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DUMPING, COUNTERVAILING DUTIES

Proposal to License All Antidumping and Countervailing Duty Agency Practitioners to Better Ensure Competency and Ethical Behavior


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Introduction [1]

[1] This paper contains the individual views of its authors.

With unfortunate frequency it appears that fraud [2] is on the rise before United States trade agencies to the serious detriment of the entire international trade bar. In light of this disturbing trend, there is a need to assess the ability to provide accountability for those who represent others before these trade agencies. [3] As it stands, the agencies do not have any regulatory provisions to monitor and police the ethical behavior of the practitioners before them—whether they are barred attorneys, foreign attorneys, or lay persons. Due to this lack of regulation, the District of Columbia Court of Appeals ("D.C. Court of Appeals") has jurisdiction to receive complaints and investigate and sanction abuses of its rules, including ethical canons. This article delves into the interplay of those canons and the D.C. Court of Appeals' Rule 49 (the "Unauthorized Practice of Law,") in the context of regulating the accountability of all trade practitioners.

[2] The word "fraud" is used in this article in the sense that it is discussed by the United States Court of Appeals for the Federal Circuit in *Home Prods. Int'l, Inc. v. United States,* No. 2010-1184, __ F.3d __ (Fed. Cir., Feb. 7, 2011), meaning party misbehavior that is sufficient to confer authority on an agency to reopen a previous

determination, which "is not limited to cases in which a determination of fraud has been made in a separate proceeding."

[3] This topic has been the subject of three recent seminars co-sponsored by the ABA's Section of International Law, International Trade Committee. The first was on March 18, 2010, at Hughes Hubbard & Reed LLP, followed by another at Kelley Drye & Warren LLP on September 30, 2010, and the most recent was hosted by the United States Court of Appeals for the Federal Circuit on February 2, 2011. It is also the subject of the March 3, 2011, panel "Ethical Issues in Customs and Trade," at the 2011 International Trade Update by the Georgetown University Law Center.

Our view is that while the conduct of attorneys practicing before these trade agencies already has a regulatory mechanism in the rules of the D.C. Court of Appeals for attorney misbehavior, it appears to be unused and ineffective. Moreover, there is no such apparatus in place governing a nonlawyer's actions before these agencies. Either the trade agencies need to develop such a regulatory structure for lawyers and nonlawyers, or the D.C. Court of Appeals needs to enforce its rules—both with respect to barred attorneys and to prohibit the unauthorized practice of law by nonlawyers practicing before the trade agencies. We favor a new regulatory structure in the form of an agency-developed and agency-administered licensing system applicable to all those practicing before the trade agencies (attorneys and non-attorneys alike) to better ensure substantive competence and ethical behavior. The intention of this paper is to engage a debate and not to answer all of the questions that actual implementation of such a licensing system would entail. If a licensing system is to be considered, such details would require time and broad discussion to identify and resolve.

The first section of this article provides a pertinent summary of U.S. trade law practice before the Department of Commerce and the International Trade Commission and highlights the need for regulation of the practice. The second section defines the practice of law and delineates why representing clients before the U.S. trade agencies is engaging in the practice of law. The final section addresses why the government agency exception to the unauthorized practice of law rule is not applicable and urges the agencies to promulgate appropriate regulations. These regulations, in the form of a licensing system, would bring the agencies within the exception. In the event the agencies do not create a system to come within the exception, however, the D.C. Court of Appeals should start enforcing its ethical canons and Rule 49 and otherwise carry out its mandate to protect the public from incompetent and unethical representation.

I. Background

A. U.S. International Trade Practice

The practice of international trade law in the United States is extremely complex and multifaceted. This article assumes a certain level of knowledge by the reader and focuses on only one area—the regulation and implementation of federal antidumping and countervailing duty ("AD/CVD") statutes. Generally, the United States regards it as "unfair" for a foreign producer to sell its product at a lower price in the U.S. market than that for which it sells the product in its home market, or to receive subsidies from its government thereby enabling lower pricing of its sales to the United States. This low pricing can be injurious to competing U.S. producers of the same product. When this injurious unfair trade occurs, the United States may assess duties on the product at the border with the goal of bringing about higher prices to eliminate injury caused by such unfair pricing. [4] The International Trade Commission ("ITC") and the Department of Commerce's International Trade Administration ("Commerce" or "ITA") jointly conduct AD/CVD investigations to determine whether it is appropriate to assess duties on the goods entering the United States.

[4] *See* 19 U.S.C. § 1671, 1673§§.

These trade investigations are extremely fact intensive, both with respect to the domestic industry's claims for AD/CVD duties to be imposed due to injury caused by the targeted imports, and concerning the information required from foreign producers for the agencies to assess whether dumping and subsidization are occurring. It is in the provision of these facts that fraud issues have arisen, whether concerning petitioners [5] (i.e., the domestic industry) or respondents [6] (i.e., the foreign producers). Factual submissions by foreign producers are much more extensive and subject to far greater agency scrutiny than those from petitioners, and it is with respect to on-site verification of respondents' information where the most frequent cases of fraud have been reported. Additionally, most trade proceedings (particularly new petitions) of late have involved foreign producers in China and this is where the reports of fraud tend to center, although not exclusively. [7]

[5] *See, e.g.*, *Tung Fong Indus. Co. v. United States*, 318 F. Supp.2d 1321, 1331–33 [26 ITRD 1496] (Ct. Int'l Trade 2004).

