

# COLLOQUIUM

## LAWYERING IN THE REGULATORY STATE

### FOREWORD

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#### INTRODUCTION

In common parlance, the “regulatory state” refers to governance through specialized administrative agencies, such as the federal agencies that arose during the progressive era in the United States.<sup>1</sup> Lawyering in the regulatory state takes a number of different forms, including the private representation of clients who are either litigating before agencies or facing compliance issues, as well as the public employment of lawyers within the agencies themselves. Both types of regulatory lawyering raise a wide range of unique ethical issues for lawyers and are the subject of the articles in this Fordham colloquium entitled *Lawyering in the Regulatory State*. These issues arise in the context of federal administrative agencies that we have heard much about, such as the Securities and Exchange Commission (SEC), the Food and Drug Administration (FDA), and the Patent and Trademark Office (PTO), lesser-known federal agencies, such as the National Highway Transportation Safety Administration (NHTSA), the Consumer Products Safety Commission (CPSC), the Office of Disability Adjudication and Review (ODAR), and the Executive Office for Immigration Review, and a host of state agencies that “affect[] everyday life in countless ways.”<sup>2</sup> The authors use a variety of methodologies, including traditional legal analysis, as well as empirical<sup>3</sup> and historical<sup>4</sup> research. Finally, they focus on such

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1. See, e.g., J.E. ANDERSON, THE EMERGENCE OF THE REGULATORY STATE (1962); see also George M. Cohen, *The Laws of Agency Lawyering*, 84 FORDHAM L. REV. 1963 (2016).

2. Elizabeth Chambliss & Dana Remus, *Nothing Could Be Finer?: The Role of Agency General Counsel in North and South Carolina*, 84 FORDHAM L. REV. 2039, 2040 (2016).

3. See *id.* at 2141 (“[The] account draws on interviews with current and former agency counsel, agency directors, and lawyers in the state Attorney General’s office, as well as roundtable discussions among agency counsel on topics of common interest.” (footnotes omitted)); David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823 (2016); Milton C. Regan, Jr. & Kath Hall, *Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights*, 84 FORDHAM

diverse issues as the role of agencies in facilitating access to justice,<sup>5</sup> the lawyer's role as gatekeeper in agency litigation<sup>6</sup> and regulatory compliance,<sup>7</sup> and the unique role of the in-house lawyer, both private<sup>8</sup> and public.<sup>9</sup> Taken together, they open a large window on the complex work of many lawyers who are often overlooked in the legal profession's literature.

### I. PRIVATE REGULATORY LAWYERS: ADVOCACY AND ADVISING

The ethical conduct of private lawyers is often discussed in the context of the lawyer as an advocate in civil or criminal litigation<sup>10</sup> or as an advisor to clients whose conduct pushes the limits of the law generally, including, without differentiation, common law, statutes, and administrative regulations.<sup>11</sup> What largely has been ignored, however, are the special problems associated with litigating before administrative agencies, many of which have unique procedures,<sup>12</sup> as well as the differing abilities of the various agencies to secure compliance with their particular regulatory regimes. In this colloquium, two of the articles on private regulatory lawyering address the lawyer as litigator, whereas the remaining five articles focus on lawyers who advise clients on regulatory compliance issues.

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L. REV. 2001, 2002 (2016) (noting that the article "draw[s] on interviews with twenty-nine lawyers involved in the business and human rights field" (footnote omitted)).

4. See David McGowan, *Lawyering Within the Domain of Expertise*, 84 FORDHAM L. REV. 1929, 1929 (2016) ("This Article uses the history of patent prosecution to assess the relationship between the practice of law and the claim of an administrative agency to possess and to employ expertise.").

5. For example, Hausman and Srikantiah examine the relationship between the length of court continuances and the ability of immigrants and their families to obtain a private lawyer. See Hausman & Srikantiah, *supra* note 3.

6. See, e.g., *infra* notes 23–35 and accompanying text (discussing article by Milan Markovic that examines the lawyer's potential role as gatekeeper in litigating Social Security Disability Insurance claims).

