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An Appraisal of Attorneys' Responsibilities Before Administrative Agencies

Harold L. Marquis*

The author suggests that the Code of Professional Responsibility, formulated for the trial bar, is inadequate as an ethical guide for administrative practice. Employing securities and patent practice as examples, the author illustrates how the nonadversary nature of administrative proceedings and the important public interests affected therein dictate responsibilities for administrative practitioners which differ from those of trial attorneys. He concludes that a joint bar-agency committee should draft a code of ethics covering the different types of administrative proceedings and, perhaps, supplemental rules tailored to the unique proceedings of particular agencies.

I. INTRODUCTION

The phenomenal proliferation of administrative agencies during the last few decades has resulted in a greater percentage of the practicing bar devoting a substantial portion of its effort to administrative law practice. While part of administrative law practice is similar to trial practice before courts, much of the practice involves nonadversary activities such as preparing documents for submission to administrative agencies for ex parte consideration. The personal appearance of attorneys before agencies is also often in a nonadversary role and frequently informal in nature. The absence of an adversary check suggests the need for different and often higher ethical standards for attorneys involved in these activities to insure that all information necessary for a decision, which is fair not only to the individual client but also to the

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public, is placed before the administrative decisionmaker. In view of the growth and sensitive nature of administrative law practice (sensitive because of the vital public interests affected as a by-product of determining the rights of a private litigant), it is surprising that the bar's ethical concerns, as illustrated by the ABA Code of Professional Responsibility, remain almost exclusively directed at the trial attorney.

There is a growing appreciation of the redefinition of the attorney's role and responsibilities in the administrative arena. The agencies, themselves, are prime movers in the redefinition as can be seen in the rules of conduct that are gradually emerging and in the attempt by the agencies to hold attorneys liable for professional incompetence and failure to carry out their new responsibilities. The process is essentially piecemeal at this time. A set of core principles, such as a revised Code of Professional Responsibility, is needed for reference, with specific refinements to be developed therefrom to meet different agency needs.

Administrative agencies can be classified into those that are engaged in policing regulation and those that primarily confer rights or economic benefit, although the latter may also police the recipients of those benefits to varying degrees. Because of differences in the professional functions of attorneys practicing before these two types of agencies and their relationship to the agency, there are important differences in matters of professional responsibility. Consequently, ethical problems encountered in practice before each of the two types of agencies are analyzed.

Securities regulation as conducted by the Securities and Exchange Commission is an example of the policing function. Because of the central role of the attorney in handling securities matters and the economic stake often at issue, increased regulation of attorneys' conduct by the SEC may be proper. Indeed, as will be discussed, the SEC is moving in this direction, forcing attorneys to recognize that competence and ethical conduct constitute duties owed to the public.

Insight into the value of such regulation may be gained by examining the regulation of patent attorneys by the Patent Office, an agency that confers a substantial economic benefit. Patent practice was chosen because it is a well-recognized specialty with an examination required for admission and because the Patent Office enjoys a broad congressional mandate to regulate the conduct of attorneys that

practice before it.\textsuperscript{3} With the increasing complexity of administrative regulation of private activities, it is interesting to analyze a "true" specialty to see whether it should serve as a model for other areas of administrative law practice.

These two examples of administrative law practice are not so different from other examples in the same class of regulation as to cast serious doubt upon the generality of the analysis, at least as to federal regulation.\textsuperscript{4} The analysis of practice before the two agencies should aid in deciding whether canons for administrative law practice are needed and whether such canons should be on an agency-by-agency basis or for all types of administrative law practice. Coupling this analysis with a discussion of more general problem areas in administrative law practice, such as ex parte communications, and trying to solve these problems by using the present trial-oriented Code of Professional Responsibility indicate the inadequacy of the present Code in the administrative context. It is beyond the scope of this article, however, to provide a complete new code proposal or a system of ensuring professional competence in specialized administrative fields. The purpose of this article is served if it indicates the complexity of the problems, the difficulties inherent in present guidelines, and some considerations for possible resolution of the problems. Unless the bar takes the initiative in dealing with the situation, it may find itself presented with a fait accompli by the courts and the agencies.

\section*{II. Securities Practice}

By joining two major law firms as defendants in \textit{SEC v. National Student Marketing Corp.},\textsuperscript{5} the SEC has raised several interesting questions concerning the public responsibilities of attorneys engaged in securities practice. These questions have yet to be answered as the court has only ruled on certain motions to date.\textsuperscript{6} The case

\begin{itemize}
\item[3.] "The Commissioner . . . may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office . . . ." 35 U.S.C. § 31 (1970).
\item[4.] There are a number of important differences between federal and state regulation which may require some modification of the approach as to state regulation.
\end{itemize}
against the law firms is premised upon their respective representation of two corporations in the consummation of a merger which allegedly violated antifraud and reporting requirements of federal securities law. There are two gravamens of the SEC's complaint. First, the firms are charged with failing to refuse to issue their opinions to each other, as required by the merger agreement, that all client action required by law and all transactions involved in the merger had been properly and validly taken. Second, the SEC alleges that the firms should have insisted upon a resolicitation of the shareholders and a revision of a financial statement when they learned, after approval of the merger by the shareholders, that the original financial statement was inaccurate. If the corporate clients should have refused resolicitation, the Commission expected counsel to cease representing them and to notify the Commission of the misleading financial statement. In addition, there are collateral charges concerning the law firms' participation in their clients' fraudulent schemes by rendering incomplete opinion letters as to the legality of certain sales and assisting in the preparation of a false and misleading annual report.

The Commission is seeking a permanent injunction against securities violations by the law firms, which would make any future violation subject to contempt of court. Granting the injunction would also provide the Commission with grounds for disciplining the attorneys which could result in disqualification to practice before the Commission.

The SEC's complaint in National Student Marketing represents a marked departure from past cases in that it is not alleged that the lawyers were either principals or prime instigators in the scheme.

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10. The Commission . . . may by order temporarily suspend from appearing or practicing before it any attorney . . . or other professional who . . . has been by name . . . permanently enjoined by any court of competent jurisdiction by reason of his misconduct in an action brought by the Commission from violation or aiding and abetting the violation of any provision of the Federal securities laws.
17 C.F.R. § 201.2(e) (1974).
11. Prior to the commencement of this action judicial decisions imposing sanctions against securities lawyers have been confined to fact situations involving an attorney's participation as a principal or prime instigator in a fraudulent scheme. See, e.g., United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), cert. denied, Mittleman v. United States, 368 U.S. 984 (1962) (affirmed judgment of conviction of attorney.
While the allegations are only based upon the lawyers' role as counsel for the participants, one commentator has suggested that the complaint appears to charge more active participation by counsel than merely poor judgment. Although there is no suggestion that the attorneys were the prime instigators or financially involved in the transaction, it is alleged that they actively aided their clients in perpetuating a fraudulent scheme. Certainly, the absence of participation as a principal does not preclude a more active role than merely rendering advice.