[6] *See, e.g.*, *Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 66,089 (Dep't of Commerce Dec. 14, 2009) ("*Pure Magnesium Final Results*").

[7] *See, e.g.*, *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352 [30 ITRD 1161](Fed. Cir. 2008) (addressing fraud in an antidumping proceeding concerning imports from Japan).

B. Increasing Unethical Conduct

Petitioners and respondents in trade proceedings normally are represented by U.S. counsel. Often these counsel are

assisted by lay persons serving as U.S. consultants or from foreign law firms and foreign consultants. There is no requirement that such assistance be disclosed publicly or otherwise to the trade agencies. Sometimes consultants and foreign law firms represent petitioners and respondents alone without barred U.S. counsel, and occasionally either side may participate in a proceeding *pro se*. The D.C. Court of Appeals' ethics rules regulate the behavior of U.S. counsel in these proceedings. There are no such ethical strictures, however, governing the activities of lay person consultants and foreign law firms in these proceedings.

It has become increasingly clear over the last few years that the incidence of fraud in the practice of international trade law before U.S. agencies is on the rise. The relatively recent cases of *Crawfish*, [8] *Magnesium*, [9] *Oil Country Tubular Goods*, [10] *Activated Carbon*, [11] and *Ironing Tables*, [12] provide particularly colorful and egregious examples, but are by no means exhaustive. We do not recount here the sordid details of the on-site exporter verifications and fraudulent questionnaire responses in these cases, as many are already well known to members of the trade bar. In each of these cases, Commerce applied adverse facts available against the exporters (i.e., high penalty duty rates were imposed on their U.S. exports) because of the inaccurate information reported and the inability to confirm its veracity. [13]

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[8] *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review and Final Revision Review, in Part*, 69 Fed. Reg. 7,193 (Dep't of Commerce Feb. 13, 2004).

[9] Issues and Decision Memorandum for the *Pure Magnesium Final Results*, *supra* note 6 at 6, *available at* http://ia.ita.doc.gov/frn/2009/0912frn/index.html (last visited Feb. 8, 2011); *Notice of Preliminary Results of Antidumping Duty Administrative Review; Final Rescission, in Part; and Intent to Rescind, in Part*, 68 Fed. Reg. 58,064; 58,067, (Dep't of Commerce Oct. 8, 2003).

[10] Issues and Decision Memorandum for the *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 Fed. Reg. 20,335 (Dep't of Commerce Apr. 19, 2010), *available at* http://ia.ita.doc.gov/frn/2010/1004frn/index.html (last visited Feb. 8, 2011).

[11] Issues and Decision Memorandum for the *First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 57,995 (Dep't of Commerce Nov. 10, 2009), *available at* http://ia.ita.doc.gov/frn/2009/0911frn/index.html (last visited Feb. 8, 2011).

[12] *Home Prods. Int'l, Inc. v. United States*, No. 2010-1184, __ F.3d __ (Fed. Cir., Feb. 7, 2011).

[13] *See, e.g.*, Issues and Decision Memorandum for the *Pure Magnesium Final Results*, *supra* note 6 at 6.

No known agency or D.C. Court of Appeals action has been taken against counsel or the consultants for the respondents. It is not always clear to what extent, if any, U.S. counsel knew about the producers' actions, nor does this appear to have been investigated. Some of the same U.S. counsel and firms appear to be involved in more than one of these cases. Verification reports confirm that foreign counsel and consultants were involved in at least some of these incidents and it is widely believed that some U.S. counsel provide little oversight of the activities of the consultants and foreign firms working with them in these representations. If it were found to be true that U.S. counsel was engaged in unethical conduct, the behavior could be sanctioned by the appropriate bar. Many presume, however, that there is no possible direct formal recourse for victims of ethics violations by lay consultants and foreign lawyers that do not fall under an American bar association. This presumption is erroneous. Representing another before the ITA and ITC constitutes the practice of law and accordingly should be regulated by the respective agencies. Unless and until these agencies regulate the practice of law before them by attorneys and nonlawyers, the D.C. Court of Appeals has the right, and maybe even the duty, to pursue those in violation of its ethics rules and the rule against the unauthorized practice of law.

II. The Practice of Law Before the ITA and ITC

A. Defining the Practice of Law

Since the colonial era there have been limitations on who is permitted to practice law in the United States. [14] The purpose of limiting the practice of law to trained legal professionals has always been to protect the clients and the integrity of the legal practice—to ensure that clients are not exploited and that the administration of justice is carried out in a competent manner. [15] For this reason, states generally limit the practice of law to admitted and active members of the local bar. [16]

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[14] *See* Therese A. Cannon, Ethic and Professional Responsibility for Paralegals 48 (5th ed. 2008) [hereinafter Ethic and Professional Responsibility].

