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Note

CAN THOU SERVE TWO MASTERS? -- THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT v. THE PATENT AND TRADEMARK OFFICE CODE OF PROFESSIONAL RESPONSIBILITY

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I. Introduction

Attorneys licensed by the State Bar of Texas are bound by the Texas Disciplinary Rules of Professional Conduct (hereinafter

"Texas Rules"). Attorneys registered with the United States Patent and Trademark Office (hereinafter "PTO") are bound by the PTO Code of Professional Responsibility (hereinafter "PTO Rules"). Both sets of ethics rules are designed to be independently comprehensive. Yet when one reviews these two sets of ethics rules one sees that a number of differences exist between them, both in terms of what behavior and actions are allowed and disallowed, and what is permissive and what is mandatory. By carefully controlling one's actions, an attorney could theoretically follow both the Texas Rules and the PTO Rules. But is this necessary? For instance, it seems inane that an attorney registered with the PTO should be bound by the PTO Rules when that attorney never handles patent prosecution and practices only patent litigation. Similarly, if an attorney's practice is limited to patent prosecution, one would think that federal preemption would remove his actions from review by the Texas Rules. A Texas PTO-registered attorney must determine when his or her activities are governed by either one set of rules or both. In determining this, there are two key questions to address.

1. What is the range of activities covered by the PTO Rules?

2. Once the range of applicability of the PTO Rules is determined, what is the extent of federal preemption by the PTO Rules over the Texas Rules?

An answer to these two basic questions (range of PTO Rules and extent of preemption) will let the Texas PTO-registered attorney know which rule he or she is to follow at what time. The courts have given no definitive answer, nor has the PTO, nor has the Texas bar. This note will attempt to answer these questions, as well as discuss the ramifications of its conclusions with respect to common difficulties that attorneys may encounter. At the end of this article is a complete cross-reference between the PTO Rules and the Texas Rules, as well as a composite ethics guide.

II. Introduction to the Texas Rules and the PTO Rules

A. The Texas Disciplinary Rules of Professional Conduct[1]

The Texas Rules were adopted by the Texas Supreme Court, and became effective as of January 1, 1990, replacing the previous Code of Professional Responsibility. These rules are based on the ABA Model Rules.

The Texas Rules consist of two preambles, a terminology list, and eight sections. The sections are as follows:

I. Client-Lawyer Relationship

II. Counselor

III. Advocate

IV. Non-Client Relationships

V. Law Firms and Associations

VI. Public Service

VII. Information About Legal Services

VIII. Maintaining the Integrity of the Profession

Each section is then broken down into a number of rules. The Texas Rules "are rules of reason. The [Texas Rules] define proper conduct for purposes of professional discipline. They are imperatives, cast in the terms 'shall' or 'shall not.'"[2] Following each rule is a Comment, which is much more extensive than the rule itself. "The Comments are cast often in the terms of 'may' or 'should' and are permissive, defining areas in which the lawyer has professional discretion."[3] These comments can also be used to help interpret the rules.

Other more important sources for rule interpretation are judicial decisions. There are also rulings by the Committee on Professional Ethics, which can help define a lawyer's responsibilities more precisely. The Texas Rules themselves state that they are not to be used as the basis of tort claims.[4] They can be used for disciplinary action, however, and actions that violate the Texas Rules will often also be amenable to a malpractice suit.[5]

B. The Patent and Trademark Office Code of Professional Responsibility[6]

A notice of proposed rule-making was published in the Federal Register on August 11, 1983,[7] to allow for public comment. Another notice extended the comment period and set a second hearing.[8] The PTO decided to withdraw and not adopt the rules as proposed, because of numerous objections and the public desire for an extended period of study and review.[9]

An advanced notice of proposed rule-making setting out revised rules was published on August 24, 1984,[10] to which there were numerous comments. A hearing was held on October 10, 1984. The PTO's Final Rule was published on February 14, 1985,[11] and all of the PTO Rules went into effect on March 8, 1985. The new PTO Rules replaced the earlier rules of conduct for those that practice before the PTO.[12] The new rules can be found in 37 C.F.R. §§ 10.20 - 10.129.

