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## ADMINISTRATIVE PRACTICE BEFORE FEDERAL AGENCIES

*William H. Sager\** and *Leslie S. Shapiro\*\**

### I. THE DISTINCTION BETWEEN FEDERAL ADMINISTRATIVE PRACTICE AND STATE PRACTICE

THERE exist more than forty federal executive and administrative agencies before which lawyers (and in many cases, laymen) may practice and serve the interests of clients. The complexities of our society, the specializations which are a by-product of a complex industrial state, and the persistent growth of government's bureaucracy, point up the continuing importance of practice before federal administrative agencies.

Over fifty years ago, Mr. Elihu Root, then president of the American Bar Association, stated:

There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. . . . We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation.<sup>1</sup>

It has been observed that the average citizen is much more directly and frequently affected by the administrative process than by the judicial process.<sup>2</sup> In fact, the number of federal agency cases disposed of, involving an oral hearing with a verbatim transcript and the determina-

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<sup>1</sup> E. Root, *Public Service by the Bar*, 41 A.B.A. REP. 355, 368-69 (1916).

<sup>2</sup> 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.02 (1958, Supp. 1965).

tion of private rights, privileges, or obligations, and excluding determinations solely on written applications or oral presentations in the nature of conference or interview, exceeded 81,000 cases in a single year.<sup>3</sup> However, the representation of clients' interests before agencies of the federal government is not a concept which has emanated solely from the recent expansion of administrative law. Review of two important areas of agency practice discloses that the recognition of practitioners before the Treasury Department dates back to 1884,<sup>4</sup> and that of the Patent Office to 1861.<sup>5</sup>

In passing, it might be noted that a state may not place restrictions on federal administrative practice, even though it is well established that states have a substantial and legitimate interest in regulating the practice of law within their borders. *Sperry v. Florida*<sup>6</sup> cleared away any doubt as to the invalidity of state regulation of practitioners before a federal administrative agency in proper exercise of its legislative mandate. Relying upon the supremacy clause of the Constitution and the doctrine of *Gibbons v. Ogden*,<sup>7</sup> the United States Supreme Court held in *Sperry* that the state may not exercise powers, otherwise permissible, where such exercise is incompatible with federal legislation. Thus, activities relating to federal administrative practice are clearly preempted by the federal government.

The question of who may practice before a federal administrative agency, qualifications, admission requirements, licensing procedures and disciplinary proceedings against those admitted to practice, are questions of import to the legal community, lay practitioners and, of course, to clients and claimants. The purpose of this article is to review some of these questions in the light of Public Law 89-332<sup>8</sup> (also referred to as

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<sup>3</sup> *Id.* (The year referred to is 1963).

<sup>4</sup> Act of July 7, 1884, 23 Stat. 258.

<sup>5</sup> Act of March 2, 1861, 12 Stat. 247.

<sup>6</sup> 373 U.S. 379 (1963). Sperry, a layman, was registered to practice in patent matters before the United States Patent Office. The Florida Bar sought to enjoin him from holding himself out as a patent attorney, alleging, among other things, that he was engaged in the unauthorized practice of law. The United States Supreme Court vacated the injunction ordered by the Supreme Court of Florida, concluding that Sperry's practice before the Patent Office was outside the scope of the state's regulatory power.

<sup>7</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>8</sup> 79 Stat. 1281, amending 5 U.S.C. § 500 (1964). The full text of the Act reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That—*

(a) Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Colum-

the Agency Practice Act); to present some of the background and the history of that legislation during its consideration by the Congress, and particularly its effect on practice before the Internal Revenue Service of the Treasury Department, before which more attorneys practice than any other agency of the federal government.

## II. HISTORY OF PUBLIC LAW 89-332, THE AGENCY PRACTICE ACT

Public Law 89-332 was signed into law by President Johnson on November 8, 1965. Basically, it eliminated agency-established admission requirements and bars for licensed attorneys who appear before federal administrative agencies (with the exception of the Patent Office in patent matters). In addition, certified public accountants were admitted to practice before the Internal Revenue Service without admission require-

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bia may represent others before any agency upon filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular party in whose behalf he acts.

(b) Any person who is duly qualified to practice as a certified public accountant in any State, possession, territory, Commonwealth, or the District of Columbia may represent others before the Internal Revenue Service of the Treasury Department upon filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular party in whose behalf he acts.