[15] *See id.*

[16] *See, e.g.*, D.C. App. R. 49(a) ("No person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an active member of the District of Columbia Bar … .").

The "practice of law," however, has not had a single or clearly delineated definition. The American Bar Association

Model Code of Professional Responsibility ("ABA Model Code") states that "[i]t is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law." [17] Consequently, its scope has vacillated with national trends toward professionalization or de-professionalization, or the recognized need to provide inexpensive representation to low-income clients. [18] In its current form, the ABA Model Code states that:

[17] Model Code of Prof'l Responsibility EC 3-5 (1983).

[18] *See Ethic and Professional Responsibility*, *supra* note 14, at 48-54.

> [f]unctionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. [19]

[19] Model Code of Prof'l Responsibility EC 3-5 (1983).

It is ultimately the individual state, however, that is left to regulate the practice of law within its jurisdiction. [20] At the seat of the national government, the D.C. Court of Appeals regulates the practice of law before many federal agencies—including persons practicing before the ITC and Commerce. [21] The D.C. Court of Appeals is empowered to establish rules "respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." [22] Pursuant to this authority, the D.C. Court of Appeals defines the "practice of law" as:

[20] "What constitutes unauthorized practice of law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction." American Bar Association Opinion 198 (1939); *see also*, *Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Svcs.*, 608 F.3d 110, 114 (1st Cir. 2010) ("[T]he state judicial branch … is solely responsible for defining what is the practice of law.") (internal quotation marks and citation omitted).

[21] Recently, the D.C. Court of Appeals stated that "[t]he great weight of authority renders it almost universally accepted that the highest court in the jurisdiction is imbued with the inherent authority to define, regulate, and control the practice of law in that jurisdiction." *Bergman v. District of Columbia*, 986 A.2d 1208, 1225 (D.C. 2010) (citation omitted). *See also*, *In re Belardi*, 891 A.2d 224, 225 (D.C. 2006) (per curiam) (upholding the recommendation of the D.C. Bar's Board on Professional Responsibility to suspend Belardi from the practice of law in D.C. for making false statements to the Federal Communications Commission); *In re Soininen*, 853 A.2d 712, 720–22, 732 (D.C. 2004) (upholding the recommendation of the D.C. Bar's Board on Professional Responsibility to suspend Soininen, in part, for the unethical practice of law before the Department of Labor).

[22] D.C. Code §11-2501(a) (1970).

> [t]he provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:
>
> (A) Preparing any legal document … intended to affect or secure legal rights …;
>
> (B) Preparing or expressing legal opinions;
>
> (C) Appearing or acting as an attorney in any tribunal;
>
> (D) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;
>
> (E) Providing advice or counsel as to how any of the activities described in subparagraphs (A) through (D) might be done, or whether they were done, in accordance with applicable law;
>
> (F) Furnishing an attorney or attorneys, or other persons, to render services described in subparagraphs (A) through (E) above. [23]

[23] D.C. Ct. App. R. 49(b)(2).

In applying the definition of the "practice of law" to specific cases, the D.C. Court of Appeals often looks to other courts to fill in grey areas. [24] For example, the court has relied on the United States Supreme Court's statement that:

[24] *See, e.g.*, *J.H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587, 594 (D.C. 1973).

> [a]ccording to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition, conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law… . [25]

[25] *Id.* at 594 (citing *In re Duncan*, 83 S.C. 186 (1909)).

The D.C. Court of Appeals has also looked to a description provided by the Supreme Court of Minnesota, which states that:

> [a] lawsuit is but one process of settling an issue of legal right and wrong. Many are disposed of without suit. But the disposition of such issues for others, by advice and negotiation, for hire, is as much the practice of law as though process and pleadings, with or without trial were necessary. Counsel as to legal status and rights, and conduct in respect thereto, are as much a special function of the English solicitor and the American lawyer as are diagnosis, prognosis, and prescription are in the special field of medicine … . [26]

[26] *Id.* at 594 (citing *Fitchette v. Taylor*, 191 Minn. 582 (1934)); see also *id.* (citing *In re Shoe Mfrs. Protective Ass'n*, 295 Mass. 369 (1936)) ("[T]he practice of directing and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which rights are created, modified, surrendered or secured are all aspects of the practice of law.").

A common theme that emerges from the varied descriptions is that when one provides legal advice or counsel that affects another person's legal rights, this is the practice of law.

B. Practice Before the ITA and ITC Is the Practice of Law

There is no question that counseling, advising, or representing another regarding submissions to the ITA and ITC in antidumping and countervailing duty cases is the practice of law. First, the majority of the practice before the two trade agencies falls under the D.C. Court of Appeal's enumerated list because it requires the interpretation of law and contains legal arguments. Second, submissions before both agencies undeniably affect another person's legal rights.

