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The Proper Scope of Nonlawyer Representation in State Administrative Proceedings: A State Specific Balancing Approach

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I. INTRODUCTION

Administrative adjudication has become an essential aspect of the American system of government as the need for dispute resolution

outside the courtroom increases. To foster alternative dispute resolution, the authorization of nonlawyers to appear as representatives in administrative proceedings presents a viable response to increasing litigation costs and a burdened court system. Accordingly, the federal administrative system, through broad enabling statutes, allows individual agencies to prescribe the proper scope of nonlawyer representation of clients during agency proceedings.[1] The individual states, however, have not adopted such a uniform approach. The inability of the individual states to establish an adequate regulatory system largely can be traced to separation of powers concerns regarding the proper regulatory body to govern representation in quasi-judicial proceedings before state administrative agencies. The failure of states to prescribe guidelines for nonlawyer representation presents significant due process concerns and may result in inconsistent ad hoc determinations. To prevent potential unauthorized practice of law violations, the individual states, in accordance with each particular state's regulatory scheme, should clarify the proper scope of nonlawyer representation before the state administrative system.[2]

In 1988 the Tennessee General Assembly granted its State Board of Equalization (the "Board"), a legislatively created administrative agency,[3] the power to certify persons to appear as official representa-

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1. *See* Levinson, *Professional Responsibility Issues in Administrative Adjudication*, 2 B.Y.U. J. PUB. L. 219, 222 (1988).

2. Recognition of the need for each individual state to address these issues seems to be emerging. *See, e.g.*, Pollack, *Lay Practice Before Administrative Tribunals—Clarification Needed*, 66 MICH. B.J. 675 (1987).

3. The State Board of Equalization was created by the Tennessee legislature in 1923. *See* Act of Jan. 25, 1923, ch. 7, § 25, 1923 Tenn. Pub. Acts 8, 20. The structure and duties of the agency are codified at TENN. CODE ANN. § 4-3-5103 (1985). The statute provides:

> The state board of equalization shall have the following duties and functions: (1) To promulgate and publish an assessment manual or manuals for the appraisal, classification and assessment of property for use by local tax assessors in making their assessments of particular classes and parcels of property, including the assessment of the various kinds of personal property owned and used by corporations, partnerships and individuals engaged in business and professions for profit;
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> (2) To effect the assessment of all property in the state in accordance with the state Constitution and all statutory provisions. The state board sball exercise powers conferred upon it by law to the end that assessments in every taxing jurisdiction may be in accordance with the law;
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> (3) To prescribe educational and training courses for state and local assessing officials and to issue certificates to such officials who successfully complete the training and requirements prescribed by the state board;
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> (4) To receive, hear, consider and act upon complaints and appeals made to the board regarding the valuation, classification and assessment of property in the state;
>
> (5) To hear and determine complaints and appeals made to the board concerning exemption of property from taxation;
>
> (6) To review assessments made by the Tennessee public service commission;
>
> (7) To promulgate all necessary rules, regulations and procedures for implementation of tax

tives during agency proceedings. The Tennessee legislation, House Bill 1482,[4] allows nonlawyers who meet specified criteria[5] to serve as counsel for clients in a quasi-judicial setting.[6] Although House Bill 1482 is consistent with Tennessee's longstanding tradition of allowing nonlawyer representation before other state administrative agencies,[7] the statute,

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relief to elderly low income taxpayers, homeowners totally and permanently disabled and disabled veterans and to make an annual summary of their findings available to members of the general assembly upon request; and

(8) To carry out such other duties as may be required by law.

Id.

4. Act of Mar. 17, 1988, ch. 619, 1988 Tenn. Pub. Acts 265 (codified at TENN. CODE ANN. §§ 67-5-1511(b), -1514 (Supp. 1988)).

5. The legislation allows the following persons to act as agents for taxpayers:

(1) Attorneys;

(2) With respect to a corporation or other artificial entity, its regular officers, directors, or employees; and

(3) Where the primary issue of any complaint, protest, or appeal pertains to those grounds as provided in § 67-5-1407, any person who presents to the board of equalization a statement of qualifications that he has four (4) years of experience in real property appraisal and/or assessment valuation, and that he either has successfully completed not less than one hundred twenty (120) classroom hours of academic instruction in subjects related to property appraisal or assessment of property from a college or university, or from a nationally recognized appraisal or assessment organization approved by the board or, in lieu of such educational requirements, has successfully passed the examination for Tennessee certified assessor as administered by the board. The board may, in its discretion, recognize certain professional designations from appraisal and/or assessment organizations which require qualifications at least equal to those set forth herein, in which event persons possessing any such designation shall be registered without submission of experience and educational requirements. A corporation engaged in the business of evaluation of property may be registered if its principal officer is registered, but only employees of such corporation who are registered shall be permitted to act as agents for taxpayers.

TENN. CODE ANN. § 67-5-1514(c) (Supp. 1988).

6. Hearings conducted by the State Board of Equalization are governed by the Tennessee Uniform Administrative Procedures Act, ch. 725, 1974 Tenn. Pub. Acts 945 (codified at TENN. CODE ANN. §§ 4-5-101 to -324 (1985 & Supp. 1988)). Tennessee law requires a contested hearing to be "conducted by an administrative judge or hearing officer sitting alone." TENN. CODE ANN. § 4-5-301(a)(2) (1985). Section 4-5-301(b) empowers the presiding officer to "rule on questions of the admissibility of evidence, swear witnesses, . . . and insure that the proceedings are carried out in accordance with . . . applicable law . . . . An administrative judge or hearing officer shall . . . decide any procedural question of law." *Id.* § 4-5-301(b).

7. Other examples of legislative enactments that confer similar powers to nonlawyers in a quasi-judicial setting include the Human Rights Commission and the Unemployment Compensation Review Board. TENN. CODE ANN. § 4-21-304(e) (1985), which governs procedure for hearings before the Human Rights Commission, states: "The complainant and his or her private attorney, and, in the discretion of the commission, any person, may intervene, examine, and cross-examine witnesses, and present evidence." Similarly, the Unemployment Board permits representation "by counsel or other duly authorized agents." *Id.* § 50-7-708(b)(2) (Supp. 1989). In addition, although not specifically authorized by the legislature, the Department of Human Services and the Public Service Commission grant nonlawyers the power to appear before these agencies in a representative capacity. *See* TENN. COMP. R. & REGS. ch. 1240-5-4-.01(2)(e) (1983) (granting the "option to . . . be represented by a lawyer or another authorized person" in Department of Human Services matters); *id.* cb. 1220-1-1-.05 (1985) (recognizing a role for a "duly authorized representative or attorney" in front of the Public Service Commission).

in prescribing standards to govern nonlawyer representation before the Board, seems inconsistent with existing Tennessee law.[8] Furthermore, the Tennessee legislature's express assertion of regulatory power over representation before state agencies may implicate due process concerns caused by inadequate representation and infringe upon the Tennessee Supreme Court's inherent power to regulate the practice of law.[9]

The conflict is caused by the inadequacy of existing Tennessee law to define the permissible scope of nonlawyer representation. Tennessee's broad statutory definition of the practice of law was enacted prior to the popularity of administrative adjudication and fails to deal adequately with modern realities.[10] Therefore, attempts to incorporate representation before administrative agencies within the parameters of Tennessee's outdated definition of the practice of law inevitably cause confusion. House Bill 1482 was passed despite an express recommendation by the Tennessee Attorney General that a statute permitting such lay representation would be unconstitutional.[11] The Tennessee legislature's assertion of the power to define regulatory principles concerning lay representation appears unprecedented. Although designed merely to clarify Tennessee law, the enactment of House Bill 1482 may significantly impact the allocation of power between the legislative and judicial branches in regulating the practice of law.

Other states that have considered these issues similarly disagree over both the standards to be used and the proper body to regulate representation before state administrative agencies.[12] More signifi-

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8. Prior legislative recognition of a role for the nonlawyer in the administrative setting in Tennessee did not attempt to define situations in which nonlawyer representation was permissible. Instead, by remaining silent, the legislature required the individual agencies to look to § 23-3-101(a) for guidance. Section 23-3-101(a) states:

> The "practice of law" is defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

TENN. CODE ANN. § 23-3-101(a) (1980). In specifically defining the scope of nonlawyer representation, H.R. 1482 granted powers to nonlawyers that directly conflict with § 23-3-101(a).

9. The court's procedural rules state "No person shall engage in the 'practice of law' or the 'law business' in Tennessee, except pursuant to the authority of this Court, as evidenced by a license issued in accordance with this Rnle, or in accordance with the provisions of this Rule governing special or limited practice." TENN. SUP. CT. R. 7, § 1.01.

10. *See supra* note 8.

11. *See* 16 Op. Att'y Gen. Tenn. No. 87-58 (Apr. 2, 1987); *see also infra* notes 38-46.

12. The mass of conflicting views among the states was recognized by the Chairman of the American Bar Association Subcommittee on Administrative Agency Practice Project, William R. Robie. In explaining the subcommittee's limited resources, Robie stated that his subcommittee would defer its study of state agencies and concentrate on federal agencies "because [tbe federal] agencies constitute a manageable universe to review and because the data were more centrally and readily available. . . ." Robie, *Foreword to Colloquium on Nonlawyer Practice Before Federal*

cantly, however, several states, like Tennessee, have remained silent. Attempts to develop consistent standards are hampered further by the American commitment to federalism, which allows the individual states to regulate the practice of law before its courts.[13] The lack of guidance given to individual state agencies may result in ad hoc determinations in which regulatory or disciplinary control over the appearance of nonlawyers is absent. To avoid this regulatory gap, the public's right to select its representatives independently must be balanced against the need for public protection from inadequate representation. The stated purposes of House Bill 1482, which include both the need for a speedy, informal, and inexpensive means to resolve property valuation disputes, and public reliance on the continued use of nonlawyer representatives,[14] attempt to achieve the proper balance. Consequently, an examination of the merits of House Bill 1482 provides significant insight into the relevant policy considerations in defining the proper scope of nonlawyer representation before all state agencies.

