

BACKGROUND REPORT FOR ATTORNEYS PRACTICING
BEFORE FEDERAL AGENCIES

REGULATION OF
ATTORNEYS PRACTICING
BEFORE FEDERAL AGENCIES*

*Michael P. Cox***

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* Although this presentation, soon to be published in *Case Western Reserve Law Review*, Vol. 34, 1984, reflects the contribution of many persons and sources, the views expressed are solely those of the author and should not be attributed, unless otherwise indicated, to particular persons/sources or to the Administrative Conference of the United States. See note 16, *infra*.

** B.S. 1965, J.D. 1968, University of Kentucky; LL.M. 1974, J.S.D. 1981, Columbia University. Professor of Law, University of Oklahoma College of Law.

Since the 1940's, the subject of regulation of attorneys practicing before federal agencies has been addressed by the Congress and considered by governmental and non-governmental entities on a number of occasions.¹ When the Administrative Procedure Act was enacted in 1946, Section 6(a) of the Act² detailed the right to counsel before administrative agencies; however, that section (as well as the entire Act) was silent on regulation of attorneys themselves. The *Attorney General's Manual on the Administrative Procedure Act*³ explained the omission:

[S]ection 6(a) leaves intact the agencies' control over both lawyers and non-lawyers⁴ who practice before them. The reports of the Senate and House Judiciary Committees contain expressions of opinion to the effect that, as to lawyers desiring to practice before an agency, the agency should normally require no more than a statement from a lawyer that he is in good standing

1. Congressional interest has been extensive and longstanding. In addition to enactment of the "Agency Practice Act of 1965" (5 U.S.C. § 500), numerous other bills have been introduced; see, e.g., S.262, 96th Cong.; S.600 and S.2374, 86th Cong.; HR 6774 and HR 7092, 86th Cong.; S.932, 85th Cong.; HR 3349, HR 3350, and HR 7006, 85th Cong.; S.746, 81st Cong.; HR 4446 and HR 8201, 81st Cong.; HR 2657 and HR 7100, 80th Cong.; S.92, S.572, and S.740, 79th Cong.; HR 339, HR 643, HR 1206, HR 1387, and HR 3089, 79th Cong.; S.1945, 78th Cong.; HR 94, HR 2323, HR 4470, HR 5237, and HR 5277, 78th Cong.; HR 605 and HR 2526, 77th Cong.; HR 4798, 76th Cong.; HR 9635, 75th Cong.; and S.2944, 74th Cong. See also "Ethics in Government Act of 1978" (18 U.S.C. § 207). Of interest with regard to S.262 introduced by Senator Ribicoff in the 96th Congress is the following statement:

My contact with the subject [*i.e.*, agency discipline of attorneys] came as Chairman of the Coordinating Group on Regulatory Reform of the American Bar Association. . . . The Coordinating Group sought to coordinate the views and efforts of various Sections of the Association in its approach to the regulatory reform legislation then pending in Congress. . . . [T]here appeared in the Bill [*i.e.*, S.262] that was being worked on during 1979 and 1980 by Senator Ribicoff, a provision that sought to deal with this complex question in one sentence. . . . We were unable to persuade the Governmental Affairs Committee to drop that provision from the Bill, but did obtain a commitment from the staff that, in negotiations with the Judiciary Committee which then had a different version of the legislation without such a provision, they would not insist on it—on the understanding that the [ABA] was attending to the subject and the Committee would have the benefit of the results of the ABA deliberations. Since then, of course, the Congress changed as did the regulatory reform legislation, and the subject has not reappeared in Congress.

Letter from Richard B. Smith to author (June 9, 1982), a copy of which is on file with the Administrative Conference of the United States. For a summary of A.B.A. activity during this time period to the present, see notes 10 and 12, *infra*.

2. 5 U.S.C. § 555 (1976).

3. The *Attorney General's Manual*, which was drafted when the late Justice Tom Clark was Attorney General, is a contemporaneous interpretation of the APA and has been "given some deference by [the] Court because of the role played by the Department of Justice in drafting the legislation." *Steadman v. SEC*, 450 U.S. 91, 103 n. 22 (1981), quoting *Vermont Yankee Nuclear Power v. Natural Resources Defense Council, Inc.*, 415 U.S. 519, 546 (1978).

4. The scope of this presentation does not include consideration of regulation of non-attorneys practicing before federal agencies. That aspect is being studied by Professor Jonathan Rose, Arizona State University College of Law, consultant to the Administrative Conference of the United States; however, reference will be made on occasion to regulation of non-attorneys when appropriate.

before the courts. . . . However, the legislative history leaves no doubt that the Congress intended to keep unchanged the agencies' existing powers to regulate practice before them. . . . [T]he subject [*i.e.*, regulation of attorneys] should be covered by separate legislation. It is clear, therefore, that the existing powers of the agencies to control practice before them are not changed by the Administrative Procedure Act. For example, an agency may exclude, after notice and opportunity for hearing, persons of improper character from practice before it, or exclude parties or counsel from participation in proceedings by reason of unruly conduct, or impose reasonable time limits during which former employees may not practice before the agency.⁵

As this passage reveals, regulation of attorneys practicing before federal agencies has at least three aspects: admission requirements, rules (or standards) of conduct, and disciplinary action. Because the practice of law in the United States traditionally has been within the province of the various states,⁶ an additional inquiry is: To what extent does the federal government have authority—constitutional or otherwise—to impose restrictions on attorneys representing or counselling clients in the federal administrative process? As a consequence, after a brief introduction, authority of the federal government to regulate attorneys practicing before federal agencies will be considered; thereafter, admission requirements, rules (or standards) of conduct, and disciplinary action will be discussed.

INTRODUCTION

On August 11, 1982, the House of Delegates of the American Bar Association (A.B.A.) considered at the Association's Annual Convention two proposals relating to regulation of attorneys practicing before federal agencies. One was recommended by the A.B.A. Standing Committee on Professional Discipline;⁷ the other was a recommendation sponsored by ten organizations, nine of which were A.B.A. affiliated.⁸ The A.B.A.'s current interest⁹ in discipline of

5. Attorney General's Manual on the Administrative Procedure Act 65, 66 (1947).

6. *See, e.g.*, *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971). *See also* *Friedman v. Rogers*, 440 U.S. 1 (1979).

7. Hereinafter referred to as the "Franck Proposal." Michael Franck was the Chair of the ABA Standing Committee during the formulation of the Proposal, which includes "Model Rules for Federal Agency Discipline." A copy of the Franck Proposal is on file with the Administrative Conference of the United States.

8. Hereinafter referred to as the "Waxman/Forrest Proposal." Margery H. Waxman and Herbert E. Forrest were the principal drafters of the proposal. At the time the proposal was developed, Ms. Waxman was Deputy General Counsel, Dept. of Treasury and Mr. Forrest was a member of Steptoe & Johnson Chartered, Washington, D.C. *See* note 203, *infra*, for a list of the sponsoring organizations. A copy of the Waxman/Forrest Proposal is on file with the Administrative Conference of the United States.

9. The American Bar Association has periodically shown interest in regulation of attorneys practicing before federal agencies. *See, e.g.*, 1965 U.S. Code Cong. & Admin. News 4179 (1965) (Endorsement of the Agency Practice Act); 81 Reports of the A.B.A. 379-380, 495-496, 514-517 (1956) (Endorsement of the Hoover Commission proposals; *see, e.g.*, note 23, *infra*).

attorneys practicing before federal agencies surfaced in early 1979, but intensified on August 5, 1980,¹⁰ when the Association's House of Delegates, upon recommendation of the Standing Committee on Professional Discipline, adopted the following resolution:

RESOLVED, That inasmuch as the public interest in the effective administration of justice requires diligent and independent representation by counsel, the American Bar Association perceives dangers in the exercise of disciplinary jurisdiction by administrative agencies over lawyers who represent clients with respect to client conduct subject to regulations by those agencies (other than authority immediately necessary to maintain order in or the integrity of proceedings before them); and

RESOLVED, That the American Bar Association undertake the development of a model enforcement mechanism for the discipline of lawyers who

10. Discipline of attorneys practicing before federal agencies appeared as an agenda item for the January 18–20, 1979, meeting of the A.B.A. Standing Committee on Professional Discipline, prompted by an attorney-discipline action before the Interstate Commerce Commission (I.C.C.): *In the Matter of Vandegrift* (No. 352) [Note: None of the matters in issue were resolved; the respondent was admonished to correct the deficiencies, if any, in his office procedures.] In general, the Standing Committee noted concern over the lack of uniformity in attorney-disciplinary procedures among the various federal agencies and, specifically, expressed alarm with the ICC's apparent failure to provide respondent Vandegrift with due process and with the Commission's broad claim of attorney disciplinary authority. Shortly thereafter, an S.E.C. (Securities and Exchange Commission) Rule 2(e) disciplinary proceeding against two members of the New York Bar, Messrs. Carter and Johnson, raised similar concerns in the federal securities bar when the administrative law judge (ALJ) in the case recommended on March 7, 1979, that Carter and Johnson be suspended from practice before the S.E.C. because they willfully violated and willfully aided and abetted violations of Sections 10(b) and 13(a) of the Securities Act of 1934 and that they engaged in unethical and improper professional conduct. See *In the Matter of Carter and Johnson*, SEC File No. 3-5464 (Mar. 7, 1979). [Note: The Commission reversed the findings of the ALJ and dismissed the proceedings against Carter and Johnson. See *In the Matter of Carter and Johnson* [SEC Release No. 34-17597, Feb. 28, 1981], Fed. Sec. L. Rep. (CCH), No. 903 (Special Edition) (March 6, 1981)]. At an April 20–21, 1979, meeting of the Standing Committee, discussion of agency regulation of attorneys centered not only on the *Vandegrift* case (and a growing concern over the S.E.C. and the implications of *Carter and Johnson*), but also the authority of agencies to discipline attorneys, the standards applicable in attorney disciplinary actions by federal agencies, and the "chilling effect" of an agency being both prosecutor and judge in a disciplinary action. At the June 7–9, 1979, Fifth Annual Workshop on Discipline Law and Procedure held in Chicago, the Chair of the Standing Committee announced that the Standing Committee was undertaking a major effort relating to federal agency attorney discipline. Later that month, the Standing Committee established its subcommittee on federal agency discipline. During the remainder of 1979, the Standing Committee (and the subcommittee) prepared and submitted a recommendation on discipline of attorneys by federal agencies to the A.B.A. House of Delegates in February 1980. The recommendation, however, was withdrawn to allow other ABA entities an opportunity to study and discuss the proposal. A conference to provide a forum for discussion was held in Chicago on March 25, 1980, and a revised recommendation was submitted to the ABA House of Delegates, which adopted the revised recommendation on August 5, 1980 [see note 11, *infra* and accompanying text]. This chronology was developed from materials supplied by Timothy K. McPike, Discipline Counsel, Standing Committee on Professional Discipline; a copy of the materials is on file with the Administrative Conference of the United States. See note 1, *supra* with regard to discussions between representatives of the ABA and the Congress on pending legislation (S.262, 96th Cong.) during this period.

practice before federal and state administrative agencies, through efforts involving interested administrative agencies and Association entities, to be coordinated by the Standing Committee on Professional Discipline.¹¹

Between the summer of 1980 and the summer of 1982,¹² the Standing Committee developed its recommendation, the major portion of which is a set of proposed "Rules for Federal Agency Discipline," forty-six pages of definitions, twenty-four rules, and commentary.¹³ In early 1982, a substitute—a document of one and a half pages—to the Standing Committee's proposed rules was developed, circulated, refined, and ultimately endorsed by ten sponsors.¹⁴ In addition to the organized attention given to the subject by the American Bar Association, many individuals have addressed in recent years the considerations, some in general terms and some with regard to specific issues, related to regulation of attorneys practicing before federal agencies.¹⁵

With the recent increase in interest in regulation of attorneys practicing before federal agencies, a relevant query is: What have the federal agencies done (or not done) to generate the escalation of opposition to agency regulation of attorneys? Many of the comments received and accumulated,¹⁶ as well as the

11. 1980 Summary of Action Taken by the House of Delegates of the A.B.A. 23 (Aug. 5–6, 1980). The language finally adopted by the 1980 House of Delegates varies slightly from that initially recommended by the Standing Committee in its 1980 Report to the House (*See* note 25, *infra*). The wording of the parenthetical in the first Resolved, was amended to include recognition not only of authority "necessary to maintain order in . . . proceedings" but also authority "necessary to maintain . . . the integrity of proceedings." *See* letter to Herbert E. Forrest from Michael Franck (June 4, 1980) and letter to Michael Franck from Marion Edwyn Harrison (June 30, 1980), copies of which are on file with the Administrative Conference of the United States. The 1982 Recommendation of the Standing Committee reverted to its former language, *i.e.*, the "integrity" language was deleted. *See* Franck Proposal, *supra* note 7; however, the Waxman/Forrest Proposal, *supra* note 8, retained the "integrity" language (*see* note 203, *infra*).

12. The Franck Proposal, *supra* note 7, represents a distillation of views of a number of persons and organizations within and without the A.B.A. Three conferences were held in Washington, D.C. (Sept. 23, 1980; Dec. 16, 1980; and July 20, 1981) to obtain the participants' perspectives and comments on the proposed "Rules for Federal Agency Discipline." In addition, responses were received from numerous individuals and entities on prior drafts of the proposed rules, to include, submissions from a number of the Sections of the A.B.A. and federal agencies, from specialized bars (*e.g.*, the Federal Communications Bar Association and Federal Bar Association), and from the Conference of Administrative Law Judges, as well as from members of the National Organization of Bar Counsel. The Standing Committee submitted its recommendation for consideration to the ABA House of Delegates on Jan. 25, 1982, but withdrew the recommendation for further revision. The final recommendation (the Franck Proposal, *supra* note 7) was submitted to the House of Delegates on August 11, 1982.

13. *See* Franck Proposal, *supra* note 7.

14. *See* Waxman/Forrest Proposal, *supra* note 8.

15. *See* Appendix C, Part 4, *infra*.

16. This study was undertaken for the Administrative Conference of the United States (ACUS) on April 6, 1982. Published materials, agency rules of practice, decisions of agencies and courts, and the proposals of bar groups and interested persons were reviewed. The textual research was supplemented by letters written to (and responses received from) numerous practitioners, law professors (specializing in administrative law or professional responsibility) and current and past members of ACUS. One Questionnaire was sent to the general counsels and chief administrative law judges of major federal agencies (from lists supplied by ACUS) [Hereinafter referred to as Federal

two presented below (without identification of the source or the agency involved¹⁷) demonstrate the nature and depth of the concern that members of the bar have with federal agencies' regulating attorneys who practice before them:

We have only this week obtained from the [agency name deleted], under the Federal Privacy Act, the memorandum which formed the basis for the finding of probable cause. . . . It is so vicious, and so wrong-headed in its legal analysis, that we hardly know whether to laugh or cry. It demonstrates anew the dangers of having disciplinary matters handled by bar counsel who are neither impartial nor familiar with the law in the area, and who are not only willing but eager to institute a public proceeding first, and to investigate later.

And,

I have received information leading me to believe that one agency's disciplinary investigators and counsel encourage attorneys in [agency name deleted], handling unrelated matters in which lawyers who are under disciplinary investigation are opposing them, to look at the files in the disciplinary investigations. The [position of official deleted] was quoted to me as having said, urging a staff attorney to review the file on this adversary, "You should take advantage of every opportunity to learn about your opponent." The staff attorney declined the invitation in this instance, but was it the first time? Or the last?

So we are not just talking about a theoretical or imaginary conflict between regulatory prosecutive zeal and disciplinary confidentiality. The

Questionnaire]; a second questionnaire was sent to all state bar counsel [Hereinafter referred to as State Questionnaire]. See Appendix A for copies of both questionnaires. [In a number of places in this presentation, reference will be made to the responses received to the State and Federal Questionnaires; however, this information is not considered to be validated statistically, but rather is only an indication of the views of persons closely associated with disciplinary matters (State Questionnaire) or with the federal administrative process (Federal Questionnaire).] Personal interviews were held on June 21, 22, 1982, in Washington, D.C., with persons selected for their expertise and contrasting perspectives on the issues relating to discipline of attorneys practicing before federal agencies. The A.B.A. Annual Convention was attended to observe the debate of the House of Delegates on August 11, 1982, on the Franck Proposal, *supra* note 7 and on the Waxman/Forrest Proposal, *supra* note 8. In addition, numerous persons (to whom appreciation is expressed) furnished copies of correspondence, documents, and other materials relevant to the inquiry.

Special recognition is given to several individuals for their continuous interest and assistance: Howard C. Anderson (Practitioner and Chair, Administrative Law Committee, A.B.A. Section on Public Utilities), Washington, D.C.; Herbert E. Forrest (Practitioner), Washington, D.C.; Paul Gonson (Solicitor, Securities and Exchange Commission), Washington, D.C.; Thomas Lombard (Practitioner), Washington, D.C.; Timothy K. McPike (Discipline Counsel, A.B.A. Standing Committee on Professional Responsibility, on behalf of Michael Franck, Chair of the Standing Committee), Chicago; and Margery H. Waxman (Deputy General Counsel, Dept., of Treasury), Washington, D.C. Appreciation is also expressed to the University of Oklahoma College of Law (and, in particular to Wayne E. Alley, Dean, and two members of the College's staff, Beverly K. Mitchell and Paula J. Wesson) for the support given to this project.

17. Copies of the letters quoted are on file with the Administrative Conference of the United States. Although both letters were written in 1979 by the same person, the concerns expressed are not unique to the writer. Similar expressions about agency disciplinary procedures and practices were made to the author in the course of this study.

conflict is not just a potent one, inherent in the structure; it is real. That lawyers acting as agency bar counsel would countenance such shenanigans makes my blood boil.

To understand why the American Bar Association and individual members of the bar are at odds with federal agencies over agency regulation of attorneys, one should analyze four areas: the authority of the federal government to regulate attorneys practicing before federal agencies;¹⁸ admission requirements for attorneys practicing before federal agencies;¹⁹ standards for regulation of conduct of attorneys practicing before federal agencies;²⁰ and discipline of attorneys practicing before federal agencies.²¹ Only after one has completed these analyses, can one appreciate the competing factors and interests that one must balance to reach conclusions and make recommendations²² on how the controversy can be resolved.

*Authority of the Federal Government to Regulate Attorneys
Practicing before Federal Agencies*

A basic question that comes to mind when one inquires into the authority of the federal government to regulate attorneys practicing before federal agencies is: Why does the federal government want (or feel compelled) to assume responsibilities normally performed by state bar counsel and state licensing authorities? Although other reasons may exist, a very simple (and, if true, persuasive) answer can be given. A jurisdictional gap has developed with regard to discipline of attorneys practicing before federal agencies:

An attorney practicing before Federal agencies may escape effective disciplinary action by the courts of his State because of his absence from that jurisdiction. Such an attorney in the Federal administrative practice who moves to Washington, D.C., often cuts all ties with the State which has admitted him to the practice of law. Only in exceptional cases is such an attorney likely to be subject to disciplinary proceedings in that State for unprofessional conduct before Federal agencies in Washington. Moreover, disciplinary proceedings will not be available against him in the District of Columbia where he is not a member of the bar of any trial court in the District. The result is a hiatus in the effective disciplining of many lawyers in the Administrative Law practice.²³

18. See notes 23 et seq., *infra* and accompanying text.

19. See notes 65 et seq., *infra* and accompanying text.

20. See notes 118 et seq., *infra* and accompanying text.

21. See notes 201 et seq., *infra* and accompanying text.

22. See notes 245 et seq., *infra* and accompanying text.

23. Commission on Organization of the Executive Branch of Government, Task Force Report on Legal Services and Procedure 308 (1955); See also Commission on Organization of the Executive Branch of Government, Commission Report on Legal Services and Procedure 38 (1955). To eliminate this "hiatus," the Hoover Commission included as Recommendation 26:

An attorney-at-law who has the privilege of representation before any agency of the United States should be subject to disciplinary control (1) by a Federal Grievance Committee through proceedings in a United States district court, and (2) by each agency, with authority to suspend him from practice before that agency for not more than one year.

Even though this statement was made in 1955 by the Hoover Commission Task Force, the Clark Committee reached the same conclusion in 1970,²⁴ and similar indications were contained in the 1980 report accompanying the ABA Standing Committee on Professional Discipline's recommendation to the Association's House of Delegates.²⁵ The House of Delegates adopted the recommendation and tasked the Standing Committee to develop "a model enforcement mechanism for the discipline of lawyers who practice before federal . . . agencies."²⁶ As a consequence, one could argue if disciplinary mechanisms in the various states were, in fact, effective in processing allegations of attorney misconduct before federal agencies, a need would not exist for federal disciplinary actions against attorneys, except perhaps with regard to conduct involving contumacious behavior committed in the course of an agency proceeding (*e.g.*, misconduct committed in the physical presence of the agency).²⁷

Commission Report at 40. With regard to the authority of the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law to investigate persons not licensed to practice in the District, see *Simons v. Bellinger*, 643 F.2d 774 (D.C. Cir. 1980).

24. A.B.A. Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 67-70 (Final Report/June 1970) [Clark Report].

25. Hereinafter referred to as "1980 ABA Standing Committee Report," a copy of which is on file with the Administrative Conference of the United States. *Id.* at 4, 5 observes:

Lawyer discipline has traditionally been left to the principal jurisdiction of the several states. But several potential problems arise in merely relying upon existing mechanisms for disciplinary enforcement to govern practice before administrative agencies notably:

1. The extent to which state disciplinary agencies lack adequate staff and financial resources to serve as the principal vehicles for administering discipline over federal agency practitioners.

2. The extent to which the high degree of expertise often involved in administrative agency practice, and disciplinary matters arising therefrom, might require that the customary state agency structure be supplemented.

26. See note 11, *supra* and accompanying text. In 1981 the General Counsel and Solicitor of the Securities and Exchange Commission agreed that some mechanism beyond state disciplinary proceedings is required to regulate effectively attorneys practicing before federal agencies:

[S]tate and local bar authorities traditionally have held—and still hold—the primary responsibility for the discipline of lawyers. However, as a growing number of lawyers engage in an essentially federal practice, there is a greater need of complementary disciplinary authority that focuses primarily on federal practice. . . . [M]any state disciplinary authorities lack extensive budgets, staff and federal expertise. It is fair to state that misconduct in federal practice may receive a low priority among the numerous competing local issues.

Letter from Ralph C. Ferrara and Paul Gonson to Michael Franck (March 19, 1981), a copy of which is on file with the Administrative Conference of the United States.

27. At least two other categories of misconduct may exist which could be handled by federal agencies: that committed while in a representative capacity, but not necessarily in the physical presence of the agency (*i.e.*, involving the integrity of the agency process) [*See, e.g.*, *Koden v. U.S.*, 564 F.2d 228 (7th Cir. 1977); *Kivitz v. S.E.C.*, 475 F.2d 956 (D.C. Cir. 1973)] and that involving the failure of an attorney to fulfill an agency's special concept of professional responsibility relating to the the agency's substantive regulatory responsibilities which may or may not involve representation of a client before the agency [*see, e.g.*, *In re Matter of Carter and Johnson*, [SEC Release No. 34-17597, Feb. 28, 1981], Fed. Sec. L. Rep. (CCH), No. 903 (Special Edition) (March 6, 1981) and *S.E.C. v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978)]. Although independent analysis may have developed a similar classification of attorney misconduct

Since effective state regulation of attorneys practicing before federal agencies continues to be undocumented²⁸ and since a need exists for attorneys practicing before federal agencies to be subject, in fact, to some regulatory authority, the initial concern to be addressed is: If the States are arguably unable to be the regulator, does authority exist for the federal government (or more precisely, in federal agencies) to assume responsibilities in this specialized attorney-discipline area? Several arguments of constitutional dimension have been proffered with regard to the lack of authority of the federal government to regulate attorneys practicing before federal agencies: One denies the existence of any power on the part of the federal government to regulate,²⁹ the other only challenges the authority of federal agencies themselves to regulate.³⁰

The former proceeds on the basic premise that regulation of the practice of law resides in the judicial branch of government—whether that be state or federal—and, thus, only state and federal courts have the power to regulate attorneys within their respective jurisdictions. Although administrative agencies have “quasi-judicial” aspects, they are (according to this line of argument) not courts and, therefore, do not possess inherent authority, as do courts, to regulate

before agencies, these distinctions were suggested in an October 1979 Draft Position Paper, A.B.A. Subcommittee on Federal Agency Discipline of the Standing Committee on Professional Discipline, a copy of which is on file with the Administrative Conference of the United States.

28. In addition to the observations made by the Hoover Commission Task Force (note 23, *supra*), the Clark Committee (note 24, *supra*) and the ABA (note 25, *supra*), the responses received to the State Questionnaire (see Appendix A, *infra*) sent to state bar counsels (*i.e.*, the state officials with responsibility for investigating and processing complaints against attorneys), reinforce the perception that state disciplinary systems may not currently be effectively regulating attorneys who practice before federal agencies. For example, of the thirty-six jurisdictions (thirty-five states, and the District of Columbia) which responded, over one third indicated that they did not have (or had reservations about) the ability to pursue misconduct by attorneys licensed by their states committed outside their states before federal agencies. Although the complement must be weighed (*i.e.*, almost two-thirds of the states responding felt confident in their ability (with current resources and level of interest) to pursue attorney misconduct by their licensed attorneys committed outside of their states before federal agencies), a substantial gap would seem to exist with regard to effective regulation of attorneys practicing before federal agencies. The responses to the State Questionnaire, therefore, confirm the conclusion, reached by the Hoover Commission, the Clark Committee, the A.B.A., and a number of federal agencies that doubt exists as to the states' ability to regulate attorneys effectively, at least where the misconduct before federal agencies occurs outside the licensing state. On the other hand, over 97% of the responding bar counsels indicated that they had the interest and resources to pursue misconduct before federal agencies committed by their attorneys within their states. Only twenty-two percent of the responding states listed any referrals from federal agencies in recent years of attorney misconduct; however, forty-two percent failed to respond to the request for this information or indicated that a response would not be provided because of unavailability of data. Twenty-eight percent indicated no referrals from federal agencies and the remaining eight percent of the responses were ambiguous; one state indicated a complaint against an agency attorney.