Consider that an AD/CVD investigation requires the parties to fill out questionnaires. These questionnaires are not a matter of filling in blanks with simple and obvious facts. Instead, responses to the questionnaires require the interpretation of relevant treaties, statutes, regulations, and case law, and mandate an understanding of the consequences attendant to their completion, as well as of the evidence required to support each asserted fact. This inherently requires legal skill and judgment. For example, one section of Commerce's antidumping questionnaire for foreign producers requests sales details to determine normal value—a legal term of art defined by treaty and statute. [27] Normal value, in turn, largely determines the exporter's level of antidumping duties. Such sales details include not only monetary figures for costs, discounts, movement charges, etc., but also information regarding level of trade adjustments and other "special factors" taken into account for determining normal value. [28] If questionnaire information is insufficient or inaccurate and the ITA or ITC determines such deficiencies to not be in good faith, the agencies are permitted to use "adverse facts available." [29] Put simply, the agencies can use "worst case scenario" figures to assess injury and to derive the highest dumping margin possible by corroborated record evidence in lieu of the figures provided by the party.

[27] *See* 19 U.S.C. §1677b.

[28] United States Department of Commerce, International Trade Administration, Import Administration, 2009 Antidumping Manual, ch. 4 pg. 6, *available at* http://ia.ita.doc.gov/admanual/index.html (last visited Feb. 3, 2011) ("*Antidumping Manual*").

[29] 19 C.F.R. §351.308.

Once a preliminary determination of dumping is rendered from answers provided in the questionnaires, Commerce permits the parties to submit legal briefs. [30] These briefs must contain, by regulation, every complaint the party deems relevant to the ultimate AD/CVD determination. [31] If not, the party can be barred from raising the omitted issues in a subsequent appeal to the U.S. Court of International Trade, [32] where only licensed attorneys may practice, because the party did not "exhaust administrative remedies," another legal term of art. [33]

[30] *Id.* §351.309.

[31] *Id.*

[32] The publication of the final order triggers the right to challenge the final determination of either agency before the United States Court of International Trade ("CIT"). The CIT is established under Article III of the Constitution and is imbued with exclusive jurisdiction over civil actions arising out of customs and international trade laws of the United States. Decisions of the CIT are appealed to the U.S. Court of Appeals for the Federal Circuit.

[33] *See*19 C.F.R. §351.309(c)(2) (requiring briefs to "present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final result"); *see also Bridgestone Americas, Inc. v. United States*, 710 F. Supp. 2d 1359, 1365 [32 ITRD 1545] (Ct. Int'l Trade 2010) (holding that respondent did not exhaust its administrative remedies because it did not raise its challenge in its case brief before the final determination).

These are merely a few of many examples that emphasize the nature of the "practice of law" before Commerce and the ITC. Consequently, those assisting others in preparing such submissions, or preparing them on behalf of a client, are practicing law within the District of Columbia and must, therefore, be "enrolled as an active member of the District of Columbia Bar, except as otherwise permitted by these Rules." [34] Nonlawyers, whether domestic or foreign, practicing before these agencies in trade proceedings are, thus, engaged in the practice of law, without authorization. There is a conditional exception to this rule for practicing before federal agencies, but the ITA and ITC presently do not meet the requirements of the exception.

[34] D.C. Ct. App. R. 49(a).

III. The Government Agency Exception Does Not Apply

A. The ITA and ITC Presently Do Not Fall Under the Rule 49(c)(2) Exception

The D.C. Court of Appeals provides an exception to its active bar membership requirement for persons practicing law before federal agencies. [35] Rule 49(c)(2) provides that a person need not be an active member of the D.C. Bar to provide legal services before an agency of the United States *if* all of the following three conditions are met:

[35] *Id.* at 49(c)(2).

> (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).

This exception applies to both lay practitioners and foreign lawyers alike. [36]

[36] *See, e.g.*, Opinion 14-04 of the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law, *available at* www.dcappeals.gov/dccourts/docs/rule49_opinion14-04.pdf (last visited Feb. 3, 2011).

The exception for federal agencies "is designed to permit persons to practice before a federal department or agency without becoming members of the Bar, where the agency has a system in place to regulate practitioners not admitted to the Bar, and where the public is adequately informed of the limited nature of the person's authority to practice." [37] The courts have been clear in the local agency context, [38] however, that even if an agency permits nonlawyers to practice before it, if the agency has not "undertaken to regulate" such practice, then the nonlawyer is conducting unauthorized practice of law. [39]

[37] D.C. Ct. App. R. 49(c)(2) cmt. to R. 49(c)(2).

[38] *Id.* at 49(c)(5). Rule 49(c)(5) provides for the same (c)(2) exception with respect to local, as opposed to federal, agencies.

[39] *See, e.g.*, *Dickens v. Friendship-Edison P.C.S.*, 724 F. Supp. 2d 113 (D.D.C. 2010) ("Rule 49 requires that the agency adopt a rule before exception (c)(5) becomes available; not that the exception is available until the agency rules that it is not."); *Agapito v. District of Columbia*, 477 F. Supp. 2d 103 (D.D.C. 2007) (holding that because the agency did not undertake to regulate the practice of law before it, any such practice by a person not licensed in the District to practice law was unauthorized and thus, such a violation of Rule 49 prohibited the award of legal fees).

