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Professional Responsibility Issues in Administrative Adjudication

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SUMMARY OF CONTENTS

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I. INTRODUCTION

May an administrative law judge exclude counsel for contemptuous conduct, disqualify counsel for conflicts of interest or other reasons, or suspend or disbar counsel for past misconduct? This question illustrates the professional responsibility issues that can arise in the adjudicative proceedings of administrative agencies.[1]

This article addresses some of these issues, by examining the admission of attorneys to practice before agencies, the standards of conduct required of attorneys when they practice before agencies, and the enforcement of these standards. The article then briefly considers the same topics of admission, standards, and enforcement with regard to parties and nonlawyer representatives. The focus of the article turns next to the standards of conduct of administrative law judges and the enforcement of these standards. The conclusion offers answers to the question posed above and others raised during the article.

II. ADMISSION OF ATTORNEYS TO PRACTICE BEFORE AGENCIES

A. *State Agencies — State Supreme Courts Control*

State supreme courts possess exclusive authority to issue licenses for the practice of law, even in states where the standards of attorney conduct are adopted by the legislature.[2] An attorney's license entitles the holder to practice in any tribunal of the state. In states which certify attorneys as specialists in designated areas of the law, the certification program demonstrates ability, but does not affect the right of designated or non-designated attorneys to practice in any area of the law.[3]

Under the principle of separation of powers, neither the legislature nor the executive branch of state government may encroach on the exclusive domain of the state supreme court to control the admission of attorneys. A statute or agency rule establishing special requirements to be met by attorneys in order to practice before an agency would there-

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1. *See generally* Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 34 CASE W. RES. L. REV. 173 (1983-84); Best, *Shortcomings of Administrative Agency Lawyer Discipline*, 31 EMORY L. J. 535 (1982); C. WOLFRAM, MODERN LEGAL ETHICS § 3.6.2 (1986).

2. On legislative adoption of standards of attorney conduct, *see infra*, notes 22-24, 45 and accompanying text. On state courts' control over admission to practice, see WOLFRAM, *supra* note 1, § 15.2.1.

3. WOLFRAM, *supra* note 1, § 5.4.

fore be unconstitutional. *The Florida Bar v. Moses* [4] notes that the legislature may not control the admission of attorneys to practice before administrative agencies, but the case allows the legislature to set standards for the admission of nonlawyers to represent clients before agencies.

If the power to enforce standards of conduct belonged exclusively to those who control admission to practice, administrative law judges (ALJ) in state agencies would be powerless to control the conduct of practitioners. ALJs, however, do have some power to control, despite their lack of power to admit.[5]

B. Federal Agencies — Congress Controls but May Delegate to Agencies

The situation at the federal level is quite different from that in the states. The federal courts handle the admission of attorneys on a decentralized basis. Each federal court, pursuant to its own rules of practice, admits attorneys to its own bar, generally on a routine basis for any attorney licensed by the highest court of the state.[6] No federal court can license an attorney to practice before another federal court[7] — or before a federal agency. Congress has enacted statutes that establish the basic standards for admission to practice before federal agencies.

In the past, statutes allowed various federal agencies to establish their own bars. These bars were governed by standards for admission and conduct prescribed by each agency within the framework of its own enabling act.[8] Some cases decided under these circumstances suggest that the ALJ's power to enforce standards of conduct flows from the agency's power to admit attorneys to practice.[9] These cases imply that

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4. 380 So.2d 412 (Fla. 1980) (based on language in state constitution authorizing legislature to confer quasi-judicial functions upon administrative agencies). For a more traditional view, where the state constitution contained no such provision, see Idaho State Bar Ass'n. v. Idaho Pub. Util. Comm'n., 102 Idaho 672, 637 P.2d 1168 (1981) (agency's order permitting nonprofit organizations and small businesses to be represented by nonlawyers in hearings held invalid). *See* further discussion *infra* notes 150-63 and accompanying text.

5. *See infra* notes 15-17, 117-32 and accompanying text.

6. WOLFRAM, *supra* note 1, § 15.2.4. The author observes, in § 5.4, that some federal district courts require attorneys to pass the trial advocacy certification before admission to practice.

7. *See, e.g., In re* Snyder, 472 U.S. 634, 643 n.4 (1985) (federal court of appeals has no authority to suspend attorney from practicing in district courts in the circuit).

8. The legislative history of the Agency Practice Act, *infra* note 10, shows that by 1965, many federal agencies had already repealed their special admission requirements. 1965-2 U.S. CODE CONG. & ADMIN. NEWS 4170. *See also* cases cited *infra* note 9.

9. *E.g.,* Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953); Schwebel v. Orrick, 153 F. Supp. 701 (D.D.C. 1957), *aff'd. on other grounds* 251 F.2d 919 (D.C. Cir. 1958), *cert. denied* 356 U.S. 927 (1958); Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952).

without the power to admit, agencies may not have the power to enforce standards of conduct.

The agencies' power to control the admission of attorneys was virtually eliminated by the Agency Practice Act of 1965 (Act).[10] Only the Patent and Trademark Office (PTO) may now impose its own standards for admission of attorneys to practice.[11] The Act confers, upon anyone licensed to practice in the highest court of any state, automatic admission to practice before any other federal agency.[12] The Act defines "agency" to mean those covered by the Administrative Procedure Act (APA).[13] The Act confers similar automatic admission privileges upon certified public accountants (CPA),[14] but allows agencies to impose their own admission requirements on any person who is neither an attorney nor a CPA.

The Act includes two important disclaimers. First, the Act "does not . . . authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency."[15] The statute thus indicates congressional willingness to allow agencies to exercise the power to discipline, even though they no longer have the power to deny admission to members of state bars. The Act does not confer the power to discipline, but does not conflict with other statutes that do so.

Second, the Act "does 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."[16] This provision apparently authorizes an agency to disqualify counsel from appearing in a specific matter, if the appearance would violate statutes or regulations which limit the activities of individuals who have passed through the "revolving door" between governmental and private practice,[17] even if the revolving door statutes or regulations do not explicitly provide for disqualification of counsel.

Thus, although the typical federal agency no longer has the power

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10. 5 U.S.C. § 500 (1982).

11. 5 U.S.C. § 500(e) (1982). The enabling act of the Patent and Trademark Office, preserved by the Agency Practice Act, authorizes the PTO to prescribe regulations requiring all attorneys seeking admission to its bar to demonstrate that they have good moral character and reputation, "and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance . . . ." 35 U.S.C. § 31 (1982).

12. 5 U.S.C. § 500(a)(2), (b) (1982).

13. 5 U.S.C. § 500(a)(1) (1982).

14. 5 U.S.C. § 500(c) (1982).

15. 5 U.S.C. § 500(d)(2) (1982).

16. 5 U.S.C. § 500(d)(3) (1982).

17. The basic limitation on practice before a federal agency by its former employees is 18 U.S.C. § 203 (1982).

to admit, it does have the power to disqualify in order to prevent violation of revolving door statutes or regulations and may exercise disciplinary powers if authorized by other statutes. In the federal system and in the states, the power to enforce standards of conduct can be exercised by agencies that do not have the power to admit.

III. STANDARDS OF ATTORNEY CONDUCT

Attorneys who represent parties in administrative adjudication are governed by the general standards of conduct that apply to the practice of law in the jurisdiction. Other statutes and rules may impose additional standards.

A. *Code of Professional Responsibility and Model Rules of Professional Conduct*

The most influential compilations of general standards are the Code of Professional Responsibility, adopted by the American Bar Association (ABA) in 1970, and the Model Rules of Professional Conduct, adopted in 1983 to supersede the Code as ABA policy. The Code and the Model Rules set forth numerous standards of conduct to govern an attorney who appears before a tribunal.[18] In addition, the Code and the Model Rules require an attorney to comply with the tribunal's own rules[19] and, to some extent, with other law.[20]

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18. *See, e.g.,* ABA Code of Professional Responsibility [hereinafter Code] DR 5-102 (withdrawal as counsel when lawyer becomes witness), DR 6-101(A) (competent representation), DR 7-102 (representing a client within the bounds of the law), DR7-103 (performing the duty of public prosecutor or other government lawyer), DR 7-106(B), (C) (conduct before a tribunal), DR 7-107 (trial publicity), DR 7-108 (communication with or investigation of jurors), DR 7-109 (contact with witnesses), DR7-110(B) (*ex parte* communications), DR 9-101(C) (claiming to have improper influence), EC 2-29 (appointment by court).

See also, ABA Model Rules of Professional Conduct [hereinafter Model Rules] Rules 1.1 (competence), 3.3 (candor toward the tribunal), 3.4 (fairness to opposing party and counsel), 3.5 impartiality and decorum of tribunal), 3.6 (trial publicity), 3.7 (lawyer as witness), 3.8 (special responsibilities of a prosecutor), 6.2 (accepting appointments), 8.4(e) (claiming to have improper influence). For a recent ABA interpretation of an attorney's duty when faced with a perjurious client, *see* ABA Formal Opinion 87-353 (1987).

19. *E.g.,* Code DR 2-110 (withdrawal), DR 7-106(A) (standing rule or ruling of tribunal); Model Rules 1.16(c) (order not to withdraw), 3.4(c) (rules of a tribunal).

20. *E.g.,* Code DR 1-102(A)(3) (illegal conduct involving moral turpitude), DR 2-106(A) (illegal or clearly excessive fee), DR4-101(C)(2) (reveal confidences or secrets when required by law or court order), DR 7-101(A)(1) (use reasonably available means permitted by law and the Disciplinary Rules), DR 7-102(A)(3) (conceal that which he is required by law to reveal), DR7-102(A)(7), (8) (illegal conduct); Model Rules 1.2(d) (criminal conduct), 3.4(b) (offer inducement that is prohibited by law), 3.5(a) (influence by means prohibited by law), 3.5(b) (communicate *ex parte* except as permitted by law), 8.4(b) (criminal act), 8.4(f) (violation of applicable rules of judicial conduct or other law).

1. *Controlling or persuasive*

Most state supreme courts have adopted their own versions of the Code or Model Rules as rules of court, enforceable through the disciplinary process.[21] Distinctive variations from this pattern are found in the two most populous states.

California lawyers are governed by a series of statutes, including one that authorizes the State Bar, with Supreme Court approval, to formulate rules of professional conduct having the force of law.[22] The California Rules of Professional Conduct[23] are shorter than the ABA Code, but the combined effect of the California Rules and that state's statutes amounts to a system of regulation comparable to that found in other states.

Standards of conduct for New York lawyers are prescribed by statute in the Judiciary Law.[24] The Code of Professional Responsibility has not been promulgated by statute or by court rule, but has been adopted by the New York State Bar Association.[25] Although the Code does not have the force of law, it is given persuasive effect by the New York courts when they interpret provisions of the Judiciary Law.[26]

Neither the Code nor the Model Rules have been adopted as general regulations for the federal courts, but the local rules of practice of federal courts generally include provisions incorporating, by reference, the standards of professional conduct adopted by the state's highest court.[27]

2. *Practice before agencies*

The Code and the Model Rules apply to practice before administrative agencies in adjudicative matters. The Code expresses this policy by defining "tribunal" to include all courts and other adjudicatory bodies.[28] Accordingly, an attorney appearing before an ALJ or an administrative agency in an adjudicative matter is governed by all the standards that apply when the attorney appears in a court — and by additional standards, if imposed by statute or agency rule.

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21. WOLFRAM, *supra* note 1, §§ 2.6.3, 2.6.4.

22. CALIF. BUS. & PROF. CODE § 6076 (West ed. 1974). *See* WOLFRAM, *supra* note 1, § 2.6.5.

23. The Rules of Professional Conduct of the State Bar of California are set forth in CALIFORNIA RULES OF COURT STATE (West 1987).

24. NEW YORK CONSOLIDATED LAW, JUDICIARY LAW § 90 (McKinney 1983).

25. The Code is set forth as an Appendix to the JUDICIARY LAW (McKinney 1975).

26. *E.g.*, *In re* Hof, 102 A.D.2d 591, 478 N.Y.S.2d 39 (App. Div. 1984).

27. WOLFRAM, *supra* note 1, § 2.6.3.

28. Code, "Definitions" (6). *See also,* DR 7-107(H), dealing specifically with publicity during the pendency of an administrative proceeding.

The Model Rules of Professional Conduct achieve the same result by a different structure. The Model Rules make frequent use of the term "tribunal," but without any definition. Rule 3.9 contains special provisions regarding one type of tribunal — a legislative or administrative tribunal in a nonadjudicative proceeding.[29] An attorney who appears before this type of tribunal is governed by only designated portions of the Model Rules. This rule implies that the full coverage of the Model Rules applies to other tribunals, consisting of courts and administrative agencies in adjudicative proceedings.

B. Judicially Created Standards

The courts have prescribed numerous other standards, many of which pertain only to practice before the courts. These other standards are relevant to the present article for three reasons. First, administrative adjudication frequently leads to the courtroom, in proceedings seeking review or enforcement of agency action. Accordingly, attorneys who anticipate appearing in administrative proceedings and in any related judicial proceedings must bear in mind the standards of conduct that the courts will require. Second, some of the judicial standards are incoporated by reference in statutes governing procedure before administrative agencies. Finally, judicial standards provide essential analogies for dealing with the conduct of attorneys before administrative agencies.

1. General rules of procedure

State supreme courts generally have authority to promulgate statewide rules of civil, appellate, criminal, and other types of procedure.[30] Again, California and New York require special mention. In each of these states, the legislature exercises primary responsibility for promul-

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29. Model Rule 3.9. For some recent intepretations of the Model Rules in the context of administrative proceedings, see, *e.g.*, *In re* Petition for Review of Opinion 583, 107 N.J. 230, 526 A.2d 692 (1987) (*ex parte* communications allowed between deputy attorney general and agency head during some stages of administrative proceeding — interpreting Rule 3.5); *In re* Petition for Review of Opinion 569, 103 N.J. 325, 511 A.2d 119 (1986) (6-month disqualification of former state employee from practicing before agency to avoid appearance of impropriety); ABA Informal Opinion 84-1508 (1984) (lawyer employed in nonlawyer capacity by state agency); ABA Informal Opinion 85-352 (lawyer may advise client to report position on tax return — limitations).