Part II of this Note discusses the Tennessee State Board of Equalization and the stated purposes and goals of House Bill 1482. Because resolution of the issues is state specific, Part II includes an analysis of existing laws governing the practice of law in Tennessee. Part III traces the historical development of the regulation of law in administrative proceedings and attempts to distinguish between the distinct regulatory structures at the state and federal levels. Part IV examines competing policy considerations and the resulting due process implications, including an examination of the existing federal regulatory system and the roles of nonlawyers before federal administrative agencies. Part V discusses the divergent views among several states in order to predict how the Tennessee Supreme Court will react to House Bill 1482. Finally, Part VI concludes that the Tennessee Supreme Court should uphold House Bill 1482 because the bill reflects a proper balance between the public's need for protection and the desire for benefits from free choice and efficiency that result from nonlawyer representation before the State Board of Equalization.

Administrative Agencies, 37 ADMIN. L. REV. 359, 359 (1985) (sponsored by the ABA Standing Comm. on Lawyers' Responsibility for Client Protection).

13. *See* U.S. CONST. amend. X.

14. *See* Act of Mar. 17, 1988, ch. 619, preamble, 1988 Tenn. Pub. Acts 265, 265-66.

II. The Conflict in Tennessee: A Void of Power

A. The Tennessee Legislature's View

The stated functions of the State Board of Equalization include the valuation, classification, and assessment of all properties in the state.[15] The Board is empowered to receive, hear, consider, and act upon complaints and appeals regarding the valuation of properties.[16] The Board's quasi-judicial powers create an overlap of functions between the legislative and judicial branches. Both the adversarial nature of the proceedings[17] and the ability of the presiding officer of a hearing to decide questions of law[18] are examples of the traditionally judicial powers given to these legislatively created agencies.

The Tennessee legislature specifically recognizes a legitimate role for nonlawyer representation before state agencies. Section 4-5-305(b) of the Tennessee Uniform Administrative Procedures Act (UAPA)[19] permits nonlawyer representation before agencies created under the UAPA unless the representation is prohibited by the provisions of another law.[20] Tennessee's broad definition of the practice of law, however, seems to render section 4-5-305(b)'s expansion of the scope of permissible representatives useless.[21] Obviously, nonlawyers appearing as representatives during administrative proceedings qualify as "advocates" appearing before any board having the authority to settle controversies within the meaning of Tennessee's broad definition of the practice of law.[22]

House Bill 1482 effectively redefines the definition of the practice of law in Tennessee. Despite the seemingly irreconcilable conflict between section 23-3-101(a)'s definition and the provisions allowing nonlawyer representation before state agencies,[23] Tennessee law seemingly requires that House Bill 1482 should prevail over the broad and general

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15. Tenn. Code Ann. § 67-5-1501(a) (1983).

16. *Id.* § 67-5-1501(b)(1).

17. *See id.* § 4-5-301(b) (1985); *see also id.* § 4-5-303(a) (prohibiting a "person who has served as an investigator, prosecutor or advocate in a contested case" before an agency from serving as an administrative judge or hearing officer).

18. *See id.* § 4-5-301(b).

19. *See id.* §§ 4-5-101 to -323 (1985 & Supp. 1988).

20. *Id.* § 4-5-305(b) (1985). Section 4-5-305(b) states: "[A]ny party [to a hearing under the Act] may be advised and represented at the party's own expense by counsel or, unless prohibited by any provision of law, other representative." *Id.*

21. Tennessee's definition of "practice of law" appears in Tenn. Code Ann. § 23-3-101(a) (1980). *See supra* note 8 and accompanying text.

22. *See supra* note 8.

23. *Compare* Tenn. Code Ann. § 23-3-101(a) (1980) *with id.* § 4-5-305(b) (1985) *and id.* § 67-5-1514(c) (Supp. 1988).

definition of section 23-3-101(a).[24] Accordingly, the enactment of House Bill 1482 is an implicit assertion of the power to define the practice of law by the legislature.[25] Pursuant to House Bill 1482, a nonlawyer who is certified by the Board may appear as a representative when the primary issue concerns property valuation.[26] By negative inference, the legislature determined that representation concerning matters pertaining to property valuation does not amount to the practice of law.[27] Otherwise, nonlawyers acting in this capacity would be engaged in the

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24. Interpreting Tennessee law, a 1986 Tennessee attorney general opinion concluded: "In determining legislative intent where two statutes facially conflict, Tennessee courts have consistently given effect to specific provisions, which control over general provisions." 15 Op. Att'y Gen. Tenn. No. 86-43, at 3 (Feb. 25, 1986) (citing Frye v. Memphis State Univ., 671 S.W.2d 467, 468-69 (Tenn. 1984)). The Attorney General then continued: "Legislative intent is also evidenced by the more recent enactment of a conflicting law, which is said to impliedly repeal former legislation to the extent of the conflict." *Id.* (citing English v. Farrar, 206 Tenn. 188, 332 S.W.2d 215 (1960)); *see also* Bible & Godwin Constr. Co. v. Faener Corp., 504 S.W.2d 370, 372 (Tenn. 1974) (holding that when there is an irreconcilable conflict between statutes, "the one last mentioned will control").

25. *See, e.g.*, Strader v. United Family Life Ins. Co., 218 Tenn. 411, 417, 403 S.W.2d 765, 767 (1966) (Chattin, J., opinion on petition for rehearing) (holding that if there is "an irreconcilable conflict" between "former laws or statutes and a subsequent law or statute . . . the former laws are repealed by implication"); Woodroof v. City of Nashville, 183 Tenn. 483, 484, 192 S.W.2d 1013, 1015 (1946) (holding that "where the special provision follows the general provision . . . there is a repeal by implication of so much of the general provision as is in irreconcilable conflict with the special provision").

26. *See* TENN. CODE ANN. § 67-5-1407(a)(1) (Supp. 1988) (defining the various complaints upon which a nonlawyer may appear). The statute provides:

> Any owner of property liable for taxation in the state shall have the right . . . to make complaint . . . on one (1) or more of the following grounds:
>
> (A) Property owned by the taxpayer has been erroneously classified . . . for purposes of taxation;
>
> (B) Property owned by the taxpayer has been assessed on the basis of an appraised value that is more than the basis of value . . . ; and
>
> (C) Property other than property owned by the taxpayer has been assessed on the basis of appraised values which are less than the basis of value . . . .

Id.

27. A construction of the relevant statutes under Tennessee law seems to imply that, at least in theory, the General Assemhly intended H.R. 1482 to override the restrictive definition contained in § 23-3-101(a). Lobbyists opposing 16 Op. Att'y Gen. Tenn. No. 87-58 (Apr. 2, 1987) argued that because § 4-5-305(b) conflicted with the broad definition contained in § 23-3-101(a), the legislature already had expressed an intent to overrule § 23-3-101(a). Letter Memorandum prepared by Randall B. Womack, Associate, Glankler, Brown, Gilliland, Chase, Robinson & Raines (Aug. 26, 1987) (filed with the Executive Secretary, Tennessee State Board of Equalization). Consequently, H.R. 1482 would serve to clarify what the legislature had already authorized the agencies to implement. This conclusion seems suspect because the Tennessee General Assembly added § 4-5-305(b) in a 1982 amendment as part of a piecemeal adoption of the Model Uniform Administrative Procedures Act (Model UAPA). The stated purpose of the Model UAPA was to codify existing law. *See* MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-203(b) comment (1981), 14 U.L.A. 120 (Supp. 1989). Consequently, an assumption that § 4-5-305(b) was an intentional effort to broaden the scope of permissible representation ignores the goal of the Model UAPA to maintain the status quo. Instead, the enactment of H.R. 1482 effectively accomplished what the lobbyists purported § 4-5-305(b) had already accomplished.

unauthorized practice of law and, therefore, would be guilty of a misdemeanor.[28]

The enactment of House Bill 1482 demonstrates that the Tennessee legislature views the scope of its authority in performing legislative functions broadly. The tradition of allowing nonlawyers to appear as representatives before state agencies and the codification of this tradition in the UAPA and House Bill 1482 are an express rejection of section 23-3-101(a) by the Tennessee legislature. The legislature justified its enactment of House Bill 1482 by citing the history of lay representation before the Board and the resulting reliance on nonlawyers by the public.[29] The legislature concluded that enactment of House Bill 1482 was consistent with Tennessee state policy and the interests of its citizens that property valuation appeals should be speedy, informal, and inexpensive.[30] Although the failure of the judiciary to actively enforce the broad parameters of section 23-3-101(a) implies that the judiciary similarly recognizes that the statute is outdated,[31] the Tennessee legislature may have exceeded its power in making this policy decision without prior judicial approval.

B. The Tennessee Supreme Court's View

The powers given to the Board in House Bill 1482 may infringe upon the power to regulate the practice of law, which is expressly vested in the Tennessee Supreme Court.[32] The supreme court considers the judiciary preeminent in this area of law.[33] According to the supreme court, the legislature may merely enact minimum standards in the exercise of its police power; however, the judiciary "may require more of the

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28. TENN. CODE ANN. § 23-3-103 (1980) prohibits a person from unlawfully practicing law in Tennessee. A violation of this statute can result in a misdemeanor conviction and a $500 fine plus treble damages for money received for services rendered. *Id.*

29. *See supra* note 14 and accompanying text.

