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### Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation

Daniel R. Coquillette

*Boston College Law School*, [daniel.coquillette@bc.edu](mailto:daniel.coquillette@bc.edu)

Judith A. McMorrow

*Boston College Law School*, [judith.mcmorrow@bc.edu](mailto:judith.mcmorrow@bc.edu)

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# Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation

DANIEL R. COQUILLETTE\*  
JUDITH A. MCMORROW\*\*

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\* J. Donald Monan, S.J. University Professor, Boston College Law School and Charles Warren Visiting Professor of American Legal History, Harvard Law School. He is Reporter to the Committee on Rules of Practices and Procedure, Judicial Conference of the United States, but this Article obviously does not represent the official views of the Committee or the Judicial Conference.

\*\* Professor of Law, Boston College Law School. We are both extremely thankful to the Boston College Law School Fund for its generous support of this research. Our thanks also go to Diane Ring, David Olsen, Renee Jones, and Eli Wald for sharing their insights on this topic. Jessica Pisano, Ting-Ting Lu, and Shawn Butte offered extraordinary research assistance. As always, Charles Riordan, the Editorial Assistant to the Monan Chair, was invaluable.

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## I. INTRODUCTION: ZACHARIAS AND A NEW PARADIGM

Abandoning a state-based system of attorney regulation for a national and federal scheme has been a percolating question for the last twenty-five years. But the issue received its first in-depth scholarly treatment by Professor Fred Zacharias in his 1994 seminal article, *Federalizing Legal Ethics*.<sup>1</sup> Professor Zacharias predicted that the increasing national character of the legal profession would result in increased pressure to create a uniform code of ethics.<sup>2</sup> Against this pressure is the long tradition of state-based regulation of the legal profession. As often was the case, Zacharias was a prophet and led the way.<sup>3</sup>

In particular, he was quite right that the pressure toward a national legal profession would continue unabated.<sup>4</sup> The regulatory consequence, however, has emerged in a somewhat unexpected form. Federalization of legal ethics is occurring not through a tectonic shift but through a more stealth, incremental approach. Rather than a conceptual, theoretical shift away from state-based regulation, the legal profession has experienced an increased regulatory contextualization of attorney conduct norms, particularly in federal practice.<sup>5</sup> This is sharply demonstrated by federal

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1. Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

2. *See id.* at 335.

3. “Wherefore, behold, I send unto you prophets, and wise men, and scribes . . .” 23 Matthew 23:34 (King James). One was Zacharias. *See id.* at 23:35. What an appropriate parallel to our wise Zacharias!

4. Professor Eli Wald explores this topic in greater detail in Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489 (2011).

5. Judith A. McMorro & Daniel R. Coquillette, *Federal Law of Attorney Conduct: Court Practice*, in 30 MOORE’S FEDERAL PRACTICE §§ 801.02–.05 (3d ed. 2010).

agencies, which increasingly use their power to regulate practitioners to create and enforce supplemental norms for attorneys. In this process, the center of gravity of attorney regulation has continued to move toward an increasing and complex web of federal regulation.<sup>6</sup> This Article will carry on Professor Zacharias's profound insights and prophecies by examining the trends in direct regulation of attorneys through federal law, with a particular focus on expanding agency regulation. We will also touch on international trends that draw on federal treaty obligations to implement international norms of attorney conduct.

The seeds for federal regulation were sown by an unlikely body. The American Bar Association (ABA) was formed in 1878 with the express goal to identify the shared interests and serve as the national representative of the legal profession.<sup>7</sup> This collective, shared interest across state boundaries, coupled with a strong resistance to federally imposed norms, reflected the profession's uneasy relationship with this state-federal tension.<sup>8</sup> As Professor Renee Knake noted in her analysis of the U.S. Supreme Court's 2009 term cases involving lawyer conduct, the Supreme Court has looked to the "ABA as the source of model guidelines for the

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6. See generally Ingrid Epperly, *Who's Afraid of a Uniform Federal Court Bar? Dispelling Fears About Standardizing Admission and Regulation of Attorneys in Federal Courts*, 22 GEO. J. LEGAL ETHICS 811, 812 (2009) (demonstrating that "standardization of admissions and regulation in federal judicial courts will prove not only more cost-efficient for attorneys and clients, but also more effective as a method of maintaining high ethical standards throughout the federal districts nationwide"); Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 768 n.11 (2004) (cataloging a number of commentators who have described the current regulatory scheme for lawyers as increasingly complex); Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. REV. 959 (describing the shift from a state-based system of self-regulation of attorney conduct to federal regulation based on Federal Rule of Civil Procedure 11); Jason Mehta, *The Development of Federal Professional Responsibility Rules: The Effect of Institutional Choice on Rule Outcomes*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 57 (2007) (analyzing the appropriate institutional actors and appropriate considerations for the development of future professional responsibility rules).

7. See EDSON R. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* 3-4, 17-18 (1953); CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 562 (1911); see also *About the American Bar Association*, AM. BAR ASS'N, [http://www.abanet.org/about/?gnav=global\\_about\\_lead](http://www.abanet.org/about/?gnav=global_about_lead) (last visited Dec. 28, 2010) ("ABA Mission: To serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.").

8. Professor Renee Knake explored the increasing constitutional dimensions of lawyering in Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499 (2010).

profession and as an advocate of practicing lawyers in filing amicus curiae briefs.”<sup>9</sup> The ABA, and state bar norms, which are typically based on the *ABA Model Rules*, can serve as a source of national core values.

But, ironically, the thrust of the movement toward federalization has come not through federal articulation of national core values. That task continues to be led by state bars and state regulatory apparatus, and the ABA and the American Law Institute (ALI)<sup>10</sup> as national entities.<sup>11</sup> The federal movement is to supplement, and occasionally change, the state-based vision to adapt to the needs of federal practice.<sup>12</sup> This is *federalization through contextualization*. If legal practice is shaped by a hundred pokes of legal regulation, then for many lawyers an increasing percentage of those pokes comes from federal law.<sup>13</sup> Expanding federal

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9. *Id.* at 1565.

10. The American Law Institute’s *Restatement of the Law Governing Lawyers* (2000), as is typical of ALI Restatements, draws heavily on state rules and cases to define national core values. See Daniel R. Coquillette, *REAL ETHICS FOR REAL LAWYERS* 4–9, 258–61 (2005).

11. The appropriateness of the ABA’s leadership has been challenged by Andrew Kaufman, who would favor deferring instead to the Conference of Chief Justices and the Judicial Conference of the United States. See Andrew L. Kaufman, *Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters*, 75 *TUL. L. REV.* 149, 157–59 (2000). On several occasions, the Committee on Rules of Practice and Procedure of the Judicial Conference has considered adopting the Federal Rules of Attorney Conduct, but no actual rule proposals have been made. See *FED. JUDICIAL CTR., WORKING PAPERS OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE* 223–34, 335–409 (1997); McMorrow & Coquillette, *supra* note 5, at §§ 802.21–23; see also Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 *GEO. WASH. L. REV.* 460 (1996). Whether the Judicial Conference has the power to adopt federal rules directly regulating attorney conduct under the Rules Enabling Act, 28 U.S.C. §§ 2073–2074 (2006), has been challenged. See generally Fred C. Zacharias & Bruce A. Green, *Federal Court Authority To Regulate Lawyers: A Practice in Search of a Theory*, 56 *VAND. L. REV.* 1303 (2003) (identifying the different potential sources of regulatory authority and highlighting the uncertainty of their reach). But these challenges may be literally academic in two ways: (1) federal local rules already de facto directly regulate attorney conduct in federal courts, and (2) when uniform federal rulemaking was being examined, bills were introduced in Congress giving the Judicial Conference and its rules committees direct congressional authority to adopt uniform Federal Rules of Attorney Conduct. See McMorrow & Coquillette, *supra* note 5, at §§ 802.20–23.

12. Other interesting proposals that could support this federalization trend include Professor Carol Needham’s argument that all lawyers who have been admitted to a state bar should be free to give advice on federal law. See Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 *U. KAN. L. REV.* 453, 456 (1997). This would uncouple the requirement that the advice be under the umbrella of agency authorization.