7. See, e.g., *infra* notes 39–45, 47–54 and accompanying text (discussing an article by Sung Hui Kim that defends her proposed reforms to enhance in-house lawyers' role as gatekeepers to prevent harm to the securities markets); *infra* notes 46, 55–61 and accompanying text (discussing an article by Bernard W. Bell that examines the in-house lawyer's potential role as gatekeeper in promoting compliance with product safety regulations).

8. See Bernard W. Bell, *Recalling the Lawyers: The NHTSA, GM, and the Chevrolet Cobalt*, 84 FORDHAM L. REV 1899 (2016) (focusing on criticism of company's in-house lawyers in recent corporate scandal); Sung Hui Kim, *Inside Lawyers: Friends or Gatekeepers?*, 84 FORDHAM L. REV 1867 (2016).

9. See Chamblis & Remus, *supra* note 2.

10. See, e.g., STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 325–422 (9th ed. 2012).

11. See, e.g., 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 6.22 (4th ed. 2016) (discussing the prohibition against lawyers counseling or assisting unlawful conduct).

12. See, e.g., Cohen, *supra* note 1 (discussing different regulatory regimes of different federal agencies).

In their article entitled *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*,<sup>13</sup> David Hausman and Jayashri Srikantiah examine the role of lawyers in administrative proceedings before immigration courts, which are overseen by the Executive Office for Immigration Review, an office within the U.S. Department of Justice. The issue for them is not the ethical conduct of the immigrant family's lawyer, but rather the proper role of these particular administrative courts in facilitating the ability of an immigrant family facing deportation to access justice through legal representation.<sup>14</sup> Because the proceedings are civil rather than criminal, there is no currently recognized right to a government-funded lawyer for those who cannot afford one.<sup>15</sup> According to the empirical research of Hausman and Srikantiah, only 14 percent of the immigrant families studied began their immigration proceedings with a lawyer; however, after the immigration judge advised them that they had a right to a lawyer at their own expense and offered them a continuance to find one, as many as 44 percent found a lawyer by the time of their second hearing.<sup>16</sup> Moreover, "The more time they had between hearings, the more likely they were to find a lawyer."<sup>17</sup> This time was necessary for them to either accumulate the money to pay a lawyer or locate a lawyer willing to represent them for free.<sup>18</sup>

There is a consensus that immigration court judges must grant a continuance after the first hearing; however, current law does not specify the length of that continuance, and the practices of individual judges differ significantly.<sup>19</sup> Hausman and Srikantiah demonstrate the problematic nature of this variability by first calculating the effect of having a lawyer on the likelihood of deportation. Their research reveals a distinct pattern between the length of a continuance (between the first and second hearing) and eventual deportation. This correlation peaks at approximately 100 days,<sup>20</sup> which is also the number of days making the most significant difference in the ability of immigrants to find representation.<sup>21</sup> As a result of their research, they advocate a presumptive right to a ninety-day continuance after the first hearing.<sup>22</sup>

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13. Hausman & Srikantiah, *supra* note 3.

14. *Id.* at 1835 (discussing "origins and contours of the right to a reasonable time [for immigrants facing deportation] to seek counsel").

15. See *id.* at 1825 (discussing position of federal government that such immigrants have no right to a government-provided lawyer); *id.* at 1825 n.9 (providing funding for lawyers to represent unaccompanied children but not for lawyers to represent families with children facing deportation).

16. *Id.* at 1826.

17. *Id.*

18. *Id.* at 1827.

19. *Id.* at 1828.

20. See *id.* at 1832 fig.3.

21. *Id.* at 1830 (discussing *Figure 2: Continuance Length and Representation for Priority Docket Cases*).

22. *Id.* at 1842–43.

