analysis (economics), technical review (scientific issues), and general counsel (law), with only cursory review by higher levels. Even when an issue is important enough to receive serious attention higher up, the decision will be based primarily on material prepared by these specialized units rather than on raw data and argument submitted by outsiders.

These facts of life are important in a number of ways.

Focus and format. There is little point in arguing law to the economists, economics to the scientists, and so on. The recipient of the argument is not likely to be interested, and

even if he is he usually cannot respond. A characteristic of internal division of labor is that within its area of expertise each office gets to make decisions that are binding on its peer units, and these decisions will rarely be reversed, even by hierarchical superiors.

This has an effect on the form of one's presentation. The government itself tends to move decisions through a format that includes an executive summary (to allow higher officials to hit the high spots), a synthesis (to bring the pieces together into a coherent story), and a set of appendices (to discuss technical issues in more detail). This format is often worth copying because it meshes with the agency's own processes. Each office can get a quick idea of the general picture, then concentrate on the issues within its sphere of responsibility.

Intra-agency conflicts. Of course the various offices do not always agree with each other, since each thinks that its own concerns should be the driving force behind agency policy. The good advocate knows and understands the implications of this for his presentation. Suppose, for example, that you have excellent economic arguments, but know that the operations unit is powerful enough to ignore the economists and, further, that it regards all economists as a bunch of woolly-headed academics. It may be worth considerable effort to translate your economic arguments into terms more in accord with the predilections of the operating unit (or to find an operating argument leading to the same conclusions), an effort that the agency economists themselves might not make. Or, alternatively, you may want to spend money to provide empirical support for the agency's office of economics so as to make it impossible for the others to dismiss the arguments as too ivory tower. Or you may concentrate on understanding why the operating office is powerful, which means why it is usually supported by higher levels of the agency, and on calculating how to convince these higher levels that your case should be an exception.

The role of oral presentations. Bureaucracies move primarily through paper. Oral presentations, ranging from meetings to hearings, have their uses, but you should recognize their limitations and not place undue weight on what you think you have achieved.

There are two problems with oral discussions: first, because the decision process is diffused, the relevant decision makers are seldom all in one place; and second, most government decision processes work slowly, and the impact of even the best oral presentation quickly fades.

You should also remember that, while there is wide variation, government people are notorious for not making memoranda of conversations and for failing to tell colleagues or subordinates what happened. Your significant points should be put on paper and left with the official. If significant points are made orally, you should do a "memcon" and send a copy to the official. This should be scrupulously accurate—nothing is more irritating than receiving a memcon that distorts what one said—but diplomatic: if the official called the boss a fool, omit it.

For the most part, meetings are opportunities to gain information rather than give it. If you ask, you will find that officials are usually candid about their working assumptions, about issues that remain open, and about the internal lineup of forces. In addition, meetings let you try out arguments so that you can improve the more formal presentations. A point you might have regarded as obvious may turn out to be hotly debated, and a point you thought extremely touchy may give the agency no difficulty.

Hearings present different problems. Anyone who has worked with transcripts knows that oral statements are usually an inefficient way to present information. However, some people like to receive information by ear rather than by eye. If the relevant decision makers are going to attend the hearing, and if they want full oral presentations, they should be accommodated. Otherwise, the main function of a hearing will often be to test information, not to unveil it: to give you a chance to cross-examine opposing witnesses, especially experts, and to give the agency or outside opponents a crack at yours.

The hierarchy. Another consequence of the bureaucratic structure of agencies is that, unless (1) the issue is of obvious major import, (2) you are able to exert extraordinary political pressure, or (3) the agency in question is in the middle of a top-to-bottom policy shift, you will get decreasing time and attention as an issue moves up the agency ladder. Moreover (as already noted), as the issue moves up, there will be less willingness to overrule lower-level deci-

sions. High government officials are well aware how tenuous their grasp of an issue may be, and of the continuing problems they create for themselves if their staff perceives them as willing to engage in quixotic reversals of careful staff work.

Do not be fooled by the soothing noises an official makes in response to your complaints about his "unreasonable" staff. According to some historians, Russian peasants being sabred by Cossacks used to say, "Ah, if the czar only knew, he would save us!" Well, the czar hired the Cossacks, and you better never forget it. In the government context, the official cannot fire the staff and has to live with it intimately, which may be worse.

