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Ernest Edward Badway

Joshua Horn

Christie McGuinness

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Ernest Edward Badway[*], *Joshua Horn*[**] & *Christie McGuinness*[***]

ABSTRACT

The United States Securities and Exchange Commission ("SEC" or "Commission") and its staff ("Staff") have brought numerous actions against lawyers in a variety of contexts over the last several years. These enforcement actions have arguably prevented zealous advocacy as well as potentially leaving lawyers reluctant to make certain arguments on behalf of their clients so as to avoid potential disciplinary actions against them. While it is important for the Commission and its Staff to ensure that lawyers do not engage in violative conduct, this Article notes that the SEC and its Staff's actions should be limited to only those occasions where the conduct is notorious and obvious. To avoid unwarranted interference in the right to counsel, this Article argues, at the very least, that the SEC should instead of bringing circumspect actions: (1) clarify the SEC's approach to its use of Rule 102(e); (2) make mandatory referrals to state bar associations; and (3) create an independent board to review potential SEC actions against lawyers to ensure the good faith nature of the proposed action.

INTRODUCTION

Despite recent court decisions limiting the reach of its enforcement power and administrative courts, the United States Securities and Exchange Commission ("SEC" or "Commission") and its staff ("Staff") continue to bring enforcement actions against lawyers in a variety of scenarios. A growing area of concern is the SEC's focus on attorney discipline, a field that was traditionally left to the states and their attorney disciplinary processes. The SEC's focus on attorney discipline threatens zealous advocacy and independent legal judgments. These actions alter the scope of

* Mr. Badway is partner with and co-chair of the Securities Industry Group of Fox Rothschild LLP in Morristown, New Jersey, and New York, New York, as well as a former SEC Enforcement attorney, and an Adjunct Assistant Professor of Law at Brooklyn Law School. Mr. Badway would like to thank his current and past research assistants, in particular David W. Inkeles and Yuliya Zahoroda, for their assistance in the research of this Article.

** Mr. Horn is partner with and co-chair of the Securities Industry Group of Fox Rothschild LLP in Philadelphia, Pennsylvania, and New York, New York.

*** Ms. McGuinness is an associate at Saul, Ewing, Arnstein & Lehr LLP, and is a graduate of Brooklyn Law School.

the SEC's substantive authority and intrude on matters appropriately delegated to state bar organizations.

This Article demonstrates that, to provide the greatest benefit to the public, lawyers and courts, rather than the SEC, should be responsible for regulating attorney conduct.[1] This Article further suggests a series of proposals that seek to prevent the SEC from deputizing the securities bar with tasks that bring them into conflict with their clients. In particular, the SEC must clarify the scope of SEC Rule of Practice 102(e) ("Rule 102(e)" or "Rule"). Specifically, the SEC should include language that limits the term "improper or unethical conduct" under the Rule to intentional misconduct, precludes legal opinions rendered in good faith from its purview, and establishes that "practicing" before the Commission only encompasses representation in a pending investigation. Additionally, the SEC should refer all professional conduct violations to state bar associations rather than initiate de novo enforcement proceedings. Lastly, there must be greater protections in place for attorneys practicing before the SEC. This may be accomplished by creating an independent board to review the SEC's enforcement charges against lawyers and field complaints from lawyers under investigation.

Any discussion of this particular area must begin with the SEC's disciplinary view towards lawyers. Part I traces the SEC's attitude towards prosecuting lawyers under the federal securities laws and Rule 102(e). Part II continues this examination through our current landscape, discussing *Altman*, an infamous Rule 102(e) proceeding, and certain reforms in the wake of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). Part III discusses the SEC's present enforcement priorities, and identifies particular areas where attorneys face increasing agency scrutiny. Finally, Part IV suggests a series of solutions to ensure the SEC remains fair and consistent in its prosecutions of lawyers.