In his article entitled *Lawyers and the Secret Welfare State*,<sup>23</sup> Milan Markovic addresses an ethical problem that confronts lawyers litigating Social Security Disability Insurance (SSDI) claims before the federal Office of Disability Adjudication and Review<sup>24</sup> (ODAR). The issue is whether and when lawyers are required to disclose to ODAR judges the existence of evidence known to them that is adverse in some respect to their client's claim of disability.<sup>25</sup> As Markovic notes, SSDI processes are nonadversarial,<sup>26</sup> the government is not represented in the hearings,<sup>27</sup> and Model Rule 3.3(d) of the American Bar Association's Model Rules of Professional Conduct requires lawyers in ex parte proceedings to "inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."<sup>28</sup> Although one state bar has opined that this rule applies to SSDI proceedings,<sup>29</sup> another state bar opinion concludes that SSDI proceedings are not ex parte because ODAR judges have the ability to develop the record.<sup>30</sup> There have been efforts to amend the Social Security Act to require expressly the production of unfavorable evidence, but these efforts were defeated, largely as the result of efforts of the organized bar.<sup>31</sup> Markovic decries these efforts, pointing to the contrary posture of the organized tax bar, which "largely supported legislative and regulatory efforts that formalized tax lawyers' gatekeeping responsibilities" in the context of tax shelters.<sup>32</sup>

After developing an argument that distributive justice requires that lawyers seeking public benefits for their clients act as gatekeepers by refusing to pursue illegitimate client interests,<sup>33</sup> Markovic addresses the question of how this result can be achieved, given the opposition of the organized bar. He proposes that the Social Security Administration (SSA) "require lawyers to certify that, based on their review of the relevant client materials, there is a reasonable basis to believe that their clients qualify for benefits."<sup>34</sup> Concerned, however, that the agency might not have the statutory authority to regulate lawyers in this manner, Markovic also proposes that the SSA provide for voluntary certification, which could benefit clients through "expedited and less exacting review."<sup>35</sup>

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23. Milan Markovic, *Lawyers and the Secret Welfare State*, 84 FORDHAM L. REV. 1845 (2016).

24. He also address Medicaid planning, *id.* at 1847, but the emphasis in the article is on litigating SSDI claims.

25. *Id.* at 1848.

26. *Id.* at 1847.

27. *Id.* at 1850.

28. *Id.* (citing and quoting ABA MODEL RULES OF PROF'L CONDUCT r. 3.3(d) (AM. BAR ASS'N 2013)).

29. *Id.* at 1850 & n.40 (citing Ala. Bar Ass'n Disciplinary Comm'n, Op. RO-93-06 (1993)).

30. *Id.* (citing N.C. State Bar, 98 Formal Ethics Op. 1 (1999)).

31. *Id.* 1851.

32. *Id.* at 1861 (footnote omitted).

33. *Id.* at 1859.

34. *Id.* at 1862.

35. *Id.* at 1863.

The concept of the lawyer as “gatekeeper” is more commonly invoked in discussions of the role of the private lawyer as advisor to clients in situations where the lawyer knows or arguably should know that the client’s conduct may be unlawful.<sup>36</sup> In the wake of Enron and other corporate scandals, Congress passed the Sarbanes-Oxley Act of 2002 (SOX), pursuant to which the SEC adopted regulations requiring lawyers who “appear and practice” before the SEC to report credible evidence of corporate violations up the ladder, all the way to the board of directors.<sup>37</sup> Two of the contributors to this colloquium invoke a more recent scandal involving General Motors Company (GM) to reassess federal agency regulation of lawyers for companies like GM.<sup>38</sup>

In 2014, after many years of delay, GM finally recalled 2.6 million vehicles with a defective ignition switch, which by June 2015 had caused hundreds of deaths and many more serious injuries.<sup>39</sup> A report commissioned by GM’s board concluded that GM’s in-house lawyers knew, as early as 2005, that GM’s Cobalt had a tendency to stall while in motion and learned in 2007 that the defective switch had been linked to an air bag failure.<sup>40</sup> In 2010, the lawyers apparently understood that the Cobalt had a history of airbag deployments and had been warned by GM’s outside products liability lawyers that GM could be subjected to punitive damages for its inaction.<sup>41</sup> Nevertheless, these in-house lawyers failed to inform GM’s general counsel of the potential need for a recall until December 2013.<sup>42</sup> In 2014, four of GM’s in-house lawyers were terminated, and the General Counsel announced his resignation.<sup>43</sup>

