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## The Laws of Agency Lawyering

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# THE LAWS OF AGENCY LAWYERING

*George M. Cohen\**

## INTRODUCTION

A significant part of lawyering in the regulatory state involves lawyers appearing and practicing before federal administrative agencies on behalf of clients.<sup>1</sup> In performing this role, as in other contexts, lawyers are themselves regulated by multiple, overlapping legal regimes. These regimes include state ethics rules, tort and criminal law, and, when regulatory matters wind up in court, rules of procedure and rules derived from the courts' inherent supervisory powers. Lawyers appearing and practicing before federal agencies, however, are often subject to additional ethical rules promulgated by the agencies.<sup>2</sup> By ethical rules, I mean rules that regulate lawyers and can be enforced by limiting or prohibiting the ability of the lawyer to practice before the agency.<sup>3</sup> The most well-known of these agency rules are the SEC's Sarbanes-Oxley rules, the IRS's Circular 230 rules, and the U.S. Patent and Trade Office's (USPTO) practice rules, but there are a number of others.

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\* Brokaw Professor of Corporate Law, University of Virginia. I thank Joshua Allred for excellent research assistance and Laurel Terry, Charles Silver, and participants at the *Fordham Law Review* colloquium *Lawyering in the Regulatory State* for helpful comments. For an overview of the colloquium, see Nancy J. Moore, *Foreword: Lawyering in the Regulatory State*, 84 *FORDHAM L. REV.* 1811 (2016).

1. Other important aspects of lawyering in the regulatory state involve lawyers employed by government agencies and lawyers appearing and practicing before state government agencies. This Article does not deal with either topic.

2. See, e.g., RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 1 cmt. b (AM. LAW INST. 2000) [hereinafter RESTATEMENT (THIRD)] ("Some administrative agencies, primarily within the federal government, have also regulated lawyers practicing before the agency, sometimes through lawyer codes adopted by the agency and specifically applicable to those practitioners."); Daniel R. Coquillete & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 *SAN DIEGO L. REV.* 123 (2011).

3. This definition omits agency rules that regulate lawyers but reference no sanction. See, e.g., 46 C.F.R. § 502.26 (2015) (stating that a lawyer practicing before the Federal Maritime Commission must conform to the ABA Model Rules as well as agency rules, but specifying no sanction for violation); cf. *id.* § 502.27(c) (stating that the Commission may sanction nonattorneys admitted to practice before it for improper professional conduct). This definition also omits rules that limit sanctions to those against a lawyer's client or monetary sanctions against the lawyer. See, e.g., 42 C.F.R. § 3.506(b) (2015) (requiring attorneys practicing before the Public Health Service to conform to standards of conduct and ethics required of practitioners before U.S. courts); *id.* § 3.530 (listing as sanctions for lawyer misconduct sanctions against the claimant and payment of attorney's fees); 45 C.F.R. § 160.530 (2015) (same for lawyers practicing before the Department of Health and Human Services).

Commentators have long debated the authority of agencies to promulgate and enforce these rules, as well as their desirability.<sup>4</sup> One feature of the regulatory landscape, however, has received less critical attention: the great variety of agency rules governing lawyers. Although state ethics rules exhibit a fair amount of variety, these rules are almost all based on the American Bar Association's (ABA) Model Rules of Professional Conduct and generally cover the same topics in relatively similar ways. Moreover, the "other law"<sup>5</sup> that governs lawyers—though it may differ from and sometimes conflict with state ethics rules—is similar enough across jurisdictions that a Restatement of the Law Governing Lawyers is fairly able to summarize it.<sup>6</sup> By contrast, the federal agency rules seem to be all over the map. Some are quite detailed; others are extremely general. Some cover a large number of topics; others very few. Some apply only to adjudicatory proceedings before agencies; others apply more broadly. Some apply to lawyers only; others to any person appearing in a representative capacity before an agency.

What accounts for this teeming variety of agency rules governing lawyers? One obvious answer is that there is nothing to prevent it. There is no private group like the ABA or the American Law Institute (ALI) that has sought to bring order out of the chaos through proposed Model Rules for Lawyers Appearing and Practicing Before Administrative Agencies. Nor has any government entity or group of agencies taken up such a project. In the absence of some great coordinator, it is perhaps not surprising that a hundred flowers bloom. Agencies have different domains, different structures, different purposes, and different histories. All these can lead to different regulatory approaches. Still, laws sometimes do converge rather than diverge even in the absence of coordination, as lawyers often look to what others are doing and follow them rather than "reinvent the wheel."

Another possibility is that there is less to the variety than first meets the eye. The differences may be more stylistic than substantive. Alternatively, the rules may not be enforced often enough, or in significant enough cases, that the differences become more apparent and contested.

At the very least, the great variety of agency rules governing lawyers raises interesting questions that are worth exploring. This Article begins that exploration. Part I lays the groundwork by briefly examining how the ABA Model Rules treat regulatory lawyering to raise the question of what regulatory gaps the agency rules might be expected to fill. Part II sets forth several possible theories of agency rule variation. Part III compares agency rules along a number of dimensions, examines some similarities and differences across agencies as well as between the agency rules and the Model Rules, and offers speculations about what may be driving the differences that exist.

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4. See, e.g., Michael P. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 34 CASE W. RES. L. REV. 173 (1984).

5. E.g., MODEL RULES OF PROF'L CONDUCT r. 8.4(e) (AM. BAR ASS'N 2015).

6. See generally RESTATEMENT (THIRD), *supra* note 2.

## I. ADMINISTRATIVE AGENCY LAWYERING UNDER THE ABA MODEL RULES

Before examining the ethics rules promulgated by the agencies, it will be helpful to see how the ABA's Model Rules regulate lawyers who practice before government agencies. They do so in three ways. First, the Model Rules include a small number of rules specifically applicable to lawyers practicing before agencies. Second, the Model Rules impose different obligations on lawyers practicing before agencies depending on which governmental function the agency is engaged in. Finally, the Model Rules in some cases incorporate the requirements of agency ethics rules.

### A. *Specific Rules on Agency Lawyering*

The ABA Model Rules are constructed on the general presumption that all lawyers should be governed by the same ethics rules.<sup>7</sup> Thus, lawyers who practice before administrative agencies<sup>8</sup> are generally bound by the same ethics rules as other lawyers. Nevertheless, the Model Rules deviate from this principle in several respects. In the first place, a few scattered rules impose additional obligations on lawyers practicing before administrative agencies, though these rules involve relatively minor aspects of agency practice.<sup>9</sup>

Most notably, Rule 3.9 requires a lawyer "representing a client before a legislative body or administrative agency in a nonadjudicative proceeding" to "disclose that the appearance is in a representative capacity."<sup>10</sup> This Rule aims to prevent lawyers from misleading an agency into thinking that a lawyer appearing before the agency is presenting the lawyer's own views.

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7. The Preamble to the Model Rules, for example, contains provisions addressed to the responsibilities of "a lawyer." *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. ("Every lawyer is responsible for observance of the Rules of Professional Conduct."). Moreover, most of the Model Rules apply to all lawyers, with a few exceptions and qualifications. The rules do temper the universalist approach somewhat by differentiating a lawyer's obligations when performing different roles, such as "Counselor" or "Advocate," which I discuss further below. *See generally* David Wilkins, *Making Context Count: Regulating Lawyers After Kaye Scholer*, 66 S. CAL. L. REV. 1145, 1152-54 (1993). In addition, Model Rule 1.13 applies to lawyers representing entity clients, and Model Rule 3.8 applies to prosecutors.

8. The Model Rules somewhat unhelpfully use the terms "administrative agency," "government agency," and "governmental entity" interchangeably, as does the Restatement, which also occasionally uses the term "regulatory agency."

9. A few comments reference practice before government agencies as simply an example of how a general rule applies in that particular context. *See* MODEL RULES OF PROF'L CONDUCT r. 2.3 cmt. 1 (noting that a government agency may request that a lawyer provide an opinion); *id.* r. 4.2 cmt. 4 (noting that a lawyer representing a client in a controversy before a government agency may communicate with nonlawyer representatives of the agency on a separate matter).

10. *Id.* r. 3.9. Rule 4.3 imposes a similar obligation on a lawyer dealing with an unrepresented person who "misunderstands the lawyer's role in the matter" to "make reasonable efforts to correct the misunderstanding." *Id.* r. 4.3. Rule 3.9 goes beyond the Rule 4.3 duty, because administrative agencies are often represented by counsel when they act in "nonadjudicative proceedings." *Id.* r. 3.9. In adjudicative proceedings, the issue would not generally arise because lawyers usually enter an appearance on behalf of an identified client litigant.

Note, however, that (somewhat surprisingly) under the literal terms of this Rule, the lawyer need not identify the client.<sup>11</sup> In the parlance of (private) agency law, a lawyer cannot act on behalf of an undisclosed principal, but can act on behalf of an unidentified principal.<sup>12</sup>

Two other rules that reference agency practice are Rule 8.4(e) and Rule 7.5(a). Rule 8.4(e) prohibits a lawyer from “stat[ing] or imply[ing] an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.”<sup>13</sup> Rule 7.5(a) prohibits a lawyer in private practice from using a “trade name” that “impl[ies] a connection with a government agency.”<sup>14</sup> These rules aim to prevent the lawyer from misleading the client about what a lawyer can legitimately do to further the client’s interests before the agency.

### B. The Tripartite Division of Agency Conduct

A second way the Model Rules address lawyers who practice before government agencies is by making some ethics rules inapplicable to certain types of agency practice. The Model Rules in effect establish a tripartite structure for lawyers practicing before government agencies, depending roughly on whether the agency is acting in a judicial, legislative, or executive capacity. When an agency “act[s] in an adjudicative capacity,” it is a “tribunal” under Rule 1.0(m).<sup>15</sup> That label matters because the Model Rules include a number of provisions specifically applicable to a lawyer practicing before a “tribunal,” many—but not all—of which are found in the group of rules falling under the heading captioned “Advocate” (Rules 3.1–3.9).<sup>16</sup>

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11. The parallel rule in the Restatement, section 104(1), states that a “lawyer representing a client before a legislature or administrative agency . . . must disclose that the appearance is in a representative capacity and not misrepresent the capacity in which the lawyer appears.” RESTATEMENT (THIRD), *supra* note 2, § 104(1). Section 104(1) does not limit its application to administrative agencies acting in a “nonadjudicative capacity,” as Rule 3.9 does, but applies to all lawyers who represent a client “before” an administrative agency. *Id.* It is not clear what the prohibition on “misrepresent[ing] the capacity in which the lawyer appears,” which is not included in Rule 3.9, adds to the requirement that the appearance in a representative capacity must be disclosed. *Id.*

12. *Id.* § 104(2).

13. MODEL RULES OF PROF’L CONDUCT r. 8.4(e).

14. *Id.* r. 7.5(a).

15. *Id.* r. 1.0(m) (stating that an agency will be considered a “tribunal” if “a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interest in a particular matter”).

16. *See id.* rr. 3.3, 3.4(c), 3.5 (all expressly referring to a “tribunal”). Other rules specifically mentioning tribunals include rules on overseeing conflict screens, *id.* r. 1.10(a)(2)(ii), 1.12(c)(1), withdrawal, *id.* r. 1.16(c), multijurisdictional practice, *id.* r. 5.5(c)(2) & cmts. 9–11, and choice of law, *id.* r. 8.5(b)(1). Some rules that mention tribunals would generally not be applicable to lawyers practicing before an administrative agency for other reasons. *See id.* r. 1.7(b)(3) (conflict of interest if lawyer represents both sides in same case); *id.* r. 3.8(d) (prosecutors in criminal cases); *id.* r. 6.2(a) (appointment of lawyer by tribunal). A number of comments also make reference to a tribunal. *See id.* r. 1.1 cmt. 7; *id.* r. 1.2 cmt. 2; *id.* r. 1.6 cmts. 15, 16; *id.* r. 1.14 cmt. 10; *id.* r. 1.17 cmt. 12; *id.* r. 2.4 cmt. 5; *id.* r. 3.7 cmt. 3; *id.* r. 5.3 cmt. 4.

When the agency acts in a legislative (rulemaking) capacity, lawyers practicing before that agency are bound by some, but not all, of the rules applicable to advocates practicing before tribunals.<sup>17</sup> Rule 3.9 identifies specific rules that a lawyer in this situation must follow: Rules 3.3(a) through (c) (Candor Toward the Tribunal), 3.4(a) through (c) (Fairness to Opposing Party and Counsel), and 3.5 (Impartiality and Decorum of the Tribunal).<sup>18</sup> The negative implication is that these lawyers are not bound by the other rules in the “Advocate” group. In addition, these lawyers are not bound by any rules outside of the “Advocate” group that apply to lawyers practicing before “tribunals.”