29. For a presentation of this argument, *see, e.g.*, Letter to Honorable John C. Culver from Thomas Lumbard (August 31, 1979), a copy of which is on file with the Administrative Conference of the United States.

30. *See, e.g.*, 1980 ABA Standing Committee Report, *supra* note 25 and Franck Proposal, *supra* note 7.

attorneys.³¹ Legislatures (including the Congress), the analysis continues, have no authority to participate in the regulation of the legal profession except perhaps in aid of the judiciary in the performance of its responsibility.³² Consequently, since regulation of attorneys practicing before federal agencies arguably is not within the inherent power of Article III courts (because representation before agencies does not involve practice before Article III courts, except on those occasions when review of agency action is sought), since the Congress (as a legislative body) has no inherent authority to regulate the practice of law, and since the Constitution does not expressly allocate the function of regulating attorneys, the Tenth Amendment³³ requires the responsibility remain with the various states. As a power "reserved to the States," therefore, the Congress would lack authority to delegate responsibilities with regard to regulation of attorneys practicing before federal agencies, either expressly or impliedly, to any instrumentality of the federal government. If one accepts this analysis, no authority would reside in the federal government to regulate attorneys practicing before federal agencies (unless, of course, Article III courts were to claim authority as part of their inherent powers).

Although this rationale might be persuasive on a theoretical basis, the practicalities of the situation (*i.e.*, decades of Congressional action,³⁴ as well as numerous judicial decisions recognizing, or at least acknowledging, authority in

31. See, *e.g.*, *Camp v. Herzog*, 104 F. Supp. 134, 136 (D.D.C. 1952): "Undoubtedly the power to control, by admission and disciplinary action, persons who appear before an administrative agency as representatives of the parties at interest is a highly important one, but it is not as is the case in judicial courts of general jurisdiction, an inherent power, but is one which, if it exists, is given by the legislative authority creating such agency; Keating, Muething & Klekamp, 45 Ad.L.2d 1072, 1080-81 n. 11 (1979) (Dissent of Commissioner Karmel):

General jurisdiction to regulate the conduct of attorneys resides in the courts and its delegated authorities. The Securities and Exchange Commission is neither a court nor a designated authority of a court. Although it may act as a tribunal in adjudicatory proceedings, it is primarily a prosecutorial and rule making body. The power of a federal administrative agency to control by disciplinary action attorneys who appear before it is not, as it is with a court of general jurisdiction, an inherent general power. To the extent the power exists, it is given by the legislature to such an agency. Absent a specific grant of statutory authority, the disciplining of attorneys traditionally has been the responsibility of the judiciary. To the extent the Commission disciplines attorneys, it impinges upon the authority of the federal and state courts to regulate the conduct of the bar.

32. See, *e.g.*, Note, *Representation of Clients before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 Val. U. L. Rev. 567, 584-99 (1981) wherein four theories of legislative power with regard to regulation of the legal profession are discussed: judiciary and legislature have concurrent jurisdiction; legislature may pass laws in aid of the judiciary; legislature has no jurisdiction; and legislature is supreme, with the judiciary secondary.

33. U.S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

34. See, *e.g.*, express grants of authority: 31 U.S.C. § 1026 (1976) (Treasury); 35 U.S.C. §§ 31, 32 (1976) (Patent Office); 43 U.S.C. § 1464 (1976) (Interior/Public Lands). In addition, Congress in 1965 enacted the "Agency Practice Act," 5 U.S.C. § 500 (1976).

the federal government to regulate attorneys practicing before federal agencies³⁵) would have to be ignored. The likelihood that the federal courts (or the Congress) would disregard this long-standing, consistent judicial and Congressional precedent and deny (or disclaim) the federal government's authority to regulate attorneys practicing before federal agencies seems extremely remote.

The other argument with constitutional underpinnings (*i.e.*, no authority exists in federal agencies to regulate attorneys) rests primarily on an alleged impermissible combining of functions in violation of due process³⁶ (and, to a lesser extent, on a claim of an unconstitutional interference with the attorney/client relationship to such an extent as to deny effective counsel).³⁷ The argument

35. See, *e.g.*, *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963); *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926); *Touche Ross & Co. v. S.E.C.*, 609 F.2d 570 (2d Cir. 1979); *Koden v. U.S. Department of Justice*, 564 F.2d 228 (7th Cir. 1977); *Herman v. Dulles*, 205 F.2d 715 (D.C. Cir. 1953); *Schwebel v. Orrick*, 153 F. Supp. 701 (D.D.C. 1957); *Camp v. Herzog*, 104 F. Supp. 134 (D.D.C. 1952); *Phillips v. Ballinger*, 37 App. D.C. 46 (1911); *Garfield v. United States ex rel. Stevens*, 32 App. D.C. 109 (1908). Although the *Sperry* and *Goldsmith* cases involved non-attorneys (patent agent and certified public accountant, respectively), the Court, albeit in dictum, clearly recognized the authority of the federal government to regulate the practice of law, and, thus, impliedly acknowledged the regulation of *attorneys*, as well as *non-attorneys*. *Sperry* at 383, 384, 388, 403: "We do not question the determination that under Florida law the preparation and prosecution of patent applications for others constitutes the practice of law. . . . Nor do we doubt that Florida has a substantial interest in regulating the practice of law within the State and that, in the absence of federal legislation, it could validly prohibit non-lawyers from engaging in this circumscribed form of patent practice. But 'the law of the State, though enacted in the exercise of powers not controverted, must yield' when incompatible with federal legislation. . . . We find implicit in this history congressional (and administrative) recognition that registration in the Patent Office confers a right to practice before the Office without regard to whether the State within which the practice is conducted would otherwise prohibit such conduct. . . . Congress having acted within the scope of the powers 'delegated to the United States by the Constitution,' it has not exceeded the limits of the Tenth Amendment despite the concurrent effects of its legislation upon a matter otherwise within the control of the State." *Goldsmith* at 122: "Our view . . . [is] that the general words by which the Board is vested with authority to prescribe the procedure in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys." See note 64, *infra*.

36. The contention is that combining functions, *e.g.*, client regulatory responsibilities and disciplinary power over attorneys, in the same agency would create an unconstitutional risk of bias in the administrative process in violation of U.S. Const. amend. V. See *Larkin v. Withrow*, 421 U.S. 35 (1975); but *cf.* *Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n.*, 426 U.S. 482 (1976).

37. Roberta Karmel observed after she left her position as an SEC Commissioner: "Although it may surprise some, the courts of law have found that the various protections in the Bill of Rights apply to businessmen and corporations as well as to others. For example, to be represented by effective counsel, and to be protected from forms of self-incrimination are rights shared also by the business community. Moreover, the client's privilege as to confidentiality has been well established in the law and cannot be waived except by the client. The movement to obligate the corporate lawyer to serve public interests beyond and perhaps inconsistent with the clients raises questions of civil liberties which have not as yet been appreciated." Remarks by Roberta S. Karmel, 2d Annual Corporate Counsel Seminar for In-House Counsel (Mar. 6, 1980), a copy of which is on file with the Administrative Conference of the United States. Ms. Karmel seems to be connecting the right to effective counsel and the Bill of Rights, *i.e.*, U.S. Const. amend. I-X. A connection does exist,

has been stated concisely, although without identifying its constitutional aspects clearly, by the ABA Standing Committee on Professional Discipline in its 1982 Report to the Association's House of Delegates:

Administrative proceedings put the agency and counsel for the regulated party in an adversarial [sic] position. When one of the parties—the agency—holds power for its staff attorneys to initiate and prosecute allegations of

of course, because U.S. Const. amend. VI provides: "In all *criminal* prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." (Emphasis added.) Because regulation of a client is not generally criminal in nature, this provision would not seem to be a constitutional basis for a denial of effective counsel in the administrative process. Although criminal charges could arise out of a client's conduct during the course of regulation, the defense of the client would be in a judicial proceeding in which the Sixth Amendment would be applicable and allegations of interference with the attorney/client relationship by the agency could be raised. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545 (1977), and the cases discussed therein. If the charges were based on information which resulted from an alleged interference with the attorney/client relationship, this would appear to be a matter of confidentiality and privilege, rather than of constitutional stature. If a criminal prosecution is not involved, a right to counsel may be required by due process (U.S. Const. amend. V), but by no means is a right to counsel inevitably a requisite of administrative due process [*see* Friendly, *Some Kind of Hearing*, 123 U.Pa.L.Rev. 1267 (1975)], although the right may exist by statute [*see, e.g.,* 5 U.S.C. § 555 (1976)]. The concern being voiced, therefore, would not seem to be necessarily of constitutional dimension, but rather one, as stated, of confidentiality and privilege. When Ms. Karmel made her remarks in 1980, she did not have the benefit of a major Supreme Court decision on corporate attorney/client relationship with regard to a federal agency (in this case the I.R.S.)—*Upjohn Company v. U.S.*, 449 U.S. 383, 389–90, 393 n. 2 (1981):

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. . . . Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation . . . and the Government does not contest the general proposition. . . .

The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege: an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

Nowhere in the opinion of the Court sustaining the client's assertion of the privilege to the IRS's administrative request for confidential information did Justice Rehnquist elevate the issues being discussed to a constitutional level. At this point in time, therefore, little authority would appear to support an argument of a right to effective counsel before federal agencies in constitutional terms. The argument would seem more properly made to the Congress to seek elimination by statute of agency interference with the attorney/client relationship. *See* notes 118 *et seq.*, *infra* and accompanying text.

impropriety in the way their adversary—counsel for the other party—opposed the agency or otherwise acted on behalf of his/her client, and the agency itself decides the merits of the charges brought by its own staff and determines the discipline to be imposed on its adversary, the chilling effect is clear. The merger of substantive and disciplinary powers in the same agency distinguishes this structure from one in which a licensing agency not involved in the substance of the underlying matter investigates allegations of a licensee's misconduct and, where warranted, prosecutes and adjudicates formal charges. The latter is the conventional disciplinary process with which we are all familiar, which has been held not to violate due process in the absence of a showing of actual bias. *Withrow v. Larkin*, 421 U.S. 35 (1975).

The merger of substantive and disciplinary jurisdiction in the same administrative agency poses a two-fold threat of serious harm to the client.

First, the lawyer's disclosures about the representation which are required to defend against the misconduct charges must be made, not to disciplinary counsel disinterested in the underlying client matter, but to employees of the client's adversary, the agency. The disclosures thus become available to the agency for use against the client in the underlying matter.³⁸

Second, the practitioner who knows that his/her ability to earn a living can be terminated by the very agency he was retained by the client to deal with or resist, may very well temper his/her representation—consciously or unconsciously—to a level of vigor and diligence less than the client's cause warrants, so as not to arouse the agency's displeasure against himself.

The potential abuse we are dealing with here strikes at the very heart of our system of justice.³⁹

This line of reasoning, which would deny authority to federal agencies to regulate attorneys, is not easy to counter. The landmark decision with regard to separation of functions is, as indicated in the 1982 ABA Standing Committee's Report, *supra*, *Withrow v. Larkin*,⁴⁰ a unanimous opinion of the United States Supreme Court. Although not involving the regulation of the practice of law,

38. The denial of effective counsel aspect of the argument was stated more clearly in the 1980 A.B.A. Standing Committee Report, *supra* note 25 at 3: "The administrative agency's claim of disciplinary power over the lawyer who represents the client with respect to the agency threatens the client with loss of access to the independent counsel and vigorous representation which is most needed when a citizen is confronted by the power of government."

39. Franck Proposal *supra* note 7. See also, Keating, Muething & Klekamp, 45 Ad.L.2d 1072, 1080 (1979) (Commissioner Karmel Dissent): "In addition, the potential corruption of justice when an administrative agency with significant prosecutorial responsibilities has the power to sanction an adversary representing and advising a client persuades me that the [Securities and Exchange] Commission should not exercise disciplinary power against attorneys." Commissioner Karmel did qualify her conclusion (*Id.* at 1081): "The Commission, like any other body, may have some need to have and to utilize a disciplinary power against attorneys who practice before it in order to keep its proceedings orderly and dignified."

40. 421 U.S. 35 (1975).

Withdraw does concern a state examining board, empowered to supervise the conduct of, and to impose discipline on, physicians. The rationale of the decision, which sustained a combining of investigative and adjudicative responsibilities, has clear implications with regard to issues under consideration:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a . . . difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented. . . .⁴¹ That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely. Within the Federal Government itself, Congress has addressed the issue in several different ways, providing for varying degrees of separation from complete separation of functions to virtually none at all. . . .⁴² That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.⁴³

The observations of the 1982 ABA Report, *supra*, would seem to indicate that "special facts and circumstances" may exist so as to make the "risk of unfairness intolerably high" when an agency has substantive and disciplinary jurisdiction.⁴⁴ The second portion of the argument (*i.e.*, denial of effective and independent counsel) flows from a perception that the combination of the two functions—substantive and disciplinary—has such a great potential for abuse that neither the attorney/client relationship nor vigorous and diligent representation can remain unaffected.

41. *Id.* at 47.

42. *Id.* at 51, 52.

43. *Id.* at 58.

44. The Chair of the Standing Committee expressed his concerns as follows: "The Committee believes that there are fundamental constitutional deficiencies in attempts to vest disciplinary jurisdiction over practitioners in administrative agencies which also exercise substantive jurisdiction over the clients those practitioners represent. In consequence, thereof, we believe that any agency discipline structure which permits such a merger of disciplinary jurisdiction over the practitioner and substantive jurisdiction over his client under any circumstances acquiesces in the potential for serious harm to essential client interests and is unacceptable." Letter to Margery H. Waxman and Herbert E. Forrest from Michael Franck (March 16, 1982), a copy of which is on file with the Administrative Conference of the United States.

With regard to these types of concerns, a perceived potential for abuse may be just as damaging to the attorney/client relationship and the vigor of advocacy as verified instances of improper commingling of substantive and disciplinary jurisdiction. Whether specific facts, arising in the context of a particular agency, might cause the Court to find an improper commingling of functions under the standards of *Withrow* is an interesting question, but one only subject to conjecture and not of assistance in this discussion. What does further the analysis is to inquire whether the potential violations of constitutional rights raised by the 1982 ABA Report are inherent in *any* combining of substantive and disciplinary jurisdiction or only exist because of how particular agencies structure their disciplinary systems?⁴⁵ The answer to this question is possible within limits.

The Congress has expressly delegated authority (in contra-distinction to the authority being implied⁴⁶) to regulate attorneys to the Patent and Trademark Office⁴⁷ and to the Department of the Treasury.⁴⁸ Each has well-established procedures for regulation of attorneys and non-attorneys practicing before them.⁴⁹

45. A letter to Marie L. Garibaldi from Myron C. Baum (Jan. 6, 1982) placed the issues raised by the 1/25/82 Franck Proposal, *supra* note 12 in perspective: "Before we begin a discussion of particular rules, it seems appropriate to consider the problems which the Standing Committee was addressing and the structure which it proposes to deal with those problems. The whole problem of agency discipline, it appears, was generated by a very aggressive attitude on the part of the Securities & Exchange Commission in attempting to regulate in considerable detail the activities of practitioners appearing before the Commission. We are not aware of any other agencies which exhibited similar conduct, and, most notably, we are certainly not aware of any criticism leveled at either the Treasury Department or the Internal Revenue Service in this regard. The first question then is: Does the attitude of one agency require the establishment of a whole disciplinary code for federal agencies with jurisdiction conferred upon district judges and federal magistrates throughout the country and with various bar counsel or other disciplinary authorities given responsibility for enforcement?"

"The question is a close one, and, on balance, it may be resolved by stating that if one agency has seemingly tried to overstep the bounds, then another one could do likewise and the need for restraint or impartial administration becomes clearer. Essentially, it is the question of impartial administration which tilts the scales here. If an agency does become too aggressive or oversteps reasonable bounds in promulgating rules of conduct, then certainly the need for separation of the prosecution and adjudication functions from the agency becomes imperative. This is largely what the Code seeks to accomplish. . . ." A copy of this letter is on file with the Administrative Conference of the United States.

46. See, e.g., 15 U.S.C. § 78w(a)(1) (1976) (Securities and Exchange Commission) sustained by *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979); *Schwebel v. Orrick*, 153 F. Supp. 701 (D.D.C. 1957) and 29 U.S.C. § 156 (1976) (National Labor Relations Board), sustained by *Camp v. Herzog*, 104 F. Supp. 134 (D.D.C. 1952).

47. See 35 U.S.C. §§ 31, 32 (1976). Although the name "Patent Office" appears frequently in judicial decisions and the United States Code, the designation has been changed to "Patent and Trademark Office." See 35 U.S.C. § 1 (1976).

48. 31 U.S.C. § 1026 (1976); See also 43 U.S.C. § 1464 (1976) for express authorization to another agency: Secretary of Interior with respect to public lands rules and regulations.

49. Patent and Trademark Office, e.g., 37 CFR § 1.341(a) (admission) and 37 CFR § 1.348 (suspension/disbarment) and Department of Treasury, e.g., 31 CFR, part 8 (practice before the Bureau of Alcohol, Tobacco, and Firearms) and 31 CFR, part 10 (practice before the Internal Revenue Service). The Treasury regulations are enforced by the Director of Practice on a full time basis. The Director's office is located in the Office of the General Counsel, Office of the Secretary of Treasury.

What is interesting, is that the attorneys practicing before these agencies are opposed to the establishment of disciplinary mechanisms separate from these agencies.⁵⁰ Although not conclusive, the existence of at least two agencies which have been able to keep their substantive and disciplinary jurisdictions separated, to an extent at least to elicit support of those affected, would seem to indicate that the potential problems perceived by the 1982 ABA Report are not inherent, but structural. If this conclusion is, in fact, valid,⁵¹ the concern should not be with the delegation of combined authority, but rather how that authority is

50. Little criticism by attorneys practicing before the I.R.S. with regard to the processing of attorney discipline cases by the Office of the Director of Practice has been identified by this study. With respect to the Patent and Trademark Office, *see* Resolution 502-4 of the Patent, Trademark and Copyright Section of the American Bar Association, adopted unanimously at the Association's 1981 Annual Meeting supporting continued authority in that Office to regulate attorneys.

51. The Chair of the ABA Standing Committee on Professional Discipline would, for example, question its validity: "While we acknowledge . . . that lawyers who practice before the Department of Treasury and the United States Patent Office appear to be satisfied with the manner in which those agencies are currently carrying out their responsibilities, that seems to us to be no answer to the potential for abuse inherent in a merged structure. We believe that client interests require structural protection against potential abuses rather than mere reliance upon the good judgment of those who at the moment administer the system. . . . Your apparent willingness to abdicate any judgment concerning the desirability of permitting exemptions for some agencies and which agencies should be so exempt to the Congress without Bar further input further troubles us." Letter from Michael Franck to Margery H. Waxman and Herbert E. Forrest (March 16, 1982), a copy of which is on file with the Administrative Conference of the United States. One response to the ABA's concern about the "potential for abuse inherent in a merged structure" was given almost two years earlier by Professor Robert Hamilton (University of Texas) when requested by Mr. Forrest to comment upon a similar argument contained in the 1980 Standing Committee's Report, *supra* note 25. Professor Hamilton observed: "Throughout, the report ignores the most basic conceptions about separations of functions within federal agencies that permit the agency to perform simultaneously adjudicative and prosecutorial functions without the latter infecting the former with bias or prejudice. . . . [T]he reasoning and argument adopted in this report is so wide of the target that it could be used without change to support the proposition that adjudicative and prosecutorial functions should never be combined in a single agency. The ABA lost that fight in the 1930s and 1940s and it is silly to use the same broad and unpersuasive arguments today when seeking to support a much narrower position." Letter from Robert H. Hamilton to Herbert E. Forrest (May 12, 1980), a copy of which is on file with the Administrative Conference of the United States. Mr. Franck, *supra* also attempts to diminish the significance of the Patent and Trademark Office's and the Treasury Department's successful separation of substantive and disciplinary functions by associating their current structure with current personnel: ". . . the good judgment of those who at the moment administer the system." This overlooks the fact that the Patent and Trademark Office has been regulating persons practicing before the Office since 1861 (*see* Act of March 2, 1861, c.88, § 8, 12, Stat. 247); that Treasury's authority was enacted in 1884 (*see* Act of July 7, 1884, c.334, § 3, 23 Stat. 258); and that the United States Supreme Court almost twenty years ago in *Sperry v. Florida*, 373 U.S. 379 (1963) extensively reviewed the authority of the Patent and Trademark Office to regulate persons practicing before the office and found its exercise not wanting. Lastly, the criterion with regard to whether a merger of functions in an agency violates due process is not one of a potential danger without specific, validating facts but rather, in the words of the *Withrow* Court, the "contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a . . . difficult burden of persuasion to carry. . . . [A] court [must determine] from the special facts and circumstances . . . that the risk of unfairness is intolerably high." (Emphasis added.) *Withrow v. Larkin*, 421 U.S. 35, 47, 58 (1975) [*See* notes

separated within a particular agency structure. As a consequence, the appropriate course of action would seem not to be invalidation (or withdrawal) of the delegation of both substantive and disciplinary jurisdiction to the same agency, but would be to challenge the structure within individual agencies with regard to how attorneys are regulated.

A final argument⁵² that can be formulated with regard to the authority of federal agencies to regulate attorneys centers around the distinction between whether the authority is express (as with the Patent and Trademark Office and the Treasury Department) or has been implied (*e.g.*, as with the S.E.C. and N.L.R.B.).⁵³ The basic hypothesis of this argument is simple: The power to regulate attorneys practicing before federal agencies must be express and may not be implied.⁵⁴

In *Goldsmith v. United States Board of Tax Appeals*⁵⁵ the Court found no express authority had been given by the Congress to the Board (a federal agency), but the justices implied "authority to prescribe . . . rules of practice for the

41-43, *supra* and accompanying text]. With the precedents of the Patent and Treasury experiences, and without presentation of specific facts demonstrating abuse generally throughout the federal administrative process with regard to agency regulation of attorneys, arguments based on "potential for abuse" do not, without more, seem to satisfy the *Withrow* standard for violation of due process.

52. Another aspect of which agencies have (or should have) authority to discipline persons practicing before them was raised in the initial stages of what eventually became the Waxman/Forrest Proposal, *supra* note 8: "[I]n the case of at least two federal agencies, the Internal Revenue Service and the Patent [and Trademark] Office, the Congress has specifically addressed itself to the requirements of practice, and has authorized those agencies to promulgate and enforce specialized standards of conduct and to discipline attorneys." [This Congressional action was then explained by the following footnote:] "The rationale for a separate set of discipline rules for these agencies is particularly strong because the Congressional grant of authority to the Secretary of the Treasury to suspend or disbar practitioners before the IRS covers CPA's and enrolled agents (anyone admitted to practice before the IRS who is not an attorney or CPA) as well as attorneys, providing consistency of treatment for all practitioners, and Patent Office practice also includes practitioners who are not attorneys." Draft Report to House of Delegates pp. 10, 11 (Attachment to March 5, 1982, Memorandum by Margery Waxman and Herbert E. Forrest), a copy of which is on file with the Administrative Conference of the United States. This observation was criticized by the Chair of the ABA Standing Committee on Professional Discipline: "Parenthetically, the rationale you advance for granting two specific agencies exemptions from the prohibition against the merger of disciplinary and substantive jurisdiction in the same agency threatens to swallow the general rule. There are after all many agencies in addition to those two before whom both lawyers and non-lawyers practice, including agencies who in our judgment have exercised the merged jurisdiction they claim they possess in a manner reflecting seriously inadequate sensitivity to the client interest at stake." Letter to Margery H. Waxman and Herbert E. Forrest from Michael Franck (March 16, 1982), a copy of which is on file with the Administrative Conference of the United States. The Waxman/Forrest Proposal, *supra* note 8 rephrased this rationale for treating the IRS and the Patent and Trademark Office differently than other agencies: "One justification suggested is that practice before both these agencies is conducted by many practitioners who are not attorneys." Waxman/Forrest, *supra* note 8 at 8.

53. See note 46, *supra*.

54. See, *e.g.*, *Touche Ross & Co. v. SEC*, 609 F.2d 570, 578 n. 13 (2d Cir. 1979) and Letter to William Warfield Ross from Thomas Lumbard (Jan. 11, 1979), a copy of which is on file with the Administrative Conference of the United States.

55. 270 U.S. 117 (1926).

admission of attorneys.”⁵⁶ *Goldsmith*, therefore, would seem to be dispositive of the argument—the authority may be implied. In 1965, however, almost forty years after the decision, the Congress enacted the Agency Practice Act⁵⁷ which, with the exception of the Patent and Trademark Office, removed the authority of agencies to set admission requirements.⁵⁸ In addition the Act contained, what has subsequently turned out to be, a somewhat ambiguous provision:

This section does not . . . authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency.⁵⁹

The reasoning behind the argument that after the Agency Practice Act (*i.e.*, 1965), the implied authority of federal agencies to regulate attorneys ceased to exist has been summarized concisely:

Whatever Congress [sic] thought it was doing, there is a respectable body of law [no citations given] indicating that, by depriving the agencies of the power to refuse to allow attorneys to practice before them Congress implicitly deprived them of the concomitant power to exclude attorneys from such practice, or to impose other discipline on attorneys. A number of cases hold that a court of limited jurisdiction, which is required to allow members in good standing of another court to practice before it, has no power to impose discipline, *qua* discipline, although it may exclude lawyers from proceedings in which they misbehave.⁶⁰

Stated more simply, to have the power to discipline, one must have the power of admission. This argument was expressly rejected in 1979 by the Court of Appeals in *Touche Ross & Co. v. SEC*,⁶¹ on the basis of statutory interpretation and legislative history.⁶² Another line of analysis points up the shortcomings of

56. *Id.* at 122; see note 64, *infra*.

57. Act of Nov. 8, 1965, P.L. 89-332, 79 Stat. 1281, *codified as* 5 U.S.C. § 500 (1976). This Act will be discussed in greater detail; see notes 65 *et seq.*, *infra* and accompanying text.

58. See 5 U.S.C. §§ 500(b) and (e) (1976); the text of § 500(b) is at note 68, *infra*.

59. 5 U.S.C. § 500(d)(2) (1976).