30. *See* Annotation, *Power of Court to Prescribe Rules of Pleadings, Practice, or Procedure,* 110 A.L.R. 22, supplemented 158 A.L.R. 705. Recent cases include Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d, 491, 77 A.L.R.2d 390 (1959), *appeal dismissed and cert. denied* 361 U.S. 374 (1960) (maximum fee schedule could be characterized as procedural rather than substantive, and therefore within rulemaking power of court); R.E.W. Constr. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965) (Idaho Supreme Court has power to promulgate rules of procedure for all courts); Barger v. Brock, 535 S.W.2d 337 (Tenn. 1976) (Tennessee Supreme Court rules may not be challenged in any lower court).

gating rules of practice, but the highest level of the judiciary may adopt additional rules, not inconsistent with statute.[31] The Model State Administrative Procedure Act incorporates the rules of civil procedure by reference,[32] to govern discovery in administrative adjudication.

At the federal level, the Rules Enabling Act[33] authorizes the Supreme Court to adopt rules for all federal courts, to become effective ninety days after presentation to Congress. The Federal Rules of Civil Procedure, promulgated under this authority, regulate civil practice in the federal courts and have served as a model for many state codes of civil procedure.[34] Federal Civil Procedure Rules 11 and 37 have achieved special prominence in recent years. These rules require the court to impose sanctions against attorneys who sign frivolous pleadings or engage in abuses of the discovery process.[35]

2. *Local rules of practice*

Each state court has power to adopt its own local rules of practice.[36] This power may be implied by the constitutional grant of the judicial power to each court, or may be expressly conferred by statute or supreme court rule.

Local rules may not abrogate standards of conduct established by statewide rules, but may impose reasonable additional standards, such as dress codes.[37] The power to impose discipline against attorneys for misconduct is generally reserved to the state supreme court and its disciplinary agencies. All courts, however, may take measures to assure

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31. CAL. CONST. art. VI, § 6; N.Y. CONST. art. VI, § 30.

32. National Conference of Commissioners on Uniform State Laws, Model State Administrative Procedure Act § 4-210(a) (1981), in 14 Unif. Laws Ann. (Supp. 1987) [hereinafter 1981 MSAPA].

33. 28 U.S.C. § 2072 (1982).

34. *See* McKusick, *State Courts' Interest in Federal Rulemaking: A Proposal for Recognition*, 36 ME. L. REV. 253 (1984); Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243 (1984).

35. *See* AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, SANCTIONS: RULE 11 AND OTHER POWERS (1986); Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433 (1986); Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499 (1986). *See also* Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) (Rule 11 does not require same procedures as for contempt, because money sanction is not contempt); Adduano v. World Hockey Ass'n., 824 F.2d 617 (8th Cir. 1987) (district court lacks authority to impose Rule 11 sanction for settlement agreement that was neither submitted to the court nor incorporated in the court's dismissal order).

36. WOLFRAM, *supra* note 1, § 2.2.2.

37. *E.g.*, Friedman v. District Court, 611 P.2d 77 (Alaska 1980) (coat and tie); Sandstrom v. State, 336 So. 2d 572 (Fla. 1976) (fabric tie, not string tie); *but see* Jensen v. Superior Court, 154 Cal. App. 3d 533, 201 Cal. Rptr. 275 (Cal. Ct. App. 1984) (trial court may not compel lawyer to remove turban).

the orderly and fair conduct of proceedings. One example is the exclusion of attorneys who engage in contemptuous conduct or who have serious conflicts of interest.[38] If no statewide rules or statutes authorize the lower courts to take such measures, courts may provide for them in local rules, or may impose them in specific cases without prior promulgation as rules.[39]

Federal statutes authorize each federal court to adopt its own rules of practice.[40] Even if these statutes had not been enacted, the federal courts could arguably claim that the Article III grant of the judicial power implies the ancillary power to adopt rules of practice. In their locally adopted rules of practice, the federal courts generally incorporate, by reference, the standards of professional conduct adopted by the state court of the locality.[41] Each federal court, in its rules, may make its own changes or additions to these standards.

3. Case law

Recent years have seen an explosion of litigation involving motions to disqualify counsel from appearing before courts,[42] and a few cases involving disqualification of counsel from appearing before administrative agencies.[43] Many court rulings on disqualification place heavy reliance on the Code or Model Rules, although the tribunal's power to disqualify attorneys and regulate conduct before its own bar is not derived from, nor controlled by, the Code or the Model Rules.

The law on the disqualification of attorneys is derived, essentially, from the decisions of courts, which either interpret local rules of court or impose disqualification based on the duty of each court to assure basic fairness. Courts also have the power and the duty to assure the fairness of proceedings by taking other necessary measures, even though these measures are not prescribed by statutes or rules.[44]

C. Statutory Standards

Federal and state statutes prescribe standards of attorney conduct, in addition to those imposed by the Code, Model Rules, or other judicial action. Statutory standards may pose special issues under the state and federal constitutions.

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38. WOLFRAM, *supra* note 1, § 2.2.4.
39. *E.g.*, Pantori, Inc., v. Stephenson, 384 So. 2d 1357 (Fla. App.1980).
40. 28 U.S.C. §§ 1654, 2071 (1982).
41. WOLFRAM, *supra* note 1, § 2.6.3.
42. WOLFRAM, *supra* note 1, § 7.1.7.
43. *Infra* notes 122-24 and accompanying text.
44. WOLFRAM, *supra* note 1, § 2.2.1.

1. State constitutional limitations

Some state constitutions vest exclusive power in the supreme court to regulate the conduct of attorneys, while other states confer this power primarily upon the legislature, allowing the highest judicial level to perform a secondary role in prescribing standards of conduct within the statutory framework.[45]

In states where the constitution vests exclusive jurisdiction in the supreme court, statutes and agency rules pertaining to the conduct of attorneys must avoid encroachment on the domain of the supreme court. In *Pennsylvania Public Utilities Commission Bar Association v. Thornburgh,*[46] a statute prohibited former public officials or employees from practicing before their former agencies within one year after leaving the agencies. The Pennsylvania court held the statute unconstitutional, as "an impermissible intrusion by the legislature into an area reserved by the Constitution to the Supreme Court and one where the Supreme Court has acted to regulate the conduct of attorneys."[47]

In other states, where the legislature exercises primary authority to prescribe standards of attorney conduct, the issue of legislative encroachment on the supreme court's domain cannot arise. In these states, however, other challenges may be asserted. For example, if a statute purports to authorize state administrative agencies to exercise judicial power, the statute will be held unconstitutional. Under the principle of separation of powers, only the courts may exercise judicial powers. Administrative agencies may be vested, by statute, with quasi-judicial, but not with judicial powers. The problem, of course, is to determine what types of power should be regarded as "judicial" in this context. Some cases addressing this issue are discussed later, in the context of statutory attempts to authorize agencies to enforce standards of attorney conduct.[48]

2. Federal constitutional limitations

Neither the United States Supreme Court nor any other entity of the federal government has the exclusive constitutional power to regulate the federal practice of law. Nor may the state courts regulate the federal practice of law, in view of the Supremacy Clause,[49] although federal courts have voluntarily adopted many state rules governing the

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45. *Supra* notes 21-26 and accompanying text.

46. 702 Pa. Commw. 88, 434 A.2d 1327 (1981), *aff'd.* 498 Pa. 589, 450 A.2d 613 (1982), *followed in* Kury v. Commonwealth, 62 Pa. Commw. 174, 435 A.2d 940 (1981).

47. 434 A.2d at 1331.

48. *Infra* notes 127-42 and accompanying text.

49. U.S. CONST. art. VI, § 2.

professional conduct of attorneys. Since no governmental entity has exclusive power to regulate the practice of federal law, federal statutes and agency rules cannot be challenged effectively on the grounds of encroachment.

Federal statutes are, however, subject to invalidation if they purport to confer judicial power on a nonjudicial entity. The rationale is that the constitution vests the judicial power exclusively in the courts established under Article III.[50]

3. General statutes

Attorneys are governed by a massive array of federal and state statutes. Many of these statutes apply to attorneys engaged in administrative as well as other types of practice, including those on such diverse topics as fraud,[51] perjury,[52] money laundering,[53] forfeiture,[54] and the "revolving door" between governmental and private practice.[55] Additional control is imposed by the federal Administrative Procedure Act, which prohibits counsel from making *ex parte* communications to administrative law judges.[56] The 1981 Model State Administrative Procedure Act contains a similar prohibition.[57]

Special standards apply to counsel who represent governmental units in administrative adjudication as well as in other proceedings. These standards are found in numerous statutes and rules regulating the conduct of government employees (including attorneys), with special emphasis on avoiding conflicts of interest.[58]

4. Enabling acts

Standards of attorney conduct are set forth in the enabling acts of the PTO and the Treasury Department. The PTO's enabling act authorizes it to exclude or suspend attorneys, either generally or from any

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50. U.S. CONST. art. III, § 1.
51. *E.g.*, 18 U.S.C. § 1341 (1982) (mail fraud).
52. *E.g.*, 18 U.S.C. § 1001 (1982) (false statements).
53. 18 U.S.C. § 1957 (Supp. IV 1986).
54. 21 U.S.C. § 853 (1982).
55. 18 U.S.C. § 203 (1982).
56. 5 U.S.C. § 557(d)(1)(A) (1982).
57. 1981 MSAPA, *supra* note 32, § 4-213(c).
58. *E.g.*, 18 U.S.C. § 207 (1982) (disqualification of former officers and employees; disqualification of partners of current officers and employees); 5 C.F.R. § 737.1 to .33 (1987) (Office of Personnel Management regulations on post-employment conflict of interest); 5 C.F.R. § 738.101 to .313 (1987) (Office of Personnel Management regulations on Office of Government Ethics); 5 C.F.R. § 1304.4601 to .4608 (1987) (Office of Management and Budget regulations on post-employment conflict of interest); 28 C.F.R. § 0.39 (1987) (Office of Professional Responsibility in U.S. Department of Justice).

particular case, if they are incompetent, disreputable, guilty of gross misconduct, fail to comply with PTO regulations, or deceive, mislead, or threaten any applicant, prosective applicant, or other person with business before the Office.[59] The enabling act of the Treasury Department sets forth the grounds on which the Secretary can suspend or disbar a representative in terms similar to those found in the PTO's enabling act.[60]

A significant feature of the PTO and Treasury statutes is that they control the conduct of attorneys, not only during proceedings before the agency, but more broadly in representing or dealing with any person who has business pending before the agency. In authorizing agencies to control attorneys in situations other than proceedings before the agencies, the statutes raise serious issues of validity and policy.[61] Arguably, an agency encroaches on the domain of the state supreme court when attempting to regulate the conduct of an attorney in any setting other than an appearance before the agency.

Other agencies claim to derive the power to regulate the conduct of attorneys from less explicit provisions in their enabling acts, which confer general power to adopt rules and regulations to carry out the agencies' statutory missions.[62] The question arises whether these broad

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59. 35 U.S.C. § 32 (1982).

60. 31 U.S.C. § 330 (1982).

61. *See infra* note 66 and accompanying text.

62. For example, the following agency rules provide for the exclusion of attorneys (the relevant statutory authority cited in each rule is indicated parenthetically after each rule): 12 C.F.R. § 269b.442(g) (1987) (Federal Reserve Board in bank labor relations matters, citing 12 U.S.C. § 248, on enumerated powers of Board — relevance is not clear); 12 C.F.R. §§ 512.5(b)(3), 512.6 (1987) (Federal Home Loan Bank Board, citing 12 U.S.C. §§ 1437, 1464 — general rulemaking power); 16 C.F.R. § 1025.42(b) (1987) (Consumer Product Safety Comm'n, citing 15 U.S.C. §§ 2064, 2069, 2076, 1194, 45 — relevance is not clear); 17 C.F.R. § 11.7(c)(2) (1987) (Commodity Futures Trading Comm'n, citing 7 U.S.C. §§ 4a(j), 12a(5) — general rulemaking power); 24 C.F.R. §§ 1720.80(b)(6), 3282.152(g) (1987) (Department of Housing & Urban Development, citing 15 U.S.C. § 1718, 42 U.S.C. § 5424 — general rulemaking power); 29 C.F.R. § 102.35(f) (1987) (National Labor Relations Board, citing 29 U.S.C. § 156 — general rulemaking power); 29 C.F.R. § 417.6(j) (1987) (Department of Labor, citing 29 U.S.C. § 481 — general rulemaking power); 29 C.F.R. § 2200.66(f) (1987) (Occupational Safety & Health Review Comm'n, citing 29 U.S.C. § 661(g), which authorizes the Commission "to make such rules as are necessary for the orderly transaction of its proceedings"); 33 C.F.R. § 148.267(d) (1986) (Coast Guard, citing 33 U.S.C. § 1504(a), (b) — general rulemaking power.

Agency rules on the suspension or disbarment of attorneys include: 7 C.F.R. § 1.26(b)(2) (1987) (Department of Agriculture, citing 5 U.S.C. § 301, which authorizes the head of an executive department or military department to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property"); 8 C.F.R. § 292.3 (1987) (Board of Immigration Appeals, subject to approval of Attorney General, citing 8 U.S.C. § 1103 — general rulemaking power, and 8 U.S.C. § 1362 — allowing parties to be represented by counsel "authorized to practice" before the agency — these rules were enforced in Koden v. Department of Justice, 564 F.2d 228 (7th Cir. 1977), *see infra* text accompanying notes 64-65); 13 C.F.R. §§

grants permit agencies to control attorneys only in proceedings before the agencies, or whether the statutes imply congressional intent to authorize broader controls.[63]

Koden v. Department of Justice[64] upheld the power of the Immigration and Naturalization Service (INS) to suspend an attorney for deceiving a client and employing a runner, although this misconduct did not occur in the presence of the agency. The INS rules prohibiting this conduct were based on a statute which authorized the Attorney General to "establish such regulations . . . as he deems necessary for carrying out his authority" under the enabling act.[65]

The court upheld the power of the INS to impose sanctions for conduct occurring outside its presence, noting that courts often exercise their contempt power to punish misconduct occurring outside their presence. The court did not address the possibility that the imposition of sanctions for conduct occurring outside the presence of the tribunal may be a type of "judicial" power, which may not be conferred by statute upon any nonjudicial entity.[66]

D. *Agency Standards*

If a valid enabling act authorizes an agency to adopt standards of attorney conduct, the agency may clearly use rulemaking as the means of exercising its power. Whether the agency may prescribe standards by

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101.8-7, 110.4 (1987) (Small Business Administration, citing 15 U.S.C. § 634 — general rulemaking power); 16 C.F.R. § 3.42(d) (1987) (Federal Trade Comm'n, citing 15 U.S.C. § 46 — general rulemaking power); 17 C.F.R. § 201.2(e) (1987) (Securities & Exchange Comm'n, citing 15 U.S.C. §§ 77s, 77sss, 78w, 79t, 80a-37, 80b-11 — general rulemaking power); 29 C.F.R. § 102.44(b) (1987) (National Labor Relations Board, citing 29 U.S.C. § 156 — general rulemaking power); 32 C.F.R. § 719.142 (1987) (Navy Judge Advocate General, citing 5 U.S.C. § 301 — *see supra* in this note, citation following 7 C.F.R. § 1.26(b)(2), Department of Agriculture); 49 C.F.R. § 1103.5 (1986) (Interstate Commerce Comm'n, citing 49 U.S.C. § 10321 — general rulemaking power — these rules were enforced in Polydoroff v. I.C.C., 773 F.2d 372 (D.C. Cir. 1985) *see infra* text accompanying note 130).