13. This phenomenon of expanded regulation from sources outside the bar has been well developed by many commentators, including Professor Zacharias, whose work is being honored in this memoriam. See, e.g., Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*, 44 *ARIZ. L. REV.* 873 (2002); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of*

law increases the range of criminal penalties to which lawyers are subject. Lawyers involved in federal securities practice, immigration, tax, patent, labor, and many other areas must be ever more attentive to the regulatory power of the agencies before which they practice.<sup>14</sup> These agencies often focus on particular role concerns. Recently, the Securities and Exchange Commission (SEC) has focused on in-house counsel to send signals about the advising role.<sup>15</sup> The Internal Revenue Service (IRS) has sharpened the tax lawyer's obligation when advising on tax shelters to prevent the abuse of lawyer services.<sup>16</sup> Immigration has given a particular emphasis on the lawyer's role in not facilitating sham marriages,<sup>17</sup> and the patent office continues to send signals about the importance of full and accurate disclosure.<sup>18</sup>

Many have noted the increasing emphasis on the lawyer as gatekeeper.<sup>19</sup> Although much passion and attention was directed to the SEC efforts to increase the gatekeeper role, other agencies were sharpening that vision of lawyer conduct and enhancing the gatekeeper role within the needs of the particular institutional setting.

This contextualization of practice also gives fertile ground for continued research about institutional choices and competency in regulating attorneys.<sup>20</sup> This regulatory approach allows for agency perspectives to be reflected in the law of lawyering. This, of course, has some challenges, including concern of capture, unease if the regulatory approach involves opposing counsel having the power to institute professional sanctions, and inconsistencies of the regulatory approach with core values. Although occasional conflicts and tensions occur, our robust experience with federalism provides a mechanism to work through those differences. It is not merely using the Supremacy Clause of the U.S. Constitution to declare that federal regulation trump state rules. A more complex

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*Law Practice*, 30 OKLA. CITY U. L. REV. 559 (2005); Fred C. Zacharias, *The Myth of Self Regulation*, 93 MINN. L. REV. 1147 (2009).

14. See *infra* Part II.B.

15. See *infra* Part II.B(1).

16. See *infra* Part II.B(3).

17. See *infra* Part II.B(2).

18. See 37 C.F.R. § 1.56(a) (2009); Hymel, *supra* note 13, at 903–04; *infra* Part II.B(4).

19. See Knake, *supra* note 8, at 1560–64.

20. See generally Symposium, *Institutional Choices in the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996) (discussing the question of who should regulate lawyers).

conversation occurs between and among these various interests to discuss and harmonize (eventually) the varying perspectives.

## II. FEDERALIZATION: TAKING STOCK

Federalization of legal ethics has come from four different methods, each lending wind to the sails of federalization.

### A. *Substantive Federal Statutes and the Rules Enabling Act as Regulating Attorneys: Some Examples*

One trend toward federalization comes from the application of generally applicable federal substantive law to lawyering activities, shifting the risk-management assessment of lawyers.<sup>21</sup> Lawyers have always been subject to generally applicable laws, both federal and state, and our legal history is dotted with examples of use of those provisions against attorneys. Criminal law is a prime example. Clarence Darrow was charged and acquitted of bribing a juror, with a second trial ending in a hung jury.<sup>22</sup> Howe and Hummell were infamous legends in the New York bar at the turn of the century before the firm imploded after Hummell's conspiracy conviction.<sup>23</sup> As Professor Bruce Green notes, criminal law can both establish standards of conduct for lawyers and influence the development of disciplinary standards.<sup>24</sup>

With the rapidly increasing volume of federal law, it is almost inevitable that there will be a corresponding increase in application of that federal law to lawyers.<sup>25</sup> The possibilities are expansive. Conspiracy

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21. For an interesting discussion of risk management in law, see Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909 (2006); and Charles W. Wolfram, *Lawyer Crimes: Beyond the Law?*, 36 VAL. U. L. REV. 73 (2001).

22. See GEOFFREY COWAN, *THE PEOPLE V. CLARENCE DARROW: THE BRIBERY TRIAL OF AMERICA'S GREATEST LAWYER* 433 (1993).

23. CAIT MURPHY, *SCOUNDRELS IN LAW: THE TRIALS OF HOWE & HUMMEL, LAWYERS TO THE GANGSTERS, COPS, STARLETS, AND RAKES WHO MADE THE GILDED AGE* 247–48, 262–67 (2010).

24. See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 343 (1998); see also Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 HOFSTRA L. REV. 353, 353 (2007) (detailing the story of John Palmieri's defense of John J. Delane in the year 1915, the subsequent debate over Palmieri's conduct during the trial, and "efforts to locate a line between a permissibly zealous defense and an improperly overzealous one").

25. The Duke Conference of May 10–11, 2010, sponsored by the Judicial Conference of the United States, included extensive discussion of expanded attorney regulation to prevent discovery abuse, particularly spoliation of electronic evidence. See JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION § III(B) (2010) [hereinafter REPORT TO THE CHIEF

and obstruction of justice loom in the background.<sup>26</sup> Charges of making false statements to the government and perjury are risks for those who either intentionally lie or fool themselves into unsupportable factual distinctions.<sup>27</sup> Federal bankruptcy law prohibiting any person from “knowingly and fraudulently mak[ing] false declarations” was the basis for a criminal prosecution of Milbank Tweed partner John Gellene, whose story is told with riveting effect in Professor Milton Regan’s book *Eat What You Kill: The Fall of a Wall Street Lawyer*.<sup>28</sup> Class action law firms have been indicted for sharing fees with clients.<sup>29</sup> Lawyer Lynne Stuart was convicted of conspiracy to defraud the United States by violating the special administrative measures imposed on her client.<sup>30</sup> Immigration lawyers have been criminally charged for engaging in immigration fraud, particularly in the sham marriage area.<sup>31</sup> Deliberate ignorance in the face of client criminal conduct is risky behavior for a lawyer.<sup>32</sup> And criminal contempt can be brought against lawyers for conduct deemed to interfere with the administration of justice.<sup>33</sup> Although not targeting the lawyers for criminal conduct, in criminal investigations against corporate clients, the Department of Justice has, in

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JUSTICE]. But whether the Conference will result in new federal rules remains to be seen.

26. See, e.g., *United States v. Cueto*, 151 F.3d 620, 632 (7th Cir. 1998) (“If lawyers are not punished for their criminal conduct and corrupt endeavors to manipulate the administration of justice, the result would be the same: the weakening of an ethical adversarial system and the undermining of just administration of the law.”); *United States v. Cintolo*, 818 F.2d 980, 983 (1st Cir. 1987) (involving a lawyer who was convicted of conspiracy to obstruct justice).

27. See, e.g., *United States v. Baum*, 32 F. Supp. 2d 642, 643 (S.D.N.Y. 1999).

28. *United States v. Gellene*, 182 F.3d 578, 585–86 (7th Cir. 1999) (criminal prosecution under 18 U.S.C. § 152(3) (2006)); MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004).

29. See Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153, 159 (2008).

30. See *United States v. Stewart*, 590 F.3d 93, 108 (2d Cir. 2009). For a very interesting analysis of issues raised by lawyer solidarity with one’s client, see Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173 (2003).

31. See, e.g., *United States v. Ramos Algarin*, 584 F.2d 562 (1st Cir. 1978).

32. See, e.g., *United States v. Wuliger*, 981 F.2d 1497, 1505 (6th Cir. 1992) (overturning wiretap conviction of a lawyer who used tapes made by the client, and noting that “[a]lthough an attorney must not turn a blind eye to the obvious, he should be able to give his clients the benefit of the doubt”).