Our two contributors confront the GM scandal from two different regulatory perspectives. Sung Hui Kim reiterates her previous criticism of the SEC regulations adopted pursuant to SOX<sup>44</sup> as inadequate to address harm to the securities markets as a result of “inside lawyer acquiescence in corporate fraud.”<sup>45</sup> Bernard Bell is less concerned with preventing harm to corporate shareholders and investors than he is with the need to promote compliance with product safety regulations designed to protect the public from serious harm caused by defective products such as GM’s Cobalt.<sup>46</sup>

36. See, e.g., Kim, *supra* note 8, at 1869 (discussing a previous article in which Kim defined a “gatekeeper” as a “private intermediary who can prevent harm to the securities markets by disrupting the misconduct of [his or her] client representatives” (quoting Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 413 (2008))).

37. See, e.g., Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 727–28, 740 (2004).

38. See *infra* notes 39–61 and accompanying text.

39. See Kim, *supra* note 8, at 1867.

40. *Id.* at 1868.

41. *Id.*

42. *Id.*

43. *Id.*

44. 17 C.F.R. § 205.1–7 (2015).

45. See Kim, *supra* note 8, at 1869. Kim wrote a series of articles promoting the in-house lawyer’s role as gatekeeper, beginning with a 2005 article. See Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel As Gatekeeper*, 74 FORDHAM L. REV. 983 (2005). For a discussion of Kim’s critique of the SOX regulations, see *id.* at 1034–52.

46. See Bell, *supra* note 8.

In her article entitled *Inside Lawyers: Friends or Gatekeepers?*, Kim responds to a critic of an earlier article where she analyzed the “ethical ecology” of in-house counsel, in which multiple roles “unleash psychological pressures that strongly affect the actions and choices of inside lawyers,” leading them to “turn a blind eye to unethical corporate behavior.”<sup>47</sup> Kim believed that the SOX regulations were inadequate to address this problem and thus proposed an alternative reform in which: (1) a committee of independent board members would oversee the corporate legal department; (2) inside counsel would be guaranteed whistleblower protection for any claim alleging retaliation; and (3) public companies would either limit the amount of equity investments an in-house lawyer could accept as compensation or otherwise minimize the potential for conflicts of interest arising from such compensation.<sup>48</sup> Lawrence Hamermesh criticized this proposal as “radical” and cautioned that direct board oversight would cause general counsel to lose access to information they would otherwise receive through informal communications with senior managers.<sup>49</sup> Hamermesh responded with his own less-radical proposals designed to encourage general counsels’ independence without sacrificing the trust of senior managers.<sup>50</sup>

In her current article, Kim defends her earlier proposals, arguing that Hamermesh’s alternative reforms do nothing to address “the *structural* forces likely to lead inside lawyers to succumb to psychological pressures in their multiple roles.”<sup>51</sup> Conceding that it is at least plausible that her proposed reforms might reduce the level of informal communication between general counsel and senior managers, Kim argues that there are numerous other sources of information, and, in any event, the likely benefits of her proposals outweigh the potential costs.<sup>52</sup> She concludes by contrasting her vision of “lawyer as gatekeeper” with Hamermesh’s vision of “lawyer as friend,”<sup>53</sup> an image that featured prominently in a controversial article authored by Charles Fried that has been the subject of much criticism.<sup>54</sup>

In his article entitled *Recalling the Lawyers: The NHTSA, GM, and the Chevrolet Cobalt*, Bell observes that the lawyer’s role as gatekeeper in the context of the SEC’s newly enacted SOX regulations is not necessarily inconsistent with the lawyer’s loyalty to clients because the goal of these regulations is to counteract the corporate lawyer’s natural inclination “to pursue management’s interests at other constituencies’ expense.”<sup>55</sup> With

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47. Kim *supra* note 8, at 1871.

48. *Id.* at 1871–72.

49. *Id.* at 1869–70 (discussing Lawrence A. Hamermesh, *Who Let You Into the House?*, 2012 Wis. L. REV. 359).