63. *See infra* note 66 and accompanying text.

64. 564 F.2d 228 (7th Cir. 1977).

65. 564 F.2d at 233 (citing 8 U.S.C. §§ 1103, 1362 (1976)).

66. The statute in *Koden* did not expressly authorize the regulation of conduct outside the agency. If the statute had done so, and if a court deemed such regulation to be a judicial function, a court would have held the statute invalid, under the principle of separation of powers. Since the statute did not expressly authorize such regulation, a court could have refused to imply it, using the technique of interpreting a statute narrowly so as to preserve its validity. *See, e.g.*, National Cable Television Ass'n Inc. v. United States, 415 U.S. 336 (1974); Kent v. Dulles, 357 U.S. 116 (1958); Blitz v. Donovan, 740 F.2d 1241 (D.C. Cir. 1984). Under a narrow interpretation of the statute, the agency's attempt to discipline an attorney for conduct occurring outside its presence would have been held invalid, as beyond the authority conferred by statute. A similar result was reached in Adduano v. World Hockey Ass'n, 824 F.2d 617 (8th Cir. 1987) (district court lacks authority to impose Rule 11 sanction for settlement agreement that was neither submitted to the court nor incorporated in the court's dismissal order).

decisions in individual cases, without prior rulemaking, is questionable. In those states where administrative law judges are organized in a "central panel," the chief judge of the panel may be authorized to promulgate rules regulating practice before ALJs of the panel, including standards of attorney conduct.

1. Agency rules

Pursuant to its enabling act, the PTO has adopted and enforced its own rules of conduct, which have withstood challenge in the courts.[67] The Secretary of the Treasury, implementing the power conferred by that Department's enabling act, has promulgated Internal Revenue Service (IRS) regulations, known as Circular 10, which establish standards of conduct by attorneys appearing before the IRS.[68] Other federal agencies have relied on the less explicit grants of power in their respective enabling acts as the basis for adopting rules governing the conduct of attorneys.[69]

2. Agency case law

An agency's attempt to impose standards of attorney conduct by decisions in specific cases, without prior rulemaking, can be challenged on a number of grounds. First, enabling acts generally authorize agencies to adopt rules to carry out their statutory missions, implying that rulemaking is an essential part of the process required by statute.[70] Second, standard-setting without prior rules arguably violates the requirement of the Administrative Procedure Act, that each agency adopt and publish rules describing its procedures.[71] Third, standards established

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67. *See* Jaskiewicz v. Mossinghoff, 822 F.2d 1053 (Fed. Cir. 1987), discussed *infra* text accompanying note 131.

68. 31 C.F.R. § 10.20 to .33 (1987).

69. The statutes and corresponding rules of selected agencies are cited *supra* note 62.

70. *See, e.g.*, Anderson v. State, 135 Ariz. 578, 663 P.2d 570 (Ct. App. 1982) (psychotropic drug treatment of involuntary patient in state hospital); Balsam v. Department of Health & Rehabilitative Services, 452 So. 2d 976 (Fla. Dist. Ct. App. 1984) (moratorium on processing of applications for certificates of need); Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 257, 478 A.2d 742 (1984) (method of assessing tax on TV/radio stations, based on share of local audience); Trebesch v. Employment Div., 300 Or. 264, 710 P.2d 136 (1985) (interpretation of statute that requires recipient of extended unemployment benefits to engage in "systematic and sustained effort to obtain work"). While the above state cases tend to emphasize the legislative intent that agencies should develop policy by rulemaking, the federal cases (compiled *infra* note 72) tend to emphasize the need for fairness. The two lines of cases can be integrated by the argument that the statutory grant of authority must be interpreted in a manner likely to produce a fair result, since the legislature presumably intended fairness. Rulemaking is the procedure most likely to produce fairness; therefore, an agency's failure to use rulemaking violates legislative intent.

71. 5 U.S.C. § 552(a)(1)(A-E) (1982); *accord,* 1981 MSAPA, *supra* note 32, § 2-104.

without prior rulemaking could be deemed fundamentally unfair, under the doctrine that fairness requires rulemaking in some situations.[72]

Despite these concerns, cases have upheld the power of agencies, in limited circumstances, to define and enforce standards in specific cases without prior rulemaking. *Camp v. Herzog* [73] allowed a federal agency, without rulemaking, to exclude an attorney for contemptuous conduct or for conflict of interest based on prior employment by the agency. The court held, however, that an agency cannot discipline attorneys, by suspension or disbarment, unless the agency has first promulgated rules. A similar result was reached by the District of Columbia Court of Appeals in *Brown v. District of Columbia Board of Zoning Appeals,*[74] upholding the power of an agency to disqualify counsel for conflict of interest, without prior rulemaking.[75]

If an agency has adopted rules of attorney conduct, and applies these rules in a specific case in a manner that indicates an apparent change in policy, the specific decision may be challenged on the grounds that the agency should have adopted its new policy by new rulemaking, not by adjudication.[76] Similar criticism was aimed at the Securities and Exchange Commission (SEC) decision in the *Carter and Johnson* case.[77]

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72. Some federal cases have required rulemaking as the procedure for the development of agency policy, *e.g.,* Morton v. Ruiz, 415 U.S. 199 (1974); Ford Motor Co. v. Federal Trade Comm'n, 673 F.2d 1008 (9th Cir. 1981), *cert. denied* 459 U.S. 999 (1982). Other cases of comparable importance have allowed agencies to create new policy without rulemaking, *e.g.* Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). *See generally* 2 K. C. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:26 (2d ed. 1979). According to Florida case law, if an agency wishes to develop new policy through adjudication, the "incipient" policy must be placed in issue during the adjudicative hearing. McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. Dist. Ct. App. 1977); Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So.2d 1177 (Fla. Dist. Ct. App. 1981).

73. 104 F. Supp. 134 (D.D.C. 1952).

74. 413 A.2d 1276 (D.C. 1980).

75. The *Herzog* and *Brown* cases will be discussed at length later, in connection with agencies' powers to enforce their standards; *infra* notes 117 and 124 and accompanying text.

76. For the proposition that an agency is bound by its own rules unless it promulgates new rules (or a higher authority intervenes), see United States v. Nixon, 418 U.S. 683 (1974); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973). The 1981 MSAPA, *supra* note 32, § 5-116(c)(8)(ii), provides for judicial relief from "agency action, other than a rule, that is inconsistent with a rule of the agency." A similar but not identical result is included in *Section of Administrative Law, American Bar Association, A Restatement of the Scope-of-Review Doctrine,* 38 ADMIN. L. REV. 235 (1986), which proposes to provide judicial relief from agency action that "violates limitations imposed by . . . an agency rule having the force of law." *Id.* § (b)(1)(C), discussed in Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report,* 38 ADMIN. L. REV. 239, 248-49 (1986).

77. *In re* Carter and Johnson, 22 S.E.C. Docket 292, Securities Act Release No. 17597 (1981), discussed in numerous commentaries, including Cox, *supra* note 1; Best, *supra* note 1; Kaplan, *Some Ruminations on the Role of Counsel for a Corporation,* 56 NOTRE DAME L. REV. 873, 878-82 (1981).

That decision, interpreting the SEC's Rule 2(e)[78] innovatively, held that attorneys would be subject to discipline under that rule for failing to try hard enough to prevent their clients from filing misleading documents with the SEC. In the interests of fairness, the SEC excused attorneys Carter and Johnson from sanctions for their past violations of this newly-announced standard. By relieving the respondents from sanctions, the SEC precluded judicial review of the decision,[79] but also deprived the decision of any precedential effect.[80]

3. Rules of central panels of ALJs

In states that have organized their administrative law judges in "central panel" systems,[81] the chief ALJs of these central panels may adopt rules of practice that include standards of conduct to govern attorneys. A pending draft of model rules for all central panel states authorizes the ALJ to impose sanctions against a party or representative who fails to appear at any scheduled proceeding, or who unreasonably fails to comply with any order of an ALJ or with any requirements of the rules.[82]

E. Professional Guidelines and Practices

This survey of standards of attorney conduct ends with a brief mention of professional guidelines and practices. These standards, while not directly enforceable, may enter into discretionary decisions on issues of attorney conduct.

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78. 17 C.F.R. § 201.2(e) (1987).

79. A party who has suffered no injury lacks standing to seek judicial review of agency action; *see* B. SCHWARTZ, ADMINISTRATIVE LAW § 8.11 (2d ed. 1984).

80. An agency cannot effectively establish a precedent by an order in an adjudicative proceeding, unless the order applies to the party in that proceeding. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), discussed in SCHWARTZ, *supra* note 79, § 4.16.

81. On the state central panel systems in general, *see* M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES (1983). The 1981 MSAPA, *supra* note 32, §§ 4-301, provides for a central panel, but offers alternatives as to whether or not its use is mandatory. *Id.* § 4-202(a) [bracketed language]. For a critical comment on the MSAPA's failure to make the central panel mandatory, *see* Harves, *The 1981 Model State Administrative Procedure Act: The Impact on Central Panel States*, 6 W. NEW ENG. L. REV. 661 (1984). On proposed legislation to create a central panel in the federal government, *see* Symposia, 6 W. NEW ENG. L. REV. 587 (1984); 19 NEW ENG. L. REV. 693 (1983-84).

82. Model Administrative Procedure Rules for Central Panel Agencies § 12.4 [draft approved August 8, 1987 by National Conference of Administrative Law Judges, Judicial Administration Division, American Bar Association] (on file at B.Y.U. Journal of Public Law).

1. Nonbinding portions of Code and Model Rules

The Code of Professional Responsibility consists of enforceable Disciplinary Rules and nonenforceable Ethical Considerations (EC).[83] In states that have adopted the Code, the ECs constitute a body of nonbinding advice to attorneys. In New York, where the Code has not been given the force of law at all, the entire Code is a body of influential but nonbinding advice from the State Bar Association.[84] The Model Rules do not contain any ECs, but the comments following each rule provide varying amounts of explanation and advice.[85]

2. Federal Ethical Considerations

The Federal Bar Association has adopted Federal Ethical Considerations (FEC) for the guidance of attorneys employed by the federal government.[86] The FECs deal with such issues as confidentiality, conflicts of interest, and identifying the client to whom the government attorney owes loyalty.

3. Practices of bar and tribunal

The Code of Professional Responsibility requires a lawyer to comply with "known customs of courtesy or practice of the bar or a particular tribunal" unless the lawyer gives timely notice to opposing counsel of the intent not to comply.[87] The Model Rules omit this provision, with the comment that it is too vague to be enforceable.[88] Although the Code provision on this point may indeed be unenforceable through the disciplinary process, the provision serves as a reminder that bars and tribunals often develop customs of courtesy or practice, which may vary considerably from one bar or tribunal to another. For example, lawyers may be quite willing to rely on a telephone conversation or a handshake to signify waiver of a filing deadline in some bars, while written consent will be expected in others.

Attorneys who practice before administrative agencies are likely to be influenced by the rules of practice in the courts, whether or not these rules are incorporated into the agencies' rules. Motion practice before an Administrative Law Judge, for example, is likely to proceed in sub-

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83. Code, *supra* note 18, Preliminary Statement.
84. *Supra* notes 25-26 and accompanying text.
85. Model Rules, *supra* note 18, Scope, ¶ 1.
86. 20 FED. BAR NEWS 363 (1973).
87. Code, *supra* note 18, DR 7-106(C)(5).
88. Model Rules, *supra* note 18, Comment to Rule 3.4, Model Code Comparison, ¶ 5.

stantially the same manner as in a court, because the attorneys and the ALJ will be familiar with this practice.

Finally, attorneys and ALJs are likely to look for analogies in the rules of court when faced with problems not covered in the agencies' own rules. The search for analogies is especially significant if ALJs or agencies experience the need to prescribe and enforce standards of attorney conduct, but find no clear guidance in their enabling acts or rules.

IV. Enforcing Standards of Attorney Conduct

The courts have traditionally enforced standards of attorney conduct. A central issue in this article is the extent to which Administrative Law Judges and agencies may undertake the enforcement of standards.

A. Court Enforcement

In recent years, judicial enforcement of standards of attorney conduct has focused on disciplinary proceedings under the Code or Model Rules. Courts have other means of enforcing standards, however, including disqualification of counsel, contempt and other sanctions, reversing administrative decisions which result from ineffective assistance of counsel, and imposing civil liability against the attorney in favor of the client or another person. Each of these judicial enforcement mechanisms requires brief examination for two reasons. First, to the extent an ALJ lacks the power to enforce standards of attorney conduct, the party seeking enforcement must resort to the courts. Second, the enforcement measures available to courts may provide analogies or contrasts to corresponding measures at the administrative level.

1. Disciplinary proceedings under Code or Model Rules

The only enforcement mechanism contemplated by the Code and the Model Rules is the disciplinary process.[89] Neither the Code nor the Model Rules specifies which sanction should be imposed for which offense. Rather, the type and severity of the sanction are left to the discretion of the highest court of the jurisdiction, which has final authority in attorney disciplinary matters (subject to review on federal constitutional grounds).

An attorney found guilty of misconduct may be disciplined by reprimand or by disbarment or suspension from practice before all tribunals of the state. Any state in which the attorney is licensed to practice

89. Code, *supra* note 18, Preliminary Statement; Model Rules, *supra* note 18, Scope, ¶ 5.

may impose sanctions. There is no distinction as to whether the violation was committed before a court or an administrative tribunal,[90] whether this is a state or federal tribunal,[91] or whether this tribunal is located inside or outside the state where sanctions are imposed.[92] Further, since the Code and the Model Rules require an attorney to comply with rules of the tribunal, disciplinary processes under the Code or Model Rules can enforce the administrative agency's own standards as rules of the tribunal. The converse is not true; an agency cannot enforce standards that are contained in the Code or the Model Rules unless these standards are first adopted as rules of the agency.