33. See, e.g., *United States v. Thoreen*, 653 F.2d 1332, 1339–41 (9th Cir. 1981). In obstruction of justice enforcement, there is a safe harbor for a bona fide legal defense, but it is an affirmative defense that must be raised and proved by the defendant. See *United States v. Kloess*, 251 F.3d 941, 948–49 (11th Cir. 2001).



the words of one commentator, “a trend towards using the criminal law and the government’s investigatory tools against lawyers because of what appears to be a deep-seated suspicion of legal advice as something harmful or inappropriate.”<sup>34</sup> And some have urged criminalization of the legal advice given by lawyers in the Office of Legal Counsel concerning the legality of torture.<sup>35</sup>

Civil actions have also swept up attorneys into the fray. The savings and loan crises in the late 1980s and early 1990s generated civil enforcement actions by the Office of Thrift Counsel against attorneys.<sup>36</sup> Subsequent malpractice actions for violation of federal standards helped reshape the expectations in this area of practice as well.<sup>37</sup> Aiding and abetting liability lurks in the background as a possible theory.<sup>38</sup>

Similarly, the SEC has been aggressive in bringing actions against attorneys. SEC Chair Christopher Cox publicly stated in 2007 that “[i]t’s because the roles of gatekeeper and watchdog come with a great deal of responsibility that, when professionals—lawyers or accountants—fail to live up to their responsibility, the Commission will bring enforcement actions.”<sup>39</sup> The SEC has brought actions against attorneys for backdating and insider trading, and for failing to engage in a

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34. Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 674 (2005).

35. See Julian Ku, *The Wrongheaded and Dangerous Campaign To Criminalize Good Faith Legal Advice*, 42 CASE W. RES. J. INT’LL. 449, 450 (2009).

36. See Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985, 988–89 (1993); William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 244 (1998).

37. See Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 97 (2008); Anthony E. Davis, *The Long-Term Implications of the Kaye Scholer Case for Law Firm Management—Risk Management Comes of Age*, 35 S. TEX. L. REV. 677, 678, 681 (1994); Susan M. Freeman, *Are DIP and Committee Counsel Fiduciaries for Their Clients’ Constituents or the Bankruptcy Estate? What Is a Fiduciary, Anyway?*, 17 AM. BANKR. INST. L. REV. 291, 362 & n.332, 381 n.417 (2009); John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 973–78 (2009); Meredith E. Level, Note, *Do the Shoes Fit? Creating Federal Common Law in Legal Malpractice Cases When a Banking Regulator Is a Party*, 23 STETSON L. REV. 893, 902–03 (1994).

38. See generally *SEC v. Fehn*, 97 F.3d 1276, 1280 (9th Cir. 1996) (finding that a lawyer’s conviction of aiding and abetting securities violations justified permanent injunction against future violations); Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers Be “Privileged” To Assist Their Clients’ Wrongdoing?*, 29 PACE L. REV. 75 (2008) (analyzing state law claims primarily).

39. Christopher Cox, Chairman, Sec. & Exch. Comm’n, Address to the 2007 Corporate Counsel Institute (Mar. 8, 2007), <http://sec.gov/news/speech/2007/spch030807cc.htm>. There have been similar initiatives in the past. See A.A. Sommer, Jr., Comm’r, Sec. & Exch. Comm’n, Address Before the Banking Corporation and Business Law Section of the New York State Bar Association: The Emerging Responsibilities of the Securities Lawyer (Jan. 24, 1974), <http://www.sec.gov/news/speech/1974/012474sommer.pdf>.

reasonable investigation before issuing an opinion that bonds would be tax exempt.<sup>40</sup> In recent years, the SEC has gone after general counsel in particular.<sup>41</sup> Some efforts were more successful than others, but the legal profession has taken note of the effort.<sup>42</sup>

A growing body of statutory and procedural provisions also shapes the attorney-client relationship in targeted areas. Congress has limited the use of legal services money, prohibiting class actions, attorneys' fees and imposing other restrictions.<sup>43</sup> The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) prohibits lawyers, who are debt relief agents within the meaning of the Act, from advising clients to take on more debt before filing for bankruptcy.<sup>44</sup> Class action representation has been reshaped by both legislation and changes to the Federal Rules of Civil Procedure. Indeed, acting pursuant to congressional authority under the Rules Enabling Act,<sup>45</sup> the Judicial Conference of the United States has directly regulated attorney conduct in filing frivolous actions,<sup>46</sup> in representing class plaintiffs,<sup>47</sup> and in spoliation of evidence.<sup>48</sup> Recent proposals growing out of the 2010 Duke Conference on Civil Procedure, now pending before the Civil Rules Advisory Committee, could include greater attorney regulation in regard to spoliation of

40. See, e.g., *Weiss v. SEC*, 468 F.3d 849 (D.C. Cir. 2006).

41. See generally W. Hardy Callcott & Abigail C. Slonecker, *A Review of Recent SEC Actions Against Lawyers*, 42 REV. SEC. & COMMODITIES REG. 71, 77–78 (2009), available at [http://www.bingham.com/ExternalObjects/Docs/Callcott\\_Slonecker\\_RSCR\\_3-18-09\\_\(4152\).pdf](http://www.bingham.com/ExternalObjects/Docs/Callcott_Slonecker_RSCR_3-18-09_(4152).pdf) (“In over a third of the investigations that resulted in SEC enforcement actions, in-house counsel for the issuers were charged with violations. The issuers’ outside counsel were not charged in any of these cases, although the SEC investigated some outside counsel.” (footnote omitted)).

42. See, e.g., *Fehn*, 97 F.3d at 1276; *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044 (2d Cir. 1976); *SEC v. Nat’l Student Mktg. Corp.*, 457 F. Supp. 682, 687 (D.D.C. 1978) (holding that although defendants violated the securities laws, the injunction was denied because the SEC did not establish that defendants would violate securities laws in the future).

43. See Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L.J. 873, 874 (2002); Elisabeth Smith Bornstein, Comment, *From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys*, 2003 U. CHI. LEGAL F. 693, 693.

44. 11 U.S.C. § 526(a)(4) (2006); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010).

45. 28 U.S.C. §§ 2073–2074 (2006).

46. FED. R. CIV. P. 11.

47. *Id.* 23.

48. *Id.* 26.

electronic evidence.<sup>49</sup> Although we should not overemphasize these statutory and rulemaking provisions, federal law and federal liability play an important role in shaping one or more norms of attorney conduct.

### *B. Federal Agency Authority and Regulating Attorneys*

Most federal agencies play a dominant role in specialty areas of law, and many of these agencies directly regulate the conduct of attorneys who appear before them. Several factors support this independent agency regulation. In many contexts, such as patent, labor, and tax, both lawyers and authorized nonlawyer practitioners can represent clients before the agency.<sup>50</sup> In these “mixed-profession” settings, “there is a clear need for some form of ethical regulation beyond that provided by the individual professional organizations.”<sup>51</sup>

Representation before agencies also involves particular practice context, so that agency-level regulation tailors the professional regulation to reflect the unique aspects of the practice setting.<sup>52</sup> This is an example of the context-driven, middle-level approach advocated by Professor David Wilkins in *Legal Realism for Lawyers*.<sup>53</sup>

Agency practice also provides a rich context in which the public interest can be identified with greater specificity. For example, whether imposing a gatekeeper role is good or bad policy requires us to understand the role lawyers play within a particular context. What might be quite tolerable in an advisory capacity might be much less tolerable in a litigation setting.<sup>54</sup>

Representation before agencies also typically puts a premium on specialized knowledge of the attorneys. That offers advantages to repeat actors, who may have an incentive to curry favor with the agency.<sup>55</sup>

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49. See REPORT TO THE CHIEF JUSTICE, *supra* note 25.

50. See *infra* Part II.B

51. BERNARD WOLFMAN ET AL., *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* 6 (4th ed. 2008) (“It is important that there be uniform standards for the various professionals to the extent that they perform identical services in the tax market.”).

52. See Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 841 (2002) (“The assumptions that all lawyers and all clients are the same have led to perhaps the most dramatic delusion inherent in the modern professional codes; namely, that a single set of rules should apply equally to, and can adequately govern, all legal representation.”).

53. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

54. See JOHN C. COFFEE JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* (2006); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1293–95 (2003).

55. See Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1106 (1995) (“[T]he

Because of the fluid movement between the public and private sector, there is also concern about the corrosive effect on public officials who may be seeking lucrative future jobs with the lawyers who appear before the agency.<sup>56</sup> Although federal conflict-of-interest laws address common concerns among the federal agencies, these issues can be fine-tuned by agency-level regulations.<sup>57</sup>

This knowledge-specific environment also has risks. There is a concern of capture, so that “opponents (especially repeat players) have a variety of incentives to enlist” attorney conduct mechanisms “to advance their own goals.”<sup>58</sup> Allowing agencies the power to regulate lawyers who are sometimes their adversaries in a litigation context could also be used to unduly pressure opposing counsel or drive a wedge between the attorney and client.<sup>59</sup>

In a quest for more context for these generalities, set out below is a brief description of six federal agency systems that regulate the conduct of attorneys who appear before the agency. One or two instances of agency regulation might be an anomaly. The multiple federal agencies that regulate attorneys indicate a trend.