As a general rule, you should broaden your presentation as you move up the hierarchy. The point to make is not that the higher levels should reverse the lower on technical issues that the latter have studied carefully (even if they should they almost certainly will not), but that the staff's analysis omits important considerations that are outside its expertise. If you *must* argue for outright reversal on a technical point, the opposite principle applies—try to narrow the argument. The superior will not do the technical analysis over again, but if you can give him a crucial question to put to his subordinates, he will probably ask it.

If one of the exceptions mentioned at the start of this section applies, of course, you can expect greater attention and you will have greater flexibility. The general rule of thumb remains: invest some effort in understanding the nuances of the hierarchical structure and adjust your presentation accordingly.

Specificity. You are trying to get people acting at different places and times to reach agreement, and the more specific your suggestions about what actions the agency should take or what language it should put in a rule or policy statement, the better your chances will be.

Know the Decision Makers' Starting Point

Even though the ideal is often not attained and the litigator must be aware of judicial idiosyncrasies, a good judge strives to approach every case with an open mind and decide the issues on the basis of the record developed in the particular proceeding. The judge is limited by precedent, but he is not supposed to have a personal investment in the precedents and should listen carefully to argument that they should be overruled, limited, or distinguished.

An agency's starting point is very different. It has probably been worrying about the issues for some time and has either a history of dealing with them in the past or some tentative conclusions as to how they should be dealt with. In some cases, a decision is all but final before notice of any proceeding is published, and the proceeding may be conducted solely to comply with legal requirements or as a last fail-safe check to be sure there are no major considerations the agency has overlooked. Most important, the agency staff's sense of collective commitment to past conclusions and present policies is likely to be quite strong.

The first principle to be derived from this seems obvious, but is often ignored: know what is going on and where you are in the process. Is the agency's thinking actually at a preliminary stage so that it wants to gather all sorts of insights and information? Or has the decision already been made, and is the proceeding actually a charade? Is the agency in doubt on one or two points? Is the agency in a policy flux in which its preconceptions and general approaches are genuinely up for grabs, or is it simply applying or extending a settled policy which it has no intention of reconsidering? These questions should shape your presentation, and most government officials will be glad to tell you the answers if you call them. But they will not call you.

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The second principle seems even more obvious, but is even more often ignored: do not insult the agency staff. Too many presentations adopt the tone that only people who were stupid, malevolent, or both could have developed the proposal at issue, and that the com-

menter is, with pained weariness, going to try once again to set the agency staff straight. This approach is seldom justified. Even if a proposal is in fact totally wrongheaded, it is usually because the agency has been given a contradictory or impossible task, or because the staff is inadequately trained for the job it is expected to do, or because the instructions were unclear.

Fairness aside, though, insult is a mistake because it is counterproductive. Again, the contrast with litigation is instructive. Some parts of the litigation bar have a tradition of treating an opponent's arguments as so ridiculous that only a moron would make them. But in that context the argument is made to a neutral judge who knows the rules of the game and may even be amused by imaginative vituperation. A similar tone adopted in dealing with an agency is addressed to the very people who will, in all probability, be the initial reviewers of the comment. They will not be amused and are likely to spend considerable effort working up reasons for rejecting the comment summarily. An advocate can become so abusive that agency people will lose sight of the merits of the proceeding in their strong desire to avoid giving him anything at all.

Moreover, an insulting approach actually makes it more difficult for superiors to reverse the staff decision that has been the target of the comment. To embrace the position of the commenter puts the superior in the position of seeming to agree that the staff work is not only erroneous but incompetent or malevolent. This requires the superior both to disrupt relationships with his staff and to admit that he personally has been an incompetent supervisor—an admission that will in turn cause him trouble with his own bosses.

As a rule of thumb, the major effect of insult will be to cause the agency to close ranks against you.

Deal with the Political Environment

To private parties, agencies often seem like arbitrary powers unchecked by any effective oversight. To themselves, agencies appear extraordinarily vulnerable to media reports of scandal or inanity and to raids on their authority or budget by the White House or Congress. When you argue that an agency should make the decision you favor, you must consider how that decision will appear to the other powers that can help or hurt the agency and how you can defend the agency directly or provide it with material with which it can defend itself.

In this connection it is important to realize, especially for private industry in a populist era, that one may be unloved. Even if Octopus, Inc., presents a sound position that, in the agency's view, would clearly promote the national interest, the mere fact that the position is presented by Octopus, Inc., can make its adoption difficult.