Those practicing before the ITA and ITC do not fall under the Rule 49(c)(2) exception because the agencies are not "expressly permitting and regulating" the practice of law before them. Under the Administrative Procedures Act,

agencies are permitted to determine whether there is a function for lay practitioners and allow them to perform duties that would otherwise constitute the practice of law. [40] Congress specifically promulgated that the International Trade Commission, for example, "is authorized to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties." [41] Likewise, the ITA has statutory authority to "make such rules and regulations as may be necessary to carry out the provisions of [the antidumping and countervailing duty statutes] . …" [42] Despite these powers, neither the ITC nor ITA has undertaken to regulate the practice of law before it. The agency regulations do not require persons presenting submissions to be lawyers. [43] Nothing in the regulations provides for minimum competence or the event of unethical conduct on behalf of those practicing before it. [44]

[40] *See* 5 U.S.C. §500(d); see *also Sperry v. Fla.*, 373 U.S. 379, 397 (1963).

[41] 19 U.S.C. §1335.

[42] 19 U.S.C. §1624. Further, the United States Court of Appeals for the Federal Circuit has recognized Commerce's broad power to interpret and implement its statutory authority to properly administer and effectuate the antidumping and countervailing duty provisions. *See Timken Co. v. United States*, 354 F.3d 1334, 1342 [25 ITRD 2025] (Fed. Cir. 2004) (recognizing that "[a]ny reasonable construction of the statute [by Commerce] is a permissible construction.") (citing *Torrington v. United States*, 82 F.3d 1039, 1044 [18 ITRD 1097](Fed. Cir. 1996)).

[43] *See* 19 C.F.R. §201.9(e) ("Each document filed with the Commission … shall be signed by the party filing the document or by a duly authorized officer, attorney, or agent of such party."); *id.* §351.303(g) ("A person must file with each submission containing factual information the certification … and, in addition, *if* the person has legal counsel or another representative, the [following] certification.") (emphasis added).

[44] Commerce regulations already provide for the sanction and disbarment from appearing before the agency of persons who disclose proprietary information under protective orders. 19 C.F.R. §351.305. These regulations include provisions for the investigation and administrative adjudication of complaints that allege such disclosures. *Id.* §§354.4–354.19. These regulations, however, do not reach other unethical conduct.

The most these agencies have done is require any factual submission to be accompanied by a "certification." [45] The statute states that "[a]ny person providing factual information to the administering authority [ITA] or the Commission in connection with a proceeding under this subtitle on behalf of the petitioner or any other interested party shall certify that such information is accurate and complete to the best of that person's knowledge." [46] A considerable attempt is being made by Commerce to address the ethical problems by tightening certification requirements, [47] but these do not seem to get at the heart of the issue and would not apply to the ITC. Certification only facilitates another form of potential enforcement action one step further removed from the agency itself, such as a Department of Justice action under 18 U.S.C. §1001, which apparently has never been enforced in this context. Moreover, any such certification requirement will not reach the foreign or domestic lawyers or consultants that did not physically submit the certification, but may have played a significant role in the unethical conduct, with or without the certifying lawyer's knowledge.

[45] *See* 19 U.S.C. §1677m(b).

[46] *Id.* §1677m(b).

[47] *See* Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule, 76 Fed. Reg. 7,491 (Feb. 10, 2011).

Currently, the only remedy known to have been undertaken by the agency when information is egregiously inaccurate to the level of fraud, is to punish the client by resorting to adverse inferences. There is no provision incurring accountability directly on the practitioner, even if the practitioner's involvement is clear. [48] A complaint may be made to the D.C. Court of Appeals about unethical behavior of counsel before these agencies, but in reality this seems to occur rarely or never. In any event, there is no similar recourse against unethical behavior by foreign lawyers who do not enter the District of Columbia and nonlawyers that have engaged in similar behavior.

[48] In contrast, Commerce's Director of the Patent Office may "suspend or exclude … from further practice before the Patent and Trademark Office, any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with regulations. …." 35 U.S.C. §32.

B. Other Agencies Regulate the Practice of Law

The fact that the ITA and ITC do not regulate the practice of law before them is unusual compared to other federal agencies. Many other federal agencies recognize the need and importance of regulating those who engage in the practice of law and have done so successfully.

For example, the United States Patent Office within the Department of Commerce has permitted and regulated all those practicing before it since its inception. [49] As early as 1861, the Commissioner of Patents had the authority to "refuse to recognize any person as a patent agent, either generally or in any particular case." [50] In 1899, in response to an

increase in deceptive advertising and victimization of inventors, which was generally thought to be carried out by lay persons and not by lawyers, the Patent Office required all those persons practicing before it to be registered with the agency. [51] Today, registration requires all practitioners to pass rigorous examination and follow the Patent Office's own Code of Professional Responsibility. [52] Canon One states that "[a] practitioner should assist in maintaining the integrity and competence of the legal profession." [53] The Patent Office is authorized to suspend, exclude, or reprimand any practitioner that does not act in accordance with the regulations. [54]

[49] *Sperry v. Fla.*, 373 U.S. 379, 388 (1963).

