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Attorney's Securities Law Liabilities

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ATTORNEYS' SECURITIES LAWS LIABILITIES

By

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The complaint filed by the Securities and Exchange Commission in *SEC* v. *National Student Marketing Corp.*,[1] has been described as "the best-read document since 'Gone With the Wind.'"[2] The action is significant and unprecedented not only because it is the first such action against a major law firm, but even more importantly because it posits novel theories as to the duties and obligations of lawyers, which would appear to significantly expand their liabilities.

Analysis of Complaint

The party defendants in the *National Student Marketing Corp.* case, alleged to have violated various provisions of the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), include the New York law firm of White & Case and one of its partners, Marion Jay Epley, III ("Epley"); the Chicago law firm of Lord, Bissel & Brook and two of its partners, Max E. Meyer ("Meyer") and Louis F. Schauer ("Schauer"); Robert A. Katz ("Katz"), a New York attorney; the national accounting firm of Peat, Marwick, Mitchell & Co. ("PMM"), one of its partners, and a former PMM auditor. The other defendants are National Student Marketing Corp. ("NSMC"); and nine persons who are officers and directors (including the General Counsel) of either NSMC or Interstate National Corp. ("Interstate") which merged with NSMC on October 31, 1969 and has since operated as a wholly-owned subsidiary. The complaint alleges a fraudulent scheme resulting in the issuance of approximately 11.2 million unregistered shares of NSMC stock between the fall of 1968 and June of 1970, in 83 separate transactions. During this period, the common stock of NSMC was registered with the SEC pursuant to Section 12(g) of the Exchange Act, and was traded in the over-the-counter market.

The charges against White & Case and Lord, Bissel & Brook are based upon their activities in connection with a stock for stock merger of Interstate into NSMC which occurred on October 31, 1969. Proxy soliciting material sent to stockholders of Interstate and NSMC seeking approval of the merger had contained unaudited financial statements of NSMC for the nine-month period ended May 31, 1969, which re-

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1. Civ. Action No. 225-72 (D.D.C. Feb. 3, 1972).

2. Green, *Irate Attorneys—A Bid to Hold Lawyers Accountable to Public Stuns, Angers Firms*, Wall St. J., Feb. 15, 1972, at 1, col. 1.

flected net earnings of $700,000. A condition of closing was a statement that PMM had no reason to believe that the unaudited financials as of May 31, 1969 were not prepared in accordance with generally accepted accounting principles and practices or required any material adjustments in order that the results of operations be fairly presented. In addition, PMM's comfort letter was to state that NSMC had not suffered any material adverse change in its financial position or results of operations. The comfort letter presented at the closing (which had been dictated in part over the telephone) stated that PMM's audit for the year ending August 31, 1969 which was still in progress disclosed certain significant adjustments which should be reflected retroactive to May 31, 1969. The contents of the letter were known to White & Case, counsel for NSMC; Lord, Bissel & Brook, counsel for Interstate; their respective defendant partners; NSMC and certain of its defendant officers and directors; and Interstate and its defendant officers and directors. Further, at the closing but before the merger was actually consummated PMM informed White & Case, Epley and the General Counsel and Secretary of NSMC that PMM wished to add another paragraph to the comfort letter stating that if the necessary adjustments had been made to NSMC's unaudited consolidated statement of earnings for the period ended May 31, 1969, NSMC would have shown a net loss for that period and the consolidated operations as at May 31, 1969, would show a break-even for the year ended August 31, 1969. About an hour after the closing, PMM informed White & Case and Epley that it wished to add still another paragraph to its comfort letter which would state that Interstate and NSMC should consider submitting corrected interim unaudited financials to stockholders prior to proceeding with the closing.