### *1. Corporate Lawyers and the Securities and Exchange Commission*

The SEC’s expanded regulation of attorneys has received extensive commentary in the last decade.<sup>60</sup> The Sarbanes-Oxley Act clarified the SEC’s authority to regulate attorneys, and the SEC has taken that

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importance to clients of hiring lawyers with expertise and a proven track record in representing clients before particular regulatory agencies creates a situation in which lawyers representing clients before agencies easily are ‘captured’ by the agencies before whom they practice.”).

56. Our thanks to Professor Renee Jones of Boston College Law School, who is currently researching this topic.

57. See Ethics in Government Act of 1978, 5 U.S.C. § 402 (2006); 18 U.S.C. §§ 201–227 (2006).

58. Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 *FORDHAM L. REV.* 1615, 1617 (2002).

59. See Julie Andersen Hill, *Divide and Conquer: SEC Discipline of Litigation Attorneys*, 22 *GEO. J. LEGAL ETHICS* 373, 373 (2009).

60. See McMorrow & Coquillette, *supra* note 5, at § 815; Peter J. Henning, *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who Better To Prevent Corporate Crime?*, 8 *BUFF. CRIM. L. REV.* 323 (2004); Hill, *supra* note 59.

authority to heart.<sup>61</sup> SEC Rule 102(e) provides authority to discipline attorneys who lack the “requisite qualifications to represent others,” “character or integrity,” or who have “engaged in unethical or improper professional conduct,” or “willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.”<sup>62</sup>

The SEC regulation of attorneys emerges in three distinct ways. First, as addressed above, the SEC has aggressively pursued some lawyers for securities violations. In particular, the SEC has pursued in-house counsel for backdating options, charging those attorneys with primary violations of the securities law. In some instances the lawyer violated securities laws as a private actor. But in other circumstances the SEC was challenging the lawyer for lawyering activity.<sup>63</sup>

The second form of SEC regulation occurs through rule 102(e) proceedings, or closely related obligations imposed by Sarbanes-Oxley and the regulations under it, against counsel who assist in transactional activities. These rule 102(e) proceedings can be closely linked to primary securities violations. A primary violation will result in an exclusion from practice before the SEC under rule 102(e), so those enforcement decisions obviously have a profound effect on the attorney-client relationship. Both the underlying substantive allegation and the professional sanction under rule 102(e) can be resolved during a settlement in which the attorney admits to the securities violation and agrees to be suspended from practice.<sup>64</sup> The scope of the willful violation provision is enhanced by the Commission’s view that *willful* means only that the respondent intentionally committed the act that was found to have violated the securities laws.<sup>65</sup>

A third body of cases sanction attorneys for litigation misconduct. This poses an interesting conceptual challenge because the SEC is on one side of the litigation and is sanctioning an opposing counsel. As Professor Julie Andersen Hill notes, this raises some significant theoretical concerns about potential abuse.<sup>66</sup>

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61. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745; Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. pt. 205 (2010).

62. 17 C.F.R. § 201.102(e)(1) (2010).

63. See, e.g., SEC v. Fehn, 97 F.3d 1276 (9th Cir. 1996).

64. See, e.g., James A Fitzhenry, Exchange Act Release No. 46,870, Accounting and Auditing Enforcement Release No. 1670 (Nov. 21, 2002) (five-year suspension by consent); Craig Scott, SEC Litigation Release No. 19,077 (Feb. 14, 2005) (three-year suspension by consent).

65. J. WILLIAM HICKS, 17 CIVIL LIABILITIES: ENFORCEMENT AND LITIGATION UNDER THE 1933 ACT § 2:115 (2010).

66. Hill, *supra* note 59.

## 2. *Immigration Lawyers and the Executive Office of Immigration Review*

Immigration practitioners, both attorneys and nonattorneys, have also experienced an increased regulation of their conduct. The Executive Office of Immigration Review (EOIR), a federal agency under the Department of Justice that oversees immigration courts, has the authority to determine both who may practice and the norms of conduct.<sup>67</sup> In June 2000, the EOIR, in conjunction with the now defunct Immigration and Naturalization Service (INS), strengthened and clarified the Rules and Procedures for Professional Conduct for Practitioners. The EOIR regulations subdivided the power to regulate based on the context within the immigration system, separating appearance before adjudicative bodies, for example, asylum proceedings and adjustment interviews, and separately authorized the EOIR to engage in similar investigations for issues in appearances before the board and immigration courts.<sup>68</sup> Amended again in December 2008, the strengthened regulations focus in particular on issues of neglect by practitioners—failure to abide by client instructions, lack of reasonable diligence, competence and promptness, and failure to stay in contact with clients—and lack of candor before the EOIR tribunals.<sup>69</sup> One goal of the 2008 amendments was to make the EOIR's professional conduct regulations “more consistent with the ethical standards applicable in most states and the *American Bar Association's Model Rules of Professional Conduct*.”<sup>70</sup>

The EOIR is not shy about establishing and publishing these norms. A link to the list of disciplined practitioners and the most recent disciplinary actions appear on the homepage of its website.<sup>71</sup> Over 400 names appear on the list of disciplined practitioners.

The regulations give adjudicating officials of the immigration court and the Board of Immigration Appeals the authority to sanction “any

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67. 8 C.F.R. § 1292.1 (2010). See EXEC. OFFICE OF IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 15–30, available at <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%202.pdf>.

68. See 8 C.F.R. §§ 3, 292 (2010); 65 Fed. Reg. 39,513 (June 27, 2000).

69. News Release, Exec. Office of Immigration Review, EOIR Implements Regulation To Enhance Attorney Discipline Program (Jan. 6, 2009), available at <http://www.justice.gov/eoir/press/09/AttyDiscReg010609.pdf>.

70. *Id.* (emphasis added).

71. *List of Disciplined Practitioners*, EXEC. OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/> (last updated July 9, 2010).

practitioner[,] if it finds it to be in the public interest to do so.”<sup>72</sup> It appears that a significant majority of those actions are instances of reciprocal discipline, in which the EOIR is adopting the recommended discipline from the state bar.<sup>73</sup> Even with a heavy focus on reciprocal discipline, there is an edginess to seeing a list of more than 400 lawyers and practitioners listed in such a public and prominent fashion. This public presentation supports the EOIR’s goal of protecting vulnerable clients from incompetent or unethical practitioners. It also has the effect of sending a signal to immigration practitioners that the EOIR is monitoring lawyering conduct.

### 3. *Tax Lawyers and the Treasury Department*

Tax attorneys have long understood that their ethical obligations are determined heavily by federal law and norms of practice before the tax courts. The Secretary of the Treasury is authorized by federal statute to regulate the practice of representative practitioners.<sup>74</sup> The Treasury Department regulations, known as Circular 230, govern tax practitioners, both lawyers and nonlawyers.<sup>75</sup> Circular 230 is a substantial set of regulations that establishes an Office of Professional Responsibility and sets out who may practice.<sup>76</sup> Circular 230 also sets out particular duties and restrictions in practice before the IRS, including circumstances when the lawyer has knowledge of a client’s omission,<sup>77</sup> obligations to exercise due diligence,<sup>78</sup> practice by former government employees or their partners and associates,<sup>79</sup> fees,<sup>80</sup> return of client records,<sup>81</sup> conflicts of interest,<sup>82</sup> solicitation,<sup>83</sup> and standards for advising with respect to tax returns,<sup>84</sup> among other topics. The Circular gives special attention to issues of “[i]ncompetence and disreputable conduct.”<sup>85</sup> Anyone who has

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72. 8 C.F.R. § 1003.101(a) (2010).

73. We have begun an empirical examination of this database, which hopefully will provide more insights into the pattern of disciplinary actions by the EOIR.