(c) Nothing herein shall be construed (i) to grant or deny to any person who is not qualified as provided by subsection (a) or (b) the right to appear for or represent others before any agency or in any agency proceeding; (ii) to authorize or limit the discipline, including disbarment, of persons who appear in a representative capacity before any agency; (iii) to authorize any person who is a former officer or employee of an agency to represent others before an agency where such representation is prohibited by statute or regulation; or (iv) to prevent an agency from requiring a power of attorney as a condition to the settlement of any controversy involving the payment of money.

(d) This section shall not be applicable to practice before the Patent Office with respect to patent matters which shall continue to be covered by chapter 3 (sections 31 to 33) of title 35 of the United States Code.

SEC. 2. When any participant in any matter before an agency is represented by a person qualified pursuant to subsection (a) or (b) of section 1, any notice or other written communication required or permitted to be given to such participant in such matter shall be given to such representative in addition to any other service specifically required by statute. If a participant is represented by more than one such qualified representative, service upon any one of such representatives shall be sufficient.

SEC. 3. As used in this Act, "agency" shall have the same meaning as it does in section 2(a) of the Administrative Procedure Act, as amended (60 Stat. 237, as amended.)

Approved November 8, 1965.

Later certain clarifications in the wording were made by the Act of Sept. 11, 1967, Pub. L. No. 90-83, 81 Stat. 195, *amending* 5 U.S.C. § 500 (1964).

ments.<sup>9</sup> The legislation is implemented by practical procedures which safeguard the agencies and the public alike.<sup>10</sup>

Prior to the enactment of the Agency Practice Act, four federal agencies—Veterans Administration, Interstate Commerce Commission, Patent Office in patent matters, and the Internal Revenue Service—required formal admission procedures or special examinations as a condition precedent to an attorney's practicing before them. These agencies, as well as other agencies, also exercised disciplinary authority, such as suspension or disbarment from practice, where attorneys engaged in misconduct before them.<sup>11</sup> A number of other agencies, which previously had admission requirements, eliminated them pursuant to a recommendation in 1957 of the Office of Legal Counsel in the Department of Justice.<sup>12</sup> Hence, the several agencies which maintained admission requirements at the time of the enactment of the Agency Practice Act, maintained their respective bars of attorneys (and in some instances, *e.g.*, Treasury Department, Patent Office and Interstate Commerce Commission, also of non-attorneys) eligible to practice before each such agency.

The principal purpose of the Agency Practice Act was to provide, as far as practicable, for the right of persons to be represented before federal agencies by any attorney in good standing. The bill, which introduced the legislation in the 89th Congress and which was eventually enacted in November 1965, was known as S. 1758. Similar bills having the purpose of abolishing administrative admission requirements had been introduced in Congress during several sessions preceding the 89th Congress. The immediate forerunner of S. 1758 was S. 1466, introduced in the 88th Congress. This measure passed the Senate, but adjournment of Congress prevented full consideration and the measure died.

The principal proponent of S. 1758 (and the predecessor bills) was the Sub-Committee on Administrative Practice and Procedure of the Senate Committee on the Judiciary. The policies prompting the introduction of the bill developed because of a long history of dissatisfaction by attorneys when faced with the onerous task of making applications

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<sup>9</sup> H.R. REP. NO. 1141, 89th Cong., 1st Sess. 2 (1965) [hereinafter cited as H.R. REP. NO. 1141].

<sup>10</sup> S. REP. NO. 755, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as S. REP. NO. 755].

<sup>11</sup> *Hearings on S. 1466 Before the Subcomm. on Admin. Practice and Procedures of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 184 (1963) [hereinafter cited as *Hearings on S. 1466*].