The best solution to this is obvious, if not always easy. Find other independent groups that have taken the position—academic analysts, independent think tanks, public interest groups, labor organizations, other agencies, states, foreign governments—and emphasize that the agency should adopt the position of these groups, not the position of Octopus, Inc. In fact, it may be worth large compromises in one's position to obtain this broader base.

The political nature of the environment has other ramifications. Partly for political reasons, partly because of the problems of uncertainty discussed below, agencies like to achieve a consensus on issues and policies. If they cannot bring everyone into the tent, they will try to get enough disparate groups together so as to make the remainder appear unreasonable. If the interested parties are too far apart for even partial consensus, then the agency will try to give everybody something—though sometimes that something is no more than the assurance that arguments were carefully considered before they were thrown out.

This thirst for consensus forces a number of difficult judgments. How much of its original position will the agency give up in order to get you in the tent? How much of their original position will your opponents give up? How much will you pay to get them? Are you in danger of being the one frozen out, or can you freeze out the opposition? Are you in a situation akin to standard split-the-difference bargaining so that the more reasonable your opening position the worse you end up? Or is this more like a case of arbitration in which each side submits its best offer and the arbitrator picks one or the other? Can you adopt a "yes, but" strategy in which you endorse what your opponents say but add some new factors, thus

enabling the agency both to agree with them and decide for you?

Accept the Limits of Legal Materials

This point is especially important for lawyers who become policy advocates. Like people in any other area of intellectual endeavor, lawyers sometimes treat their field as a system of self-contained logic uninfluenced by analyses or approaches from outside its bounds. Thus there is some tendency to make policy arguments strictly from such legal materials as the statute, legislative history, and judicial precedents, even when these materials may be ambiguous or contradictory on the relevant policy choices.

To policy makers who are not lawyers much of this argument is both unconvincing and irrelevant. They would readily concede that the legal materials constrain agency decisions and that the policy ultimately formulated must not be inconsistent with legal requirements. But they do not regard these materials as providing any particular insight into the process of policy formulation. Quite the contrary, in fact. People in other fields often regard legal doctrine as an arbitrary and irrational irritant and expect their own lawyers to set things straight.

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They will not adopt what they regard as bad policy because of legal argument unless directly informed by their own lawyers that there is no alternative.

Finespun legal arguments are wasted in this context and may actually be counterproductive. The assumption of the policy makers may well be that the advocate has no *good* arguments and is thus forced to rely on legal technicalities. The finer points of the law should be saved for the agency general counsel's office or for a reviewing court. The best approach is to explain, first, why what you want is sound policy, and only second why and how the law not only allows but compels it.

Do Not Ask the Impossible

There is no percentage in asking the agency to do what it cannot do. Thus, while one should not overemphasize legal argument, neither should one ask the agency to ignore its governing statutes or give up its basic reason for existing. Of course, few advocates would ask the agency to do the impossible in such an obvious way, but many ask it in a different form. They urge the agency to bind itself to inaction unless and until it creates a perfect information system and resolves all uncertainties.

To be sure, agencies often act on unnecessarily bad information, but advocating the best may in these cases be the enemy of attaining the good. The agency people know that neither they nor anyone else can achieve perfection in such things, and they will conclude, usually correctly, that the advocate is trying to put them in that most-dreaded of conditions—paralysis by analysis. Such arguments are not read.

An industry representative should also be aware that in the end the agency is likely to ask industry for the data he claims it must have to regulate. In trying to place an impossible information burden on the agency, he legitimizes a costly and intrusive level of demand on his own clients. There are realistic ways in which agencies can improve their information, and industry has a legitimate complaint when these are not used, but the persuasiveness of the case is vitiated by pushing it too far. Again, specificity is the key: point to real data bases and analytic devices, not ideal ones.

Use the "Basics" of Policy Analysis

For twenty years—ever since Robert McNamara and Lyndon Johnson began planning-programming-budgeting—the White House and the Executive Office of the President have been pressuring federal agencies to improve analysis of their policies. The same period has seen an explosion of academic interest in policy analysis. Change has been slow, but one cannot talk about many topics now without some knowledge of market behavior, cost-benefit and cost-effectiveness analysis, risk assessment, organization behavior, collective action problems, and game theory. Economists, lawyers, organization theorists, physical and political scientists,

MBAs, and public policy Ph.D.s have all become involved and the amount of off-the-shelf academic hardware available is increasing steadily.