[50] *Id.* (citing Act of March 2, 1861, c. 88, s 8, 12 Stat. 247).

[51] *Id.* at 390.

[52] *See* 37 C.F.R. §§10, 11.7 §§.

[53] *Id.* §10.21.

[54] *Id.* §11.15.

Another example of an agency that regulates the practice of lawyers and lay persons is the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF" or "Bureau"), which devotes an entire part of its regulations to the "Practice Before the Bureau of Alcohol, Tobacco and Firearms." [55] In addition to attorneys, ATF permits certified public accountants and enrolled practitioners to represent clients before the Bureau. [56] "The Director may grant enrollment to practice to any person" who is technically qualified and in good standing with the Bureau. [57] A person seeking enrollment must fill out an application, describe their technical qualifications, and pay a nominal fee. [58] Most importantly, however, the Bureau, "after due notice and opportunity for hearing, may suspend or disbar from practice before the Bureau any attorney, certified public accountant, or enrolled practitioner shown to be incompetent, disreputable or who refuses to comply with the rules and regulations … ." [59]

[55] 31 C.F.R. §8.

[56] *Id.* §§8.1, 8.2(b)–(c).

[57] *Id.* §8.21.

[58] *Id.* §8.22.

[59] *Id.* §8.51.

Similarly, the Federal Energy Regulatory Commission ("FERC") of the Department of Energy permits and regulates lawyers and lay practitioners. "A participant may appear in a proceeding in person or by an attorney or other qualified representative." [60] Such appearance, however, is conditioned on the participant remaining in good standing with the Commission.

[60] 18 C.F.R. §385.2101(a).

> [T]he Commission may disqualify and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to a person who is found:
>
> (1) Not to possess the requisite qualifications to represent others, or
>
> (2) To have engaged in unethical or improper professional conduct, or
>
> (3) Otherwise to be not qualified. [61]

[61] *Id.* §385.2102(a).

The FERC, similar to Commerce and the ITC, carries out highly technical investigations, [62] accepts petitions, and conducts hearings and reviews. [63]

[62] *Id.* §1b.17.

[63] *Id.* §§385.501–385.1117.

These examples are not intended to be exhaustive and merely serve to illustrate that many federal agencies regulate the conduct of those practicing before them in accordance with the rules of the D.C. Court of Appeals, utilizing regulatory structures applicable to lawyers and lay persons alike to comply with the Rule 49(c)(2) exception. The failure of the ITA and ITC to do the same makes these agencies federal ethical outliers when it comes to regulating those engaged in the practice of law before a federal agency.

C. The ITA and ITC Should Implement Licensing Procedures and Regulate the Practice of Law

Real and serious concerns are at issue. As set forth by the ABA Model Code of Professional Responsibility, the principle of the "unauthorized practice of law" exists "to protect the public from legal services by persons unskilled in the law." [64] The D.C. Court of Appeals expressed that the rule exists "[t]o protect members of the public from persons who are not qualified by competence or fitness to provide professional legal advice or services," "[t]o ensure that any person who purports or holds out to perform the services of a lawyer is subject to the disciplinary system of the District of Columbia Bar," and also "[t]o maintain the efficacy and integrity of the administration of justice and the system of regulation of practicing lawyers." [65]

[64] Model Code of Prof'l Responsibility Canon 3, n.1 (1980) (citation omitted).

[65] D.C. Ct. App. R. 49(a) cmt. to R. 49(a).

There are legitimate concerns that the public is not being properly protected from unregulated practitioners before Commerce and the ITC. Self-regulation by the agencies seems the most appropriate solution for several reasons. First, the United States Supreme Court has suggested that it may not be appropriate for states to be correcting the abuses of practitioners before federal agencies. [66] Second, because of the complexity of the proceedings before the trade agencies, it seems reasonable that the agencies themselves are the most capable of assessing competence, handling complaints, and detecting grievances. [67] Third, the D.C. Bar has proven to be an ineffectual means of regulating ethical conduct and the unauthorized practice of law before the trade agencies, which may be mostly because its enforcement apparently has not been sought by either the agencies or the public. Fourth, agency regulation would ensure the most comprehensive protection for clients because it would extend to foreign lawyers who otherwise might fall under the exception to the D.C. Court of Appeals Rule 49 for the "incidental and temporary practice" of law. [68] Fifth, an agency licensing system would have a significant deterrent effect, for without a license the practice of international trade law before these agencies would be prohibited. Sixth, the bar rules do not reach domestic and foreign lay persons in any event. Seventh, Commerce and the ITC already have regulations that adjudicate and sanction violations of protective orders safeguarding the disclosure of proprietary information. [69] It does not seem inordinately difficult to extend such regulations to include complaints of unethical conduct of those practicing before the agencies. [70] Lastly, in many of these cases the "public" is a foreign producer and treaty-regulated international commerce is directly affected. The federal government truly has the most superior interest in ensuring that those processed before it, foreign or domestic, receive professional, ethical representation. Because Commerce and the ITC pride themselves on a transparent and fair process for rendering their AD/CVD determinations, [71] ensuring that parties are properly represented would effectuate the procedural integrity the government desires. As it stands, the agencies punish only the parties themselves, but do not provide recourse if their representation has been inadequate or unethical.