74. 31 U.S.C. § 330 (2006).

75. 31 C.F.R. § 10 (2010). For an early history of Circular 230, see Dennis J. Ventry Jr., *Filling the Ethical Void: Treasury’s 1986 Circular 230 Proposal*, 112 TAX NOTES 691 (2006).

76. 31 C.F.R. §§ 10.1–.8 (2010).

77. *Id.* § 10.21.

78. *Id.* § 10.22.

79. *Id.* § 10.25.

80. *Id.* § 10.27.

81. *Id.* § 10.28.

82. *Id.* § 10.29.

83. *Id.* § 10.30.

84. *Id.* § 10.34.

85. *Id.* § 10.51.

corresponded by e-mail with a tax lawyer has seen the standard Circular 230 disclaimer at the end of the e-mail.

In the early 1980s government officials threatened government action if the bar did not take action to establish professional standards in tax shelter opinions.<sup>86</sup> Both the bar and IRS would take action.<sup>87</sup> By the mid-1980s tax practitioners began noting that “professional standards in the tax marketplace are undergoing dramatic change.”<sup>88</sup> Circular 230 has been amended over time to strengthen the obligations of tax attorneys, including the 2004 amendments to impose stronger due diligence requirements on tax attorneys who provide tax shelter advice.<sup>89</sup> More recent congressional and Treasury action now requires that the advice position have a “more likely than not” chance of succeeding on the merits, and if not, the position must be disclosed to the IRS.<sup>90</sup> The IRS has also clarified the underlying standards for tax shelters, creating a flurry of legal commentary on the content of the legal rules.<sup>91</sup> But a dual track of regulating both the content of the rules applied to the taxpayers and those who assist clients in applying the rules, namely, tax practitioners, increases the chance of compliance.

As with all regulations, the real question is whether these attorney conduct norms have meaning in the lives of tax lawyers. The enhanced standards for tax shelter advice have continued to draw the attention of practitioners, with a flurry of articles and practice commentary.<sup>92</sup> As a tax attorney, it would be hard to ignore the enforcement actions of the IRS against attorneys. In 2005, the law firm of Jenkins & Gilchrist closed after admitting that it owed a penalty of \$76 million to the IRS for

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86. James P. Holden, *New Professional Standards in the Tax Marketplace: Opinions 314, 346 and Circular 230*, 4 VA. TAX REV. 209, 217 (1985).

87. *Id.* at 217–18.

88. *Id.* at 209.

89. See Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 79, 95–97 (2006).

90. See, e.g., Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1, 31 (2004).

91. See Susan Cleary Morse, *The How and Why of the New Public Corporation Tax Shelter Compliance Norm*, 75 FORDHAM L. REV. 961 (2006); Jay A. Soled, *Tax Shelter Malpractice Cases and Their Implications for Tax Compliance*, 58 AM. U. L. REV. 267 (2008).

92. See David J. Moraine, *Loyalty Divided: Duties to Clients and Duties to Others—The Civil Liability of Tax Attorneys Made Possible by the Acceptance of a Duty to the System*, 63 TAX LAW. 169 (2009).



abusive and fraudulent tax shelters.<sup>93</sup> The IRS public statement accompanying that announcement declared that “[p]ursuing abusive tax shelters is a top priority for the IRS.”<sup>94</sup> Tax attorneys risk a civil preparer penalty for understatement of liability or claim for a refund when there was not a reasonable belief or basis for the position taken.<sup>95</sup> No one would be surprised to learn that submitting false or misleading information in connection to with a client’s return can result in suspension from practice.<sup>96</sup> And a tax attorney who fails to file her own tax return is at serious risk of being barred from practice before the IRS.<sup>97</sup>

Of course, formal agency sanctions are not the only concern. High-profile investigations by Congress or the IRS can be both embarrassing and time-consuming. The IRS has also entered into public settlement agreements that publicize investigations, creating a public reprimand. For example, in 2007 the IRS Office of Professional Responsibility (OPR) announced a settlement with two attorneys concerning a municipal bond issuance.<sup>98</sup> The OPR had alleged inadequate due diligence.<sup>99</sup> The attorneys settled by agreement to comply fully with practices implemented by their current firm in its public finance group.<sup>100</sup>

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93. I.R.S. News Release IR-2007-71 (Mar. 29, 2007), available at <http://www.irs.gov/pub/irs-news/ir-07-071.pdf> (“[T]his should be a lesson to all tax professionals that they must not aid or abet tax evasion by clients or promote potentially abusive or illegal tax shelters, or ignore their responsibilities to register or disclose tax shelters . . .”).

94. *Id.* (internal quotation marks omitted)

95. See 26 U.S.C. § 6694(a) (2006 & Supp. II 2009). For examples of enforcement of this provision, see *Goulding v. United States*, 957 F.2d 1420, 1423–24 (7th Cir. 1992), which states, “Section 6694 of the Internal Revenue Code penalizes income tax return preparers for understatements of taxpayer’s liability which result from negligent disregard of rules and regulations by the return preparer or from [willful] attempts by the return preparer to understate the tax due.” Section 6694(b) imposes a separate penalty for “willful attempt” to understate liability or a “reckless or intentional disregard of rules and regulations.” See 26 U.S.C. § 6694(b) (2006 & Supp. II 2009). This preparer penalty is subject to limitations that it does not apply if the preparer had reasonable cause for the understatement and the preparer acted in good faith. See WOLFMAN ET AL., *supra* note 51, at 105; see also I.R.S. Notice 2008-13, 2008-3 I.R.B. 282; T.D. 9436, 2009-3 I.R.B. 268.

96. See, e.g., I.R.S. News Release IR-2010-19 (Feb. 5, 2010), available at <http://www.unclefed.com/Tax-News/2010/nr10-19.html>.

97. See, e.g., *Owrutsky v. Brady*, No. 89-2402, 1991 WL 18156, at \*1 (4th Cir. Feb. 19, 1991) (holding attorney who failed to file tax returns disbarred from practice before IRS for voluntary and intentional violation of a known legal duty, even though the attorney was eligible for refunds); I.R.S. News Release IR-2010-27 (Mar. 4, 2010), available at <http://www.unclefed.com/Tax-News/2010/nr10-27.html> (discussing attorney barred from practice before the IRS for forty-eight months for failure to file one federal tax return and filing another five returns late).

98. I.R.S. News Release IR-2007-197 (Dec. 6, 2007), available at <http://www.unclefed.com/Tax-News/2007/nr07-197.html>.

99. *Id.*

100. *Id.*

Perhaps the most effective sanction is a successful malpractice action. Tax lawyers should be particularly attentive to the malpractice implications if violating agency norms causes harm to the client. As Professor Jay Soled has noted, “taxpayers who invested in failed tax shelters have brought an avalanche of malpractice cases against their advising lawyers and accountants.”<sup>101</sup> Both the temptations and the punishments can be severe in the extraordinary context of tax practice. In this world of tax conduct, there is relatively little discussion of bar *disciplinary* actions. The regulation in this area is dominated by tax court norms and malpractice. The ABA as a source of norms, however, appears to have been influential in the dialectic between congressional and agency action and bar norms.<sup>102</sup>

#### 4. *Intellectual Property Lawyers and the Patent and Trademark Office*

Congress has expressly authorized the U.S. Patent and Trademark Office (USPTO) to regulate attorneys and agents who appear before it.<sup>103</sup> The USPTO has a dedicated Office of Enrollment and Discipline (OED).<sup>104</sup> Although the practice in trademark cases is generally open only to licensed attorneys, the patent office has a fully developed alternative practice scheme that closely parallels state bars.<sup>105</sup> The USPTO requires that practitioners pass a registration exam, commonly known as the Patent Bar, and demonstrate “good moral character and reputation.”<sup>106</sup> Patent practitioners include both attorneys and nonattorneys, who are known as patent agents.<sup>107</sup> All practitioners appearing before the USPTO, whether attorneys or patent agents, must comply with the

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101. Soled, *supra* note 91, at 268.