<sup>12</sup> *Id.* at 1.

to federal agencies for admission, and particularly when meeting requirements of admission was seemingly meaningless.<sup>13</sup> Therefore, the Senate Sub-Committee concluded that passage of the bill would closely align procedures before federal administrative agencies with those which are effectively used in state and federal courts throughout the country today.<sup>14</sup>

Review of the transcript of the hearings held on S. 1758 (and also its predecessor S. 1466) discloses that the bill was given the overwhelming support of attorneys, bar associations and persons who are experts on the administrative process. Mr. Richard H. Keating, Chairman of the American Bar Association, Committee on the Administrative Practice Act (Administrative Law Section) set forth the following basic position of the American Bar Association:

The American Bar Association's position is based upon a fundamental principle; namely, that an attorney who has been found qualified to represent others before the highest court in his jurisdiction, and who is subject to the restraints and disciplines of the legal profession, should by that fact be accepted as qualified to represent others before the various Federal agencies. That is the essence of our position. It has wide support among the rank and file of the members of the bar throughout the country.<sup>15</sup>

The Virginia Bar was overwhelmingly in support of the legislation. Mr. Waldo G. Miles, on behalf of the Executive Committee of the Virginia State Bar Association, stated that the Association was unanimously in favor of the legislation.<sup>16</sup> Further, the Virginia State Bar submitted to the Senate Judiciary Committee the following resolution:

After careful consideration the executive committee of the Virginia State Bar, acting on behalf of the council and members of the Virginia State Bar, heartily endorses and approves the enactment of Senate bill S. 1466 now pending in the 88th Congress and directs Hon. R. E. Booker, secretary-treasurer, to transmit this resolution to the Senate subcommittee on Administrative Practice and Procedure, with copies

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<sup>13</sup> *Id.*

<sup>14</sup> S. REP. NO. 755 at 7.

<sup>15</sup> *Hearings on S. 1160, S. 1336, S. 1758, and S. 1079 Before the Subcomm. on Admin. Practice and Procedures of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 116, 117 (1965) [hereinafter cited as *Hearings on S. 1758*].*

<sup>16</sup> *Hearings on S. 1466* at 203.

to the members of the Senate and House of Representatives from Virginia.<sup>17</sup>

Thus, the lawyers of the Commonwealth of Virginia, as well as those of numerous other states, supported by their respective bar associations, sanctioned the passage of the bill to the extent of formalizing their endorsement by resolution.

*A. Opposition to the Original Bill (S. 1466) by the American Institute of Certified Public Accountants*

The principal area of opposition outside the federal government to the proposed legislation was by the American Institute of Certified Public Accountants. This association comprises a national organization of certified public accountants in the United States with membership in 1965 of over 53,000.<sup>18</sup> Its objectives include the maintenance and enhancement of the professional standards of the accounting profession to the end that members of the profession may render an effective service to the public in the accounting field.<sup>19</sup> The opposition by the American Institute of Certified Public Accountants was directed at Section 1 of S. 1466<sup>20</sup> (the predecessor of S. 1758). The Institute's opposition was based on the principles set forth by the Supreme Court that each agency, by its own evaluation, should determine what protection is necessary in recognizing practitioners in light of its own particular needs for efficient functioning and in light of adequate protection of the public.<sup>21</sup> The Institute felt the matter was of special importance with respect to practice before the Internal Revenue Service of the Treasury Department. The Institute's statement pointed out that the Treasury Department traditionally has recognized the qualifications and competency of certified public accountants and has granted them the privilege of enrollment

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<sup>17</sup> *Id.*

<sup>18</sup> *Hearings on S. 1758* at 70.

<sup>19</sup> *Hearings on S. 1466* at 226, 227.

<sup>20</sup> See Act of Nov. 8, 1965, Pub. L. No. 89-332, § 1, 79 Stat. 1281, *amending* 5 U.S.C. § 500 (1964); Act of Sept. 11, 1967, Pub. L. No. 90-83, 81 Stat. 195, *amending* 5 U.S.C. § 500 (1964).

<sup>21</sup> *Sperry v. Florida*, 373 U.S. 379 (1963). See also *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1925). This was a mandamus proceeding by an attorney and certified public accountant from a denial of his application to practice before the Board of Tax Appeals. The chief issues was whether the Board of Tax Appeals had power to adopt rules of practice by which it might limit those who practiced before it to persons whom the Board deemed qualified to perform such service and to be of proper character. The Supreme Court held that the Board was so authorized to make rules as to persons who might practice before it.

to practice before the Department upon a showing that they hold a license to practice under state law, are in good standing, and are not subject to any special disqualification.<sup>22</sup> Hence, the American Institute of Certified Public Accountants concluded that the enactment of S. 1466 would not be in the public interest.<sup>23</sup> The Institute voiced similar objections in connection with S. 1758.<sup>24</sup> The Senate Committee on the Judiciary considered the interests and arguments of the American Institute of Certified Public Accountants and amended S. 1758 to include duly qualified certified public accountants in the case of representation solely before the Internal Revenue Service of the Treasury Department.<sup>25</sup>