30. *Id.*

31. The existing definition of the "practice of law" statute was passed in 1935 and has remained unaltered despite subsequent legislative encroachments. *See*, Act of Feb. 13, 1935, ch. 30, 1935 Tenn. Pub. Acts 25. Since the enactment of the 1935 statute both the Tennessee UAPA and § 4-5-305(b), which was amended by Act of Apr. 8, 1982, ch. 874, § 43, 1982 Tenn. Pub. Acts 606, 622-23, have been passed without response by the judiciary.

32. *See supra* note 9 and accompanying text.

33. *See, e.g., In re* Tenn. Bar Ass'n, 532 S.W.2d 224 (Tenn. Ct. App. 1975). The court stated:

> Requiring qualifications for the practice of law is . . . a field in which both the legislative and judicial departments . . . may enter. The extent to which the Legislature may go . . . seems to depend upon whether a particular statute . . . is a reasonable exercise of the police power of the State. The judicial department, in the exercise of its inherent authority, may require more of the officers of its Courts.

Id. at 226-27 (quoting *In re* Rule of Court Activating, Integrating and Unifying the State Bar of Tenn., 199 Tenn. 78, 88, 282 S.W.2d 782, 786 (1955)).

officers of its [c]ourts."[34] Consequently, the court's acceptance of any usurpation by the legislature of the judiciary's regulatory powers would be gratuitous. Under this view, therefore, the Tennessee Supreme Court reserves the unqualified right to examine the merits of House Bill 1482.

Nevertheless, the Tennessee Supreme Court has remained relatively silent in regulating the practice of law outside its courts and has demonstrated a reluctance to confront the legislature.[35] Although the supreme court seems to have adopted, at least implicitly, a more liberal definition of the practice of law,[36] section 23-3-101(a) remains a part of Tennessee law. The judiciary similarly never has addressed the validity of nonlawyer representation before state agencies, which traditionally has been permitted and is codified in the UAPA.[37]

The Tennessee Supreme Court's history of silence suggests that the judiciary will not expand its jurisdiction to include quasi-judicial administrative proceedings. Existing Tennessee law, however, seems to restrict the legislature and requires the judiciary to assume responsibility. Therefore, the supreme court's failure to clarify the proper scope of the legislature's regulatory power concerning representation during state administrative proceedings produces a void of power in which the Tennessee legislature has no clearly defined guidelines.

C. The Tennessee Attorney General Opinions: The Conflict in Action

A series of Tennessee attorney general opinions written prior to the enactment of House Bill 1482 demonstrates the inadequacy of existing Tennessee law. A 1987 opinion specifically considers the constitutionality of allowing nonlawyers to appear before the State Board of Equalization in a representative capacity.[38] Interpreting Tennessee law, the

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34. *Id.*

35. Instead, Tennessee courts adopted § 23-3-101(a) as the applicable definition of the practice of law. *See, e.g.*, Haverty Furniture Co. v. Foust, 174 Tenn. 203, 124 S.W.2d 694 (1939); Bar Ass'n of Tenn., Inc. v. Union Planters Title Guar. Co., 326 S.W.2d 767 (Tenn. Ct. App. 1959); *see also supra* note 31.

36. *See* TENN. SUP. CT. R. 8, EC 3-5. The rule states:

> It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. . . . Where this professional judgment is not involved, non-lawyers . . . may engage in occupations that require a special knowledge of law in certain areas.

Id.

37. The 1982 amendment to § 4-5-305 specifically authorized nonlawyers to appear as representatives in some situations. *See* Act of Apr. 8, 1982, ch. 874, § 43, 1982 Tenn. Pub. Acts 606, 622-23. The scope of power granted to a layperson in § 4-5-305(b), however, may be extremely narrow in light of the stated purposes of the Model UAPA. *See supra* note 27.

38. *See* 16 Op. Att'y Gen. Tenn. No. 87-58 (Apr. 2, 1987).

Attorney General unequivocally concludes that nonlawyer representation of a taxpayer before the Board constitutes the unauthorized practice of law.[39] In reaching this conclusion, the Attorney General focused on the broad definition given in section 23-3-101(a) to conclude that the practice of law clearly includes representation before the Board.[40]

The 1987 opinion relied heavily on a 1985 attorney general opinion that examined the interrelationship of the regulatory powers given to the judicial and legislative branches.[41] In the 1985 opinion, the Attorney General stated that while the legislature has the authority to require certain qualifications, the supreme court may require qualifications that are more extensive than those required by statute.[42] The Attorney General refused to interpret section 4-5-305(b)[43] to allow representation by a nonlawyer before the Civil Service Commission and held that such representation constituted the unauthorized practice of law under section 23-3-101(a).[44] The opinion concluded that an interpretation of section 4-5-305(b) allowing nonlawyer representation before the Civil Service Commission would be tantamount to a legislative infringement upon the supreme court's inherent power to regulate the practice of law. Instead, the Attorney General relied upon the broad parameters of section 23-3-101(a) as the proper definition of the practice of law in Tennessee.[45]

Although the Tennessee attorney general opinions possess a foundation in Tennessee law, the analysis in these opinions appears flawed on at least two grounds. First, the reliance on section 23-3-101(a) as the existing definition of the practice of law seems misplaced.[46] Although the statute has not been repealed, neither the legislature nor the judiciary enforce the statute's broad parameters.[47] Second, Tennessee courts

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39. *Id.* at 1.

40. *See id.* at 3.

41. *See* 14 Op. Att'y Gen. Tenn. No. 85-166 (May 17, 1985).

42. *See id.* at 3; *see also supra* note 33.

43. *See supra* note 20.

44. 14 Op. Att'y Gen. No. 85-166 (May 17, 1985).

45. *Id.*

46. Even the Tennessee Attorney General has, at least implicitly, recognized that as a practical matter the hroad and sweeping parameters of § 23-3-101(a) are difficult to reconcile with modern realities. For example, a later 1987 Tennessee attorney general opinion narrowed the scope of 16 Op. Att'y Gen. Tenn. No. 87-58 (Apr. 2, 1987) to allow nonlawyer employees of a corporation to appear as representatives for the corporation before the State Board of Equalization. *See* 16 Op. Att'y Gen. Tenn. No. 87-183 (Dec. 3, 1987) (allowing certified appraisers who are employees of the corporation to appear as "duly authorized representatives" in hearings before the Board). Because these corporate employees functionally serve in the same capacity as nonlawyers not employed by a corporation, no justifiable policy reason for such a distinction seems to exist.

47. The history of allowing lay representation before state agencies in contravention of § 23-3-101(a) and the enactment of H.R. 1482 demonstrate a legislative recognition of the statute's inadequacy. *See supra* note 7. As for the judiciary, both the judicial acquiescence to the existing

have neither asserted regulatory control over state administrative proceedings nor challenged the legislative assertion of this power on separation of powers principles.[48] Consequently, this history of judicial acquiescence makes suspect any conclusion that legislative power over state administrative proceedings is subservient to the judiciary.

The judiciary may have been reluctant to clarify these issues for several reasons. Assuming that the legislature's power is secondary, the judiciary may have concluded that (1) representation before state administrative agencies does not constitute the practice of law; or (2) although such representation does constitute the practice of law, permitting nonlawyer representation in certain situations is warranted. In each instance, the supreme court reserves the power to reassert its authority. Alternatively, however, the judicial silence may be based on an implicit recognition of the legislature's concurrent power to regulate the practice of law before legislatively created administrative agencies.

An examination of the merits of House Bill 1482 provides an excellent opportunity through which the Tennessee Supreme Court can clarify both the definition of the practice of law in Tennessee and the scope of authority among the separate branches. The contrasting views of the Attorney General and the Tennessee legislature demonstrate the existing confusion under Tennessee law.[49] Furthermore, the tradition of allowing nonlawyer representation seems inconsistent with both the legislative definition of the practice of law in section 23-3-101(a)[50] and the judicial assertion of the exclusive power to regulate the practice of law.[51] Therefore, judicial review of House Bill 1482 is needed to provide a foundation for the development of consistent standards regarding representation before all Tennessee agencies.

D. The Wisdom of Tennessee House Bill 1482

The primary function of the State Board of Equalization is to value property for the assessment of taxes.[52] Because the power to tax is unquestionably a legislative function,[53] supporters of expanding nonlawyer

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lay representation and the adoption of Tenn. Sup. Ct. R. 8, EC 3-5, *supra* note 36, support this conclusion.

48. The lack of judicial guidance has required individual agencies to consult the Tennessee Attorney General on the scope of their authority. *See supra* notes 38-46 and accompanying text.

49. The Tennessee legislature passed H.R. 1482 after the Tennessee Attorney General specifically advised that nonlawyer representation before the Board constituted the unauthorized practice of law. *See* 16 Op. Att'y Gen. Tenn. No. 87-58 (Apr. 2, 1987); *see also supra* note 11 and accompanying text.

50. *See supra* note 8.

51. *See supra* note 9.

52. *See* TENN. CODE ANN. § 67-5-1501 (1983); *id.* § 67-5-1407 (Supp. 1988).