102. See WOLFMAN ET AL., *supra* note 51, at 14–16.

103. See 35 U.S.C. § 2 (2006).

104. See Laura Heyne, *The Disciplinary Function of the PTO's Office of General Counsel*, 19 J. CONTEMP. LEGAL ISSUES 65, 65 (2010); *Office of Enrollment and Discipline: OED Responsibilities*, U.S. PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/about/offices/ogc/oed.jsp> (Aug. 26, 2010, 2:23 PM).

105. See 37 C.F.R. § 11.14 (2010); *Trademark FAQs*, U.S. PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/faq/trademarks.jsp#Other005> (last visited Dec. 28, 2010).

106. 37 C.F.R. § 11.7 (2010).

107. *Id.* § 11.1.

*Patent and Trademark Office Code of Professional Conduct*, which is based on the *ABA Model Code of Professional Responsibility*.<sup>108</sup>

The Patent and Trademark Office has a well-developed system to both investigate and bring action against patent practitioners who violate the *USPTO Code of Professional Conduct*, are convicted of a serious crime, have been disciplined by another jurisdiction or other federal agency, or have violated any oaths of office.<sup>109</sup> As with Board of Immigration Appeals, much of the focus of the USPTO disciplinary process is on reciprocal discipline.<sup>110</sup> Violations that are uniquely tailored to patent practice include backdating correspondence to the USPTO, abandoning patent applications, deceptive advertising, and withholding from the patent examiner known information about prior art.<sup>111</sup>

This latter point of withholding known information is a particular concern to the USPTO because its Rules of Practice impose a higher duty of disclosure, candor, and good faith on individuals who file and prosecute patent applications.<sup>112</sup> This flows from the nature of the legal right given in the patent context. It is not an adversarial proceeding but a government grant of exclusive rights, which imposes a legal duty of full disclosure as a condition to the right.<sup>113</sup> The patent system depends on this higher level of disclosure than we typically see in other legal contexts.<sup>114</sup>

As with immigration, the USPTO Office of Enrollment and Discipline makes its final decisions available online. The office lists 202 reported discipline matters as of December 2010.<sup>115</sup> The most serious sanction of exclusion from practice appears to be reserved for instances in which the practitioner was convicted of a crime and has already been disciplined by the practitioner's state bar.<sup>116</sup>

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108. See David Hricik, *Patent Agents: The Person You Are*, 20 GEO. J. LEGAL ETHICS 261, 265 (2007); William J. Jacob, *Professional Ethics Before the USPTO: A Discussion for Beginners*, 16 PROF. LAW., no.2, 2005 at 22, 22; see generally 37 C.F.R. §§ 10.2–112 (2010).

109. 37 C.F.R. § 11.19(b)(1)(i)–(v) (2010) (grounds for discipline). The disciplinary process is set out in *id.* § 11.24.

110. See Heyne, *supra* note 104, at 67.

111. See *id.* at 69.

112. 37 C.F.R § 1.56(a) (2010).

113. See 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 31:63–:65 (4th ed. 2010).

114. See *Norton v. Curtiss*, 433 F.2d 779, 794 (C.C.P.A. 1970) (“The highest standards of honesty and candor on the part of applicants in presenting such facts to the office are thus necessary elements in a working patent system.”).

115. *Decisions of the Office of Enrollment and Discipline*, U.S. PATENT AND TRADEMARK OFFICE, [http://des.uspto.gov/Foia/DispatchOEDServlet?decisionType=Discipline&contractNo=&respName=&txtInput\\_StartDate=&txtInput\\_EndDate=&docTextSearch=&page=9999999](http://des.uspto.gov/Foia/DispatchOEDServlet?decisionType=Discipline&contractNo=&respName=&txtInput_StartDate=&txtInput_EndDate=&docTextSearch=&page=9999999) (last visited Dec. 28, 2010).

116. Heyne, *supra* note 104, at 69.

*5. Veterans' Lawyers and the Veterans Benefits Administration*

The Veterans Benefits Administration came late to the issue of authorizing representatives. Until 2008, it was a crime to accept more than \$10 to represent a person with a VA claim, which obviously shut down any system of paid representation.<sup>117</sup> The U.S. Supreme Court upheld the constitutionality of this exclusion in 1985 when the Court deferred to congressional intent to make the proceedings informal and nonadversarial, and to ensure that the veteran would not have to share the benefit award with attorneys.<sup>118</sup> This prohibition was amended in the Veterans' Judicial Review Act, which now allows attorneys fees under specific circumstances but largely prevents attorney involvement until a notice of disagreement is filed, which generally occurs after the record is set.<sup>119</sup>

Paid representation is now allowed beginning at the second stage of review. A "Notice of Disagreement" triggers a review at the VA Regional Office, which can be formally appealed to the Board of Veteran Appeals (BVA).<sup>120</sup> The BVA findings may be appealed to the Court of Appeals for Veterans Claims.<sup>121</sup>

The Veterans Administration also sets out procedures for the designation of authorized representatives.<sup>122</sup> Both attorneys and nonattorneys may be designated as representatives.<sup>123</sup>

Continued restrictions on when attorneys may receive compensation may be one reason why the veterans bar is comparatively small. The U.S. Court of Appeals for Veterans Claims lists about 700 practitioners

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117. The \$10 limit appeared at 38 U.S.C. § 3404(c) (2006). See generally Barton F. Stichman, *Advocating Benefits for Veterans*, 43 CLEARINGHOUSE REV. 256 (2009).

118. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321–26 (1985), *superseded by statute*, Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

119. See Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988). For a fuller description of the current provision, see Matthew J. Dowd, *No Claim Adjudication Without Representation: A Criticism of 38 U.S.C. § 5904(c)*, 16 FED. CIR. B.J. 53, 60–64 (2007); and Benjamin W. Wright, *The Potential Repercussions of Denying Disabled Veterans the Freedom To Hire an Attorney*, 19 FED. CIR. B.J. 433, 441–43 (2009).

120. See Miguel F. Eaton et al., *Ten Federal Circuit Cases from 2009 that Veterans Benefits Attorneys Should Know*, 59 AM. U. L. REV. 1155, 1160–61 (2010).

121. *Id.* at 1161.

122. 38 C.F.R. § 14.630 (2010).

123. *Id.*

approved for practice before the court.<sup>124</sup> This is a relatively small number given the high caseload.<sup>125</sup> Even with this relatively small bar, the U.S. Court of Appeals for Veterans Claims maintains a link to publicly identify disciplined attorneys, setting out links for disbarred attorneys, two-year suspensions, and reciprocal suspensions.<sup>126</sup> The published content is slender, however, with no attorneys disbarred or suspended, and two receiving reciprocal discipline. One inference, perhaps premature, is that the role of attorneys is sufficiently hampered that the Court of Appeals for Veterans Claims does not need to focus on attorney misconduct. And as with other areas of law, it is relatively rare that an administrative action to suspend an attorney from practice reaches the courts.<sup>127</sup>

#### 6. *Labor Lawyers and the National Labor Relations Board*

The National Labor Relations Board (NLRB) regulations state that “[a]ny attorney or other representative appearing or practicing before the Agency shall conform to the standards of ethical and professional conduct required of practitioners before the courts.”<sup>128</sup> The NLRB is authorized to discipline an attorney or representative “at any stage of any Agency proceeding.”<sup>129</sup> The regulations establish a procedure, with initial investigation by the Associate General Counsel, Division of Operations-Management, or the Associate General Counsel’s designee, as the investigating officer.<sup>130</sup>

Lawyers practicing before the NLRB have been disciplined under this process for a variety of conduct. For example, a lawyer was reprimanded and reported to the state bar for failure to comply with applicable rules concerning conflicts of interest and failing to factually investigate

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124. *Public List of Practitioners*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/practitioners/> (last visited Dec. 28, 2010); *see also* Wright, *supra* note 119, at 446.

125. *See* Wright, *supra* note 119, at 439.

126. *Disciplined Attorneys*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/practitioners/DisciplinaryAction.cfm> (last visited Dec. 28, 2010).

127. *See, e.g.*, Malik v. Shinseki, No. 10-233, 2010 WL 1252254, at \*1 (U.S. App. Vet. Apr. 1, 2010) (denying a petition for writ of mandamus because “[t]he petitioner’s accreditation to represent claimants before [the] VA was cancelled . . . on the grounds that the petitioner had knowingly presented false information to [the] VA and had accepted unlawful compensation for representing claimants before [the] VA”).