When the actual comfort letter was received, White & Case and Lord, Bissel & Brook issued opinions stating that all steps taken to consummate the merger had been validly taken and that no violation had been incurred of any federal or state statute or regulation to the knowledge of counsel. Lord, Bissel & Brook also issued an opinion that certain NSMC shares acquired by certain Interstate shareholders could be sold and such shares were sold on or about October 31, 1969 for approximately $3 million. In this connection, it should be noted that Meyer was a director of Interstate and he sold NSMC stock. The PMM comfort letter was mailed to all directors of NSMC and Interstate, but its contents were not disclosed to stockholders or otherwise made public. In October and November 1969, NSMC filed 8-K reports with the SEC which contained representations as to the fairness, truthfulness and accuracy of NSMC's financial statements as of May 31, 1969. White & Case transmitted the reports to the SEC.

The gravamen of the complaint against White & Case and Lord, Bissel & Brook and their respective defendant partners is their failure "to refuse to issue their opinions" that all steps taken to consummate

the merger had been validly taken and "to insist that the financial statements be revised and shareholders be resolicited, and failing that, to cease representing their respective clients" and notify the SEC "concerning the misleading nature of the nine-month financial statements." Additionally, Interstate shareholders sold NSMC shares in reliance on Lord, Bissel & Brook's opinion without disclosing the contents of the comfort letter. For these acts of omission, NSMC, various of its officers and directors, PMM, White & Case, Epley, Lord, Bissel & Brook, Meyer and Schauer are charged with violations of the anti-fraud provisions of the Securities Act and the Exchange Act and certain of the defendants, including White & Case and Epley, are charged with violations of Sections 13(a) and 14(a) of the Exchange Act. Various defendants, including White & Case, Epley and Katz, are also charged with violations of the anti-fraud provisions and Section 13(a) in connection with the sale of Compujob, Inc., allegedly made after August 31, 1969 for a non-recourse note, as of August 29, 1969, so that NSMC could include income from the sale in its August 31, 1969 year end financials. Katz represented the purchasers of Compujob, Inc. and issued opinions relating to such disposition.

The prayer for relief includes requests for an injunction against White & Case, Epley, Lord, Bissel & Brook, Meyer, Schauer and Katz from violation of the anti-fraud provisions of the Securities Act and the Exchange Act in connection with the purchase or sale of NSMC or any other issuer, requests for an injunction against White & Case, Epley and Katz from violation of Section 13(a) of the Exchange Act in the filing of false and misleading annual and other reports, and requests for an injunction against White & Case and Epley from issuing and disseminating proxy material for meetings of NSMC or any other person which do not comply with Section 14(a) of the Exchange Act. The breadth of the prayer for relief is noteworthy. It could transform an opinion of White & Case erroneously given in some future securities transaction into contempt of court. Ordinarily injunctions against securities laws violations in the securities upon which the complaint is based "or any other issuer" are reserved for repeated or notorious violaters of the law.[3] This type of language seems inappropriate to a case of first impression.

Prior Actions against Attorneys

Prior actions initiated against attorneys by the SEC, directly by way of Rule 2(e) disciplinary proceedings,[4] or indirectly by way of criminal

3. *See,* SEC v. Manor Nursing Centers, Inc., CCH FED. SEC. L. REP. ¶ 93,341, at 91,860-61 (2d Cir. 1972); SEC v. Seaboard Securities Corp., CCH FED. SEC. L. REP. ¶ 91,697, at 95,564 (S.D. N.Y. 1966).

4. Rule 2(e) of the SEC's Rules of Practice, 17 C.F.R. §201.2(e), empowers the SEC to suspend or disbar from appearing or practising before it any attorney found not to be unqualified or lacking in character or integrity or guilty of unethical or improper professional conduct; or to have willfully violated or aided

prosecutions,[5] have been unfortunately numerous. However, injunctive actions are a relatively recent phenomenon and indicate a subtle but significant shift in the agency's attitude toward the civil liabilities of attorneys for the securities laws violations of their clients.[6] The complaint in the *National Student Marketing Corp.* case is not significant or unusual because attorneys are named as defendants. Rather, the action is noteworthy and troubling because it charges illegal conduct by the defendants qua attorneys.