53. *See, e.g.*, Marion County v. State Bd. of Equalization, 710 S.W.2d 521, 522 (Tenn. Ct.

representation argue that any legal issues that may arise in a property valuation are generally insignificant. Consequently, the expertise necessary for representatives appearing before the State Board of Equalization involves property valuation, which relates only remotely to the practice of law. Proponents of nonlawyer representation further contend that eliminating persons who possess expertise in property valuation simply because they do not have law degrees would reduce the total number of competent representatives available to the public.[54]

Opponents who favor the prohibition of nonlawyer representation contend that the potential harm to the public outweighs the benefits.[55] Even if legal issues do not seem prominent on the surface, a client's interests may be impaired permanently if a nonlawyer fails to recognize a potential legal claim that falls outside the nonlawyer's narrow field of expertise.[56] Additionally, the adversarial nature of administrative proceedings often requires legal skills. Because the introduction of additional evidence is limited on judicial appeal, adversarial administrative proceedings require the proper development of facts and preparation of an adequate record.[57] Furthermore, the lack of specific and tested standards of conduct may impair the development of a disciplinary system capable of effectively regulating the actions of nonlawyer representatives.[58]

House Bill 1482 contains provisions designed to prevent the impairment of a client's legal interests. The legislation added section 67-5-1511(b) to provide de novo judicial review.[59] This provision ensures that a client's substantive rights will be preserved even if a nonlawyer fails to adequately prepare a record before the Board. Section 67-5-1514(g)

App. 1986) (stating that "[u]nder the general law, the right to tax property is peculiarly a matter for the legislature and the legislative power in this respect can only be restricted by . . . positive expressions in the constitution").

54. *See generally infra* notes 114-20 and accompanying text.

55. *See generally infra* notes 109-13 and accompanying text.

56. For example, general principles of administrative law require parties to exhaust administrative remedies before seeking judicial review. *See* TENN. CODE ANN. § 4-5-322(a)(1) (Supp. 1989). Consequently, if a nonlawyer fails to recognize legal issues, valid legal rights may never be asserted. Furthermore, even if a controversy reaches judicial appeal, the resulting delay may permanently impair a client's interests.

57. The limited review of administrative matters prohibits the introduction of additional evidence and allows the court to consider only questions of law. *See id.* § 4-5-322(g).

58. Arguably, unlike the existing disciplinary and ethical standards by which an attorney is bound, an independent agency's disciplinary system would be untested and improperly regulated. Furthermore, persons opposing nonlawyer representation argue that the consequences of a breach of conduct by a nonlawyer are small in comparison to the potential disbarment for an attorney's breach of ethics. *See generally* TENN. SUP. CT. R. 7, 8.

59. *See* TENN. CODE ANN. § 67-5-1511(b) (Supp. 1988). The provision states: "[J]udicial review [as to all matters passed upon by the Board] . . . shall be a de novo appeal to the Chancery Court of Davidson County or the county where the disputed assessment is made." *Id.*

similarly was added to promote full disclosure to the public.[60] This provision requires nonlawyer representatives to place disclaimers in advertisements. The amendment recognizes the public's freedom of choice when choosing representation and attempts to ensure that the public will make an informed choice. House Bill 1482 also prescribes minimum qualifications for nonlawyers who wish to appear before the Board.[61] In addition, section 67-5-1514(f) grants the Board disciplinary power over agents for specified actions and discretionary power to adopt additional standards of conduct for all agents who appear before the Board.[62] The minimum qualifications for appearance and the grant of disciplinary power to the Board, although not comprehensive, establish a foundation to develop sufficient standards of conduct capable of protecting the public from incompetent or unscrupulous nonlawyer representatives.

The most troublesome concern regarding nonlawyer representation before the Board is the amount that a client has at stake. Because controversies involving property valuation often involve tremendous sums of money, clients may suffer significant harm from inadequate representation. Arguably, therefore, even if nonlawyer representation is justified in some circumstances, the interests involved in property valuation proceedings may be too significant to be entrusted to nonlawyers.[63] A dis-

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60. *Id.*; *see id.* § 67-5-1514(g). The statute provides:

> Any written solicitation of business, by letter, advertisement, or otherwise, by any person other than an attorney, who qualifies as an agent under this section shall contain, in type large enough to be easily readable, a disclaimer substantially as follows: "Taxpayer agents who are not lawyers may only appear on your behalf before the state board of equalization on matters of classification, assessment, and/or valuation, and may not represent you in a court of law."

Id.

61. *See id.* § 67-5-1514(c)(3). For the language of this provision, see *supra* note 5.

62. *See* TENN. CODE ANN. § 67-5-1514(f) (Supp. 1988). The statute states:

> (1) All persons authorized to appear before the board of equalization pursuant to the provisions of subdivision (c)(3) shall register with the board, and shall pay an annual fee for such registration as may be established by the board, which may reprimand, revoke, or suspend from practice or place on probation or otherwise discipline any agent for any of the acts set forth below:
>
> (A) Procuring or attempting to procure registration pursuant to this act by knowingly making a false statement, submitting false information, or through any form of fraud;
>
> (B) Failing to meet the minimum qualifications established by this section;
>
> (C) Paying money or other valuable consideration, other than as provided for by this section, to any member or employee of the board to procure registration under this section; or
>
> (D) Any act or omission involving dishonesty or fraud that could substantially benefit the registrant or another person or with the intent to substantially injure another person.
>
> (2) The board may adopt additional standards of conduct, if any, regarding all agents when appearing at any conference or hearing pursuant to this section.

Id.

63. Such a distinction has been made in other jurisdictions. *See infra* notes 162, 163, and accompanying text. A monetary distinction, however, seems to ignore the fact that nonlawyers often have valuable expertise that would be sacrificed under such a strict rule. *See infra* notes 116,

tinction based on such specialized considerations raises the additional possibility that the scope of nonlawyer representation before state administrative agencies requires an agency by agency determination.[64]

An examination of the merits of House Bill 1482 requires several distinct steps. Regardless of its substantive advantages, the threshold issue concerns the proper legislative role in regulating the practice of law. This issue must be resolved before one can examine the narrower issues regarding the proper scope of nonlawyer representation before state agencies. If such representation is determined to constitute the practice of law, the subsidiary question of whether the individual agencies are sufficiently unique to warrant separate consideration may arise. Although House Bill 1482 attempts to provide several safeguards, resolution of this final question is particularly relevant to the State Board of Equalization because an individual appearing before the Board has significant interests at stake.[65]

III. Historical Development

A. *The Inherent Powers Doctrine*

Courts traditionally claim the power to regulate the practice of law through the inherent powers doctrine.[66] The origin of this doctrine is based on lawyer self-regulation, which is thought to be necessary to effectively serve the public.[67] This rationale assumes that the regulation of lawyers involves legal complexities that cannot be understood adequately by nonlawyers[68] and concludes that the court system could not function properly without the judicial power to regulate lawyers.[69]

The resulting regulatory framework that developed was a function of the American commitment to federalism expressed in the tenth amendment of the United States Constitution.[70] One commentator noted that the federal government possesses no power to regulate the practice of law because the Constitution does not reserve this function expressly for the federal government.[71] Accordingly, a decentralized system developed in which each state regulates the practice of law within

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117, and accompanying text.

64. Several jurisdictions also have distinguished agencies. *See infra* notes 156-60 and accompanying text.

65. *See* Op. Att'y Gen. Colo. File No. OLS8804271/AQT (Sept. 1, 1988); *see also infra* notes 162, 163, and accompanying text.

66. C. Wolfram, Modern Legal Ethics § 2.2.1, at 22 (1986).

67. *Id.* § 2.1, at 20.

68. *Id.* § 2.1, at 20-21.

69. *Id.* § 2.2.2, at 26.

70. *See* U.S. Const. amend. X.

71. *See* Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 34 Case W. Res. L. Rev. 173, 180-81 (1983-1984).

its own boundaries. The exclusive authority of each state's supreme court to issue licenses to practice law before the state's courts is well settled.[72] Important questions remain, however, concerning the proper judicial role in regulating nonlawyers who appear in other forums, such as state administrative agencies.[73]

The scope of the "negative inherent powers" doctrine has produced controversy concerning the proper allocation of regulatory power between the legislative and judicial branches.[74] The most restrictive form of the doctrine assumes that because each branch of government "is supreme witbin its assigned sphere," any attempt by the legislative or executive branch to exercise judicial power is an "unconstitutional usurpation."[75] Although a majority of states claim to follow this "radical form" of the doctrine,[76] states rarely assert this extreme view in practice. Comity considerations generally make the judiciary reluctant to confront the legislature unless absolutely necessary.[77] Otherwise, the incongruous result of striking down these statutes solely on constitutional grounds would often frustrate legislation that actually is consistent with judicial policies.[78] Therefore, state legislatures effectively maintain some degree of power in regulating the practice of law even in states that purport to place exclusive authority in the judiciary.

The divergent theories among the states regarding legislative regulation of the practice of law can be characterized as a continuum.[79] A restrictive view allows legislative enactments only if the reviewing court finds the legislative intent "congenial" with existing judicial regulatory policies.[80] A more compatible view allows the legislature to provide "a guiding infiuence" to move the courts in directions they would not otherwise take.[81] The most expansive view explicitly recognizes a legislative role to regulate concurrently the practice of law.[82]

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72. *See* Levinson, *supra* note 1, at 221.

73. *See generally id.*

74. *See, e.g.*, C. WOLFRAM, *supra* note 66, § 2.2.3, at 27.

75. *Id.*

76. *Id.* at 27-28.

77. *Id.* at 28.

78. *Id.* (noting that "[u]nder [the constitutional] view, even legislation that is fully compatible with the court's own goals for regulation . . . would be susceptible to invalidation").