60. Letter to William Warfield Ross from Thomas Lumbard (Jan. 11, 1979), a copy of which is on file with the Administrative Conference of the United States.

61. 609 F.2d 570 (2d Cir. 1979).

62. *Id.* at 578 n. 13:

Appellants contend that the enactment in 1965 of 5 U.S.C. § 500, eliminating federal agency practice *admission* requirements, demonstrates the intent of Congress to strip the SEC of any authority to discipline professionals practicing before it. The stated purpose of the section was quite to the contrary. It was intended to ensure that persons appearing before the agencies *be represented by attorneys of their choice*. H. R. Rep. No. 1141, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 4170, 4171. Moreover, the statute explicitly provides in § 500(d)(2) that the section “*does not . . . authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency. . . .*” (emphasis added). We find nothing in this language to support appellants’ contentions. The language, as appellants acknowledge, is “neutral.” It neither authorizes nor limits the power of the agencies to discipline professionals who appear or practice before them; that was not the purpose of the section. And there certainly is nothing to suggest that Congress intended to limit disciplinary proceedings to those agencies with specific statutory authorization to do so. See, *e.g.*, 111 Cong. Rec. 27193 (Oct. 18, 1965); S. Rep. No. 755, 89th Cong., 1st Sess. 5 (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 4170.

the argument. The analogy made in the argument is to the authority of a court, *i.e.*, the judicial power to regulate attorneys; however, that may not be the power present in this situation. If the authority to regulate attorneys practicing before federal agencies is in the Congress, the issue is one of delegation (*i.e.*, May the Congress delegate all or a portion of the function? & Has the Congress used appropriate standards in the delegation?) and not a question of separation of powers.

In *Sperry v. Florida*⁶³ the Court concluded its opinion sustaining the authority of the Patent and Trademark Office to regulate the persons practicing before it with the following statement: "Finally, § 31 [*i.e.*, 35 U.S.C. § 31: Regulations for agents and attorneys] contains sufficient standards to guide the Patent Office in its admission policy to avoid the criticism that *Congress* has improperly delegated *its* powers to the administrative agency."⁶⁴ (Emphasis added.) One can reasonably conclude that the Court is indicating that the authority to set admission requirements (*i.e.*, the first aspect of the regulation of the practice of law) is one of the powers of the Congress—that is, a power which remains with the Congress unless effectively delegated. If, in fact, the Congress is the branch of the federal government with the responsibility, one can reason further that the Congress has authority to delegate all or part of that power, constrained only by the requirement that appropriate standards be set. Thus, when the Congress withdrew the power from federal agencies in 1965 to set admission requirements (save for the Patent and Trademark Office), the other aspects of the power to regulate attorneys (*i.e.*, authority to promulgate standards and to discipline) remained in the agencies to the extent previously delegated. As a consequence, the Agency Practice Act arguably did not affect the ability of federal agencies to base their authority to regulate attorneys (except for admission requirements) on an implied delegation from Congress.

63. 373 U.S. 379 (1963).

64. *Id.* at 403, 404. Although the authority of the Congress to regulate persons practicing before the Patent and Trademark Office is buttressed by U.S. Const. Art. I, § 8, Cl. 8 ["The Congress shall have Power . . . To promote the Progress of Science and useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries''] and although *Sperry* discussed extensively the relationship of the Congress and the Patent and Trademark Office, the Court's statement should not be discounted as precedent for Congressional authority to regulate persons practicing before administrative agencies in general. For example, in *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926) wherein the Court sustained the implied power of the Board to prescribe rules of practice for the admission of persons practicing before the Board (in *Goldsmith*, accountants), the Court used language (albeit dictum) which acknowledged the authority of Congress to delegate the power to regulate attorneys to an agency: "[I]t is urged . . . that it was not intended by Congress to give it [the Board] the power. Our view, on the contrary, is that . . . the general words by which the Board is vested with the authority to prescribe the procedure in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys." *Id.* at 122. *Goldsmith* made no reference to U.S. Const. Art. I, § 8, Cl. 1 [Congressional "Power to lay and collect Taxes"]. Although *Sperry* and *Goldsmith* involve agencies delegated express constitutional, Congressional powers, one can argue that this is a distinction without significance. All Congressional delegations to agencies are "constitutionally" authorized, either expressly or impliedly; otherwise, the delegation would be impermissible.

Although other arguments challenging federal agencies' authority to regulate attorneys may exist (or be constructed) and although the analyses of those set out, *supra*, may not be without fault, a reasonable conclusion would seem to be that the federal government (specifically, the Congress) has authority to regulate attorneys practicing before federal agencies and that in a number of instances this power has been delegated, either expressly or impliedly, to various federal agencies. Consequently, consideration now turns to the three aspects of regulating attorneys practicing before federal agencies: admission requirements, standards of conduct, and disciplinary action to determine whether federal agencies have been acting unconstitutionally, *ultra vires*, or otherwise improperly in their regulation of attorneys, and if problems (whether practical or theoretical) exist, what corrective action should be taken.

*Admission Requirements for Attorneys
Practicing before Federal Agencies*

In 1965, the Congress enacted the Agency Practice Act⁶⁵ in order "to provide, as far as practicable, for the right of persons to be represented by any attorney in good standing in matters before Federal agencies. The bill [does] away with agency established admission requirements for licensed attorneys, and thus [allows] persons to be represented before agencies by counsel of their choice."⁶⁶ The Act provides, *inter alia*: "An individual who is a member in good standing of the bar of the highest court of a State⁶⁷ may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts."⁶⁸ The Congress included in the Act, however, four limitations to this provision which affect attorneys, *i.e.*, the section does not

- [1] authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency; . . .
- [2] authorize an individual who is a former employee of an agency to represent a person before an agency when the representation is prohibited by statute or regulation; . . .

65. Act of Nov. 8, 1965, 89th Cong., P.L. 89-332, 79 Stat. 1281, codified as 5 U.S.C. § 500 (1976).

66. H.R. Rep. No. 1141, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 4171 (1965). Prior to the Act a number of agencies had admission requirements which restricted the right to practice before federal agencies. See F. Vom Baur, *Standards of Admission for Practice Before Federal Administrative Agencies* (1953) (Sponsored by the Survey of the Legal Profession, Under the Auspices of the American Bar Association); Henley, *Admission of Attorneys to Practice before Federal Administrative Agencies*, 24 I.C.C. Prac. J. 1198-1206 (1957). In 1957, the Justice Department recommended that agencies abolish admission requirements which most did by 1965. When the Congress considered enacting the Agency Practice Act, only Treasury and the Patent Office raised objections to eliminating their admission to practice requirements. See 1965 U.S. Cong. & Admin. News 4171.

67. 5 U.S.C. § 500(a)(2) (1976) defines "state" as "a State, a territory or possession of the United States including a Commonwealth, or the District of Columbia."

68. 5 U.S.C. § 500(b) (1976).

- [3] prevent an agency from requiring a power of attorney as a condition to the settlement of a controversy involving the payment of money. . . .
[; or]
- [4] apply to practice before the Patent Office with respect to patent matters that continue to be covered by chapter 3 (sections 31–33) of title 35.⁶⁹

The first of these limitations will be considered in detail, *infra*,⁷⁰ and the fourth seems self-explanatory.⁷¹

The second limitation was placed in the Act to permit agencies to deal with the so-called “revolving-door” practice of persons employed in the federal government, *e.g.*, “many government attorneys . . . choose not to make government service a career and enter or return to private practice. This flow of attorneys benefits the government by bringing seasoned lawyers and enthusiastic law school graduates into public service, and gives attorneys an opportunity to acquire expertise and skills that can benefit their subsequent private practice.”⁷² Although some agencies have promulgated rules restricting post-employment activities of former employees,⁷³ the Congress has entered the field with specific guidelines. The Ethics in Government Act of 1978⁷⁴ amended existing post-employment legislation and imposed additional proscriptions.⁷⁵ Post-employment-restricting statutes and regulations attempt to reduce the negative effects of the “revolving door” practice, *e.g.*, to discourage a person from tailoring her/his official conduct while in office in order to enhance future employability in the private sector; to eliminate possible unfair influence with the former agency; and to deter improper use of confidential information.⁷⁶ As the Administrative Conference of the United States recently adopted a recommendation relating to post-employment restrictions,⁷⁷ this limitation to the general admission policy of the Agency Practice Act will not be considered further.

The remaining limitation (*i.e.*, authority to require a power of attorney as a condition to a monetary settlement) included by the Congress to the Agency Practice Act’s admission requirement has, as enacted, apparently not been controversial; however, the limitation may not be broad enough to take into account

69. 5 U.S.C. § 500(d)(2)–(4), § 500(e) (1976).

70. See Discipline of Attorneys Practicing before Federal Agencies, notes 201 *et seq.*, *infra* and accompanying text.

71. 35 U.S.C. § 31, 32, 33 (1976) relate to, respectively: regulations for agents and attorneys; suspension or exclusion from practice; and unauthorized representation as practitioner.

72. Note, *Conflicts of Interest and the Former Government Attorney*, 65 Geo. L.J. 1025, 1026 (1977).

73. See, *e.g.*, 16 C.F.R. § 1025.67 (CPSC); 46 C.F.R. § 502.32 (FMC); 20 C.F.R. § 501.11(b) (Labor); 42 C.F.R. 5357 (Postal Service) as well as 5 C.F.R. § 735 (Rules on Post Employment Conflict of Interest, issued by OPM).

74. P.L. 95-521, § 501(a), 92 Stat. 1824, *codified as* 18 U.S.C. § 207 (Supp. IV 1980).

75. For an explanation of the Act, consult materials cited in Appendix C: Selected Bibliography, Part 4, *infra*; see also Consumer Product Safety Act, § 4, 15 U.S.C. § 2053(g)(2) (1976).

76. See Shapiro, *Post Employment Restrictions of Ohio Ethics Law*, 7 Ohio North. L. Rev. 913, 917–23 (1980). See note 187, *infra*.

77. See Recommendation 79-7, Administrative Conference of the United States, *reprinted in* 1 CFR 305.79-7 (1982).

a situation that a number of agencies face—release of information which is restricted by statute.⁷⁸

In 1982, a federal district court in *McDaniel v. Israel*⁷⁹ struck down a regulation of the Social Security Administration (SSA)⁸⁰ as being inconsistent with the Agency Practice Act. The SSA rule required submission to the Administration of a notice signed by the claimant that the attorney, in fact, represented the client prior to the SSA's recognizing the attorney's representation. *McDaniel* held the rule in conflict with the Act, specifically with regard to the provision quoted, *supra*,⁸¹ and another subsection which provides: "When a participant in a matter before an agency is represented by an individual qualified under this section, a notice or other written communication required or permitted to be given the participant in the matter shall be given to the representative in addition to any other service specifically required by statute."⁸² The Social Security Administration refused to send to the attorney in *McDaniel* notices and written communications until he submitted the signed appointment of representation. This, the court held, was improper.⁸³

Federal agencies may be caught in a statutory conflict. Particular statutes require that authorization be obtained before restricted information is released⁸⁴ and, in fact, sanctions may be imposed for improper release.⁸⁵ On the other hand, the Agency Practice Act, as interpreted by *McDaniel*, might appear to forbid an agency to require an attorney to submit a signed, appointment of representation, the effect of which would be to permit restricted information about the client to be provided to the attorney without a further release. The *McDaniel* opinion does not hold, however, that an agency may not require a power of attorney from a client prior to release of restricted information, only that such a release may not be made an admission to practice requirement before an agency. Presumably, an agency is permitted, after an attorney has filed "with the agency a written declaration that he is currently qualified" (*i.e.*, a member in good standing of the bar of the highest court of a State⁸⁶), to require the

78. See notes 84 and 85, *infra*.

79. 53 Ad.L.2d 521 (W.D. Va. 1982).

80. See 20 C.F.R. § 404.1707 (1982).

81. See note 68, *supra* and accompanying text.

82. 5 U.S.C. § 500(f) (1976). Although protection of confidential, personal information was recognized in *McDaniel* to be of concern, the court held that "the public is already adequately protected . . . by 18 U.S.C. § 1007. . . . Congress has established the procedures by which an attorney may qualify to represent a claimant . . . [and] this is all that is necessary and appropriate." 53 Ad.L.2d at 525.

83. 53 Ad.L.2d at 524-25.

84. See, *e.g.*, 26 U.S.C. § 6103(a) (1976) (Internal Revenue Service); 35 U.S.C. §§ 122, 181 (1976) (Patent and Trademark Office); 38 U.S.C. § 3305 (Supp. IV 1980) (Veterans Administration).

85. See, *e.g.*, 18 U.S.C. § 1905 (Supp. IV 1980); 26 U.S.C. §§ 7213(a)(1), 7217 (Supp. IV 1980); 35 U.S.C. § 186 (1976); 38 U.S.C. § 3301(j) (Supp. IV 1980) (Incorporating penalty provisions of Privacy Act, 5 U.S.C. § 552a).

86. 5 U.S.C. § 500(b) (1976).

attorney to submit a power of attorney signed by the client prior to releasing information which is restricted by statute. This would involve a two-step process, rather than the one-step procedure invalidated by the *McDaniel* court. Without addressing the reasoning of *McDaniel*, one can argue that even if the court is correct in its statutory interpretation, a two-step process is unnecessary and is only a bureaucratic burden. As a consequence, the Agency Practice Act should be amended to permit an agency to require a power of attorney from the client authorizing release of information which is restricted by statute as a condition of recognizing an attorney's representation.⁸⁷

In response to a survey sent to federal agencies (general counsels and chief administrative law judges⁸⁸), over ninety-five percent of the twenty-four agencies responding to a question relating to admission requirements⁸⁹ did not favor admission requirements beyond those required by the Agency Practice Act, *i.e.*, the Act should not be amended to permit specialized requirements. One agency—the Postal Service—indicated, however, that an additional admission requirement was currently being imposed:

Generally, except as provided in § 951.3, any attorney at law who is a member in good standing of the Bar of the Supreme Court of the United States or of the highest court of any State, District, Territory, Protectorate or Possession of the United States, or of the District of Columbia, and *is not under any order of any court or executive department of one of the foregoing governmental entities suspending, enjoining, restraining, disbaring, or otherwise restricting him in the practice of law* may represent others before the U.S. Postal Service.⁹⁰ (Emphasis added.)

87. 5 U.S.C. § 500(d) should be amended to read: "This section does not—****prevent an agency from requiring a power of attorney as a condition to the release of information the disclosure of which is restricted by law.*" See note 235, *infra*. A similar recommendation was made in Weckstein, Control of Practice and Discipline of Representatives before Federal Administrative Agencies—A Study for the Administrative Conference of the United States 41 (Preliminary Draft/October 1970). See *Id.* at 34–42, for a discussion of powers of appointment as required by agencies in 1970, as well as the legislative history of 5 U.S.C. § 500(d)(4).

88. See note 16, *supra*, and Appendix A (Federal Questionnaire).

89. Twenty-seven agencies responded to the Federal Questionnaire; in some instances a response was received both from the general counsel and from the chief administrative law judge (or their representative) and in other instances only one or the other responded. The responding agencies were: The Department of Health and Human Services; Department of State; Postal Rate Commission; Department of Interior; U.S. International Trade Commission; Department of Commerce; NLRB; HUD; Federal Reserve System; Department of Transportation; FMC; Merit Systems Protection Board; USDA; CFTC; FCC; Department of Treasury; U.S. Coast Guard; SEC; FERC; CAB; ICC; FTC; Drug Enforcement Administration; FDA; U.S. Postal Service; National Transportation Safety Board; and Occupational Safety & Health Review Commission. Of the twenty-seven responding agencies, only twenty-four responded to QUESTION ONE, relating to admission requirements. Two agencies did state parenthetically that if additional requirements were to be imposed, the requirement would relate to competence (QUESTION TWO).

90. 39 C.F.R. §951.2(c) (1982).

Section 951.3 provides:

Persons ineligible for admission to practice.

(a) *No person disbarred from practice before the Postal Service or in any other executive department of any of the governmental entities mentioned in § 951.2(c) [set out, supra] will be eligible to practice before the Postal Service until said order of disbarment shall have been revoked.*

(b) *Any person who, subsequently to being admitted to practice before the Postal Service, is disbarred by any governmental entity mentioned in § 951.2(c) shall be deemed suspended from practice before the Postal Service during the pendency of said order or disbarment.*⁹¹ (Emphasis added.)

These sections of "Procedures Governing the Eligibility of Persons to Practice before the Postal Service"⁹² raise several issues. First, has the Postal Service imposed an additional admission requirement by denying eligibility to practice to an attorney who is under a disciplinary order issued by a court (or by an executive agency)? Second, may an agency deny, *ipso facto*, eligibility to practice on the basis of another authority's (*i.e.*, the licensing state's or an executive agency's) disciplinary order without an independent determination?

With regard to denying eligibility to practice because of discipline imposed by another agency (whether executive or independent), no authority appears to be included in the Agency Practice Act to support this proscription of the Postal Service regulation. As a consequence, ineligibility based on a disciplinary order of another agency would appear to violate 5 U.S.C. § 500.⁹³

91. 39 C.F.R. §951.3(a) & (b) (1982).

92. 39 C.F.R. §951 (1982).

93. One can argue that at least two parts of SEC Rule 2(e) [17 C.F.R. § 201.2(e) (1982)] violate 5 U.S.C. § 500 as "indirect" admission requirements. The Rule permits the Commission to impose discipline if an attorney does not "possess the requisite qualifications to represent others" or is "lacking in character or integrity." 17 C.F.R. § 201.2(e)(1)(i), (ii). *See* note 119, *infra* for text of Rule 2(e). The issue is, of course, do these standards permit the SEC to define competence and moral qualifications and, if an attorney is found lacking in either, to restrict her/his eligibility to practice before the Commission? If the response is in the affirmative, in the broader sense of independently defining these concepts rather than depending on the professional standards of the licensing state to define competence and moral character (and to give content to them by either denying a license or by restricting a license by a state disciplinary proceeding), these parts of Rule 2(e) would seem to violate § 500(b)—qualification to practice before federal agencies based solely on admission to a state bar. The legislative history of the Agency Practice Act is quite clear that the Congress intended to eliminate specialized bars before federal agencies and that matters of competence and moral character were for state determination, except for the Patent and Trademark Office. *See* 1965 U.S. Code Cong. & Ad. News 4170–80; Senate Comm. on the Judiciary, Abolishing Admission Requirements for Licensed Attorneys before Federal Administrative Agencies, S. Rep. No. 755, 89th Cong., 1st Sess. 1–7 (1965). If an agency can discipline a person because (s)he does not "possess the requisite qualification" or because (s)he is "lacking in character or integrity," is this not an indirect way of saying, "You must meet *our* standards of competence and moral qualification or we shall remove by a disciplinary proceeding your eligibility to practice before us." That this is a reasonable interpretation of Rule 2(e) is reinforced by the next part of Rule 2(e)(1)(ii) which gives as an alternative basis for discipline that the attorney has "engaged in unethical or improper professional conduct." Competence and moral qualification are, therefore, being treated internally within Rule 2(e) as matters alternative to, and separate from, "unethical or improper

An exchange of correspondence between Michael Franck, Chair of the ABA Standing Committee on Professional Discipline and Howard C. Anderson, Chair of the Administrative Law Committee, ABA Section on Public Utility Law is instructive on the effect that may be given to a disciplinary action of the licensing state(s)—

Mr. Anderson on May 17, 1982:

There is an additional point which should be considered in connection with the discussion. . . .

As you know . . . a member [currently] in good standing of the bar of the highest court of a state may represent a person before an agency. . . .

I understand that a state court can disbar, suspend or otherwise discipline a lawyer for conduct elsewhere, including conduct before a federal agency. For example, . . . [A] lawyer might be disbarred [in Texas for misconduct before the Department of Interior]. The attorney, having lost his membership in the bar of Texas, will have lost his right to practice before the Department of Interior and other federal agencies.

If this example does not bring out all the relevant points, others can be put forward.⁹⁴

Mr. Franck on May 19, 1982:

I have your further letter of May 17, 1982. You therein draw a conclusion the validity of which is subject to some doubt.

It is not at all clear that because the right of a practitioner to practice before a federal administrative agency is originally dependent upon his admission to practice before the highest court of the state that if that state later revokes that practitioner's license to practice in the state he therefore automatically loses his right to continue to participate in matters pending before the agency. . . .

I know of no clear statement of authority which holds that the revocation of the state license automatically revokes the right to continue to practice before an agency. Those who believe it does rely upon the logic of that conclusion.

But the very same logic applies to admission to practice before the federal courts which is also dependent upon admission to practice before the highest court of a state. One would assume with equal logic that revocation of the state license upon which federal admission is predicated would automatically result in the revocation of the federal admission. But the Supreme Court of the United States has held to the contrary, *Selling v. Radford*, 243 U.S. 46 (1917) and *Theard v. United States*, 354 U.S. 278 (1957). Thus, a practitioner who has been disbarred by a state court might well argue that

professional conduct," the former being standards withdrawn by the Congress in the Agency Practice Act in 1965 as admission requirements, except for the Patent and Trademark Office. Whether federal agencies have authority under the Agency Practice Act to adopt standards relating to "unethical or improper conduct" is discussed at notes 118 *et seq.*, *infra* and accompanying text.

94. Letter to Michael Franck from Howard C. Anderson (May 17, 1982), a copy of which is on file with the Administrative Conference of the United States.

once he has qualified for agency practice he is entitled to a federal forum in which to have the matter of his continued qualification determined rather than have the federal forum "blindly" adhere to a state determination. . . .

Finally, whatever the ultimate outcome of the foregoing issue as to the effect of the state court disbarment upon the right to practice before federal agencies insofar as practitioners who are admitted to practice in only a single state is concerned, it is clear that those federal agency practitioners who are admitted to practice in more than one state (an ever increasing number) could continue to practice before federal agencies at least until and unless they were disbarred in every state in which they were admitted.⁹⁵

Mr. Anderson on May 28, 1982:

I have your letter dated May 19, 1982. . . . [Mr. Anderson quoted 5 U.S.C. § 500(b),⁹⁶ emphasizing that an attorney must declare *current* good standing in the bar of the licensing State].

If an individual is a member in good standing of the bar of the highest court of more than one state, then this qualification in either state will be sufficient under the statute to entitle him to represent a person before an agency. If he ceases to be so qualified in one state, but remains qualified in the other state, the latter qualification will suffice.

You agree, as I understand it, that an individual admitted to practice in the courts of the state may be disbarred, by that State, because of conduct in a proceeding before a federal agency. That state disbarment would mean that he would not be entitled to make the representation (required by 5 U.S.C. § 500) that he is "currently qualified" as provided in that section. If that individual were also admitted to practice in a second state, it is of course possible that the second state would also take action, but if it did not the lawyer would remain qualified by virtue of the language in 5 U.S.C. § 500.

Of course, your committee [*i.e.*, the ABA Standing Committee on Professional Discipline] may propose a change in 5 U.S.C. § 500 but it is not clear to me that you have indicated any desire to do so. So far as I know, § 500 has worked well, and if the individual is disbarred in the state in which he is admitted to practice (or in every state in which he is admitted to practice) why should not that terminate his statutory right to practice before federal agencies? Why should it make any difference that the bad conduct for which he was disbarred was conduct before a federal agency?

The situation respecting practice before the federal courts (which you discuss in your letter) is quite different. In *Theard v. United States*, 354 U.S. 278, Justice Frankfurter pointed out (page 281) that the rules of court provide that when a member of the court's bar has been suspended in any state, then he has forty days to show cause why he should not be disbarred from the federal court. That seems clear, and it was applied in that case.

95. Letter to Howard C. Anderson from Michael Franck (May 19, 1982), a copy of which is on file with the Administrative Conference of the United States.

96. See note 68, *supra*, and accompanying text.

We have to recognize that 5 U.S.C. § 500 is quite different, unless and until you ask Congress to change it.⁹⁷

Mr. Franck on June 2, 1982:

I have your further letter of May 28, 1982.

There are a number of problems with placing reliance upon the provisions of 5 U.S.C. § 500 to revoke the right of lawyers to practice before administrative agencies. You have identified one, the individual who is admitted to practice in more than one state. How can one defend a provision which leads to the possible result that a lawyer licensed to practice in three states who is disbarred for misconduct before a federal agency by two of them, must continue to be permitted to practice before that very agency because the third state in which he is licensed has taken no action? . . .

I agree that the decision in *Theard v. United States* is not dispositive. But, on the other hand, it is not accurate to suggest that the determination of that case depended upon the particular disciplinary rule in force in the lower federal court in which the proceeding was initiated. To the contrary, the court in substance concluded that a rule giving the federal court the discretion to evaluate the state court disbarment was required. The case stands clearly for the proposition that the federal courts may not under any circumstances undertake to automatically disbar a member of their bar simply on the basis of that lawyer's disbarment by a state court, even if that state court is the one upon which the lawyer's admission to the federal court was predicated. See also *Selling v. Radford*, 243 U.S. 46.⁹⁸

Mr. Anderson on June 4, 1982:

Thank you for your letter of June 2, 1982. . . . [Mr. Anderson quoted the question ending the penultimate paragraph, directly above: "How can one defend . . . no action?"] With all respect, I suggest that this is a straw man. If the hypothetical lawyer admitted in three states is disbarred in two states, it is very likely that he will be disbarred also in the third state. . . .

Regarding *Theard v. U.S.*, 354 U.S. 278, I believe the holding in the case was correctly stated in my letter of May 28. The court applied the rule of court which was clear and covered that case, just as it would apply 5 U.S.C. § 500 in a case involving a federal agency (unless you persuade Congress to change it).⁹⁹

And finally, Mr. Franck on June 7, 1982:

I have your further letter of June 4, 1982. At the risk of appearing to insist that I have the last word, I feel a reply is necessary.

I am afraid that in evaluating the adequacy of existing provisions it is necessary to look at the world the way it is and not the way it ought to be.

97. Letter to Michael Franck from Howard C. Anderson (May 28, 1982), a copy of which is on file with the Administrative Conference of the United States.

98. Letter to Howard C. Anderson from Michael Franck (June 2, 1982), a copy of which is on file with the Administrative Conference of the United States.