2. *Disqualification of counsel*

The Code and the Model Rules provide for sanctions after misconduct, but provide no mechanisms for preventing attorneys from committing misconduct. The courts, in the exercise of their powers to assure the fairness of their own proceedings, entertain motions to disqualify counsel and make frequent references to the Code and the Model Rules as sources of the applicable standards.[93]

If a court has jurisdiction to review the actions of an administrative agency, the court is apparently empowered to entertain motions on ancillary matters, such as the disqualification of counsel, and may do so at an interlocutory stage of the proceedings in accordance with the principles that generally govern the review of nonfinal agency action.[94] If the ALJ or agency is also authorized to disqualify counsel, a party may be required to exhaust this administrative remedy before asking the court to order disqualification of counsel.[95]

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90. *E.g.*, Attorney Grievance Comm'n of Maryland v. Miller, 310 Md. 163, 528 A.2d 481 (1987) (federal appellate court's review of ICC decision to discipline lawyer was held not "final adjudication by judicial tribunal;" therefore, it was not conclusive proof of misconduct for state bar purposes — implying that the misconduct before the ICC, if proved, would be grounds for state discipline); *In re* Hutchinson, 518 A.2d 995 (D.C. 1986) (attorney discipline imposed by D.C. court for lawyer's untruthfulness before SEC).

91. *Id.*

92. *Id.;* Model Rules, *supra* note 18, Rule 8.5.

93. *Supra* notes 42-43.

94. *E.g.*, FTC v. Exxon Corp., 636 F.2d 1336 (D.C. Cir. 1980) (federal court disqualified law firm from appearing in a later stage of proceeding before FTC); Kadish v. Commodity Futures Trading Comm'n, 548 F. Supp. 1030 (N.D. Ill. 1982) (declaratory suit by law firm seeking authority to represent plaintiff in subpoena enforcement matter — court disqualified individual lawyer but not law firm).

95. *Infra* note 148 and accompanying text.

3. Contempt and other sanctions

The prevailing party in an administrative proceeding may seek a court order, enforceable through the contempt power of the court, to compel the losing party to comply with the agency's order.[96] This remedy is available for the enforcement of interlocutory as well as final orders; for example, subpoenas and discovery orders are generally enforceable through the court's contempt power.[97] Accordingly, if an attorney refuses to comply with the order of an ALJ on a matter of professional conduct, an appropriate movant may ask a court to compel compliance.[98] The respondent attorney will, of course, have an opportunity to explain why the court should not order compliance.

If the court orders compliance, a further question is whether the court should impose any sanction for the attorney's failure to comply with the ALJ's order in the first place. Some statutes provide for civil penalties in such situations, although courts may be reluctant to impose them.[99] If the attorney's explanation to the court is frivolous, the attorney risks sanctions under Civil Procedure Rule 11 or its equivalent.[100] The agency may, in turn, be ordered to pay a private party's attorney fees and costs if the agency took an unjustified position that led to unnecessary litigation.[101]

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96. *E.g.,* Youst v. Longo, 185 Cal. App. 3d 50, 215 Cal. Rptr. 577 (Cal. Ct. App. 1985), *modified on other grounds,* 43 Cal. 3d 64, 729 P.2d 728, 233 Cal. Rptr. 294 (1987). The 1981 MSAPA, *supra* note 32, includes general provisions on judicial enforcement of agency action, §§ 5-201 to 5-205. On federal law, *see generally* SCHWARTZ, *supra* note 79, § 9.15.

97. SCHWARTZ, *supra* note 79, § 3.10. See Note, *The Argument for Agency Self-Enforcement of Discovery Orders,* 83 COLUM. L. REV. 215 (1983).

98. The motion should be made by the aggrieved party, not by the Administrative Law Judge. *See* Young v. United States *ex rel.* Vuitton et Fils, S.A., 107 S. Ct. 2124, 2141 (1987) (Scalia, J., concurring).

99. *E.g.,* Reisman v. Caplin, 375 U.S. 440 (1964) (appropriate method of challenging validity of IRS summons is to disobey — statute provides penalties for noncompliance, but respondent will not suffer these penalties if refusal is based on reasonable grounds, even though court overrules respondent's objections and orders compliance); Genuine Parts Co. v. FTC, 445 F.2d 1382 (5th Cir. 1971) (court stayed statutory penalty, although court found support in the record for FTC's contention that respondent had delayed compliance in bad faith). *Cf.* St. Regis Paper Co. v. United States, 368 U.S. 208 (1961) (Court enforced civil penalty nearly three years after respondent's failure to comply with FTC subpoena).

100. *Supra* note 35.

101. The basic federal statute is the Equal Access to Justice Act, 28 U.S.C. § 2412 (Supp. III 1985). Recent interpretations include United States v. Kemper Money Market Fund, Inc., 781 F.2d 1268 (7th Cir. 1986) (under the combination of Equal Access to Justice Act and Rule 37, attorney fees and expenses can be awarded against the United States); Barry v. Bowen, 825 F.2d 1324 (9th Cir. 1987) *see infra,* text accompanying notes 190-91 (attorney fees awarded under EAJA because of Social Security Administration's actions under the Bellmon review program).

Many states have enacted similar statutes. Recent state cases include Rosen v. State Bd. of Pub. Accountancy, 689 P.2d 478 (Alaska 1984) (court has discretion to award attorney fees — relevant factors include extent to which litigants have been involved in prior administrative pro-

4. Judicial relief for ineffective assistance of counsel

Ramirez-Durazo v. I.N.S.[102] held that a party is entitled to judicial relief upon demonstrating a denial of due process resulting from ineffective assistance of counsel during a deportation hearing. This case is a rare discussion of judicial relief for a party whose attorney violated professional standards in an administrative hearing.

5. Civil liability to client or others

Courts may indirectly enforce attorney standards of conduct by holding attorneys civilly liable to their former clients or to other parties who suffered prejudice from the attorneys' misconduct. The preambles to the Code and the Model Rules assert that these documents are not intended to establish the grounds for civil liability.[103] Courts generally agree that violation of the Code or Model Rules is not negligence *per se*, but may be taken into account in a negligence suit against the attorney.[104]

If counsel for a private party violates professional standards in administrative adjudication, and this violation also constitutes malpractice, the client and other victims can hold the attorney civilly liable.[105] Counsel for an agency is generally absolutely immune from civil liability, as is a prosecutor or judge,[106] but counsel may be subject to adverse

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ceedings, cost thereof, nature of judicial review, and its cost); Moore v. California Unemployment Ins. Appeals Bd. (Bechtel Power Corp.), 169 Cal. App. 3d. 235, 215 Cal. Rptr. 316 (Cal. Ct. App. 1985) (fee award can be based on agency's arbitrary or capricious action, but not merely on agency's reversible error); Bogner v. State Dep't of Revenue and Taxation, 107 Idaho 854, 693 P.2d 1056 (1984) (statute requires court to award fee upon finding that agency acted without reasonable basis in fact or law); Van Gordon v. Oregon State Bd. of Dental Examiners, 63 Or. App. 561, 666 P.2d 276 (Ct. App. 1983) (basic policies of statute are to deter groundless or arbitrary agency action, and "to redress individuals who have borne unfair financial burdens defending against groundless charges or otherwise attempting to right mistakes that agencies should never have committed.").

102. 794 F.2d 491 (9th Cir. 1986).

103. Code, *supra* note 18, Preliminary Statement; Model Rules, *supra* note 18, Scope, ¶ 6.

104. *E.g.*, Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980), *cert. denied* 449 U.S. 888 (1980) (violation of Code is a factor to be considered in malpractice litigation); Lipton v. Boesky, 110 Mich. App. 589, 313 N.W.2d 163 (1981) (violation of Code creates presumption of malpractice).

105. *See generally* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE (2d ed. 1981); D. HORAN & G. SPELLMIRE, ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE (1987).

106. On judicial immunity, see *infra* notes 199-201 and accompanying text. Federal law clearly gives a prosecutor the same immunity as a judge; Butz v. Economou, 438 U.S. 478 (1978). State law is generally similar, although some state decisions indicate that prosecutors enjoy absolute, quasi-judicial immunity only with regard to their advocacy functions, but they enjoy only qualified immunity with regard to their investigative or administrative functions. *See* Blake v. Rupe, 651 P.2d 1096 (Wyo. 1982) (discussing precedents from other states, as well as Restatement Torts Second § 656); Higgs v. District Court, 713 P.2d 840, 851-53 (Colo. 1986) (applying

action through civil service or similar channels.[107]

B. Referrals to State Bars or State Prosecutors or Warnings by ALJ

An administrative law judge who knows that an attorney has engaged in misconduct may refer the matter to state bar authorities for disciplinary action[108] or to prosecutors for criminal proceedings.[109] An ALJ who is faced with an attorney's threatened misconduct may warn the attorney that the ALJ will report to the bar or the prosecutor if the misconduct takes place. An ALJ may even consider warning the attorney's client about the possible adverse consequences to the client as well as to the attorney if the misconduct takes place, although the ALJ must generally avoid interfering with the attorney-client relationship.

If reports to the bar or to prosecutors do not yield speedy resolution and if mere warnings do not procure compliance, ALJs may understandably consider imposing their own measures to procure timely compliance with the applicable standards of attorney conduct. Cases and rules focus on two types of actions by ALJs[110] to prevent attorneys from engaging in misconduct or to penalize those who have committed acts of misconduct: (1) exclusion or disqualification of the attorney from the specific proceeding, and (2) suspension or disbarment of the attorney from future proceedings before the agency.

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federal law); Custom Craft Carpets, Inc. v. Miller, 127 Cal. App. 3d 563, 179 Cal. Rptr. 634 (Cal. Ct. App. 1981), *further considered on other grounds* 159 Cal. App. 3d 676, 206 Cal. Rptr. 12 (Cal. Ct. App. 1984).

107. Federal employees are generally governed by 5 U.S.C. §§ 7511-7514 (1982), but some federally-employed attorneys are outside the coverage of that statute, and are not entitled to its protection. *See, e.g.*, Williams v. IRS, 745 F.2d 702 (D.C. Cir. 1984) (attorney employed by IRS in excepted service is not entitled to civil service protections, despite his status as a preference eligible veteran); Morse, *A New Stride in Protecting Federal Attorneys*, 32 FED. BAR. NEWS & J. 288 (1985).

108. If the ALJ is an attorney, the ALJ is required to report other lawyers' violations, under the Code, *supra* note 18, DR1-103(A), and Model Rules, *supra* note 18, Rule 8.3(a). Further, the Code of Judicial Conduct, Canon 3.B.(3), requires a judge to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." On the question whether the Code of Judicial Conduct applies to ALJs, see *infra* notes 166-79 and accompanying text. *See also* Rolle v. Nolan, 464 N.Y.S.2d 930 (N.Y. Civ. Ct. 1983) (anyone, whether a judge or not, who files complaint with bar disciplinary authorities is absolutely immune from civil liability).

109. The ALJ should not, however, become involved as movant or party in proceedings seeking a court order compelling an attorney to comply with the ALJ's orders; *see supra* note 98.

110. For convenient discussion, this part of the article focuses on the actions that can be taken by ALJs. The allocation of authority between ALJs and agencies is examined *infra*, text accompanying notes 143-47.

C. *ALJ Enforcement by Exclusion or Disqualification*

The terms "exclusion" and "disqualification" both indicate a refusal, on the part of the ALJ, to allow the attorney to represent a party in a pending proceeding. "Exclusion" is generally used when the ALJ's refusal is based on the attorney's contemptuous conduct, while "disqualification" is generally used when the cause of the refusal is the attorney's conflict of interest.

1. *Exclusion for Contemptuous Conduct*

The federal Administrative Procedure Act (APA) authorizes the ALJ to regulate the course of the proceeding.[111] Similar language is found in state APAs.[112] These provisions could arguably be cited to support the ALJ's power to exclude attorneys for contemptuous conduct, but these provisions do not appear to have been used in this connection.

The recently enacted Utah APA, like the federal and state APAs, authorizes the ALJ to regulate the course of formal adjudicative proceedings.[113] The Advisory Committee's Comments to the Utah APA indicate that this provision should be broadly construed.[114] In addition, the Utah APA states that the enumeration of the ALJ's powers "does not preclude the presiding officer from taking appropriate measures necessary to preserve the integrity of the hearing."[115] According to the Advisory Committee, this provision should be narrowly construed.[116] Any speculation as to the judicial interpretation of these Utah APA provisions seems premature.

Rather than relying on APAs or other general statutes, the courts have taken a common-law approach to the powers of ALJs to exclude attorneys for contemptuous conduct. In *Camp v. Herzog,*[117] an attorney engaged in contemptuous conduct — an unprovoked assault against opposing counsel. The ALJ excluded the attorney from the pending proceeding. The agency head then conducted a special hearing regarding this attorney's misconduct and ordered his suspension from practice before the agency for two years. The court reversed the sanction of suspension because the agency had not adopted rules for the imposition of discipline. The court noted that an agency may exclude an attorney

111. 5 U.S.C. § 556(c) (1982).
112. *See, e.g.,* 1981 MSAPA, *supra* note 32, § 4-211(1).
113. Utah Code Ann. § 63-46b-8(1)(a) (Supp. 1987).
114. Advisory Committee Comments to Utah Code Ann. § 63-46b-8(1)(a) (Supp. 1987).
115. Utah Code Ann. § 63-46b-8(2) (Supp. 1987).
116. Advisory Committee Comments to Utah Code Ann. § 63-46b-8(2) (Supp. 1987).
117. 104 F. Supp. 134 (D.D.C. 1952).

for contemptuous conduct or disqualify an attorney because of conflict of interest from prior employment without first adopting rules. The court's rationale is that exclusion and disqualification are inherent in the agency's power to adjudicate. These measures are not disciplinary sanctions, but are means by which the ALJ or agency protects the integrity of the adjudicative process. On the other hand, an ALJ or agency may not impose suspension or other disciplinary sanctions unless the agency has first adopted rules implementing its statutory authority.

A similar result was reached in *Great Lakes Screw Corp. v. NLRB.*[118] An ALJ excluded chief counsel for Great Lakes on the 13th day of a hearing, pursuant to the agency's rules which provided for exclusion for contemptuous conduct. The attorney took an immediate interlocutory appeal to the agency head, which denied relief without a hearing. The agency stated no grounds for its exclusion of the attorney until rendering its final order almost two years later. The agency then noted that the attorney had intimidated witnesses, belittled the ability of opposing counsel, harassed the ALJ with superfluous objections, and ignored the ALJ's admonitions to stop this disruptive conduct. The court sustained the validity of the rule but reversed the agency's action for lack of support in the record. The court observed that exclusion of counsel, if ordered on insufficient grounds, violates the client's right to counsel under the Administrative Procedure Act.