[66] *See Sperry v. Fla.*, 373 U.S. 379, 395 (1963) ("Nor is it insignificant that we find no suggestion that the abuses being perpetrated by patent agents could or should be corrected by the States.").

[67] An important obvious issue is how to define "unbecoming" or unethical conduct before the agency that would warrant revoking the ability to practice before it. As discussed in Part III.B, many other federal agencies have addressed this issue and implemented corresponding regulations, each of which could be consulted for guidance in defining these terms in the trade agency context.

[68] *See* D.C. Ct. App. R. 49(c)(13) (stating that an exception to the general rule prohibiting the unauthorized practice of law includes the provision of "legal services in the District of Columbia on an incidental or temporary basis, provided that the person is authorized to practice law by … a foreign country"). There is some question as to whether a foreign lawyer would be able to practice before a federal agency not in compliance with the Rule 49(c)(2) exception. Rule 49(c)(13) provides another general exception to Rule 49 for "incidental and temporary practice." A legal practitioner does not have to be barred if they are:

> [p]roviding legal services in the District of Columbia on an incidental and temporary basis, provided that the person is authorized to practice law by the highest court of a state or territory or by a foreign country, and is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court.

D.C. Ct. App. R. 49(c)(13). The parameters of what constitutes "incidental and temporary practice" under this provision have not been clearly defined. This requires fulsome definition, as many foreign lawyers regularly hold themselves out to the public as experienced (i.e., regular and consistent) practitioners before the ITA and ITC.

[69] *See supra* note 44; 19 C.F.R. §207.7.

[70] The authors are cognizant of the agencies' limited monetary and staffing resources, an issue that would need to be addressed by Congress. Given the magnitude and importance of the problems to be addressed, this should not be insurmountable.

[71] *Antidumping Manual*, *supra* note 28 ("[W]e must conduct our unfair trade proceedings in as open and transparent a manner as possible, demonstrating to the public that our decision-making is based on the facts provided in the case and the applicable law, rather than behind-the-scenes consideration.").

We believe that a licensing system built upon the following nine principles would help to staunch the rising instances of fraud being perpetrated on the trade agencies:

1. Licensing requirements would apply equally to lawyers and to nonlawyers.

2. Licensing would be controlled by each respective agency and would encompass both technical competence [72] and ethical integrity.

3. No attorney or lay person, domestic or foreign, could practice before the agency on behalf of another unless licensed to do so by the agency.

4. Obtaining a license would be a relatively simple matter of filling out an application and describing technical qualifications, as with the ATF, [73] so as not to create unwarranted barriers to entry because the core purpose is the license removal authority for demonstrated incompetence or unethical behavior.

5. Licensing would be of an individual, not an individual's firm or employer (i.e., licenses would be transportable by the individual, and disbarment would be on an individual basis).

6. Licensed practitioners would be required to disclose to the agency the identity of all those assisting in representing another before the agency. [74]

7. A licensed practitioner could only be assisted by another licensed practitioner, except with respect to the licensed practitioner's non-attorney employees.

8. A party could appear *pro se* without a license and accordingly, an in-house advisor (i.e., employee) of the party practicing before the agency would not need to be licensed.

9. Trade agency license debarment would not preclude enforcement of any other applicable law or bar rule.

A licensing system based on these nine principles would be a relatively simple means of addressing a major problem. As recognized at the outset of this article, we have not sought to resolve all of the issues that would arise in implementing agency rules to regulate and sanction practitioners for incompetent or unethical behavior before Commerce and the ITC. These unaddressed issues include defining the substantive criteria to identify and sanction misbehavior, specifying the appeal rights of those disbarred from agency practice, and many others. Our goal is only to posit for further consideration an idea to address a growing problem that is undermining the integrity of the entire trade bar. It is our unfettered belief, however, that the implementation of regulations along the lines proposed would provide the accountability needed to extinguish the unethical conduct of some of those practicing before the trade agencies.

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[72] The trade agencies could look to the technical competence standards applied by other agencies regulating the practice of law. For example, the ATF states that the

> [m]inimum criteria required of an enrolled practitioner will consist of: 5 years employment with the Treasury Department in a responsible position which would familiarize the person with applicable laws and regulations; or 5 years employment in a regulated industry in a responsible position which would familiarize the person with applicable laws and regulations; or possession of a law degree; or other significant experience such as the prior representation of persons before the Internal Revenue Service or the Bureau of Alcohol, Tobacco and Firearms.

31 C.F.R. §8.21(b)(1). Adopting similar minimum technical competence requirements could provide much-needed protection for parties appearing before the trade agencies in the inherently complex proceedings.

[73] *See* Section III.B.