99. Letter to Michael Franck from Howard C. Anderson (June 4, 1982), a copy of which is on file with the Administrative Conference of the United States.

The fact is that all too often lawyers admitted in more than one state and disbarred in one of them are not disciplined in the other.¹⁰⁰

The Anderson/Franck exchange of correspondence demonstrates the interrelation of the issues relating to the effect that may be given by a federal agency to a disciplinary action of the licensing state(s). Noteworthy is that Messrs. Anderson and Franck agree, at least in theory,¹⁰¹ on the first point, *i.e.*, if a person has been admitted to the practice of law in more than one state, that person is qualified to practice before federal agencies under the Agency Practice Act (5 U.S.C. § 500), notwithstanding discipline by one state, provided (s)he remains qualified to practice in at least one licensing state. If they are correct, and such appears to be the case, Postal Service regulation § 951.2(c) would violate the Act under the particular set of circumstances where an attorney retains a license to practice in one state, although having been disciplined in another jurisdiction.

Although a violation may exist, one tends to agree with Mr. Franck's June 2, 1982, observation: "How can one defend a provision which leads to the possible result that a lawyer licensed to practice in three states who is disbarred for misconduct before a federal agency by two of them, must continue to be permitted to practice before the very agency because the third state in which he is licensed has taken no action?" This is a situation which was apparently not considered by the Congress in 1965 when the Agency Practice Act was enacted and is one which should be eliminated by amendment of the Act.¹⁰²

100. Letter to Howard C. Anderson from Michael Franck (June 7, 1982), a copy of which is on file with the Administrative Conference of the United States.

101. In the exchange of correspondence, Mr. Anderson believes this type of situation unlikely to occur (*see* note 99, *supra*, and accompanying text) while Mr. Franck states that it happens "not infrequently," (*see* note 100, *supra*, and accompanying text). On balance, Mr. Franck's experience with disciplinary matters [*i.e.*, as Executive Director of the Michigan Bar Association (a position he holds at present) and as Reporter for the Clark Committee (1970) (*see* note 24, *supra*)] would seem to suggest that his appraisal of the current situation may be more accurate.

102. 5 U.S.C. § 500(b) should be amended to read: "An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts. *Notwithstanding, an agency which receives notice that a State license by virtue of which an individual is (or could have been) qualified under this subsection to represent persons before the agency has been suspended, enjoined, restrained, revoked, or otherwise restricted by the State, may require the individual to show cause within forty days why he should not be similarly suspended, enjoined, restrained, disbarred, or otherwise restricted in representing persons before the agency; the agency may suspend temporarily the right of the individual to represent persons before the agency unless and until he shall show cause.*" The indefinite article "a," rather than the definite article "the," has been used as the eighth word of the proposed amendment so that if an individual is licensed in more than one State, an agency may require the individual to "show cause," even though her/his right to practice has not been affected in all licensing States. A similar recommendation was made by Thomas Lumbar, a Washington, D.C., practitioner in his "Proposed Amendments to Title 5, United States Code, Section 500." *See* Letter to Jeffrey S. Lubbers from Thomas Lumbar (Mar. 25, 1982), a copy of which is on file with the Administrative Conference of the United States. *See also* note 112, *infra*.

Postal Service Regulation 951 raises another question: May discipline by a licensing authority or an executive agency (and for purposes of analysis, also by an independent agency) affect *ipso facto* the eligibility of a person to practice before the Postal Service? That is, do *Theard*¹⁰³ and *Selling*¹⁰⁴ (and other cases¹⁰⁵) require an agency to make its own evaluation? Messrs. Anderson and Franck were unable to reach agreement on this issue. The answer with regard to discipline imposed by another agency, whether independent or executive, would seem clear: One agency, under the Agency Practice Act as currently enacted, may not deny eligibility to practice, whether *ipso facto* or otherwise, because of discipline taken by (or misconduct before¹⁰⁶) another agency. The Act provides for one admission requirement: current good standing to practice before the highest court of a state.¹⁰⁷

Even though Mr. Anderson is correct in his interpretation of the precedents (*i.e.*, exclusion under *court* rules permitting an attorney to show cause why (s)he should not be disbarred¹⁰⁸) and, thus, *Theard* and *Selling* are not directly on point, one should not ignore the clear implications of the cases, especially the language of *Theard*:

While a lawyer is admitted into a federal court [*or to practice before an administrative agency*] by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judiciaries and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. . . . Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred. . . . The recognition that must be accorded such a state judgment [of disbarment] and the extent of the responsibility that remains in the federal judiciary were authoritatively expounded in *Selling*.¹⁰⁹

103. *Theard v. United States* 254 U.S. 278 (1957).

104. *Selling v. Radford*, 243 U.S. 46 (1917).

105. *See, e.g., In re Ruffalo*, 390 U.S. 544 (1968); *Bogart v. Carter*, 445 F.2d 321 (9th Cir. 1971).

106. Although 5 U.S.C. § 500 does not "authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency," no indication has been found which indicates this provision was intended to apply to misconduct before another agency. *Id.* at § 500(d)(2).

107. 5 U.S.C. § 500(b) (1976).

108. *See, Theard v. United States*, 354 U.S. 278, 281 (1957); *Selling v. Radford*, 243 U.S. 46, 51 (1917).

109. *Theard v. United States*, 354 U.S. 278, 281-282 (1957). Under the *Selling* standard, a state judgment must stand unless one or more of the following conditions appear from the state record:

1. That the state procedure, from want of notice or opportunity to be heard, was wanting in due process;
2. [T]hat there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or

In 1971, the Court of Appeals for the Ninth Circuit extended the *Theard/Selling* standard to administrative agencies when an agency considers the effect to be given to the discipline imposed by an attorney's licensing state.¹¹⁰ Five years later, the Attorney General of the United States reversed a rehearing of the case overturned by the Ninth Circuit in 1971:

It is my view that the Ninth Circuit . . . implicitly asserted an inalienable obligation on the part of the [Immigration & Naturalization] Service [INS] to exercise an independent judgment in suspension proceedings similar to that required of federal courts. Thus the hearing required by that decision was not a hearing simply to determine whether respondent has been suspended, but a hearing in which respondent might seek to discredit the state finding for lack of minimum procedural fairness in the underlying process, or for absence of minimally sufficient evidentiary support, and in which respondent might adduce some other "grave reason" which should prevent the natural consequences of the state judgment from extending into the federal sphere.

The Board argues it is bound by [its regulation] which states that the board may suspend an attorney if such suspension is in the public interest and that, if an attorney has been suspended by a state court, his suspension from the bar of the board "shall be deemed to be in the public interest." Obviously, however, *Departmental regulations cannot contravene judicially established requirements of fairness. . . . The standard for suspension from practice before the board and the Service . . . is the same as that for disbarment before the federal courts.*¹¹¹ (Emphasis added.)

Of course, one court of appeals' decisions (and the opinion of the Attorney General) do not by themselves provide authoritative interpretation of the Agency Practice Act on this point; however, the strong implication contained in *Theard* and *Selling* adds strength to the argument that an agency is to provide a "show-cause" hearing before imposing a restriction on the eligibility to practice before the agency based on discipline by the licensing state. To clarify this point, the Agency Practice Act should be amended to provide for a "show-cause" hearing before an agency restricts the right to practice because of discipline imposed by the licensing state.¹¹²

3. [T]hat some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained to do so.

Selling v. Radford, 243 U.S. 46, 51 (1917).

110. *Bogart v. Carter*, 445 F.2d 321 (9th Cir. 1971).

111. *In re Peter D. Bogart*, 38 Ad.L.2d 124, 128-29 (1976). The Attorney General did bolster his conclusion by reference to INS procedures permitting 30 days to respond to charges and to discretionary language in the INS regulation. 38 Ad.L.2d at 128.

112. If the Agency Practice Act were to be amended to permit reciprocity not only for state imposed discipline, but also for that imposed by federal courts and other federal agencies, the language suggested for 5 U.S.C. § 500(b) [note 102, *supra*] would be expanded to read: "An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf

In the early draft of the ABA Standing Committee on Professional Discipline's proposed "Rules for Federal Agency Discipline,"¹¹³ a centralized register of attorneys was suggested because "[a]n efficient system requires the development and maintenance [sic] of a roster of the name, address, and birthdate of all practitioners, the agencies before which they are admitted to practice, and the jurisdictions in which they are licensed, in order to assist . . . in the proper identification of practitioners who allegedly have engaged in professional misconduct."¹¹⁴ Opposition to the register apparently induced the Standing Committee to delete the concept of a centralized register from subsequent drafts, as well as from the final proposed rules presented to the ABA House of Delegates on August 11, 1982, at the Association's Annual Convention.¹¹⁵ The register was viewed by its critics as "burdensome"; "creating great repositories of files"; and inherently incomplete because of the impossibility of constructing a comprehensive listing since: (1) some "agencies do not enroll a practitioner but instead provide that an attorney qualified to practice in any state . . . is automatically authorized to practice before that agency" and (2) a "lawyer in the hinterlands who never physically appears in agency premises in person or by paper, but who advises a client about a statute or rule administered by an agency" would not be listed.¹¹⁶ In other words, as an official of the Treasury Department observed, "The proposal to maintain a roster of all practitioners . . . would be a horrendous undertaking, since it would mean listing all lawyers . . . in the U.S."¹¹⁷

When one first considers regulation of attorneys practicing before federal agencies, a logical requirement seems to be creation and maintenance of a register, roster, or the like of attorneys practicing administrative law; however, on closer reflection, one is led to the conclusion that this is an idea whose day has not, and probably never will, come. The expense involved, as well as little expectation of producing anywhere near a complete listing, makes the creation

he acts. *Notwithstanding, an agency which receives notice that a State license by virtue of which an individual is (or could have been) qualified under this subsection to represent persons before the agency (or that such an individual's qualification to represent persons before a federal court or before another agency) has been suspended, enjoined, restrained, revoked, or otherwise restricted by the State, federal court, or other agency may require the individual to show cause within forty days why he should not be similarly suspended, enjoined, restrained, disbarred, or otherwise restricted in representing persons before the agency; the agency may suspend temporarily the right of the individual to represent persons before the agency unless and until he shall show cause.*" For further discussion of reciprocity of agency discipline, see notes 231 to 234, *infra* and accompanying text.

113. See Franck Proposal, *supra* note 7.

114. See Draft Model Mechanism, dated March 19, 1981, page 9 (Commentary to Rule 5), a copy of which is on file with the Administrative Conference of the United States.

115. See Franck Proposal, *supra* note 7.

116. The sources of the quotations are not considered important, but their cumulative effect, as well as others, appears to have had its effect—the register, as a concept, was deleted. Copies of the quoted correspondence are on file with the Administrative Conference of the United States.

117. Letter to Michael Franck from David R. Brennan (April 16, 1981), a copy of which is on file with the Administrative Conference of the United States.

of a centralized listing of attorneys practicing in the federal administrative process highly unlikely.

If attorneys authorized to practice before agencies under the requirements set by the Congress (*i.e.*, the Agency Practice Act) are to be regulated, two additional aspects are applicable: To what standards of conduct are attorneys to be held? And, what mechanism will be employed for violation of the applicable standards of conduct? These will be considered in order.

*Standards for Regulation of Conduct of
Attorneys Practicing before Federal Agencies*

On February 28, 1981, the Securities and Exchange Commission (SEC) announced in *In the Matter of Carter and Johnson*¹¹⁸ an interpretation of SEC Practice Rule 2(e):¹¹⁹

[A] lawyer engages in "unethical or improper professional conduct" under the following circumstances: When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance. The Commission has determined that this interpretation will be applicable only to conduct occurring after the date of this opinion.¹²⁰

The SEC explained that an attorney who finds her/himself in such a situation is to counsel accurate disclosure but if that advice is not followed and the security laws continue to be violated, (s)he must take "further, more affirmative steps": *e.g.*, resignation, a direct approach to the board of directors, or enlistment of aid from other members of the management.¹²¹ In sum, what is required is "some prompt action that leads to the conclusion that the lawyer is engaged in

118. *In the Matter of Carter and Johnson* [SEC Release No. 34-17597, Feb. 28, 1981], Fed. Sec. L. Rep. (CCH), No. 903 (Special Edition) (March 6, 1981) [hereinafter referred to as *Carter and Johnson*].

119. Rule 2(e), 17 C.F.R. 201.2(e) (1978), provides in paragraph (1):

The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the federal securities laws (15 U.S.C. 77a to 80b-20), or the rules and regulations thereunder.

See note 93, *supra*.

120. *Carter and Johnson*, *supra* note 118, at 79, 80. The promulgating of new policy in an adjudication without applying the policy in the adjudication would appear to be a "prospective order," similar in nature to the "Excelsior Rule" invalidated in *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); cf. *Ford Motor Co. v. FTC*, 654 F.2d 599 (9th Cir. 1981). See note 123, *infra*.

121. *Carter and Johnson*, *supra* note 118, at 80, 81.

efforts to correct the underlying problem, rather than having capitulated to the desires of a strong-willed, but misguided client.”¹²²

Six months later, the Commissioners requested comments on the appropriateness of the announced interpretation, specifically stating that comments with regard to the “authority to adopt and administer Rule 2(e)” were not being solicited.¹²³ The attempt to limit public input to the *Carter and Johnson* interpretation of Rule 2(e) was not successful. Many of the comments received by the SEC directly challenged not only the standard (on which comments were requested), but also the authority of the Commission to establish *any* standards similar to canons of ethics or a code of professional responsibility.¹²⁴

The Commissioners’ request for comments on the *Carter and Johnson* standard provided a vehicle for associations of attorneys and individual practitioners to express their concern not only about agency standards of conduct in general, but also about an emerging type of practice standard—one whose purpose appears to be enlistment of attorneys to assist in carrying out an agency’s substantive law responsibilities. In 1973, the SEC clearly stated an intention to enlist attorneys, a purpose which was reaffirmed in 1981 in *Carter and Johnson*:

We have previously noted “the peculiarly (sic) strategic and especially central place of the private practicing lawyer in the investment process and

122. *Id.* at 81.

123. SEC release No. 34-18106, September 21, 1981, *reprinted in* 23 SEC Docket 8261826 (Oct. 6, 1981). The SEC’s request for comments would not seem to cure the “prospective order” nature of the interpretation [*see note 120, supra*], as the policy interpretation of Rule 2(e) is not being repromulgated, but remains “in effect” subject to change:

After careful consideration of these comments, the Commission will issue a further release summarizing and analyzing the comments received. *Based upon the comments, it may or may not determine to expand or modify its interpretation.* Until that time, *the present interpretation will govern all similar circumstances* for purposes of proceedings pursuant to Rule 2(e) if the conduct occurred after February 28, 1981. (Emphasis added.)

23 SEC Docket at 8261827.

124. *See* 68 ABAJ 252 (1982) for a brief summary of a number of comments. The entire file of comments is available for public inspection (under File No. 57-905) at the Commission’s Public Reference Section, Room 6101, 1100 L Street, N.W., Washington, D.C. The September 21, 1981, twenty-one page Response of the ABA Section of Corporation, Banking and Business Law (whose position was adopted by the ABA Board of Governors as policy of the Association) is representative of the comments received by the Commission:

The Proposal appears to reflect the Commission’s belief that, notwithstanding the absence of any authority for the Commission to establish a “federal securities bar,” the Commission somehow possesses and should exercise authority, analogous to that possessed by state bar authorities and state courts, to promulgate the equivalent of canons of ethics or a code of professional responsibility. The current proposal is, of course, concerned with but one aspect of the relationship between lawyers and with their corporate securities clients. We find nothing in the Release, however, that acknowledges any limitation on the Commission’s belief concerning its power to set standards of conduct for lawyers acting as lawyers. . . . In our view the Proposal to transform the Commission into a promulgator of ethical norms for the legal profession is a novel and disturbing one.

Id. at 2, 3. A copy of the Response is on file with the Administrative Conference of the United States.

in the enforcement of the body of federal law aimed at keeping that process fair. . . . [T]he task of enforcing the securities laws rests in overwhelming measure on the bar's shoulders."¹²⁵

In addition to the SEC, at least one other agency has proposed a similar role for attorneys. In late 1979, the Internal Revenue Service (IRS) began considering (and in 1980 proposed) new rules which would have prohibited an attorney from issuing a tax shelter opinion unless (s)he concludes that it is "more likely than not that the bulk of the tax benefits on the basis of which the shelter has been promoted are allowable under the tax law."¹²⁶ A breach of this standard would have constituted grounds for disbarment before IRS, without regard to the wilfulness of the violation.¹²⁷ One commentator observed about the tax-shelter proposal, "Just as the debate over the SEC's Rule 2(e) program begins to boil and bubble, creating toil and trouble for more and more securities attorneys, [the IRS] is suggesting improper conduct in tax counseling could be grounds for discipline by the Treasury Department."¹²⁸ The increased interest by federal

125. *Carter and Johnson*, *supra* note 118, at 12 n. 21 quoting *In the Matter of Emanuel Fields*, 45 SEC 262, 266 n. 20 (1973), *aff'd without opinion*, 495 F.2d 1085 (D.C. Cir. 1974). The SEC in *Fields* continued the thought quoted in the text, making the intent of the Commission even clearer: "These were statements of what all who are versed in the practicalities of securities law know to be a truism, *i.e.*, that this Commission with its small staff, limited resources, and onerous tasks is peculiarly dependent on the probity and the diligence of the professionals who practice before it." 45 SEC at 266 n. 20. This sentence was not quoted in *Carter and Johnson*. *But cf.* dissent of SEC Commissioner Karmel in *Keating, Muething & Klekamp*, 45 Ad.L.2d 1072, 1083 (1979):

In my opinion, rule 2(e) is an invalid exercise of the Commission's authority. I recognize that I am not writing on a clean slate, but until the question of the Commission's authority to discipline attorneys is validated by the United States Supreme Court or the Congress, I believe the validity of Rule 2(e) will not be free from doubt. I also recognize that the Commission has brought numerous 2(e) proceedings against attorneys, and that unless the courts or Congress abrogate the rule, the Commission, unfortunately, is unlikely to rescind it. Accordingly, I advocate that the Commission at least confine proceedings against attorneys under Rule 2(e) to cases in which an attorney has improperly conducted himself while personally representing clients before the Commission. Further, the misconduct should thwart the Commission's ability to function or should obstruct administrative justice. In no case, I believe, should the Commission invoke an equivocal administrative remedy like Rule 2(e) to discipline attorneys for conduct which does not directly threaten its administrative processes. To do so, is tantamount to setting professional standards for the practice of law.

For a discussion of the SEC position on enlisting attorneys, see Pickholtz, *The Proposed Model Rules of Professional Conduct—and other Assaults Upon the Attorney-client*, 36 Bus. Law. 1841, 1848–51 (1981).

126. See Tax Shelters, Practice Before the Internal Revenue Service, Proposed Treasury Regulation, 45 Fed. Reg. 58,594 (1980).

127. For an explanation of the Tax-Shelter Rule proposed by the IRS, see Hester, *Are New Treasury Rules a Tax Device in Disguise?*, 3 Legal Times Washington, Sept. 19, 1980, at 12, Col. 1. See also citations in 68 ABJ 471 n. 2 (1982).

128. Lempert, *IRS Mulls Attorney Shelter Crackdown*, 2 Legal Times Washington, Dec. 3, 1979, at 1, Col. 2.

agencies (not only by the SEC and the IRS, but by others¹²⁹) in promulgating standards of conduct to regulate attorneys, was the primary factor in generating the proposals relating to discipline of attorneys practicing before federal agencies considered by the ABA House of Delegates on August 11, 1982.¹³⁰

Analysis of the authority of federal agencies to promulgate standards of conduct, as well as the extent and nature of attorney conduct which may be controlled by these standards, is central to understanding regulation of attorneys by federal agencies. Even if one concludes that an agency has authority to promulgate standards of conduct, the extent to which this power may be exercised in controlling the practice of law must be considered.

Without question, the most explicit authority to adopt practice standards and to discipline attorneys who violate the standards has been given to the Patent and Trademark Office:

The Commission . . . may prescribe regulations governing the . . . conduct of attorneys¹³¹. . . [and] may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case from further practice before the [Patent and Trademark Office] any . . . attorney . . . who does not comply with the regulations.¹³²

And to the Treasury Department:

The Secretary of Treasury may prescribe rules and regulations governing the recognition of . . . attorneys. . . [and] may after due notice and

129. See, e.g., *NRC Will Discipline Lawyers Under Proposed Conduct Rules*, 2 Nat. L.J., Feb. 11, 1980, at 8, Col. 1; Moore, *FERC Criticizes Lawyers' Work*, 4 Legal Times Washington, Jan. 4, 1982, at 2, Col. 3.

130. See notes 7 *et seq.*, *supra* and accompanying text. With regard to the significance placed on agency authority to adopt standards of practice, a further resolution dealing with standards was proposed for addition to the Waxman/Forrest Proposal, *supra* note 8:

Further resolved, that the American Bar Association recognizes that important constitutional issues relating to the right to counsel and to due process are presented by legislation expressly conferring authority on federal agencies to adopt standards of practice governing, or to exercise disciplinary authority over, attorneys who represent clients subject to the procedures of and regulation by federal agencies and the exceptions for such express statutory authority contained in the foregoing resolution are not intended to express any conclusion by this Association on those important issues.

This additional resolution was proposed in order to "preclude any implication that the ABA, by adopting the alternative proposal [*i.e.*, Waxman/Forrest Proposal], endorses the efficacy of express statutory authorizations of federal agencies to adopt standards of practice. . . ." Letter to Antonin Scalia from W. Loeber Landau (July 16, 1982), forwarding the proposed "Resolved" for Waxman/Forrest Proposal *supra*, a copy of which is on file with the Administrative Conference of the United States. A clearer explanation of why the additional "Resolved" was suggested (as well as why the Waxman/Forrest Proposal note 8, *supra*, was amended on the floor of the House of Delegates before the Proposal was submitted for consideration; see note 203, *infra*) may be that a number of persons became concerned that the Waxman/Forrest Proposal as drafted and originally submitted to the House of Delegates, would permit the SEC simply to seek express authority from the Congress to adopt standards. See, e.g., letter to Joseph A. DeGrandi from Stuart N. Senniger (July 19, 1982) which raises this concern; a copy of this letter is on file with the Administrative Conference of the United States.

131. 35 U.S.C. § 31 (1976).

132. 35 U.S.C. § 32 (1976).

opportunity for hearing suspend, and disbar from further practice before his department any such . . . attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations.¹³³

Except for the few agencies that have express authority to promulgate rules and discipline attorneys for their violation,¹³⁴ authority to promulgate standards (and to discipline) must be implied. One of the clearest expressions of judicial approval of implied authority to adopt standards of conduct and to discipline persons appearing before an agency was given by the Court of Appeals for the Second Circuit in 1979 in *Touche Ross & Co. v. SEC*:¹³⁵

Section 23(a)(1) of the 1934 Act, 15 U.S.C. § 78w(a)(1) (1976), authorizes the [Securities and Exchange] Commission to “make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which [it is] responsible or for the execution of the functions vested in [it] by this title. . . .” Pursuant to this general rulemaking authority, the Commission adopted and subsequently has amended Rule 2(e) of its Rules of Practice, 17 C.F.R. § 201.2(e) (1978). . . .

The current Rule and its predecessors have been in effect for over forty years. It has been the basis for a number of disciplinary proceedings brought against professionals—including accountants and attorneys—during this forty year period. . . .

Although the mere fact that the Rule is of long standing does not relieve us of our responsibility to determine its validity, . . . , it is noteworthy that no court has ever held that the Rule is invalid. . . .

[W]e reject appellants’ assertion that the Commission acted without authority in promulgating Rule 2(e). Although there is no express statutory provision authorizing the Commission to discipline professionals appearing before it, Rule 2(e), promulgated pursuant to its statutory rulemaking authority, represents an attempt by the Commission to protect the integrity of its own processes. It provides the Commission with the means to ensure that those professionals, on whom the Commission relies heavily in the performance of its statutory duties, perform their tasks diligently and with a reasonable degree of competence. As such the Rule is “reasonably related” to the purposes of the securities laws. . . . Moreover, we hold that the Rule does not violate, nor is it inconsistent with, any other provision of the securities laws. *We therefore sustain the validity of the Rule as a necessary adjunct to the Commission’s power to protect the integrity of its administrative procedures and the public in general.*¹³⁶ (Emphasis added.)

133. 31 U.S.C. § 1026 (1976).

134. At least one other agency has express authority from the Congress. On July 4, 1884, three days before the Treasury statute was enacted, the Secretary of the Interior was empowered, by language similar to that contained in 31 U.S.C. § 1026, to promulgate rules and to discipline attorneys. See 43 U.S.C. § 1464 (1976) (Public Lands).

135. 609 F.2d 570 (2d Cir. 1979). Although *Touche Ross* sustained Rule 2(e) as applied to accountants, strong dictum suggests the court’s rationale has equal application to the authority of the SEC to promulgate and apply Rule 2(e) to attorneys. See note 136, *infra* and accompanying text.

136. 609 F.2d at 577–78, 582.

The court's bases for sustaining the implied authority of agencies to regulate the conduct of persons practicing before them are open to criticism. For example, how broad is the power to "protect the integrity of . . . administrative procedures and the public"? A critique of *Touche Ross* was made by SEC Commissioner Karmel in her dissent in *Keating Muething & Klekamp*,¹³⁷ in which a number of crucial issues are raised regarding the extent of the implied authority of agencies to promulgate standards of practice:

In *Touche Ross & Co. et al. v. SEC*, the Second Circuit recently upheld the validity of Rule 2(e), as a general matter, as to accountants, and by the way of dictum as to attorneys, on the ground that it was "reasonably related" to the purposes of the securities laws. The Court viewed Rule 2(e) as an attempt by the Commission to protect the integrity of its own processes and to ensure that professionals practicing before the Commission perform their tasks diligently and with a reasonable degree of competence. I believe this rationale may justify the use of Rule 2(e) to discipline accountants,¹³⁸ although express statutory authority to this effect would, in my mind, be better government. However I do not believe this rationale is sufficient to justify the use of Rule 2(e), as presently drafted, as a general enforcement tool to discipline attorneys. . . . The Commission, like any other government body, may have some need to have and to utilize a *disciplinary power against attorneys who practice before it in order to keep its proceedings orderly and dignified*. However, the lack of any demonstrated need for an enforcement mechanism generally to raise the competence of attorneys or

137. 45 Ad. L. 2d 1072, 1077 (1979).