National Student Marketing appears to have set a new trend as the Commission has subsequently filed several complaints against attorneys alleging active aid in a client's fraudulent scheme. While all of these complaints are premised upon fraudulent participation by attorneys, rather than negligence in advising clients, the Commission is apparently attempting to shift some of its policing duty of clients involved in securities transactions to their private counsel. Counsel will not be permitted to stand silent behind the attorney-client privilege while his client engages in actions which are fraudulent under the securities laws. At a minimum, the attorney cannot bless these actions with his opinion. A practical effect of forcing an attorney to cease representing his client and to notify the SEC if the client refuses to correct his fraudulent practices is that the client will be more responsive to advice from his attorney that he comply with the securities laws. In this manner, the securities attorney may become an officer of the Commission, perhaps to a greater extent than attorneys are officers of the court. The additional "officers" would certainly ease the enforcement task of the Commission. And the withdrawal requirement alone would not seem to harm the attorney-client relationship; indeed, it may enhance the sagging respect for the bar. The ABA Committee on Professional Ethics has advo-

based on personal participation). Administrative decisions suspending or disqualifying attorneys from practice before the SEC have been based upon similar participation. See, e.g., Morris Mac Schwebel, 40 S.E.C. 347 (1960), modified, 40 S.E.C. 459 (1961) (Commission accepted the attorney's consent to permanent disqualification from practice before the SEC based upon both participation as a principal and flagrant conduct as an attorney in a number of securities violations). However, the Commission's regulations provide that it may disqualify an attorney for unethical conduct that is purely professional in nature. 17 C.F.R. § 201.2(e)(1)(ii) (1974).

12. Lowenfels, supra note 5, at 421.

icated withdrawal in an analogous situation where a client refuses to correct a misrepresentation made to the Internal Revenue Service.\(^4\) At first blush, the establishment of the additional duty to report does not appear to endanger the attorney-client relationship since clients would seldom proceed with a plan in the face of a threat of report. However, a closer examination reveals that the relationship may be harmed due to reticence of management to disclose all facts to their attorney, which is essential to effective representation.

The ABA *Code of Professional Responsibility* may provide some guidance in the resolution of this problem by its requirement that an attorney receiving information which clearly establishes that his client has perpetrated a fraud upon a tribunal must report it if the client refuses to do so.\(^1\) But this general ethical principle is very difficult to apply to specific securities situations. This difficulty is evident in the *National Student Marketing* case but the difficulty is even greater when attempting to apply the principle to answer the questions heretofore left unanswered by the courts. For example, courts have not indicated whether they would impose a reporting obligation where the attorney may only have reason to suspect a violation or where there is doubt as to whether or not the facts constitute a violation. Under these circumstances, the attorney should have the duty at least to investigate his client's statements which he has reason to believe may be false. Certainly, he has a duty to be more than a blind scrivener in preparing false statements for circulation to potential investors.\(^1\) An obligation to check a client's statements where easily verifiable was suggested in *Escott v. Bar Chris Construction Corp.*,\(^1\) even though counsel was found to be liable to the investors only in his role as a director of the corporation.

On the other hand, the attorney should not have to investigate every possible impropriety in his client's statement, as this would make securities practice impossible. If this approach were pushed to its logical extreme, securities attorneys might need to undertake an independent investigation, including a financial audit, to determine the accuracy and completeness of facts disclosed by individual

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\(^4\) ABA *Code of Professional Responsibility*, Disciplinary Rule 7-102(B) (1), at 360 (1975). The interpretation of this amended rule has been the subject of much controversy as to whether it allows the dissemination of privileged information when the attorney feels it is necessary, or whether it prohibits such communication in all instances.

\(^{15}\) "If . . . the lawyer believes that the service relies on him as corroborating statements of his client which he knows to be false, then he is under a duty to disassociate himself from any such reliance." ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS, No. 314 (1965).

\(^{16}\) SEC v. Frank, 388 F.2d 486, 489 (2d Cir. 1968) (dictum).

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clients. Fortunately, the duty to investigate facts which may lead to a reporting requirement has not been pushed to this extreme. While a lawyer who consents to the use of his opinion on a technical matter, such as probable patent or tax results filed with a registration statement, probably has a duty as an "expert" to conduct a reasonable investigation of the facts,\(^{18}\) this obligation only extends to facts upon which his opinion is based and not other facts in the registration statement. Unless he is such an "expert," there is, in general, no duty to conduct a reasonable investigation and the attorney is probably not liable to purchasers under the Securities Act (although he might be liable for common law malpractice in certain instances). Under the Securities Act, this result seems to be inconsistent with the express duty of directors and accountants to conduct a reasonable investigation of the unexpertised portions of the registration statement,\(^{19}\) especially in light of the securities attorney's extensive participation in drafting a registration statement. Nevertheless, there is no indication that the Commission plans to impose an independent investigation requirement upon securities attorneys in a role other than as "experts," except as to matters where there is reason to suspect the inaccuracy of a client's statements and a verification is relatively easy to make. Even this extension would significantly increase the client's expense for securities work.

In addition to the fraud exception to the general rule forbidding disclosures of a client's confidences, another ethical principle might be applied in the securities area. But it, too, is difficult to apply in the administrative context. The *Code of Professional Responsibility* permits disclosure of a client's confidences to prevent the commission of a crime.\(^{20}\) As the goal of this ethical obligation is crime prevention, it would seem that the attorney should inform his client before reporting, which in itself is likely to prevent the crime from being committed. For the same reason, attorneys should not be obligated to report confidences that do not contemplate the commission of a

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18. "In case any part of the registration statement . . . contained an untrue statement . . . any person acquiring such security . . . may . . . sue . . . every . . . person whose profession gives authority to a statement made by him . . . No person, other than the issuer, shall be liable . . . who shall sustain the burden of proof . . . [that] as regards any part of the registration statement purporting to be made upon his authority as an expert . . . he had, after reasonable investigation, reasonable ground to believe . . . that the statements therein were true . . . ."


20. ABA _CODE OF PROFESSIONAL RESPONSIBILITY_. Disciplinary Rule 4-101(c)(3), at 17 (1971). Disclosure is mandatory if "the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed." ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS, No. 314 (1965).
crime. If the reporting obligation were to be extended to situations other than the planning of crimes, the weakening of the confidential obligation would be detrimental to effective representation, which is a high price to pay for ease in enforcement. The primary duty of the securities attorney should remain to his client and not the Commission.

On the other hand, the Commission and the public should be able to rely upon the integrity and forthrightness of the securities attorney. By holding themselves out in a manner to encourage investor reliance, as when they know investors will receive and rely upon their opinions, attorneys may assume a greater responsibility to investors which must be taken into account in reconciling the confidence and reporting obligations. Imposing a greater responsibility is especially appropriate because of the central position of the securities attorney in the investment process and the limited ability of the Commission to determine the accuracy of statements filed within the predominantly nonadversary proceedings. Thus, it may be justifiable to hold the securities attorney to a higher ethical standard than his colleagues practicing in other areas.

Clearly, the courts and the SEC are attempting to thrust an ill-defined reporting obligation on the securities bar to enlist its aid in the policing function. That obligation must be clarified. The role of the attorney and the function of the agency must be taken into account in establishing any reporting obligation. As a general rule, the lowest reporting obligation should be imposed when the Commission is in an adequate position to discover the facts independently and the obligation is likely to be most harmful to the attorney-client relationship. The traditional adversary role where the Commission is functioning as a prosecutor and counsel is defending his client fits these criteria. A greater reporting obligation may be in order when counsel is assisting a client in preparing registration statements or other documents for ex parte filing with the Commission since these are not examined in an adversary setting.