Criminal prosecutions of attorneys for securities laws violations have involved fairly patent frauds, where the defendants demonstrated a disregard for the law beyond any failure to discharge their professional obligations.[7] Similarly, SEC disbarment proceedings have ordinarily involved active participation in securities frauds, rather than nonfeasance or even malpractice.[8] The distinction between negligence and willful misconduct by a professional acting on behalf of clients who are law violaters can be very nebulous. The work performed by an attorney in connection with a securities transaction will usually involve the preparation of a prospectus, proxy solicitation or similar document and the issuance of an opinion as to the legality of various matters, possibly including sales of securities. Where such documents contain false or misleading information, an attorney's liability for such fraud, where an attorney is acting solely as agent for a client, must necessarily depend upon either actual knowledge of the fraudulent statements, or, absent such knowledge, a duty to discover the fraud. In a case which imposed criminal liability upon an attorney, the court noted

> "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss

and abetted violations of the federal securities laws. A recent amendment to this Rule, set forth in Securities Act Release No. 5147 (May 10, 1971), gives the SEC power to suspend without a preliminary hearing any attorney "permanently enjoined by any court of competent jurisdiction by reason of his misconduct in an action brought by the Commission from violation or aiding and abetting the violation of any provision of the federal securities laws . . . or of the rules and regulations thereunder." Presumably, such violations would not have to have been willful, and an attorney could be suspended without a hearing for conduct not sufficiently grevious to justify disbarment.

5. Section 24 of the Securities Act and Section 32(a) of the Exchange Act provide for criminal penalties for violations of these acts. The SEC transmits evidence of violations to the Attorney General for criminal prosecution pursuant to Section 20(b) of the Securities Act and Section 21(e) of the Exchange Act.

6. *See generally,* Mathews, *SEC Civil Injunction Actions, Pt. 1,* 5 REV. SEC. REG. 969 (1972) and cases cited therein.

7. *E.g.,* United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964); United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), *cert. denied sub. nom.* Mittleman v. United States, 368 U.S. 984 (1962); United States v. Schwartz, CCH FED. SEC. L. REP. ¶93,023 (E.D. N.Y. 1971).

8. *E.g.,* Marshall I. Stewart, Securities Act Release No. 4829 (Apr. 29, 1966); Morris MacSchwebel, 40 S.E.C. 347 (1960) and 40 S.E.C. 459 (1961); Sol M. Alpher, 39 S.E.C. 346 (1959). *But see,* Murray A. Kivitz, Securities Act Release No. 5163 (June 29, 1971) (suspension for unethical and unprofessional conduct in allowing a layman to exploit an attorney's privilege to practice before the SEC, acquiescing in improper fee arrangements and including questionable financial statements in a registration statement)

> more potent than the chisel or the crowbar. Of course, Congress did not mean that any mistake of law or misstatement of fact should subject an attorney or an accountant to criminal liability simply because more skilled practitioners would not have made them. But Congress equally could not have intended that men holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess."[9]

The first injunctive action brought by the SEC against an attorney based upon false statements in an offering circular (prepared for an intra-state offering) was *Securities and Exchange Commission* v. *Frank*.[10] The false statements concerned a chemical additive designed to accelerate the curing of rubber. The defendant attorney appealed from an order of preliminary injunction, taking the position that the portion of the offering circular containing misrepresentations about the additive had been prepared by officers of the issuer, and the defendant's function had been only that of a scrivener helping them to place their ideas in proper form. Although reversing the case for failure of the trial court to hold an evidentiary hearing and make findings of fact, the court held that if, as the SEC contended, the defendant had been furnished with information which even a non-expert would have recognized as showing the falsity of the misrepresentations in the offering circular an injunction would have been properly issued. "A lawyer has no privilege to assist in circulating a statement with regard to securities which he knows to be false simply because his client has furnished it to him." Further, a lawyer cannot escape liability for fraud "by closing his eyes to what he saw and could readily understand."