79. *See* Note, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 VAL. U.L. REV. 567, 584-99 (1981) (discussing four theories of legislative power to regulate the legal profession: (1) the legislature has no power, (2) the legislature may aid the judiciary, (3) the legislature and the judiciary have concurrent power, and (4) the legislature is supreme and the judiciary is secondary).

80. *See* C. WOLFRAM, *supra* note 66, § 2.2.3, at 28 n.55.

81. *See id.* n.57.

82. *See, e.g.*, State Bar v. Galloway, 124 Mich. App. 271, 283, 335 N.W.2d 475, 480 (1983) (holding that the judiciary does not have the inherent power to assert ultimate authority over the practice of law in proceedings before the Michigan Employment Security Commission), *aff'd*, 422 Mich. 188, 369 N.W.2d 839 (1985).

B. *Administrative Tribunals and the Inherent Powers Doctrine*

Administrative tribunals are statutorily created bodies designed to foster the performance of legislative functions.[83] To further these legislative functions, the administrative tribunals are empowered to settle controversies in a quasi-judicial setting through administrative proceedings.[84] In theory, a state administrative agency's power is limited to the adjudication of disputes within the realm of the individual agency's legislative powers.[85] However, as legal issues arise and the nature of the proceedings become increasingly adversarial, legislative and judicial functions inevitably overlap.[86]

The vague contours of ambiguous grants of legislative power become particularly complex when applied to state administrative proceedings. The inherent powers doctrine traditionally was used to justify judicial supremacy in an era before quasi-judicial administrative proceedings became an essential element in American government.[87] Consequently, the recurring overlap of legislative and judicial functions in administrative proceedings was not contemplated when this doctrine first was developed. As demonstrated in Tennessee, attempts to resolve these seemingly irreconcilable conflicts with the negative inherent powers doctrine present difficult problems.[88]

IV. The Balancing Process

A. *Due Process in Administrative Adjudication*

Due process guarantees of the fifth amendment require public protection from inadequate representation in quasi-judicial administrative adjudications.[89] The possibility of "jurisdictional gaps" is an inherent

83. *See* E. Stason & F. Cooper, The Law of Administrative Tribunals 5 (3d ed. 1957).

84. *Id.* at 148.

85. While providing a simple and arguably necessary means for the resolution of disputes, commentators argue that the wide ranging powers given to these tribunals may infringe upon the judiciary's inherent power to regulate the practice of law. *See, e.g.*, Cox, *supra* note 71, at 180-81; Levinson, *supra* note 1, at 221.

86. The scope of the inherent powers doctrine is unique in that it "assumes that sharp lines divide judicial from legislative and executive functions." C. Wolfram, *supra* note 66, § 2.2.3, at 30. Apparently rejecting the doctrine, Wolfram concludes that "the quality of advocacy before other branches is a concern only for those branches and not for the courts." *Id.* at 29.

87. *See generally id.* § 2.2.1, at 22-23.

88. *See supra* notes 38-51 and accompanying text.

89. *See* U.S. Const. amend. V. Although the right to counsel in a noncriminal proceeding is not "an inevitable requisite of administrative due process," *see* Cox, *supra* note 71, at 182 n.34, the United States Supreme Court clearly requires basic concepts of fair play to protect an individual's rights in an administrative setting. *See* Morgan v. United States, 304 U.S. 1, 19 (1938) (stating that "Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature").

problem caused by the evolution of quasi-judicial administrative proceedings.[90] Neither the legislative nor the judicial branch assumes the responsibility to discipline nonlawyer representatives in many states that have failed to develop a consistent policy regarding nonlawyer representation before state agencies.[91] This void of power may create inconsistent standards and complicate effective monitoring of nonlawyers. Because state administrative proceedings may involve determinations of legal rights, regulatory control over representation before the agencies appears necessary to protect citizens' rights.

Potential conflicts of interest may result if each agency is allowed to discipline representatives appearing before its own proceedings.[92] The 1982 report by the American Bar Association (ABA) Standing Committee on Professional Discipline discusses due process concerns that are implicated when "substantive" jurisdiction and "disciplinary" jurisdiction are merged.[93] First, the ABA notes that disclosure in a misconduct charge is required to be made to a disciplinary body that is not disinterested in the underlying controversy.[94] Thus, such disclosures may unfairly prejudice a client's interests because the disclosures required to defend a misconduct charge would become available to the agency for use against the client in the underlying controversy.[95] Second, the ABA report recognizes that a practitioner may compromise his representation before an agency in order to maintain amicable standing with the agency.[96] These concerns are valid particularly in proceedings before the State Board of Equalization because the Board has few members and only a small number of representatives traditionally appear before its proceedings.[97]

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90. *See* Cox, *supra* note 71, at 178-80.

91. *See* C. WOLFRAM, *supra* note 66 § 2.2.3, at 29 (stating that "[a]s a permanent fixture of a state's jurisprudence, the doctrine both limits legislative ambitions to usurp the judiciary's turf and limits the possibilities for reform of the legal profession").

92. *See* Cox, *supra* note 71, at 181-82.

93. *Id.* at 182 (citing ABA STANDING COMM. ON PROFESSIONAL DISCIPLINE, REPORT TO THE HOUSE OF DELEGATES at ii-iii (Aug. 1982) (on file with the *Case Western Reserve Law Review*)).

94. *Id.* The Report noted that a threat of serious harm to the client existed because disclosures had to be made "not to disciplinary counsel disinterested in the underlying client matter, but to employees of the client's adversary, the agency." *Id.*

95. *Id.*

96. *See id.* The Report stated:

> [T]he practitioner who knows that his/her ability to earn a living can be terminated by the very agency he was retained by the client to deal with or resist, may very well temper his/her representation . . . to a level of vigor and diligence less than the client's cause warrants, so as not to arouse the agency's displeasure against himself.

Id.

97. Additional conflict is present because "[o]ne uncomfortable consequence [of lawyer self-regulation] is that the same body that promulgates . . . rules regulating the conduct of lawyers must also sit as the body that determines their validity if later attacked." C. WOLFRAM, *supra* note

The absence of a confidentiality privilege between a client and his nonlawyer representative also may implicate due process concerns.[98] Even if representation during the initial quasi-judicial administrative proceeding is not considered to constitute the practice of law, the disputed issues ultimately may be determined by a court of law after all administrative remedies have been exhausted.[99] Accordingly, once the state's judiciary possesses jurisdiction over an appeal from an administrative proceeding, prior communications between a nonlawyer and his client may be subject to discovery.[100]

Structural defects in an administrative system that allows both nonlawyers and lawyers to represent clients also may place adversarial parties on unequal terms. For example, persons selecting a nonlawyer representative may be at a disadvantage in relation to an adversarial party who is represented by an attorney and, therefore, enjoys a privilege of confidentiality.[101] Similarly, because a nonlawyer representative is not bound by the same ethical obligations as an attorney, a nonlawyer representative may enjoy greater flexibility when representing a client.[102]

B. The Federal Regulatory System

1. The Decentralized Approach: Deference and Individual Autonomy

Regulatory control of federal administrative agencies is exclusively a legislative function controlled by congressional statutes.[103] The federal judiciary refuses to invoke the negative inherent powers doctrine and recognizes legislative supremacy in regulating representation before federal administrative agencies.[104] Furthermore, Congress delegates significant power to the individual federal agencies, allowing the agencies

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66, § 2.2.1, at 23.

98. *See generally* Comment, *Asserting Confidentiality: The Need for a Lay Representative-Claimant Privilege*, 15 PAC. L.J. 245 (1984).

99. *See, e.g.*, TENN. CODE ANN. § 4-5-322(a) (1985); *see also supra* note 56 and accompanying text.

100. *See* Comment, *supra* note 98, at 261.

101. *See id.* at 258-59.

102. Arguably, a lawyer remains bound by ethical obligations and is subject to disciplinary action, even if representation before an administrative agency is not considered to be the practice of law, because a lawyer's oath extends to all professional relationships with clients appearing before administrative agencies. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-15 (1981) (stating that "[a] lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law" (footnotes omitted)); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.9 comment 1 (1983) (requiring that a "lawyer appearing before [administrative agencies] should deal with the tribunal honestly and in conformity with applicable rules of procedure").

103. *See* Levinson, *supra* note 1, at 222.

104. *Id.*

to impose their own admission requirements under the Agency Practice Act of 1965.[105] This commitment to individual autonomy mirrors the decentralized regulatory scheme of the federal court system.[106]

The evolution of the decentralized federal system may explain why a power struggle over regulation of federal administrative proceedings does not exist. At the federal level, the judiciary did not divest itself of pre-existing power by allowing the legislature to control practice before federal agencies. Thus, the reluctance to change demonstrated by the state supreme courts may be historically based and possess little practical advantage.[107] The federal system, which rejects judicial superiority in regulating practice before administrative agencies, supports this view.

2. The Merits of the Federal Administrative Agency System

Examining the effectiveness of nonlawyer representation in the federal system provides significant insights because the concern for public protection from inadequate representation is common to both federal and state agency proceedings. A study by the American Bar Association revealed a diversity of approaches among the individual federal agencies regarding nonlawyer practice.[108] The following subsections discuss the costs and benefits of nonlawyer practice before federal administra-

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105. *Id.* at 222. The Agency Practice Act of 1965, Pub. L. No. 89-332, 79 Stat. 1281 (1965) (codified as amended at 5 U.S.C. § 500 (1988)), authorizes individual agencies to control admission of nonlawyers. The Agency Practice Act also grants automatic admission for certified public accountants to practice before all federal agencies. 5 U.S.C. § 500(c) (1988).