The meaning of the term "contemptuous conduct" as the basis for excluding counsel is suggested by the fact patterns of the few cases that apply it. The term receives further clarification in the rules of some federal agencies.[119] Clearly it does not include the entire range of activities that are evoked by the term "contempt." Rather, it seems limited to conduct that seriously disrupts the proceedings. In this sense, the power to adjudicate appropriately includes the power to protect the proceedings from disruption by excluding "contemptuous" persons, whether the tribunal has previously adopted a rule to this effect or not. It is noteworthy that lower state courts are allowed to exclude counsel on similar grounds, even though these courts generally lack the power to impose discipline.[120]

After counsel has been excluded, the ALJ has the obvious duty to facilitate a prompt appeal from the order of exclusion and to protect the

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118. 409 F.2d 375 (7th Cir. 1969).

119. Selected federal rules are cited *supra* note 62. *See also* District No. 1, Pacific Coast Dist. Eng.Beneficial Ass'n, 279 N.L.R.B. No. 215, 61 Ad. L.2d 539 (1985) (agency head reversed ALJ's order excluding counsel); Cincinnati Gas & Elec. Co., 16 N.R.C. 1512, 57 Ad. L.2d 1185 (1982) (agency head denied motion to disqualify agency staff counsel).

120. *Supra* notes 38-39 and accompanying text.

client of the excluded attorney by allowing a reasonable time for substitution of counsel. The ALJ must, at the same time, protect the rights of opposing parties to have the merits of the case resolved without undue delay.[121]

2. *Disqualification for conflict of interest*

In *In re Tenure Hearing of Onorevole,*[122] a party to a matter pending before an ALJ of the New Jersey Office of Administrative Law (OAL) moved for disqualification of opposing counsel for conflict of interest. The OAL is the state's central panel that assigns ALJs to hear cases for various agencies and to render initial decisions which are subject to review by the respective agency heads. The statute creating the OAL authorizes it to promulgate rules of practice regarding the conduct of hearings before its ALJs. Pursuant to this statute, the OAL adopted a rule providing for the disqualification of attorneys for conflict of interest.[123] The motion to disqualify in *Onorevole* relied on this OAL rule.

The New Jersey Supreme Court upheld the validity of the statute and rule, rejecting the argument that they encroached upon the court's jurisdiction to regulate the practice of law. The court noted that the ALJ's ruling on the disqualification of counsel was subject to review by the agency head under the existing system, but would be subject to review by the director of OAL under a pending proposed amendment; either of these avenues of administrative review would be appropriate so long as judicial review remained ultimately available. However, based on the facts presented in the motion to disqualify counsel in *Onorevole,* the court held that the motion should be denied.

An agency's power to disqualify counsel, even in the absence of a rule, was upheld by the District of Columbia Court of Appeals in *Brown v. District of Columbia Board of Zoning Adjustment.*[124] A party moved to disqualify opposing counsel from appearing in a zoning proceeding on the grounds of conflict of interest resulting from counsel's former employment in the District of Columbia Counsel's Office. The Board, noting that no statute or rule authorized it to entertain

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121. *See, e.g.,* 1981 MSAPA § 4-208, *supra* note 32, which requires the ALJ, after holding a party in default, to "conduct any further proceedings necessary to complete the adjudication without the participation of the party in default and . . . determine all issues in the adjudication, including those affecting the defaulting party." Some of the federal rules on exclusion, suspension, or disbarment of representatives, *supra* note 62, *infra* note 126, include provisions for the subsequent protection of parties.

122. 103 N.J. 548, 511 A.2d 1171 (1986).

123. N.J. Admin. Code § 1:1-3.8, cited by the court, 103 N.J. at 553, 511 A.2d at 1175.

124. 413 A.2d 1276 (D.C. App. 1980).

such motions, concluded that it lacked jurisdiction to do so and dismissed the motion without deciding whether or not counsel had a disqualifying conflict of interest. The District of Columbia Court of Appeals reversed and remanded, holding that the Board had the power and the duty to entertain motions to disqualify counsel even though there were no statutes or rules on point. According to the court, every tribunal that has the power to adjudicate also has the power to disqualify counsel for conflict of interest. This power to disqualify seems to be implied, either by the statute that prohibits conflicts of interests by former public employees or by the requirements of due process. On remand, the Board entertained the motion to disqualify counsel and denied it, holding that counsel did not have a disqualifying conflict of interest based on the facts of this case. The court affirmed.[125]

The above cases on exclusion and disqualification present a coherent doctrine — that any statute conferring adjudicative power upon a tribunal includes, by implication, a grant of power to exclude counsel for contemptuous conduct and to disqualify counsel for conflict of interest. The agency's power to disqualify counsel for conflict of interest receives further implied support from any applicable conflict of interest statute or rules. An agency may exclude counsel for contemptuous conduct or disqualify counsel for conflict of interest although these powers are not expressly conferred by statute or the agency's rules.

These cases do not clearly explain whether the power to exclude or disqualify is merely implied by statute, or is rooted in the due process requirement of fundamental fairness to all parties in the agency proceeding. If the power is based on due process, two consequences may ensue. First, the legislature may be unable to remove this power from an agency, even by a clearly written statute attempting to do so. Second, agencies may exclude or disqualify counsel on other grounds or may take other action than exclusion or disqualification to assure the fundamental fairness of the proceedings.

The rules of some federal agencies use the term "disqualify" with a different meaning than has been used above. These rules assert the power to "disqualify" attorneys from future proceedings before the agency as a sanction for past misconduct.[126] This use of the term "dis-

125. 486 A.2d 37 (D.C. App. 1984).

126. For example, representatives (including attorneys) face either suspension for one to five years, or disqualification for at least one year and until reinstatement, under three similar groups of rules of the Department of Health & Human Services: 20 C.F.R. § 404.1770(a)(2) (1987) (old age, survivors, and disability insurance); 20 C.F.R. § 410.693(a) (1987) (Black Lung benefits); 20 C.F.R. § 416.1570(a)(2) (1987) (supplemental security for aged, blind, and disabled). *See also* 20 C.F.R. § 702.131(b), (c) (1987) (Secretary of Labor shall annually post list of representatives, including attorneys, who are disqualified from representing parties under Longshoremen's & Har-

qualify" is confusing, since prevailing usage applies the term "disqualify" only to a measure for the prevention of future improprieties such as conflict of interest. A more appropriate term for the disciplinary sanctions provided in these rules would be "suspend" since these rules provide, in effect, for suspension from practice before the agency as a disciplinary sanction for past misconduct. This topic will be discussed next.

D. ALJ Enforcement by Suspension or Disbarment

Can an ALJ suspend or disbar attorneys as a means of enforcing standards of conduct? The question has produced a sharp split between state and federal cases.

1. State suspension or disbarment for misconduct

In *Hustedt v. Workers Compensation Appeals Board,*[127] an attorney, after being warned, failed to appear on time before a Workers Compensation Judge. The agency initiated concurrent proceedings for discipline and contempt pursuant to statutes conferring both types of powers upon the agency. The attorney filed a writ of prohibition in court seeking to prevent the agency from proceeding.

The California Supreme Court invalidated the statutory provision which authorized the agency to suspend attorneys as a sanction for misconduct. The court characterized this statute as an impermissible intrusion on the "judicial" powers of the state courts to regulate the practice of law, and as an undesirable attempt to fragment the state's disciplinary system. The court acknowledged the agency's need to control its own proceedings but found that the agency could achieve this by using other powers.

One of these other powers was to resort to the courts for the issuance of enforcement orders backed by the courts' contempt power. Another was the agency's own contempt power. The court reaffirmed earlier decisions upholding the statutory grant of contempt power to the Workers Compensation Appeals Board.[128]

The West Virginia court reached a similar conclusion as to the invalidity of statutes allowing agencies to suspend attorneys. In *Christie*

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bor Workers' Compensation Act); 28 C.F.R. § 2.61(b) (1987) (Parole Commission may disqualify representatives, including attorneys, for up to five years).

127. 30 Cal. 3d 329, 636 P.2d 1139, 178 Cal. Rptr. 801 (1981). See also the companion case of Katz v. Workers Compensation Appeals Board, 30 Cal. 3d 353, 636 P.2d 1153, 178 Cal. Rptr. 815 (1981).

128. *See infra* note 143 and accompanying text.

v. West Virginia Health Care Cost Review Authority,[129] an agency suspended an attorney from practicing before it because of the attorney's disrespectful conduct. The court granted the attorney relief, holding that agencies may adopt rules of procedure but may not suspend attorneys from practicing before the agencies, since suspension is a form of discipline and the disciplining of attorneys is the exclusive domain of the state's highest court.

2. *Federal suspension or disbarment for misconduct*

Federal cases, in contrast to state cases, have upheld statutes authorizing agencies to impose suspension for disciplinary purposes. In *Polydoroff v. Interstate Commerce Commission,*[130] the U.S. Court of Appeals for the District of Columbia Circuit upheld the action of the Interstate Commerce Commission (ICC) in suspending two practitioners from practicing before the Commission for six months. The ICC found that the practitioners had violated the prohibition against the representation of conflicting interests as stated in the Canons of Ethics contained in the ICC's rules.

Jaskiewicz v. Mossinghoff[131] arose under the rules of the Patent and Trademark Office. The PTO suspended an attorney for two years for filing misleading information with the PTO and engaging in other "inequitable conduct."[132] The Court of Appeals for the Federal Circuit affirmed the PTO's decision that the attorney had violated the rules, but the court reduced the sanction.

The conflict between state and federal cases on the disciplinary power of agencies is understandable. The state cases assert the exclusive power of the state supreme court over the disciplining of attorneys while the federal cases acknowledge that Congress may authorize agencies to adopt rules of conduct and to enforce these rules by the agencies' own disciplinary processes.

3. *Contempt and other judicial powers distinguished*

This discussion of suspension and disbarment raises the question whether agencies may impose other types of sanctions, such as holding attorneys in contempt. State courts are divided as to whether statutes can confer the contempt power upon administrative agencies. The Virginia Constitution expressly confers contempt power upon the Corpora-

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129. 345 S.E.2d 22 (W. Va. 1986).

130. 773 F.2d 372 (D.C. Cir. 1985).

131. 822 F.2d 1053 (Fed. Cir. 1987).

132. The court characterized PTO Rule 56, 37 C.F.R. § 1.56, as prohibiting inequitable conduct. 822 F.2d at 1057.

tion Commission.[133] In *Hustedt*, the California court reaffirmed earlier decisions upholding a statutory grant of the contempt power to the Workers Compensation Appeals Board, partly in view of the special status of that agency under the state constitution.[134] The same case emphasized that disciplinary proceedings against attorneys are quite different from contempt proceedings. The West Virginia court took a different approach in *Appalachian Power Co. v. Public Service Commission.*[135] The court invalidated a statute that delegated the contempt power to the Commission, but upheld another statute that allowed the Commission to impose civil penalties. The implication seems to be that contempt is too infamous a sanction to be imposed by a nonjudicial entity, even though that entity could impose a civil penalty for the same monetary amount.

Federal cases have generally held, as did the West Virginia court, that the contempt power is a type of judicial power that can be exercised only by the courts,[136] but agencies may be authorized by statute to impose civil penalties.[137] *Polydoroff* and *Jaskiewicz* imply that suspending attorneys from practicing before a federal agency is distinguishable from holding an attorney in contempt, and is not an exercise of the judicial power. Congress may therefore authorize agencies to suspend attorneys as a disciplinary measure.

E. ALJ Decision Against Attorney's Client

In some situations, a client may lose an administrative case on the merits as a result of the attorney's violation of applicable standards of conduct. The federal APA authorizes an agency to decide the merits of a case against a party whose attorney makes improper *ex parte* communications during the administrative process.[138] The Act specifies, however, that the agency should consider the interests of justice before reaching such a decision. As a result, it appears that an agency should be lenient toward an innocent party but should decide on the merits against a party who asked or encouraged the attorney to engage in the

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133. VA. CONST. art. IX, § 3.

134. *See supra* note 127 and *infra* note 143 and accompanying text.

135. 296 S.E.2d 887 (W. Va. 1982). *Accord,* Josam Mfg. Co. v. Ross, 428 N.E.2d 74 (Ind. App. 1981) (administrative bodies of Indiana have no contempt power).

136. *See* Note, *supra* note 97. *In re* Sequoia Auto Brokers Ltd. Inc., 827 F.2d 1281 (9th Cir. 1987) explored the split of authority as to whether Congress could properly confer the contempt power upon bankruptcy judges. The court did not resolve the question, finding instead that Congress had not attempted to confer that power.

137. SCHWARTZ, *supra* note 79, § 2.25.

138. *Supra* note 56.

ex parte communication.[139] Along similar lines, an agency should be lenient toward an innocent party who is subject to default because of the attorney's failure to appear, or whose complaint is subject to dismissal because of the attorney's abuse of the discovery process.[140]

NLRB v. International Medication Systems, Inc.[141] suggests that an agency's power to enforce its standards of conduct by deciding the merits against an offending party is subject to limits. The agency precluded a party from introducing its own evidence because the party had failed to respond properly to subpoenas. The U.S. Court of Appeals, Ninth Circuit held the agency's preclusion order improper since it was similar to an exercise of the contempt power which was clearly unavailable to the agency. However, in *Atlantic Richfield Co. v. United States Department of Energy,*[142] the U.S. Court of Appeals for the District of Columbia Circuit rejected the reasoning of *International Medication* and upheld an agency's power to issue preclusion orders as a sanction for a party's recalcitrance in complying with discovery requirements.

F. Allocation of Enforcement Power — ALJ, Agency, Court

Assuming that standards of attorney conduct can be enforced in some manner at the administrative level, a further question is how the enforcement power is allocated among the ALJ, the agency, and the court.

1. Does ALJ or agency head conduct disciplinary hearing?

Marcus v. Workers Compensation Appeals Board[143] involved an attorney who allegedly struck opposing counsel during a hearing before a referee. Another referee, after a separate hearing on the attorney's conduct, found the attorney in contempt and imposed a fine of $100. The board affirmed without a hearing. The California court reversed, noting that the statute conferred the contempt power upon the board, not upon its individual referees. Although most of the board's other types of hearings are conducted by referees, subject to the board's appellate review, the exercise of the contempt power is such a serious

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139. On the sanctions for *ex parte* communications, see Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth., 685 F.2d 547, 564-65 (D.C. Cir. 1982).