Ethical conduct has not been the only area of administrative practice with which the SEC has concerned itself. The competence of the securities bar is receiving increased attention. Without waiting for a decision on its attempt to hold attorneys accountable for aiding a fraudulent scheme, the Commission has endeavored by filing two complaints to hold attorneys accountable for negligence in

21. These points were stressed in Emanuel Fields, [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,407, at 83,174 n.20 (SEC 1973), rejecting an argument that the Commission lacked authority to disqualify an attorney from practice before the Commission.
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rendering opinions to clients.\(^1\) These complaints allege that the attorneys knew or should have known that their clients were not entitled to an exemption as they stated in an opinion letter. The complaints represent a marked departure from the traditional rule that the attorney is liable only to his client for negligence. Imposing negligence accountability upon attorneys would greatly increase the Commission's control over the securities bar, especially in view of the threat of the drastic sanction of disqualification from practice. If attorneys are to be disqualified on negligence grounds, the Commission should endeavor to minimize the incidence of negligence by admitting attorneys only by examination as is done by the Patent Office.\(^2\) This may be justifiable in view of the complexities of securities practice. Possibly, the Commission is attempting to assert greater control over the securities bar in an effort to restore investor confidence in the sagging securities market. This tack may have been necessary because self-regulation of the securities area by the bar has not been very effective. While vigorous self-regulation is perhaps contrary to human nature, deficiencies in self-regulation are likely to result in overcorrection by the administrative agencies.

At this point it is worthwhile to ask if this drastic overhaul of the attorney's responsibilities in the securities field is justified by a benefit to be gained by the general public. Some economists who have studied the activities of the Commission have concluded that investors have not greatly benefited from the regulatory effort which is designed to reduce investor ignorance, a goal often forgotten by the Commission in its concentration upon the technicalities of regulation. The Commission may have believed that its impact would be increased by placing some of the enforcement responsibility upon attorneys. As in the case of the direct regulation of prime movers, any expansion of regulation should be analyzed in terms of economic costs and benefits.

As pointed out by Professor Demsetz, the rate of return of investing in securities regulation is the "present value of the stream of future benefits minus future costs, all divided by the initial invest-

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23. The current Rules of Practice permit representation by any attorney admitted to practice in any state or the District of Columbia. 17 C.F.R. § 201.2(b) (1974).

Regulation is worthwhile if the expected rate of return at least equals the expected rate from employing the resource elsewhere. Information dissemination is a complex activity to control because of the difficulty of ascertaining what information gives investors an accurate account of the value of an investment. For this reason it is to be expected that the cost of regulation will be high relative to the rate of return. A comparison of the large sums spent by investors to uncover worthwhile business information with the meager resources of the Commission suggests that regulation only increases the useful information slightly. Imposing a part of the enforcement responsibility on the private securities bar may reduce the Commission's cost of regulation, but it is difficult to see how it is likely to increase greatly the useful information for the investing public. The inherent difficulty of regulating information dissemination is even greater in this situation because attorneys are specially trained to avoid such controls. Under this approach, attorneys' opinions on securities and drafts of stock prospectuses may contain even more hedging language than at present. While complete knowledge by investors is essential to achieving perfect competition, not only is the cost of increasing the knowledge high, but perfect competition would not be attainable in any event as it is only a theoretical tool of economics.

The Commission has responded to the conclusion that its regulation is not very effective by expanding its regulation, which is the typical response of a regulatory agency. Agencies rarely ask whether it may be desirable to decrease the amount of regulation.

While the value of the SEC attempt to enlist securities attorneys in its police force at the expense of traditional attorney-client relationships may be questioned, the existence of the attempt may not. It remains to be seen whether the federal courts will accede to the desire of the Commission to expand its control over the securities bar.

In any event, the inadequacies of the present Code of Professional Responsibility in the securities area when called upon to solve the problems raised by the SEC in the reporting area are manifest. Similarly, the bar has failed to consider the Commission's legitimate concerns with professional competence in this intricate area. The SEC has shown no reluctance to force the issue in the courts despite the possible lack of any real gain to the investing public and the

26. Id.
countervailing costs. Surely the bar itself should weigh these considerations and provide guidance to practitioners before other bodies develop concrete rules without bar input.

III. Patent Practice

Any attorney in good standing is permitted to represent clients before nearly all administrative agencies.27 A unique aspect of patent practice is that a bar-type examination administered by the Patent Office must be passed in order to prepare and prosecute patent applications for others.28 Another indication that patent practice is a true specialty is the fact that the United States permits patent attorneys licensed in foreign countries to represent applicants from such countries.29 In recognition of the importance of a scientific background, admission to practice is not restricted to attorneys; any citizen with the necessary scientific qualifications is also permitted to take the patent examination.30 Nonlawyers are admitted under the label of patent agent, but are permitted to practice before the Patent Office to the same extent as a patent attorney.31

Although the minimum scientific qualifications are not contained in its regulations,32 the Patent Office requires that an applicant for registration as a patent agent have a degree in engineering or physical science or have served a long apprenticeship under a patent practitioner.33 An applicant for registration as a patent attorney must have some scientific training, but not to the same degree as that required of patent agents.

27. 5 U.S.C. §§ 500(b), (e) (1970) (applicable to all federal agencies except Patent Office with respect to patent matters).
28. 37 C.F.R. § 1.341(c) (1974). The examination may be waived for anyone who has served for four years as an examiner in the Patent Office. Any attorney in good standing may represent clients in trademark matters before the Patent Office without taking an examination. Id. § 2.12 (1974).
29. On the basis of reciprocity, the U.S. Patent Office will register foreign patent attorneys to represent applicants from their country. Id. § 1.341(e) (1974).
30. "Any citizen of the United States not an attorney at law who fulfills the requirements and complies with the provisions of these rules may be admitted to practice before the Patent Office." Id. § 1.341(b) (1974).
31. Id.
32. The only scientific qualification stated is that the applicant must "establish to the satisfaction of the Commissioner that he is . . . possessed of the legal and scientific and technical qualifications necessary to enable him to render applicants for patents valuable service . . . ." Id. § 1.341(c) (1974).
This power to decide who will practice before it, not enjoyed by other agencies such as the SEC, vests the Patent Office with a unique opportunity to ensure that all patent practitioners are competent. As discussed previously, the SEC has resorted to negligence actions in the courts to achieve the same goal. But the Patent Office has not exercised the full extent of competency screening power it has available. Once an applicant is admitted to practice as a patent attorney or agent, he is permitted to prepare and prosecute applications in any technical field regardless of his lack of training in that field. Thus, a patent attorney with training in mechanical engineering is permitted to prepare chemical patent applications even though he has never had a course in chemistry. Within patent practice the technical fields of chemical, electrical and mechanical practice are well recognized. If the Patent Office wished to afford complete protection to the public from incompetent practitioners, an examination should be required for each technical field allowing only those who have passed the examination to practice in that field. Fortunately, the problem is only of slight significance since most patent practitioners recognize their limitations and do not venture too far out of their technical field.