I. THE TRADITIONAL RULES GOVERNING A LAWYER'S CONDUCT

Traditionally, the SEC only prosecuted lawyers for their role as primary violators of the federal securities laws.[2] Today, however, improper lawyering—even poor legal advice—may lead to an investigation or

1. *See, e.g.*, *In re* Carter & Johnson, No. 292, Release No. 17597, 1981 WL 384414, at *25 (Feb. 28, 1981) (observing that "[s]ignificant public benefits flow from the effective performance of the securities lawyer's role.").

2. Lawyers were also commonly held liable as aiders and abettors to a primary violator, for instance, by falsifying documents during an SEC investigation. Jean Eaglesham, *Legal Eagles in Cross Hairs*, WALL ST. J. (Apr. 30, 2012, 8:36 PM), http://www.wsj.com/articles/SB10001424052702304868004577376391979631740.

enforcement proceeding.[3] The SEC sometimes disciplines securities lawyers using three avenues.[4] Attorneys, like any other individuals, may be charged for their role in violating the federal securities laws. Additionally, the Commission may investigate and sanction attorneys practicing before the agency pursuant to Rule 102(e), if it deems that the attorney has engaged in unsuitable conduct.[5] Lastly, lawyers that commit perjury or obstruct SEC investigations may be referred to the Department of Justice ("DOJ"), or to state attorneys general or local prosecutors for criminal prosecution.

Increasingly, securities lawyers are finding themselves marked for ethical infractions. The Commission's amplified scrutiny in this area stems from its perception that attorneys, like underwriters or auditors, are "gatekeepers."[6] This Part I will trace the history of attorney discipline under the relevant provisions of the federal securities laws and Rule 102(e).

A. THE SEC'S USE OF SECTION 10(B) AGAINST ATTORNEYS

1. Section 10(b)—Beware: No Country for Timid Attorneys

Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act")[7] is the essential catchall antifraud provision, prohibiting the use of fraudulent practices in connection with the purchase or sale of securities.[8] This provision and Rule 10b-5 of the Exchange Act precluded, among other things, insider trading and making materially false statements to the public "in connection with" a pending corporate event or information. Under Section 20(e) of the Exchange Act, the SEC may also bring an action against any individual who "knowingly provide[s] substantial assistance" to a primary Section 10(b) violator.[9] In fact, the SEC has demonstrated a

3. *See, e.g.*, Benjamin Weiser, *Lawyer Gets 20 Years in $700 Million Fraud*, N.Y. TIMES (July 13, 2009), http://www.nytimes.com/2009/07/14/nyregion/14dreier.html?_r=0 (noting an example of an attorney found guilty for operating multimillion-dollar Ponzi scheme); Altman v. SEC, 666 F.3d 1322, 1326 (D.C. Cir. 2011) (upholding a permanent ban against attorney for "unethical or improper professional conduct" in violation of Rule 102(e)).

4. *SEC Enforcers Continue to Witness 'Poor Practices' by Some Defense Attorneys*, 44 SEC. REG. & L. REP. (BNA) No. 21, at 1008 (May 21, 2012).

5. Rule 102(e) has three subsections that give the SEC independent grounds to temporarily bar or permanently ban an attorney, or other professional, from appearing or practicing before it. These provisions are discussed in greater detail below. 17 C.F.R. § 201.102 (2006).

6. *See* Kara M. Stein, Comm'r, SEC, Keynote Address at Compliance Week 2014 (May 19, 2014), https://www.sec.gov/news/speech/2104-spch051914kms (transcript available on SEC website) ("[O]ne gatekeeper that often is absent from the list of cases I see every week are the lawyers . . . I think we should carefully review the role that lawyers play in our markets, with a view towards how they can better help deter misconduct and prevent fraud.").

7. 15 U.S.C. § 78j(b) (2012).