140. On sanctions for abuse of the discovery process, see Chapman v. United States Commodity Futures Trading Comm'n, 788 F.2d 408 (7th Cir. 1986) (CFTC properly dimissed complaint as sanction under Rule 37(b)).

141. 640 F.2d 1110 (9th Cir. 1981), *cert. denied* 455 U.S. 1017 (1982).

142. 769 F.2d 771 (D.C. Cir. 1984).

143. 35 Cal. App. 3d 598, 111 Cal. Rptr. 101 (Cal. Ct. App. 1973), *followed in* Morton v. Workers Compensation Appeals Bd., 238 Cal. Rptr. 651 (Cal. Ct. App. 1987).

matter that the board itself, or one of its members, must conduct the hearing.

The *Marcus* precedent may be limited to those rare situations in which administrative agencies are allowed to use the contempt power. The typical approach is that agencies may not exercise the contempt power, but they may exclude attorneys for contemptuous conduct or disqualify them for conflict of interest, with or without express provisions in statutes or rules. In the federal system but not the states, agencies may impose suspension or discipline as sanctions if authorized by statutes and rules.

In these settings, one could argue that the power to regulate the course of the proceedings, conferred upon the ALJ by the typical state APA,[144] includes an implied grant of power to exclude or disqualify counsel based on whatever process is fair and expedient in the circumstances. In contrast, the power to suspend or disbar attorneys seems more remote from the immediate need to regulate a specific proceeding, and clearly calls for a separate hearing on the disciplinary matter. Power to conduct a hearing in this type of situation could appropriately be vested, by statute or rule, with either the agency or an ALJ other than the one before whom the misconduct allegedly occurred. If the matter is not expressly covered by statute or rule, the disciplinary hearing may appropriately be conducted at the same level as in other matters. Generally, an ALJ renders an initial or recommended order. However, the agency head may select specific cases or categories of cases in which it will conduct the hearing.

2. *Administrative review of ALJ's decision*

Three approaches have appeared in the cases and literature regarding the possible availability of administrative review of an ALJ's decision excluding, disqualifying, suspending or disbarring counsel. The first approach is that administrative review should be unavailable. This approach is implied from some state APAs which authorize the ALJ to rule on questions of procedure.[145] The theory is that the ALJ is law-trained while the agency members are generally not. Therefore the ALJ's ruling on procedural matters should bind the agency head as well as the parties, subject only to judicial review.

A second approach, suggested by the *Onorevole* case, is that the

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144. *See, e.g.*, 1981 MSAPA, *supra* note 32, § 4-211(1). The equivalent federal APA provision is 5 U.S.C. § 556(c) (1982). *See* Exxon Corp. v. F.T.C., 665 F.2d 1274 (D.C. Cir. 1981) (FTC has authority to issue protective orders, and has properly delegated this power to its ALJs).

145. *See* Levinson, *The Pre-Hearing Stage of Contested Cases under the Tennessee Uniform Administrative Procedures Act*, 13 MEM. ST. U.L. REV. 465, 496-98 (1983).

decision of the ALJ should be subject to administrative review but not necessarily by the agency head.[146] *Onorevole* arose in a state which has a central panel organization of ALJs. The New Jersey court approved administrative review of the ALJ's disqualification order, either by the head of the agency for which the ALJ had conducted the hearing or by the chief ALJ of the central panel.

A third approach holds that the agency head has full power to review all actions of the ALJ and needs this power in order to carry out its statutory mission. This last approach is reflected generally in the rules of federal agencies.[147]

3. Exhaustion of administrative remedies before judicial review

In *Englishtown Sportswear Ltd. v. Tuttle,*[148] a party filed a motion in federal district court to disqualify opposing counsel from appearing in a pending matter before the Patent and Trademark Office. The court dismissed the motion since the proper forum was the PTO. Resort to the court was premature before exhaustion of the administrative remedy.

Instead of using the principle of exhaustion of administrative remedies to decide the above type of case, one could recognize that the disqualification of counsel in administrative proceedings falls within the concurrent original jurisdiction of the agency and the court. The original jurisdiction of the court is derived from its declaratory and injunctive powers. The issue facing a court, then, is not whether the party failed to exhaust administrative remedies but whether the court or the agency should exercise primary jurisdiction.[149] The use of the primary jurisdiction analysis in this situation confers more discretion on the court than is conferred by the principle of exhausting administrative remedies.

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146. In a 1982 decision, the New Jersey court invalidated rules of the Office of Administrative Law that limited the power of the agency head to review procedural rulings of ALJs. *In re* Uniform Administrative Procedure Rules, 90 N.J. 85, 447 A.2d 151 (1982). But in *In re* Tenure Hearing of Onorevole, 103 N.J. 548, 511 A.2d 1171 (1986), *see supra* text accompanying note 122, the same court held that an ALJ's ruling on disqualification of counsel could by rule be made reviewable either by the agency head or by the chief ALJ of OAL.

147. The federal Administrative Procedure Act reflects the assumption that the agency head can review the orders of ALJs, 5 U.S.C. § 557(b) (1982).

148. 547 F. Supp. 700 (S.D.N.Y. 1982).

149. On the distinction between primary jurisdiction and exhaustion of administrative remedies, see United States v. Western Pacific R.R., 352 U.S. 59 (1956), discussed in SCHWARTZ, *supra* note 79, § 8.23.

V. Parties and Non-Attorney Representatives

Parties sometimes appear in agency proceedings without any representative or with a non-attorney representative. The special status of parties and non-attorneys requires separate comment as regards admission, standards of conduct, and enforcement of these standards.

A. Admission

A party who is a natural person has a basic right to appear in his or her own behalf.[150] A corporation or other artificial entity must appear through a representative. According to the traditional state court approach, only a licensed attorney may represent a party.[151] This tradition has been relaxed to a limited extent with regard to the representation of parties in administrative proceedings, but questions still remain regarding the permissible role of non-lawyer representatives.

The Attorney General of Utah rendered a significant opinion on this issue in July, 1987.[152] The question presented was whether non-attorneys may represent parties in administrative proceedings pursuant to three Utah statutes.[153] After noting that none of these statutes addressed the issue of non-attorney representation, the Attorney General observed that the new Utah APA permits non-attorneys to appear on behalf of others in administrative hearings. He reached this conclusion on the basis of the APA provision which allows oral and written presentations at hearings by non-parties.[154] This APA provision, according to the Attorney General, is a legislatively created exception to the pre-existing statute that prohibits non-attorneys from engaging in the practice of law.[155]

The Attorney General then raised the basic question under the

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150. The party's right to appear is recognized in the federal APA, 5 U.S.C. § 555(b) (1982), and in the 1981 MSAPA, *supra* note 32, § 4-203.

151. *See* 1981 MSAPA, *supra* note 32, § 4-203(a), Commissioners' Comment. *But see* Newsome v. Potter, 491 N.Y.S.2d 257 (City Ct. Albany 1985) (since a 1984 statute allows corporations to appear in Small Claims Court as defendants and to be represented by non-attorney, individual defendants in same court may also appear by non-attorney, as matter of equal protection).

152. Op. Atty. Gen. Utah 87-25 (1987).

153. The statutes are the Administrative Determination of Overpayments Act, Utah Code Ann. §§ 55-15e-1 through -13 (1953); the Public Support of Children Act, Utah Code Ann. §§ 78-45b-1 through -24 (1953); and the Child Support Collection Act, Utah Code Ann. §§ 78-45d-1 through -13 (1986 Supp.)

154. Utah Code Ann. § 63-46b-8(e) (Supp. 1987).

155. The Attorney General's interpretation of the cited Utah APA provision is questionable. The Advisory Committee Comments to the APA observe that the provision is patterned after the comparable provision in the 1981 MSAPA, *supra* note 32, § 4-211(3). This MSAPA provision clearly has nothing to do with representation by non-attorneys, since the MSAPA contains another section dealing expressly with that issue, namely, 1981 MSAPA, *supra* note 32, § 4-203.

principle of separation of powers, namely, which branch of state government has the constitutional power to permit non-attorneys to represent parties in administrative proceedings. Some state courts have asserted their own power to make this determination while other state courts have deferred to the legislature.[156] The Utah courts have not yet addressed the issue.

If the Utah Supreme Court asserts its own authority in this field, it may follow other state courts that permit limited types of representation by non-attorneys. The first level of analysis is to ascertain whether or not the representation constitutes the practice of law. This depends on the type of service rendered and the level of skill required. If, for example, the representation requires only the skill and knowledge of an ordinary layman, it is not regarded as the practice of law and it can properly be performed by a non-attorney.[157]

If, however, the representation is regarded as the practice of law, additional analysis is required. The Attorney General has identified four situations in which other state courts have allowed non-attorneys to practice law by representing parties at administrative proceedings: (1) when appeal with a *de novo* hearing is available;[158] (2) when the amount in controversy is too small to warrant hiring an attorney;[159] (3) when the non-lawyer representative is supervised by an attorney;[160] or (4) when the non-lawyer representative does not charge a fee for his services.[161] The Attorney General's opinion necessarily ends on a note of uncertainty, due to the absence of controlling case law in Utah.

Federal law is quite different. The federal judiciary has no power to determine the qualifications of representatives who appear before administrative agencies. The matter is controlled by statutes. In particular, the Agency Practice Act authorizes agencies to establish their own admission standards for representatives who are neither attorneys nor CPAs.[162] Nonlawyer representatives routinely appear before federal agencies. In *Walters v. National Association of Radiation Survi-*

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156. The Opinion cites a number of cases, including Idaho State Bar Ass'n v. Idaho Pub. Util. Comm'n, 102 Idaho 672, 676, 637 P.2d 1168, 1171 (1981) (court controls); State Bar of Michigan v. Galloway, 124 Mich. App. 271, 277, 335 N.W.2d 475, 480 (1983) (court cannot control practice before legislatively-created agencies). *See also supra* note 4.

157. The Opinion cites State v. Gould, 437 N.E.2d 41, 43 (Ind. 1982).

158. The Opinion cites *Gould, supra* note 157.

159. The Opinion cites Unauthorized Practice of Law Comm. v. Employers Unity, 716 P.2d 460, 463 (Colo. 1986).

160. The Opinion cites Anamax Mining Co. v. Arizona Dep't of Economic Security, 147 Ariz. 482, 486, 711 P.2d 621, 624 (Ct. App. 1985).

161. The Opinion cites *In Re* Unauthorized Practice of Law, 175 Ohio St. 149, 192 N.E.2d 54, 57 (1963).

162. *Supra* notes 10-16 and accompanying text.

vors,[163] the United States Supreme Court upheld a statute that imposes a $10 limit on the fee that may be paid to an attorney or other representative of a person submitting a claim to the Veterans Administration for service-connected death or disability benefits. The Court noted with approval that the fee limitation effectively discouraged claimants from hiring attorneys.

B. Standards of Conduct and Their Enforcement

In the federal system, the conduct of parties and non-attorney representatives is regulated by agency rules pursuant to broad grants of power in enabling statutes. Typically, the rules prohibiting disruptive conduct and the provisions on conflict of interest and unethical conduct apply alike to parties, attorneys and non-attorney representatives.[164] Enforcement is in the hands of the agencies.

The available state law on standards of conduct of parties and non-attorney representatives is sketchy. Obviously the non-attorney representative is not governed by the Code of Professional Responsibility or the Model Rules of Professional Conduct because the representative is not subject to the disciplinary process applicable to bar members. The non-attorney representative, however, may be employed to oppose a party represented by an attorney, or may compete against attorneys for employment by clients. In the interests of basic fairness, it may be appropriate for the non-attorney to observe some if not all of the Code or Model Rules provisions.[165]

VI. ALJ Conduct: Standards and Enforcement

Administrative law judges wield formidable powers over attorneys and other participants in the administrative process. The ALJs, in turn, are subject to standards of conduct. One purpose served by these standards may be to legitimize the ALJs' exercise of power.

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163. 473 U.S. 305 (1985).

164. For example, the rules cited *supra* note 126 apply to non-attorney representatives as well as to attorneys. In addition, many of the rules cited *supra* note 62 apply to non-attorneys as well as to attorneys.

165. One of the controversial issues arising when a party is represented by a non-attorney is whether communications between the client and the non-attorney representative are privileged. *See, e.g.,* Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 25, 619 P.2d 1036 (1980) (court allows non-attorneys to represent parties in some types of personnel cases, but observes that communications will not be privileged); Welfare Rights Organization v. Crisan, 33 Cal. 3d 766, 661 P.2d 1073, 190 Cal. Rptr. 919 (1983) (California statute implementing federal AFDC regulations provides for lay representation — court holds that this implies the privileged nature of communications).

A. *Code of Judicial Conduct — Is It Applicable to ALJs?*

The American Bar Association (ABA) adopted the Code of Judicial Conduct in 1972. Most state supreme courts have promulgated the Code as statewide rules of court[166] while the Judicial Conference of the United States has approved a modified version of the Code for federal judges.[167]

The Code does not expressly state whether or not it applies to administrative law judges, but it contains the following language under the heading "Compliance:"

> Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.[168]

1. *ABA opinion — Code applies to ALJs*

In Informal Opinion No. 86-1522, the Ethics Committee of the ABA expressed the view that federal ALJs are judges falling within the above definition; accordingly, they are covered by the Code.[169] The ABA committee's opinion obviously is not binding. While some ALJs may voluntarily conform to the Code out of respect for the committee, others may wait to see whether the Code will be given the force of law as applied to ALJs. But which governmental entity is authorized to make the Code applicable to ALJs ?

The state supreme courts may have neither the inclination nor the jurisdiction to declare that their Codes of Judicial Conduct apply to ALJs located in the executive branch of government. Statutes, agency rules, and the rules of chief ALJs of central panels seem to be the available mechanisms for imposing the Code upon ALJs. The legislatures, agencies, and chief ALJs may, in turn, be encouraged to adopt the Code if courts allow ALJs who are governed by the Code to exercise more powers than ALJs who are not.

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166. Thode, *Code of Judicial Conduct — The First Five Years in the Courts,* 1977 UTAH L. REV. 395.

167. The Judicial Conference adopted its own version of the Code of Judicial Conduct in 1973, and has subsequently made some amendments. *See* 69 F.R.D. 273 (1975). The Judicial Conference serves in an advisory capacity in various matters, including judicial discipline. 28 U.S.C. §§ 331, 372(c) (1982).