Even without additional safeguards, the existing patent examination—which tests the applicant's knowledge of patent law and his practice skills, especially the intricacies of claim drafting—is also a substantial market restriction. It is very difficult to pass the examination unless practice skills have been acquired by a brief apprenticeship with an experienced practitioner. Admittedly, these restrictions serve to bar some who are unqualified, but as with all such restrictions, those who are admitted are able to charge higher fees than they could with greater competition. Given the technical and legal complexities involved in procuring a patent, an examination of practice qualifications is undoubtedly necessary. The Patent Office is justified in screening out incompetents by its examination. However, it must be mindful of the market-restricting effect and, perhaps, could ameliorate this effect by simplifying patent procedure and claims writing so that practice admission qualifications could be lowered.

Unlike most agencies, the Patent Office has the specific statutory authority to promulgate detailed rules regulating the conduct of patent practitioners. Unfortunately the only specific rule it has promul-

34. The regulations provide no further restrictions after the applicant has passed the examination. 37 C.F.R. § 1.341 (1974).
gated is a ban against advertising, which is quite similar to the ban applicable to attorneys in general. Like the entrance examination, this rule has the undesirable side effect of market restriction. Both price theory and several empirical studies support the contention that advertising makes markets more competitive, resulting in lower prices to consumers. The advertising ban makes entry into patent practice more costly and difficult, which serves to benefit the well-established patent firms. Given the support of the organized bar for the advertising ban and the dual regulation of the conduct of patent attorneys by state bars and the Patent Office, however, it

36. "The use of advertising . . . to solicit patent business . . . is forbidden as unprofessional conduct, and any person engaging in such solicitation . . . shall be refused recognition to practice before the Patent Office or may be suspended, excluded or disbarred from further practice." 37 C.F.R. § 1.345 (1974).


39. See, e.g., Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. Law & Econ. 337 (1972); Kessel, Price Discrimination in Medicine, 1 J. Law & Econ. 20, 43-44 (1958). Professor Benham found that the price of eyeglasses averaged $37.48 in states where advertising was banned and $17.98 in states with no restriction on advertising. Benham, supra, at 342 (Table 1).

40. Without advertising, firms have to resort to more expensive ways of finding customers which increases the costs of entry. Attorneys find clients by membership in country clubs, involvement in public activities and politics, and through friends. All of these activities may be more costly than advertising.

41. A principal justification given for the advertising ban is that it is designed to insure quality service. It is contended that clients might select attorneys more adept in advertising for clients than in representing them. L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 358 (1971). The author has not seen any empirical studies that support the contention. Assuming the contention is correct, an argument can be developed that automobile mechanics should not be permitted to advertise because of the importance of the quality of their repair work to our very lives. It is also logical to extend the argument to goods as well since services are involved in their manufacture and distribution. See generally Comment, A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. Chi. L. Rev. 674 (1958); Note, Advertising, Solicitation and Legal Ethics, 7 Vand. L. Rev. 677 (1954). The Canons of Ethics (predecessor of the Code of Professional Responsibility) have been broadly attacked as fostering a guild system and favoring large, well-established law firms. Shuchman, Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code, 37 Geo. Wash. L. Rev. 244 (1968).

42. In Sperry v. Florida, 373 U.S. 379 (1963), the Court held that, by virtue of the supremacy clause, a state may not enforce licensing requirements for practice before the Patent Office in addition to those established by the Office. The Court vacated an injunction restraining a nonlawyer patent practitioner registered in the Patent Office from representing Florida clients before the office. While the Patent Office demands that both patent attorneys and agents conform to the standards of the ABA Code of Professional Responsibility, see note 43, infra, the Sperry case does not prevent a state from enforcing the Disciplinary Rules against patent attorneys. However, the states do not have jurisdiction over patent agents
is probably not feasible for the Patent Office to repeal the advertising ban.

Instead of tailoring its own rules of conduct to its specific situation, the Patent Office has chosen to adopt the ABA Code of Professional Responsibility\textsuperscript{43} which was shown inadequate in the securities regulation field. There have not been many disbarment or suspension cases instituted by the Patent Office. The dearth of cases may be due to patent practitioners observing high ethical standards or inadequate policing by the Patent Office. Another plausible explanation is that fewer ethical problems are encountered in patent practice before the Patent Office because much of the work involves dealing with objective scientific facts where any deception is likely to be discovered quickly.

Nevertheless, one of the few disbarment cases instituted reached the Supreme Court. The Court, in Kingsland v. Dorsey,\textsuperscript{44} upheld the disbarment of a patent attorney by the Commissioner of Patents for deceiving the Patent Office as to the real authority of an article he cited to support a patent application and representing it as the work of a reluctant witness. The later suppression of the deception in litigation,\textsuperscript{45} which ultimately led to the patent being held unenforceable by the attorney's corporate client, may have been the decisive factor in the imposition of the harsh penalty for what was essentially ghostwriting. Holding this type of ghostwriting unethical seems to be inconsistent with treating the ghostwriting of affidavits by attorneys as proper. The different treatment can be explained by the fact that a tribunal is not deceived when an attorney assists in the drafting of an affidavit as such assistance is commonly expected. However, it is not commonly expected that an article praising the ingenuity of an invention and published under the name of a labor leader is ghostwritten by the patent attorney. Nevertheless, the penalty seems a little harsh in that the article was apparently not a factual account but rather an expression of opinion which is not of great probative value on the issue of inventiveness. Of course, if the attorney participated in or was aware of later suppression of

\textsuperscript{43} "Attorneys and agents appearing before the patent office must conform to the standards of ethical and professional conduct set forth in the Code of Professional Responsibility of the American Bar Association . . . ." 37 C.F.R. § 1.344 (1974).

\textsuperscript{44} 338 U.S. 318 (1949).

these facts by his corporate client, he clearly had a duty to report it to the court if his client refused to do so. The Court went beyond the facts of the case in endorsing the view of the Patent Office Committee on Enrollment and Disbarment that the "highest degree of candor and good faith" is required of attorneys in patent prosecution because of the nature of the patent application.

When applications are made in the patent field, as in the securities field, the client or practitioner often possesses extensive information concerning the subject of that application. Relevant facts which may be within the client's or practitioner's knowledge include public use or sale of the invention more than one year before the application date, publication of the invention more than one year before the application date, prior invention by someone else, premature or unlicensed filing of a foreign application, and misjoinder of inventors. The information, if brought to the attention of the Patent Office, might materially affect the decision of whether to grant the patent. The failure to disclose information of this type may lead to the issuance of an invalid patent which accords the patentee a monopoly to which he is not entitled.

Some of these facts, such as public use or sale, are more likely to be within the client's personal knowledge, but other facts, such as premature or unlicensed filing of a foreign application might also be known by the patent practitioner. Knowledge of prior patents which are relevant references against the application may only be obtained by the practitioner as a result of a thorough patent search.

The existence of fraud in the procurement of a patent presents the clearest instance of breach of duty in this specialized field. Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co. established "an uncompromising duty" on anyone with a pending application to report to the Patent Office all facts concerning possible fraud involving his application because of the public interest in the economic consequences of patents. While the setting aside of a patent because of fraud requires clear and convincing evidence, a breach of this reporting duty when fraud may

46. This is now expressly required by ABA Code of Professional Responsibility, Disciplinary Rule 7-102(b) (1971).
47. 338 U.S. at 319.
49. Id.
50. Id. § 102(g).
51. Id. §§ 102(b), (d), 185 (1970).
52. Id. § 256 (1970).
53. 324 U.S. 806, 818 (1945).
be involved renders the patent unenforceable under the unclean hands doctrine and obligates the patent owner to pay the challenger's attorneys' fees, and may lead to the disbarment of the offending attorney. In addition, enforcement of a patent obtained by fraud can result in antitrust liability because of the concomitant restraint of trade.