Finally, lawyers representing private clients who engage with an agency acting in what we might call its executive capacity have fewer obligations still. Comment 3 to Rule 3.9 defines these contexts to include representing a client in a “negotiation or other bilateral transaction with a governmental agency,” “application for a license or other privilege,” “compliance with generally applicable reporting requirements,” and “an investigation or examination of the client’s affairs conducted by government investigators or examiners.”<sup>19</sup> In all these situations, Comment 3 says that the rules that apply are the rules governing “transactions with persons other than clients,”<sup>20</sup> comprising Rules 4.1 (Truthfulness in Statements to Others) to 4.4 (Respect for the Rights of Third Persons) and, thus, apparently, not *any* of the “Advocate” rules (Rules 3.1 to 3.9) or rules governing practice before a “tribunal.” From the perspective of the Model Rules, then, the primary issue for lawyers practicing before agencies is how many of the “advocate” and “tribunal” rules apply to them: all, some, or none.<sup>21</sup>

The tripartite approach of the Model Rules is interesting mostly because of the recognition and treatment of the last category: lawyers practicing before agencies acting in their executive capacity. The activity that comprises this category is perhaps the most common work that lawyers who

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17. Comment 1 states that the type of “nonadjudicative proceeding” Rule 3.9 has in mind are proceedings in which the agency is “acting in a rule-making or policy-making capacity,” or is holding an “official hearing or meeting . . . to which the lawyer or the lawyer’s client is presenting evidence or argument.” *Id.* r. 3.9 cmts. 1, 3.

18. *Id.* r. 3.9.

19. *Id.* r. 3.9 cmt. 3. The limitation in Comment 3 derives from ABA Opinion 93-375, a product of the savings and loan crisis. That opinion found that a lawyer representing a client subject to a routine bank examination by a government agency was not governed by Model Rule 3.9 because the agency was not a “tribunal,” a term that has since been defined in Model Rule 1.0(m) as discussed above. *See supra* note 15. That conclusion mattered because the mandatory disclosure obligations in Model Rule 3.3 apply only to lawyers practicing before a tribunal. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 93-375 (1993).

20. *See* MODEL RULES OF PROF’L CONDUCT rr. 4.1–4.

21. Restatement Third on the Law Governing Lawyers, section 104(3), does not adopt the tripartite structure of the Model Rules, but rather draws a distinction between “an adjudicative proceeding before a government agency or involving such an agency as a participant,” in which the lawyer “has the legal rights and responsibilities of an advocate in a proceeding before a judicial tribunal,” and “other types of proceedings and matters,” in which the lawyer “has the legal rights and responsibilities applicable in the lawyer’s dealings with a private person.” RESTATEMENT (THIRD), *supra* note 2, § 104(3).

practice before agencies do, yet the Model Rules address this work only indirectly, ambiguously, and in a comment.<sup>22</sup> Moreover, the implication of the Model Rules is that lawyers practicing before administrative agencies acting in an adjudicative capacity owe more ethical duties than lawyers who practice before administrative agencies acting in an executive capacity, who tend to act in a more transactional or advisory role.

In the two most well-known events involving lawyers practicing before agencies in the last thirty years—the Kaye Scholer case<sup>23</sup> and the SEC’s Sarbanes-Oxley rules<sup>24</sup> promulgated in the wake of the Enron scandal—some in the corporate bar took what seems like the opposite perspective: that lawyers practicing before an administrative agency acting in its executive capacity should be viewed as advocates, who have fewer ethical restrictions, or more ethical leeway, than lawyers acting as advisers or counselors.<sup>25</sup> We allow lawyers to make aggressive and creative arguments in litigation, knowing that there will be a lawyer on the other side to make counterarguments.<sup>26</sup> Lawyers acting as advisers have less leeway in making creative arguments to avoid complying with the law.<sup>27</sup> The corporate bar’s position has thus seemed to want to have it both ways: lawyers who practice before agencies can view themselves as advocates for the purpose of interpreting disclosure requirements narrowly, but can view themselves as nonadvocates for the purpose of avoiding duties to the court.

The tripartite division of agency practice in the Model Rules leaves a number of questions unresolved. First, do *all* the Advocate Rules apply to lawyers practicing before an agency acting in an adjudicatory capacity, even if a particular rule does not reference a “tribunal”? The Advocate

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22. MODEL RULES OF PROF’L CONDUCT r. 3.9 cmt. 3.

23. See GEOFFREY C. HAZARD, SUSAN P. KONIAK, ROGER C. CRAMTON, GEORGE M. COHEN & W. BRADLEY WENDEL, *THE LAW AND ETHICS OF LAWYERING* 161–63 (5th ed. 2010).

24. See, e.g., 17 C.F.R. § 205.1–7 (2015) (Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer).

25. See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 166 (1998) (stating that the defenders of Kaye Scholer’s actions representing Charles Keating’s savings and loan before the bank agency “framed the matter as litigation, and argued that in that context counsel had no duty to avoid misleadingly incomplete (as opposed to specifically false) representations,” whereas the agency “framed the matter as bank regulation and argued that in that context a higher duty of candor was appropriate”); Wilkins, *supra* note 7, at 1183–85; Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1276–77 (2003) (criticizing SEC rule allowing a lawyer not to report up evidence of wrongdoing to a company’s board if the board has retained a lawyer who “may” assert a “colorable defense” as applying an inappropriate advocacy standard to a lawyer in a counseling role).

26. See generally Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 769–71 (2004).

27. See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY EC 7-3 (AM. BAR ASS’N 1980) (describing the different lawyer roles of advocate and adviser and stating that “[w]hile serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law,” but “[i]n service the client as an adviser, a lawyer . . . should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law”).

Rules use different terms (not defined in Model Rule 1.0) for the kind of activity that generally is performed before a tribunal. Some of the Advocate Rules refer to a “proceeding,”<sup>28</sup> a term that seems broad enough to encompass actions before an administrative agency acting in an adjudicative capacity. Other Advocate Rules refer to “litigation.”<sup>29</sup> Still others refer to “trial.”<sup>30</sup> It is not clear whether administrative agency adjudications are “litigation” or “trials” within the meaning of these rules.<sup>31</sup>

Second, and relatedly, do the Model Rules, as Comment 3 to Model Rule 3.9 suggests, really make none of the “Lawyer As Advocate” Rules applicable to lawyers practicing before an agency acting in its executive capacity? For example, Rule 3.6(a) (Trial Publicity) expressly refers to a lawyer participating in an “investigation” in addition to, and apparently distinct from, “litigation.”<sup>32</sup> In addition, Rule 3.4 (Fairness to Opposing Party and Counsel) includes prohibitions on destroying<sup>33</sup> and falsifying<sup>34</sup> evidence, which one might think ought to apply to agency investigations. People certainly raised that question in light of the Arthur Andersen case,<sup>35</sup> in which an in-house lawyer allegedly encouraged Arthur Andersen’s destruction of Enron documents in the face of a likely SEC investigation, though no disciplinary or other action was ever brought against the lawyer.<sup>36</sup>

Perhaps the ABA’s apparently more limited view of the responsibilities of lawyers appearing before an agency in its executive capacity is much ado about nothing. Conduct not covered by the advocacy rules or the tribunal

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28. See MODEL RULES OF PROF’L CONDUCT rr. 3.1, 3.3(b), 3.3(d), 3.5(b), 3.6(a).

29. See *id.* rr. 3.2, 3.6(a).

30. See *id.* rr. 3.4(e), 3.7. The Restatement takes the position that the advocate-witness restrictions of Model Rule 3.7 apply to lawyers practicing before administrative agencies acting in their adjudicative capacity. See RESTATEMENT (THIRD), *supra* note 2, § 108 cmt. c (“The advocate-witness rule applies in all contested proceedings in which a lawyer appears as both advocate and witness, including . . . hearings before administrative agencies.”).

31. The USPTO rules clear up a number of these ambiguities by substituting “tribunal” for one of the other terms used by the Model Rules. See 37 C.F.R. § 11.302 (2015) (replacing “litigation” from Model Rule 3.2); *id.* § 11.303(b) (replacing “adjudicative proceeding” from Model Rule 3.3(e)); *id.* § 11.304(e) (replacing “trial” from Model Rule 3.4(b)); *id.* § 11.307 (replacing “trial” from Model Rule 3.7).

32. MODEL RULES OF PROF’L CONDUCT r. 3.6(a) (“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”). Statements in some agency investigations could arguably fall under this rule.

33. *Id.* r. 3.4(a) (“A lawyer shall not . . . unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”).

34. *Id.* r. 3.4(b) (“A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”).

35. Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005).

36. United States v. Arthur Andersen, LLP, 374 F.3d 281, 286–87 (5th Cir. 2004), *rev’d*, 544 U.S. 696 (2005).



rules may be covered by other rules.<sup>37</sup> For example, consider a simple situation in which a lawyer knowingly submits false information to an agency on behalf of a client. If the agency is acting as a “tribunal,” this conduct violates several of the Advocate Rules.<sup>38</sup> If the agency is not acting as a “tribunal,” the same conduct could nevertheless violate several other rules applicable to all lawyers.<sup>39</sup> The difference is that the Advocate Rules impose more specific obligations than the comparable rules for nonadvocates. The fact that the drafters of the Model Rules created more specific duties for advocates suggests that the more general rules applicable to other lawyers do not include all those duties. The Model Rules themselves, however, give little guidance on this issue.

Another example in which the tripartite division might not have much practical effect is the rule on multijurisdictional practice.<sup>40</sup> Rule 5.5(c) allows lawyers licensed in one state to practice before a tribunal in a different state under certain conditions.<sup>41</sup> For lawyers who practice before federal agencies, however, Rule 5.5(d)(2) allows all lawyers who practice before federal agencies to engage in multijurisdictional practice so long as some federal law or rule allows them to do so.<sup>42</sup>

### C. Incorporation of Agency Ethics Rules

Apart from specific rules addressing agency lawyering and the tripartite division, the Model Rules impact lawyers practicing before federal agencies in another way, directly tied to the theme of this Article. Some of the Model Rules seem to expressly incorporate agency rules, including agency rules governing the conduct of lawyers practicing before those agencies. Most notably, Rule 3.4(c) states that a “lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.”<sup>43</sup> Because an

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37. The Restatement suggests as much: “In any event, the legal duties of an advocate in an adjudicative proceeding are not necessarily significantly different from or less exacting than those governing a lawyer functioning in a nonlitigation capacity.” RESTATEMENT (THIRD), *supra* note 2, § 104 cmt. d.

38. See MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (“A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . . .”); *id.* r. 3.3(a)(3) (“A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false . . . .”); *id.* r. 3.4(b) (“A lawyer shall not . . . falsify evidence . . . .”).

39. See *id.* r. 1.2(d) (“A lawyer shall not . . . assist a client . . . in conduct that the lawyer knows is criminal or fraudulent . . . .”); *id.* r. 4.1(a) (“In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person . . . .”); *id.* r. 8.4(d) (“It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”).

40. *Id.* r. 5.5

41. *Id.* r. 5.5(c).

42. *Id.* r. 5.5(d)(2) (allowing a lawyer not licensed in a jurisdiction to provide legal services there if the services are ones “that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction”).

43. *Id.* r. 3.4(c); see also RESTATEMENT (THIRD), *supra* note 2, § 105 (“In representing a client in a matter before a tribunal, a lawyer must comply with applicable law, including rules of procedure and evidence and specific tribunal rulings.”); *id.* § 105 cmt. b (noting that

administrative agency acting in an adjudicative capacity is a “tribunal” under the Model Rules, a lawyer can be disciplined by the lawyer’s state disciplinary authority under Rule 3.4(c) for violating an agency’s rules when it acts in that capacity, even if those rules differ from the Model Rules applicable to advocates.<sup>44</sup> Moreover, Rule 3.4(c), via Rule 3.9, also applies to lawyers appearing before an administrative agency acting in a “nonadjudicative proceeding,” that is, in a legislative capacity. Thus, the Model Rules apparently incorporate agency rules governing an agency’s conduct in this capacity as well. On the other hand, if the lawyer practices before an agency acting in its executive capacity, that lawyer’s violation of the agency’s rules would not violate Rule 3.4(c) (though it could violate other ethics rules and subject the lawyer to consequences under other law).<sup>45</sup>

Another rule that incorporates the rules of a tribunal is Rule 1.16(c) on withdrawal, which requires a lawyer to “comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.”<sup>46</sup> Thus, if an agency acting in an adjudicatory capacity has a rule requiring notice or permission before a lawyer can withdraw (as some do),<sup>47</sup> a lawyer who fails to follow that rule would be subject to discipline by the relevant state ethics authorities.