At the same time, the decision in the *Frank* case acknowledges that platitudes from conspiracy cases about liability for misrepresentations in securities sales literature do not adequately deal with the issue of whether an attorney who plays no role except that of counsel in drafting such literature can be held liable under the anti-fraud provisions of the securities acts. Whether such provisions "require a lawyer passing on an offering circular to run down possible infirmities in his client's story of which he has been put on notice, and if so, what efforts are required of him, is a closer question on which it is important that the

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9. United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964).

10. 388 F.2d 486 (2d Cir. 1968). In SEC v. A. G. Bellin Securities Corp., 171 F. Supp. 233 (S.D. N.Y. 1959) an attorney was enjoined from further violations of the Securities Act. The attorney had purchased the stock certificates and records of a shell corporation, the unregistered shares of which were shortly thereafter distributed to the public. The attorney engaged a transfer agent and participated in making marketing arrangements with brokers. Although he argued that whatever he did was done solely on behalf of and pursuant to instructions of his clients, he never disclosed the identity of any such clients. The court clearly held him liable as a principal in the transactions, rather than as an attorney.

court be seized of the precise facts, including the extent . . . to which [the defendant's] role went beyond a lawyer's normal one."[11]

A harbinger of the *National Student Marketing* case was the complaint filed in *SEC* v. *Everest Management Corp.*,[12] which charged 44 defendants with 45 separate counts of securities fraud, centering around the market manipulation of a number of stocks, through various mutual funds and hedge funds to the detriment of the investors in such funds, and the embezzlement by certain persons of the assets of some of the funds. Two defendants named in the complaint are attorneys. One of them was secretary, counsel and shareholder of defendant Microthermal Applications, Inc. ("Microthermal").

Microthermal in July 1969 had a registered public offering of its common stock and received proceeds of approximately $650,000, about $500,000 of which the SEC alleged was misappropriated, converted and dissipated by three of the defendants. The company's counsel is charged with engaging in a scheme with other defendants to make it appear that such proceeds had been invested in U.S. Treasury bills and bank certificates of deposit. As part of this scheme, documents were prepared and entries made purporting to show the purchase of $500,000 in CD's, and Microthermal then entered into a transaction with defendant United States Secretarial Institute, Ltd. ("U.S. Secretarial") in which certain securities of U.S. Secretarial, which were worthless, were purportedly sold to Microthermal for $375,000 in nonexistent bank CD's. The attorney and other defendants allegedly arranged to have false certified financial statements prepared for Microthermal, for the payment of $10,000 and caused a New York City bank to issue letters and other documents falsely confirming the purported purchase of the bank CD's. The false financial statements were filed with the SEC as part of a Form 10-K report. To gain additional time for these illegal efforts, counsel requested an extension of time from the SEC for the filing of the Form 10-K, on the false ground that certain accounting records had been temporarily lost. The attorney and other defendants are also charged with having caused Microthermal to fail to file subsequent Form 10-K, Form 8-K, Form 9-K and Form 10-Q reports. As a result of such activities, counsel is alleged to have violated the anti-fraud provisions of the Securities Act and the Exchange Act and Section 15(d) of the Exchange Act and various rules thereunder.

The rationale of the *Frank* decision is very similar to the rationale of *Escott* v. *BarChris Construction Corp.*[13] insofar as it imposed lia-

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11. 388 F.2d at 489.

12. Civ. Action No. 71-4932 (S.D. N.Y. Nov. 11, 1971). *See also,* SEC v. Fields, Civ. Action No. 71-5416 (S.D. N.Y. Dec. 13, 1971), an injunctive action against an attorney who wrote over 65 opinion letters allegedly permitting unregistered shares of the stock of four corporations to be illegally distributed to the public.