No one can be expert on all these topics, but the good policy advocate, like the good medical GP, must at least know the rudiments of the approaches and have some idea when his case would benefit from specialized advice. He should also know the appropriate languages well enough to be sure they are used correctly in his presentation. Creating an impression that one has picked up a few words of jargon and thrown them in randomly in the hope that the decision maker will be as ignorant as the commenter is a quick ticket to the wastebasket.

Using the techniques of policy analysis is a delicate matter because their use within the government varies so much from one agency to another and from one unit to another within agencies. As noted, there is no point in making a technical argument to a unit whose personnel cannot follow the reasoning or do not believe in the approach, and there is no substitute for knowing the realities of the internal workings of the agency. In the current climate, moreover, the upper levels of an agency and such external reviewers as the Office of Management and Budget and the President's Task Force on Regulatory Relief may have more interest in policy analysis than the agency's operating staff, and you may want to tailor your presentation more toward eventual appeal to the upper levels than would usually be the case.

Two points made above deserve special emphasis in this context. First, professional policy analysts recognize that their techniques are partial approaches which produce intriguing insights but little certainty. It is particularly easy for the naive advocate to ask for the impossible—to urge, for example, the most perfect cost-benefit analysis in history as a prerequisite to agency action. Often the agency's major problem will be how to use the techniques effectively, given their inherent limitations and the applicable information problems. Good solutions to this problem will be taken very seriously; efforts at overkill will not.

Second, while detailed substantive discussion of policy analysis is beyond the scope of this article, one issue deserves mentioning here. An important characteristic of many regulatory policies is their impact on the distribution of wealth, even though redistribution is not part of the agency's formal mandate. Agency officials are often reluctant to face this problem because it complicates their lives enormously. Nonetheless, forcing the agency to confront the fact that its policies will injure people it has no wish, and possibly no right, to injure can be useful.

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Here, again, some honesty and sophistication in the analysis is called for. It is not persuasive to argue that a policy has a favorable cost-benefit ratio because *you* get the benefits and somebody else pays the costs. Nor is a reflexive "the consumer pays," unsupported by respectable analysis, likely to convince.

Treat Uncertainty Appropriately

This area probably presents the greatest differences between conventional legal advocacy and policy advocacy.

A dominant characteristic of a lawsuit is that a decision must be reached and even the most intractable uncertainties must be resolved one way or the other if resolution is necessary to the decision. The law usually excludes the possibility of delaying decision to seek more information. Important uncertainties in litigation involve past events, and one might as well settle them now because all the information that is ever likely to be available is available now. In addition, specific parties have presented claims, and a decision to delay is automatically a decision for the party favoring the status quo. Thus judges have no choice except to go ahead and judge as best they can.

One should distinguish two kinds of uncertainty in litigation. The first concerns the facts —the reconstruction of what actually happened. The law has developed a number of mechanisms for deciding such issues, ranging from the rules of evidence to the allocation of the burden of proof on various issues. Much of the form and content of legal argument is ori-

ented around these mechanisms. For the most part, these rules are well-crafted to meet the needs of their context, but because that context is the opposing contentions of two sides there is little room for expressing shadings of probability. If A's contention is slightly more likely than B's, then that edge will be treated as if it were a certainty and the case decided for A. In civil litigation, for example, if there is a 60 percent chance that the defendant ran the stop sign, and a 40 percent chance that he did not, the law regards his failure to stop as "a fact" established by a "preponderance of evidence." For further purposes, such as assessing damages, it treats that fact as 100 percent certain.

The second type of uncertainty involves the law itself. Once the facts are established, what legal principles apply or ought to apply? Analysis of the nature of this decision quickly develops metaphysical characteristics. It may involve quasi-factual inquiry into the state of mind of the legislature that passed the rule, the parsing of prior cases to extract relevant principles, the use of analogy, and an intuitive effort to balance the interests served by the different possible rules. It is sufficient to note that, once again, because a decision must be made, the system has no choice but to treat what may be a very marginal probability as a certainty.

Furthermore, when the appeals are over, the decisions made on both the facts and the law are final as between the parties to the case. They cannot relitigate and try to do better next time. Even for nonparties, the doctrine of *stare decisis* dictates that the resolution will have at least a strong presumption of correctness in future cases involving similar questions. Thus the litigation lawyer lives and dies by the great realities that what his side wins cannot be taken away and what his side loses cannot be retrieved; that it is worth an extraordinary investment to move the probability of his contentions across the tilt line of 50 percent but worth little to move them, say, from 0 to 10 percent, or from 90 to 95 percent; and that the system *will* produce a decision, even if it is sometimes long delayed.