Breach of the reporting duty is less clear-cut when it is based on a failure to cite similar prior art. The presumption of validity which attaches to patents is destroyed or weakened when the patent's validity is attacked on grounds of prior art not cited by the Patent Office. The patent practitioner has an ethical obligation to cite pertinent prior art which is analogous to the attorney's ethical obligation to cite contrary authority. Since the attorney's obligation to cite contrary authority is set forth in an Ethical Consideration rather than in a Disciplinary Rule, it is aspirational in character rather than mandatory. Consequently, the rule's effect is like that of a rule of manners; the bench and bar may frown upon its breach but are unlikely to take legal action.

Just as there is some dispute concerning the ethical responsibility to cite noncontrolling authority, there is conflict over the obligation to disclose prior art which is not anticipatory but which might be pertinent to the obviousness issue. The ABA Code of Professional Responsibility imposes only the ethical obligation to cite directly adverse legal authority in the controlling jurisdiction. Imposition of an ethical obligation to cite authority that is either not directly adverse, but nevertheless somewhat relevant, or from a non-controlling jurisdiction may undermine the attorney's role as an advocate by detracting from the force of his argument. In a sense, such a requirement would make the attorney a representative of both sides of a controversy. Extensive citation of authority which is

56. Cuyahoga County Bar Ass'n v. Whitaker, 42 Ohio St. 2d 1, 325 N.E. 2d 889 (1975).
60. ABA Code of Professional Responsibility, Ethical Consideration 7-23, at 26 (1971).
61. Id. at 1.
merely persuasive can result in confusion and hamper careful scrutiny by the bench of what is actually the most relevant authority. Indeed, some overtaxed judges would not welcome such extensive displays of learning. Certainly, an attorney is obligated to respond with candor to requests from the bench concerning noncontrolling authority, but the desirability of a rule imposing a duty to volunteer such authority must be balanced with the attorney's role as his client's advocate.

The same considerations raised above are also relevant to the patent practitioner's obligation to cite prior art. It may be justifiable, however, to impose a greater obligation upon the patent practitioner. This greater obligation arises because patent prosecution is basically an ex parte process. Even though the examiner assumes a quasi-adversary role, his role as decisionmaker prevents him from being the equivalent of an aggressive opposing counsel who is directly affected by the outcome. In order to protect the public interest it is essential to impose a higher obligation upon the attorney when there is no opponent and when the tribunal has less control over the attorney than does a court. Unfortunately, the ABA Code of Professional Responsibility is primarily directed at the advocate whose activities are examined by his opponent and controlled by a court.64

The circumstances under which there is a duty to disclose prior art in a patent proceeding have been subject to some judicial scrutiny. The Seventh Circuit, in Wen Products, Inc. v. Portable Electric Tools, Inc.,65 held there was no obligation to disclose prior art that did not embody the inventions in the disputed claims. On the other hand, the Fifth Circuit, in Beckman Instruments, Inc. v. Chemtronics, Inc.,66 indicated that it is the applicant's uncompromising duty to disclose any close prior art to the Patent Office. The Beckman court reasoned that the determination of whether the prior art renders the invention obvious should be left to the Patent Office rather than to the judgment of the applicant. The court emphasized that the Patent Office did not have its own research facilities

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65. 367 F.2d 764 (7th Cir. 1966). The court quoted the opinion of a district court with approval: "There has been no showing that under any statute, or rule of the Patent Office, or professional custom, or canon of ethics there is any explicit or implicit obligation resting upon an applicant for a patent or his solicitor to disclose to the Patent Office all the material which he has used in evolving the invention he claims." 767, citing United States v. Standard Elec. Time Co., 155 F. Supp. 949, 952 (D. Mass. 1957), appeal dismissed, 254 F.2d 598 (1st Cir. 1958).
66. 428 F.2d 555, 566 (5th Cir. 1970). The prior art in this case was nearly identical to the invention claimed. Id. at 562-64.
and that the patent prosecution process could not function properly as an "arm's length" adversary proceeding.\(^6\)

The *Beckman* approach raises a question of how close the prior art must be before there is a duty to disclose. A committee appointed by the National Council of Patent Law Associations, in conjunction with a corresponding committee appointed by the Commissioner of Patents, has formulated *Proposed Guidelines Respecting Conduct Before the Patent Office* which attempt to answer this question.\(^6\) These guidelines impose an obligation upon the inventor and his counsel to disclose "prior art which has not been cited by the Examiner, provided [the inventor or his counsel] then has actual knowledge of the prior art and he recognizes that it should be considered in determining whether a claim in a patent application" is non-obvious.\(^6\) The guidelines do not indicate whether or not the obligation is to be mandatory, but their wording suggests that they are only aspirational.

Since the relevant prior art is most frequently discovered in a patentability search conducted by the patent practitioner prior to filing an application, it can be argued that this proposed standard may have an adverse impact upon the quality of applications because some practitioners will be discouraged from conducting searches for fear of finding relevant prior art. The main infirmity in this argument is that most practitioners are aware that the examiner is likely to find the prior art in his own search and that the prospect of drafting an allowable application is enhanced by conducting a thorough search. Nevertheless, the guidelines could penalize the thorough patent practitioner, and do not consider the problem of the less thorough practitioner.

One way to eliminate this unequal treatment would be to require that a patent search be conducted before the application is filed with the results of the search to be disclosed to the Patent Office. The two main difficulties with such an approach are that it would be difficult to develop and apply uniform standards for searches and the costs of patent prosecution would be increased to the detriment of the poorly financed inventor. It can also be argued that no affirmative disclosure obligation should be imposed as the prior art is equally accessible to the practitioner and the examiner. But it must be

\(^6\) *Id.* at 564-65.

\(^6\) Report from W. Hulbert, Chairman, to the National Council of Patent Law Associations, Nov. 20, 1970, in *Guidelines Respecting Conduct Before Patent Office*, 1970 AM. PAT. L. ASS'N BULL. 640 [hereinafter referred to as *Guidelines*]. Formal adoption of these guidelines by the Patent Office was apparently considered, but no action has yet been taken.

\(^6\) *Id.* at 641 (Guideline No. 4).
realized that due to the difficulty of conducting a patent search and given the application load, an examiner will not always find the most relevant prior art. Since this is not a true adversary process, it does not seem unfair to impose a disclosure obligation upon the practitioner in order to protect the public interest.

Unfortunately, the substance of the proposed guidelines is inadequate for the patent practitioner to ascertain which prior art should be brought to the attention of the examiner. This failure to develop an informative standard will create considerable uncertainty among practitioners about the scope of their obligation. Since the easiest standard to apply, one limiting the disclosure obligation to prior art that was directly anticipatory, would make the disclosure obligation virtually meaningless (prior art generally is not directly anticipatory), a higher but more difficult-to-apply standard is required. One means of reducing the confusion would be to supplement the standards with examples similar to those found in the Treasury Regulations of the Internal Revenue Code.