168. ABA Code of Judicial Conduct, "Compliance with the Code of Judicial Conduct."

169. ABA Inf. Op. 86-1522 (1986).

2. Statutes or agency rules

Only a few instances have been found in which statutes or rules have imposed the Code of Judicial Conduct upon ALJs. Workers Compensation Judges (WCJs) of the California Workers Compensation Appeals Board are required, by statute, to conform to the state's Code of Judicial Conduct.[170] These WCJs, also by statute, have the contempt power discussed earlier.[171] The combination of the two statutes — one granting the contempt power, the other imposing the Code of Judicial Conduct on the very same WCJs — implies a legislative determination that the contempt power may be wielded legitimately only by individuals who are subject to the Code of Judicial Conduct. ALJs in the New Jersey central panel are subject to rules promulgated by the chief ALJ, incorporating the Code of Judicial Conduct as well as other provisions.[172] The mayoral executive order creating the New York City central panel requires all ALJs to conform to the Code of Judicial Conduct.[173]

3. Court decisions

In upholding the New Jersey ALJs' power to disqualify counsel in the *Onorevole* case, the New Jersey court mentioned that these ALJs were governed by the Code of Judicial Conduct.[174] In context, it appears that the court took into account the fact that ALJs are governed by the Code, and concluded that ALJs may properly exercise the power to disqualify counsel in adjudicative proceedings. If this interpretation of *Onorevole* is correct, it indicates that the New Jersey court, like the California legislature, ties the type of power exercisable by an ALJ to the type of control imposed on the same ALJ. This approach suggests that the Code — or an equivalent compilation of judicial standards — not only imposes burdens upon those governed by it, but also confers added legitimacy upon them, thereby extending the range of powers they may properly exercise.

A Colorado appellate court recently made a strong statement about the applicability of the Code of Judicial Conduct to ALJs. In *Wells v. Del Norte School District C-7*,[175] in a hearing on a public school

170. Fremont Indemnity Co. v. Workers Compensation Appeals Bd., 153 Cal. App. 3d 965, 200 Cal. Rptr. 762 (Cal. Ct. App. 1984), citing Cal. Labor Code § 123.6.

171. *Supra* notes 134, 143 and accompanying text.

172. *Infra* note 174.

173. City of New York, Executive Order No. 32 (Jul. 25, 1979) (on file at BYU Journal of Public Law).

174. *In re* Tenure of Hearing of Onorevole, 103 N.J. 548, 552, 511 A.2d 1171, 1175 (1986).

175. No. 85CA0126 (Slip. Op., Colo. App., Oct. 15, 1987, in 1987 COLO. LAW. 2221). I am

teacher's dismissal case, the hearing officer called a lunch recess during the testimony of a witness. The hearing officer went to a nearby restaurant for lunch, and sat down to eat at the table where the witness and counsel for the school board were eating. When the hearing resumed, the hearing officer reported this lunch-time incident. He explained that no other seats had been available at the restaurant, and that before taking his seat he had indicated he would not discuss the case. No evidence of any inappropriate discussion existed; however, the teacher and others involved in the hearing saw the hearing officer engaging in conversation with the witness during lunch. The hearing officer decided against the teacher, and she appealed.

The court reversed and remanded for a new hearing before a different hearing officer. The court found no violation of due process, but did find a blatant appearance of impropriety in violation of the Code of Judicial Conduct. "When administrative proceedings are quasi-judicial," the court stated, "agency officials should be treated as the equivalent of judges."[176]

In this case, the improper off-the-bench conduct was clearly related to the pending adjudicative proceeding, and created an appearance that the hearing officer's decision in that proceeding might be tainted by his *ex parte* contacts at the restaurant. The court does not indicate whether it would grant relief if the off-the-bench misconduct was less directly related to a pending proceeding before the hearing officer. Other courts have made only passing references to the relationship between ALJs and the Code of Judicial Conduct.[177]

B. Selected Provisions of the Code of Judicial Conduct

The Code of Judicial Conduct imposes numerous controls on judges. It prohibits them from serving as officers or directors of business corporations[178] (but Utah has not included this prohibition in its Code), from engaging in various political activities,[179] and from com-

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indebted to Judith F. Schulman, a Colorado ALJ, for bringing this case to my attention at the seminar. The summary of the case in the accompanying text is similar to a summary I prepared for "Administrative Law News," a publication of the ABA Section of Administrative Law.

176. 1987 COLO. LAW. at 2222.

177. *E.g.*, Michigan Ass'n of Admin. Law Judges v. Personnel Director, 156 Mich. App. 388, 402 N.W.2d 19 (1986) (Code of Judicial Conduct does not apply to ALJs); Pinkney v. Indep. School Dist. No. 691, 366 N.W.2d 362 (Minn. Ct. App. 1985) (hearing examiners should conduct themselves in accordance with Minnesota Code of Judicial Conduct); State Div. of Human Rights v. Merchants Mutual Ins. Co., 59 A.D.2d 1054, 399 N.Y.S.2d 813 (App. Div. 1977).

178. ABA Code of Judicial Conduct, Canon 5.C(2).

179. ABA Code of Judicial Conduct, Canon 7.

mitting indiscretions in their personal lives.[180] Two areas require special discussion in context of applying the Code to ALJs — the prohibition against the practice of law and the standards for judicial disqualification.

1. *Practice of law*

The Code prohibits full-time judges from practicing law.[181] This provision was the specific issue in ABA Informal Opinion No. 86-1522.[182] Having concluded that the Code applies to ALJs, the ABA committee opined that an ALJ may not serve as counsel for another ALJ in an administrative hearing since such service would constitute the practice of law in violation of the Code.

The Code allows a part-time judge to practice law, but not "in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves."[183] As applied to the administrative setting, this provision prohibits an individual from serving part-time as an ALJ and part-time as counsel appearing in cases before the same agency. Such an alternation of roles would also violate the Administrative Procedure Act which prohibits ALJs from being assigned any duties incompatible with their decisional responsibilities.[184]

2. *Disqualification*

The Code of Judicial Conduct contains elaborate standards for the disqualification of a judge — not only for actual bias but also for numerous other reasons.[185] The Model State Administrative Procedure Act incorporates, by reference, the disqualification standards applicable to judges in the state by providing that an ALJ may be disqualified on any grounds for which a judge is disqualified.[186]

In states that have not enacted similar statutes, courts must decide whether to use the Code's standards or others in determining disputes about the disqualification of ALJs from agency proceedings. The dif-

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180. ABA Code of Judicial Conduct, Canon 2. See Lubet, *Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct,* 1986 ARIZ. ST. L.J. 379.

181. ABA Code of Judicial Conduct, Canon 5.F.

182. *Supra* note 169.

183. ABA Code of Judicial Conduct, "Compliance with the Code of Judicial Conduct" (A)(1), (2).

184. 5 U.S.C. § 3105 (1982).

185. For example, ABA Code of Judicial Conduct, Canon 3.C. requires disqualification of a judge on the basis of certain family relationships between the judge and a party or attorney for a party, whether or not these relationships cause any actual bias. The underlying policy is to prevent even the appearance of impropriety.

186. 1981 MSAPA, *supra* note 32, § 4-202(b).

ference between the Code and other standards is illustrated by *New York State Inspection, Security and Law Enforcement Employees, District Council 82 v. New York State Public Employees Relations Board.*[187] The court held that the Code was inapplicable to the Board's ALJs. Instead of applying the across-the-board provisions of the Code, the court applied due process requirements on a case-by-case basis. The distinction made a difference in the outcome of this case; the court held that disqualification was not required by due process but would have been if the Code of Judicial Conduct had governed.

C. *Other Standards of ALJ Conduct — Independence and Impartiality*

ALJs are subject to standards of conduct derived from various other sources. If the Code of Judicial Conduct applies, its standards overlap with some of those derived from other sources. Most fundamentally, ALJs must assure the due process rights of parties appearing before them. One aspect of due process is the requirement of an unbiased decisionmaker. The Code of Judicial Conduct and the case law regarding due process overlap partially on this issue although, as illustrated by the *New York State Inspection* decision,[188] the Code of Judicial Conduct calls for disqualification even in situations where due process does not.

A related aspect of due process is the need for the ALJ to exercise decisional independence. Numerous suits have been brought in the federal courts by parties seeking relief from the threat to ALJs' independence posed by the Social Security Administration's (SSA) system for selective administrative review of ALJs' decisions. This system, known generally as the Bellmon system, provided for the SSA appeals council to review, on its own motion, a relatively high percentage of the decisions rendered by ALJs whose previous decisions tended to favor claimants.[189] The courts, with virtual unanimity, have held the system invalid as an interference with the decisional impartiality of ALJs. Recently, in *Barry v. Bowen,*[190] the court observed: "Administrative decisionmakers do not bear all the badges of independence that charac-

187. 629 F. Supp. 33 (N.D.N.Y. 1984). ***But see*** State Div. of Human Rights v. Merchants Mutual Ins. Co., 59 A.D.2d 1054, 399 N.Y.S.2d 813 (App. Div. 1977) (Judiciary Law on disqualification does not apply to quasi-judicial administrative officers, but court looks to such law).

188. *Supra* note 187.

189. The system was based on the Social Security Disability Amendments of 1980, P.L. 96-265, § 304(g), 94 Stat. 441, 456 (1980), codified as note to 42 U.S.C. § 421 (1982), which authorized the Secretary to establish a system for selective appellate review of the decisions of ALJs.

190. 825 F.2d 1324 (9th Cir. 1987).

terize an Article III judge, but they are held to the same standard of impartial decisionmaking."[191]

The need for decisional independence must be balanced with the ALJ's obligation to conform to reasonable administrative requirements of the employing agency or central panel system. Two recent cases have addressed the issue.

In *Deretich v. Office of Administrative Hearings,*[192] an ALJ who had been discharged from employment by the Minnesota central panel brought a civil rights action in federal court. The federal court denied relief, holding that the discharge was based on valid grounds including the ALJ's violation of rules on conflict of interests, his utilization of a leave of absence for purposes different from those for which it had been granted, and his refusal to cease his association with a law firm as counsel in hearings of the type he regularly conducted as a judge.

In *Lowry v. State, Board of Industrial Insurance Appeals,*[193] an ALJ refused to allow non-attorneys to represent parties although the Board directed him to do so. The Board suspended the ALJ for insubordination. The court reversed, noting that the ALJ believed that compliance with the Board's directive would constitute assisting the unauthorized practice of law in violation of criminal statutes and the Code of Professional Responsibility. The court did not rule on the merits of the Board's directive. By refraining from ruling on this issue, the court implied that the ALJ's concerns as to its illegality were an adequate basis for his refusal to comply.

If ALJs are members of the bar, they are subject not only to judicial-type standards but also to the standards of conduct applicable to attorneys. Nonlawyer ALJs, while not subject to attorney standards, should be governed by any other standards applicable to lawyer-ALJs, not only out of fairness to the parties but also to establish the legitimacy of the exercise of ALJs' powers by nonlawyers.[194] In a system in which ALJs are governed by the Code of Judicial Conduct, non-lawyer ALJs as well as lawyer-ALJs should comply with the Code.

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191. 825 F.2d at 1330.

192. 798 F.2d 1147 (8th Cir. 1986).

193. 102 Wash.2d 58, 684 P.2d 678 (1984).

194. Due process does not require an ALJ to be a lawyer. This result is implied by Schweiker v. McClure, 456 U.S. 188 (1982) and by the substantial literature on nonlawyer judges. *See* D. PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM (1986); North v. Russell, 427 U.S. 328 (1976); Lecates v. Justice of the Peace Court, 637 F.2d 898 (3d Cir. 1980).

D. *Enforcing Standards of ALJ Conduct*

Standards of ALJ conduct are enforceable in a variety of ways. A biased ALJ is subject to disqualification under the APA or other law.[195] A decision resulting from an ALJ's misconduct is subject to reversal on administrative or judicial review.[196]

ALJs are subject to discipline by agencies, civil service boards, or the chief ALJs of central panels as applicable in the circumstances.[197] Special care must be taken to prevent the threat of discipline from unduly impairing an ALJ's decisional independence. ALJs who are attorneys are subject to bar disciplinary process for misconduct, including that committed while serving as ALJ.[198]

Tort law is not an effective means of enforcing standards of ALJ conduct since full-time ALJs enjoy absolute immunity from civil liability arising under federal law[199] while administrative officials who serve occasionally as hearing officers enjoy only qualified immunity.[200] State law on immunity of ALJs appears to be similar to federal law.[201]

VII. CONCLUSIONS

The law of professional responsibility in the states is distinguishable from its federal counterpart because of the significant role played by the state supreme courts. No federal court performs an equivalent function.

In the states, the supreme courts control admission to the practice

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195. Federal APA, 5 U.S.C. § 556(b)(3); 1981 MSAPA, *supra* note 32, § 4-202(b).

196. The party seeking review must show that the ALJ's misconduct caused prejudice. *See* federal APA, 5 U.S.C. § 706 (1982); 1981 MSAPA, *supra* note 32, § 5-116(c).

197. Discipline of federal ALJs is governed by 5 U.S.C. § 7521 (1982). On discipline of state ALJs in the central panel systems, see RICH & BRUCAR, *supra* note 81, at 47-49.

198. On discipline of judges as lawyers see, *e.g.*, *In re* Hasler, 447 S.W.2d 65 (Mo. 1969); State *ex rel.* Oklahoma Bar Ass'n v. Haworth, 593 P.2d 765 (Okl. 1979).

199. Butz v. Economou, 438 U.S. 478 (1978).

200. Cleavinger v. Saxner, 474 U.S. 197 (1985).

201. Absolute immunity was conferred upon administrative decision-makers in Loran v. Iszler, 373 N.W.2d 870 (N.D. 1985) (hearing officer); State v. Mason, 724 P.2d 1289 (Colo. 1986) (parole board member); Tarter v. State, 68 N.Y.2d 511, 510 N.Y.S.2d 528, 503 N.E.2d 84 (1986) (parole board member); Tulio v. Com., State Horse Racing Comm'n, 79 Pa. Commw. 305, 470 A.2d 645 (Commw. Ct. 1984) (racing commission member); Harlow v. Clatterbuck, 230 Va. 490, 339 S.E.2d 181 (1986) (corrections employees who decided to release juvenile delinquent); Rayburn v. City of Seattle, 42 Wash. App. 163, 709 P.2d 399 (1985) (police pension board member). *See also In re* Dwyer, 486 Pa. 585, 406 A.2d 1355 (1979) (members of Industrial Board immune from criminal prosecution for allowing motel to remain in business in unsafe building, leading to loss of lives in fire, where no corruption or bad faith was alleged). *But see* Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977) (parole board members enjoy only qualified immunity).

of law on a centralized basis.[202] A license to practice law includes the privilege of practicing before all tribunals of the state including administrative agencies. In most states the supreme courts themselves promulgate statewide standards of attorney conduct. In a few states, some of the basic standards are promulgated by statute, and additional details are provided by bar association rules which in turn are subject to the influence of the courts.