13. 283 F. Supp. 643 (S.D. N.Y. 1968).

bility upon an attorney who was an outside director of a corporation for false statements in the corporation's prospectus. The court held that although the attorney was not an expert within the meaning of Section 11 of the Securities Act, he failed to establish his due diligence defenses because there were too many instances where he failed to make inquiry he could easily have made which, if pursued, would have put him on his guard.[14] The court in the *Frank* case viewed the defendant as an insider who played more of a role than is customarily played by outside counsel. This subtle but significant difference between the role of outside counsel and the role of a lawyer who is an insider, either by virtue of being a corporate director or otherwise, could prove important in the development of the law in this area. The SEC's action against counsel for Microthermal for violations of the Exchange Act's filing requirements could be based upon his role as Secretary, as well as counsel to the company, although the office of secretary is ministerial and not policy making.

In the *National Student Marketing* case, however, no distinction seems to have been made between the attorney who is also an officer or director and the attorney who is solely outside counsel. Although Meyer was a director of Interstate, Schauer was not and Epley and White & Case had no connection to NSMC except that of counsel. Rather, the violations of the filing requirements charged in the *National Student Marketing* case are essentially that the attorneys for NSMC and Interstate discovered that false financial statements had been filed by NSMC with the SEC and they did nothing to correct this situation.

In one recent case involving directors' liability, failure to act was deemed participation in a securities law violation.[15] In another case, directors were held liable for not discovering a fraud perpetrated by other directors.[16] Two cases do not constitute a trend,[17] and it does not and should not follow that the securities law liabilities of directors and attorneys should be the same. However, the elision between the two types of liability may be tempting to plaintiffs, including the SEC. Holding attorneys to the high ethical standards suggested in the *National Student Marketing* complaint has an easy public interest appeal which is difficult to criticize. Nevertheless, the idea that an attorney

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14. *Id.* at 683, 689-92. *See also,* Feit v. Leasco Data Processing Equip. Corp., CCH FED. SEC. L. REP. ¶93,163, at 91,194-96 (S.D. N.Y. 1971) (liability of attorney who was an inside director for omissions in prospectus).

15. Brennan v. Midwestern United Life Ins. Co., 286 F. Supp. 702 (N.D. Ind. 1968), *aff'd,* 417 F.2d 147 (7th Cir. 1969). *Cf.* Black & Co. v. Nova-Tech, Inc., CCH FED. SEC. L. REP. ¶93,289 (D. Ore. 1971) (failure by counsel to notify plaintiff that securities were unregistered under Blue Sky statute held an "act" under Rule 10b-5).

16. Heit v. Bixby, 276 F. Supp. 217 (E.D. Mo. 1967).

17. *See,* Wessel v. Buhler, CCH FED. SEC. L. REP. ¶92,929 (9th Cir. 1971) in which the court refused to impose securities law liability against an accountant for inaction.

has a duty to the SEC or the public to investigate the information he receives from his clients in connection with an SEC registration statement or other filing and disclose any falsities discovered could prove inimical to existing attorney-client relationships.

The Canons of Legal Ethics

Canon 4 of the ABA Code of Professional Responsibility requires a lawyer to preserve the confidences and secrets of a client, an ethical obligation which is broader than the attorney-client privilege and exists without regard to the nature or source of information or the fact that others share the knowledge.[18] Further, "secrets" refers to any information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.[19] The public interest in protecting the confidentiality of the attorney-client relationship is insuring the right of every person to freely and fully confer with and confide in an attorney, which right requires freedom from fear of revealment of matters disclosed.[20]

A lawyer's duty to preserve the confidences and secrets of a client can come into conflict with other duties which are also important to the administration of justice. A lawyer may reveal the intention of a client to commit a crime and the information necessary to prevent the crime. Further, he must make such a disclosure if the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed.[21] A closely related canon provides that

> "A lawyer who receives information clearly establishing that:
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.
> (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." (Footnotes omitted).[22]

The conflict between the duties of confidentiality and candor was recognized in an inquiry to the ABA Committee on Professional Ethics as to whether an attorney who secured a divorce for a client should reveal the truth to the court when the client informed him that he com-