Dealing with uncertainty is equally important to policy formulation and policy advocacy, but the choices available are different and the appropriate ways of dealing with it are therefore different as well. Policy choices are largely concerned with what future events ought to look like, not with what past events did look like, and are inherently even more fragmentary and subject to error than historical reconstruction. Moreover, there are no natural limits on obtaining information. There are always more studies that could be done, more experiments that could be conducted, and more alternatives that could be explored. And how much finality to give to a decision is itself a policy choice.

Because of these differences, policy makers should not act like judges, and most people involved in policy making become skeptical of their ability to resolve uncertainties in any truly satisfactory way. They emphasize a mode of approach that accepts the existence of uncertainty as the dominant fact for purposes of policy making and concentrates on reaching decisions that will do the most good (or the least harm) given the various probabilities about the ultimate resolution of the uncertainties. To the extent they can avoid it, competent policy makers never convert a marginal probability into a certainty and thereafter treat it as "true." They analyze whether additional information is likely to be worth its costs, look explicitly at the price of delay, examine the consequences of error each way, and to the extent possible make tentative and revocable decisions that can be reexamined in the light of experience. Finality is often a trap to be shunned, not a value to be embraced, and final closure on policy is reached very cautiously.

These differences between litigation and policy making have profound implications for policy advocacy. The first rule is to think about the game you are playing. While the principles noted above are those adopted by competent policy makers, the government, unfortunately, has more than a few who do not fall into this category. They regard policy proceedings as lawsuits, act as though marginally probable things were 100 percent certain, thirst for definitive decisions, and do not seek additional information. In some situations, you may want to educate the agency on the ABCs of uncertainty.

On the other hand, the government's bad decision may be your good decision. If the agency is willing to resolve the irresolvable on the basis of fragmentary evidence, the advocate may want to encourage just such a course when he thinks the decision likely to go in his favor. But this can be tricky. If the advocate misjudges the agency, the inappropriate treatment

of uncertainty is another route to the wastebasket. In addition, given that policy judgments are rarely final, winning on a dubious argument does not have the conclusive quality that it has in a lawsuit. In choosing the best tactical posture, the advocate must think seriously about the long-term consequences if and when the agency realizes that it has been snookered. Unless delay is of extraordinarily high value, it may be better to try to educate the agency even if this creates short-term problems.

If the decision makers are good, the advocate's job is easier in a way, inasmuch as this avoids the intellectual schizophrenia inherent in making bad arguments or in putting good ones into a bad form. But it means the advocate cannot think like a litigator, because the value of investment in resolving or creating levels of uncertainty is very different. For example, in litigation it may be worth a lot to show that the probability that your chemical caused an environmental disaster is only 40 percent, not 60 percent. In policy advocacy, moving this distance means nothing: a 40 percent chance of disaster is still intolerable. On the other hand, in policy advocacy, it may be worth a lot to show that a risk is 10^{-6} rather than 10^{-5}, a difference that is rarely crucial in litigation, or, at the other extreme, to show an agency that the risk of disaster from its policy is not 0 percent, but 10 percent (or even 1 percent).

The crucial generalization is that the burden of proof is a variable that changes with the issues and the kinds of risk involved. The advocate must analyze the nature of his burden of proof and whether he can meet it. If he cannot, then he must think about what other considerations can be brought into play to change it.

A special point should be made about finality in policy choices. An advocate should think in the same terms as the agency officials—deciding when to try to delay decision (pending the receipt of more information) and when to try to reach closure. He should also recognize that lack of finality makes it possible to promote incremental or experimental shifts in policy. If the advocate's maximum position is too much for the agency to accept, he might propose experiments designed to prove or disprove the validity of his position. Of course, it is important he do his utmost to be sure the experiments work. Otherwise, those within the agency who have argued for them are likely to be discredited and policy is likely to lurch backward, even if the experiment was ill-designed, did not go far enough, or was not tried long enough.

On the other hand, it will frequently become clear that the agency is tending in directions adverse to the advocate's position, and that the best arguments have been heard, understood—and rejected. In such circumstances it may be possible to take advantage of the lack of finality inherent in policy decisions and adopt a strategy of damage limitation. If the agency can be persuaded to try the opposing policy on an experimental basis, there is some chance that it will fail, and the issues will be reopened. In fact, there are situations in which any policy will probably fail and it is better to have the opponents' tried rather than one's own. The untried course may win by default.