50. *Id.* at 1888.

51. *Id.* at 1875 (footnote omitted).

52. *Id.* at 1883.

53. *Id.* at 1887–95.

54. *Id.* at 1888–89 (discussing Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976)).

55. Bell, *supra* note 8, at 1900 (footnote omitted).

respect to nonsecurities lawyers, however, there is less of an identity between the lawyer's client and regulatory beneficiaries, and yet "the physical harms that may befall consumers [of defective products] are far more serious than the financial losses shareholders typically suffer."<sup>56</sup> Bell then uses GM's response to the Cobalt ignition switch defect as a case study to examine the question of whether it is legal and prudent for a regulatory agency to impose gatekeeping responsibilities on such counsel.<sup>57</sup>

In recounting the actions of GM's in-house and outside counsel, Bell notes that, in contrast to the role of lawyers in SEC filings, neither set of GM lawyers played a significant role in disclosures GM made to NHTSA.<sup>58</sup> In-house lawyers were informed by outside products liability litigators of the extent of the defect problem, and these in-house lawyers clearly took far too long in responding to these concerns.<sup>59</sup> However, Bell is not convinced that the appropriate regulatory response is for product safety agencies to regulate the conduct of lawyers. He questions the authority of these agencies to enact such regulations, distinguishing them from the SEC, which acted pursuant to authorization in the text of SOX, and further noting that the GM lawyers did not "practice" before NHTSA, nor were they involved in any "agency proceedings."<sup>60</sup> More importantly, he questions whether it would be prudent for such agencies to attempt to make lawyers serve as gatekeepers in the product safety context, arguing that they lack the expertise to resolve controversial ethics issues and that there are alternative ways of increasing company compliance; for example, by enacting whistleblower bounties or by requiring the companies to obtain a lawyer's certification before taking certain actions.<sup>61</sup>

David McGowan is also concerned with the differing types of relationships between lawyers and particular administrative agencies. In his article entitled *Lawyering Within the Domain of Expertise*, McGowan focuses on the PTO and then "uses the history of patent prosecution to assess the relationship between the practice of law and the claim of an administrative agency to possess and to employ expertise."<sup>62</sup> His thesis is that "where an agency *claims* expertise, that claim will lead it to give lawyers appearing before it less leeway than lawyers generally have."<sup>63</sup>

McGowan's historical review of patent prosecutions portrays the PTO as swinging back and forth between claims of agency expertise, under which the PTO would engage in a rigorous examination of a patent claim,<sup>64</sup> and a preference of "legal over technical expertise,"<sup>65</sup> in which the PTO would grant patent requests liberally and defer to courts the adjudication of

56. *Id.* at 1901.

57. *Id.*

58. *Id.* at 1903.

59. *Id.* at 1904–11.

60. *Id.* at 1914.

61. *Id.* at 1918–27.

62. McGowan, *supra* note 4, at 1929.

63. *Id.* at 1929–30.

64. See *id.* at 1931–33.

65. *Id.* at 1943.

disputes between patent holders and their challengers.<sup>66</sup> He demonstrates how lawyers were ambivalent but generally sided with the liberal grant of patents, not only because their inventor-clients preferred that regime, but also because it permitted the lawyers to earn large contingent fees in patent litigation and to exercise their “tradecraft.”<sup>67</sup> In response to numerous abuses of the liberal regime, in which lawyers played a significant role, the PTO reasserted its own expertise, culminating in the adoption of agency rules designed to prohibit “fraud and inequitable conduct” by applicants and their agents, including lawyers.<sup>68</sup> He concludes that “[t]hough there are many justifications for regulation [of lawyers], an agency’s *claim* of disinterested expertise will tend to produce stricter rules on lawyers’ behavior than would be found absent that claim.”<sup>69</sup>

Unlike the previous authors, George M. Cohen takes a comprehensive approach to the “teeming variety of agency rules governing lawyers.”<sup>70</sup> In his article entitled *The Laws of Agency Lawyering*, Cohen takes a close look at forty-six federal agencies with rules governing practice before these agencies.<sup>71</sup> He catalogues the different approaches they take and then seeks to determine if there is a rational basis for these differences.