### *B. Patent Office Opposition to the Legislation*

Only two federal agencies raised objections to S. 1758 or the predecessor bill S. 1466, the Patent Office and the Treasury Department.<sup>26</sup> The Patent Office took the position in its objection that practice before it is so specialized that only persons who have particular types of training should be permitted to practice in patent matters. The thrust of the objection of the Patent Office was that the uniqueness of the practice before the Patent Office represented a special case requiring an exemption from the provision of the bill.<sup>27</sup> Hence, the Patent Office wished to retain the statutory sanction for its imposition of admission requirements.<sup>28</sup> The Senate Committee on the Judiciary, believing that patent cases could continue to be handled by technically competent attorneys, concluded initially that the exemption requested by the Patent Office was not warranted.<sup>29</sup> However, the House Committee on the Judiciary found merit in the contention of the Patent Office and recommended the operations of the Patent Office with respect to patent matters should be exempted from the provisions of Section 1 of S. 1758.<sup>30</sup> The Senate eventually receded and the legislation, as enacted into Public Law 89-332, thus exempted the Patent Office from its purview.

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<sup>22</sup> *Hearings on S. 1466* at 226, 227; TREAS. DEPT. Circular No. 230, § 10.3(d) (Aug. 1964); 31 C.F.R. § 10.3(b) (1969).

<sup>23</sup> *Hearings on S. 1466* at 226, 227.

<sup>24</sup> See statement by John F. Sonnet, attorney representing the American Institute of Certified Public Accountants, *Hearings on S. 1758* at 69.

<sup>25</sup> S. REP. NO. 755 at 2.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> 35 U.S.C. § 31 (1964).

<sup>29</sup> S. REP. NO. 755 at 5, 6.

<sup>30</sup> H. R. REP. NO. 1141 at 4.

### C. Treasury Department Opposition to the Legislation

The position of the Treasury Department before the Senate Committee on the Judiciary was that it also should be exempt from the purview of the Agency Practice Act. Under Treasury Department regulations governing eligibility for enrollment to practice before the Internal Revenue Service, an attorney was required to satisfy requirements of good character and reputation.<sup>31</sup> In this connection, an application<sup>32</sup> was filed by each prospective practitioner together with an application fee of \$25.00. An evaluation of his application was made by the Office of Director of Practice regarding the applicant's character and reputation, including whether or not he had filed required federal income tax returns for each of the three years preceding the year of his application. The Treasury Department set forth the rationale that it did not believe that state bar associations adequately policed the conduct of their members and, as a result, retained on their rolls attorneys who might be persons of questionable character and reputation.<sup>33</sup> More attorneys are enrolled to practice before the Internal Revenue Service than before any other agency of the federal government. This, of course, is because more citizens and corporations are concerned with their obligations as taxpayers to the Internal Revenue Service than are concerned with affairs or matters before any other federal agency. The Treasury Department, therefore, argued that it should be assured that the numerous attorneys who appeared before it to represent clients on tax matters were honest taxpayers themselves and persons of good tax morality.<sup>34</sup> In brief, the Internal Revenue Service should not be com-

<sup>31</sup> 31 C.F.R. § 10.3(a) (1964), *reprinted as* TREAS. DEPT. Circular No. 230 (Aug. 1964).

<sup>32</sup> TREAS. DEPT. Form 23.

<sup>33</sup> S. REP. No. 755 at 4; *Hearings on S. 1466* at 90, 91, in which Crane C. Hauser, Chief Counsel, Internal Revenue Service stated:

"There is wide diversity among the States, both in character and fitness requirements for admission to the bar and in disciplinary procedures. As far as we know, a conviction for the misdemeanor of failure to file tax returns is not grounds for disbarment in any jurisdiction, and there are even some jurisdictions where a conviction for the felony of tax evasion will not be considered a crime involving moral turpitude which entails disbarment. Dean E. Blythe Stason, who is the administrator of the American Bar Foundation, expresses some doubts as to the efficacy of State disciplinary procedures in an article in the March 1963, issue of *American Bar Association Journal*. . . . I quote what he said there:

"With about 285,000 lawyers in the country, the number subjected to discipline is remarkably small. One wonders how many there are who deserve discipline but in fact escape."