The PTO Rules are styled after the older ABA Model Code, not the newer ABA Model Rules. This decision was based on the fact that most states at that time still used some variation of the Model Code, and almost no state had adopted a variation of the Model Rules.[13]

The PTO Rules are first partitioned by Canons, with each Canon setting out a section of the PTO Rules. "Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of practitioners in their relationships with the public, with the legal system, and with the legal profession."[14] They perform a function similar to the sections of the Texas Rules in collecting the rules, though they serve as general guidelines, similar to the Comments. The Canons are as follows:

10.21	--	Canon 1.	A practitioner should assist in maintaining the integrity and competence of the legal profession.
10.30	--	Canon 2.	A practitioner should assist the legal profession in fulfilling its duty to make legal counsel available.
10.46	--	Canon 3.	A practitioner should assist in preventing the unauthorized practice of law.
10.56	--	Canon 4.	A practitioner should preserve the confidences and secrets of a client.
10.61	--	Canon 5.	A practitioner should exercise independent professional judgment on behalf of a client.
10.76	--	Canon 6.	A practitioner should represent a client competently.
10.83	--	Canon 7.	A practitioner should represent a client zealously within the bounds of the law.
10.100	--	Canon 8.	A practitioner should assist in improving the legal system.
10.110	--	Canon 9.	A practitioner should avoid even the appearance of professional impropriety.[15]

Following each Canon are a number of related Disciplinary Rules. "Disciplinary Rules are mandatory in character and state the minimum level of conduct below which no practitioner can fall without being subjected to disciplinary action."[16]

There are only a few published interpretations of these rules by the PTO itself, involving just a small number of the rules.[17] They have not been used as the basis for a malpractice suit, though like the Texas Rules, an action that violated them would likely also be a violation of tort law.

III. Range of Activities Controlled by the PTO Rules

What is the range of the PTO Rules? Generally, there are three possibilities. First, the PTO Rules cover all activities by a registered practitioner at all times. Second, the PTO Rules cover only activities relating to or relevant to practice before the

PTO. Third, the PTO Rules cover only actual activities before the PTO. An analysis begins by looking at the face of the regulations for guidance.

A. Wording of the Regulations

The PTO Rules state: "This part [i.e., Part 10] governs solely the practice of patent, trademark and other law before the Patent and Trademark Office."[18] There are two possible interpretations of this sentence, depending on how "solely" is understood. "Solely" could be used to limit the range of the PTO Rules to only PTO matters, or "solely" could be used to state explicit preemption in this area.

The second sentence of this regulation states a limitation: "Nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law, except to the extent necessary for the Patent and Trademark Office to accomplish its federal objectives."[19] This does not help us in our determination of range, without defining "to the extent necessary" for the PTO to "accomplish its federal objectives." Neither of these phrases nor "solely" is defined in the wording of the regulations themselves.

To aid us in defining these terms, and to more accurately answer the range question, we shall next examine the legislative history of the PTO Rules.

B. Legislative History

In the notice of final rule-making the PTO replied to comments, including some involving the scope of the rules.[20] The PTO stated that the second sentence of 37 C.F.R. § 10.1 "makes clear the PTO's intent to regulate only conduct related or relevant to practice before the PTO."[21] This is a fairly specific limitation, one that an attorney can have a basic feel for, in deciding what actions are "related or relevant to practice before the PTO." The PTO Rules clearly do not extend to all activities of an attorney. Just as clearly, they are not limited to just actions directly before the PTO.

The PTO further states[22] that the language in the second sentence of 37 C.F.R. § 10.1(a) is based upon *Sperry v. Florida ex. rel. Florida Bar.*[23] In that case, the court stated that a non-lawyer patent agent could perform the tasks which were incidental to the preparation and prosecution of patent applications before the PTO.[24] This included maintaining an office, representing himself to the public as a patent agent, representing clients before the PTO, rendering opinions on patentability, and preparing legal documents including applications and amendments for patents before the PTO.[25] This is adopted by the PTO itself as its basis for what is "related or relevant to practice before the PTO,"[26] and adds even more detail to our determination of the scope of the PTO Rules. At this point, a practitioner should feel fairly confident that he or she can delineate whether any specific action is under the onus of the PTO Rules, using the specific list above along with the general limitation of what is "related or relevant to practice before the PTO."

The PTO does add that, with respect to the regulations that do not on their face include language restricting them to just PTO related activities, there is no need to add such restricting language via 37 C.F.R. § 10.1.[27] This further supports the idea that the PTO Rules are not to extend to matters not relevant or related to practice before the PTO.