Cohen begins by examining the rather cursory treatment of private agency lawyering under the ABA Model Rules, concluding that these rules leave a number of unresolved questions, including the extent to which violating an agency rule subjects a lawyer to discipline under state ethics standards.<sup>72</sup> He then turns to potential explanations and justifications for federal agency rules regulating the conduct of lawyers, including the following candidates: (1) specialized rules tailored to specific agency practices; (2) rules that unify practice before agencies generally; (3) uniform rules for lawyers and nonlawyers practicing before an agency; (4) inadequate enforcement of state ethics rules; (5) multijurisdictional practice issues; (6) private lawyer interests; (7) experimentation in lawyer regulation; and (8) agency history and experience.<sup>73</sup>

In the remainder of the article, Cohen demonstrates detailed differences among the lawyer conduct rules of the forty-six federal agencies he examined, exploring variations with respect to the identification, format and scope of such rules, as well variations in their content.<sup>74</sup> He then analyzes the extent to which these rules reflect the various justifications for agency regulation. Noting that no “one explanation predominate[s]” over the others,<sup>75</sup> he provides examples of agency regulations reflecting each proposed justification, concluding that “[d]ifferent theories better explain

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66. *See id.* at 1938–48.

67. *Id.* at 1955.

68. *Id.* at 1953.

69. *Id.* at 1955.

70. Cohen, *supra* note 1, at 1964.

71. *Id.* app. A.

72. *Id.* at 1965–72.

73. *Id.* at 1972–78.

74. *Id.* at 1978–89.

75. *Id.* at 1981.

rules in different agencies, though the reason for the differences between agencies is not always apparent.”<sup>76</sup>

Thus far, our colloquium contributors addressed private regulatory lawyering in the context of administrative agencies within the federal government of the United States. Milton C. Regan, Jr. and Kath Hall expand the concept of private regulatory lawyering to consider the role of lawyers for multinational companies in respecting human rights. In their article entitled *Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights*, they describe the challenges posed by the rise of what they call “a system of transnational ‘governance.’”<sup>77</sup> Obviously, there is no international or transnational “state” that is the equivalent of the nation state; therefore, by “governance” they mean to “incorporate[] the network of actors, instruments, and mechanisms that to varying degrees regulate transnational corporations apart from formally authoritative state laws.”<sup>78</sup> Looking to actors such as “international organizations, non-governmental organizations (NGOs), industry and professional organizations and private sector providers,” the authors examine “regulatory instruments” that include both legally binding “hard law” and informal “soft law,” which is meant to influence conduct in a more informal manner such as through financial or reputational sanctions.<sup>79</sup>

After describing in some detail the protection afforded human rights under this system of “transnational ‘governance,’”<sup>80</sup> Regan and Hall begin to examine the role of lawyers within this system.<sup>81</sup> They do so through interviews with twenty-nine lawyers who are involved in advising businesses on human rights either as inside or outside counsel or are employed in organizations that play a role in this field.<sup>82</sup> The authors identify various factors found to influence these lawyers’ provision of human rights advice, including the binding or nonbinding nature of the relevant human rights obligations, the ability to frame human rights issues to appeal to client interests, and the relationship between outside and inside counsel.<sup>83</sup> They conclude that the most effective means of communicating with clients consists of what they call “the risk management lexicon,” including the risk of legal liability, the legal risks of nonbinding standards that are likely to become “hard law,” and business risk, including harm to the company’s reputation.<sup>84</sup> Regan and Hall conclude by observing that there is clearly a significant role for lawyers to play in this emerging system

76. *Id.*

77. Regan & Hall, *supra* note 3, at 2001.

78. *Id.* at 2001–02 (footnote omitted).

79. *Id.* at 2002.

80. *Id.* at 2003–20.

81. *Id.* at 2020–30.

82. Of the twenty-nine persons interviewed, two were senior lawyers in corporate legal departments, thirteen practiced at law firms, and fourteen worked for organizations that focus on business and human rights. *Id.* at 2020.