In addition, several Model Rules base their ethical obligations or permissions on “law,” which may include agency rules. For example, Model Rule 1.6(b)(6) permits a lawyer to “reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order.”<sup>48</sup> Comment 15 to Rule 1.6 states that the permission may apply when a lawyer is ordered to reveal information by a “governmental entity claiming authority pursuant to other law to compel the disclosure.”<sup>49</sup> Another example is Model Rule 4.2, which allows lawyers to make contact with represented persons if the contact is “authorized . . . by law.”<sup>50</sup> Comment 5 to Rule 4.2 suggests that

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“administrative agencies . . . may have rules of procedure and evidence different from those of courts”).

44. See MODEL RULES OF PROF’L CONDUCT r. 3.4(c).

45. By contrast, the Restatement states that a lawyer representing a client before an administrative agency “must comply with applicable law and regulations governing such representations.” RESTATEMENT (THIRD), *supra* note 2, § 104(2). The Restatement is not, however, limited to ethical prohibitions and so states a broader rule to alert lawyers to potential consequences other than state discipline for violating a federal agency’s rules.

46. MODEL RULES OF PROF’L CONDUCT r. 1.16(c).

47. See, e.g., 17 C.F.R. § 12.9(c) (CFTC; notice plus permission); 17 C.F.R. § 201.102(d)(4) (SEC; notice only); 29 C.F.R. § 2200.23(b) (OSHR; notice plus permission).

48. MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(6). Note that the exception says “court” order, not order of a “tribunal,” so a question could be raised about whether an order by an agency acting in its adjudicative capacity falls under this exception.

49. *Id.* cmt. 15; see also Michigan State Bar Judicial Ethics Comm., Op. RI-311 (1999) (opining that the Code of Federal Regulations constitutes “law” for purposes of the Rule 1.6 exception, so that compliance with an agency rule mandating disclosure would not violate Michigan’s Rules of Professional Conduct).

50. MODEL RULES OF PROF’L CONDUCT r. 4.2.

such communications “may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.”<sup>51</sup> Other Model Rules that incorporate other law include rules on communication,<sup>52</sup> conflicts of interest,<sup>53</sup> withdrawal,<sup>54</sup> tampering with evidence<sup>55</sup> or witnesses,<sup>56</sup> and impartiality of a tribunal.<sup>57</sup> One argument against interpreting “law” to include agency regulations is that there is one Model Rule that uses both the terms “law” and “rule,” suggesting that the drafters view them as distinct.<sup>58</sup>

In sum, lawyers who practice before federal agencies must comply with state ethics rules, typically based on the ABA Model Rules and applicable to all lawyers, as well as with the specific rules applicable to lawyers engaged in agency practice. They also must pay attention to which function the agency is serving to determine which state ethics rules apply. And they must consider how the agency’s own rules may impact their ethical obligations under the general ethics rules. Just what those agency rules are and what purposes they might serve are the topics of the remaining two parts.

## II. EXPLANATIONS AND JUSTIFICATIONS FOR FEDERAL AGENCY RULES

State ethics rules provide an important backdrop for the federal agency rules regulating lawyers who appear and practice before the agencies. Although some of these rules predate the ABA Model Rules, many agencies have promulgated or revised their rules since the Model Rules first appeared in 1980. Yet while the states have almost unanimously fallen in line behind the Model Rules, the agencies have largely gone their own ways. This part examines possible reasons for these rules and their apparent diversity. Looking at what is and why it might have come to be

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51. *Id.* cmt. 5.

52. *Id.* r. 1.4(a)(5) (“A lawyer shall . . . consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”).

53. *Id.* r. 1.7(b)(2) (allowing consent to cure a concurrent conflict of interest if, among other things, “the representation is not prohibited by law”).

54. *Id.* r. 1.16(a)(1) (stating that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law”).

55. *Id.* r. 3.4(a) (“A lawyer shall not . . . unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value . . .”).

56. *Id.* r. 3.4(b) (“A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”).

57. *Id.* r. 3.5(a) (“A lawyer shall not . . . seek to influence a judge, juror, prospective juror or other official by means prohibited by law.”); *id.* r. 3.5(b) (“A lawyer shall not . . . communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.”).

58. *Id.* r. 5.5(d)(2) (allowing a lawyer not licensed in a jurisdiction to provide legal services there if the services are ones “that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction”).

can provide a more informed debate about the normative questions concerning the legitimacy and desirability of these rules.

*A. Specialized Rules Tailored  
to Particular Regulatory Regimes*

One possible explanation for agency ethics rules is that an agency can tailor its rules to the agency's particular subject area and practice context.<sup>59</sup> By contrast, the ABA's Model Rules aim to govern all lawyers, regardless of the subject matter or nature of the lawyer's practice and therefore must arguably be more general.<sup>60</sup> The ABA itself has, on occasion, taken a more specialized approach, for example, by adopting Standards Relating to the Administration of Criminal Justice,<sup>61</sup> as well as other standards on particular practice topics that provide more detailed guidance than the Model Rules do.<sup>62</sup>

If specialized tailoring is the goal of agency rules, we would expect the agency rules to focus on those aspects of practice specific to a particular agency and the industry the agency regulates. We might expect a big emphasis on issues such as competence, because the meaning of competence varies by practice area. On the other hand, if the tailoring theory were the dominant explanation for agency rules, we would expect relatively few general rules that could easily apply to lawyers appearing before different agencies, operating in different industries, and with different purposes.

*B. Rules Addressing Practice Before Agencies Generally*

A related justification for agency ethics rules is that agency practice in general has unique aspects that the Model Rules either do not cover or on which agencies' views of lawyers' responsibilities differ. The argument is that practice before any administrative agency shares certain common features that necessitate separate rules.

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59. See Coquillette & McMorro, *supra* note 2, at 132 ("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."); see also *id.* at 147 (noting that agency practice rules reflect federal norms that complement state regulations in areas of unique federal interest).

60. The Model Rules do not follow this principle absolutely. In addition to Rule 3.9, discussed *supra* notes 9–11, 17–22, see Rules 1.11 (conflict of interest rule for former and current government lawyers), 1.12 (conflict of interest rule for former judges), 1.13 (special rule for lawyer representing organizations, including government lawyers), 2.4 (special rule for lawyer serving as a third-party neutral), and 3.8 (special rule for prosecutors) for other exceptions.

61. AM. BAR ASS'N, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (1992).

62. See, e.g., STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES (2007); STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING A CHILD IN ABUSE AND NEGLECT CASES (1996).

As discussed in the previous part,<sup>63</sup> the Model Rules identify three types of agency conduct and then determine which rules apply to which type of conduct. Roughly speaking, the Model Rules divide the lawyering world into litigation lawyers and transactional lawyers. Lawyers practicing before agencies acting in their executive capacity, however, do not fall squarely within either of these traditional practice paradigms. Perhaps the main activity agencies do is compel the production of information, the raw material that agencies in turn use to create, modify, or enforce regulations. Regulated persons and entities must provide this information, often with the assistance of their lawyers. Advocate lawyers and their clients are also compelled to provide information, but only in the limited context of an adversary proceeding, supervised by a court, concerning a specifically alleged wrong that generally has already occurred. Transactional lawyers and their clients generally are not compelled to provide any information, though they often do so voluntarily, and in doing so they must not lie to others or otherwise engage in fraud. Agencies compelling the production of general information about ongoing activities absent any accusation of wrongdoing fall somewhere in between these paradigms.

If agency rules aim to address the unique aspects of agency practice, we should expect to see relative uniformity across agency rules and a focus on topics such as investigations. On the other hand, we might expect to see fewer rules addressing areas of practice common to all lawyers, such as rules governing the lawyer-client relationship, because these do not implicate the unique features and institutional interests of agencies.

*C. Uniform Rules for Nonlawyers  
and Lawyers Who Practice Before an Agency*

One common justification for agency rules regulating lawyers is that many agencies allow specified nonlawyers to represent people before them.<sup>64</sup> This justification breaks down into two parts. First, because nonlawyers are not otherwise regulated, agencies need to do it to ensure that these nonlawyer practitioners act appropriately. Second, if agencies are going to regulate the nonlawyers who practice before them, the same standards should apply to both lawyers and nonlawyers providing the same services.

Both of these rationales can be questioned. With respect to the first, nonlawyer representatives generally act as agents of the regulated people they are representing; thus, they are regulated by the common law of agency, which covers much of the same ground as ethics rules.<sup>65</sup> They are

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63. See *supra* Part I.A.

64. See Coquillette & McMorro, *supra* note 2, at 132 & n.51 (quoting BERNARD WOLFMAN ET AL., *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* 6 (4th ed. 2008)).

65. See generally *RESTATEMENT (THIRD) ON AGENCY* (AM. LAW INST. 2000). An agent is anyone who acts on behalf of someone else, subject to that person's control, and with that person's consent. See *id.*

also subject to other general law, such as tort, contract, and criminal law.<sup>66</sup> Administrative agencies may nevertheless find this other law inadequate (as state bar organizations have in promulgating lawyer ethics rules), either because the standards are not demanding or definitive enough, or because enforcing agency law through liability and criminal sanction may be excessively difficult and costly for clients or agencies.

With respect to the second rationale, the question is what purpose uniformity of standards for lawyer and nonlawyer representatives is supposed to serve. If the purpose is to provide some minimum standard of behavior to protect clients and the agency, then it is not clear why uniformity is necessary. So long as the lawyer's state ethical standards meet or exceed the minimum set by the agency, there is no obvious need to apply the agency's rules to the lawyers. One reason to allow nonlawyer practitioners to represent people before an agency may be to provide a lower-cost alternative to clients. Clients who prefer the supposedly higher quality service that lawyers provide can opt for that. The real purpose of uniformity may be the opposite, however: to impose a stricter set of rules on the nonlawyers to protect lawyers from a competitive disadvantage relative to the nonlawyer practitioners. If that is the purpose, then we might expect the agency rules to apply essentially all of a lawyer's ethical obligations to the nonlawyer. A final reason for uniformity might be that the lawyer ethics rules are inadequate, so that both lawyers and nonlawyers need to be brought up to the "higher" agency standard of conduct.

#### *D. Inadequate State Ethics Rule Enforcement*

Another potential reason for agency ethics rules is that state disciplinary authorities may lack the expertise or resources (or both) to discipline lawyers who practice before federal agencies.<sup>67</sup> Agencies are experts in their own rules and governing statutes, whereas state disciplinary authorities cannot staff themselves with lawyers expert in all areas of legal practice. Moreover, the resource constraints of state disciplinary authorities are well-known.

If this rationale predominates, we might expect to see little deviation from state ethics rules. In particular, because the main concern is inadequate enforcement, not substance, agency rules might simply

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66. See, e.g., 18 U.S.C. § 201 (2012) (bribery of public officials and witnesses); *id.* § 1001 (false statements to government agencies); *id.* § 1505 (obstruction of justice in proceedings before agencies); *id.* § 1512 (tampering with witnesses or evidence); *id.* § 1519 (destruction of records in agency investigations).

67. See Coquillette & McMorow, *supra* note 2, at 147–48 (stating that agency ethics enforcement “generally addresses areas of attorney conduct that are neglected by state regulators”); Cox, *supra* note 4, at 179 n.22 (quoting ABA STANDING COMM. ON PROF'L DISCIPLINE, REPORT TO THE HOUSE OF DELEGATES 4 (1980)); *id.* at 179 n.23 (quoting a letter from SEC officials to the ABA concerning proposals regarding agency discipline of lawyers); Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, 2003 PROF. LAW. 15, 30–31 (suggesting that increased regulation of lawyers by agencies may “reflect a broad perception that traditional state regulation of lawyers is failing and that nontraditional regulators should enter the field”).

incorporate the state ethics rules of each lawyer's home jurisdiction. To the extent that agency rules deviate from state rules, we might expect to find more agency rules governing areas that are more legally or factually complex.

#### *E. Multijurisdictional Practice Issues*

Lawyers who practice before federal agencies might not practice in the jurisdiction in which they are licensed.<sup>68</sup> In particular, lawyers who work in Washington, D.C., and practice full time before federal agencies may be licensed in another jurisdiction, yet are permitted to practice in D.C.<sup>69</sup> These lawyers are not subject to discipline by the D.C. authorities.<sup>70</sup> They are subject to discipline in the jurisdictions in which they are licensed, but, for reasons stated in the previous section,<sup>71</sup> such discipline may be unlikely against lawyers living and working outside the jurisdiction.