If the policy you oppose is going to be tried, it is important that the agency make its experimental nature explicit and develop criteria for its evaluation. Agencies are often slow to evaluate settled policies, especially if such evaluation might make important units of the agency look bad should the policy turn out to be wrong. But proponents may be willing to build in an evaluation process in exchange for a muting of internal opposition. In the longer term, it is easier to obtain a reversal of policy if its proponents within the agency have committed themselves to it only as an experiment and do not feel seriously threatened if the experiment does not work.

... given the lack of finality in policy decisions, how you lose can be more important than whether you lose....

To sum up, given the lack of finality, how you lose can be more important than whether you lose, and you should not pursue ephemeral chances of victory at the expense of effective damage limitation.

Know When These Principles Do Not Apply

There are situations in which the law is so clearly against you or an agency so antipathetic to your position that no policy argument will

do any good. In such cases you may simply have to recognize that you should take an intransigent position and try to reverse the agency in the courts or in Congress.

But you should consider carefully before reaching this conclusion. If the governing statute precludes your position, your chances of achieving legislative reform will be improved if the agency itself agrees that change is necessary. This agreement is likely to be obtained only through good analysis in support of your position. In addition, the statute may not be as completely against you as the agency says. An agency sometimes uses the "we would like to be reasonable but the law won't let us" approach as a ploy. It may actually have considerable autonomy but hope to avoid political heat for the consequences of its policies by arguing that its hands are tied. A change in attitude may open up new vistas of discretion.

If the agency is so hostile that it is impervious to your arguments, you should consider the interplay between your efforts at the agency and efforts at OMB, in court, or in Congress. Any case in a reviewing forum—whether that forum is judicial, legislative, or executive—is helped if you avoid creating the impression that you are objecting to the agency policy simply on the grounds of legal technicalities or because it is inconvenient or costly to you. In judicial review, especially, you will need legal doctrine as a peg, but, as any legal advocate knows, an appealing case from an equitable standpoint—or in this case from a policy standpoint—vastly improves your chances. At the least, it improves the chance that the reviewer will bounce the matter back for a better explanation as to why the agency rejected your arguments. In itself, this can force the agency to pay attention to them.

Nonetheless, all rules have exceptions, and so do these.

Know Thyself

The party trying to influence an agency policy decision is not normally an individual but an institution with its own organizational structure and ethos, and these internal organizational characteristics often make good policy advocacy difficult to engage in. For example, most of the rules discussed here involved some judgment on the part of the advocate, or of the person instructing him, as to the organization's real interests and, more important, what parts of the organization's maximum desired position should be subordinated or compromised to obtain the best overall result.

The same thing is true in litigation, of course, but there are two important differences. In litigation, the looming menace of trial forces a realistic appraisal of one's own case, especially when it is time to talk settlement. Policy proceedings generally lack this decision-forcing mechanism. In addition, policy proceedings are often more complex, the impact of any one's participation more attenuated, and the real stakes and possibilities harder to identify.

All this makes it difficult for advocates to form the necessary judgments, especially if they are outsiders hired for the occasion and are not steeped in the organization and its problems. Moreover, if the advocate can make the judgment, he may be reluctant to do so. Few policy advocates ever get in trouble by taking an intransigent position in support of their client's antiregulatory fantasies, even if the result is worse than might be achieved by a different posture. Winning and losing are ambiguous concepts in policy advocacy, and the advocate is always vulnerable to second guessing about whether he gave up more than necessary in the course of the proceeding. Failures due to unrealistic intransigence are easily blamed on the agency's "refusal to listen."

Any organization with a serious desire to influence agency policy in ways other than through its PAC must think through the internal necessities of effective participation. This may mean simply that someone high enough in the organization to make decisions must be involved in the process and must understand the options and the uncertainties involved. If policy advocacy is left entirely to outside mercenaries or lower-level staff, it is quite likely that most of these principles will be continually violated, simply because the people involved lack the authority to give up one iota of the maximum position, or even to recast arguments into a form more persuasive to a policy maker. The result will be ineffective and expensive effort, and continuing bewilderment as to why the agencies will not listen to reason.

They will—generally—if you present it reasonably. ■