In addition to the lack of interest on the part of many bar associations in tax violations as grounds for disbarment, even those bar associations which might be so interested do not have available to them the necessary information. . . ."

<sup>34</sup> *Hearings on S. 1466* at 91.

pelled to deal administratively with a dishonest attorney, even if he is in good standing with his state bar association.

In addition to the Treasury Department's criticism of the state bar associations' failure to adequately supervise their membership, the Department argued further that the bars of the various states do not grant comity or reciprocity to a member of the bar of a sister state without an independent integrity check into the applicant's good character and reputation. Why, then, should the attorney who seeks to represent a client before a federal agency in an administrative practice involving original federal jurisdiction, over which the state may exercise no control, not be required to establish his good character and reputation to the satisfaction of the agency?

It was conceded by the Treasury Department that attorneys as well as certified public accountants were qualified professionally to represent taxpayers before the Internal Revenue Service. Hence, there were no further qualifications imposed on members of these professions with respect to competence, skills, knowledge and ability.<sup>35</sup>

It should be noted that in 1958 the Hoover Commission recommended that admission requirements to practice before federal administrative agencies be abolished.<sup>36</sup> The Treasury Department's position at that time was that it had no objection to such action if directed by legislation to do so.<sup>37</sup> The Treasury Department's now reversed position questioned the ethical standards of attorneys by insisting that the test of good character and reputation should be continued as required by current regulations. On the other hand, the Patent Office was concerned with the technical training and educational background of practitioners. Thus, the objections of the two agencies contradicted rather than supported each other.<sup>38</sup>

The House Committee on the Judiciary concluded that there is a presumption that members in good standing in the profession of the law (and certified public accountancy) are persons of good moral character, and that surveillance by state bar associations will sufficiently insure the integrity of practice by such persons before the Internal Revenue Service. Accordingly, the House Committee recommended the elimination of the good character and reputation qualifications imposed by the Treasury Department regulations upon attorneys who sought admission

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<sup>35</sup> H. R. REP. NO. 1141 at 3.

<sup>36</sup> S. REP. NO. 755 at 4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

to practice before the Internal Revenue Service.<sup>39</sup> The Senate Committee on the Judiciary also was of the similar opinion that surveillance by state bar associations would insure the integrity of practice. Consequently, this Committee concluded that the admission procedures were a restriction on duly licensed attorneys in tax cases and, therefore, unwarranted. The Senate Committee viewed the relationship between the effectiveness of an advocate and that advocate's personal affairs and personal tax problems as being remote.<sup>40</sup>

As can be seen, of the principal objections to the proposed legislation, the positions set forth by the certified public accountants and the Patent Office were accepted by the Congress. The objections of the Treasury Department were overruled. Since the other two federal agencies who had prior admission requirements raised no objection, practitioners most affected by the legislation were those who practiced before the Internal Revenue Service of the Treasury Department. On November 8, 1965, the date of the enactment of the Agency Practice Act, there were approximately 86,000 attorneys and certified public accountants enrolled to practice before the Internal Revenue Service.<sup>41</sup>

### III. THE EFFECT OF THE AGENCY PRACTICE ACT ON PRACTICE BEFORE THE INTERNAL REVENUE SERVICE

Prior to the enactment of the Agency Practice Act, no person appearing as an attorney or agent in behalf of a taxpayer before the Internal Revenue Service would be recognized as such unless he was duly enrolled and in good standing to practice before the Internal Revenue Service in accordance with regulations. Evidence of enrollment was indicated by the possession of a so-called "treasury card" which was issued to enrolled persons, in one form or another, after June 28, 1923.<sup>42</sup> Moreover, evidence of enrollment (the "treasury card") was required to be submitted upon request when a practitioner appeared before the Internal Revenue Service for conference.<sup>43</sup> Enactment of the Agency Practice Act eliminated the necessity of enrollment by attorneys and certified public accountants and provided that all attorneys and certified

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<sup>39</sup> H.R. REP. NO. 1141 at 4.

<sup>40</sup> S. REP. NO. 755 at 5.

<sup>41</sup> 1966 SEC'Y TREAS. ANN. REP. 94.