18. EC 4-4.
19. DR 4-101(A).
20. Ellis-Foster Co. v. Union Carbide & Carbon Corp., 159 F. Supp. 917 (D.N.J. 1958); DRINKER, LEGAL ETHICS 132-33 (1953).
21. DR 4-101(c)(3) and notes thereto.
22. DR 7-101(B). A recent New York State Bar Association opinion has interpreted this canon as imposing no affirmative duty on a lawyer to disclose information to a government agency unless fraud is involved. N.Y. State Opinion 207 (1971).

mitted perjury in securing the divorce concerning the date his wife deserted him. The Committee held (5-2) that the attorney's duty of candor and fairness to the court was not sufficient to override his duty to preserve his client's confidences. Although the attorney should urge his client to make the disclosure, if the client will not take his advice, the attorney should have nothing further to do with the client but should not disclose the facts to the court or to the authorities.[23] In a similar situation involving fraud by the executor of an estate, the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York distinguished between fraud upon the court which the attorney might be perpetuating by his silence in failing to correct his own prior statements to the court, and fraud upon the estate. The attorney could properly tell the surrogate about matters necessary to set right mistakes which the attorney had made unwittingly, but not about other matters which he had discovered even though such matters constituted a fraud.[24]

The difficulties of delineating between the duty of a lawyer to remain silent and the duty to speak in situations involving a fraud upon a court, are increased in situations involving representation of clients before administrative agencies. In such situations it is not always clear whether the lawyer is acting as advocate or adviser,[25] just as it is not always clear whether the agency is acting as legislator, prosecutor or judge. These difficulties are recognized in ABA Opinion 314, which generally discusses the ethical obligations of a lawyer in practice before the Internal Revenue Service and states:

> "In all cases, with regard both to the preparation of returns and negotiating administrative settlements, the lawyer is under a duty not to mislead the Internal Revenue Service deliberately and affirmatively, either by misstatements or by silence or by permitting his client to mislead. The difficult problem arises where the client has in fact misled but without the lawyer's knowledge or participation. In that situation, upon discovery of the misrepresentation, the lawyer must advise the client to correct the statement; if the client refuses, the lawyer's obligation depends on all the circumstances.
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> "Fundamentally, subject to the restrictions of the attorney-client privilege imposed by [the duty to keep client confidences] the lawyer may have the duty to withdraw from the matter. If for example, under all the circumstances, the lawyer believes that the service relies on him as corroborating statements of his client which he knows to be false, then he is under a duty to disassociate

23. ABA Opinion 287 (1953).
24. Ass'n of the Bar Opinion 673 (1945). *Cf.* United States v. Ford, 9 F.2d 990, 991 (D. Mont. 1925).
25. Although a lawyer may simultaneously serve as advocate or adviser, the two roles are essentially different. EC 7-3.

himself from any such reliance unless it is obvious that the very act of disassociation would have the effect of violating [the duty to keep client confidences]. Even then, however, if a direct question is put to the lawyer, he must at least advise the service that he is not in a position to answer."

The theories advanced by the SEC in the *National Student Marketing* case are contrary in spirit to the foregoing principles, most clearly to the extent that violations of the SEC's proxy rules are alleged. The complained-of soliciting material was disseminated prior to the time PMM or the defendant law firms were aware of possible problems in the presentation of the May 31, 1969 financials. Yet, the SEC is claiming that Section 14(a) of the Exchange Act was violated by the subsequent failure of White & Case and Lord, Bissel & Brook to insist upon resolicitation of revised financials or to withdraw from representation of NSMC and Interstate and inform on their clients to the SEC. The basic premise of the SEC in making such a charge is that an attorney to a corporation has a higher duty to the investing public than to management or existing shareholders, and should compel compliance by management with the securities acts by making public, or at least disclosing to the SEC, violations of the law, particularly in the area of SEC filings.[26] Further, since the failure to withdraw a false or misleading financial statement in an SEC filing is viewed by the SEC as a continuing violation, attorneys could be placed in the position of revealing past violations of law by their clients, as well as preventing present or future violations.