138. Commissioner Karmel explained the express statutory differences between the SEC's authority to discipline attorneys and accountants and noted a bill before Congress which was pending when she wrote her dissent:

In the case of accountants, Congress gave the Commission express statutory power in Section 19(a) and Schedule A of the Securities Act of 1933 [15 U.S.C. § 77s(a) and § 77aa (Schedule A)] to define accounting terms and to require that financial statements be certified by an independent public accountant. It therefore can be argued that the administrative disciplining of accountants is a necessary and appropriate adjunct to an express Commission mandate and responsibility. In the case of attorneys, however, there is no such direct substantive authority for the Commission to implement by way of an administrative remedy.⁸

[Footnote 8 reads:]

In this regard, however, I note that there is presently pending in Congress legislation which contains a provision which could be construed to vest not only the Commission but any federal agency with effectively unlimited power to discipline attorneys. *See* Section 203(a) of S. 262, 96th Congress, providing in part:

[E]ach agency may prohibit any individual from operating before the agency or its responsible employees whenever such individual refuses to adhere to reasonable standards of orderly and ethical conduct *or* continues, despite agency requests to the contrary, to engage in the deliberate use of dilatory tactics . . . (emphasis added).

Although enactment of this provision would solve the problems I have with the commission's statutory authority to promulgate Rule 2(e), I believe such a provision would be contrary to sound public policy for the reasons set forth in this opinion.

45 Ad. L. 2d at 1079. *See* note 1, *supra* for position of ABA on S.262. *See also* Daley & Karmel, *Attorneys' Responsibilities: Adversaries at the Bar of the SEC*, 24 Emory L.J. 747 (1975); Karmel, *Attorneys' Securities Laws Liabilities*, 27 Bus. Law. 1153 (1972).

to protect investors is indicated by the history of Rule 2(e). . . . In my opinion, it is *improper* for an independent federal administrative agency to impose sanctions which are not specified by Congress. In addition, the potential corruption of justice when an administrative agency with significant prosecutorial responsibilities has the power to sanction an adversary representing and advising a client persuades me that the Commission should not exercise disciplinary power against attorneys.¹³⁹ (Emphasis added.)

Although other judicial decisions do sustain implied authority of agencies to regulate attorneys,¹⁴⁰ *Touche Ross* is the “current” precedent. Commissioner Karmel correctly points out that with respect to attorneys, *Touche Ross* is dictum, and that at least with regard to the SEC, a different statutory pattern exists with regard to attorneys and to accountants.¹⁴¹ Although the *Touche Ross* language seems clear, dictum is just that, dictum—not precedent. Ms. Karmel also questions the extent, even if an agency has authority to promulgate standards, an agency may address conduct of an attorney beyond that required to keep its proceedings “orderly and dignified.” She appears to be suggesting that a line should be drawn between standards which are directed at maintaining order in (and perhaps assuring the integrity of) a particular proceeding versus those that have as their focus the raising of attorney competence or enlisting attorneys to assist in enforcing substantive law. Is this distinction valid? One can argue that the point is well taken.

Something strikes one as amiss when substantive law provisions (*e.g.*, obtaining disclosure in the securities area or policing tax shelters) must be enforced by ethical standards. If an attorney violates a requirement imposed by statute, (s)he should be called to task in the courts for the substantive violation.¹⁴² The theoretical basis for objecting to the use of professional standards to compensate for deficiencies in substantive law (whether statutory or the administrative implementation) or for the inconvenience, expense, delay, or whatever of pursuing substantive violations in the judicial (or administrative) process is difficult

139. 45 Ad. L. 2d at 1079–80, 181, 183.

140. *See, e.g.*, note 46, *supra*.

141. *See* note 138, *supra*.

142. The SEC, in addition to responding to attorney misconduct by Rule 2(e) proceedings, also seeks injunctions against violation of the securities law by attorneys [*see, e.g.*, *SEC v. Blatt*, 583 F.2d 1325 (5th Cir. 1978); *SEC v. Coven*, 581 F.2d 1020 (2d Cir. 1978); *SEC v. Universal Major Industries Corp.*, 546 F.2d 1044 (2d Cir. 1973); *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978)] and attorneys are, on occasion, criminally prosecuted for securities violation [*see, e.g.*, *United States v. Benjamin*, 328 F. 2d 854 (2d Cir. 1964)]. Sometimes these alternatives come together as in *In re Emanuel Fields*, 33 Ad. L. 2d 439 (1973) which involved permanent disqualification under Rule 2(e) of an attorney who had been enjoined four times from violating various sections of the securities law. On occasion, the action taken by the SEC in a Rule 2(e) action is reversed; *see Kivitz v. SEC*, 475 F.2d 956 (D.C. Cir. 1973). Lastly, an attorney may be subject to a damage action by persons who have been injured by her/his misconduct. *See, e.g.*, *Wachovia Bank and Trust Co., N.A. v. National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980); *cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1970) (Private cause of action against accountants). For application standards, *see Fiflis, Choice of Federal or State Law for Attorneys' Professional Responsibility in Securities Matters*, 56 N.Y.U.L. Rev. 1236 (1981).

to formulate. Simple responses such as "It's not right." or "It shouldn't be done." are not helpful. Dean John F. Sutton, Jr., however, has provided an insight for analysis, although his comments were made with reference to whether the Code of Professional Responsibility should be revised.¹⁴³ After explaining the division of the Code into Canons ("general concepts used as chapter headings"), Ethical Considerations ("aspirational in character"), and Disciplinary Rules ("mandatory regulatory rules"), he noted that Canons and Ethical Considerations were not intended to be binding or to be enforced, as has occasionally occurred, as regulatory rules or law. In addition, he continued, "Disciplinary Rules have been misused as rules of procedure in substantive cases as rules of procedure to affect lawyer conduct, a role for which in some instances the Rules were ill-suited."¹⁴⁴

A reasonable inference of Dean Sutton's remarks would seem to be almost self-evident: Guidelines to regulate the practice of law reflect a delicate balance between "regulatory laws, standards of *recommended normal professional practices*, and *ethical norms of aspirations* and professional objectives."¹⁴⁵ (Emphasis added.) In recommending a revision of the Code of Professional Responsibility, he urges that future disciplinary standards be "realistic and susceptible of uniform, regular enforcement."¹⁴⁶

Even though a single, uniform statement of standards of professional responsibility for attorneys is not possible in the United States because of the myriad authorities which adopt standards for attorneys, the legal profession does have a basic norm (although tailored by these authorities) to govern its conduct: The Code of Professional Responsibility or whatever successor statement is

143. Sutton, *How Vulnerable is the Code of Professional Responsibility*, 57 N.C. L. Rev. 497 (1979). Professor Sutton was the Reporter for the ABA Special Committee on Evaluation of Ethical Standards (1965-1970), the Committee that drafted the Code of Professional Responsibility, and at present is Dean of the University of Texas School of Law.

144. *Id.* at 514-516. See also Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 Am. B. Found. 421. In the Statement of the ABA Section of Corporation, Banking, and Business Law (July 3, 1979) in response to the SEC's request for comments on the administrative law judge's (ALJ) findings in *Carter and Johnson* (SEC Release 34-15724, Mar. 7, 1979), the distinction between Disciplinary Rules and Ethical Considerations was brought to the attention of the Commission. According to the Statement, the ALJ made no finding which supported a violation of Disciplinary Rules (p. 14), but rather much of the ALJ's discussion related to alleged violations of Ethical Considerations (p. 14-17). The Statement concluded by voicing its disagreement with the ALJ that an attorney is required "as a matter of competence, professional responsibility or securities law compliance to bring disagreements with management as to legal matters to the attention of his clients' board of directors, at least in the absence of knowledge by the lawyer of a conflict between the interests of the corporation and those of the officers with whom he deals." (p. 17) A copy of the Statement is on file with the Administrative Conference of the United States.

Of interest is that in the Commission's opinion in *Carter and Johnson*, the SEC declined to make use of the Disciplinary Rules of the Code of Professional Responsibility (CPR) in evaluating the conduct of Messrs. Carter and Johnson, preferring instead to announce a new interpretation of Rule 2(e) which apparently is not grounded in the CPR. See *Carter and Johnson*, *supra* note 118, at 73 n. 65.

145. 57 N.C. L. Rev. at 517.

146. *Id.*

produced by the American Bar Association and adopted by the authorities. This norm reflects what a significant segment of the legal profession at a particular point in time believes to be the proper balance between, *e.g.*, regulatory laws, recommended professional practices, and ethical aspirations. To permit a federal agency to operate outside the general framework of the current thinking of the legal profession by imposing *ad hoc* substantive, regulatory laws would seem not only divisive, but also could place attorneys practicing before the agency in conflict with the mainstream of the legal profession with regard to professional responsibility or, even more serious, in violation of standards adopted by the attorneys' licensing authorities.¹⁴⁷

In 1975, Justice Potter Stewart recognized that the role of a business lawyer in our society has yet to be resolved, and that only when her/his role was defined could a determination be made "what ethical judgments are best left in the public interest—not to a code of professional responsibility, but to individual con-

147. *See, e.g.*, Letter to author from John F. Sutton, Jr. (May 4, 1982), a copy of which is on file with the Administrative Conference of the United States:

At the time the Wright Committee was preparing the Code of Professional Responsibility, the members of the Committee definitely thought the Code should apply to all conduct of all lawyers in all situations before all bodies. In other words, they intended for the disciplinary rules to constitute the regulatory law but realized, of course, that the disciplinary rules would be effective only when adopted by an authority having jurisdiction to discipline lawyers. In addition to the Supreme Court of each state, they thought, I believe, that the federal courts would use the rules in that fashion; and at least, I am sure that Justice Charles Whitaker so believed. At the same time, they felt it would be divisive and would probably present conflicting standards to lawyers if agencies (whether State or Federal) adopted separate disciplinary or regulatory law. On the other hand, obviously different agencies proceed in varying ways and professional norms might well differ when practicing before various kinds of courts and agencies. . . .

My own belief is that agencies should not adopt separate administrative codes for conduct of lawyers but should seek to amend the Code or the Model Rules if a change is desirable. *See also* Letter to author from Andrew L. Kaufman (May 24, 1982), a copy of which is on file with the Administrative Conference of the United States:

My primary concern is that practicing lawyers not be subjected to conflicting standards of professional conduct. It is difficult enough for lawyers to figure out what their obligations to their clients and to society are without at the same time being subjected to multiple varying standards from different bodies that may have some authority over them. As the practice of law is currently organized, the codes of professional responsibility presently adopted in the various states represent the primary sources of lawyers' obligations. I understand the concerns that impel various state and federal agencies to consider the imposition of additional obligations. It may be that there are truly unique circumstances that might justify particular agencies in adopting rules to cover particular situations that are left uncovered by those codes. Most such proposals, however, while they may involve special situations, also involve the possibility of concurrent application of the state law of professional responsibility, and I am fearful that any opening of the door to so-called "special situations" will result in the promulgation of many rules that will put lawyers who genuinely care about their professional duty in very difficult situations.

Professor Kaufman is the author of *A. Kaufman, Problems in Professional Responsibility* (1976).

science.’’¹⁴⁸ Two years earlier, the Court—the majority as well as the dissenters—reaffirmed the special relationship between attorneys and the government. Justice Powell delivered the opinion of the Court in *In re Griffiths*¹⁴⁹ (which held exclusion of resident aliens from the practice of law unconstitutional):

It has been stated many times that lawyers are “officers of the court.” One of the most frequently repeated statements to this effect appears in *Ex parte Garland*, 4 Wall. 333, 378. The Court pointed out there, however, that an attorney was not an “officer” within the ordinary meaning of that term. Certainly nothing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word “officer” as it has always been applied to lawyers conveys quite a different meaning from the word “officer” as applied to people serving as officers within the conventional meaning of that term. . . .

Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, *they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.*¹⁵⁰ (Emphasis added.)

The two dissenters, especially Chief Justice Burger, agreed with the majority on this point:

Whatever the erosion of the officer-of-the-court role, the overwhelming proportion of the legal profession rejects both the denigrated role of the advocate and counselor that renders him a lackey to the client and the alien idea that he is an agent of government. . . .

The very independence of the lawyer from the government on the one hand and client on the other is what makes law a profession, something apart from trades and vocations in which obligations of duty and conscience play a lesser part. It is as crucial to our system of justice as the independence of judges themselves. . . .

148. Stewart, *Professional Ethics for the Business Lawyer: Morals of the Market Place*, 31 Bus. Law. 462, 468 (1975). Justice Stewart also raised a number of related questions:

[A]side from the inescapable responsibility that his profession places upon every lawyer to act as a wholly honorable and trustworthy person and a good law abiding citizen, is there any way in which a business lawyer can better serve the public interest than by giving the best possible legal advice to his clients? Is it the duty of a lawyer, by contrast, to try to impose upon his clients his own notions of social, or political or economic morality? Is it indeed even ‘ethical’ for him to try to impose his own system of moral priorities and social values on his clients’ business decisions, in the guise of neutral legal advice?

Id.

149. 413 U.S. 717 (1973).

150. *Id.* at 729, quoting *Cammer v. United States*, 350 U.S. 399, 405 (1956).

In some countries the legal system is so structured that all lawyers are literally agents of government and as such bound to place the interests of government over those of the client. That concept is so alien to our system with an independent bar that I find it difficult to see how nationals of such a country, inculcated with those ideas and at the same time unwilling to accept American citizenship, could be properly integrated into our system.¹⁵¹

Although the statement of *Touche Ross* that the SEC has implied authority to promulgate standards "to protect the integrity of its administrative procedures"¹⁵² appears unobjectionable,¹⁵³ the court's further conclusion that implied authority exists to prescribe professional standards "to protect . . . the public in general"¹⁵⁴ cannot be accepted as easily, especially in light of the SEC's announcement in *Carter and Johnson* which many feel borders on making attorneys agents of the government.¹⁵⁵ As SEC Commissioner Karmel stated (after *Touche Ross*, but before *Carter and Johnson*) in her dissent in *Keating, Muething & Klekamp*, "By utilizing Rule 2(e) to implement a program of professional protection, the Commission is not limiting its disciplinary powers to assuring the proper administration of justice. . . . [A] Pandora's box of misguided stan-

151. 413 U.S. at 732, 733. The other dissenter, Justice Rehnquist, recorded his thoughts in a companion case to *Griffiths*, *Sugarman v. Dougall*, 413 U.S. 634, 663 (1973).

152. 609 F.2d 570, 582 (2d Cir. 1979).

153. In light of the legislative history of the Agency Practice Act (5 U.S.C. § 500), one can reasonably conclude that the Congress intended to leave with federal agencies authority to promulgate "traditional" standards of professional conduct (*i.e.*, of the type present in 1965) relating to maintenance of order in and integrity of agency proceedings. The SEC's opinion in *Carter and Johnson* contains a representative sample of the legislative history on this point. See *Carter and Johnson*, *supra* note 118, at 6 n. 9:

For example, in discussing the bill which ultimately was enacted, Congressman Willis stated that "[i]t does not affect the power of agencies to discipline persons who appear before them." 111 Cong. Rec. H. 27193 (Oct. 18, 1965). Similarly, Representative Poff remarked: "The bill in no way modifies the authority of agencies to discipline persons before them. . . ." *Ibid.* Further, the Senate Report on this proposed law stated: "If matters of ethical conduct are brought to the attention of the agencies, adequate tools are at their disposal to deal with the situation." S. Rep. No. 755, 89th Cong., 1st Sess. 5 (1965). And, in a letter to Senator Eastland, then Deputy Attorney General Katzenbach confirmed the Administration's understanding that the bill "does not modify the authority of agencies to discipline persons appearing before them. . . ." He remarked that the Department of Justice

ha[d] eliminated formal admission procedures and special examinations for practice before the administrative boards and agencies under its supervision. The Department, however, has retained the power to discipline attorneys. . . .

Further, after noting that "the bill retains in Federal agencies an element of control, particularly in disciplinary situations," he concluded that, "[s]ubject to the foregoing, the Department favors enactment of the measure." The Katzenbach letter to Senator Eastland was annexed to H.R. Rep. No. 1141 and set forth at 2 *U.S. Code Cong. & Ad. News* at 4178 (1965).

154. 609 F.2d 570, 582 (2d Cir. 1979).

155. See note 120, *supra* and accompanying text.

standard-setting regulation'' is being opened.¹⁵⁶ Without doubt, Ms. Karmel would characterize *Carter and Johnson* as such¹⁵⁷

Even though the SEC may be in the process of reassessing its approach to regulating attorneys who practice before the Commission,¹⁵⁸ shifts in policy often reverse with personnel changes. In addition, the SEC is only one agency and the language of *Touche Ross* is available to other agencies which might be inclined to follow its lead. To clarify the status of those agencies which depend on *implied* authority to promulgate standards to regulate attorneys, the Congress should amend the Agency Practice Act to address expressly the promulgation of standards of conduct for attorneys practicing before federal agencies.

As the Congress is the branch of government with responsibility for regulating attorneys practicing before federal agencies (the arguments already having been made that such is the case¹⁵⁹), the Congress has the power to decide by whom the standards are to be promulgated.¹⁶⁰ In those instances where agencies have been *expressly* authorized to promulgate rules and to regulate the conduct of attorneys, a Congressional choice has been made. Where the Congress has not expressly spoken, however, several alternatives exist. Legislation could expressly authorize all federal agencies to adopt such standards. This approach,

156. 45 Ad.L.2d 1072, 1083, 1087 (1979). One approach facilitating greater disclosure in the securities area was suggested in a letter to the author from Thomas Lumbard (April 12, 1982), a copy of which is on file with the Administrative Conference of the United States:

The solution to many of the agencies' problems, it seems to me, is more imaginative use of their power to regulate "practice and procedure," *qua* practice and procedure, rather than the power to regulate the conduct of practitioners. If the SEC wants lawyers to make inquiries not normally required of counsel for parties, the SEC can require that certain papers must be accompanied by an affidavit of counsel that such inquiries have been made, and that counsel is satisfied that the statements in the prospectus, or the 10-K, or the annual report, are neither false nor misleading. A lawyer would be disbarred for making a false affidavit of that sort to the SEC, just as a lawyer would be disbarred for making a false certificate of good faith in a federal court that required a pleading to be accompanied thereby.

157. See, e.g., "Karmel Blasts SEC Discipline of Lawyers," 67 ABAJ 1097 (1981).

158. See, e.g., Speech by SEC General Counsel Edward F. Greene, New York County Lawyers' Association (Jan. 13, 1982), *reprinted in* 4 Legal Times Washington, p. 25, Col. 1 (Jan. 25, 1982).

159. See notes 29 to 64, *supra* and accompanying text.

160. An argument could be made that the Congress should either: one, renounce its power to regulate attorneys practicing before federal agencies in favor of state regulation—a likelihood which seems quite remote and which was pointed out repeatedly by persons speaking before the ABA House of Delegates on August 11, 1982, in favor of the Franck Proposal, *supra* note 7 (see note 206, *infra*) or two, simply make individual state standards of conduct the basis for federal attorney disciplinary proceedings, with which state's standards to apply to depend on where the accused attorney was licensed. The latter would truly result in a balkanization of standards at the federal level. Attorneys practicing before the same agency could be subject to different standards of conduct depending on where they were licensed to practice. As neither of these alternatives seem likely, promulgation of standards of conduct for attorneys practicing before federal agencies will be undertaken, if at all, by an authority at the federal level. As the representatives of the Standing Committee pointed out to the 1982 A.B.A. House of Delegates, federal standards are nothing new. Attorneys have long been subject to standards of discipline adopted by federal courts. See note 206, *infra*.

although simplest (and perhaps least costly), would not reach the concerns addressed, *supra*, specifically: balkanization of professional standards to which attorneys are subject, *ad hoc* proscriptions which may or may not be consistent with the overall responsibilities of attorneys, and potential enlistment of attorneys to enforce substantive law via ethical standards.

On the other hand, the Congress could require uniform standards be formulated (with or without the possibility of additional standards, not inconsistent with the basic standards, necessitated by individual agency requirements).¹⁶¹ This choice would be costlier than the other alternative and, thus, the question of need must be faced. Does the extent of attorney misconduct before federal agencies justify expenditure of additional federal monies to regulate attorneys?

The nature, frequency, and pervasiveness of attorney misconduct in the federal administrative process is not precisely known. A chart prepared by the Director of the ABA National Center for Professional Responsibilities¹⁶² and responses to the Federal Questionnaire sent out to selected federal agencies, as well as correspondence/comments received and acquired,¹⁶³ indicate that extensive misconduct by attorneys practicing before federal agencies cannot be documented at present. Lack of documentation, however, may be misleading because records are not uniformly kept with regard to misconduct before federal agencies.¹⁶⁴ For example, of the thirty-six licensing authorities which responded to the State Questionnaire,¹⁶⁵ over twenty-five percent indicated that no statistics

161. Of the federal agencies responding to the Federal Questionnaire (*see* notes 16 and 89, *supra* and Appendix A), the great majority (approx. 66%) indicated that uniform standards were not necessary (QUESTION EIGHT) and almost 50% responded that they had (and found desirable) particularized standards for their agencies (QUESTIONS THREE AND FIVE). On the other hand, if uniform standards were promulgated, almost 70% of those responding did not believe any agencies should be exempted from the uniform standards (QUESTION TEN). If uniform standards were to be promulgated, opportunity should be provided to permit agencies to present their requirements for particularized standards. To prohibit particularized standards at the outset, without consideration of the particular circumstances and problems facing federal agencies, would seem to oversimplify the complexities which face the agencies. *See, e.g.,* Marquis, *An Appraisal of an Attorney's Responsibility before Administrative Agencies*, 26 Case W. Res. L. Rev. 285, 287-304 (1976). Uniformity (with exception), although perhaps a contradiction in terms, can be obtained within limits, as has been demonstrated by the standards of conduct for conflict of interest promulgated by federal agencies under the guidance of the Office of Government Ethics. *See* 5 C.F.R. Part 735 (1982).

162. The National Center for Professional Responsibilities is located at 77 South Wacker Drive, Chicago, Illinois 60606. The Chart, prepared by its Director (Ms. Jeanne Gray), is reproduced in Appendix B.

163. *See* note 16, *supra*.

164. For example, an instance of attorney conduct that might have otherwise gone undocumented except in agency files was noted by the United States Court of Appeals for the District of Columbia: "Our review of the hearing transcript reveals that Presiding Official Bogle showed remarkable restraint in the face of rude and arrogant behavior by petitioner's counsel, Mr. Alexander. The record is replete with insolent outbursts, contemptuous remarks and hubristic responses addressed to both witnesses and the presiding Official by attorney Alexander. This conduct of counsel far exceeded the bounds of legitimate advocacy and was generally well short of the decorum expected of a member of the bar." *Gibson v. Veterans Administration and the United States*, No. 81-1933, Slip Op. at 8 (D.C. Cir. July 13, 1982).

165. *See* note 28, *supra*, and Appendix A, State Questionnaire (QUESTION ELEVEN).

were available on misconduct by attorneys before federal agencies. In addition, almost twenty percent failed to answer the question requesting data on this attorney misconduct—a “response” which may indicate no data available or, at least, not readily accessible. Officials at the SEC also have indicated that instances of potential attorney misconduct are not, as a matter of course, recorded and filed separately by Commission personnel but rather remain buried in the records of the Commission.¹⁶⁶

Another factor relevant to whether Congressional action should be taken at this time is the perennial nature of the concern shown by the bar, as well as by federal agencies, with respect to discipline of attorneys practicing before federal agencies.¹⁶⁷ The Congress addressed the matter in 1965 with the enactment of the Agency Practice Act (5 U.S.C. § 500), a statute which has failed to subdue the hearty debate over standards of conduct and who should impose discipline. As a consequence, a clear Congressional statement on standards of conduct for attorneys practicing before federal agencies is needed to resolve the current controversy.

Should the Congress, however, draft the standards and enact them into law?¹⁶⁸ The answer should be in the negative. The deliberations required to produce professional guidelines for attorneys seems inappropriate, both in potential duration and nature, for the Congress. Standards of conduct for the practice of law should not be debated, drafted, and effected in the political and partisan atmosphere of the Congress. The process should be a concentrated effort, which could be lengthy and one that should not be pre-empted by matters which are (or are perceived to be) more urgent. In addition, standards of this nature should not have the rigidity of being cast in statutory form; non-Congressional promulgation would provide greater flexibility for the agencies and the legal profession to respond to change. The responsibility for formulating standards of conduct for attorneys practicing before federal agencies is one that the Congress should delegate, with appropriate guidance to ensure that any standards ultimately adopted are within (and remain within) the mainstream of legal thinking on professional responsibility. A number of delegates are possible, *e.g.*: the federal judiciary, an *ad hoc* body, a new agency, or an existing agency.

166. The Commission has begun a review of its files to identify instances of potential attorney misconduct, but the review is not available at this time. *See* letter to author from Stephan E. Cavan (May 13, 1982) (indicating intention to begin the search), a copy of which is on file with the Administrative Conference of the United States. Subsequent oral communications with Paul Gonson, SEC Solicitor, indicate that the review, although begun, is still unavailable.

167. *See* note 1, *supra*.

168. Of the agencies responding to the Federal Questionnaire (*see* notes 16 and 89, *supra*, and Appendix A), a choice was given for who should promulgate uniform standards: ABA; Federal Courts; Congress; Ad Hoc Group Attorneys; Ad Hoc Group (Agency Personnel); Ad Hoc Group (Attorneys/Agency Personnel); and other (QUESTION NINE). Although the preferences shown by the responses were somewhat inconclusive, general counsels responding indicated little support for a Congressional promulgation; however, the chief administrative law judges tended to select the Congress as the promulgator.