Lawyers practicing before federal agencies in D.C. are licensed in a variety of jurisdictions. One might expect that agencies would want to apply the same rules to all lawyers who practice before them. Doing so would reduce enforcement costs for agencies that would not have to become familiar with multiple sets of ethics rules. Although the aspiration of the ABA Model Rules is that states will adopt them without change, many states modify the ABA Model Rules. Agencies that sought to achieve uniformity for these reasons could do so in several ways. They could hew closely to the ABA Model Rules so as to be neutral with respect to particular state variations. Or agencies could use the D.C. Rules as a

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68. See Cox, *supra* note 4, at 178, 179 (arguing that “if the states effectively processed allegations of attorney misconduct before federal agencies, federal disciplinary actions arguably would be unnecessary”).

69. Rule 49 of the D.C. Court of Appeals Rules (“the D.C. Rules”) exempts from the prohibition on unauthorized practice of law lawyers who

[p]rovid[e] legal services to members of the public solely before a special court, department or agency of the United States, where:

- (A) Such legal services are confined to representation before such fora and other conduct reasonably ancillary to such representation;
- (B) Such conduct is authorized by statute, or the special court, department or agency has adopted a rule expressly permitting and regulating such practice; and
- (C) If the practitioner has an office in the District of Columbia, the practitioner expressly gives prominent notice in all business documents of the practitioner's bar status and that his or her practice is limited consistent with this section (c).

RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS r. 49(c) (2015). As discussed in the previous section, *see supra* note 41 and accompanying text, Model Rule 5.5(d)(2) adopts a similar permission for “services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction,” but the D.C. Rules do not include this provision; instead, the comment to D.C. Rule 5.5 references Rule 49. *Id.* r. 5.5 cmt. 1.

70. D.C. Rule 8.5(a), which sets forth the D.C. disciplinary authority, does not extend this authority to lawyers licensed outside of D.C. but practicing in D.C. By contrast, ABA Model Rule 8.5(a) provides: “A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.” MODEL RULES OF PROF'L CONDUCT r. 8.5(a).

71. See *supra* Part II.D.

model, as that is the jurisdiction in which most federal agencies are headquartered. Or agencies could just adopt their own rules. But any of these approaches potentially creates difficult choice of law problems for lawyers whose state ethics rules differ from the federal agency rules.<sup>72</sup>

Agencies may, however, use their own ethics rules to restrict, rather than expand, the ability of lawyers to engage in multijurisdictional practice. In particular, agencies may seek to engage in reciprocal discipline, in which agencies restrict practice by lawyers who have already been disciplined elsewhere. If that is the main concern, agencies need not have uniform rules, or any substantive ethics rules, but simply can rely on the various state authorities disciplining lawyers under their own rules.

#### F. Private Lawyer Interests

Agency rules may reflect the interests of the lawyers who practice before the agencies rather than the interests of agencies. Agency rules created under this theory could be benign and desirable; for example, they could help create or maintain a close-knit community of practitioners, like a specialized bar. Alternatively, agency rules could reflect self-interested capture of an agency by lawyers who practice before it. One might expect smaller bars with extensive repeated interactions with agencies to have greater influence on those agency rules.<sup>73</sup>

It may be difficult, however, to discern whether agency rules reflect lawyer interests and whether these interests are benign or malign. Some rules could on their face appear to serve lawyer interests more than an agency's interest or the public interest. On the other hand, if agency ethics rules aim to respond to capture concerns—for example, rules governing revolving door conflicts or other forms of undue influence—the existence of such rules might suggest that the malign version of agency rules is less likely.<sup>74</sup>

#### G. Experimentation in Ethical Regulation

We are used to thinking of states as the laboratories of democracy in our federal system. The significant variation in the state versions of the Model Rules is consistent with this view.<sup>75</sup> Nevertheless, agencies may feel less constrained by the ABA prototype than states do, and therefore they may feel freer to experiment, even if none of the justifications discussed above applies. Under this rationale, we might expect to find variations that do not fall within the above categories, but simply reflect an agency's view of desirable ethics rules.

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72. *But see* Coquillette & McMorrow, *supra* note 2, at 148 (concluding that choice of law issues seem to be “manageable”).

73. Professors Coquillette and McMorrow suggest that the capture problem may in fact be bigger for the state ethics rules than for agency-created rules. *Id.* at 148–49.

74. *See id.* at 132–33.

75. *See* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 373–76 (1994) (analyzing the argument that respecting state professional regulation “enables the states to serve as laboratories for novel approaches”).



### H. History and Experience

Finally, agency ethics rules may arise and exhibit variety simply because agencies have different histories and experiences. As I tell my students, law is the fossilized remains of prior misbehavior. Agency rules may simply reflect an agency's experiences with lawyers practicing before it, which may not have anything to do with agency practice generally or an agency's particular subject matter context. Although one might expect a highly public scandal involving lawyers practicing before one agency to influence other agencies' rules, agencies may, rightly or wrongly, see problems faced by other agencies as unique to those agencies' particular circumstances.

## III. AN EXAMINATION OF RULES GOVERNING LAWYERS PRACTICING BEFORE FEDERAL AGENCIES

This part offers a preliminary examination of federal agency ethics rules. It begins with some general observations about these rules and then evaluates the theories presented in the previous part based on the rules that exist. I find some support for most of the theories, but no single theory explains all or most of the existing rules.

### A. General Observations

Forty-six agencies that have rules published in the Code of Federal Regulations have at least one ethics rule governing lawyers who practice before the agency.<sup>76</sup> Rules appear in twenty-six of the fifty titles of the Code of Federal Regulations.<sup>77</sup> The agencies steadily have adopted these rules over a period stretching from 1958 to 2014, with no more than a four-year gap from the adoption of one set of rules to the adoption of the next, with no year having more than three adoptions, and with most years having no more than one.<sup>78</sup> The most common topics covered by the rules are disruptive conduct (twenty-seven agencies), ex parte contact with agency officials (twenty-six),<sup>79</sup> incorporation of state ethics duties (twenty-five), frivolous claims (twenty), required compliance with agency rules (nineteen), and obstruction of justice (eighteen). This list is striking. Only the first three of these rules have been adopted by a majority of agencies having at least one ethics rule, and no ethics rules outside this list are adopted by one-third or more of the agencies having at least one rule. The vast majority of rules apply to lawyers practicing before an agency acting in

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76. See *infra* APPENDIX A for an alphabetical list. The rules are not easy to locate, and classification is subject to interpretation, so I may have missed some. A spreadsheet I created containing all the agency rules I could find and matching them up to the ABA Model rules is available on the *Fordham Law Review* website at <http://fordhamlawreview.org/gmc/>.

77. See *infra* APPENDIX B.

78. See *infra* APPENDIX D.

79. The Administrative Procedure Act bars ex parte communications with agency decision makers, but the remedy is limited to dismissal of the claim. See 5 U.S.C. §§ 557 (d)(1)(A), (d)(1)(O) (2012). Although agencies typically have rules against ex parte contact with agency officials, I included only those agencies whose rules specifically provide for some form of discipline against lawyers who violate the rule.

its judicial capacity. Although the content of these rules does not vary greatly when an agency includes them, which agencies include which rules varies significantly, with no readily apparent pattern. In addition, the organizational structure and labeling of agency rules varies dramatically.<sup>80</sup>

Only two sets of agency rules track the format and scope of the Model Rules: the USPTO Rules of Professional Conduct<sup>81</sup> and the Judge Advocate General (JAG), Department of the Navy, Rules of Professional Conduct.<sup>82</sup> Even these rules do not include the comments from the Model Rules; in fact, no agency rules include comments.<sup>83</sup> Eight other agencies have relatively comprehensive and detailed lawyer practice rules not generally patterned on the Model Rules: Executive Office of Immigration Review<sup>84</sup> (EOIR), Department of Homeland Security<sup>85</sup> (DHS), Department of Transportation (DOT), Aviation Proceedings,<sup>86</sup> Social Security Administration<sup>87</sup> (SSA), IRS,<sup>88</sup> Veterans Administration (VA), Surface Transportation Board<sup>89</sup> (STB) (formerly Interstate Commerce Commission), and Bureau of Alcohol, Tobacco and Firearms (BATF). The SEC has a detailed set of rules promulgated under the Sarbanes-Oxley statute, but these rules cover a limited number of topics.<sup>90</sup>

The agencies regulating banks also have significant rules governing lawyers who practice before the agencies, but they do not separate out those rules, identify them as rules of professional conduct or similar nomenclature, or collect all the rules in one place, making them difficult to find if one does not know where to look. These agencies are: the Federal Deposit Insurance Corporation<sup>91</sup> (FDIC), the Office of Thrift Supervision<sup>92</sup> (OTS), the Office of the Comptroller of the Currency<sup>93</sup> (OCC), the National

80. *See infra* APPENDIX C. The most common term identifying the rules is “Rules of Practice” (fifteen agencies), followed by “Professional Conduct” (five), “Rules of Procedure” (three) and “Rules of Conduct” (two). But fewer than half of the agencies with rules use one or more of these terms to label their rules, including the IRS, which has one of the most detailed sets of rules.

81. 37 C.F.R. §§ 11.101–.111 (2015). For a complete list of the agencies discussed in this Article and their respective abbreviations, see *infra* APPENDIX A.

82. 32 C.F.R. §§ 776.18–.71 (2015).

83. The JAG Rules do contain preamble and principles sections, loosely related to the Model Rules preamble and scope sections. *See* 32 C.F.R. §§ 776.18–.19; *cf.* 49 C.F.R. § 1103.10 (2015) (“Introduction” to STB rules, providing that the rules do not relieve a lawyer from other applicable ethical duties).

84. 8 C.F.R. § 1003.102 (2015).

85. *Id.* § 292.3(b). The DHS Rules simply incorporate the EOIR Rules, which is explained by the fact that both agencies split off from INS. I count them as separate agencies in this discussion but refer only to EOIR when giving examples.

86. 14 C.F.R. §§ 300.1–.20 (2015).

87. 20 C.F.R. § 404.1740 (2015).

88. 31 C.F.R. §§ 10.22–.38 (2015) (Circular 230).

89. 49 C.F.R. §§ 1103.10–.35. These rules are based to some extent on the ABA’s former Canons of Professional Ethics.

90. 17 C.F.R. §§ 205.1–.7 (2015).

91. 12 C.F.R. §§ 308.6(b)–.9, 308.108–.109, 390.355(b) (2015).

92. *Id.* §§ 509.6(b)–.9, 513.4(a), 563.180(b).

93. *Id.* §§ 19.6(b)–.9, 109.6(b)–.9, 19.183(e), 163.180(b). For some reason, the OCC has two identical sets of Uniform Rules of Practice and Procedure.

Credit Union Administration<sup>94</sup> (NCUA), and the Federal Reserve Board<sup>95</sup> (FRB). With respect to adjudicative proceedings, the banking agencies have adopted “Uniform Rules of Practice and Procedure,” which serve as the equivalent of the Federal Rules of Civil Procedure<sup>96</sup> (FRCP). These Uniform Rules cover topics found in the ABA Model Rules, such as rules on disruptive or obstructionist conduct, frivolous claims, conflicts of interest, and ex parte communications with officials.<sup>97</sup> The placement of these rules within rules of procedure, which occurs in other agencies as well as the banking agencies, shows that agencies do not necessarily follow the division of territory normally observed between rules of civil procedure and ethics rules.<sup>98</sup> With respect to their nonadjudicative capacities, the banking agencies do not have uniform ethics rules, and the ethics rules they have are listed under different topic headings, such as “Practice Before the [Agency]” or “Formal Investigations.”<sup>99</sup>

Agency rules leave out a large number of topics covered in the state ethics rules. Some of the omitted topics simply reflect the more limited scope of lawyer practice before the agency. For example, no agency rules address criminal practice, with the exception of the JAG Rules, which apply to courts martial.<sup>100</sup> In addition, none of the agencies’ rules include any rules similar to the Public Service Rules found in Model Rules 6.1 to 6.5. And none of the agencies’ rules includes Model Rule 7.6 on Political Contributions to Obtain Government Legal Engagements or Appointments

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94. *Id.* §§ 747.6(b)–9; *id.* § 747.807(d).

95. *Id.* §§ 263.6(b)–9. Other rules governing lawyers located in Title 12 of the Code of Federal Regulations, which houses almost a quarter of the agencies having ethics rules (more than any other Title), include those of the Federal Housing Finance Agency, *id.* §§ 1209.13–.14, §§ 1209.73–.74; the Farm Credit Administration, *id.* §§ 622.3(b), 622.7(j), 622.105(d)(2); and the recently created Bureau of Consumer Financial Protection, *id.* §§ 1081.107–.110.