C. Conclusion with Respect to Range

The PTO Rules apply only to activities that are relevant or related to the PTO, as defined by *Sperry.* The PTO probably thought that this was the best that they could do to minimize conflicts with judicial precedent.

IV. Extent of Preemption by the PTO Rules

Generally, within the range of activity the PTO Rules cover, there are three possible levels of preemption. First, the PTO Rules occupy the field, allowing no coexistence with the Texas Rules. Second, the PTO Rules preempt with respect to any area that they address, even if it were theoretically possible to follow both sets of rules. Third, the PTO Rules allow virtually complete coexistence with the Texas Rules, preempting only when there is direct conflict in actions required by attorneys.

The extent of preemption is often determined judicially. We will review the basic judicial analysis, apply it to this situation, and hopefully draw an accurate conclusion.

A. Preemption Basics

Federal preemption was an important topic in the United States Supreme Court in 1992, with five cases.[28] The basic analysis has been the same throughout these cases. Federal preemption is based on the Supremacy Clause of the Constitution.[29] It has long been settled that state law that conflicts with federal law is without effect.[30] "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'"[31] "Accordingly, '[t]he purpose of Congress is the ultimate touchstone.'"[32] "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'"[33] In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law,[34] or if "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"[35] Also, federal regulations can preempt just as well as federal statutes.[36]

So we need to determine what was the intent of Congress (or the PTO) with respect to preemption. Once again, we will first look at the wording of the regulations themselves.

B. Wording of the Regulations

The second sentence of 37 C.F.R. § 10.1 reads: "Nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law, except to the extent necessary for the Patent and Trademark Office to accomplish its federal objectives." In actuality this is more a statement of the limitations on the scope of the PTO Rules, rather than a preemption statement.

One can also look at the regulations in their entirety to help determine their extent of preemption, and more specifically, whether they are supposed to occupy the field.[37] It is readily apparent when looking at the PTO rules that they are designed to be a comprehensive set of ethics rules unto themselves, covering all major areas of interest. This raises the possibility that the PTO Rules are meant to occupy the field in PTO related matters. It should be noted that the current Supreme Court is very disposed to find and maximize preemption wherever possible. Also, some of the justices prefer to review regulations on their face when convenient, ignoring the legislative history. Therefore, based on just the wording and breadth of the regulations, a serious possibility exists that the Federal courts would find extensive preemption of state rules, possibly including occupying the field, which would completely remove a PTO-registered practitioner from state control, at least with respect to PTO related matters. Just as easily, and possibly getting a few more votes, would be preemption in any area that is addressed, allowing the Texas Rules to supplement the PTO Rules only in areas not addressed. Perhaps we will have a better understanding of the willingness of the federal courts to preempt state ethics rules when decisions are reached in the current "Thornburgh memoranda" controversy.[38]

Hence, no conclusive answers can be had by looking solely at the wording of the Rules. A more thorough investigation must turn to the legislative history.

C. Legislative History

The PTO plainly states that the purpose of 37 C.F.R. § 10.1 is to minimize preemption of state control of the practice of law.[39] This statement does not actually clarify the extent of preemption, but it could be useful in litigation for an attorney arguing to restrict preemption.

The PTO further defines the extent of preemption via the *Sperry* case. This case states "since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives."[40] The PTO seems to believe that this statement by itself makes everything clear, and goes no further in defining the extent of preemption. In fact, though, this statement still leaves all three possible answers.

There is another interesting item buried among the responses to comments on proposed rule-making. In response to a comment concerning 37 C.F.R. § 10.112, the PTO stated:

> One comment suggested that practitioners residing in the United States should be able to maintain trust funds in a bank in any State. This suggestion is being adopted . . . . However, if a State bar requires funds to be kept in a bank within the State, a practitioner would be required to keep funds in a bank in the State in order to comply with State rules.[41]

First one must ascertain what is in the trust fund. Is it monies from purely PTO related matters, purely non-related matters, or mixed funds? According to which scenario is discussed, three different inferential answers to the preemption question result. First, the PTO could be referring to strictly PTO related funds. If that is the case, this would mean that a practitioner is bound by both sets of rules at once, and indeed, the absolute minimum of preemption would be the standard, with preemption occurring only when the two rules require contradictory actions. Second, the PTO could not be referring to a trust fund containing strictly non-PTO related funds, as they have made clear that the PTO Rules never apply to non-PTO related activities. Third, the PTO could be referring to a trust fund that contains both PTO and non-PTO related funds. In that case, the above statement is merely once again reiterating the range of the PTO Rules, and saying nothing about preemption. Thus, this comment does not further the resolution of this question.