<sup>42</sup> TREAS. DEPT. Circular No. 326 (June 1923). Applications for enrollment were required of attorneys since February 15, 1921. See the first publication of TREAS. DEPT. Circular No. 230 (1921).

<sup>43</sup> 26 C.F.R. § 601.502(b) (1954).

public accountants who met the requirements of the Act were eligible to practice before the Internal Revenue Service.

Interim regulations issued by the Treasury Department on November 16, 1965, directed the Internal Revenue Service to recognize any attorney who filed a declaration as described in paragraph 1(a) of the Act, which would contain the following statements and information:

- (a) a statement that the declarant is currently qualified as a member in good standing of the bar of the highest court of any state, possession, territory, Commonwealth, or the District of Columbia, specifying in which of such jurisdictions he is so qualified;
- (b) the declarant's full name, address and telephone number; and
- (c) a statement that declarant is authorized to represent a particular party and the name and address of that party.<sup>44</sup>

A similar statement was required of a certified public accountant.

Revisions of the rules governing the practice of attorneys, certified public accountants and enrolled agents before the Internal Revenue Service took effect on September 13, 1966, and formalized the effect of the Agency Practice Act on practice before the Internal Revenue Service.<sup>45</sup> Under these revised rules any attorney who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Service, upon filing with the Service the written declaration required by the Act.<sup>46</sup> Other revisions to the rules of practice before the Internal Revenue Service necessitated by the enactment of the Agency Practice Act are discussed in a subsequent part of this article.

It also became necessary to revise the Conference and Practice Requirements promulgated by the Commissioner of Internal Revenue.<sup>47</sup> The Conference and Practice Requirements are published as a means of implementing the formal regulations and policy of the Internal Revenue Service regarding its discussions and conferences with taxpayers and their representatives on matters of disputed tax liability. Accordingly, while Treasury Department Circular No. 230 provides standards of conduct for practice before the Internal Revenue Service, the Commissioner's

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<sup>44</sup> 30 Fed. Reg. 14331 (1965).

<sup>45</sup> 31 C.F.R. § 10 (1969); TREAS. DEPT. Circular No. 230 (Sept. 1966).

<sup>46</sup> 31 C.F.R. § 10.3(a) (1969); TREAS. DEPT. Circular No. 230, § 10.3(a), (Sept. 1966). The declaration form is INT. REV. Form 2848 (combined with power of attorney) or Form 2848-D (combined with the tax information authorization).

<sup>47</sup> 26 C.F.R. § 601.501-27 (1969).

Conference and Practice Requirements set forth the procedures for practice.

Revisions to the Conference and Practice Requirements were published on September 14, 1967.<sup>48</sup> Under the revised procedures, an attorney is recognized if (1) he meets the requirements set forth in Treasury Department Circular No. 230 and files the required declaration, and (2) furnishes evidence to the Internal Revenue Service that he is authorized to perform certain acts on behalf of the taxpayer, or that he is authorized to receive or inspect confidential tax information regarding the taxpayer.

A power of attorney is a continuing requirement under the Commissioner's Conference and Practice Requirements and is required when the taxpayer's representative desires to perform one or more of the following acts:

- (1) receive (but not for endorsement or for collection) a check in payment of any Internal Revenue refund for taxes, penalties or interest;
- (2) execute a waiver of restriction on assessment or collection of a deficiency in tax, or of a waiver of notice of disallowance of a claim for credit or refund;
- (3) execute a consent to extend the statutory period for assessment or collection of a tax;
- (4) execute a closing agreement under Section 7121 of the Internal Revenue Code;
- (5) substitute another representative.<sup>49</sup>

A new concept in the Commissioner's Conference and Practice Requirements is the tax information authorization. This is a document signed by the taxpayer authorizing his representative to receive or inspect confidential tax information regarding a specified matter. Its purpose is to protect the confidentiality of tax information which is required by statute and to assure the Service employee that confidential tax information is revealed only upon direction of the taxpayer to his authorized representative. The tax information authorization is not necessary if the representative files a power of attorney as discussed above, if the representative attends a conference accompanied by the taxpayer, or if he receives notices or other communications which do not involve the disclosure of confidential tax information.<sup>50</sup> However, there can be no

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<sup>48</sup> 32 Fed. Reg. 13058 (1967).