96. *See* 12 C.F.R. §§ 19.1–.41, 109.1–.41 (OCC); 12 C.F.R. §§ 263.1–.41 (FRB); 12 C.F.R. §§ 308.1–.41 (FDIC); 12 C.F.R. §§ 509.1–.41 (OTS); 12 C.F.R. §§ 747.1–.41 (NCUA).

97. For the Office of the Comptroller of the Currency, these rules are 12 C.F.R. §§ 19.8, 109.8 (conflicts of interest); 12 C.F.R. §§ 19.7, 109.7 (frivolous claims); 12 C.F.R. §§ 19.9, 109.9 (ex parte contact); 12 C.F.R. §§ 19.6(b), 109.6(b) (disruptive conduct).

98. The Federal Rules of Civil Procedure do not, for example, have a rule about conflicts of interest in litigation. Law governing that topic is left to the ethics rules and the courts’ rulings on disqualification motions. Nor do the Federal Rules have a rule on disruptive or obstructionist conduct or ex parte communications, both of which are included in state ethics rules. *See* MODEL RULES OF PROF’L CONDUCT r. 3.5 (b) (ex parte contact), *id.* r. 3.5(d) (disruptive conduct). On the other hand, Federal Rule 11 and Model Rule 3.1 both address the issue of frivolous claims in similar ways, and both sets of rules cover some other topics, such as discovery abuse. FED. R. CIV. P. 11(b)(2) (discovery abuse); MODEL RULES OF PROF’L CONDUCT r. 3.1; *id.* r. 3.4(d) (discovery abuse). The federal agency rules on frivolous claims tend to track the language of Rule 11 rather than Model Rule 3.1. *See, e.g.*, 37 C.F.R. § 11.301 (2015) (USPTO, tracking FED. R. CIV. P. 11). *But see* 32 C.F.R. § 776.40 (2015) (JAG, tracking Model Rule 3.1).

99. *See, e.g.*, 12 C.F.R. §§ 263.91–.94 (FRB, Practice Before the Board); 12 C.F.R. § 513.4(a) (OTS, Practice Before the Office); 12 CFR § 563.180(b) (OTS); 12 C.F.R. § 19.183(e) (OCC, Formal Investigations, Rights of Witnesses).

100. *See* 32 C.F.R. § 776.47.

by Judges, as agencies generally do not engage in retaining or appointing private lawyers.

The USPTO and JAG Rules, which track the Model Rules (with significant modifications), include versions of all the other Model Rules, though in some cases only one of these two agencies includes a particular rule. The topics of many of those rules, however, are not included in the rules of any other agency.<sup>101</sup> Even Rule 3.9, which specifically addresses lawyers appearing before agencies acting in nonadjudicative contexts, appears in only one other agency's rules.<sup>102</sup> A number of other topics covered by the Model Rules appear in the rules of no more than four agencies, including all the rules on Information About Legal Services, but also such significant topics as successive conflicts of interest, the No-Contact Rule (the rule that prohibits certain contact with represented persons, not the rule that prohibits contact with agency personnel), and the duty to report misconduct.<sup>103</sup> It is particularly noteworthy that apart from the SEC's Sarbanes-Oxley Rules (and the USPTO and JAG Rules), no other agency has a rule on the responsibilities of lawyers for an organization, including the up-the-ladder reporting obligation, even though several financially oriented agencies have adopted rules since Sarbanes-Oxley (i.e., FHFA, OCC, and Bureau of Consumer Financial Protection (BCFP)).

#### *B. How Agency Rules Reflect the Justifications for Agency Regulation*

In light of this hodgepodge, it should not be surprising that no single theory explains all of the agency rules. Nor does one explanation predominate. In many cases, more than one rationale seems applicable. Different theories better explain rules in different agencies, though the reason for the differences between agencies is not always apparent. This section examines the extent to which agency rules governing lawyers reflect the previously identified justifications.

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101. The Model Rules that appear in some form in either the USPTO Rules or the JAG Rules but are not in any other agency rules (that I could find) are: 1.12 (conflicts of interest for former judges), 1.14 (clients with diminished capacity), 1.17 (sale of a law practice) (USPTO only), 1.18 (duties to prospective clients) (USPTO only), 2.3 (opinion letters), 2.4 (lawyer as third-party neutral), 3.7 (lawyer as witness), 3.8 (duties of a prosecutor) (JAG only), 5.6 (restrictions on the right to practice) (USPTO only), 5.7 (law-related services) (USPTO only), 8.2 (statements about judges), and 8.5 (choice of law) (JAG only).

102. 10 C.F.R. § 2.1509 (2015) (Nuclear Regulatory Commission).

103. The rules (apart from those mentioned in the previous footnote) whose topics are not addressed in more than four agencies (including USPTO and JAG) are: Rules 1.0 (definitions), 1.8 (transactional conflicts), 1.9 (successive conflicts), 1.10 (imputation of conflicts of interest), 1.13 (organizational clients), 2.1 (lawyer as advisor), 3.6 (trial publicity), 3.9 (nonadjudicative proceedings), 4.2 (no-contact rule), 4.3 (dealing with unrepresented persons), 4.4 (respect for the rights of third persons), 5.2 (subordinate lawyer), 5.3 (nonlawyer assistants), 5.4 (independence of lawyer), 7.2 (advertising), 7.5 (firm names and letterheads), 8.1 (bar admission), and 8.3 (reporting misconduct).

### 1. Specialization and Competence

Some agency rules are tailored to specialized areas of practice. For example, the USPTO rule on competence adds that lawyers (and nonlawyer practitioners) practicing before that agency must have “scientific and technical knowledge” necessary for the representation,<sup>104</sup> an obvious necessity for patent practice. In addition, the immigration agencies (EOIR and DHS) are unique in requiring that lawyers make reasonable efforts to communicate with a client in the client’s native language, a particularly apt requirement for lawyers handling immigration cases. The SSA details the assistance a practitioner must provide to a claimant for benefits in providing certain evidence to the agency,<sup>105</sup> which may reflect the fact that the claimants before that agency are individuals who are generally mentally or physically disabled or elderly and so likely need extra assistance in gathering information. The IRS’s Circular 230 Rules include detailed requirements for lawyers assisting clients with tax returns or drafting tax opinions.<sup>106</sup> The JAG confidentiality rule includes a mandatory disclosure provision for situations in which a lawyer “reasonably believes” such disclosure is “necessary to prevent . . . significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.”<sup>107</sup>

Most agency rules, however, neither tailor their rules to the agency’s area of expertise, nor require lawyers to have any particular nonlegal expertise related to the agency’s function. Perhaps most striking, many agencies with ethics rules do not include a competence rule. Those that do<sup>108</sup> generally track the language of Model Rule 1.1,<sup>109</sup> sometimes (in addition to adding supplemental requirements, as discussed in the previous paragraph) incorporating language from that rule’s comments,<sup>110</sup> or adding the requirement that a practitioner must have knowledge of the agency’s governing statute and regulations, which would seem to go without saying (at least for lawyers).<sup>111</sup>

104. 37 C.F.R. § 11.101 (2015).

105. 20 C.F.R. § 404.1740(b)(2) (2015).

106. *See* 31 C.F.R. §§ 10.22, 10.34(d), 10.37 (2015).

107. 32 C.F.R. § 776.25(a)(2) (2015); *see also id.* § 776.25(b) (elaborating on the type of information that must be disclosed).

108. I found seven agencies with some kind of competence rule: 8 C.F.R. § 1003.102(o) (2015) (EOIR, DHS); 20 C.F.R. §§ 404.1740(a)(1), (b)(1), (b)(2), (b)(3)(i) (SSA); 10 C.F.R. §§ 10.22, 10.33(a)(2), 10.34(d), 10.35, 10.37 (2015) (IRS); 32 C.F.R. § 776.20 (JAG); 11 C.F.R. §§ 11.101, 11.18 (2015) (USPTO); 38 C.F.R. § 14.632(b)(1) (2015) (VA).

109. MODEL RULES OF PROF’L CONDUCT r. 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

110. *See, e.g.*, 8 C.F.R. § 1003.102(o) (EOIR). The rule adds to the text derived from Model Rule 1.1 the first sentence of Comment 5 to that rule, which states: “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.” MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt 5.

111. *See* 38 C.F.R. § 14.632(b)(1) (stating that competence for lawyers practicing before the VA “includes understanding the issues of fact and law relevant to the claim as well as the

In addition, many agency rules that at first blush seem to fit the specialization mold could, in fact, be adopted by other agencies. For example, the SEC Sarbanes-Oxley Rules largely expand on the up-the-ladder reporting obligation found in Model Rule 1.13,<sup>112</sup> which applies beyond the securities law context. Other than specifying securities law violations as triggering the lawyer's obligations, very little in the SEC Rules seems uniquely tailored to securities law practice. Similarly, the duty of inquiry imposed by the IRS's Circular 230 could easily fit other practice areas.<sup>113</sup>

## 2. Agency Uniqueness and Tripartite Structure

Some agency rules reflect the unique features of agencies in general rather than the specialized areas in which agencies operate, though not as much as one might expect. For example, one might expect that, given the tripartite structure of the Model Rules and the more detailed obligations they impose on lawyers practicing before an agency acting in its adjudicative capacity, agency rules would focus more on the agencies' legislative and executive capacities.

Some agencies do have rules applying to their executive role, in particular rules governing agency investigations and the submission of information to the agencies, but not many. The IRS is unique in adopting a prohibition against "frivolous" positions in documents filed outside of litigation.<sup>114</sup> In addition, the IRS,<sup>115</sup> USPTO,<sup>116</sup> and SSA<sup>117</sup> all contain

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applicable provisions of Title 38, United States Code, and Title 38, Code of Federal Regulations"). Somewhat ironically, such competence would be necessary to find this rule itself. See 20 C.F.R. § 404.1740(b)(3)(i) (stating that competence for a lawyer practicing before the SSA includes "knowing the significant issue(s) in a claim and having a working knowledge of the applicable provisions of the Social Security Act, as amended, the regulations and the Rulings").

112. See MODEL RULES OF PROF'L CONDUCT r. 1.13(b).

113. See 31 C.F.R. § 10.22(a)(2)–(3) (2015) (requiring a practitioner to exercise "due diligence . . . in determining the correctness of oral or written representations made by the practitioner" to the Treasury Department or IRS); 31 C.F.R. § 10.37(a)(2)(ii)–(iii) (requiring a practitioner providing written advice to "reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know" and to "use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter").

114. 31 C.F.R. § 10.34(b)(1) ("A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous."); *id.* § 10.34(b)(2)(ii) ("A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service . . . [t]hat is frivolous . . .").

115. *Id.* §§ 10.22, 10.34(d).

116. 37 C.F.R. § 11.18(b)(2) (2015). Note that this rule is not included in the USPTO's general rules of professional conduct. For a discussion of the requirements of this Rule, see Brandee N. Woolard, *The Resurrection of the Duty to Inquire After Therasense, Inc. v. Becton, Dickenson & Co.*, 12 DUKE L. & TECH. REV. 41 (2014).

117. 20 C.F.R. § 404.1740(b)(1) (2015) (stating that a representative must "[a]ct with reasonable promptness to obtain the information and evidence that the claimant wants to submit in support of his or her claim, and forward the information or evidence to us for consideration as soon as practicable").

express duties of inquiry that apply something like the FRCP 11 standard outside of the litigation context. The great majority of agency rules, however, deal with lawyers' duties to an agency acting in its adjudicative role, the subject covered most extensively by the Model Rules. Moreover, apart from the Nuclear Regulatory Commission<sup>118</sup> (NRC), JAG,<sup>119</sup> and the USPTO,<sup>120</sup> none of the agencies have rules specifically addressing a lawyer's obligations when practicing before an agency acting in its rulemaking capacity.<sup>121</sup>

One reason agencies do not adopt rules addressing lawyers who practice before the agency in its executive role may be that the agencies believe they lack statutory authority to do so. Several recent court decisions have highlighted this issue and thrown into doubt the IRS's authority to regulate lawyers outside the adjudicatory context under Circular 230. In *Loving v. IRS*,<sup>122</sup> the D.C. Circuit held that the IRS could not regulate nonprofessional tax preparers under its Circular 230 Rules because they do not "practice" before the agency. The only nonadjudicative context the court recognized as "practice" was an "investigation."<sup>123</sup> Subsequently, a federal district court extended the *Loving* holding to tax professionals such as lawyers.<sup>124</sup> How far those opinions extend in the IRS context and beyond currently is uncertain.<sup>125</sup>

Other agency rules extend lawyer obligations beyond those imposed by the Model Rules in ways that reflect the concerns of agencies in general. For example, one of the most common types of agency rule requires practitioners to comply with agency rules.<sup>126</sup> These rules extend beyond the requirements of the Model Rules, which expressly require lawyers to obey agency rules only if the agency acts as a "tribunal."<sup>127</sup> Similarly, Model Rule 1.2(d) prohibits a lawyer from aiding and abetting only a

118. 10 C.F.R. § 2.1509 (2015).