Assigning the task to the federal judiciary, one can argue, would also be inappropriate even though judges may have experience with discipline of attorneys. The issue in question is not misconduct before a federal court, however, but practice before federal agencies by Congressionally-admitted, not judicially-admitted, attorneys.¹⁶⁹ Some of the same objections to Congressional enactment of standards are equally applicable to judicial promulgation. The process could be lengthy, involve resources beyond those reasonably available to the judiciary, and could be partisan in nature. The argument can be made, therefore, that, at least with regard to promulgating applicable standards, the criteria against which attorney conduct is to be judged should be administratively, not Congressionally or judicially, generated. In fact, the judges of the United States District Court for the District of Columbia unanimously rejected an overture by the ABA to be the promulgating body for uniform standards.¹⁷⁰

Although an *ad hoc* body could be established to promulgate the standards, a severe shortcoming exists to this alternative, which to some extent is applicable to the alternatives already rejected. More needs to be done than just promulgate and disband—changes will have to be made, interpretations will have to be given, and the like.¹⁷¹ These functions an *ad hoc* group cannot perform. To establish a new agency would not seem to be justified financially at this time because of the absence of a clearly documented record of attorney misconduct before federal agencies. Assigning the responsibilities, however, to an existing agency, if one could be identified that has expertise in the area of ethical standards, would seem appropriate. Ideally such an agency—already established with personnel, procedures, and accumulated experience—could perform the required rulemaking and continuing responsibilities without a prohibitive increase in appropriation of funds. Arguably that agency exists.

169. See notes 65 *et seq.*, *supra*, and accompanying text. Although the Congress has by 5 U.S.C. § 500 determined that if an attorney is licensed by a state court and is currently in good standing, (s)he may practice before federal agencies, a state license (by, in, and of itself) is not the authority for a person to practice before federal agencies. The Congress has set the admission requirements for practice before federal agencies which is a state license. The Congress theoretically could have set some other requirement, *e.g.*, passing a federal bar examination. For example, a state license to practice law does not entitle a person to practice before the Patent and Trademark Office; the Congress has permitted that agency to impose its own requirements. See 5 U.S.C. § 500(e) (1976).

170. See letter to Jeanne P. Gray from John Lewis Smith, Jr. (Mar. 5, 1982): “This is to advise that the Judges of this Court in Executive Session voted unanimously against the proposal [1/25/82 Franck Proposal, *supra* note 12]. In particular, we are opposed to Rule 2(A) which involves this Court in the promulgation and monitoring of the standards.” A copy of Chief Judge Smith’s letter is on file with the Administrative Conference of the United States. Little support for judicial promulgation of uniform standards was reflected in the responses to the Federal Questionnaire (see notes 16, 89, and 168, *supra*).

171. Some support for promulgation of federal standards of conduct by an *ad hoc* group of attorneys and agency personnel was reflected in the responses of general counsels to the Federal Questionnaire (QUESTION NINE); however, the other possible *ad hoc* groups gathered few responses from either the general counsels or the chief administrative law judges. The other possible responses to QUESTION NINE (*i.e.*, The ABA and Other) drew few selections. The most popular “other” selection was the Administrative Conference of the United States. See note 168, *supra*.

In 1978, the Ethics in Government Act created the Office of Government Ethics,¹⁷² *inter alia*, to “centralize executive responsibility . . .; provide guidance to agencies; issue clear and understandable standards of conduct; [and] provide advisory opinions.”¹⁷³ The Office of Government Ethics through its Director is currently funded, of course, to perform these functions (and others) with regard to “preventing conflicts of interest on the part of officers and employees of any executive agency, as defined in Section 105 of Title 5.”¹⁷⁴ Section 105 includes within its definition of “executive agencies” so-called “independent agencies (*e.g.*, SEC, NLRB, ICC, and the like).¹⁷⁵

In carrying out its current statutory responsibilities, the Office of Government Ethics promulgated (through the Office of Personnel Management (OPM)) uniform standards relating to ethical conduct.¹⁷⁶ Each agency is required to promulgate its own standards which must contain, at minimum, the uniform standards, as well as any other non-inconsistent additional standards “appropriate to the particular functions and activities of the agency.”¹⁷⁷ Individual agency regulations must be approved by OPM prior to publication and becoming effective; however, an agency may adopt the uniform standards without additions.¹⁷⁸ For ease of reference, all agency standards promulgated under this requirement have been published under the same “Part Number” of the C.F.R., *i.e.*, C.F.R. 0.735 [*e.g.*, 31 C.F.R. 0.735 (Treasury); 29 C.F.R. § 0.735 (NLRB); 7 C.F.R. § 0.735 (USDA); etc.], a practice that would be helpful with regard to professional standards governing attorneys.

Although the financial impact of assigning the responsibility of promulgating and monitoring professional standards for attorneys practicing before federal agencies to the Office of Government Ethics is not known (and its calculation is not within the scope of this presentation), of the alternatives available, the use of an existing agency with expertise in the area of ethical standards—the Office of Government Ethics—would seem to be the least expensive, as well as the most attractive, choice.

With regard to the latter point (*i.e.*, selecting an “attractive choice”), professional responsibility for attorneys is not only for the benefit of the legal profession, but also of the public. In recent years, beginning with the revelations of attorney misconduct associated with events commonly called Watergate, the ethicality and professionalism of attorneys has been cast in doubt. By placing

172. Ethics in Government Act, Title IV, 5 U.S.C. App. I § 401 (Supp. IV 1980).

173. 1978 *U.S. Code Cong. & Ad. News* 4246, 4247.

174. 5 U.S.C. App. I § 402 (Supp. IV 1980).

175. 5 U.S.C. § 105 (1976) defines federal agency: “For purposes of this title [*i.e.*, Title 5], ‘Executive agency’ means an executive department, a Government corporation, and an independent establishment.” The legislative history to the 1979 amendments to Ethics in Government Act clearly indicates that “independent agencies” such as the FCC and SEC are included within this definition of “Executive Agency.” See 1979 *U.S. Code Cong. & Ad. News* 145.

176. 5 C.F.R. Part 735 (1982).

177. 5 C.F.R. § 735.104(a)(2) (1982).

178. 5 C.F.R. § 735.104(a), (f) (1982).

responsibility for professional standards for attorneys practicing before federal agencies with the Office of Government Ethics, the Congress can send a message to the American public that the federal government is serious about requiring attorneys at the federal level to be professional and to be ethical. Because of the advantages offered by utilizing the Office of Government Ethics—economic, expertise, experience, and for lack of a better word, public relations—the Agency Practice Act and the Ethics in Government Act should be amended to assign the responsibility of developing and monitoring uniform¹⁷⁹ standards of conduct for attorneys practicing before all federal agencies (except to the extent that the Congress has provided otherwise) to the Office of Government Ethics, a function which should be implemented in the same manner in which the Office has carried out its responsibilities relating to conflict-of-interests standards.¹⁸⁰

Any uniform standards drafted to define the professional conduct of attorneys practicing before federal agencies must, of necessity, address a number of related issues, some of which are discussed briefly without regard to priority. For example, if laypersons are permitted to practice before a particular federal agency, should they be subject to the same standards of conduct as attorneys? The two proposals presented to the ABA House of Delegates on August 11,

179. See note 161, *supra*.

180. The drafting of such detailed and extensive legislation is considered beyond the scope of this presentation; however, the intent and nature of the proposed amendment (and its administrative implementation) can be suggested: "The Agency Practice Act (5 U.S.C. § 500) [*see* note 235, *infra*] and Title IV of the Ethics in Government Act (5 U.S.C. App. I §§ 401 *et seq.*) should be amended to assign the responsibility for developing, promulgating, and monitoring uniform standards of conduct for attorneys practicing before all federal agencies [except to the extent the Congress has expressly provided otherwise] to the Director, Office of Government Ethics, by legislation similar in nature to Title IV of the Ethics in Government Act of 1978, as amended (*see*, 5 U.S.C. App. I §§ 402, 403, 404); the Congress should make appropriations to the Office of Personnel Management adequate to implement this responsibility; and the Congress should amend 5 U.S.C. App. I § 405, as required. The standards promulgated should be published in the Code of Federal Regulations under the same "Part Number" and should be uniform except to the extent that additional standards are required by the functions and activities of a particular agency, any such additional standards to be approved by the Office of Personnel Management prior to publication and becoming effective (*see, e.g.*, 5 C.F.R. § 735.104)." [Note: If the standards of conduct were to apply not only to practitioners, but also to government attorneys, the responsibilities of receiving complaints of proscribed conduct by an employee or member of an agency; of presenting allegations of that proscribed conduct (and accompanying documents) to a federal district court; and, if the judicial proceeding is not terminated by the court, of presenting the case in chief should be assigned to the Director, Office of Government Ethics (or his designate) by amendment of 5 U.S.C. App. I §§ 402, 403, 404]; *see* note 235, *infra*. Appreciation is expressed to Peter L. Strauss (Professor of Law, Columbia University) whose suggestion early in this study, albeit in a different context, that "[p]erhaps an independent federal body, operating under the Office of Personnel Management or some other safe harbor, would be appropriate . . ." raised the possibility of OPM's participation in the matters generally under consideration; however, his comment was made with reference to adjudicating disciplinary complaints, not establishing standards. *See* letter to author from Peter L. Strauss (May 6, 1982), a copy of which is on file with the Administrative Conference of the United States.

1982, answered in the negative.¹⁸¹ In general,¹⁸² both proposals would remove regulation of attorneys from federal agencies while leaving laypersons subject to the jurisdiction of the agencies. This consideration will not be discussed in detail because this presentation relates to regulation of attorneys, not laypersons, practicing before federal agencies;¹⁸³ however, the proposals made herein could be applicable to all persons who practice before federal agencies, not just attorneys.

In 1975, Joseph Daley and Roberta Karmel noted in their frequently cited article, "Attorneys' Responsibilities: Adversaries at the Bar of the SEC,"¹⁸⁴ that a double standard exists with regard to conduct of staff attorneys and private practitioners: "Another telling argument against the duties which the SEC is preaching to attorneys is that in cases where SEC staff-attorneys have been urged to assume similar duties, the SEC has asserted privilege and resisted responsibility."¹⁸⁵ If uniform standards are adopted, should they apply to both sides—private practitioners *and* government attorneys? Although employment actions may, of course, be taken against government attorneys for improper conduct, may a dismissed government attorney be denied eligibility to practice before federal agencies on the basis of the misconduct that led to the dismissal unless her/his state licensing authority has acted on the misconduct?¹⁸⁶ The Agency Practice Act would seem to indicate a negative response (except perhaps for the former employer¹⁸⁷)—the only admission to practice requirement is being a member in good standing of a state bar.¹⁸⁸ If government attorneys were subject

181. See Franck Proposal, *supra* note 7 and Waxman/Forrest Proposal, *supra* note 8.

182. Since the Waxman/Forrest Proposal, *supra* note 8 would permit agencies which currently have express authority to adopt standards to continue to do so, those agencies would be able to apply the same standards to both attorneys and laypersons.

183. See note 4, *supra*.

184. 24 Emory L.J. 747 (1975).

185. *Id.* at 812.

186. See notes 23–28, *supra* and accompanying text. The observations made, *supra*, are not limited to private practitioners who are not subject to the local discipline authority, but apply with equal force to government attorneys who are not employed within their licensing states.

187. The Agency Practice Act (5 U.S.C. § 500) indicates that its provisions do not "authorize an individual who is a former employee of an agency to represent a person before an agency when the representation is prohibited by statute or regulation." 5 U.S.C. § 500(d)(3). The sparse legislative history that is available on this paragraph indicates that the exception was included so as not to "modify the authority of agencies to . . . prevent former employees from representing persons appearing before the agencies to avoid conflict-of-interest situations." Letter to Hon. James O. Eastland from Nicholas deB. Katzenbach (June 10, 1963), reprinted in 1965 *U.S. Code Cong. & Ad. News* 4178. Professor Donald T. Weckstein in his 1970 study for the Administrative Conference of the United States also concluded that avoidance of conflict of interests was the purpose of this paragraph. See Weckstein, *Control of Practice and Discipline of Representatives before Federal Administrative Agencies*, A Study and Recommendations for the Administrative Conference of the United States 65–66 (Preliminary Draft 1970). As a consequence, whether former employees who are not subject to conflict-of-interest, post-employment restrictions may be denied eligibility to practice before their former agencies because of misconduct is unclear. See notes 72–77, *supra* and accompanying text.

188. 5 U.S.C. § 500(b) (1976).

to the same standards as private practitioners, the double standard about which Daley and Karmel wrote might be eliminated.¹⁸⁹

With regard to private practitioners, unique, ethical quandaries may arise when an administrative agency becomes involved in clients' affairs. In responding to these situations, whether an attorney is in-house or retained may be relevant.¹⁹⁰ Should these types of special problems be addressed or are they resolved adequately by the professional standard proposed by the American Bar Association—whether that be the Code of Professional Responsibility or its successor? A related inquiry would involve, of course, such issues as: Are American Bar Association recommendations on professional responsibility too much of a compromise work product produced by a "political adoption process",¹⁹¹ and do they emphasize too strongly the adversary environment of a trial-oriented practice of law¹⁹² to be used as a model for uniform standards of conduct for attorney practice before federal agencies?

Another issue deserving consideration by the promulgating authority involves subjecting an attorney practicing before federal agencies to professional standards too much at variance from those of her/his licensing state(s). How is an attorney to know which standard to follow if a conflict exists between federal and state standards? One solution to this dilemma is to apply the strictest standard. This might be a reasonable approach provided the attorney knows that (s)he is subject to both standards. What about the attorney, however, far removed from Washington, D.C., who gives advice to a client involving a federal agency. Does that advice bring the attorney within the coverage of federal standards and if so, would the attorney reasonably understand that by giving the advice, (s)he has just subjected her/himself to another professional responsibility regulatory system? The answer is, "That depends." Whenever standards are promulgated to apply to attorneys practicing before federal agencies, whether on an *ad hoc* basis by an agency or uniform standards by a neutral authority such as the Office of Government Ethics, the "That depends" must be considered and resolved.

The proposals submitted to the ABA House of Delegates on August 11, 1982, addressed in different ways, at what point an attorney becomes subject to federal standards and when (s)he is subject only to the standards of the licensing state(s). One proposal would subject an attorney to federal standards when attorney conduct involves a "Direct Appearance" before an agency, *i.e.*, "An

189. Of course, federal agencies would have to be authorized to deny eligibility to practice to an attorney who has been disciplined by a federal agency. This would require amendment of the Agency Practice Act; see note 112, *supra*.

190. For a discussion of the issues involved, see, e.g., Pickholtz, *The Proposed Model Rules of Professional Conduct—and Other Assaults Upon the Attorney-Client*, 36 Bus. Law. 1841, 1854–55 (1981); Mundheim, *Should Code of Professional Responsibility Forbid Lawyers to Serve on Boards of Corporations for Which They Act as Counsel*, 33 Bus. Law. 1507 (1978); Subak, *Special Problems of Inside Counsel*, 33 Bus. Law. 1433 (1978).

191. Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C.L. Rev. 497 (1979).

192. Marquis, *An Appraisal of Attorneys' Responsibilities before Administrative Agencies*, 26 Case Wes. Res. L. Rev. 285 (1976).

actual appearance before the agency in a hearing or similar proceeding or the filing with the agency of a document which is signed by, or is otherwise submitted on the authority of, the practitioner."¹⁹³ The other proposal would limit federal standards to situations "affecting [an] attorney's participation in a particular proceeding before it, as immediately necessary to maintain order in or assure the integrity of such proceeding."¹⁹⁴

A basic consideration in the regulation of attorneys, thus, is to what types of misconduct should federal standards apply? Many persons who have analyzed regulation of attorneys practicing before federal agencies seem to agree that federal agencies should be able to regulate attorneys with regard to conduct involving contumacious behavior committed in the course of *an* agency proceeding, so as to maintain order in (and perhaps integrity of) *the* proceeding, with any discipline therefor limited to *that* proceeding.¹⁹⁵ This is the position of the second proposal, *supra*. Others would expand the applicability of federal standards to cover attorney misconduct committed in a representative capacity but not necessarily committed in the presence of the agency. The first proposal's scope reaches, within its defined limits, also into this area. A third category of potential misconduct involves the failure of an attorney to "live up to" an agency's special concept of professional responsibility relating to the agency's substantive regulatory responsibilities which may or may not involve representation of a client before the agency,¹⁹⁶ *e.g.*, the interpretation announced in *Carter and Johnson*.¹⁹⁷

Subjecting an attorney to standards of conduct (and, thus, to discipline) without adequate notice of the regulatory system's applicability, one can argue, has constitutional overtones.¹⁹⁸ The United States Supreme Court has indicated on a number of occasions that the right to practice law may not be taken away without due process.¹⁹⁹ Adequate notice is one of the basic components of due

193. See Franck Proposal, *supra*, note 7. Rule 3 specifically provides: "The jurisdiction conferred by these rules shall not be construed to deny any agency the powers immediately necessary to maintain control over its proceedings. . . ."

194. See Waxman/Forrest Proposal, *supra* note 8, Resolution 2(b).

195. See, *e.g.*, notes 193 and 194, *supra* and accompanying text. With regard to standards governing this type of misconduct, should individual agencies be permitted to adopt their own standards? See, *e.g.*, *Camp v. Herzog*, 104 F. Supp. 134 (D.D.C. 1982). One can argue that this should be the case, but if uniformity among federal agencies as to standards is a goal, no compelling reason seems to exist why standards governing contumacious behavior should be treated differently than other standards, especially if agencies have an opportunity to adopt standards in addition to the uniform standards if the requirement can be demonstrated. See note 180, *supra*.

196. See, note 27, *supra* and accompanying text.

197. See notes 120 et seq., *supra* and accompanying text.

198. For a discussion of the requirement of a person's having notice of jurisdiction, see R. Weintraub, *Commentary on the Conflict of Laws*, § 4.4 (2d Ed. 1980).

199. See, *e.g.*, *In re Ruffalo*, 390 U.S. 544 (1968); *Theard v. United States*, 354 U.S. 278 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 236 (1957); *Ex Parte Robinson*, 86 U.S. 505 (1873).

process.²⁰⁰ The answer that if one is confronted with a client who has a federal administrative law question, one has the obligation and responsibility to review all the applicable rules and regulations prior to giving any advice oversimplifies the realities of practicing law. Many attorneys do not have ready access to the Code of Federal Regulations, much less the Federal Register. What has to be determined is where the dividing line for applicability of federal standards of conduct is—one that not only satisfies due process, but also is readily recognizable. As a consequence, the proper response to conflicting standards may not be to apply the strictest, but rather to apply each standard to its own domain—federal standards to those areas where they may constitutionally be applied and state standards to the remainder. Violation of federal standards should be pursued in a federal forum, leaving enforcement of state standards to the states.

Standards, however, without effective enforcement benefit no one—not the legal profession, not federal agencies, and not the public. The final aspect, therefore, of regulating attorneys practicing before federal agencies involves who should impose discipline for a violation of federal standards of conduct.

*Discipline of Attorneys Practicing
before Federal Agencies*

Officials at the Securities and Exchange Commission have indicated that “it must be recognized that federal administrative agencies are unlikely to voluntarily cease the disciplining of attorneys and other professionals for misconduct unless a substitute mechanism that is truly effective becomes available.”²⁰¹ This conclusion would seem to be accurate. On the other hand, the Commission does “not oppose the creation of an independent model disciplining mechanism. . . . [as] such a body would relieve the agencies of the need to devote their scarce resources to this task.”²⁰² Two proposals presented to the ABA House of Delegates on August 11, 1982, made recommendations on the discipline of attorneys practicing before federal agencies. The House of Delegates adopted the shorter, less complicated recommendation:

200. See, e.g., *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950): “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action.”

201. Submission of the General Counsel and Solicitor of the Securities and Exchange Commission to the American Bar Association Standing Committee on Professional Discipline Concerning Discipline of Lawyers Who Practice Before Federal Agencies 3 (Mar. 19, 1981) [Hereinafter referred to as the Ferrara/Gonson Proposal], a copy of which is on file with the Administrative Conference of the United States. At the time the proposal was drafted Ralph C. Ferrara was General Counsel of the SEC and Paul Gonson was its Solicitor.

202. Letter to Michael Franck from Paul Gonson (July 28, 1982), forwarding the position of the SEC on discipline of attorneys practicing before federal agencies, a copy of which is on file with the Administrative Conference of the United States. The SEC reiterated the position taken by its officials earlier (see note 201, *supra*) that any non-agency disciplinary mechanism must be “truly effective.” *Id.*

RESOLVED, That the American Bar Association endorses the enactment of legislation which would provide that:

1. Except as existing legislation expressly provides, no federal agency shall adopt standards of practice to govern the professional conduct of attorneys who represent clients subject to the administrative procedures of or regulation by that federal agency, except such standards of practice as required to apply subparagraph 2(b) below to maintain order in or assure the integrity of proceedings before it.

2. Except as existing legislation expressly provides, a federal agency shall exercise disciplinary authority over an attorney only:

(a) in conformity with formal disciplinary action taken against such attorney in a jurisdiction where such attorney is admitted to practice; or

(b) affecting such attorney's participation in a particular proceeding as immediately necessary to maintain order in, or assure the integrity of, such proceeding.

RESOLVED, That the American Bar Association recognizes that it is important that state disciplinary authorities afford federal agencies an effective means of securing review of charges by such federal agencies of professional misconduct arising out of the practice of attorneys before the agencies; and that it is a matter of clear and important policy of the American Bar Association to encourage and assist state disciplinary authorities to fulfill this function.

RESOLVED, That the American Bar Association authorize the Standing Committee on Professional Discipline to initiate and coordinate efforts to assure that state disciplinary authorities function in a manner which provides federal agencies with an effective forum to which professional responsibility complaints arising out of agency practice can be brought; and, to this end, the Standing Committee shall establish liaison with appropriate state bar associations or other groups within each state which would directly undertake these efforts at the state level.²⁰³

203. See Waxman/Forrest Proposal, *supra* note 8. The proposal was sponsored by ten organizations: The ABA Sections of Administrative Law; Corporation, Banking and Business Law; Natural Resources Law; Patent, Trademarks and Copyright Law; Public Contract Law; Public Utility Law; and Taxation; by the ABA Special Committee on Lawyers in Government; by the ABA Judicial Administration Division; and by the Federal Communications Bar Association. Prior to introducing the Waxman/Forrest Proposal to the House of Delegates, the proposal as originally filed with the ABA was amended, *i.e.*, the first seven words of paragraphs 1 & 2 of the first Resolved ("In the absence of express statutory authority") were changed to that quoted, *i.e.*, "Except as existing legislation expressly provides." See note 130, *supra*. Although an extensive analysis of the Proposal is not warranted, a few comments should be made. The underlying concept of the Waxman/Forrest Proposal is use of *state* disciplinary mechanisms to pursue allegations of conduct, proscribed by *state* standards, committed by attorneys practicing before federal agencies. Although emphasis on state regulation of such attorney misconduct may appeal to a state-oriented body such as the ABA House of Delegates, little likelihood would appear to exist that the Congress would abandon (and one can add—or should abandon) at this time its power in this area without convincing evidence that the states can provide effective regulation of attorneys practicing before federal agencies. (See note 206, *infra*). The concerns of the federal government are not new. In 1955 the Hoover Commission Task Force specifically pointed to the "hiatus in the effective discipline of many lawyers in the Administrative Law practice" (see note 23, *supra*), a conclusion again validated by the Clark Report

The other proposal is too lengthy to reproduce,²⁰⁴ but its main features can be described briefly: (1) in general, removal of jurisdiction from federal agencies to conduct attorney misconduct proceedings; (2) referral of complaints of attorney misconduct before federal agencies to the bar counsel of the attorney's licensing state, who would investigate the charges and prosecute the case before an appropriate United States District Court, and (3) promulgation of uniform standards of conduct by the United States District Court for the District of Columbia. The actual recommendation contained in the proposal was less than one-half page, but incorporated by reference nine definitions and twenty-four proposed "Rules for Federal Agency Discipline." The proposed rules were the result of almost three and one half years work by the ABA Standing Committee on Professional Discipline.²⁰⁵ As stated, a choice was made; the American Bar Association adopted the shorter, less complicated recommendation.²⁰⁶

in 1970 (*see* note 24, *supra*) and which still appears to be warranted today (*see* notes 25 and 28, *supra*). Until the states can document effective regulation of attorneys practicing before federal agencies, implementation of the Waxman/Forrest Proposal does commend itself.

204. *See* Franck Proposal, *supra* note 7. Two of the principal contributions of the Franck Proposal are identification of a forum (*i.e.*, federal district court) to adjudicate allegations of attorney misconduct before federal agencies and recognition that, as a general principle, the standards of conduct should not be promulgated by the federal agencies themselves. In suggesting implementation of these concepts, however, the Franck Proposal included a number of features which reduce its overall attractiveness. Foremost is use of *state* bar counsels to investigate and to prosecute the alleged violations of *federal* standards. Eighty-six percent of the jurisdictions responding to the State Questionnaire (*see* notes 16 and 28, *supra*) indicated that they "only [had] authority to investigate, discipline, etc. an attorney licensed to practice by [their] state for a violation of a standard adopted by some official body (*e.g.*, court, legislature, bar association) of [their] state." (QUESTION TWO) In other words, the overwhelming number of bar counsels responding do not appear to have authority to use state resources to enforce federal standards, thus undermining a fundamental part of the Franck Proposal. The report accompanying the Waxman/Forrest Proposal (*see* note 8, *supra*) pointed to the same problem, but from a different perspective: "While Congress can condition the grant of federal funds upon state adoption and enforcement of related state laws (*e.g.*, conditioning highway funds upon state adoption and enforcement of a 55 mph speed limit), it is extremely doubtful that Congress can require the states to use their executive powers to enforce a *federal* law or regulation. *Cf.* National League of Cities v. Usery, 426 U.S. 833 (1976). Thus, even if Congress were to adopt the Model Rules' extraordinary provision that with regard to the federally-adopted standards state disciplinary enforcement authorities 'shall . . . [p]erform all prosecutorial functions including investigation.' it is questionable whether those authorities would have to comply." In response to this criticism, the Franck Proposal was amended on the floor of the House of Delegates on August 11, 1982, to change the definition of "Counsel" to that contained in the ABA Model Rules of Disciplinary Enforcement (*i.e.*, substitution of federal district court bar member as counsel, if state bar counsel declined to serve). Other objections to the Franck Proposal (*e.g.*, attorneys could still be required to enforce substantive agency policies; reluctance of the district court for the District of Columbia to promulgate the standards; subjecting an attorney to conflicting standards; no authoritative source to monitor the standards; lack of uniformity of enforcement because of prosecutorial discretion that would exist with state bar counsels, and the complexity of the "Rules for Federal Agency Discipline") might have been overcome by Congressional action. However, their presence reinforced the inclination of the House of Delegates to adopt a strong, state-oriented position on discipline of attorneys practicing before federal agencies, *i.e.*, the Waxman/Forrest Proposal. *See* note 206, *infra*.