106. Levinson, *supra* note 1, at 222. Each federal court admits attorneys to its own bar and has no power to control an attorney's practice before another court. *Id.* (citing *In re* Snyder, 472 U.S. 634, 643 n.4 (1985) (holding that a federal court of appeals has no authority to suspend an attorney from practicing before district courts in the same circuit)).

107. At least one commentator advocates implementation of the existing uniform federal system at the state level. *See* Note, *supra* note 79, at 573. Such a simplistic approach, however, overlooks the American judicial system's commitment to federalism and the resulting separation of powers implications. *See supra* notes 70, 71, and accompanying text. Because each state independently regulates the practice of law within its own boundaries, complete deference may be inconsistent with a particular state's determination to grant its judiciary the inherent authority to regulate the practice of law. Furthermore, while arguably providing predictability, a uniform approach conferring legislative supremacy over all state administrative agencies ignores the state specific policy determination of what constitutes the practice of law and the distinct nature of individual agencies deserving independent consideration. Accordingly, the inconsistency that may result from a grant of legislative power to regulate practice before state administrative agencies may upset a state's existing power structure and cause irreconcilable conflicts that fail to adequately protect the interests of a state's citizens.

108. STANDING COMM. ON LAWYER'S RESPONSIBILITY FOR CLIENT PROTECTION & ABA'S CENTER FOR PROFESSIONAL RESPONSIBILITY, RESULTS OF THE 1984 SURVEY OF NONLAWYER PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES (1985). The results of this study motivated the ABA to sponsor a colloquium to explore the variety of views on nonlawyer representation before federal administrative agencies. *See Robie, supra* note 12, at 359-61.

tive agencies.

a. The Costs of Nonlawyer Practice Before Federal Administrative Agencies

Those who oppose the appearance of nonlawyers before federal agencies generally focus on the need for a lawyer's professional judgment. This view emphasizes the fundamental need for legal knowledge in order to preserve a client's interests.[109] Although nonlawyers may possess superior expertise in a specific area, the various legal remedies that are available to a claimant and the ability to obtain those remedies are not known until the case has been investigated thoroughly.[110] This argument concludes that although the specialized abilities of a nonlawyer remain essential, legal training is required to coordinate and utilize the nonlawyer's talents effectively.[111]

The protection of a free market system in which the public may independently select its representatives has been offered to justify nonlawyer representation. These economic and free market rationales similarly are discounted by opponents of nonlawyer representation. In summarily dismissing the unavailability of competent counsel, one commentator concluded that there is no evidence that lawyers are unwilling to represent clients in federal agency proceedings.[112] Apparently dismissing the public's ability to adequately assess the competency of its representatives, opponents of nonlawyer representation similarly take a paternalistic approach in dismissing the public's right of free choice in choosing representation. One commentator argues that some clients may realize short-term cost savings, but other clients will face long-term litigation defeats.[113]

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109. Heiserman, *Nonlawyer Practice Before Federal Administrative Agencies Should Be Discouraged*, 37 ADMIN. L. REV. 375, 378 (1985) (proceedings of the colloquium sponsored by the ABA Standing Comm. on Lawyers' Responsibility for Client Protection).

110. *Id.* at 376. Heiserman noted that "[n]onlawyers might fail to recognize legal issues outside their particular areas of competency." *Id.* at 380.

111. *Id.* at 376-79.

112. Heiserman seems to argue that there exists no evidence of a proximate relationship between any scarcity of lawyers performing services before federal agencies and lawyer unwillingness to enter this specialized market. He states:

> Our economy is guided by the principle of supply and demand . . . . If consumers feel that representation is worth the investment, they will retain counsel. If nonlawyers are allowed to provide services typically provided by lawyers, there is no guarantee that prices would be lower or that services would be more readily available.

Id. at 380.

113. *Id.* at 381.

b. The Benefits of Nonlawyer Practice Before Federal Administrative Agencies

Proponents of nonlawyer representation focus on the need to balance the interests of protecting the public from inadequate representation with the need for efficient resolution of extra-judicial disputes. At least four rationales are suggested for permitting nonlawyer representation: (1) nonlawyers possess specialized competence in particular fields; (2) the issues presented before federal agency proceedings involve simple and less dominant legal issues; (3) a sufficient number of lawyers are not available to perform the services; and (4) in choosing its representation, the public has a freedom of choice.[114]

The limited importance of legal skills when representing a client during administrative proceedings is the basis of the first two rationales. The informal nature of many federal administrative agency disputes renders the use of legal formalities unnecessary.[115] Even if formal rules or procedures are used, they arguably are not beyond the comprehension of nonlawyers and many nonlawyers are proficient in applying these formalistic procedures.[116] Proponents of nonlawyer representation further contend that the predominant questions during administrative proceedings usually involve "economic, scientific, financial, or technical" expertise, and the legal issues that may arise rarely involve a client's substantive rights.[117]

A commitment to the free market system justifies the final two rationales for nonlawyer representation. An individual's freedom of choice is an essential part of a free market system and government regulation is needed to protect consumers only if the market fails.[118] Regulation of the existing market of representation before federal agencies would only increase transaction costs and decrease the number of available choices for the consumer.[119] According to one commentator, the great majority of clients requiring representation before federal agencies are sophisticated businessmen or corporate entities who are capable of ascertaining the competency of potential nonlawyer representatives.[120] Conse-

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114. Rose, *Nonlawyer Practice Before Federal Administrative Agencies Should Be Encouraged*, 37 ADMIN. L. REV. 363, 365 (1985) (proceedings of the colloquium sponsored by the ABA Standing Comm. on Lawyers' Responsibility for Client Protection).

115. *Id.* at 369.

116. *Id.*

117. *See id.*

118. *Id.* at 366.

119. *Id.* at 368.

120. This argument against government regulation states:

[M]any persons appearing before the agencies are sophisticated and intelligent. They have specialized knowledge about their cases and thus can assess the competency of potential representatives, either lawyers or nonlawyers. In addition, they often are corporate entities that

quently, government regulation would have little utility because consumers already are able to make an informed choice.

V. THE STATES

Unlike the federal system, the states do not offer a uniform approach. Consequently, analysis at the state level is more complicated because it is difficult to predict how a particular state will address nonlawyer representation. Initially, states must address whether an appearance as a representative before a state administrative agency constitutes the practice of law. If such representation is not determined to be the practice of law, there is no role for the judiciary. States that accept this view downplay the quasi-judicial format of administrative proceedings and emphasize the simple legal techniques and concepts involved in administrative hearings.[121] If, however, representation before state agencies falls within the state's definition of the practice of law, further analysis is required. The inevitable conflict between the legislative and judicial branches must be considered in order to achieve a proper balance between the branches and promote the public interest. The focus of this inquiry shifts toward defining situations in which nonlawyer representation is justified.

A. Other States' Supreme Court Views

The prevailing state view seems to reserve the exclusive authority to regulate the practice of law for the judiciary.[122] Nevertheless, some courts asserting this power permit lay representation in certain situations.[123] In *Unauthorized Practice of Law Committee v. Employers Unity, Inc.*[124] the Colorado Supreme Court concluded that it had exclusive authority to define and regulate the practice of law and that the

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employ a large number and wide variety of intelligent and specially trained employees. Corporate entities have available vast expertise on their relationships with government, and they usually are experienced in choosing competent representatives. These features make them infrequent victims of misrepresentation or manipulation.

Id. at 367.

121. *See, e.g.*, State *ex rel.* Pearson v. Gould, 437 N.E.2d 41, 43 (Ind. 1982).

122. *See, e.g.*, Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 619 P.2d 1036 (1980) (en banc); Anamax Mining Co. v. Arizona Dep't of Economic Sec., 147 Ariz. 482, 711 P.2d 621 (Ct. App. 1985); Unauthorized Practice of Law Comm. of the Sup. Ct. of Colo. v. Employers Unity, Inc., 716 P.2d 460 (Colo. 1986) (en banc); Florida Bar in re Advisory Opinion HRS Nonlawyer Counselor, 518 So. 2d 1270 (Fla. 1988) (per curiam); Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n, 102 Idaho 672, 637 P.2d 1168 (1981); *Gould*, 437 N.E.2d at 41; Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779 (Ind. 1982); Henize v. Giles, 22 Ohio St. 3d 213, 490 N.E.2d 585 (1986).

123. *See, e.g.*, *Hunt*, 127 Ariz. at 259, 619 P.2d at 1036; *Employers Unity*, 716 P.2d at 460; *Florida Bar*, 518 So. 2d at 1270.

124. 716 P.2d 460 (Colo. 1986).

Colorado General Assembly had no constitutional authority to determine who could practice law before administrative agencies.[125] Despite this seemingly unequivocal statement, the court refused to invalidate a statute permitting laypersons to appear before a state agency. Notwithstanding the determination that representation before the agency constituted the practice of law, the court's holding was justified on public policy grounds.[126] The court labeled its tolerance of this legislative infringement "gratuitous" and consistent with the judiciary's authority to regulate the practice of law.[127]

The Arizona Supreme Court similarly authorized limited nonlawyer representation for public policy reasons in *Hunt v. Maricopa County Employees Merit System Commission*.[128] The *Hunt* court defined the parameters of nonlawyer representation in monetary terms. A bright-line test was developed to allow nonlawyer representation if (1) the nonlawyer representative provides his services without a fee; and (2) the amount in controversy does not exceed one thousand dollars.[129] Although somewhat arbitrary, the test is designed to permit nonlawyer representation when a client is unable to hire a lawyer for economic reasons.