<sup>49</sup> 26 C.F.R. § 601.502 (c) (1) (1969); INT. REV. FORM 2848.

<sup>50</sup> 26 C.F.R. § 601.502 (c) (3) (1969). The Agency Practice Act requires that the agency communicate with the authorized representative. 79 Stat. 1281, § 2.

disclosure of confidential tax information unless the representative files a power of attorney, or a tax information authorization, or is accompanied by the taxpayer.

There are several matters regarding practice before federal administrative agencies which are not covered by the Agency Practice Act. Among these are representation before agencies by laymen, self-representation, conflict of interest, disciplinary procedures, and representation by former employees. More important, the Act specifically does not authorize or limit discipline, including disbarment, of persons appearing in a representative capacity before any agency.<sup>51</sup> Consequently, agencies maintain authority to deal with these matters, and regulations in regard thereto are in effect.

With respect to practice before the Internal Revenue Service of the Treasury Department, enrollment still is required of non-attorneys and non-certified public accountants who meet the qualifications for enrollment set forth by regulations.<sup>52</sup> Rules of conduct also are maintained and enforced by the Treasury Department governing practice by attorneys, certified public accountants and enrolled agents before the Internal Revenue Service.<sup>53</sup> Such regulations were revised, effective September 13, 1966, to meet the scope and intent of the Agency Practice Act. The greatest change in the rules of conduct is that the rules now refer almost exclusively to the conduct of practice before the Internal Revenue Service, as opposed to the broad range of a practitioner's conduct generally. Hence, under the revised regulations, disciplinary proceedings are concerned primarily with violation of standards of conduct which directly affect the rights of taxpayers to sound representation before the Internal Revenue Service, or which relate to the ability of the Service to carry out its functions. These revisions were made on the theory that the professional licensing authorities and grievance committees of bar associations will now "police" their members' general professional conduct and redress grievances of clients for misconduct no longer covered by the regulations governing practice before the Service. However, practitioners are still subject to disciplinary action (including disbarment) for violation of the rules governing practice before the federal agencies. For example, for the fiscal year ended June 30, 1968, the Office of Director of Practice of the Treasury Department (which acts, in effect, as a "grievance committee" for the Commissioner

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<sup>51</sup> 79 Stat. 1281, § 1(c) (ii).

<sup>52</sup> 31 C.F.R. § 10.4 (1969); TREAS. DEPT. Circular No. 230 § 10.4 (Sept. 1966).

<sup>53</sup> 31 C.F.R. § 10 (1969), *reprinted as* TREAS. DEPT. Circular No. 230 (Sept. 1966).

of Internal Revenue) was instrumental in disciplinary action against forty-four practitioners. Of these, eight were attorneys, twenty-three were certified public accountants and the remainder were enrolled agents.<sup>54</sup>

#### IV. SUMMARY AND COMMENT

When the House of Representatives considered S. 1758 for enactment, Representative Richard H. Poff (R., Va.), a member of the House Judiciary Committee, summed up the purpose of the legislation in the following manner:

Mr. Speaker, this is not a lawyer's bill. This is not a certified public accountant's bill. This is not a Government agency bill. This is a private citizen bill.

As the Federal Government grows bigger and bigger, as its laws get more and more complex, and as it touches more and more the lives of more and more citizens, it becomes more and more important that the citizen's rights in any dispute he may have with his Government should be accorded the first priority.

The first protection he must be assured is his right to select his own representative to speak for him. That right he does not fully enjoy today. Some governmental agencies have assumed a power never delegated specifically by statute. They have undertaken to decide who is qualified and who is not qualified to represent his fellow citizens in proceedings before them. . . .

This bill intends to return to the citizen to whom it belongs the right to exercise his own judgment in choosing his own representative. It provides simply that any person who is a member in good standing of the bar of the highest court in any State will be eligible to represent those who employ him before any Federal agency. . . .<sup>55</sup>

Thus, the Agency Practice Act is described as a federal agency-wide declaration of the principle that an attorney who is a member of the bar of the highest court of his jurisdiction (or a duly licensed certified public accountant in practice before the Internal Revenue Service) is, by that fact, eligible to represent others before a federal agency without requirements of admission. This principle is implemented by the practitioner's own certification that he is duly qualified in his jurisdiction. The client is assured that the attorney chosen to represent him before an

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<sup>54</sup> 1968 SEC'Y TREAS. ANN. REP. 78.