Distinctions between Attorneys and Accountants

The *National Student Marketing* complaint can be viewed as part of an SEC program to expand its jurisdiction over professionals who have public companies as clients. Recently, the SEC has instituted actions against banks and even a public relations firm, as well as accountants and attorneys.[27] At the same time, the SEC seems to place accountants and attorneys in a separate class, and to hold them to similar standards of conduct. The breach of duty alleged against White & Case and Lord, Bissel & Brook in the *National Student Marketing* case is essentially the same as that alleged against PMM. However salutatory

26. In this connection, it should be noted that Canon 5 of the ABA Code states that

"A lawyer employed or retained by a corporation . . . owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."

27. In Korholz, Investment Co. Act Release No. 7034 (Mar. 3, 1972), the SEC named four banks as respondents in administrative proceedings and charged them with aiding and abetting violations of the Investment Company Act of 1940. *See also,* Southern California First Nat'l Bank of San Diego, Securities Exchange Act Release No. 9289 (Aug. 16, 1971). In SEC v. Pig 'N Whistle Corp., CCH FED. SEC. L. REP. ¶ 93,384 (N.D. Ill. 1972), a broad and unusual injunction was obtained against a public relations firm.

it may be to hold attorneys responsible for SEC filings which they prepare or transmit, and for opinion letters issued in securities transactions, the SEC is likening the function of a securities lawyer to that of an independent certified accountant. Although some similarities exist between these two types of professionals, the function of an independent accountant is different from the function of counsel to an issuer of securities.

One crucial difference is that there is no accountant-client privilege recognized in the federal securities laws.[28] Further, although an attorney is directed by Canon 5 of the ABA Code to exercise independent professional judgment on behalf of a client, he is nevertheless essentially an agent and adversary. Certification is a material fact which must be performed by an "independent" accountant because the purpose of certification under the securities laws is "the submission to an independent and impartial mind of the accounting practises and policies of registrants."[29] In order to insure the integrity of financial statements filed with the SEC, and the independence of accountants, the SEC has adopted fairly elaborate regulations and policies concerning the certification of financial statements.[30] Also, an accountant is an "expert" under Section 11(a) of the Securities Act, whereas an attorney is not.[31] An attorney's opinion is not based upon the same type of independent investigation as is an accountant's certificate, and it is therefore a different and more limited imprimatur.

In a case in which the SEC held that an accountant who is also an attorney for a registrant is not "independent" under the SEC's rules, the distinction between an accountant and an attorney was stated as follows:

> "Though owing a public responsibility, an attorney in acting as the client's advisor, defender, advocate and confidant enters into a personal relationship in which his principal concern is with the interests and rights of his client. The requirement of the Act of certification by an independent accountant, on the other hand, is intended to secure for the benefit of public investors the detached objectivity of a disinterested person."[32]

28. Basch v. Talley Industries, CCH FED. SEC. L. REP. ¶93,364 (S.D. N.Y. 1971).

29. Cornucopia Gold Mines, 1 S.E.C. 364, 367 (1936).

30. Regulation S-X, 17 C.F.R. §210; Accounting Series Releases, 17 C.F.R. §211. *See,* RAPPAPORT, SEC ACCOUNTING PRACTICE AND PROCEDURE Chs. 2, 21 (2d ed. 1966). The standards for independence required of attorneys and accountants are different. It is not considered improper or unethical for an attorney who represents a corporation on an annual retainer to serve as director of the corporation, provided he does not vote or influence the vote on the matter or amount of his retainer. Ass'n of the Bar Opinion 611 (1942). The SEC, however, will not recognize as "independent" an accountant who is a director of any corporation, or parent or subsidiary of any corporation. 17 C.F.R. §210.2-01(b).

31. Escott v. BarChris Construction Corp., 283 F. Supp. 643, 683 (S.D. N.Y. 1968).

32. American Finance Co., 40 S.E.C. 1043, 1049 (1962).

The extent to which the SEC may now be trying to blur this distinction remains to be seen. Hopefully, the legitimate public interest in preserving the confidential relationship between attorney and client will be regarded as more important than the SEC's apparent intention of enlisting the aid of private practitioners to implement enforcement of the securities laws.