Employers Unity and *Hunt* demonstrate a judicial recognition that nonlawyer representation is warranted in some circumstances. Both the Colorado and Arizona courts apply a balancing approach to decide that lay representation is in the best interests of the public.[130] Other courts, however, use similar balancing tests to conclude that the public interest requires a ban on lay representation.[131] Courts that ban lay representation stress the potential for inadequate representation and the inability to discipline nonlawyers.[132] Proponents of this restrictive view regard

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125. *Id.* at 463 (citing Denver Bar Ass'n v. Public Utils. Comm'n, 154 Colo. 273, 391 P.2d 467 (1964) (en banc)).

126. *Id.* The court relied on the 50 year tradition of lay representation in the administrative field and the cost effectiveness of the present system. *Id.*

127. *Id.*

128. 127 Ariz. 259, 619 P.2d 1036 (1980).

129. *Id.* at 264, 619 P.2d at 1041.

130. Apparently recognizing the inadequacy of a general definition of the practice of law in an ever changing society, the Rhode Island Supreme Court recently stated:

> [T]he General Assembly has without interference by this court permitted a great many services that would have come within the definition of the practice of law to be performed by [lay persons] . . . . The plain fact of the matter is that each of these exceptions [to the general definition of the practice of law] enacted by the Legislature constituted a response to a public need.

Unauthorized Practice of Law Comm. v. State Dep't of Workers' Compensation, 543 A.2d 662, 664-65 (R.I. 1988) (upholding a workers' compensation statute allowing nonlawyer representation).

131. *See, e.g., Professional Adjusters*, 433 N.E.2d at 779.

132. *See, e.g., id.* at 783 (invalidating a statute providing for licensing of certified public accountants to undertake negotiation settlements as unconstitutional).

the public protection from inadequate representation as more important than any efficiency benefits derived from hiring nonlawyers.

A less restrictive view allows the legislature to guide the judiciary in formulating its policies on nonlawyer representation.[133] In these states the legislature generally derives its authority from the exercise of legislative police power.[134] In practice, however, states adhering to this grant of legislative power are practically indistinguishable from states that reserve exclusive judicial authority. For example, the Idaho legislature was permitted to enact laws in aid of judicial functions that set minimum requirements,[135] but was prohibited from setting maximum requirements.[136] The Idaho Supreme Court, however, invalidated a statute that allowed nonlawyers to appear before the Public Utilities Commission. The court failed to explain why the statute was unconstitutional and refused to prescribe hypothetical situations concerning which activities undertaken by nonattorneys would constitute the practice of law.[137]

At least two states explicitly recognize concurrent authority between the legislature and the judiciary in regulating the practice of law.[138] In *Florida Bar v. Moses*[139] the Florida Supreme Court determined that the power to regulate the practice of law during state administrative proceedings was granted expressly to the legislature in the Florida Constitution.[140] Similarly, in *State Bar v. Galloway*[141] the Michigan Supreme Court upheld a statute permitting nonlawyers to appear before the Employment Security System despite existing unauthorized

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133. *See, e.g.*, Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n, 102 Idaho 672, 637 P.2d 1168 (1981).

134. *See, e.g., id.* at 676, 637 P.2d at 1172 (citing *In re* Kaufman, 69 Idaho 297, 315, 206 P.2d 528, 539 (1949)).

135. *Id.*

136. *Id.* The language contained in *Kaufman* is remarkably similar to previous views of the Tennessee Supreme Court. *Compare id. with In re* Tenn. Bar Ass'n, 532 S.W.2d 224 (Tenn. Ct. App. 1975). For a discussion of the Tennessee Supreme Court's position in *Tenn Bar Ass'n*, see *supra* notes 33, 34, and accompanying text.

137. *See Idaho State Bar*, 102 Idaho at 676-77, 637 P.2d at 1172-73. A subsequent Idaho Supreme Court decision applying the general rule of *Idaho State Bar* demonstrates the court's view of the severely limited role of the Idaho legislature. *See* Kyle v. Beco Corp., 109 Idaho 267, 272, 707 P.2d 378, 383 (1985) (holding that "the legislature could not have delegated to the Industrial Commission the power . . . to allow laypersons to represent parties in adjudicative proceedings").

138. *See* Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980); State Bar v. Galloway, 422 Mich. 188, 369 N.W.2d 839 (1985).

139. 380 So. 2d 412 (Fla. 1980).

140. *Id.* at 417 (holding that "the legislature has constitutional authorization to oust the Court's responsibility to protect the public in administrative proceedings . . ., and when it does so any 'practice of law' conduct becomes, in effect, authorized representation"); *see* FLA. CONST. art. V, § 1.

141. 422 Mich. at 188, 369 N.W.2d at 839.

practice statutes.[142] The court refused to undertake a separation of powers analysis and focused instead on statutory interpretation in an effort to discern the legislative purpose of the statute.[143]

Regardless of any particular court's ultimate conclusion, a recurring theme appears in all of the state supreme court cases: a reluctance to treat all state agencies the same. The courts limit the scope of their opinions to a particular agency. This agency by agency analysis demonstrates a recognition that each state agency is unique and seems to indicate a commitment to a balancing analysis on a case by case basis.

B. States Failing to Address Nonlawyer Representation Before State Agencies

Recent attorney general opinions in states that have remained silent demonstrate the dilemma facing agencies in these states.[144] Despite a long history of judicial acquiescence allowing lay representation, an examination of the state's applicable law often results in a conclusion that nonlawyer representation is illegal.[145] Often attorney general opinions are the only source of information upon which a state agency may rely for formulating acceptable standards for the practice of law before the agency.[146]

The specific statutes that have been interpreted to reach the conclusion that nonlawyer representation is illegal generally define the practice of law broadly and ambiguously.[147] Most of the statutes, however, were enacted at a time when the court viewed its role as very paternalistic.[148] These old and broad definitions of the practice of law

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142. *Id.* at 197, 369 N.W.2d at 843.

143. The Michigan court stated: "In construing a statute, [the Supreme Court] will make every effort to give meaning to every part of it and avoid rendering any part nugatory." *Id.* at 196, 369 N.W.2d at 843 (citing Melia v. Appeal Bd. of Mich. Employment Sec. Comm'n, 346 Mich. 544, 562, 78 N.W.2d 273, 275 (1956)).

144. The Utah Attorney General noted that the "contradiction" between legislative statutes and case law "makes it difficult to predict whether the court will defer to the legislature's decision . . . . It is not clear whether the court will impose its own standards . . . ." Op. Att'y Gen. Utah 87-25 (July 21, 1987).

145. *See, e.g.*, Op. Att'y Gen. Colo. File No. OLS8804271/AQT (Sept. 1, 1988) (stating that a nonlawyer may not represent taxpayers before the Colorado Board of Assessment Appeals).

146. The analysis in these states would seem particularly relevant since the Tennessee legislature ignored an attorney general opinion on the precise issue of nonlawyer representation before the State Board of Equalization in enacting H.R. 1482. *See supra* note 11 and accompanying text.

147. The statutes define the practice of law with a "broad sweep and imprecise definition." C. WOLFRAM, *supra* note 66, § 15.1.3, at 835. As recently as 1988 the Florida Supreme Court stated that "[t]he practice of law is an amorphous term, not susceptible to precise definition." Florida Bar re Advisory Opinion HRS Nonlawyer Counselor, 518 So. 2d 1270, 1271 (Fla. 1988).

148. An example of an overly broad statute designed to protect the public can be found in State *ex rel.* Fla. Bar v. Sperry, 140 So. 2d 587 (Fla. 1962), *vacated and remanded*, 373 U.S. 379 (1963). The Florida Supreme Court stated:

include almost all areas of commercial and governmental activities and are insufficient in the modern era.[149] Therefore, gaps occur in the law because the statutes were not designed to address modern situations such as appearances before administrative agencies. The broad parameters of these outdated statutes effectively require the attorney general to conclude that nonlawyer representation constitutes the unauthorized practice of law. Nevertheless, although the opinions forbid nonlawyer representation in the respective instance addressed, the opinions recognize a valid role for nonlawyers in some areas.[150]

Although attorney general opinions recognize a legitimate role for the nonlawyer, there is a disparity of opinions granting a nonlawyer a right to appear in agency proceedings. This apparent inconsistency may be the result of several motivations. Cynics contend that the attorney general opinions simply are an example of lawyers helping lawyers.[151] A more optimistic view, however, is that the attorneys general merely are being conservative. In light of the broad definitions being interpreted, a conclusion that prohibits nonlawyer representation in a close case serves to protect the public until the judiciary can act.[152]

Despite their ultimate conclusion, several of the attorney general opinions demonstrate an understanding of the practical realities that warrant nonlawyer representation in certain situations. The obvious inconsistency between the broad statutes and the history of lay representation before state agencies inevitably led to confusion. Consequently, several opinions attempt to provide some principles with which to guide the formation of a regulatory framework.[153]

> [I]f the giving of such advice and performance of such services affect important rights of a Person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

Id. at 591; *see also* Denver Bar Ass'n v. Public Utils. Comm'n, 154 Colo. 273, 279, 391 P.2d 467, 471 (1964) (en banc) (ruling that "one who acts in a representative capacity in protecting, enforcing, or defining the legal rights and duties of another and in counselling, advising and assisting him in connection with these rights and duties is engaged in the practice of law").

149. C. WOLFRAM, *supra* note 66, § 15.1.3, at 835.

150. *See, e.g.*, Op. Att'y Gen. Colo. File No. OLS8804271/AQT (Sept. 1, 1988).

151. *See, e.g.*, Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1189 (Fla. 1978) (per curiam) (noting that "[b]ecause of the natural tendency of all professions to act in their own self interest, however, this Court must closely scrutinize all regulations tending to limit competition in tbe delivery of legal services to the public . . .").