119. 32 C.F.R. § 776.48 (2015).

120. 37 C.F.R. § 11.309.

121. The CFTC allows a lawyer to be disciplined who has "engaged in unethical or improper professional conduct either in the course of any adjudicatory, investigative or rulemaking or other proceeding before the Commission or otherwise." 17 C.F.R. § 14.8 (2015).

122. 742 F.3d 1013 (D.C. Cir. 2014).

123. *See id.* at 1018.

124. *Ridgely v. Lew*, 55 F. Supp. 3d 89, 92 (D.C. Cir. 2014).

125. *See* Jaime P. Hopkins, *Loving v. IRS: The IRS's Achilles' Heel for Regulated Tax Advice?*, 34 VA. TAX REV. 191, 222–23 (2014).

126. *See* 12 C.F.R. §§ 263.91, 263.94(h) (2015) (FRB); *id.* § 308.108(a)(3) (FDIC); *id.* § 513.4(a)(4) (OTS); *id.* § 1209.74 (FHFA); 13 C.F.R. § 134.219(a)(2) (2015) (SBA); 16 C.F.R. § 1025.66(b) (2015) (CPSC); 17 C.F.R. § 14.4 (2015) (CFTC); *id.* § 201.102(e)(1)(iii) (SEC); 20 C.F.R. §§ 404.1740 (a)(2), (c)(9) (2015) (SSA); 29 C.F.R. § 18.23(a)(1)(iii) (2015) (DOL); 31 C.F.R. § 10.34(b)(2)(iii) (2015) (IRS); 32 C.F.R. § 776.42(a)(1)(v) (2015) (JAG); 40 C.F.R. § 27.29(a)(1) (2015) (EPA); 48 C.F.R. § 6101.33(a) (2015) (CBCA); 49 C.F.R. § 1103.27(f) (2015) (STB). The immigration agencies have a rule limited to requiring lawyers to follow the agencies' rule on signing and completing a Notice of Entry of Appearance. 8 C.F.R. § 1003.102(t) (2015) (EOIC, DHS).

127. MODEL RULES OF PROF'L CONDUCT r. 3.4(c) ("A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligations exists.").

client's "conduct that the lawyer knows is criminal or fraudulent,"<sup>128</sup> whereas agencies that include an aiding and abetting rule often include regulatory or statutory violations.<sup>129</sup> These violations may not count as crimes or frauds within the meaning of Model Rule 1.2(d). Moreover, in some cases, the agency aiding and abetting rules omit a scienter standard or (in the case of the IRS) specify a recklessness or gross incompetence standard, which is less demanding than the "knowledge" scienter required for an aiding and abetting violation under Model Rule 1.2(d).

One might expect that agencies would act aggressively to impose disclosure obligations on lawyers to further their public missions, which require detailed and accurate information from regulated parties. In fact, only a few agencies impose affirmative mandatory disclosure provisions on lawyers in the absence of a specific request by the agency. The USPTO requires practitioners to "disclose to the Office information necessary to comply with applicable duty of disclosure provisions."<sup>130</sup> The IRS Circular 230 Rules require that practitioners "promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged"<sup>131</sup> and "provide[s] any information the practitioner has concerning [an] alleged violation [of the regulations in this part], unless the practitioner believes in good faith and on reasonable

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128. *Id.* r. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

129. *See, e.g.*, 12 C.F.R. § 263.94(a) (FRB) (stating that the Board may discipline an individual for "[w]illfully or recklessly violating or willfully or recklessly aiding and abetting the violation of any provision of the Federal banking or applicable securities laws or the rules and regulations thereunder or conviction of any offense involving dishonesty or breach of trust"); *id.* § 308.109(a)(1)(iii) (FDIC) (stating that a lawyer can be disciplined if found to "have engaged in, or aided and abetted, a material and knowing violation of the FDIA"); *id.* § 513.4(a)(4) (OTS) (stating that a lawyer can be disciplined if found to "have willfully violated, or willfully aided and abetted the violation of, any provision of the laws administered by the Office or the rules and regulations promulgated thereunder"); 14 C.F.R. § 300.6(d) (2015) (DOT) (stating that a practitioner before the DOT should "[a]dvice all clients to avoid improprieties and to obey the law as the attorney believes it to be"); 17 C.F.R. § 14.4 (CFTC) (stating that the agency may discipline any person found "to have violated, caused, or aided and abetted any violation of the Commodity Exchange Act . . . or the rules and regulations adopted thereunder"); *id.* § 201.102(e)(1)(iii) (SEC Rule 102(e)) (stating that the SEC can discipline a lawyer if the lawyer is found to have "willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder"); 20 C.F.R. § 404.1740(c)(11) (SSA) (stating that a representative must not "[a]dvice any claimant or beneficiary not to comply with any of our rules or regulations"); 31 C.F.R. § 10.34(a)(1) (2015) (IRS) (stating "[a] practitioner may not willfully, recklessly, or through gross incompetence" assist a taxpayer in specified conduct that violates the tax code, or take a position that "lacks a reasonable basis"); 49 C.F.R. § 1103.31 (2015) (STB) (stating, based on the former ABA Canons, that a "practitioner bears the responsibility for advising as to questionable transactions, bringing questionable proceedings, or urging questionable defenses"). As this list makes clear, the aiding and abetting standards vary greatly across agencies. For example, the FRB, OTS, CFTC, SEC, and IRS rules extend the prohibition to both statutory and regulatory violations; the SSA Rule applies to regulatory violations only; the FDIC rule applies to statutory violations only; and the DOT and STB rules are unclear.

130. 37 C.F.R. § 11.106(c) (2015).

131. 31 C.F.R. § 10.20(a)(1).



grounds that the information is privileged.”<sup>132</sup> Most recently, the SSA revised its regulations to impose on representatives a duty to “[a]ct with reasonable promptness to help obtain the information or evidence that the claimant must submit under our regulations, and forward the information or evidence to us for consideration as soon as practicable.”<sup>133</sup>

In sum, a number of agencies do have ethics rules applicable to lawyers appearing before the agencies acting in their executive capacity, such as rules concerning investigations, duties of inquiry, and aiding and abetting prohibitions. The existence of these rules supports the theory that agencies are filling in some of the gaps left by the tripartite structure of the Model Rules and addressing issues uniquely relevant to agency practice generally. Nevertheless, fewer agencies have such rules than one might anticipate and the rules that agencies do adopt vary widely. Thus, this theory is only partially successful in explaining the existence and variety of agency rules.

### 3. Nonlawyer Practitioners

The vast majority of agencies with rules for representatives who practice before the agency allow nonlawyer as well as lawyer practitioners and apply the same rules to both. That fact somewhat supports the theory that the rules are at least as much about regulating nonlawyer practitioners as about regulating lawyers.

Nevertheless, some features of the rules are not consistent with this theory. Some agencies do adopt rules applying only to lawyers. The most notable of these rules are the SEC’s Sarbanes-Oxley Rules.<sup>134</sup> Other agencies whose rules apply only to lawyer representatives include EOIR, DNFSB, SBA, FTC, DOJ, JAG, USPS, CSHIB, and EPA.<sup>135</sup> The existence of these rules obviously cannot be explained by the need to ensure that nonlawyers adhere to adequate standards of practice. In addition, as already noted, most agencies do not have competence rules, contrary to what one would expect if the primary concern of the rules was nonlawyer practitioners’ abilities.

More important, among the agencies permitting nonlawyer practice, only the USPTO follows the Model Rules format, which effectively makes the nonlawyer practitioners conform to almost all the lawyer ethics rules. One would think that if agencies wanted to ensure that nonlawyer practitioners were subject to the same standards as lawyers, they would follow the Model

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132. *Id.* § 10.20(a)(3).

133. 20 C.F.R. § 1740(b)(1) (2015). This regulation was adopted to combat the practice of representatives withholding adverse evidence about the claimant’s condition from the agency. *See* Thomas Katsiotas, Comment, *The Last Days of Social Security Disability: How the Social Security Administration’s Policies on the Submission of Adverse Evidence and Non-Attorney Representation Have Contributed to Its Institutional Failure*, 63 BUFF. L. REV. 685, 706–10 (2015).

134. 17 C.F.R. § 205.1 (“This part sets forth minimum standards of professional conduct for attorneys practicing before the Commission in the representation of an issuer.”).

135. The rules may apply to parties or their “inside” agents (e.g., partners in a partnership) but not to nonlawyer representatives. *See, e.g.*, 32 C.F.R. § 776.2(d) (2015) (JAG); 8 C.F.R. § 1003.101 (2015) (EOIR).

Rules more closely and include many more rules than they do, especially those regulating the lawyer-client relationship.<sup>136</sup> Thus, even if the need to have rules governing nonlawyers explains the existence of agency rules, it does not fully explain their variety.

#### 4. Inadequate State Enforcement and Incorporation of State Ethics Rules

If agency rules are driven by inadequate state enforcement, one would expect agencies simply to incorporate state ethics rules. Several agencies do have only an incorporation rule or very minimal additional rules.<sup>137</sup> A number of agencies, however, have not only incorporation rules, but substantive rules as well, which suggests a concern with more than inadequate state enforcement.<sup>138</sup>

#### 5. Multijurisdictional Practice and Reciprocal Discipline

Agency rules facilitate multijurisdictional practice by generally allowing lawyers licensed in any jurisdiction to practice before the agency. That fact, plus the prevalence of incorporation rules discussed in the previous section,<sup>139</sup> suggests that agencies are not too concerned about the possibly conflicting ethics rules of different states, perhaps because these differences do not matter very much in the disciplinary issues that agencies most commonly see. Moreover, several agencies do have reciprocal discipline rules,<sup>140</sup> suggesting that they at least sometimes expect that state disciplinary authorities will discipline lawyers who practice before them. But these agencies fit no particular pattern. They include several with detailed ethics rules (JAG, EOIR/DHS, DOL, BATF), some but not all of the financial agencies (FRB, FDIC, CFTC), and several agencies with minimal rules (DOI, FCC).

136. *Cf.* Katsiotas, *supra* note 133, at 720–23 (criticizing the SSA ethics rules as less stringent than state ethics rules and arguing that they are less effectively enforced).

137. *See, e.g.*, 4 C.F.R. § 22.27 (2015) (GAO); 21 C.F.R. § 1316.51(b) (2015) (DEA); 28 C.F.R. § 68.33(c)(3)(iii) (2015) (DOJ); 29 C.F.R. § 102.177(a) (2015) (NLRB); 39 C.F.R. § 955.34 (2015) (USPS); *id.* § 3001.6(e) (PRC); 43 C.F.R. § 1.6(a) (2015) (DOI); 45 C.F.R. § 500.4 (2015) (FCSC); 47 C.F.R. §§ 1.24(a)(2), (a)(4) (2015) (FCC).

138. 7 C.F.R. §§ 1.26(b)(1), (2) (2015) (DOA); *id.* § 97.157 (same); *id.* §§ 110.8(h)(3), (4) (same); 10 C.F.R. §§ 1708.112(a), (b)(2) (2015) (DNFSB); 12 C.F.R. § 308.109(a)(1)(ii) (2015) (FDIC); *id.* § 1081.107(c)(1) (BCFP); 14 C.F.R. §§ 300.6(a), .20(a) (2015) (DOT, Aviation); 16 C.F.R. § 4.1(e)(1)(i)(B) (2015) (FTC); 17 C.F.R. § 14.8 (CFTC); *id.* § 201.102(e)(ii) (SEC); 18 C.F.R. § 385.2101(c) (2015) (FERC); 29 C.F.R. § 18.22(c) (DOL); *id.* § 2200.104(a) (OSHR); 31 C.F.R. § 8.41(b)(2)(i) (2015) (BATF) (ABA advertising and solicitation rules only); 32 C.F.R. § 776.19(a)(2) (2015) (JAG); 38 C.F.R. § 14.632(d) (2015) (VA); 48 C.F.R. § 6101.33(a) (2015) (CBCA); 49 C.F.R. § 1103.11 (2015) (STB) (U.S. courts).

139. *See supra* note 136 and accompanying text.