[74] This principle is intended to highlight and put potential licensees on notice that ethical rules regarding "supervisory lawyers" would maintain its full effect. *See, e.g.*, D.C. Rules of Prof'l Conduct R. 5.1(c), 5.3(c) (stating that a "supervisory lawyer" is responsible for another lawyer's or nonlawyer's "violation of the Rules of Professional Conduct if … the lawyer requests or, with knowledge of the specific conduct, ratifies the conduct involved … .").

D. The D.C. Court of Appeals Should Regulate if Commerce and the ITC Will Not

If the agencies do not step up to the plate, however, it is the province of the D.C. Court of Appeals to do so. In the past, the D.C. Court of Appeals has expressed great concern with gaps in its regulation of those practicing law in its jurisdiction. [75] The D.C. Court of Appeals recognizes the requirement under the supremacy clause of the United States Constitution to permit agencies to determine whether they will allow lay practitioners. [76] Accordingly, the D.C. Court of Appeals has interpreted the Supreme Court's holding in *Sperry* to mean that "states may not limit practice before a federal agency, or conduct incidental to that practice, where the agency maintains a registry of practitioners and regulates standards of practice with sanctions of suspension or disbarment." [77] Thus, if agencies in its jurisdiction allow

the practice of law before it without regulation, "the Committee will then proceed to consider the complaint under the provisions of Rule 49." [78]

[75] *See* D.C. Ct. App. R. 49(c)(2) cmt. to R. 49(c)(2). Because many lay advisors or foreign attorneys are hired by U.S. counsel to prepare filings and for verification, it could be argued that the District of Columbia's Rules of Professional Conduct already make supervisory lawyers responsible for the conduct of advising lay persons and foreign attorneys. Under the Rules a "supervisory lawyer" is responsible for another lawyer's or nonlawyer's "violation of the Rules of Professional Conduct if … the lawyer requests or, with knowledge of the specific conduct, ratifies the conduct involved … ." D.C. Rules of Prof'l Conduct R. 5.1(c), 5.3(c). Despite the existence of this umbrella protection for clients, it clearly has not been effective in deterring the fraud occurring before the U.S. trade agencies. This may be due to the difficulty in meeting the high evidentiary standard of proving that the supervisory lawyer "knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action." *Id.* at 5.1(c)(2), 5.3(c)(2). Simply put, a lay person or foreign lawyer advisor can hide nefarious activity from its U.S. counsel (just as can a client), as a result of which neither the advisor nor the U.S. counsel can be sanctioned under the current absence of a regulatory structure.

[76] *Id.* Indeed, the Supreme Court in *Sperry* held that Florida could not prevent a lay practitioner registered to practice before the United States Patent Office from practicing before the agency even though it was unquestionably the practice of law in violation of Florida's laws. *Sperry v. Fla.*, 373 U.S. 379, 379 (1963).

[77] D.C. Ct. App. R. 49(c)(2) cmt. to R. 49(c)(2).

[78] *Id.* The Committee on Unauthorized Practice of Law has the power to "initiate an original proceeding before the Court of Appeals for violation of this Rule 49." D.C. Ct. App. R. 49(e).

The commentary to the D.C. Court of Appeals Rules further warns that "[w]here there is doubt whether a federal agency undertakes to regulate the quality or integrity of practitioners before it, there is necessarily doubt under section (c)(2)(B) whether this exception would apply to allow persons practicing before the agency who are not admitted to the Bar to engage in any practice of law in the District of Columbia." [79] The Commentary goes on to state that:

[79] D.C. Ct. App. R. 49(c)(2) cmt.

> [i]n order to resolve such doubt, the Committee will refer to an agency any complaints it should receive concerning practitioners before the agency who are not admitted to the Bar. If the agency does not take any action, or advises that it will not take any action, on the referred complaint in 90 days following the referral, the Committee will inform the agency that it presumes the agency does not undertake to regulate the conduct of practitioners before it; and the Committee will then proceed to consider the complaint under the provisions of Rule 49. [80]

[80] *Id.*

In the patent law context, the D.C. Court of Appeals has held that "when a petitioner is not registered [to practice] … a state does not interfere with any federal purpose in subjecting the practitioner to its own licensing regulations and is free to do so." [81] Thus, without rapid change by the trade agencies the D.C. Court of Appeals needs to take a hard look at the wholly unregulated, as well as unauthorized practice of law occurring in its jurisdiction before the U.S. trade agencies.

[81] *In re Amalgamated Dev. Co., Inc.*, 375 A.2d 494, 497 (D.C. 1977); *see also In re Simon Banks*, 805 A.2d 990, 999 (D.C. 2002).

Conclusion

It is clear that it is time to bring accountability to the practice of law before the U.S. trade agencies. Because the ITC and ITA do not regulate those practicing before them, there is exactly the void of responsibility and standards that ethical canons and Rule 49 seek to prevent. In light of this deficiency and the increase of blatant unethical practices, the U.S. trade agencies have a duty to effectively address the problem. The duty is predicated on upholding the integrity and soundness of the proceedings before them and the resulting AD/CVD determinations. If the agencies refuse, the D.C. Court of Appeals should be pressed to fill in the gap and enforce its ethical requirements for lawyers and prohibit the unauthorized practice of law in its jurisdiction, as its rules require.

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