83. *Id.* at 2020–21.

84. *Id.* at 2024–30.

of transnational governance, but that it remains to be seen whether and how various lawyers will be willing to confront a system that “challenge[s] conventional understandings of what constitutes law and regulation.”<sup>85</sup>

## II. PUBLIC REGULATORY LAWYERS

Our three contributions on public regulatory lawyering examine strikingly different aspects of the professional lives of these lawyers. The first set of authors, Elizabeth Chambliss and Dana Remus, use empirical research to explore the counseling function of state agency lawyers, including the extent to which they actually shape agency policy and practice.<sup>86</sup> Daniel J. Bussel focuses on the government lawyer’s role as a third-party neutral when serving as an inquisitorial bankruptcy examiner under the supervision of federal bankruptcy judges.<sup>87</sup> Finally, Renee Newman Knaake explores the First Amendment rights of agency lawyers when they are engaged in a unique type of activity she describes as “assessment of the workplace.”<sup>88</sup>

In their article entitled *Nothing Could Be Finer?: The Role of Agency General Counsel in North and South Carolina*, Chambliss and Remus note that there has been considerable scholarship on the litigation role of state attorneys general, but very little on the role of state attorneys in counseling the agencies they work for.<sup>89</sup> The counseling function is important because these agency lawyers “provide day-to-day, front-end advice about a wide range of issues,” including the “interpretation of statutes and regulations [that] may significantly shape formal law,” much of which is never reviewed.<sup>90</sup>

Drawing on interviews and roundtable discussions with lawyers who have served in North or South Carolina as either current or former agency counsel, agency directors, or employees with the state attorney general, Chambliss and Remus examine “the structural evolution of the agency general counsel position and the functional division between in-house agency counsel and the Attorney General’s office,” as well as “the characteristics and career paths of lawyers who serve as agency general counsel” and the various “sources of authority in their roles.”<sup>91</sup> They discovered that agency general counsel are generalists, not specialists,<sup>92</sup> and that they are “relatively insulated from both hierarchical and political pressure.”<sup>93</sup> The coauthors conclude with observations on the limits of their sample and identification of a future research agenda, including expanding the sample to include former agency counsel and lawyers below

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85. *Id.* at 2037.

86. Chambliss & Remus, *supra* note 2.

87. Daniel J. Bussel, *Ethics for Examiners*, 84 FORDHAM L. REV. 2073 (2016).

88. Renee Newman Knaake, *Lawyer Speech in the Regulatory State*, 84 FORDHAM L. REV. 2099, 2101 (2016).

89. Chambliss & Remus, *supra* note 2, at 2039–40.

90. *Id.* at 2040.

91. *Id.* at 2041.

92. *Id.* at 2056–57.

93. *Id.* at 2058.

the rank of agency counsel and examining the likelihood that further developing organized networks will “promote the development of shared professional norms and enhance agency counsels’ authority.”<sup>94</sup>

Bussel’s contribution, an article entitled *Ethics for Examiners*, builds on his prior scholarship<sup>95</sup> on bankruptcy examiners who have recently begun to employ “inquisitorial”—that is, nonadversarial—methods of investigation in large Chapter 11 reorganizations.<sup>96</sup> These methods differ from those employed by trustees or creditors’ committees, who, unlike examiners, are not neutrals.<sup>97</sup> Avoiding adversarial investigation and litigation has many advantages, including efficiency and more accurate fact-finding, but there are also costs, primarily the potential abuse of power by the examiners themselves.<sup>98</sup> To the extent they are regulated at all, inquisitorial examiners are supervised by the appointing bankruptcy court on an ad hoc basis.<sup>99</sup> Bussel’s article explores the possibility of regulating these examiners through binding codes of ethical conduct.<sup>100</sup>