Although prior art may be equally accessible to the patent practitioner and examiner, certain disqualifying facts, such as a statutory bar like public use,\(^7\) may not be so readily discoverable by the Patent Office. The client is only penalized for failure to disclose the facts by being required to pay challenger's attorneys fees if such failure is held to be fraudulent.\(^{71}\) Since the patent can be held invalid solely upon the basis of the statutory bar, until the statutory bar is established, which may never occur, the patent owner enjoys the full patent reward. The proposed guidelines prohibit a patent practitioner from filing or maintaining a claim in a patent application "which he actually knows to be unpatentable because of any statutory bar."\(^{72}\) Even without these guidelines, a patent practitioner is subject to being disciplined by the Patent Office under these circumstances.\(^{73}\) The guidelines do not directly answer the interesting issue of whether there is an obligation to disclose facts\(^{74}\) which the patent practitioner should recognize that the examiner might consider as raising an issue of statutory bar.

\(^{71}\) The inventor could be prosecuted for a false swearing on his oath accompanying the patent application, but this is rarely done. See 18 U.S.C. § 1001 (1970).
\(^{72}\) Guidelines 641 (No. 3).
\(^{73}\) Patent attorneys and agents are required to conform to the standards of ABA Code of Professional Responsibility. See note 42 supra and accompanying text.
\(^{74}\) The patent attorney may decide that the facts do not constitute a statutory bar. In a close case the examiner may reach the opposite conclusion. For example, as to the public use bar there may be a close question as to "experimental use." See Elizabeth v. American Nicholson Pavement Co., 97 U.S. 126 (1878).
Such a disclosure obligation may be implied from the proposed guidelines which recognize the right of the patent practitioner to advocate in good faith "the patentability of a claim if he believes the reasons asserted." Clearly, there should be a higher standard of disclosure in this case than with prior art which is readily available to the examiner. Indeed, the determination of whether an issue of statutory bar ought to be raised should be made by the examiner and not preempted by the patent practitioner.

The nonadversary nature of most patent practice and the peculiar problems encountered therein strongly suggest the need for more detailed ethical rules to govern patent practitioners. As is presently being done in the securities area, a greater obligation to the administrative agency could be imposed upon the patent practitioner in order to enlist his aid in screening patent applications. No doubt the efficiency of the Patent Office could be improved by this course of action, but the improvement would be at the expense of the important attorney-client relationship. In the long run, the imposition of such an obligation could be self-defeating, as clients might withhold possibly invalidating information from their attorneys as was previously suggested in discussion of the securities arena. In adopting detailed standards for patent practitioners, it should be borne in mind that the public does not rely upon their statements to the extent that they rely on the statements of securities attorneys. Perhaps, therefore, the protection of the public interest does not require as much from a patent attorney as it does from a securities specialist.

IV. Canons for Administrative Practice

The ABA Code of Professional Responsibility is largely directed at the trial attorney whether he is before a court or in a comparable adjudicative proceeding before an administrative agency. But as presently constituted, the Code demands that attorneys follow the same standard of conduct in nonadjudicative settings. Although it recognizes the variety of administrative proceedings, the Code does not enunciate tailor-made rules for nonadjudicative proceed-

75. Guidelines 641 (No. 3).
76. Appeals to the Board of Appeals in the Patent Office are adversary in that the government is represented by the Office of Solicitor within the Patent Office. Interference proceedings, which are priority contests between two persons claiming the same invention, are also adversary. 35 U.S.C. § 135 (1970).
77. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-15, at 25 (1971).
ATTORNEYS' RESPONSIBILITIES

The analysis of securities and patent practice illustrates the need for such special rules.

The Code's sweeping prohibition of ex parte communications by a lawyer on the merits of his case with the judge or the decision-maker in an administrative agency is an example of its emphasis on the courtroom attorney. The prohibition is more applicable to adversary proceedings and the Code fails to delineate guidelines for the more difficult problem of ex parte communications in non-adversary proceedings such as rulemaking.

Numerous bills were introduced in Congress between 1957 and 1961 to regulate ex parte communications with administrative agencies. Legislative concern abated as many agencies adopted their own rules to discourage ex parte communications, usually accomplished by denying what the communicator was seeking. Disclosure of those communications that were made enabled adverse parties to assert their positions more effectively. Both the federal Administrative Procedure Act and Model State Administrative Procedure Act contain provisions prohibiting administrative agencies from making certain types of ex parte communications. It is unfortunate that there is no similar code of administrative practice to regulate the ethical conduct of representatives practicing before agencies.

The Code of Professional Responsibility does not define the adversary proceedings in which ex parte communications are prohibited. The prohibition obviously includes contested cases similar to court trials. It should also be interpreted to include administrative proceedings in which conflicting private claims are at issue, even though the proceeding may formally be classified as rulemaking. The risk of undue influence is no less in these instances than in a court trial. For example, the rulemaking procedure is used by the Federal Communications Commission in distributing television channels among various communities. Since this type of distribution can resolve conflicting private claims to valuable broadcasting

78. ABA Code of Professional Responsibility, Disciplinary Rule 7-110(B) (1971).
80. See, e.g., 47 C.F.R. § 1.1251 (1973) (FCC may disqualify a participant in a restricted proceeding who attempts to make an unauthorized ex parte presentation).
82. Uniform Model State Administrative Procedure Act § 13.
84. 47 C.F.R. § 1.572(e) (1973).
rights, the Code should apply to any ex parte communications made in such proceedings.

There are a few types of rulemaking proceedings where it is difficult to decide whether or not ex parte communications should be banned. Among these are the FCC's proceedings to formulate policy on cable television and pay-TV. While ex parte communications in such a proceeding might be beneficial to the agency, any policy it ultimately would formulate directly affects private groups which possess an economic interest in the policy. At the very least, to alleviate any unfair advantage, the agency should make public the substance of the ex parte communications prior to the promulgation of a rule so interested groups have an opportunity to respond. The identity of the person or firm making the ex parte communication should also be disclosed in situations where it will not have the effect of losing a valuable informal contact. Disclosure of ex parte communications should also be made in rulemaking proceedings not involving conflicting private interests because the communication may aid in understanding and interpreting the rule.

Since most rulemaking does not involve conflicting private claims, application of the Code to such rulemaking would bar informal contact on the merits of the rule by attorneys representing industry and interested groups. The expertise of these attorneys and their clients can assist the agency in formulating sound policy and working out the details of the rules. Indeed, in recognition of this expertise, agencies frequently solicit ex parte communications.

Nevertheless, there are certain ex parte communications that should not be made in any type of rulemaking proceeding. For instance, an attorney should not relate without prior notification the activities of a person which are likely to be pivotal to the agency in deciding whether its regulation will encompass that person's activities. To illustrate the application of this proposal, suppose that a pollution control agency is in the process of adopting a regulation setting emission standards for smokestacks. The proposed regulation does not set any emission standard for substance A. An attorney for a firm whose smokestack does not emit substance A informs the agency that X's smokestack emits 50 parts per million of A without notifying X. As a result of this communication, the

85. See Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959), on remand, 19 Radio Reg. 1055 (FCC), remanded for new proceedings, 294 F.2d 742 (D.C. Cir. 1961). The court required reopening of proceedings in which a television channel was assigned to a community on grounds that improper ex parte communications vitiated basic fairness. The assignment affected private parties with conflicting claims to the channel.
agency proposes and adopts an emission standard of 2 parts per million of A. It seems to be commonly assumed that the communication is not unfair to X as he had an opportunity to comment upon the merits of the proposal. However, had the agency known that X's smokestack was emitting only 3 parts per million, it might have set the standard at that level or decided not to set any standard because of the low emissions. It might not occur to X to disclose his emission level in the rulemaking procedure. In a case such as this, where the communication related to a specific person, the attorney making the comment could have notified X. Even if the agency informed X of the communication, fairness seems to require that the communicating attorney, whether he represents a competitor, labor union, or public interest group, also inform X.