140. *See, e.g.*, 8 C.F.R. §§ 1003.102(e), (k) (2015) (EOIR/DHS); 12 C.F.R. §§ 263.94(d), (g) (FRB); *id.* § 308.109(b)(1) (FDIC); 17 C.F.R. § 14.6 (CFTC); 29 C.F.R. § 18.23(a)(1)(i), (ii) (DOL); 31 C.F.R. § 8.52(h) (BATF); 32 C.F.R. § 776.71 (JAG); 43 C.F.R. § 1.6(a) (2015) (DOI); 47 C.F.R. § 1.24(c) (2015) (FCC).

## 6. Private Lawyer Interests

Identifying rules that reflect lawyer interests rather than agency interests is not always easy. Lawyers have been successful in opposing the adoption of certain rules, especially those mandating lawyer disclosure. For example, although the securities bar lost the battle opposing the SEC's Sarbanes-Oxley Rules, it successfully watered down the trigger for reporting up and dissuaded the SEC from adopting a "noisy withdrawal" provision.<sup>141</sup> Lawyers also have successfully resisted attempts by some agencies to expand the application of their rules to nonadjudicatory matters (what I have called the "executive function").<sup>142</sup> On the other hand, as noted previously, many agency aiding and abetting rules impose more stringent standards on lawyers than Rule 1.2(d).<sup>143</sup> Moreover, the extensive permission for nonlawyers to practice before agencies in competition with lawyers suggests that lawyer clout in this context may not be strong. Thus, the capture theory, like the previous ones, may explain some rules (or their absence), but does not appear to explain a significant number or the patterns across agencies.

## 7. Experimentation

A significant degree of variation in the agency rules may be attributable to a simple preference of the agency to address a particular topic or use particular language.

In other cases, an agency may simply seek to clarify a recognized ambiguity in the Model Rules. One example is the USPTO and JAG rules' modifications to the Model Rules' use of the word "law." The previous section discussed an ambiguity in this term, which could be interpreted to include agency regulations.<sup>144</sup> The USPTO and JAG rules add the term "rule" (USPTO) or "regulation" (JAG) to some of their ethics rules using the term "law."<sup>145</sup> Interestingly, there is only one rule for which both agencies make the change: the exception to the prohibition on ex parte contact with an official.<sup>146</sup> In other cases, one agency adds "rule" or "regulation" but the other does not.<sup>147</sup> In still other cases, most notably the confidentiality rule exception, neither agency adds to the word "law."<sup>148</sup>

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141. See, e.g., Cramton, Cohen & Koniak, *supra* note 26.

142. See Bernard W. Bell, *Recalling the Lawyers: The NHTSA, GM, and the Chevrolet Cobalt*, 84 FORDHAM L. REV. 1899, 1917, 1918 (discussing proposed rules by the CPSC and FCC).

143. See *supra* notes 128–29.

144. See *supra* notes 48–58.

145. See *infra* notes 146–47.

146. Compare MODEL RULES OF PROF'L CONDUCT r. 3.5(b) ("A lawyer shall not . . . communicate ex parte with [a judge or other official] during the proceeding unless authorized to do so by law or court order."), with 37 C.F.R. § 11.305(b) (2015) (USPTO) (adding "rule"), and 32 C.F.R. § 776.44(a)(2) (JAG) (2015) (adding "regulation" after "law" and "court order").

147. Compare MODEL RULES OF PROF'L CONDUCT r. 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer . . . is

## 8. History and Experience

Several agency rules appear to be directly related to the particular history or experience of that agency. Most obviously, the SEC's Sarbanes-Oxley Rules were a direct consequence of Enron, other corporate scandals, and the concern that the SEC did not act aggressively enough to police lawyer participation in financial fraud.<sup>149</sup> Another rule that seems directly to reflect an agency's experience is EOIR's unique prohibition on "boilerplate" filings.<sup>150</sup> In addition, both the SSA and VA Rules add to their confidentiality provisions prohibitions on a lawyer's disclosure of information provided by the agency to the lawyer and the claimant concerning the claim.<sup>151</sup> Once again, however, this theory does not appear to explain a large number of the agency rules, though a more detailed study of the history of each agency's rules might reveal more information supporting this theory.

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authorized to do so by law or a court order."), with 37 C.F.R. § 11.402(a) (USPTO) (adding "rule" after "law" and "court order"), and 32 C.F.R. § 776.50 (JAG) (leaving Model Rule 4.2 unchanged); compare MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(1) (stating that "a lawyer shall not represent a client . . . if . . . the representation will result in violation of the rules of professional conduct or other law"), with 37 C.F.R. § 11.116(a)(1) (USTPO) (leaving Model Rule 1.16(a)(1) unchanged in this respect), and 32 C.F.R. § 776.35(a)(1) (JAG) (adding "regulation" after "law" and "court order"); compare MODEL RULES OF PROF'L CONDUCT r. 3.5(a) ("A lawyer shall not . . . seek to influence a judge . . . or other official by means prohibited by law."), with 37 C.F.R. § 11.305(a) (USPTO) (leaving Model Rule 3.5(a) unchanged in this respect), and 32 C.F.R. § 776.44(a)(1) (JAG) (adding "regulation" after "law" and "court order").

148. Compare MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(6) (permitting a lawyer to reveal confidential information "to comply with other law or a court order"), with 37 C.F.R. § 11.106(b)(6) (USPTO) (leaving Model Rule 1.6(b)(6) unchanged), and 32 C.F.R. § 776.25 (JAG) (declining to include the exception); compare MODEL RULES OF PROF'L CONDUCT r. 1.4(a)(5) (requiring a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law"), with 37 C.F.R. § 11.104(a)(5) (USPTO) (leaving Model Rule 1.4(a)(5) unchanged), and 32 C.F.R. § 776.23 (JAG) (declining to include the rule); compare MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(2) (allowing consent to cure a concurrent conflict of interest if, among other things, "the representation is not prohibited by law"), with 37 C.F.R. § 11.107(b)(2) (USPTO) (leaving Model Rule 1.7(b)(2) unchanged), and 32 C.F.R. § 776.26 (JAG) (declining to include rule). Neither agency adopts Model Rule 5.5(d)(2), allowing a lawyer not licensed in a jurisdiction to provide legal services there if the services are ones "that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction." MODEL RULES OF PROF'L CONDUCT r. 5.5(d)(2).

149. See generally Cramton, Cohen & Koniak, *supra* note 26, at 729–32 (discussing the history of the SEC rules).

150. 8 C.F.R. § 1003.102(u) (2015) (EOIR/DHS) (subjecting to discipline a practitioner who "[r]epeatedly files notices, motions, briefs, or claims that reflect little or no attention to the specific factual or legal issues applicable to a client's case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client").

151. 20 C.F.R. § 404.1740(c)(5) (2015) (SSA) (stating that a representative must not "[d]ivulge, without the claimant's consent, except as may be authorized by regulations prescribed by us or as otherwise provided by Federal law, any information we furnish or disclose about a claim or prospective claim"); 38 C.F.R. § 14.632 (c)(10) (2015) (VA) (stating that a representative must not "[d]isclose, without the claimant's authorization, any information provided by VA for purposes of representation").

## CONCLUSION

The rules governing lawyers who practice before federal agencies are an important yet too often neglected part of the landscape of the law of lawyering. State ethics rules recognize the tripartite structure of agencies as mini governments, but mostly to delineate which of the “advocacy” rules apply to these lawyers: all, when an agency acts in its adjudicative capacity; some, when an agency acts in its legislative capacity; and none, when an agency acts in its executive capacity. That approach leaves ample room for agencies to fill in gaps with their own rules. Instead, agency rules mostly address lawyers appearing before them in their adjudicative capacity in ways that substantively duplicate state ethics rules.

Nevertheless, agency rules exhibit a great deal of variety. This variety has multiple causes, none of which is dominant. The variety may be benign, or even desirable, but it is not without cost. Perhaps the cost is not great for lawyers, who tend to specialize in representation before one or a limited number of related agencies. But the challenges may be greater for law firms engaging in a broad regulatory practice, for state disciplinary authorities and courts that may need to interpret multiple agency rules, and for the agencies themselves for which the chaos may act as a barrier to desirable coordination and streamlining.

Further study is needed to determine whether the agency rules are effective and work well as currently structured. This Article has at least begun the task of making these rules somewhat more accessible and identifying some of their common themes. Perhaps the ABA, the ALI, or the agencies themselves will find this project worth expanding.

## APPENDIX A

LIST OF FEDERAL AGENCIES WITH RULES  
GOVERNING PRACTICE BEFORE THE AGENCIES  
(IN ALPHABETICAL ORDER)

1. Bureau of Alcohol, Tobacco & Firearms (BATF)
2. Bureau of Consumer Financial Protection (BCFP)
3. Chemical Safety and Hazard Investigation Board (CSHIB)
4. Civilian Board of Contract Appeals, General Services Administration (CBCA)
5. Consumer Product Safety Commission (CPSC)
6. Commodity Futures Trading Commission (CFTC)
7. Defense Nuclear Facilities Safety Board (DNFSB)
8. Department of Agriculture (DOA)
9. Department of Homeland Security (DHS) [formerly INS]
10. Department of Interior (DOI)
11. Department of Justice (DOJ)
12. Department of Labor (DOL)
13. Department of Transportation (DOT) (Aviation)
14. Drug Enforcement Administration (DEA)
15. Environmental Protection Agency (EPA)
16. Executive Office of Immigration Review, Department of Justice (EOIR) [formerly INS]
17. Farm Credit Administration (FCA)
18. Federal Communications Commission (FCC)
19. Federal Deposit Insurance Corporation (FDIC)
20. Federal Energy Regulatory Commission (FERC)
21. Federal Housing Finance Agency (FHFA)
22. Federal Reserve Board (FRB)
23. Federal Trade Commission (FTC)
24. Foreign Claims Settlement Commission of the United States, Department of Justice (FCSC)
25. General Accountability Office (GAO)
26. Internal Revenue Service (IRS)
27. International Trade Administration, Department of Commerce (ITA)
28. International Trade Commission (ITC)
29. Judge Advocate General (JAG) (Navy)
30. National Credit Union Administration (NCUA)
31. National Highway Traffic Safety Administration, Department of Transportation (NHTSA)
32. National Labor Relations Board (NLRB)
33. National Transportation Safety Board (NTSB)
34. Nuclear Regulatory Commission (NRC)

35. Occupational Safety Health Review Commission (OSHRC)
36. Office of Comptroller of the Currency (OCC)
37. Office of Foreign Asset Control (OFAC)
38. Office of Thrift Supervision (OTS)
39. Postal Regulatory Commission (PRC)
40. Securities and Exchange Commission (SEC)
41. Small Business Administration (SBA)
42. Social Security Administration (SSA)
43. Surface Transportation Board (STB) [formerly Interstate Commerce Commission (ICC)]
44. United States Patent & Trademark Office (USPTO)
45. United States Postal Service (USPS)
46. Veterans Affairs (VA)

## APPENDIX B

LIST OF FEDERAL AGENCIES WITH RULES  
GOVERNING PRACTICE BEFORE THE AGENCIES  
(BY CODE TITLE)

- Title 4: General Accountability Office
- Title 7: Department of Agriculture (DOA)
- Title 8: Executive Office of Immigration Review, Department of Justice (EOIR); Department of Homeland Security (DHS)
- Title 10: Nuclear Regulatory Commission (NRC); Defense Nuclear Facilities Safety Board (DNFSB)
- Title 12: Office of Comptroller of the Currency (OCC); Federal Reserve Board (FRB); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision (OTS); Farm Credit Administration (FCA); National Credit Union Administration (NCUA); Bureau of Consumer Financial Protection (BCFP); Federal Housing Finance Agency (FHFA)
- Title 13: Small Business Administration (SBA)
- Title 14: Department of Transportation (DOT) (Aviation)
- Title 16: Consumer Product Safety Commission (CPSC); Federal Trade Commission (FTC)
- Title 17: Commodity Futures Trading Commission (CFTC); Securities and Exchange Commission (SEC)
- Title 18: Federal Energy Regulatory Commission (FERC)
- Title 19: International Trade Commission (ITC); International Trade Administration (ITA)
- Title 20: Social Security Administration (SSA)
- Title 21: Drug Enforcement Administration (DEA)
- Title 28: Department of Justice (DOJ)
- Title 29: Department of Labor (DOL); National Labor Relations Board (NLRB); Occupational Safety Health Review Commission (OSHRC)
- Title 31: Bureau of Alcohol, Tobacco & Firearms (BATF); Internal Revenue Service (IRS); Office of Foreign Asset Control (OFAC)
- Title 32: Judge Advocate General (JAG) (Navy)
- Title 37: United States Patent & Trademark Office (USPTO)
- Title 38: Veterans Affairs (VA)
- Title 39: United States Postal Service (USPS); Postal Regulatory Commission (PRC)
- Title 40: Chemical Safety and Hazard Investigation Board (CSHIB); Environmental Protection Agency (EPA)
- Title 43: Department of Interior (DOI)
- Title 45: Foreign Claims Settlement Commission (FCSC)
- Title 47: Federal Communications Commission (FCC)