<sup>55</sup> 111 CONG. REC. 27193 (1965).

agency will be dealt with in that manner by the agency.<sup>56</sup> Among other things, the Act reserved to the agencies the authorization to discipline practitioners who are adjudged guilty of misconduct in their practice before the respective agencies. Hence, while the attorney is qualified by virtue of his professional license to practice before all federal agencies (with the exception of the Patent Office in patent matters), each agency has retained the authority to provide for standards of conduct of practice before it and also to provide for discipline of the practitioner who has violated such standards of conduct. Nothing in the Agency Practice Act prohibits an agency from setting up standards of admission for laymen, and, pursuant to the doctrine of *Sperry v. Florida*, a state may not interfere with, nor attempt to regulate, a layman who has been admitted to practice administratively before a federal agency.

The practical effect of the Agency Practice Act was to eliminate admission requirements for attorneys and certified public accountants to practice before the Internal Revenue Service; to prohibit any federal agency from establishing future requirements of admission for attorneys; and to compel the agency to deal with the citizens' authorized representative. As stated previously, only four federal agencies, out of approximately forty, required formal admission to practice before them when S. 1466 and S. 1758 were under consideration by the 88th and 89th Congress. Of these, the Veterans' Administration and the Interstate Commerce Commission simply required the filling out of a routine admission form. The Patent Office required examination of lawyers prior to admission, but that office was eventually exempted from the provisions of S. 1758. Only the Treasury Department retained an enrollment program for attorneys requiring an application and some proof of good character and reputation, at least insofar as the applicant's character and reputation related to his tax practice before the Internal Revenue Service. The Treasury's admission or enrollment requirements extended only to practice before the Internal Revenue Service. Other bureaus of Treasury, such as Bureau of Customs, did not have requirements of enrollment.

As previously stated, Treasury's opposition to the legislation was founded on the proposition that good standing of an attorney in the bar of his state did not necessarily constitute proof of good character and reputation for practice in tax matters before the highest administrative level of the Internal Revenue Service. The proponents of the legisla-

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<sup>56</sup> *Hearings on S. 1758* at 120.

tion insisted that it is the fundamental right of every individual to be represented by counsel of his choice and that such counsel should not be burdened by the necessity of further qualifying himself with an administrative agency when he has already qualified as a member of the bar of his jurisdiction. In the event he failed to qualify before the agency, he was denied the opportunity to represent his client and the client was denied his choice of counsel. This, in effect, amounted to federal limitation on the choice of counsel, and in some respects was an abrogation of the citizen's right to counsel. In reply to this argument, the Treasury Department maintained that it should not be compelled to recognize attorneys of questionable integrity or whose conduct in tax matters showed contempt of the federal tax system. Essentially, the federal tax system is a voluntary self-assessment system which depends on voluntary compliance with the tax laws. Hence, the Treasury insisted upon unimpeachable character and good reputation in tax matters for those attorneys who engage in tax practice before the agency.

Has the enactment of the Agency Practice Act impaired or improved the quality or integrity of representation before the agencies? There is no way to ascertain any answer with certainty. The Treasury Department, which vigorously opposed the legislation and failed to achieve the exemption which it sought, has had the opportunity to review its position in the light of experience under the Act. In a talk before the American Institute of Certified Public Accountants Committee on Professional Ethics, two years after passage of the Act, the General Counsel of the Treasury Department summed up the matter in this way:

I was one of those in the government who led the fight in opposition to the bill which eventually became the Agency Practice Act. We opposed this bill solely out of our concern for the protection of the taxpayers and for the protection of the revenue of the United States. Nevertheless, the act was passed, and, upon reflection, I am satisfied that we were wrong and the Congress was right in passing that act.<sup>57</sup>

Insofar as the principle and objective of the Agency Practice Act were to guarantee to the citizen his choice of counsel—the proposition that every citizen should have the lawyer of his choice—that objective certainly has been achieved. Whether the citizen receives skilled and honest representation is another matter.

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<sup>57</sup> Remarks by Fred B. Smith, General Counsel, Treasury Department, National Conference on Professional Ethics in Committee on Professional Ethics of the American Institute of Certified Public Accountants, New York, N. Y. on October 16, 1967.