Each administrative agency may adopt its own rules of practice within the framework established by the statutes that create the agency and define its mission. The agency's rules are incorporated, by reference, in the state's Code of Professional Responsibility or Model Rules of Professional Conduct.[203] As a matter of policy, it appears desirable for agencies to exercise restraint in adopting rules of practice so that their rules do not create needless diversity or complexity.

Each agency may exclude attorneys for contemptuous conduct tending to disrupt the proceedings.[204] If this power is not expressly conferred by statute, it is implied in the grant of power to adjudicate. This power is not, however, absolutely essential since the ALJ has an alternative means of protecting the integrity of the proceedings — the ALJ may continue the proceedings and refer the matter to the state courts or bar authorities. If experience shows that the option of continue-and-report is generally impractical, the ALJ should be excused from using this option and should be allowed, instead, to use the only remaining practical option — excluding attorneys who engage in contemptuous conduct. The legislature may, however, expressly prohibit the ALJ from exercising the power to exclude. In that situation, the only option available to an ALJ faced with contemptuous counsel is to continue the proceedings and refer the matter to state courts or bar authorities, even though this option may be impractical.

An ALJ has the additional implied power to disqualify counsel from appearing in a particular proceeding where the grounds for disqualification are provided by statute, as in the case of the "revolving door" between public and private employment.[205] One explanation is that the statute which expresses the grounds for disqualification should be read *in pari materia* with the statute that confers the power to adjudicate. The combined effect of both statutes is to empower the ALJ to

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202. *Supra* notes 2-4.

203. *Supra* note 19; *see also supra* notes 87-88.

204. *See supra* notes 117-20 (federal cases on exclusion of counsel) and notes 122-25 (state cases on disqualification of counsel) which tend to support the accompanying text, although no state cases have been found that specifically uphold the power of an ALJ to exclude counsel for contemptuous conduct.

205. *Supra* notes 122-25.

disqualify counsel where the statutory grounds apply. If, however, the statute expressly prohibits the ALJ from disqualifying counsel, the ALJ's only option is to continue and report.

Another explanation of the ALJ's power to disqualify counsel is that the statutory grant of power to adjudicate implies that the ALJ may do whatever is practically required to protect the integrity of the proceedings including, but not limited to, the exclusion of counsel for contemptuous conduct. This explanation could support the power of the ALJ to disqualify counsel, not only where the grounds are provided by statute, but in other situations as well.

Assume, for example, that a motion is filed with an ALJ to disqualify counsel from representing the licensee in a license revocation proceeding on the grounds that counsel is likely to be a necessary witness in the same proceeding. This situation would generally require disqualification under the Code[206] or the Model Rules,[207] but let us assume that no statute or agency rule covers it. What options are available to the ALJ?

The ALJ may refuse to entertain the motion and may proceed with the hearing. This option is clearly unsatisfactory since the ALJ, without having determined the merits of the movant's position, would allow counsel to engage in an alleged violation of the Code or Model Rules. The ALJ may, instead, refuse to entertain the motion, refer the matter to an appropriate court or bar tribunal, and continue the administrative hearing pending determination of the disqualification motion. This option is clearly proper but it causes obvious delay and for that reason is probably impractical in the typical situation. Finally, the ALJ may entertain and decide the motion, subject to administrative and judicial review on an interlocutory or final basis in the same manner as would apply to any other procedural ruling. This option is, on balance, the most attractive and is supportable by the ALJ's general statutory power to regulate the course of the proceedings. This option could be precluded by statute because it is not essential for due process purposes. If a statute precluded this option, the ALJ would have to exercise the second option, continue-and-refer.

State law does not allow ALJs or agencies to suspend or disbar attorneys.[208] Even without such powers, ALJs are able to protect the integrity of the proceedings without unnecessary delay through exclusion and disqualification of counsel, while avoiding encroachment on

206. Code, *supra* note 18, DR 5-102.
207. Model Rules, *supra* note 18, Rule 3.7.
208. *Supra* notes 127-29.

the general authority of the state supreme courts to exercise disciplinary power on a statewide basis.

As regards non-attorney representatives, the states have been unable to reach consensus.[209] Some state supreme courts have themselves determined the circumstances, if any, in which non-attorneys may represent parties before agencies while other courts have deferred to the legislature on this issue. The extent of non-attorney practice before agencies seems to vary considerably from one state to another.

Some courts, in determining whether non-attorneys may practice before agencies, have made incidental statements about the conduct required of such representatives.[210] With this exception, state supreme courts generally lack jurisdiction to prescribe standards of conduct for non-attorneys. Standards must therefore be set by the legislature or the agency.

It seems desirable to establish uniform, statewide standards for non-attorney representatives and to harmonize these standards, as far as possible, with those governing attorneys. Any significant difference between the standards governing attorneys and those governing non-attorneys could create a serious risk of unfairness in a proceeding where one party is represented by an attorney and the other by a non-attorney. For example, the rules which prohibit attorneys from taking frivolous positions in litigation[211] or offering false evidence[212] should be made applicable to non-attorneys; otherwise, a party represented by an attorney would risk a serious disadvantage against an opposing party represented by a non-attorney.

These considerations require harmonization of attorney and non-attorney standards only with regard to matters that are directly related to the fair conduct of the adjudicative proceeding. In contrast, it appears unnecessary to subject non-attorneys to the same rules as attorneys on matters that do not directly relate to the fair conduct of the proceeding. Differences in the rules on solicitation applicable to attorneys[213] and to non-attorneys, for example, may have an impact on the competition for obtaining clients by these two categories of practitioners, but are unlikely to create a risk of unfairness to the parties or to have any other impact on the conduct of the representation. Accordingly, harmonization of attorney standards with non-attorney standards on solicitation seems unnecessary.

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209. *Supra* notes 156-61.

210. *Supra* notes 157-61, 165.

211. Code, *supra* note 18, DR 7-102(A)(1), (2); Model Rules, *supra* note 18, Rule 3.1.

212. Code, *supra* note 18, DR 7-102(A)(4); Model Rules, *supra* note 18, Rule 3.3.

213. Code, *supra* note 18, DR 2-103(A), DR 2-104; Model Rules, *supra* note 18, Rule 7.3.

Harmonization of standards of conduct of attorneys and non-attorneys will not eliminate the risk of unfairness unless the enforcement of these standards is also harmonized. This creates obvious difficulties since the enforcement of standards of attorney conduct is in the hands of the courts and their supporting tribunals, while enforcement of standards of non-attorney conduct is generally in the hands of the agencies and beyond the jurisdiction of the courts (except in the exercise of limited judicial review of agency action). A narrow range of judicial supervision may exist where a court, having determined the limits within which non-attorneys may practice before agencies, attempts to monitor compliance with these limits.

Harmonization of enforcement may be achieved by aligning the agency's enforcement measures against non-attorneys with the court's enforcement measures against attorneys. For example, if the courts routinely dismiss complaints alleging that attorneys have taken frivolous positions in litigation, the agency should adopt a similar attitude when faced with similar complaints against non-attorneys.

Standards of ALJ conduct are generally promulgated by statute, agency rule, or central panel rule.[214] Courts may intervene to guarantee due process, especially where the issue is whether an ALJ should be disqualified for bias. The ABA committee has opined that the Code of Judicial Conduct applies to ALJs.[215] A few court decisions have taken a similar view, at least with regard to ALJ conduct that relates directly to the fairness of a particular proceeding.[216] While a court can declare a specific provision of the Code of Judicial Conduct applicable for the benefit of a party in a particular case, the courts have not imposed the Code upon ALJs generally. An argument could be made that the due process rights of the parties require a legitimate system of adjudication, which in turn requires all ALJs to be governed by a coherent body of rules, such as the Code of Judicial Conduct. The courts have not adopted this argument. They tend, instead, to defer to the legislature, agency, or central panel director as the source of standards to govern ALJs.

Attorney ALJs are governed by bar standards in addition to whatever standards may be imposed on ALJs with regard to their status as adjudicators. Thus attorney ALJs are subject to administrative discipline for violating any statutory or regulatory standards, and to bar discipline for violating standards that apply to them as attorneys. If the statutory or regulatory standards include or even approximate the Code

214. *Supra* text following note 169.
215. *Supra* note 169.
216. *Supra* notes 174-77.

of Judicial Conduct, these standards are likely to be sufficient to guarantee the fairness of the proceedings and the bar standards applicable to ALJs as attorneys are unlikely to be invoked. If, on the other hand, the statutory or regulatory standards do not include or approximate the Code of Judicial Conduct, the bar standards may provide a significant back-up guarantee of fairness. The general theory of harmonization suggests that non-attorney ALJs be governed by standards similar to those that govern attorneys in matters that relate directly to the fairness of the proceedings, and that enforcement against non-attorney ALJs be harmonized with enforcement against attorney ALJs.

In the absence of any significant governing role by the federal courts, practice before federal agencies is governed by statutes and agency rules. In one vital area — the admission of attorneys to practice before agencies — federal law defers almost completely to state law. The Agency Practice Act allows attorneys licensed in any state to practice before virtually all federal agencies, but the Act reserves power to federal agencies to impose discipline and to prevent conflicts of interest resulting from violation of "revolving door" statutes.[217] Thus the Act expresses a federal policy of deferring to the states with regard to the admission of attorneys but not with regard to discipline or disqualification.

Federal standards of attorney conduct are established by statute or rule. Agencies may develop non-rule standards only with regard to exclusion for contemptuous conduct, or disqualification for violation of "revolving door" statutes.[218]

Two major issues arise regarding the substantive content of federal standards established by statute or rule — whether these standards may extend to attorney conduct occurring outside the presence of the agency and whether these standards may differ from corresponding provisions of state law. Federal case law has given affirmative answers to each question[219] but troublesome policy issues persist as to the impact of these cases on the relationship between federal and state regulation.

If the system of attorney discipline at the state level is functioning effectively, one may argue that the state bar authorities should be allowed to exercise primary jurisdiction in adopting and enforcing standards of attorney conduct. Federal statutes and rules should reflect appropriate restraint in order to avoid unnecessary interference with state law. Thus the appropriate domain of regulation by federal agencies should be the same as that of state agencies — dealing with contemptu-

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217. *Supra* notes 10-17.

218. *Supra* notes 117-18, 130-31.

219. *Supra* notes 64-66, and *see supra* notes 77-78.

ous conduct and disqualification of counsel in situations where the procedural rights of the parties cannot be practically protected by continuing the proceedings and reporting to state bar authorities. Under this theory, federal agencies should refrain from exercising their power to regulate attorney conduct outside the presence of the agency, and should regulate conduct in the presence of the agency in a manner that harmonizes as much as feasible with the corresponding state law. It would seem unnecessary for federal agencies to exercise the power to suspend or disbar attorneys just as it seems unnecessary for state agencies to exercise these powers. Further, where federal agencies enforce their regulations of attorney conduct, they should harmonize their enforcement policies with those of the state.

The difficulty is that federal agencies may regard state bar regulation as not sufficiently effective. In this setting, federal agencies may determine that they must exercise primary jurisdiction in adopting and enforcing standards of attorney conduct. Federal agencies, under this approach, may regulate conduct occurring outside the presence of the agency, may impose standards of conduct that differ from state rules on the same topic, and may impose the sanctions of suspension and disbarment. This is a very different view of agency powers than that taken by state agencies.

The dispositive factor appears to be the federal agency's perception of the effectiveness of state regulation of attorney conduct. This is not a matter that a reviewing court is likely to evaluate. Even if a court could make a finding as to the effectiveness of state regulation, the court might conclude that a federal agency exercises non-reviewable discretion in deciding whether to use its statutory enforcement power or to defer to the primary jurisdiction of state bar authorities.

The task of the federal agency will be further complicated if the agency determines that state bar enforcement is effective in one state but not in another. The agency may then have to consider deferring to state bar authorities in the first state but not in the second. This appears to be an appropriate manifestation of federalism, giving the maximum feasible deference to the states.

There is less overlap between federal and state law on the regulation of non-attorneys. Federal admission standards are established by statute and rule with no deference to the states. To a considerable extent, federal standards of non-attorney conduct have been harmonized with federal standards of attorney conduct.[220] The states appear to be in the early stages of formulating standards of non-attorney conduct.[221]

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220. *Supra* note 164.

221. *Supra* notes 156-61, 165.

As indicated above, reasonable harmonization of these standards with the standards of attorney conduct seems desirable, although the state agencies handle enforcement against non-attorneys while the state courts generally handle enforcement against attorneys.

Federal ALJs, like their state counterparts, are regulated by statute and agency rule. Since the central panel approach has not yet been adopted by the federal government, federal ALJs are not subject to central panel rules of conduct. Questions of ALJs' decisional independence have been more vigorously litigated in the federal courts than in the states.[222] Federal attorney-ALJs, like their state counterparts, are subject to discipline by state bar authorities.

The Code of Judicial Conduct has not been adopted for federal ALJs. Their exercise of the power to decide cases and to discipline attorneys — and indeed their claim to the title "Judge" — would be on stronger ground if they were governed by the Code or an equivalent set of standards.

The most obvious contrast is between the role of the state supreme courts in regulating conduct before state agencies and the lack of any equivalent judicial control at the federal level. Does this structural difference lead to any difference in the conduct of those who practice before state and federal agencies? Empirical evidence is lacking, although it could possibly be obtained by distributing a questionnaire to state and federal ALJs asking about the frequency of misconduct by attorneys and other representatives and about the number of complaints referred to state bar authorities.

The diverse views of separation of powers at the state and federal levels are reflected in the different allocations of regulatory jurisdiction explored earlier in this article. In the arena of practice, there appear to be three major distinctions between the state and federal levels. First, practice by non-attorneys has received more formal and widespread recognition before federal than state agencies; second, federal agencies make less use of non-attorney ALJs than do state agencies; and third, some federal agencies — notably the SEC and the IRS — are fairly aggressive in bringing enforcement proceedings against attorneys and other representatives, including actions for misconduct allegedly occurring outside the presence of the agency. I see no indication of similar enforcement efforts by state agencies or bar authorities. If indeed state authorities have failed to match the enforcement efforts of these federal agencies, the lack of state enforcement offers some justification for continued enforcement by federal agencies.

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222. *Supra* notes 189-93.