205. *See* notes 10 and 12, *supra*.

206. Discussion of the Franck and Waxman/Forrest Proposals (items 119A and 123, respectively, on the ABA House of Delegates Final Calendar) began shortly before 5 p.m. on August 11,

Both of these proposals represent the work product of persons who have studied and considered in detail the issues involved in discipline of attorneys practicing before federal agencies. Each adds to the resolution of who should discipline attorneys. The proposals agree in one major aspect: Except for misconduct relating to maintaining order in (or the integrity of²⁰⁷) a specific agency proceeding, authority to discipline attorneys for misconduct before federal agencies should be removed from the agencies. The proposal adopted by the House of Delegates as policy of the ABA and which is set out, *supra*, would except the Treasury Department and the Patent and Trademark Office (which have express authority²⁰⁸) from this proscription; the other proposal does not. The primary reason for removing attorney discipline from substantive agencies has already been discussed, *i.e.*, “the potential corruption of justice when an administrative agency with significant prosecutorial responsibilities has the power to sanction an adversary representing and advising a client.”²⁰⁹ The practical reason for exempting Treasury and the Patent and Trademark Office is that they apparently are doing a good job and have the support of the attorneys who

1982, the final day of the meeting of the House. The Franck Proposal, *i.e.*, the recommendation of the ABA Standing Committee on Professional Discipline, was presented and briefly explained. As the person presenting the Waxman/Forrest Proposal began to speak, a member of the House of Delegates rose, was recognized by the Chair, and made what appeared to be an “important” inquiry to him: What was the hour? The Chair indicated that the time was 5:07, give or take a few minutes. The implication of the question and the response of the House of Delegates was clear—The hour was late and the Calendar needed to be completed. The explanation of the Waxman/Forrest Proposal was kept short and to the point: simplicity and states rights, *i.e.*, take the authority to discipline attorneys away from federal agencies and give the responsibility to the states where the function belonged. The response of the House of Delegates—a body composed of representatives of state bars—was predictable, applause. At this point, the House of Delegates appeared to be ready without further discussion to vote on whether the Waxman/Forrest Proposal should be adopted as a substitute for the Franck Proposal momentarily before the Chair called for a vote, further comments were made by supporters of the two proposals. The proponents of the Franck Proposal reiterated points made when the proposal was introduced, *e.g.*: (1) the Congress would not enact legislation which eliminates federal government jurisdiction to discipline attorneys practicing before federal agencies; (2) since attorneys are already subject to different professional guidelines because the states (as well as the federal courts) do not have the same standards, uniform federal standards of conduct to govern attorneys practicing before federal agencies would not be revolutionary, but appropriate to eliminate the possibility of attorneys (from different states) practicing before federal agencies being subject to different standards. Other volleys were exchanged relating to, *e.g.*, the unwillingness of the United States District Court for the District of Columbia to promulgate uniform standards (a feature of the Franck Proposal) [*see* note 170, *supra*]; the ineffectiveness of the states in processing complaints of attorney misconduct before federal agencies; and the danger of state agencies adopting standards similar to that announced by the SEC in *Carter and Johnson* (*see* note 120, *supra*). Shortly before 5:30 p.m., the Waxman/Forrest Proposal [quoted in text, *supra* note 203] was adopted as a substitute for the Franck Proposal. Within a few minutes thereafter the Calendar was completed and the House of Delegates adjourned.

207. *See* note 11, *supra*.

208. At least one other agency has express authority; *see* note 134, *supra*.

209. Note 126, *supra*. For discussion of the implications of not separating the functions, *see* notes 36 *et seq.*, *supra* and accompanying text, as well as the reports accompanying the Franck Proposal (*supra* note 7) and the Waxman/Forrest proposal (*supra* note 8).

practice before them;²¹⁰ in addition, the Congress has expressly granted these agencies the authority and without a compelling reason, one can argue that the delegations should not be disturbed.²¹¹

The same types of concerns as were considered with regard to who in the federal government should promulgate standards are involved in who should discipline attorneys practicing before federal agencies. The conclusion, one can also argue, should be similar, *i.e.*, remove from the agencies as a general principle, except for those with express authority, the authority to discipline attorneys.²¹²

210. See note 50, *supra*.

211. See notes 47 and 48, *supra*.

212. Responses to the Federal Questionnaire (see notes 16 and 89, *supra* and Appendix A, *infra*) relating to attorney discipline were revealing. The two agencies with express authority that responded (*i.e.*, the Dept. of Treasury and the Patent and Trademark Office) both opposed a centralized authority to process attorney cases (QUESTION THIRTEEN). In fact, only two Federal Questionnaires sent to general counsels (*i.e.*, to the ICC and the MSPB) and two Federal Questionnaires sent to chief administrative law judges (*i.e.*, to the ICC and FDA) indicated approval of establishment of a centralized disciplinary authority. The remaining agencies opposed establishment. Of interest, however, is of those submitting negative responses, only two agencies besides Treasury and Patent and Trademark indicated more than two instances of attorney misconduct annually (QUESTION NINETEEN). Those agencies were the SEC in the Federal Questionnaire submitted by the chief administrative law judge and the Department of Health & Human Services in the response submitted by its general counsel. The Federal Questionnaire sent to the SEC general counsel was not returned. Because of the position of the SEC (see note 202, *supra*) and its officials (see note 201, *supra*), the position of the SEC would seem to be not to oppose a centralized disciplinary authority, but rather to support its establishment, provided the mechanism were effective. Although insignificant attorney misconduct in response to QUESTION NINETEEN. The affirmative response of the ICC, not only to a centralized disciplinary authority, but also to uniform standards (QUESTION EIGHT), in the Federal Questionnaires sent to the general counsel and the chief administrative law judge is noteworthy. The Commission has a long history, as does the SEC, with regard to standards of conduct and attorney discipline. For example, in 1930, a code of ethics was adopted by the practitioners before the ICC and this Code (in its current form) has been adopted by the Commission as part of its rules governing practice. See 49 C.F.R. § 1100.11, incorporating Appendix A: Code of Ethics for Practitioners before the Interstate Commerce Commission. [Under a proposed revision and redesignation of the ICC Rules of Practice, Appendix A would become 49 C.F.R. §§ 1103.10-1103.35; see Ex Parte. No. 55 (Sub-No. 55), Interstate Commerce Commission, a copy of which can be obtained at Room 2209, Office of the Secretary, Interstate Commerce Commission, Washington, D.C. 20423.] See "Code of Ethics of Practitioners Before the ICC," 17 A.B.A.J. 73-74 (1931). The Acting Director, Office of Compliance and Consumer Assistance (who responded to the Federal Questionnaire sent to the ICC General Counsel) stated: "This office favors the creation of a centralized authority to handle attorney disciplinary matters. Ideally, such an office could process discipline cases more efficiently than the individual agency. It is our feeling that discipline cases demand an inordinate amount of the agency's enforcement effort." Letter to author from Bernard Gaillard (Jun. 9, 1982), a copy of which is on file with the Administrative Conference of the United States. A similar conclusion was reached by the SEC. See note 202, *supra*. Of the agencies responding, therefore, the absolute numbers overwhelmingly do not favor the establishment of a centralized disciplinary authority; however, when the position of the agencies with appreciable attorney discipline cases is considered, only Treasury, Patent and Trademark, and Health & Human Services have extensive experience and oppose. The SEC and the ICC, the other two agencies with a documented record of experience, do not oppose. As between four of these agencies, at least two distinguishing factors are present. Treasury and Patent and Trademark have express authority; SEC

An issue on which the two proposals presented to the 1982 ABA House of Delegates differed substantially is who should undertake the disciplinary responsibility if this function is removed from the agencies. The proposal adopted by the House of Delegates would use the states; the other proposal recommended utilizing an appropriate federal district court (with the prosecution handled by the bar counsel of the attorney's licensing state). Who is correct, or does a middle ground exist? One of the basic considerations in 1980 when a concerted effort was begun by the ABA to seek a resolution of the issues here under discussion was, "The extent to which state disciplinary agencies lack adequate staff and financial resources to serve as the principal vehicles for administering discipline over federal agency practitioners."²¹³ The extent is still unknown. As a consequence, until the states, in general, can demonstrate the resources and interest required to assume effectively the responsibilities associated with discipline of attorneys practicing before federal agencies,²¹⁴ a recommendation to transfer this function to the states not only would seem premature, but would have little likelihood of receiving Congressional approval.²¹⁵ The responsibility of disciplining attorneys practicing before federal agencies should remain, therefore, at least for the foreseeable future, in the federal government. The question is, of course, where?

If one eliminates the agencies themselves as adjudicators, the choices seem to be two: a neutral body or the federal judiciary. Creation of a centralized authority would not seem realistic because of the cost involved. Use of the Office of Government Ethics for this function would not seem appropriate, as adjudi-

and the ICC do not. Second, the attorneys practicing before the former do not appear to be dissatisfied with the current procedures of the agencies (note 50, *supra*), while some evidence of discontent does exist with regard to the latter (*see* note 10, *supra*). As a consequence, except for those agencies that have express authority to discipline attorneys, opposition to the concept of centralizing attorney discipline appears to come from agencies (except for Health & Human Services) that do not have significant experience with the problem at least insofar as the views of the officials responding to the Federal Questionnaire are reflective of the agencies' position.

213. *See* note 25, *supra*.

214. *See* notes 23, 24, and 28, *supra*.

215. This was the conclusion of the proponents of the Franck Proposal (*supra* note 7) which was not adopted by the ABA House of Delegates on August 11, 1982. *See* note 206, *supra*. In addition, the public might misperceive such an action: "I agree . . . that it would be inadvisable for the bar to seek legislation preventing agencies from instituting disciplinary rules. . . . At this time when voices are increasingly heard criticizing the bar's alleged self-protective posture, legislation which would prevent agencies from taking any steps toward disciplining wayward attorneys would be the wrong proposal at the wrong time." Letter to John S. Nolan from Myron C. Baum (Mar. 22, 1982), a copy of which is on file with the Administrative Conference of the United States.

216. *E.g.*, with regard to the federal courts: "In summary, total reliance on a state's disciplinary judgments is not permissible, and the federal courts require a disciplinary structure to deal with misconduct violative of federal court standards which are not dealt with by a state system. Further, a demonstration of federal judicial concern can serve as a point of leadership and example in response to the current professional and lay concern with professional standards." Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 Hofstra L. Rev. 249, 284 (1975).

cating cases of this nature are not within its current responsibilities and, thus, would involve a different emphasis from that assumed at present. Others besides the ABA Standing Committee on Professional Discipline have thought the federal courts an appropriate forum for disposition of misconduct by attorneys at the federal level.²¹⁶ Dean Thomas D. Morgan,²¹⁷ for example, has stated:

In my view, the forum for trial of these matters should be the United States District Court for the District of Columbia, with appeal to the United States Court of Appeals for the D.C. Circuit.

The disbarment or other discipline of lawyers has traditionally been perceived as a judicial function and worthy of this kind of high-level attention. Given the fact that I believe that the number of these cases would be small and that most of the reciprocal disbarment cases would be straight forward, I do not believe that this would be a significant burden on the Federal courts²¹⁸ nor a significant burden on the attorney from Montana who was forced to have his or her conduct reviewed in Washington.²¹⁹

In fact, a twenty-seven page legislative proposal and commentary was circulated in 1981 by the General Counsel and the Solicitor of the SEC which would have placed the responsibility for disciplining attorneys for misconduct before federal agencies with the federal district courts.²²⁰ Many features of this proposal are instructive, *e.g.*:

1. The complaining agency should be the initiating body for charges of attorney misconduct which would be filed with the appropriate United States district court "under seal"; the charges (and accompanying documents) would be examined *in camera* to determine whether to continue the proceeding. If the proceeding was terminated, the charges (and accompanying documents) would remain nonpublic. If the court were to find that the charges warranted further action, the charges would become public and the proceeding would continue.²²¹

2. Venue with regard to adjudication of attorney misconduct before federal agencies would lie, "where the agency has its principal office . . . ; where the conduct occurred . . . ; where the lawyer maintains an office . . . ; where the conduct occurred . . . ; or where the lawyer is licensed to practice law." The initial choice of where to file would be made by the complaining agency, but opportunity for change of venue by the attorney would be provided.²²²

217. Dean, Emory University School of Law and co-author of T. Morgan & R. Rotunda, *Problems and Materials in Professional Responsibility* (2d ed. 1981).

218. The General Counsel and Solicitor of the SEC also concur that the "economic impact" on the federal judiciary should not be significant: "Presumably, the impact of this additional jurisdiction in the federal courts would be so slight as to not warrant funding." See Ferrara/Gonson Proposal, *supra* note 201, at 5.

219. Letter to Margery H. Waxman from Thomas D. Morgan (Feb. 9, 1982), a copy of which is on file with the Administrative Conference of the United States.

220. See Ferrara/Gonson Proposal, *supra* note 201.

221. *Id.* at 6.

222. *Id.* at 6 and 7.

3. Authority of agencies to discipline attorneys would not be withdrawn until two years after the effective date of the legislation placing jurisdiction in the United States district courts, *i.e.*, concurrent jurisdiction would exist for two years.²²³

The first suggestion, *i.e.*, use of agency personnel to initiate charges (and presumably to present the case in chief to the court if the proceeding were continued) is subject to an obvious objection: Would not this permit the complaining agency to become privy to information protected by the attorney/client privilege if the attorney were to reveal in her/his defense confidential communications with a client?²²⁴ Although this may be a theoretical concern, a federal district judge should have sufficient tools at hand to prevent improper communication of this information to the complaining agency, *e.g.*, issuance of a protective order or receipt of the testimony *in camera*. If agency personnel were not used for this function, a "special prosecutor" would most likely have to be appointed or a permanent office established. The financial costs of this alternative would not seem to be justified until such time as abuse by agency personnel performing the function of presenting evidence of alleged attorney misconduct cannot be prevented by the court.²²⁵ By requiring the charges to be delivered "under seal" and by not permitting them to become public until a neutral third party—a federal district judge—has determined that the charges (and accompanying documents) warrant further action, one can eliminate an alleged deficiency in the current practices of some agencies, *i.e.*, "to institute a public proceeding first and to investigate later."²²⁶

A flexible venue provision, such as that suggested, seems preferable to a more restricted provision, because of the difficulty of predicting which situs will be most convenient for the parties under particular circumstance.²²⁷ For example, a case might involve an attorney who is licensed in Oregon, who maintains her/his principal office or residence in Miami (perhaps a law professor or a retired

223. *Id.* at 10.

224. *See* Code of Professional Responsibility, Disciplinary Rule 4-101(c)(4): "A lawyer may reveal . . . confidences or secrets necessary to . . . defend himself . . . against an accusation of wrongful conduct."

225. If the professional standards approved by the Office of Personnel Management were applicable not only to practitioners, but also government attorneys (*see* notes 184-189, *supra* and accompanying text) and if government attorneys were subject to federal district court jurisdiction for violation of the standards, use of agency personnel might be inappropriate. Under this set of circumstances, a non-agency person should be available, not only to initiate the charges and present the case in chief to the court, but also with whom to lodge a complaint in the first place. *See* note 180, *supra* and note 235, *infra*.

226. *See* note 17, *supra* and Franck Proposal, *supra* note 7, at 28 [Rule 15: Public Hearings—Confidentiality].

227. In addition to the limited venue suggested by Dean Morgan (note 219, *supra*), *see* also Franck Proposal, *supra* note 7, at 7 [Rule 2(c) would place the venue of the federal district court "in a state in which the practitioner is licensed to practice, unless no significant element of alleged misconduct occurred in that state in which case the action shall be brought in the court for the district in which the practitioner maintains his principal office for agency practice."].

attorney), and who is charged with misconduct before the SEC regional office in Fort Worth. Which forum should be selected? Oregon? Florida? Texas? The District of Columbia? Without more facts the choice cannot necessarily be made with any guarantee or certainty as to which is the best selection. Although the hypothetical facts just described most likely would never occur, a restricted venue provision which would limit the situs of a trial to the place of licensing, the place where the alleged misconduct occurred, the place of an attorney's principal office, or the like would not provide the flexibility that seems desirable for adjudications of misconduct by attorneys who may be licensed anywhere in the United States and which may involve facts arising in many diverse jurisdictions.

The overlap period of two years before expressly withdrawing the authority of federal agencies to discipline attorneys (except of course to the extent that express authority otherwise provides) seems advisable. A period of adjustment would permit an effective system (standards, as well as the new disciplinary mechanism) to be in place before extinguishing the present system, thus, avoiding the creation of a power vacuum with regard to attorney discipline.

Other conceptual details should also be considered. For example, what types of attorney discipline, if any, should not be adjudicated in federal district court? One can argue that authority to discipline in a case in which the sanction imposed only affects an attorney's eligibility to practice before the complaining agency for the duration of the proceeding out of which the misconduct arose, should remain with the agency. An administrative law judge, therefore, could continue to exclude an attorney from a hearing because of contumacious behavior or the agency could suspend an attorney for the remainder of a proceeding because the attorney filed a false affidavit. These types of misconduct (*i.e.*, those involving order in, or integrity of, a proceeding) whose sanction does not extend beyond the immediate proceeding should not be adjudicated by federal district courts. The misconduct can be handled expeditiously by the agency and would not seem to warrant judicial participation.²²⁸ The standards of conduct relating to these

228. The Franck Proposal, *supra* note 7, at 10 [Rule 3], as well as the Waxman/Forrest Proposal, *supra* note 8, at 7, reached the conclusion that a limited category of misconduct should be handled by the agencies. *See, e.g.*, the Commentary to Rule 3:

It has long been recognized that a judicial officer has the power to maintain decorum and order in the proceedings before him. . . . This power includes the right to remove summarily anyone who willfully obstructs the course of judicial proceedings. . . .

The power to suspend from practice is not needed in order to maintain control and supervision over the hearing room. To allow the agency itself to suspend practitioners for conduct the agency considers contemptuous (otaher [sic] than by excluding them from the hearing room in a particular proceeding when necessary to maintain order) carries too great a danger that the conscientious practitioner may be deterred from zealous representation of the client before the agency. Only a court with disciplinary jurisdiction may impose discipline *permanently* affecting the right to practice.

If a practitioner is determined to be willfully obstructing the course of a proceeding, the hearing officer may correct the abuse by the imposition of sanctions which do not deprive the practitioner of the right to practice law generally. In such circumstances, the agency should

types of conduct, however, should still be subject to approval of the Office of Personnel Management.²²⁹ Some misconduct of this nature (*e.g.*, contumacious conduct during a hearing) may, of course, be so serious as to warrant a sanction extending beyond the immediate proceeding,²³⁰ if the agency concludes the facts warrant discipline of this nature, charges should be filed with the appropriate federal district court.

A second type of misconduct proceeding for which an argument can be made not to use federal district courts involves a summary proceeding held for the purpose of determining whether reciprocity should be given to the discipline imposed by another authority (*e.g.*, a licensing state, a federal court, or another federal agency). Reciprocity hearings would not seem to involve the same separation-of-function problems as do adjudications of original misconduct.²³¹ The agency adjudicator has not been “personally offended” and the adjudication is limited to the question of whether reciprocity should be granted.²³² In addition, an agency is perhaps better informed than a federal district judge to make a decision as to whether an attorney disciplined elsewhere should be similarly disciplined by the agency. As a consequence, little reason would seem to exist to consume valuable, judicial resources for reciprocity hearings.

With regard to whether a sanction imposed by one agency should automatically be applied by all federal agencies, the responses to the Federal Questionnaire²³³ were mixed, at best, although a substantial number of agencies did favor reciprocity. Recognition of another agency’s disciplinary action should not, however, be automatic; an agency should conduct a “show-cause” hearing prior to giving reciprocity, which satisfies constitutional requirements.²³⁴

With respect to the mechanism to enforce standards of conduct for attorneys practicing before federal agencies, the Agency Practice Act (5 U.S.C. § 500) should be amended²³⁵ to provide that (except as otherwise expressly authorized

immediately inform counsel of the nature of the practitioner’s misconduct for initiation of appropriate disciplinary action. (Emphasis added.)

Franck Proposal, *supra* note 7, at 10. See note 193, *supra* for text of Rule 3. The Waxman/Forrest Proposal, *supra* note 8, at 7 and note 203, *infra* would “restrict the agency’s disciplinary authority to the minimum compatible with the need of maintaining the order and integrity of its proceedings. For the latter purpose, it may disqualify the attorney from the particular case or matter; but to impose broader sanctions it must proceed before a disciplinary board in a state where the attorney is licensed to practice.”

229. See note 195, *supra*.

230. See, *e.g.*, *Camp v. Herzog*, 104 F. Supp. 134 (D.D.C. 1952).

231. See notes 36 to 51, *supra* and accompanying text.

232. For the type of factors to be considered in a reciprocity hearing, see note 109, *supra*.

233. See notes 16 and 89, *supra* and Appendix A.

234. See note 112, *supra*.

235. The Agency Practice Act (5 U.S.C. § 500) should be amended as follows—

1. 5 U.S.C. § 500 (d)(2) should be changed to read: “This section does not—**(2) prevent an agency from requiring a power of attorney as a condition to the release of information the disclosure of which is restricted by law; or.” This amendment would repeal 5 U.S.C. § 500(d)(2) as currently enacted; for current text of this paragraph, see note 59, *supra*. See also note 87, *supra*.

by the Congress), no federal agency has authority to impose discipline on attorneys who practice before the agency except: (1) with regard to reciprocity hearings to determine whether a sanction imposed by another authority should be applied to the attorney by the agency, and (2) with regard to imposition of

2. 5 U.S.C. § 500(f) should be redesignated as 5 U.S.C. § 500(g) and the following language enacted as 5 U.S.C. § 500(f):

“(1) Except as provided by this subsection, no agency shall be authorized, two years after the effective date of this subsection, to adopt standards of conduct for persons qualified by subsection (b) or to impose discipline thereon for violation of any such standards:

(A) No agency shall promulgate standards of conduct for persons qualified by subsection (b) except as provided by [5 U.S.C. App. I, §§ 401 et seq.] and by the regulations adopted by the Office of Personnel Management in implementation thereof;

(B) An agency may discipline a person qualified by subsection (b) for conduct proscribed by the standards adopted pursuant to paragraph (A), above, to the extent required to maintain order in or the integrity of a proceeding, provided the discipline imposed by the agency does not continue past the duration of the proceeding;

(C) An agency may conduct reciprocity proceedings as provided in subsection (b), above; and

(D) Nothing in this subsection affects the authority of a State to regulate an individual described in subsection (b), above, or of an agency which has express, statutory authority (or which may be granted express, statutory authority) to adopt standards of conduct for persons qualified by subsection (b), above, and to impose discipline thereon for violation of standards adopted under the agency's express, statutory authority.

(2) In all other instances, the district courts of the United States have jurisdiction to impose discipline on persons qualified under subsection (b), above, for conduct proscribed by standards adopted pursuant to paragraph 1(A), above:

(A) Allegations of proscribed conduct (with accompanying documents) committed by a person qualified under subsection (b), above, shall be presented by the agency to the court under seal; the court shall determine in camera whether substantial evidence of proscribed conduct has been presented by the agency so as to warrant continuation of the proceeding. If the proceeding is not continued, the allegations (and accompanying documents) shall remain non-public and the proceeding shall be terminated. If the court determines that substantial evidence of proscribed conduct exists, the proceeding shall be continued according to rules prescribed by the court. The burden shall be on the agency to sustain the allegation of proscribed conduct. If the court finds clear and convincing evidence has been presented that proscribed conduct has occurred, the court shall disbar, suspend, place on probation, or reprimand the person who has committed the proscribed conduct and may assess against the person who committed proscribed conduct the costs of the proceedings, as well as order restitution to persons financially injured by the proscribed conduct, or both.

(B) The action may be brought in the district court of the United States in which the agency has its principal office; in which the conduct occurred; in which the person qualified by subsection (b), above, maintains an office; in which the person qualified by subsection (b), above, resides; or in which the person qualified by subsection (b), above, is licensed to practice law. The court shall give consideration to a request by the person against whom an action is filed for a change of venue. Review of discipline imposed by a federal district court under this subsection shall be in the United States Court of Appeals.”

discipline necessary to maintain order in, or the integrity of, a proceeding, the sanction for which does not extend beyond the duration of the proceeding. In all other instances, the agency would be required to file charges (and supporting documents) of alleged attorney misconduct with the appropriate federal district court and be prepared, if the court determines further proceedings are warranted, to present the case in chief. Although uniform procedures for adjudicating attorney misconduct before federal agencies might be desirable, the simpler course is to permit the federal district courts to adopt appropriate procedures.²³⁶ In no case, however, should a disciplinary action, except for reciprocity hearings, be initiated or discipline imposed except for a violation of the standards of conduct approved by the Office of Personnel Management.²³⁷ The disciplinary mechanism recommended could be applied, of course, not only to attorneys,²³⁸ but also to non-attorneys practicing before federal agencies.²³⁹

A final matter to be considered is how to increase the exchange of information between federal agencies with regard to discipline of attorneys. At present federal agencies do not appear to communicate the imposition of discipline against an attorney to other agencies.²⁴⁰ If a federal registry of attorneys existed,

[NOTE: If the standards of conduct adopted pursuant to § 500 (f)(1)(A), *supra*, are to apply not only to practitioners but also to government attorneys (*see* notes 184–189, *supra* and accompanying text and note 225, *supra*), additional language should be added to 5 U.S.C. § 500 (f)(2)(A), *supra*: “If the person alleged to have committed proscribed conduct is an employee or member of an agency, the complaint shall be made to the Director, Office of Government Ethics (or his designate) who shall assume the responsibility of presenting the allegation of proscribed conduct (and accompanying documents) to the court and if the proceeding is not terminated by the court, of presenting the case in chief.” Such a provision would also require amendment of Title IV, Ethics in Government Act, 5 U.S.C. App. I, §§ 401 *et seq.* *See* note 180, *supra*. With regard to the language suggested for 5 U.S.C. § 500(f)(2)(A), the administrative law standard of “substantial evidence” was thought more appropriate for the preliminary evaluation of the evidence of proscribed conduct than the criminal law standard of “probable cause to believe that an offense has been committed” applicable to preliminary examinations [*see* Fed. Rules of Crim. Pro. Rule 5.1(a)]. “Clear and convincing evidence” is the standard most frequently applied in attorney disciplinary proceedings to determine whether proscribed conduct has been committed. 7A C.J.S. Attorney & Client § 103 (1980).