D. Conclusion on Preemption

No clear answer has emerged from the PTO about how extensive preemption is to be with respect to the Texas Rules. If one wanted to make an argument for full preemption with respect to any area addressed, or even occupation of the field, one can cite all the relevant commentary both in the PTO Rules themselves and the earlier comments, and cite all the current case law, which has extensively pushed the envelope on preemption. The current federal courts will almost always find preemption given the chance.

For the attorney wishing to make an argument for the absolute minimum in preemption, one can cite the standard interpretive rules for preemption, which require minimal interference with state rules, the comments in which the PTO states they wish minimal interference, and the state's need to regulate the practice of law. It would also probably be beneficial to try and get the suit in a Texas court. Of course, such a suit could be removed to the federal courts, as it would involve a federal question.

V. Conclusion

The PTO Rules only apply to activities related or relevant to practice before the PTO, so activities that are not related or relevant to the PTO are governed solely by the Texas Rules. With respect to PTO related activities, the extent of preemption is simply an open question, waiting for a good litigator to address it. The short answer is that, as a matter of caution, a Texas PTO attorney should follow both sets of rules with respect to any PTO related matter, unless he has a desire to litigate the point. The following section examines various scenarios where a lawyer may wish to litigate the interaction of the Texas Rules and the PTO Rules.

VI. Application of Conclusion to Various Scenarios

A. Disciplinary Action and Malpractice

The Texas Rules state explicitly that they are not meant to be the basis for a civil suit.[42] They can be used for disciplinary action. The PTO Rules state that they can be the basis for disciplinary action, but do not comment as to their applicability in civil suits.[43] It is certainly logical that if an attorney is in a situation where he or she feels compelled to follow just the PTO Rules (in a PTO related matter), the attorney would wish to plead preemption as a defense. And the utility of this defense may extend even beyond that.

There has been a push in the United States Supreme Court in the last few years to reduce tort actions. A case of potentially major significance is *Cipollone v. Liggett Group, Inc.*[44] In this case, the Court held that if a defendant was properly following a Federal Act, (the requirement to add warning labels on cigarette packs), then any common law tort claim that sufficiently touched upon said Act would be preempted.[45] The Court split three ways on how far this principle should reach. Three justices were for no preemption whatsoever,[46] two were for very broad sweeping preemption,[47] and four justices tried to split the difference.[48] The result was that some common law claims based on false advertising were restricted, while all claims based on fraudulent misrepresentation, express warranty and conspiracy were allowed to go forward.[49] The relevancy of the claim to the federal statute which is required to invoke preemption is a very fuzzy line. Given the lack of clarity in the determination of the scope of preemption of the PTO Rules, it would be possible for this Court (or a lower court with similar inclinations) to uphold a finding of preemption either with a specific rule, or by a determination that the PTO Rules occupy the field. Once that determination is made, the reach of preemption could easily reduce or eliminate some common law claims, including malpractice.

Conversely, one could use either set of rules as an offensive weapon, bringing them to bear on the unwitting attorney who does not follow both sets of rules in all PTO related activities. To date, no one has invoked state ethics rules before the PTO, nor invoked the PTO Rules in a Texas action. Once again, for a court to decide such a case there would have to be a determination of the extent of preemption.

B. Conflict of Interest

One of the current areas of intense litigation in Texas is conflict of interest.[50] Case law has seriously modified the original wording of the Texas Rules with respect to this area.[51] The Texas Rules also state that the application of the conflict of interest rules in administrative proceedings is variable, and not necessarily as strict as in litigation.[52]

The PTO has followed the PTO Rules in conflict of interest cases it has addressed.[53] The PTO's understanding of conflict of interest fairly well follows the wording of the PTO Rules. One change they have made is to extend the conflict of interest rules to former clients, who are not literally covered by the PTO Rules.[54]

It seems logical that the Texas Rules' application to conflict of interest could be brought to bear in an adversarial proceeding before the PTO if both sides have Texas attorneys and a minimal amount of preemption is involved. Likewise in a Texas suit that involved PTO related actions, the PTO conflict of interest rules could be invoked at any level of preemption. Either way the outcome would once again be tied to the question of the extent of preemption. Conversely, the PTO Rules could be used as a defense to Texas conflict of interest rules if preemption were argued.