152. The effectiveness of such a deferential approach is extremely suspect because the judiciary has been reluctant to confront the issue of representation before administrative proceedings. *See supra* notes 36 & 37.

153. *See, e.g.*, Op. Att'y Gen. Kan. No. 79-298 (Dec. 13, 1979); 65 Op. Att'y Gen. Md. 28 (1980); Op. Att'y Gen. Utah No. 87-25 (July 21, 1987).

The Utah Attorney General recommends a situational approach in which a universal standard could be applied to all administrative proceedings.[154] While providing a bright-line test, a situational approach unnecessarily prevents lay representation in many circumstances. Under the Utah approach, nonlawyer representation is allowed only when four specific circumstances are present: (1) when de novo review is available on appeal; (2) when the amount in controversy is too small to warrant the hiring of an attorney; (3) when the nonlawyer is supervised by an attorney; and (4) when the representative does not charge a fee.[155]

Other attorney generals advocate a balancing approach. Proponents of this view argue that the inadequacy of an all or nothing test can be demonstrated by examining constitutional, efficiency, and public policy considerations.[156] Such a fact specific approach was adopted by the Attorney General of Kansas.[157] Refusing to adopt an all or nothing agency by agency analysis, the Kansas Attorney General focuses on the character of the act done, rather than where the act was performed.[158] The Kansas opinion also provides guidance for establishing when an administrative proceeding exceeds its legislative function and assumes judicial powers. The first question under the Kansas test is whether the parties could have solicited the courts for redress without first bringing their claim to the agency.[159] The second step in the Kansas test is whether the function performed by the representative was historically a judicial function practiced prior to the creation of the administrative body.[160]

The rejection of a uniform definition of the practice of law reveals that a fact specific balancing approach represents the growing trend. The *Model Code of Professional Responsibility* focuses on the lawyer's "professional judgment" and "educated ability to relate the general body and philosophy of law to a specific legal problem."[161] Under this definition, nonlawyers should be allowed to appear during informal proceedings that do not require a sophisticated knowledge of law.

Even if one accepts "professional judgment" as the determinative factor in the practice of law, additional considerations remain. A 1988

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154. *See* Op. Att'y Gen. Utah No. 87-25 (July 21, 1987).

155. *Id.* The Utah Attorney General analyzed the situations in which nonlawyer representation was allowed in sister states in formulating the opinion.

156. Even states that place an absolute ban on nonlawyer representation avoid firm standards and rely on public policy considerations to justify their conclusions. *See, e.g.*, Op. Att'y Gen. Nev. No. 87-9 (May 11, 1987).

157. *See* Op. Att'y Gen. Kan. No. 79-298 (Dec. 13, 1979).

158. *Id.*

159. *Id.*

160. *Id.*

161. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1981).

Colorado attorney general opinion focused on the magnitude of a client's interests in refusing to allow laypersons to appear before the state's Board of Assessment Appeals.[162] While endorsing the continued use of lay representation in "poor man's court," the Attorney General concluded that the large sums involved in matters before the Tax Board and the inexperience of laypersons in procedural and substantive matters necessarily affect their clients' interests.[163]

Questions addressing the scope of review over state administrative agencies also have been problematic. Judicial appeal universally is allowed for a party who has exhausted all administrative remedies.[164] These appeals, however, often are limited to questions of law and additional evidence may not be introduced on appeal.[165] Thus, preparation of an adequate record is vital to the protection of a client's interests. Under the "professional judgment" model, the nonlawyer does not possess the training, skill, or even the motivation to develop an adequate record for appeal.

VI. CONCLUSION

The conflicting views among the states exemplify the difficulty of developing a standard that adequately addresses both the procedural and substantive protections the public deserves. Tennessee and many other states, however, demonstrate the problems caused when policy decisions are not made. The amorphous language used by the judiciary allows the courts to selectively apply existing laws. The resulting confusion prevents the development of consistent standards concerning the proper role for nonlawyers appearing as representatives before state administrative agencies.

The lack of guidance within a particular state may be the result of a power struggle between the legislative and judicial branches. In contrast to the decentralized federal regulatory structure, state supreme courts maintain ultimate regulatory control over the practice of law.[166]

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162. Op. Att'y Gen. Colo. File No. OLS8804271/AQT (Sept. 1, 1988).

163. *Id.* Since issues before these boards usually do not involve legal issues, however, such a distinction is difficult to justify theoretically. Lawyers are, in most instances, less qualified as experts in nonlegal fields such as taxation than the nonlawyer experts who concentrate on these areas. *Compare id. with* Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 263, 619 P.2d 1036, 1040 (1980) (finding that although competency is important, the courts are also concerned with the ethical standards, discipline, training, and controls placed on lawyers). For further discussion of the *Hunt* court's public policy analysis, see *supra* notes 128, 129, and accompanying text.

164. *See, e.g.*, TENN. CODE ANN. § 4-5-322(a) (Supp. 1989); *see also supra* note 56.

165. *See* Op. Att'y Gen. Colo. File No. OLS8804271/AQT (Sept. 1, 1988); Op. Att'y Gen. Kan. No. 79-298 (Dec. 13, 1979); *see also* TENN. CODE ANN. § 4-5-323(g) (Supp. 1989); *supra* note 54.

166. *See supra* notes 122-43 and accompanying text.

The overlap of legislative and judicial functions that inevitably occurs in a quasi-judicial legislative proceeding presents an additional question not present at the federal level: which is the proper body to control practice before state administrative proceedings? Whether a result of comity considerations or a failure to recognize the potential hazards to the public, neither the judiciary nor the legislature authoritatively has defined these standards.

The failure to address adequately the proper scope of nonlawyer representation before state agency proceedings could undermine the public's right to adequate representation. A subtle recognition of this potentially serious problem seems to be emerging. The long history of permitting lay representation without express statutory authorization demonstrates that both branches, at least implicitly, recognize a legitimate role for the nonlawyer during state administrative proceedings. A definite trend toward a balancing approach among the states that have considered the issue exists. The balancing analysis recognizes that individual agencies are sufficiently unique to warrant separate consideration and allows competing policy objectives to be considered on a case by case basis.

Tennessee House Bill 1482 is an excellent example of an attempt to provide the proper mix that is desirable when balancing the competing interests of free choice and efficiency against the public's need for protection. House Bill 1482 was designed to ensure that nonlawyer representation would continue before the State Board of Equalization. Additional provisions, however, were included in the bill to provide safeguards to the public and to minimize constitutional infringements upon the judicial power to regulate the practice of law.[167] Furthermore, although its effectiveness is untested, the statute also prescribes standards of conduct to govern both attorneys and authorized lay representatives who appear before the Board.[168]

The Tennessee General Assembly properly acted within its authority in asserting the power to prescribe standards for representatives appearing before the State Board of Equalization.[169] House Bill 1482 contains safeguards designed to address the potential conflicts that may arise. First, requiring disclaimers by nonlawyers prevents misrepresentation and allows the public to make an informed choice.[170] Second, al-

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167. *See* TENN. CODE ANN. §§ 67-5-1511(b), -1514(g) (Supp. 1988); *see also supra* notes 59, 60, and accompanying text.

168. *See* TENN. CODE ANN. § 67-5-1514(c), (f) (Supp. 1988).

169. In Tennessee the legislature may guide the formulation of judicial policies in performance of its police powers. *See In re* Tenn. Bar Ass'n, 532 S.W.2d 224 (Tenn. Ct. App. 1987); *see also supra* notes 33, 34, and accompanying text.

170. *See* TENN CODE ANN. § 67-5-1514(g) (Supp. 1988); *see also supra* note 60 and accompa-

lowing de novo review for judicial appeals from the Board protects a client's substantive legal rights.[171] Finally, although the magnitude of interests are often significant in controversies before the Board,[172] the sophistication and overall competence of the majority of clients required to appear before the Board should prevent the selection of incompetent nonlawyer counsel.[173] The only justifiable concern regarding House Bill 1482 may be the existence of inherent structural defects that prevent an attorney and lay representative from acting on equal footing.[174] The validity of such a concern, however, presupposes that representation before the Board constitutes the practice of law. If such representation were not the practice of law, a lawyer representing a client before the Board effectively would leave his role as an attorney regulated by a Code of Professional Responsibility and step into the agency's prescribed role for representatives.

The judicial response to House Bill 1482, or lack thereof, should shed light on how Tennessee courts will regulate practice before state administrative agencies. Because House Bill 1482 is tantamount to an express assumption of legislative power to authorize nonlawyer representation, the Tennessee Supreme Court may reassert its superiority. However, the judiciary more likely will uphold the statute. The tradition of lay representation and resulting reliance by the public were major factors upon which the legislature justified the statute.[175]

The judiciary's acceptance of a tradition of lay representation for many years is strong evidence that the judiciary recognizes a legitimate role for the nonlawyer in the administrative setting. In addition, judicial silence may represent a shift toward the federal approach in which the legislature is supreme within its own sphere. The resulting power structure allows the legislature the freedom to oversee and develop an efficient means of performing its legislative functions, while reserving ultimate power for the judiciary if the legislature oversteps its authority.

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171. *See* TENN. CODE ANN. § 67-5-1511(b) (Supp. 1988); *see also supra* note 59 and accompanying text.

172. *See* Op. Att'y Gen. Colo. File No. OLS8804271/AQT (Sept. 1, 1988); *see also supra* notes 162, 163, and accompanying text.

173. *See supra* note 120 and accompanying text.

174. *See supra* notes 89-102 and accompanying text.

175. *See supra* notes 29, 30, and accompanying text.