The economically valuable rights awarded in adversary proceedings before administrative agencies provide an incentive for a directly affected person to exert improper influence on the decisionmakers. The economic incentive is especially strong when a valuable certificate of public convenience and necessity in the regulated public utility sector of the economy is at stake. The temptation to exert improper influence is even greater because the decision between competing applicants is not based upon adjudicative facts but is largely discretionary with the agency. For example, in most cases the Civil Aeronautics Board can justify awarding an airline route to more than one of the applicants. The Federal Communications Commission can likewise justify an award of a TV channel to more than one of the competing groups. It is very difficult for a losing applicant to obtain reversal of the decision upon judicial review except on procedural grounds or application of incorrect legal standards by the agency. Even if he succeeds in obtaining a reversal, the case is usually remanded for further proceedings in which the original successful applicant is likely to win again because the agency is unshaken in its view that he would be the best operator. The improper influence problem may have been created by the possible inappropriateness of administrative proceedings to allocate economic resources. The inherent nature of the problem suggests that a better procedure for allocating these economic resources is possible and should be devised. For example, valuable operating rights, such as television channels, could be assigned to the highest bidder in an auction. But whatever specific solution is chosen, it is clear that something must be done to alleviate the problem as it exists today.86

86. Levin, Regulatory Efficiency, Reform and the F.C.C., 50 GEO. L.J. 1, 23 (1961).
Another illustration of the ineffectiveness of the present Code as applied to administrative practice is in the area of investigations. Unlike courts, many administrative agencies conduct investigations. These can be divided into two categories: regulatory or informational. A regulatory investigation may result in criminal prosecution or civil action being brought for violation of a rule. An informational investigation may lead to the promulgation of a new regulation, amendment of an existing regulation, or the introduction of legislation by the agency.

Regulatory investigation is similar to a grand jury proceeding in that the agency gathers evidence to determine whether there is a reasonable basis to believe that a violation has occurred. The agency may informally interview witnesses and collect information, or a formal hearing may be held. Because no one is on trial, witnesses and possible respondents do not have the same rights as in an adjudicatory hearing. For example, there is generally no constitutional right to counsel for a person compelled to testify at an investigatory hearing. Because rights are not being adjudicated in regulatory investigations, some modification of the rules governing conduct for attorneys in adjudication is desirable.

A Disciplinary Rule of the Code of Professional Responsibility prohibits a lawyer from delaying a trial or taking "other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." But the Code is silent about the use of dilatory tactics by counsel representing a client being investigated. This problem is less serious in adjudication before a court than in administrative investigations because, in an adjudication, the judge exerts some control over attorneys who use dilatory tactics. This is not the case before an agency, however, where the investigating agency has less control. Special rules to curtail the use of dilatory or obstructionist tactics by counsel for persons being investigated by administrative agencies are needed for agencies to carry out effectively their legislative mandates. Often, counsel for a person being investigated will use such tactics to delay the commencement of a case against a client or to hinder the agency's effort to change a rule.

87. See, e.g., In re Groban, 352 U.S. 330 (1957) (witness before a state fire marshall in the investigation of a suspicious fire is not entitled to counsel). However, the federal Administrative Procedure Act recognizes that a person compelled to appear before the agency or as a party to the action has a right to counsel. 5 U.S.C. § 555(b) (1970).

favorable to his client. The danger of such tactics being successful is greater in administrative investigations than in proceedings before a judge because the investigator usually lacks the stature and experience implicit in the judicial office. The problem arises frequently enough to justify the imposition of new rules.

One of the most common obstructionist tactics is for a person being investigated to refuse to answer questions or comply with a subpoena or other administrative demand for evidence. As an agency generally has no power to punish for contempt, it must apply to a judge for an order directing compliance. Any order issued can be appealed, so a recalcitrant person may be able to avoid compliance for months or years by testing the order in the courts. One simple solution would be to give agencies the power to punish for contempt, but that power often is not exercised wisely by judges and is much more likely to be abused by agencies pursuing a policy to which they are emotionally committed. Because the recalcitrant witness is often advised by counsel at each step, another possible solution to the problem would be to adopt a disciplinary rule prohibiting the attorney from advising or assisting a person under investigation in using the procedures available solely for purposes of delay. This would reduce the effectiveness of using the courts as an instrument to further dilatory tactics.

The Disciplinary Rule dealing with trial delay is not appropriate for administrative investigations as there is usually no opposing party to be harassed or maliciously injured. Accordingly, a disciplinary rule should be adopted to prohibit obstructionist and dilatory tactics that are primarily designed to harass the administrative agency or maliciously prevent it from carrying out its legislative mandate. Such a rule should also obligate the attorney to withdraw from representing a client who engages in such tactics. Whether a particular tactic is used for dilatory or obstructionist purpose in any given instance depends largely upon motive. Because the determination of motive is a subjective inquiry, it is unlikely that any such rule would be vigorously enforced, but its existence might be a restraining influence.

In addition to granting agencies the power of contempt or adopting a new disciplinary rule, a third solution to the problem of delay would be to encourage the administrative agency to promulgate its own procedural rules.

90. See Mead Corp., 62 F.T.C. 1467, 1470 (1963) (real danger of undue delay
The most serious ethical problem involving counsel in the administrative rulemaking process is the presentation of erroneous, misleading, or overly selective data to agencies. Before a substantive rule can be promulgated, it is usually necessary to provide interested parties with advance notice and an opportunity to present their views. This opportunity is generally limited to written submissions or a short oral statement, but occasionally a trial-type hearing is required. In the process, factual information about the client and the problem which is thought likely to persuade the agency is frequently presented, and due to the possible benefit or detriment of the rule to a private party, the potential for misinformation increases.

The dimensions of the problem have grown with the general increase in regulation, but the type of information most frequently misrepresented has shifted towards scientific and technical information because of the disproportionate increase in technological regulation. The possibilities for successful misrepresentation of scientific information have increased because neither the agency nor any member of the public, other than the firms being regulated, usually has the funds and technical capability to conduct verification tests. It is not difficult to misrepresent test data through the test design, the omission of unfavorable data, or the technical misrepresentation of the data itself. The complexity of technology being regulated makes sophisticated misrepresentation difficult to detect. A prime example of the problems encountered is the determination of safety and efficacy of drugs. The results can be distorted by a slight error in the selection of subjects for a double blind study or for an attempt to determine the cause of side effects discovered. A slight change in the side effects discovered can result in a diametrical policy shift for or against a drug. Misrepresentation of technical matter, however, is not confined to the natural sciences. Opinion surveys, which are sometimes submitted to agencies, can also be distorted by improper sample selection or questionnaire design.