Bussel begins by noting significant differences between the role of an inquisitorial examiner and possible analogous positions, such as prosecutor, judge, or mediator, concluding that these examiners are “*sui generis*” and face “unique ethical quandaries and considerations.”<sup>101</sup> He then describes in some detail the work of an inquisitorial examiner, using three recent cases he has discussed in his prior work.<sup>102</sup> After identifying the ethical framework in which such examiners work, including the important ways in which their role differs from other lawyers and judges,<sup>103</sup> Bussel addresses specific ethical issues: due process values; deposing witnesses and ex parte contacts; privileges; duties to the process and the public (including independent judgment, transparency, efficiency, minimizing threats to reorganization, overzealousness); and maintaining impartiality (for example, by avoiding conflicts of interest and declining to combine investigation with mediation).<sup>104</sup> His tentative suggestions with respect to each issue reflect his overall assessment of the particular nature of the inquisitorial examiner’s role, which is often akin to the judicial role but with some important exceptions, such as the need for access to privileged material of the debtor.<sup>105</sup>

94. *Id.* at 2064.

95. See Daniel J. Bussel, *A Third Way: Examiners As Inquisitors*, 90 AM. BANKR. L.J. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2587273](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587273) [https://perma.cc/E2DH-MS67].

96. Bussel, *supra* note 87.

97. *Id.* at 2074.

98. *Id.* at 2075.

99. *Id.* at 2076.

100. See *id.* at 2073–79.

101. *Id.* at 2078–79.

102. *Id.* at 2079–82.

103. *Id.* at 2082–84.

104. *Id.* at 2084–96.

105. Compare, e.g., *id.* at 2083–84 (duties to the process and the public much like duties of judges), with *id.* at 2086–88 (unlike a judge, an examiner has a need of access for a debtor’s privileged material).

Knake, who has previously argued in favor of strong First Amendment protection for attorney advice and advocacy,<sup>106</sup> builds on that prior work in her article entitled *Lawyer Speech in the Regulatory State*.<sup>107</sup> In this article, she joins other scholars who have criticized “two highly controversial split decisions from the Supreme Court ascribing minimal First Amendment protection to government lawyer speech—*Connick v. Meyers* and *Garcetti v. Ceballos*.<sup>108</sup> Her criticism is unique, however, in her focus on “the significance of workplace assessment speech by lawyers in the context of the regulatory state [which] has escaped the attention of commentators and courts.”<sup>109</sup>

She begins by situating the two most recent Supreme Court cases within a prior history of cases addressing the ability of government employers to regulate the speech of their employees. Prior to *Connick* and *Garcetti*, the Court was protective of the government’s role as employer, but carved out an exception for employee speech relating to matters of public concern that did not interfere with the efficient operation of the public employer.<sup>110</sup> In these two recent cases, however, Knake argues that the Court’s majority set an unduly high bar for what constitutes matters of “public concern”<sup>111</sup> and further required that the employee speak as a private individual in order to receive First Amendment protection.<sup>112</sup> Both cases involved agency lawyers, and as Knake observes, whistleblowing is arguably “a fundamental aspect of the role of a lawyer, where professional obligations require a fidelity to the democratic process and rule of law.”<sup>113</sup> She concludes by arguing that government lawyers, who are in a unique position to check agency misconduct, deserve heightened protection when they exercise “their professional judgment in deciding whether to engage in information providing, watchdogging, or whistleblowing functions.”<sup>114</sup>

#### CONCLUSION

Taken together, these colloquium articles confront issues of great interest to the legal profession. Whether they are addressing the ethical issues facing private regulatory lawyers or the special concerns of public regulatory lawyers, they identify questions that are relevant to the work of an increasing number of lawyers. These lawyers, who have been largely overlooked by the more traditional professional responsibility literature, will find much to learn in the pages of this highly informative and thought-provoking colloquium.

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106. See Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639 (2011).

107. See Knake, *supra* note 88.

108. *Id.* at 2104 (footnotes omitted).

109. *Id.*

110. *Id.* at 2106 (citing and discussing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

111. *Id.* at 2107–09 (citing and discussing *Connick v. Myers*, 461 U.S. 138 (1983)).

112. *Id.* at 2109–11 (citing and discussing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

113. *Id.* at 2110.

114. *Id.* at 2120.