128. 29 C.F.R. § 102.177(a) (2010).

129. *Id.* § 102.177(d) (“Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.”).

130. *Id.* § 102.177(e)(1).

submissions.<sup>131</sup> Lawyers have been suspended for a pattern of misconduct, such as engaging in ad hominem comments, misuse of affidavits, racial slurs, misrepresentations and obstruction, and delay of the hearing.<sup>132</sup> Not surprisingly, physical violence will result in a suspension from practice.<sup>133</sup> Nonattorney representatives have also been sanctioned under this provision.<sup>134</sup>

It is somewhat more complicated when lawyers or representatives engage in misconduct during an NLRB hearing. In some cases, the board has been more rigorous in requiring that a formal section 102.177(d) hearing be instituted.<sup>135</sup> In other circumstances, an administrative law judge has been allowed to immediately sanction an attorney, including excluding an attorney for cumulative inappropriate conduct and false and misleading testimony.<sup>136</sup> An attorney might be warned during a hearing that future conduct may warrant referral to the investigating officer for possible disciplinary action.<sup>137</sup>

As important as formal authority is the NLRB's desire to focus on the issue. The NLRB General Counsel's office has explored whether to engage in more rulemaking concerning attorney conduct in labor practice.<sup>138</sup> At this time, however, the attorney conduct regulation at the NLRB is not as aggressive as other federal agencies.

#### *7. All Agencies: An Amorphous Definition of the Practice of Law*

A federal perspective has offered one interesting twist on the traditional notions of self-regulation. These federal agencies are much less persuaded by concerns for unauthorized practice of law. Many agencies are granted express authority to determine who may practice—and allow

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131. See, e.g., Simpson, 347 N.L.R.B. 883 (2006) (reprimand and referral to bar).

132. See, e.g., Keiler, 316 N.L.R.B. 763 (1995).

133. See, e.g., Murphy, 338 N.L.R.B. 769 (2002) (responding to allegation that respondent struck decertification petitioner in face during a Board-conducted decertification election).

134. See, e.g., Einy, 352 N.L.R.B. 1178 (2008).

135. See, e.g., Mail Contractors of Am., 347 N.L.R.B. 1158, 1159 (2006) (agreeing that published reprimand in written opinion constitutes a sanction that requires section 102.177 procedures).

136. See, e.g., USA Remediation Servs., Inc., No. 5-CA-31524, 2006 N.L.R.B. LEXIS 89 (Mar. 15, 2006).

137. See, e.g., McAllister Towing & Transp. Co., 341 N.L.R.B. 394, 427 (2004).

138. See LORI W. KETCHAM, NAT'L LABOR RELATIONS BD., LEGAL ETHICS AT THE NATIONAL LABOR RELATIONS BOARD (2008), available at <http://www.abanet.org/labor/dlcomm/mw/papers/2009/papers/mw-m.pdf>.

for nonlawyer practitioners—including patent,<sup>139</sup> tax,<sup>140</sup> immigration,<sup>141</sup> and labor.<sup>142</sup> Under the Supremacy Clause, the federal agency decisions override state regulations, so that a state cannot prohibit the federal practice by nonattorneys.<sup>143</sup> Lawyers and nonlawyers have provided services in these contexts side-by-side with relatively little controversy.

Despite this experience, both the American Bar Association and state regulatory systems continue to pursue a policy of strengthening legal norms to bar unauthorized practice.<sup>144</sup> These efforts suffered a blow in 2002, when the ABA Task Force on the Model Definition of the Practice of Law proposed a definition for public discussion.<sup>145</sup> The proposed definition was challenged by the Department of Justice and Federal Trade Commission, which expressed concern that the Model Definition was overly broad and likely to hurt consumers.<sup>146</sup> These concerns reflect the 1984 challenges by the Department of Justice to state bar association agreements with the banking industry.<sup>147</sup> This agency experience with shared practice is an important datum point in the debate about unauthorized practice.

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139. 35 U.S.C. § 31 (2006).

140. *Id.* § 330 (setting out authority to regulate the practice of representatives of persons before the Department of the Treasury).

141. 8 C.F.R. § 1292.1 (2010).

142. 29 C.F.R. § 18.34(g) (2009).

143. *See* U.S. CONST. art. VI, cl. 2; *Sperry v. Florida*, 373 U.S. 379, 385 (1963) (“Florida may not deny [petitioner] the right to perform the functions within the scope of the federal authority.”).

144. *See Task Force on the Model Definition of the Practice of Law: Challenge Statement*, AM. BAR ASS’N, [http://www.abanet.org/cpr/model-def/model\\_def\\_challenge.html](http://www.abanet.org/cpr/model-def/model_def_challenge.html) (last visited Dec. 28, 2010) (noting the growing gray area where nonlawyers provide services that are difficult to characterize “as being, or not being, the delivery of legal services,” which may be partly responsible for “spotty enforcement of unauthorized practice of law statutes across the nation and arguably an increasing number of attendant problems related to the delivery of services by nonlawyers”).

145. *See* John Gibeaut, *Another Try: ABA Task Force Takes a Shot at Defining the Practice of Law*, A.B.A. J., Dec. 2002, at 18.

146. *See* Letter from U.S. Dep’t of Justice & Fed. Trade Comm’n to Members of the Task Force on the Model Definition of the Practice of Law, Am. Bar Ass’n (Dec. 20, 2002), *available at* <http://www.abanet.org/cpr/model-def/ftc.pdf> (“[T]he DOJ and the FTC believe that consumers generally benefit from lawyer-nonlawyer competition in the provision of certain services. . . . We conclude that the proposed definition is not in the public interest because the harms it imposes on consumers by limiting competition are likely much greater than any consumer harm that it prevents.”).

147. *Id.*; *see also* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 443–49 (3d ed. 1996); COMM’N ON NONLAWYER PRACTICE, AM. BAR ASS’N, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS (1995).

*C. Federal Litigation Norms*

Litigation norms have long been established primarily by the courts, not the state regulatory apparatus. Of course, almost all American judges have come through the common training ground of national American law schools and have been inculcated in the common values of the legal profession. But fine-tuning those values in the context of litigation has been left to the courts. Federal courts have established a fairly wide body of doctrine on attorney conduct.<sup>148</sup> Through the Federal Rules Enabling Act the courts have embraced the power to make rules on attorney conduct.<sup>149</sup> And case-by-case adjudication has resulted in a rich body of doctrine addressing conflicts of interest, confidentiality, contact with represented persons, and the like. The conflicts doctrine developed by federal courts has been particularly influential in creating understandings of appropriate behavior in the litigation context.

Bankruptcy courts offer another interesting example. Ethical issues in bankruptcy, which is of course a federal practice, are factually and legally complex. In 1998, Professor Nancy Rapoport urged that the time had come to create a federal law of bankruptcy ethics, arguing persuasively that the state-based norms offer little guidance for the particular issues that arise in bankruptcy practice.<sup>150</sup> Although formal national rules have yet to be adopted through the Rules Enabling Act, the bankruptcy courts have looked more widely than just state rules of conduct to analyze norms of conduct in bankruptcy practice.<sup>151</sup> And the power to control fees has given bankruptcy judges an enormous power to make bankruptcy lawyers pay attention to what courts say is

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148. See generally McMorrow & Coquillette, *supra* note 5; Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3 (2005).

149. See McMorrow & Coquillette, *supra* note 5, at §§ 805.01–.07; see also FED. JUDICIAL CTR., *supra* note 11, at 294–308.

150. Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 46–50 (1998); Nancy B. Rapoport, *The Intractable Problem of Bankruptcy Ethics: Square Peg, Round Hole*, 30 HOFSTRA L. REV. 977, 982–85 (2002).

151. See, e.g., *Rossana v. Momot*, 395 B.R. 697, 701 n.4 (Bankr. D. Nev. 2008) (stating that a court may look beyond the Nevada Rules of Professional Conduct to “consider other relevant authorities, such as the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, the actual Model Rules and their related commentaries”).



appropriate behavior.<sup>152</sup> The net effect is that federal bankruptcy courts are the dominant regulators in this area.