The problem of misrepresentation is especially serious because

in investigatory proceedings caused by witness' counsel taking advantage of the inexperienced investigator).

92. E.g., id.
93. See, e.g., UNIFORM MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3 (hearing required upon request of 25 persons).
the rulemaking proceeding is nonadversary, so that parties who might take issue with a factual presentation are often not aware it has even been made. The problem is compounded because factual information is sometimes presented outside formal rulemaking channels. It may be presented to a friend in the agency or to a legislator who has some influence or control over the agency. In contrast to the view in the not-so-distant past that lobbying by attorneys was distasteful or reprehensible, it is now fairly well accepted that counsel may "lobby" for a rule favorable to his client. In fact, these activities constitute a significant part of the time and energy of high-powered attorneys engaged in administrative law practice.

Very little effort has been expended to develop standards of ethics for such practice. Although counsel is prohibited by a disciplinary rule from knowingly making a false statement of fact, the rule is neither sufficiently strict nor detailed enough to be effective in the rulemaking process. Counsel should be held to a higher standard in the rulemaking process because of the paramount public interest in insuring that sound rules are promulgated. The absence of an adversary increases the attorney's temptation to misrepresent the facts and to permit omissions to stand unrectified. Counsel's submission to temptation, coupled with the prevailing attitude that it is all right to play fast and easy with the facts in rulemaking, has resulted in considerable factual distortion in these proceedings. This moral climate may have developed because the misrepresentation does not affect an individual party but only the ethereal "public interest."

Any disciplinary rule adopted ought to apply to misleading omissions of fact as well as false or misleading affirmative statements of fact. The situation in which the attorney has reason to suspect that a statement may be false or misleading should also be within the bar. Again, counsel should be obligated to withdraw from representing a client if the latter makes the misrepresentation and refuses to correct it. Some allowance must be made for minor misrepresentation of technical facts by the attorney who is unskilled in the technical area. However, it is precisely the attorney's lack of skill which should prompt him to question his client more thoroughly in order to discover potential misrepresentation. Such conduct should be strongly encouraged by any rules which are adopted.

But the main improvement will have to be made by the agen-

cies. They cannot automatically set aside a rule adopted in reliance upon a misrepresented fact, as can be done in cases of patents procured through fraud. Unlike a patent, a rule usually affects parties other than the one who made the misrepresentation. Certainly, the agency should reconsider the rule in light of the corrected facts. Another needed change is to modify the rulemaking procedure so that greater reliance is placed upon open hearings which receive statements from interested persons. Because there are frequently more interested persons than can be accommodated in oral hearings, the agencies should publish more of the data and arguments submitted so that other parties can readily and intelligently respond.

Due to the specialized nature of administrative bodies, each of the agencies receiving technical data needs its own set of rules governing the technical data's preparation and submission. It might seem that agencies would have little control over the submission of technical data as it is submitted voluntarily. However, an agency could gain such control by refusing to consider data submitted in violation of its rules. Without discussing the peculiar rules needed by a particular agency, the general thrust that should be taken is readily apparent. For example, a party submitting data should certify that all of the test results were submitted or state the reason for any omission. The test procedure used should be specified in detail unless it is a standard test which is properly identified. The party should also list other tests on the same issue of which he is aware, regardless of who conducted them.

Another problem which occurs in administrative practice is the improper influence exerted by counsel to secure legislators' intervention in investigations, adjudication, or rulemaking. This type of interference is difficult for agencies to control in the absence of legislation limiting such contact. Agencies are naturally sensitive to the power the legislative body has over them. More extensive publication of their contacts might tend to make legislators more circumspect and allow adverse parties an opportunity to counteract their influence. The disclosure approach has a strong appeal in this post-Watergate era.

It would also seem that some limits could be placed upon contact with a legislator by counsel without seriously impinging upon the constitutional right of petition. For example, a disciplinary rule could be adopted prohibiting an attorney from contacting a legislator during the course of an adjudicative proceeding to ask him to influence the agency's decision in favor of the attorney's client.97

97. It is unethical for a practitioner before the I.C.C. "[t]o attempt to sway the
Similarly, contact seeking the discontinuation of an investigation of the attorney's client should be specifically prohibited. The rule should not ban an attorney from seeking the legislator's aid in determining the status of a case, however, as this act alone does not constitute an attempt to influence the decision and agencies are sometimes exceedingly slow in proceeding with a case. When administrative agencies are slow to inform a party of the status of a case, the legislator performs a valuable and appropriate function by intervening.

Care should be taken that the contact ban is not extended to rulemaking except in those cases which affect only the attorney's client. The desirability of unrestrained comment during the process of rulemaking is the same as in the legislative process of investigation and lawmaking. The more persons with diverse interests that provide input during the rulemaking process, the greater is the possibility that erroneous facts and improper influence may be countered. In any event, gagging attorneys is likely to produce more harm by impeding their good faith efforts to prevent agencies from promulgating rules the attorney genuinely regards as unsound.

It can be argued that it is discriminatory to impose limits upon attorneys contacting legislators without limiting nonattorneys. Perhaps this discrimination can be justified because attorneys as a group seem to be more effective than nonattorneys in persuading legislators to intervene. Whether or not this reason is sufficient, the simple realization that attorneys are professionals and should be held to a higher standard as members of a profession provides a sufficient justification.

The Code of Professional Responsibility does not adequately recognize the distinction between advocate and counselor. Most attorneys in administrative law practice spend a large part of their time in the role of counselor, preparing documents for submission to an agency and appearing in a representative capacity for a client in matters not involving litigation. It is especially important to establish rules governing the counselor because his activities shape the future while the advocate deals primarily with events that have already transpired. The counselor's activities are not checked to the same degree as those of an advocate since the lat-

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ter's activities are scrutinized by his opponent and subject to judicial control. It was in the attorney's role of counselor in the rule-making process and in securities practice that the difficult ethical problems analyzed in this article were encountered.

V. CONCLUSION

It should be clear that there is a need for a new set of ethical rules especially tailored for administrative law practice. The next question is who should promulgate the rules. Like the Code of Professional Responsibility, the rules could be adopted by the American Bar Association. But because of the noticeable propensity of groups not to engage in rigorous self-regulation, it may be better if the rules are drafted by a joint committee of the bar and representatives from administrative agencies.

Alternatively, rules could be drafted by each agency for attorneys practicing before it. The trouble with this approach is not only that it would contribute to the morass of government regulation, but also that the rules drafted are likely to be very general in nature, based upon rules that have been adopted by agencies to date. More importantly, this course of action creates a risk that administrative agencies might abuse this power by devising and/or applying rules in a manner which prevents attorneys from opposing agency policies.

Thus, promulgation of a code of professional responsibility for administrative law practice can probably best be accomplished by a joint bar-agency committee. Because the characteristics of each type of proceeding are similar in all agencies, general rules can be drafted for each type of proceeding. However, it may be necessary to draft supplementary rules which cover the special features of particular agencies.

It seems especially appropriate to undertake more self-regulation of administrative law practice in light of the impact of Watergate upon the public image of the bar. If the bar does not choose to regulate administrative law practice more effectively, legislative or administrative bodies may be tempted to do so without consideration of the bar's viewpoint. The result may be the creation of a set of rules which overcorrects for past abuses and which serves the interests of neither the bar nor the public.