- Title 48: Civilian Board of Contract Appeals, General Services Administration (CBCA)
- Title 49: National Highway Traffic Safety Administration (NHTSA); National Transportation Safety Board (NTSB); Surface Transportation Board (STB)

## APPENDIX C

TITLES OF AND CITES FOR FEDERAL AGENCY RULES  
GOVERNING PRACTICE BEFORE THE AGENCIES

1. BATF: Duties and Restrictions Relating to Practice, 31 CFR Subt. A, Pt. 8, Subpt. D, §§ 8.31–.42, 8.52
2. BCFP: Rules of Practice for Adjudication Proceedings, General Rules, 12 CFR Ch. X, Pt. 1081, Subpt. A, §§ 1081.107–.110
3. CSHIB: Administrative Investigations, 40 CFR Ch. VI, Pt. 1610, § 1610.1
4. CBCA: Contract Dispute Cases, Ex Parte Contact; Sanctions and Other Proceedings, 48 CFR Ch. 61, Pt. 6101, § 6101.33
5. CPSC: Rules of Practice for Appellate Proceedings; Appearances, Standards of Conduct, 16 CFR Ch. 8, Subch. A, Pt. 1025, §§ 1025.66, 1025.68
6. CFTC: Rules of Practice, General Provisions, 17 CFR Ch. I, Pt. 10, §§ 10.10–.11; Rules Relating to Investigations, Rights of Witnesses, 17 CFR Ch. I, Pt. 11, § 11.7; Rules Relating to Reparations, General Information and Preliminary Consideration of Pleadings, 17 CFR Ch. I, Pt. 12, Subpt. A, §§ 12.7, 12.9; Rules Relating to Suspension or Disbarment from Appearance and Practice, 17 CFR Ch. I, Pt. 14, §§ 14.2–.8
7. DNFSB: Procedures for Safety Investigations, 10 CFR Ch. XVII, Pt. 1708, §§ 1708.109–.112
8. DOA: Departmental Proceedings, Representation Before the Department of Agriculture, 7 CFR Subt. A, Pt. 1, Subpt. B, § 1.26; Procedures Related to Administrative Hearings Under the Program Fraud Civil Remedies Act of 1986, 12 CFR Subt. A, Pt. 1, Subpt. H; Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, 12 CFR Subt. A, Pt. 1, Subpt. L, §§ 1.151(b), 1.303, 1.316, 1.328(a); Commodity Laboratory Testing Programs, Plant Variety and Protection, Attorneys and Agents, Professional Conduct, 7 CFR Subt. B, Ch. I, Subch. E, Pt. 97, § 97.157, Pt. 110; Rules of Practice, § 110.8(h)
9. DHS: Professional Conduct for Practitioners—Rules and Procedures, 8 CFR Ch. I, Subch. B, Pt. 292, § 292.3; Professional Conduct for Practitioners—Rules and Procedures, Grounds, 8 CFR Ch. V, Subch. A, Pt. 1003, Subpt. G, § 1003.102
10. DOI: Practices Before the Department of the Interior, 43 CFR Subt. A, Pt. 1, §§ 1.2–.6
11. DOJ: Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allocations of Unlawful Employment of Aliens, Unfair

- Immigration-Related Employment Practices, and Document Fraud, 27 CFR Ch. I, Pt. 68, § 68.33(c)(3)(iii); Rules of Procedure for Assessment of Civil Penalties for Possession of Certain Controlled Substances, Standards of Conduct, 28 CFR Ch. I, Pt. 76, §§ 76.15, 76.31
12. DOL: Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 CFR Subt. A, Pt. 18, Subpt. A, §§ 18.14, 18.22–23, 18.35
  13. DOT: Rules of Conduct in DOT Proceedings Under This Chapter, 14 CFR Ch. II, Subch. B, Pt. 300, §§ 300.5–.6, 300.13–.14, 300.19–20
  14. DEA: Administrative Hearings, Conduct of Hearing and Parties, 21 CFR Ch. II, Pt. 1316, Subpt. D, § 1316.51(b)
  15. EPA: Program Fraud Civil Remedies, 40 CFR Ch. I, Subch. A, Pt. 27, § 27.3 (Basis for Civil Penalties and Assessments), § 27.15 (Ex Parte Contacts), § 27.29 (Sanctions); 40 CFR Ch. VI
  16. EOIR: Professional Conduct for Practitioners—Rules and Procedures, Grounds, 8 CFR Ch. V, Subch. A, Pt. 1003, Subpt. G, §§ 1003.102–.103; Ch. V, Subch. B, Pt. 1292, § 1292.3
  17. FCA: Rules Applicable to Formal Hearings, 12 CFR Ch. VI, Subch. B, Pt. 622, Subpt. A; Rules and Procedures Applicable to Formal Investigations, Conduct of Investigation, §§ 622.3, 622.7; 12 CFR Ch. VI, Subch. B, Pt. 622, Subpt. D, § 622.105(d)(2)
  18. FCC: General Rules of Practice and Procedure; Parties, Practitioners, and Witnesses; Censure, Suspension, or Disbarment of Attorneys, 47 CFR Ch. I, Subch. A, Pt. 1, Subpt. A, § 1.24; Multichannel Video and Cable Television Service, Program Access Proceedings, 47 CFR Ch. I, Subch. C, Pt. 76, Subpt. O, § 76.1003(k)
  19. FDIC: Uniform Rules of Practice and Procedure, 12 CFR Ch. III, Subch. A, Pt. 308, §§ 308.6–9, 308.108–.109, 308.148, 390.355(b)
  20. FERC: Rules Relating to Investigations, Rights of Witnesses, 18 CFR Ch. I, Subch. A, § 1b.16; Appearance and Practice Before the Commission, 18 CFR Ch. I, Subch. X, Pt. 385, Subpt. U, § 385.2101
  21. FHFA: Parties and Representation Practice Before the Federal Housing Agency; Rules of Practice and Procedure, 12 CFR Ch. XII, Subch. A, Pt. 1209, Subpt. C, §§ 1209.13–.14; Standards of Conduct, 12 CFR Ch. XII, Subch. A, Pt. 1209, Subpt. D §§ 1209.73–.74
  22. FRB: Uniform Rules of Practice and Procedure, 12 CFR Ch. II, Subch. A, Pt. 263, Subpt. A, §§ 263.6–9; Practice Before the Board, Subpt. F, §§ 263.91–.94
  23. FTC: Noncompliance with Compulsory Process, 16 CFR Ch. I, Subch. A, Pt. 2, Subpt. A, § 2.13; Organization, Procedures and

- Rules of Practice, Miscellaneous Rules: Appearances, Ex Parte Communications, 16 CFR Ch. I, Subch. A, Pt. 4, §§ 4.1, 4.7
24. FCSC: Rules of Practice, Appearance and Practice, 45 CFR Subt. B, Ch. V, Subch. A, Pt. 500, § 500.4
  25. GAO: Rules of Procedure of the Government Accountability Office Contract Appeals Board, 4 CFR Ch. I, Subch. B, Pt. 22, §§ 22.8(j), 22.10, 22.27.
  26. IRS: Duties and Restrictions Relating to Practice Before the Internal Revenue Service, 31 CFR Subt. A, Pt. 10, Subpt. B, §§ 10.22–.37
  27. ITA: Information and Argument, 19 CFR Ch. III, Pt. 351, §§ 351.303(g)(2), 351.306(d), 351.313
  28. ITC: Rules of General Applicability, 19 CFR Ch. II, Subch. C, Pt. 201, § 201.15; Pt. 210, §§ 210.2, 210.4(c), 210.4(d)(2), 210.33(b), 210.34(c)
  29. JAG: Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General, 32 CFR Subt. A., Ch. VI, Pt. 776, §§ 776.18–71
  30. NCUA: Uniform Rules of Practice and Procedure, 12 CFR Ch. VII, Subch. A, Pt. 747, Subpt. A, §§ 747.6–9; Local Rules Applicable to Formal Investigative Proceedings, Rights of Witnesses, Ch. VII, Subch. A, Pt. 747, Subpt. I, § 747.807(d)
  31. NHTSA: Adjudicative Procedures: Appearances; Standards of Conduct, 49 CFR Subt. B, Ch. V, Pt. 511, §§ 511.76, 711.78
  32. NLRB: Misconduct by Attorneys or Party Representatives, 29 CFR Subt. B, Ch. I, Pt. 102, Subpt. W, § 102.177
  33. NTSB: Rules of Practice in Air Safety Proceedings, Ex Parte Communications, 49 CFR Subt. B, Ch. VIII, Pt. 821, Subpt. J, §§ 821.60–.63
  34. NRC: Agency Rules of Practice and Procedure, Rules of General Applicability, 10 CFR Ch. 1, Pt. 2, Subpt. C, §§ 2.314, 2.347; Subpt. O, § 2.1509
  35. OSHRC: Rules of Procedure, Parties and Representatives, Appearances and Withdrawals, 29 CFR Subt. B, Ch. XX, Pt. 2200, Subpt. B, § 2200.23; Rules of Procedure, Miscellaneous Provisions, 29 CFR Subt. B, Ch. XX, Pt. 2200, Subpt. G §§ 2200.104–.105
  36. OCC: Uniform Rules of Practice and Procedure, 12 CFR Ch. I, Pt. 19, Subpt. A, §§ 19.6–9; Formal Investigations, Rights of Witnesses, 12 CFR Ch. I, Pt. 19, Subpt. J, § 19.183(e); Rules of Practice and Procedure in Adjudicatory Proceedings, Uniform Rules of Practice and Procedure, 12 CFR Ch. I, Pt. 109, §§ 209.6–9; 12 CFR § 163.180(b)
  37. OFAC: Appearance and Practice, 31 CFR Subt. B, Ch. V, Pt. 501, Subpt. D, § 501.704(d)

38. OTS: Uniform Rules of Practice and Procedure, 12 CFR Ch. V, Pt. 509, Subpt. A, §§ 509.6–9; Practice Before the Office, 12 CFR Ch. V, Pt. 513, §§ 513.4(a), 563.180(b)
39. PRC: Rules of Practice and Procedure, Rules of General Applicability, 39 CFR Ch. III, Subch. A, Pt. 3001, Subpt. A, § 3001.6(e)
40. SEC: Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 CFR Ch. II, Pt. 205; Appearance and Practice Before the Commission, 17 CFR § 201.102(e)
41. SBA: Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, Rules of Practice, 13 CFR Ch. I, Pt. 134, Subpt. B, §§ 134.209, 134.219, 134.220
42. SSA: Rules of Conduct and Standards of Responsibility for Representatives, 20 CFR § 404.1740
43. STB: Canons of Ethics, 49 CFR Subt. B, Ch. X, Subch. B, Pt. 1103, Subpt. B, §§ 1103.10–35
44. USPTO: Rules of Professional Conduct, 37 CFR Ch. I, Subch. A, Pt. 11, Subpt. D, §§ 11.101–901
45. USPS: Rules of Practice Before the Postal Service Board of Contract Appeals, 39 CFR Ch. I, Subch. N, Pt. 955, §§ 955.33, 955.34
46. VA: Standards of Conduct for Persons Providing Representation Before the Department, 38 CFR § 14.632

## APPENDIX D

CHRONOLOGICAL LISTING OF AGENCIES WITH RULES  
(BY ORIGINAL DATE OF ADOPTION)

- 1958: EOIR/DHS [INS]
- 1959: NLRB
- 1962: NRC
- 1964: DOI
- 1966: IRS
- 1967: FTC; DOA
- 1971: DEA; PRC
- 1972: OSHRC
- 1976: CFTC
- 1977: DOT (Aviation); BATF
- 1978: FERC
- 1980: CPSC
- 1982: STB
- 1983: DOL
- 1986: FCA
- 1987: SEC (Rule 102(e))
- 1988: VA; EPA
- 1991: OTS; DOJ
- 1992: NCUA; FCC
- 1994: FRB; ITC
- 1996: FDIC
- 1997: OFAC
- 1998: SSA
- 2000: USPTO; JAG; CSHIB
- 2001: FCSC
- 2002: NHTSA
- 2003: NTSB; SEC (Sox Rules)
- 2005: GAO
- 2007: CBCA
- 2008: FHFA
- 2009: USPS
- 2010: SBA
- 2011: OCC
- 2013: BCFP; ITA
- 2014: DNFSB