*D. Treaty Obligations, International Practice, and  
Technology Pressures*

The shift of regulation has moved beyond simply federal legislative, agency, or court regulation of attorneys. As many other commentators have noted, the hydraulic pressure on legal practice from both expanded technology and the global economy has shifted the focus to international practice. U.S. law firms are expanding abroad, and foreign firms and foreign legal consultants are coming to the United States to advise their clients.<sup>153</sup> This internationalization is not limited to large firms. Solo and small firm practitioners are often needed to address the legal problems of the growing U.S. immigrant community. Some of those problems involve cross-border concerns—movement of property, inheritance, marriage, child custody, and other issues that have international dimensions. This again creates pressure to look to national norms to adapt to these pressures.

The ABA Commission on Ethics 20/20 was formed in 2009 to review the “U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.”<sup>154</sup> Many of the questions that arise from the cross-border practice will likely result in recommendations on how states can reduce the barriers to cross-border practice. Problems in multijurisdictional practice and the movement of in-house counsel across both state and national borders are challenges that cannot be contained by simply insisting that the world adjust to the state-based model of regulation. Competition from international firms for a worldwide market for legal services also pressures U.S. regulatory structures to consider alternate models being adopted abroad.<sup>155</sup>

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152. See, e.g., Stephen J. Lubben, *Corporate Reorganization & Professional Fees*, 82 AM. BANKR. L.J. 77 (2008); Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Cases*, 5 J. BUS. & TECH. L. 263 (2010).

153. A rich body of literature is emerging on this subject. See, e.g., Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57 (2010) (exploring why the international trend toward cross border practice has not occurred in India). Related problems occur from multijurisdictional practice in the United States. See generally Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331.

154. ABA Commission on Ethics 20/20: *Statement from Co-Chairs*, AM. BAR ASS’N, <http://www.abanet.org/ethics2020/chairs.html> (last visited Dec. 28, 2010).

155. See Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193 (2010) (providing a historical review of the MDP debate in the United States and Canada).

While states consider the implications of multijurisdictional practice and tweak the state-based ethics rules, international norms are increasingly being imposed on lawyers through treaty obligations. As Professor Laurel Terry has observed, the General Agreement on Trade in Services (GATS) raises significant questions about the application of generally applicable treaty obligations to state-based legal regulation.<sup>156</sup> The federal government, through its treaty-making power, can sweep attorneys under treaty obligations and instantly harmonize lawyer conduct to make the obligations consistent with international norms. The legal profession can anticipate more treaty-based obligations.

### III. CONTEXTUALIZATION

This movement of the center of gravity in attorney regulation to federal law and norms highlights several important trends, most anticipated by Professor Zacharias. But as developed above, federal regulation has not occurred via an express preemption of lawyer regulation by the states. Such preemption could be both politically confrontational and problematic in practice.<sup>157</sup> But federal norms are seen as complementing state regulation in those areas of unique federal interest. These areas of substantive law and agency practice all have sharply defined federal interest: SEC, immigration, patent and trademark, tax, social security, among others. This method of complementing state-based regulation becomes more significant because we have increased specialization in legal practice, which results in increased expertise and regulation in context.<sup>158</sup>

This contextualization is a net social good because it generally addresses areas of attorney conduct that are neglected by state regulators. Insufficient bar resources and efficiency concerns likely play a role in this functional bar deference. There has been little hew and cry about the expanding norms, as long as they do not directly contradict state core values. For example, at the 2010 ABA National Conference on Professional Responsibility, Bar Counsel for the District of Columbia

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156. See Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001), revised in 35 VAND. J. TRANSNAT'L LAW 1387 (2002).

157. See FED. JUDICIAL CTR., *supra* note 11, at 27, 29.

158. See, e.g., REGAN JR., *supra* note 28, at 366.

stated publicly that they welcome the actions of the federal agencies to supplement state bar regulatory activities.<sup>159</sup>

As a practical matter the state bars lost the battle of predominant self-regulation, assuming it ever truly had a system of self-regulation. Professor Zacharias noted that the bar continues to cling to the “myth of self-regulation,” but functionally is a coregulator with these other systems.<sup>160</sup> Indeed, the desire to retain some role in self-regulation was the impetus for the ABA 20/20 Commission.

This federalization and contextualization is creating some significant challenges, but they are manageable issues. First is a question about choice of law. If there is a direct conflict between federal and state attorney regulation, the federal regulation will trump. But choice of law norms become complicated when regulatory systems are layered, which is often the case in attorney regulation. A lawyer practicing before the Patent and Trademark Office may simultaneously be held to federal agency, federal district court, and state court regulations—sometimes all in direct conflict. Efforts to resolve these conflicts by incorporating choice of law standards, such as ABA Model Rule 8.5, have had a checkered history, in part because some states have resisted a uniform conflicts rule.<sup>161</sup> But when the Committee on Practice and Procedure of the Judicial Conference of the United States held a major conference to explore Federal Rules of Attorney Conduct (FRAC), even representatives of major national firms and the Department of Justice reported that, with some relatively narrow exceptions, the contextualized system was working, aided by some realistic court supervision.<sup>162</sup>

Ironically, another concern raised by contextualization has been capture of the regulation by the regulated bar, especially in narrow agency practice with “revolving doors.” Of course, purely state-based self-regulation has long been criticized for unduly reflecting the self-interest of the profession, at the expense of protecting the public. Indeed, the argument can be made that contextualization reduces the danger of capture by introducing a kind of “checks and balances” of different regulatory realities on each other. Thus, the criminal defense bar is traditionally strong in state-based regulatory systems, an influence that led to concern by the United States Department of Justice whose lawyers had to act across the country in regulatory systems that, in

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159. Wallace E. “Gene” Shipp, Jr., D.C. Bar Counsel, Remarks at the Panel on Prosecutions of Lawyers: Trends and Implications at the 36th ABA Nat’l Conference on Prof’l Responsibility (June 3, 2010).

160. Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

161. See Carla C. Ward, Comment, *The Law of Choice: Implementation of ABA Model Rule 8.5*, 30 J. LEGAL PROF. 173 (2005).

162. See FED. JUDICIAL CTR., *supra* note 11, at 237–61.

certain cases, the Department felt were unreasonable.<sup>163</sup> But criminal defense lawyers practicing in tax cases would face a different, national context, which could balance out more local capture. There has been no serious empirical study of the effect of contextualization on capture, and anecdotal testimony during the FRAC Conference was inconclusive. It is quite conceivable that a serious study would show development of attorney regulation by federal contextualization was more protective of the public interest than the traditional state system. In any event, these concerns have not slowed the process itself.

#### IV. CONCLUSION: ZACHARIAS'S PROPHECY

As early as 1829, the great Justice Joseph Story predicted that the combination of the new national law schools, the increased power of federal courts and federal jurisprudence, and the influence of treaty obligations and global trade would result in a truly national profession. But powerful historical forces sent his vision the same way as his landmark decision, *Swift v. Tyson*, for nearly two centuries.<sup>164</sup>

New historical forces, which Justice Story never dreamed of, have now emerged: most particularly the new scope of federal judicial rulemaking, the regulatory sweep of Congress over all professions, and the vast expansion of federal regulatory agencies. Professor Zacharias was the prophet who would first clearly see the implication of this new world for the legal profession and for the American system of justice. For this we are all in his debt.

But the prophecy has manifested itself in an unexpected way. The political realities of entrenched state bars, often projecting themselves through national bar associations, have made a direct upheaval of professional regulation both unlikely and, perhaps, undesirable and unnecessary. Contextualization of an ever increasingly specialized federal bar has resulted in growing and effective regulation by the combined incremental effects of congressional action, judicial rulemaking, federal litigation ethics, and the overall influence of global and

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163. *Id.* at 27–34.

164. See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 237–70 (1985); ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817–1967, at 92–139 (1967); Daniel R. Coquillette, “Mourning Venice and Genoa”: Joseph Story, Legal Education, and the Lex Mercatoria, in FROM LEX MERCATORIA TO COMMERCIAL LAW 11 (Vito Piergiovanni ed., 2005).

technological change. Thus, Zacharias's Prophecy is coming true, but in a way that uniquely reflects the conditions of a post-modern age.