236. Federal district courts currently promulgate procedures relating to adjudicating attorney misconduct arising before the courts. Some federal district courts have adopted the 1978 ABA Model Federal Rules of Disciplinary Enforcement, others have not. In addition, the Franck Proposal, *supra* note 7, makes valuable recommendations as to appropriate procedures. As a consequence, recommendation of a particular procedure, or that the federal district courts adopt uniform procedures for this single category of adjudication, seems unnecessary and would lessen the likelihood of judicial support for the overall recommendations made in this presentation.

237. *See* note 180, *supra*.

238. *See* note 225, *supra*.

239. *See* note 4, *supra*.

240. A similar problem was recognized in 1973 in the Clark Report with regard to exchange of information between disciplinary authorities: “Problem 29. No procedures for notifying disciplinary agencies when attorneys admitted to practice in their jurisdiction are disciplined elsewhere.” The Clark Committee’s recommendation resulted in the establishment of the National Discipline Data Bank, “to which every court and administrative agency should report all formal discipline imposed against attorneys for dissemination to every disciplinary agency within the United States.” ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 156, 158 (Final Draft/June 1970). Although the National Dis-

the listing could be used to facilitate the exchange of information; however, its creation appears unlikely at this time.²⁴¹ How can this information be distributed efficiently, if no record exists as to which agencies before which a disciplined attorney practices? A reasonable, cost-efficient method²⁴² would seem to be to designate a central clearinghouse in the federal government to whom all federal agencies would send information about discipline imposed on attorneys as the result of misconduct before their agency—whether the discipline was imposed by an agency proceeding (reciprocal or otherwise) or by a decision of a federal district court. This information (*e.g.*, name, identifying particular, the complaining agency, and the like) would be compiled on a periodic basis (monthly, quarterly, or whatever experience suggested) by the central clearinghouse and published on a regular basis in the Federal Register. If publication in the Federal Register were effected, in fact, on a regular basis (to include a negative report if no disciplinary actions existed for a particular reporting period), one would hope that agency personnel and administrative law judges would seek out the entry in the Federal Register on the appropriate day (*e.g.*, first issue of each quarter). In this way, information about disciplinary actions involving misconduct arising out of practice before federal agencies would be readily available to those who had an interest.

A remaining matter to be resolved, of course, is who should be the clearinghouse? As with other recommendations, creation of a special entity to perform the function does not appear to be financially justified; however, assigning the function to the Office of Government Ethics²⁴³ should not require substantial, if any, increase in that Office's appropriation because of the relatively small number of attorney disciplinary actions, on a government-wide basis, that appear to be initiated.²⁴⁴

Conclusions and Recommendations

The three aspects of regulation of attorneys practicing before federal agencies—admission requirements, standards of conduct, and disciplinary action—as well as the authority of the federal government (and, in particular, of the Congress and federal agencies) to exercise authority over attorneys in the federal

cipline Data Bank is in operation, information regarding discipline imposed as a result of misconduct before federal agencies does not appear to be readily available to federal agencies.

241. See notes 114–18, *supra* and accompanying text.

242. Publication of a separate document, *e.g.*, "Report of Federal Agency Discipline," on a government-wide basis does not seem to be financially justifiable. However, such a report is published by at least one agency for that agency's purpose. See "Quarterly Report of Disciplinary and Related Actions (Doc. No. 5528)" published by the Office of the Director of Practice, Department of the Treasury.

243. Title IV, Ethics in Government Act, 5 U.S.C. App. I, §§ 401 *et seq.* should be amended to provide that all federal agencies are to forward to the Director, Office of Government Ethics (or his designate) information relating to imposition of discipline on attorneys arising out of misconduct before the agencies (whether the discipline is judicially or administratively imposed); that the Director, Office of Government Ethics shall determine the nature of the information to be reported; and that the Director, Office of Government Ethics shall cause to be published in the Federal Register on a periodical basis the information.

244. See notes 28, 163–66, *supra* and accompanying text; note 212, *supra*; and Appendix B.

administrative process have been considered and discussed in detail. Long standing, consistent precedent, both congressional and judicial, support the conclusion that the Congress has the power to regulate attorneys practicing before federal agencies. In exercising this authority, the Congress has set a single admission requirement for practice before federal agencies, save only for practice before the Patent and Trademark Office.²⁴⁵ The other two aspects of regulation of attorneys—standards and discipline—have not, however, been as clearly defined by the Congress. Because the Congress in 1965 did not cover in detail attorney discipline²⁴⁶ (which of necessity presupposes the existence of applicable standards) when admission requirements were addressed,²⁴⁷ the authority of federal agencies without express authority to promulgate standards and to impose discipline remains unsettled and a matter of concern to the bar and federal agencies alike.²⁴⁸ Although extensive misconduct by attorneys before federal agencies has not been documented to date (except with respect to a few agencies and only then to varying degrees²⁴⁹), the lack of clarity in the Agency Practice Act with regard to the extent and nature of agency authority to define standards of conduct for attorneys who practice before federal agencies and to impose discipline for violation of the standards should not continue. Until the Congress expressly defines agency responsibilities relating to standards of conduct and discipline, the controversy between the bar and federal agencies on these matters is unlikely to disappear.

The following recommendations, therefore, suggest precise statutory language in some instances and describe general statutory schemes in others to effect amendments in the Agency Practice Act (5 U.S.C. § 500) and in Title IV of the Ethics in Government Act (5 U.S.C. App. I, §§ 401 *et seq.*). The recommendations not only represent an appreciation and balancing of the interests and concerns of attorneys and of the federal agencies, but also reflect a regard for the public's right to expect (and to demand) an effective regulation of attorneys practicing in the federal administrative process.

The Recommendations are:

1. That 5 U.S.C. § 500(b) be amended to read:

“An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts. *Notwithstanding, an agency which receives notice*

245. See the Agency Practice Act of 1965, 5 U.S.C. § 500 (1976), and in particular, § 500(b), (e).

246. Agency Practice Act of 1965 addresses agency discipline only in general terms: “This section does not— . . . (2) authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency.” 5 U.S.C. § 500(d)(2) (1976). See notes 87 and 235, *supra*.

247. See note 68, *supra*.

248. See notes 131 *et seq.*, *supra* and accompanying text and notes 210 *et seq.*, *supra* and accompanying text.

249. See notes 28, 163–66, *supra* and accompanying text; note 212, *supra*; and Appendix B.

that a State license by virtue of which an individual is (or could have been) qualified under this subsection to represent persons before the agency (or that such an individual's qualification to represent persons before a federal court or before another agency) has been suspended, enjoined, restrained, revoked, or otherwise restricted by the State, federal court, or other agency may require the individual to show cause within forty days why he should not be similarly suspended, enjoined, restrained, disbarred, or otherwise restricted in representing persons before the agency; the agency may suspend temporarily the right of the individual to represent persons before the agency unless and until he shall show cause."²⁵⁰

2. That 5 U.S.C. § 500(d)(2) be amended to read:

*"This section does not—*** (2) prevent an agency from requiring a power of attorney as a condition to the release of information the disclosure of which is restricted by law; or"*

This Recommendation would repeal 5 U.S.C. § 500(d)(2) as currently enacted.²⁵¹

3. That 5 U.S.C. § 500(f) be redesignated as 5 U.S.C. § 500(g) and that the following be enacted as 5 U.S.C. § 500(f):

"(1) Except as provided by this subsection, no agency shall be authorized, two years after the effective date of this subsection, to adopt standards of conduct for persons qualified by subsection (b) or to impose discipline thereon for violation of any such standards:

(A) No agency shall promulgate standards of conduct for persons qualified by subsection (b) except as provided by [5 U.S.C. App. I, §§ 401 et seq.] and by the regulations adopted by the Office of Personnel Management in implementation thereof;

(B) An agency may discipline a person qualified by subsection (b) for conduct proscribed by the standards adopted pursuant to paragraph (A), above, to the extent required to maintain order in or the integrity of a proceeding, provided the discipline imposed by the agency does not continue past the duration of the proceeding;

(C) An agency may conduct reciprocity proceedings as provided in subsection (b), above; and

(D) Nothing in this subsection affects the authority of a State to regulate an individual described in subsection (b), above, or of an agency which has express, statutory authority (or which may be granted express, statutory authority) to adopt standards of conduct for persons qualified by subsection (b), above, and to impose discipline thereon for violation of standards adopted under the agency's express, statutory authority.

(2) In all other instances, the district courts of the United States have jurisdiction to impose discipline on persons qualified under subsection (b), above, for conduct proscribed by standards adopted pursuant to paragraph 1(A), above:

250. See note 112, *supra* and preceding text.

251. See note 87, *supra* and preceding text, and note 235, *supra*.

(A) *Allegations of proscribed conduct (with accompanying documents) committed by a person qualified under subsection (b), above, shall be presented by an agency to the court under seal; the court shall determine in camera whether substantial evidence of proscribed conduct has been presented by the agency so as to warrant continuation of the proceeding. If the proceeding is not continued, the allegations (and accompanying documents) shall remain non-public and the proceedings shall be terminated. If the court determines that substantial evidence of proscribed conduct exists, the proceeding shall be continued according to rules prescribed by the court. The burden shall be on the agency to sustain the allegation of proscribed conduct. If the court finds clear and convincing evidence has been presented that proscribed conduct has occurred, the court shall disbar, suspend, place on probation, or reprimand the person who has committed the proscribed conduct and may assess against the person who committed proscribed conduct the costs of the proceedings, as well as order restitution to persons financially injured by the proscribed conduct, or both.*

(B) *The action may be brought in the district court of the United States in which the agency has its principal office; in which the conduct occurred; in which the person qualified by subsection (b), above, maintains an office; in which the person qualified by subsection (b), above, resides; or in which the person qualified by subsection (b), above, is licensed to practice law. The court shall give consideration to a request by the person against whom an action is filed for a change of venue. Review of discipline imposed by a federal district court under this subsection shall be in the United States Court of Appeals.'*

[NOTE: If the standards of conduct adopted pursuant to § 500 (f)(1)(A), above, are to apply not only to practitioners but also to government attorneys, additional language should be added to 5 U.S.C. § 500(f)(2)(A): "If the person alleged to have committed proscribed conduct is an employee or member of an agency, the complaint shall be made to the Director, Office of Government Ethics (or his designate) who shall assume the responsibility of presenting the allegation of proscribed conduct (and accompanying documents) to the court and if the proceeding is not terminated by the court, of presenting the case in chief." See Recommendation 4, below.]²⁵²

4. That the Agency Practice Act (5 U.S.C. § 500) [See Recommendation 3, above] and Title IV of the Ethics in Government Act (5 U.S.C. App. I. §§ 401 *et seq.*) be amended to assign the responsibility for developing, promulgating, and monitoring uniform standards of conduct for attorneys practicing before all federal agencies [except to the extent the Congress has expressly provided otherwise] to the Director, Office of Government Ethics, by legislation similar in nature to Title IV of the Ethics in Government Act of 1978, as amended (*see* 5 U.S.C. App. I §§ 402, 403, 404); that the Congress make appropriations to the Office of Personnel Management adequate to implement this responsibility;

252. See note 235, *supra* and preceding text.

and that the Congress amend 5 U.S.C. App. I § 405, as required. The standards promulgated should be published in the Code of Federal Regulations under the same "Part Number" and should be uniform except to the extent that additional standards are required by the functions and activities of a particular agency, any such additional standards to be approved by the Office of Personnel Management prior to publication and becoming effective (*see, e.g.*, 5 C.F.R. § 735.104).

[NOTE: If the standards of conduct adopted pursuant to this Recommendation are to apply not only to practitioners, but also to government attorneys, the responsibilities of receiving complaints of proscribed conduct by an employee or member of an agency; of presenting allegations of that proscribed conduct (and accompanying documents) to a federal district court; and, if the judicial proceeding is not terminated by the court, of presenting the case in chief should be assigned to the Director, Office of Government Ethics (or his designate) by amendment of 5 U.S.C. App. I §§ 402, 403, 404. *See* Recommendation 3, above.]²⁵³

5. That Title IV, Ethics in Government Act, 5 U.S.C. App. I, §§ 401 *et seq.* be amended to provide that all federal agencies shall forward to the Director, Office of Government Ethics (or his designate) information relating to imposition of discipline of attorneys arising out of misconduct before the agencies (whether the discipline is judicially or administratively imposed); that the Director, Office of Government Ethics shall determine the nature of the information to be reported; and that the Director, Office of Government Ethics shall cause to be published in the Federal Register on a periodical basis the information.²⁵⁴

6. That the express, statutory authority of federal agencies [*e.g.*, 31 U.S.C. § 1026 (1976); 35 U.S.C. §§ 31, 32 (1976); 43 U.S.C. § 1460 (1976)] to adopt standards of conduct for attorneys practicing before federal agencies and to impose discipline thereon for violation of the standards be reviewed in light of these Recommendations.

253. *See* note 180, *supra* and preceding text.

254. *See* note 243, *supra* and preceding text.

APPENDIX A

STATE AND FEDERAL QUESTIONNAIRES

SURVEY STATE QUESTIONNAIRE

This Survey of eleven (11) questions is intended to aid in making a recommendation to the Administrative Conference of the United States (5 U.S.C. §§571-576) on issues relating to discipline of attorneys practicing before federal agencies. RESPONSE TO THIS SURVEY IS VOLUNTARY. The information being solicited is not available from the National Center for Professional Responsibility (and other sources contacted). You are probably aware that the American Bar Association and other groups and individuals are addressing themselves to the need for more effective control over attorneys practicing before federal agencies and to the problems raised by attorneys whose practice brings them into contact with forums other than the state of their original admission. This has raised questions of, *inter alia*, whether there should be uniform standards of professional conduct for attorneys practicing before federal agencies (above and beyond the Code of Professional Responsibility) and whether current disciplinary procedures are adequate. This Survey is designed to obtain information with respect to the issues involved. Please feel free to comment on any matter related to the subject of inquiry even if the issue is not presented by a specific question.

1. You have authority to investigate, discipline, etc. an attorney licensed to practice by your State, without regard to whether misconduct occurs *within* or *without* your State.

TRUE _____ FALSE _____ (Please explain on separate sheet).

2. You *only* have authority to investigate, discipline, etc. an attorney licensed to practice by your State for a violation of a standard adopted by some official body (e.g., court, legislature, bar association) of your State.

TRUE _____ FALSE _____ (Please explain on separate sheet).

3. You have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State (but who has her/his principal office in your State) for misconduct which occurs *without* your State.

TRUE _____ FALSE _____.

4. You have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State for misconduct which occurs *within* your State.

TRUE _____ FALSE _____.

5. If you have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State for misconduct, which occurs *within* your State, the investigation, discipline, etc. would be for a violation of a standard adopted by

YOUR STATE _____ THE LICENSING STATE _____ BOTH _____

OTHER _____ (Please explain on separate sheet).

QUESTION NOT APPLICABLE _____.

6. If you have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State (but who has her/his principal office in your State) for misconduct which occurs *without* your State, the investigation would be for a violation of a standard adopted by

YOUR STATE _____ THE LICENSING STATE _____

THE STATE WHERE MISCONDUCT OCCURRED _____ OTHER _____ (Please explain on separate sheet)

QUESTION NOT APPLICABLE _____.

7. Does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *within* your State by attorneys licensed to practice by your State?

YES _____ NO _____ (Please explain on separate sheet).

8. Does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *without* your State by attorneys licensed to practice by your State?

YES _____ NO _____ (Please explain on separate sheet).

STATE QUESTIONNAIRE (BACK)

9. If you have authority to investigate, discipline, etc. an attorney NOT licensed to practice by your State,

a. does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *within* your State by attorneys NOT licensed to practice by your State?

YES _____ NO _____ (Please explain on separate sheet).

QUESTION NOT APPLICABLE _____.

b. does your State realistically have the interest, resources, etc. to pursue [pursue vigorously?] misconduct relating to federal agencies committed *without* your State by an attorney NOT licensed to practice by your State (but who has her/his principal office in your State)?

YES _____ NO _____ (Please explain on separate sheet).

QUESTION NOT APPLICABLE _____.

10. Does your State have reciprocal discipline arrangements with:

a. other states? YES _____ (Please explain on separate sheet);

NO _____.

b. federal agencies? YES _____ (Please explain on separate sheet);

NO _____.

11. In addition to answering the ten (10) general questions, above, information is solicited on the number and disposition of complaints you have received in recent years relating to federal agencies. [The time period is left to your discretion, but at least the past five years is desirable.] Obviously, the names (or other identifying particulars) of the individuals involved are not being sought but rather "anonymous" data, to include, if possible, items of information such as: year, source of the complaint (e.g., private source or SEC, Treasury, Army JAGC, or the like), nature of the complaint, and the disposition/sanction (if any) imposed. The format, below, is suggested for the data:

Date	Source	Nature of Complaint	Disposition/Sanction	
			Private (Type)	Public (Type)

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(continue on additional sheet(s) if required)

Name of State _____ Position Held _____

Thank you for your assistance in this matter. Please return this Survey (and additional pages needed for explanation) as soon as possible, but not later than June 28, 1982, in the self-addressed envelope provided.

Sincerely,

PROFESSOR MICHAEL P. COX
The University of Oklahoma College of Law
Norman, Oklahoma 73019

FEDERAL QUESTIONNAIRE

Survey: Discipline of Attorneys Practicing before Federal Agencies

This Survey of twenty (20) questions is intended to aid in making a recommendation to the Administrative Conference of the United States on issues relating to discipline of attorneys practicing before federal agencies. **RESPONSE TO THIS SURVEY IS VOLUNTARY AND THE INFORMATION BEING SOLICITED IS NOT BEING COLLECTED BY OR FOR THE FEDERAL GOVERNMENT.** You are probably aware that the American Bar Association and other groups and individuals are addressing themselves to the need for more effective control over attorneys practicing before federal agencies and to the problems raised by attorneys whose practice brings them into contact with forums other than the state of their original admission. This has raised questions of, *inter alia*, whether there should be uniform standards of professional conduct for attorneys practicing before federal agencies (above and beyond the Code of Professional Responsibility) and whether current disciplinary procedures are adequate. This Survey is designed to obtain your reactions and opinions on issues related to these questions and to obtain information derived from your experience with respect to the issues involved. Please feel free to comment on any matter related to the subject of inquiry even if the issue is not presented by a specific question.

Requirements for Admission to Practice

1. Should attorneys practicing before the agency with which you are associated [hereinafter referred to as "your agency"] be subject to requirements beyond those required by "The Agency Practice Act," 5 USC §500?
YES _____ NO _____
2. If additional requirements were imposed, what type of requirements (if any) would be appropriate with regard to your agency? PLEASE EXPLAIN ON SEPARATE SHEET.

Standards of Professional Conduct

3. Has your agency promulgated particularized standards of practice relating to professional conduct beyond those required by an attorney's licensing state?
YES _____ NO _____
4. If your agency does NOT have particularized standards, do you think they would be desirable for your agency?
YES _____ NO _____
5. If your agency DOES have particularized standards, do you think they are desirable?
YES _____ NO _____
6. If particularized standards exist [or were to be promulgated] for your agency, what considerations require [would require] your agency to impose standards beyond those applied to attorneys by their licensing states? PLEASE EXPLAIN ON SEPARATE SHEET.

7. Should different professional standards apply depending on whether the alleged misconduct arises out of a direct appearance before an agency (e.g., actually appearing before the agency; filing a document the contents of which were prepared by the attorney; and the like) or does not arise of a direct appearance (e.g., failure to "blow the whistle" on a corporate decision).

YES _____ NO _____.

8. Should uniform standards of professional conduct for federal agency practice be promulgated?

YES _____ NO _____.

9. By whom should any such uniform standards of professional conduct for federal agency practice be promulgated?

ABA _____ Federal Courts _____ Congress _____

Ad Hoc Group (Attorneys) _____ Ad Hoc Group (Agency Personnel) _____

Ad Hoc Group (Attorneys/Agency Personnel) _____ Other _____

(Please explain on separate sheet)

FEDERAL QUESTIONNAIRE (BACK)

10. Should any agencies be exempted from any such uniform standards of professional conduct for federal agency practice?

YES _____(Please explain on separate sheet) NO _____

Attorney Discipline

11. Do you feel that current procedures used by your agency effectively process and resolve misconduct by attorneys practicing before your agency?

YES _____ NO _____ (Please explain on separate sheet).

12. How does your agency process complaints against attorneys practicing before your agency?

Forward to Licensing State _____ In-House Agency Proceedings _____

Other _____(Please explain on separate sheet)

13. Are you in favor of the creation of a centralized federal authority to handle discipline of attorneys practicing before federal agencies?

YES _____ NO _____.

14. Whom should such a centralized authority use to screen and investigate a complaint arising out of misconduct before your agency?

US Attorney _____ Your Agency _____ Licensing Bar Counsel _____

Federal Magistrate _____ Federal Judge _____

The Centralized Authority _____ Other _____ (Please explain on separate sheet)

15. Whom should such a centralized authority use to dispose of a screened/investigated complaint, to include imposing discipline (if appropriate).

US Attorney _____ Your Agency _____ Licensing Bar Counsel _____

Federal Magistrate _____ Federal Judge _____

The Centralized Authority _____ Other _____ (Please explain on separate sheet)

16. Should any agencies be exempted from such a centralized authority for attorney discipline?

YES _____(Please explain on separate sheet) NO _____

17. Should attorneys sanctioned (e.g., suspension, disbarment) for misconduct before your agency be similarly restricted in their practice before all federal agencies?

Under a centralized authority approach: YES _____ NO _____

Under agency-by-agency approach: YES _____ NO _____

18. With respect to your agency, misconduct by attorneys arises:

Regularly _____ Periodically _____ Occasionally _____ Almost Never _____

19. How many instances of attorney misconduct (of such a nature as to warrant sanction) occur annually before your agency? _____; Are the attorneys involved generally sanctioned? YES ____ NO _____(Please explain on separate sheet)

20. What types of misconduct occur most frequently before your agency? PLEASE EXPLAIN ON SEPARATE SHEET.

Optional: Name of Agency _____; Position Held _____;
Name _____.

Thank you for your assistance in this matter. Please return this Survey (and additional pages needed for explanation) in the enclosed return envelope.

Sincerely,
PROFESSOR MICHAEL P. COX
The University of Oklahoma
College of Law
Norman, Oklahoma 73019

MARCH 10, 1982 CHART: ATTORNEY MISCONDUCT
BEFORE ELEVEN FEDERAL AGENCIES (PREPARED BY
THE ABA CENTER FOR PROFESSIONAL
RESPONSIBILITIES)

Agency	Approximate Number of Lawyer Discipline Cases per Year	Has Agency Referred Lawyer Discipline Cases to State Agencies	Has Agency Been Satisfied with State Agencies' Handling of Cases	How Many Lawyer Discipline Cases Did Agency Handle in 1981
Administrative Agency Disciplinary Proceedings March 10, 1982				
1. Civil Aeronautics Board (CAB)	One case every several years	No	----	0
2. Federal Trade Com- mission (FTC)	One case every two years	One case in past five years	No idea what happened with case; never heard anything from state	0
3. Interstate Commerce Commission (ICC)	Ten cases per year	Yes—over past six months have referred all their cases	Extremely pleased thus far	2
4. Office of Personnel Management (OPM)	Never had a case	No	----	0
5. Securities and Ex- change Commission (SEC)	Thirty-five cases per year in- vestigated; one per year goes to administrative proceeding	About fifteen cases in past five years	Pleased with some states, displeased with others	5-6
6. Department of Trea- sury (DOT)	Fifty cases per year	No	----	about 50

<i>Agency</i>	<i>Approximate Number of Lawyer Discipline Cases per Year</i>	<i>Has Agency Referred Lawyer Discipline Cases to State Agencies</i>	<i>Has Agency Been Satisfied with State Agencies' Handling of Cases</i>	<i>How Many Lawyer Discipline Cases Did Agency Handle in 1981</i>
7. Nuclear Regulatory Commission (NRC)	One case every four years	No	----	0
8. Department of Justice (DOJ)	no response			
9. National Labor Relations Board (NLRB)	18-20 in 55 years; all for misconduct in hearings	No	----	0
10. Department of Energy (DOE)	Never had a case	No	----	0—(DOE) (Federal Energy Regulatory Commission—FERC)—2 reprimands
11. Federal Communications Commission (FCC)	Two cases within last five years	No	----	0

APPENDIX C

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Immigration and Naturalization Service:

- 8 C.F.R. § 292.1(a)(1) (admission)
- 8 C.F.R. § 292.3 (suspension/disbarment)

Federal Reserve:

- 12 C.F.R. § 263.3(a) (admission)
- 12 C.F.R. § 263.3(b) (conduct)

Federal Deposit Insurance Corporation:

- 12 C.F.R. § 308.04(a) (admission)
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- 12 C.F.R. § 308.04 (practice)

Federal Home Loan Bank Board:

- 12 C.F.R. § 509.3(a) (admission)
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Small Business Administration:

- 13 C.F.R. § 103.13-3(b) (admission)
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Civil Aeronautics Board:

- 14 C.F.R. §§ 300.5–300.6 (rules of conduct)
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Federal Trade Commission:

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Consumer Product Safety Commission:

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Securities and Exchange Commission:

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