As is plain from this discussion, the potential preemptive effect of the PTO Rules in disciplinary actions, malpractice, conflict of interest, and other areas is ripe for litigation or abuse.

Footnotes

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[1] TEX. GOV'T CODE ANN. § 9 (West 1993).

[2] *Id., Preamble: Scope,* ¶ 10.

[3] *Id.*

[4] *Id.* ¶ 15.

[5] *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.1:201 (2d ed. Supp. 1992).

[6] The *PTO Rules* are a subsection of *Representation of Others Before the Patent and Trademark Office,* 37 C.F.R. part 10 (1992). The three subsections of 37 C.F.R. part 10 are *Individuals Entitled to Practice Before the Patent and Trademark Office,* 37 C.F.R. § 10.5-10.19; *Patent and Trademark Office Code of Professional Responsibility,* 37 C.F.R. § 10.20-10.129; and *Investigations and Disciplinary Proceedings,* 37 C.F.R. § 10.130-10.170. This paper will discuss only the *PTO Rules,* 37 C.F.R. § 10.20-10.129, and 37 C.F.R. § 10.1.

[7] 48 Fed. Reg. 36,478 (1983) (to be codified at 37 C.F.R. §§ 1, 2) (proposed Aug. 11, 1993) (as per the requirements of the Administrative Procedure Act, 5 U.S.C. § 551).

[8] 48 Fed. Reg. 45,424 (1983) (to be codified at 37 C.F.R. §§ 1, 2) (proposed October 5, 1983).

[9] 49 Fed. Reg. 33,790 (1984) (to be codified at 37 C.F.R. §§ 1, 2, 10) (proposed August 24, 1984).

[10] *Id.*

[11] 50 Fed. Reg. 5158 (1985) (to be codified at 37 C.F.R. §§ 1, 2, 10) (proposed Feb. 6, 1988).

[12] 37 C.F.R. § 1.344 and § 2.12 (deleted as of March 8, 1985) (incorporating by reference the ABA CODE OF PROFESSIONAL RESPONSIBILITY).

[13] 50 Fed. Reg. 5158, 5159 (1985) (to be codified at 37 C.F.R. §§ 1, 2, 10).

[14] 37 C.F.R. § 10.20(a) (1992).

15 37 C.F.R. §§ 10.21-10.110 (1992).

[16] 37 C.F.R. § 10.20(b) (1992).

[17] *In re* Boe, 26 U.S.P.Q.2d (BNA) 1809 (Comm'r of Pat. 1992) (citing 37 C.F.R. §§ 10.22, 10.92); Focus 21 Int'l v. Pola Kasei Kogyo Kabushiki Kaisha, 1992 TTAB LEXIS 12 (Trademark Trial & App. Bd. Feb. 27, 1992) (citing § 10.63); McClandish v. John Doe, 22 U.S.P.Q.2d (BNA) 1223 (Comm'r of Pat. 1992) (citing §§ 10.23 and 10.85); *In re* Bard, 20 U.S.P.Q.2d (BNA) 1708 (Comm'r of Pat. 1991) (citing §§ 10.23, 10.24, 10.77, 10.84); *In re* Borenstein, 1991 Comm'r Pat. LEXIS 29 (Comm'r of Pat. Aug. 16, 1991) (citing §§ 10.23, 10.24, 10.77); Gilman Corp. v. Gilman Bros. Co., 20 U.S.P.Q.2d (BNA) 1238 (Comm'r of Pat. 1991) (citing §§ 10.56, 10.57, 10.61, 10.66); Weiffenbach v. Turner, 20 U.S.P.Q.2d (BNA) 1103 (Comm'r of Pat. 1991) (citing §§ 10.23, 10.35, 10.84); Weiffenbach v. Frank, 18 U.S.P.Q.2d (BNA) 1397 (Comm'r of Pat. 1991) (citing §§ 10.23, 10.77); Weiffenbach v. Gould, 14 U.S.P.Q.2d (BNA) 1331 (Comm'r of Pat. 1989) (citing § 10.23); Little Caesar Enters. v. Domino's Pizza, 11 U.S.P.Q.2d (BNA) 1233 (Comm'r of Pat. 1989) (citing §§ 10.61, 10.62, 10.63); *In re* Burkner, 3 U.S.P.Q.2d (BNA) 1630 (Comm'r of Pat. 1987) (citing § 10.89); *In re* Small, 1986 Comm'r Pat. LEXIS 29 (Comm'r of Pat. Apr. 26, 1986) (citing §§ 10.23, 10.77, 10.85). It should be noted that no U.S. District Court or Court of Appeals, including the Federal Circuit, has ever addressed any decisions based on the current PTO Rules, although there are decisions using the precursor rules.

[18] 37 C.F.R. § 10.1 (1992).

[19] *Id.*

[20] 50 Fed. Reg. 5158, 5159 (1985). The reader may be relieved to know that in response to an inquiry from the PTO asking whether the new rules would cause any difficulties, the Texas State Bar replied they "did not perceive that any problem would be created by . . . [the proposed rules] in Texas."

[21] *Id.* at 5158.

[22] *Id.*

[23] 373 U.S. 379 (1963).

[24] *Id.* at 404.

[25] *Id.* at 381.

[26] 50 Fed. Reg. 5158, 5161 (1985) (to be codified at 37 C.F.R. §§ 1, 2, 10).

[27] *Id.* at 5163 (referring to 37 C.F.R. § 10.23 (b)(4)-(6)); *Id.* at 5164 (referring to § 10.62(a)); *Id.* at 5165 (referring to §§ 10.65, 10.66, 10.67, 10.68, 10.78, 10.84, 10.85); *Id.* at 5166 (referring to §§ 10.87, 10.92, 10.93, 10.101, 10.102, 10.103, 10.111).

[28] District of Columbia v. Greater Washington Bd. of Trade, 113 S.Ct. 580 (1992); Cipollone v. Liggett Group, 112 S.Ct. 2608 (1992); Gade v. National Solid Waste Mgmt. Ass'n, 112 S.Ct. 2374 (1992); Morales v. Trans World Airlines, Inc., 112 S.Ct. 2031 (1992); County of Yakima v. Yakima Indian Nation, 112 S.Ct. 683 (1992).

[29] U.S. CONST. art. VI, cl. 2.

[30] *E.g.,* Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

[31] *Cipollone,* 112 S.Ct. at 2617 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[32] *Id.* (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

[33] *Id.* (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

[34] *Id.* (citing Pacific Gas & Elec. Co. v. Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983)).

[35] *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[36] Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

[37] *Cipollone,* 112 S.Ct. at 2617.

[38] *See,* Chris Carmody, *U.S. Judge's Opinion: Justice Dept. Rules Trump State Ethics,* NAT'L L.J., Mar. 1, 1993, at 7.

[39] 50 Fed. Reg. 5158 (1985).

[40] *Sperry,* 373 U.S. at 402.

[41] 50 Fed. Reg. 5166 (1985).

[42] *Supra* note 1, *Preamble: Scope,* ¶ 15.

[43] 37 C.F.R. § 10.20(b) (1992).

[44] 112 S.Ct. 2608 (1992).

[45] *Id.* at 2620.

[46] *Id.* at 2625 (Blackmun, Kennedy and Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part).

[47] *Id.* at 2632 (Scalia and Thomas, JJ., concurring in the judgment in part and dissenting in part).

[48] *Id.* at 2625 (Stevens, J., along with Rehnquist, C.J., White, and O'Connor, JJ.) (plurality opinion).

[49] *Id.*

[50] *Supra* note 1, Rules 1.06-1.09.

[51] *See, e.g., In re* American Airlines, 972 F.2d 605 (5th Cir. 1992).

[52] *Supra* note 1, Rule 1.06, cmt., ¶ 13-16.

[53] Focus 21 Int'l v. Pola Kasei Kogyo Kabushiki Kaisha, 1992 TTAB LEXIS 12 (Trademark Trial & App. Bd. Feb. 27, 1992); Gilman Corp. v. Gilman Bros. Co., 20 U.S.P.Q.2d (BNA) 1238 (Comm'r of Pat. 1991); Little Caesar Enters. v. Domino's Pizza, 11 U.S.P.Q.2d (BNA) 1233 (Comm'r of Pat. 1989).

[54] *Gilman Corp.,* 20 U.S.P.Q.2d (BNA) 1238.