8. *Id.*

9. JOHN C. COFFEE & HILLARY A. SALE, SECURITIES REGULATION: CASES AND MATERIALS 1115 (Robert C. Clark et al. eds., 12th ed. 2012). Significantly, the Supreme Court has foreclosed any such aiding and abetting liability in private causes of action. Cent. Bank of Denv., N.A. v.

willingness to rely on Section 20(e) to prosecute attorneys for their role in facilitating a client's primary 10(b) violation.[10] The SEC may also use Rule 102(e) to suspend an attorney from practicing before the Commission for violating Section 10(b) and Rule 10b-5.[11] In other cases, the Commission may also refer Section 10(b) violations to the DOJ for criminal proceedings.[12]

2. Lawyers Charged with Exchange Act Violations

The SEC has not been shy with using Exchange Act Sections 10(b) and 20(e) to charge lawyers. For example, *SEC v. Fehn* is a leading case on Exchange Act Section 20 liability that attacks securities lawyers who advise clients on materially false or misleading disclosures.[13] H. Thomas Fehn, a seasoned securities lawyer, was hired by CTI Technical, Inc. ("CTI") to represent the company in an SEC investigation regarding its purportedly tainted initial public offering.[14] Upon being retained, Fehn became aware that CTI had neglected to comply with its obligation to file a Form 10-Q, a quarterly report, pursuant to Sections 13 or 15(d) of the Exchange Act.[15] Fehn voiced concern over these violations with Wheeler, CTI's promoter and control person.[16] He advised Wheeler that the company should make the required disclosures.[17] The lawyer's suggestions, however, were met with adamant refusal.[18] Ultimately, Fehn edited and signed off on a partial disclosure document that omitted material information about CTI.[19] The document, initially prepared by a non-attorney employee, did not accurately portray Wheeler's controlling role in the company, and omitted potential civil liability CTI faced as a result of earlier state and federal securities law violations.[20]

The United States Court of Appeals for the Ninth Circuit found that Fehn was liable under Section 20 for providing substantial assistance to

First Interstate Bank of Denv., 511 U.S. 164, 177 (1994); *see also* Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 153 (2011).

10. *See, e.g.*, United States v. Kluger, 722 F.3d 549 (3d Cir. 2013); SEC v. Payton, No. 14-CV-4644, 2015 WL 1539454 (Apr. 6, 2015).

11. *See, e.g.*, *Attorney Suspended for Insider Trading*, FED. SEC. L. REP. (CCH) No. 2434, at 8 (June 30, 2010) (noting that under Rule 102(e), a corporate attorney may be suspended from appearing or practicing before the Commission for at least five years after being found liable for insider trading); *In re* Melissa A. Mahler, Exchange Act Release No. 34-62267 (June 10, 2010).

12. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642 (1997) (upholding insider trading charges against former counsel).

13. SEC v. Fehn, 97 F.3d 1276, 1282 (9th Cir. 1996).

14. *Id.* at 1280–81.

15. *Id.* at 1281.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1281.

CTI, a primary violator of Section 10(b).[21] Substantial assistance included the "'participation' in the editing of information for the purposes of marketing securities."[22] Fehn undoubtedly made personal edits to the documents in question and failed to adequately advise CTI on the effect of the material omissions therein.

However, Fehn argued that legal advice rendered in good faith, although improper, precluded a finding of "substantial assistance."[23] The Ninth Circuit disagreed, finding that, regardless of Fehn's subjective good faith, his actions and efforts were neither reasonable in light of existing disclosure obligations nor consistent with the policy of open disclosure, pointing out, "[s]ecurities regulation in this country is premised,"[24] upon such disclosures. The Ninth Circuit stressed that it is "incumbent upon practitioners . . . to be highly familiar with the disclosure requirements and to insist that their clients comply with them."[25]

3. Lessons Learned for Lawyers

The *Fehn* case reminds attorneys to be vigilant and to ensure that they are not engaging in conduct that rises to "substantial assistance" in their clients' wrongdoing.[26] Lawyers should be cognizant that disagreement with management over disclosure of corporate information is common. In these situations, risk aversion is a facet of good lawyering rather than a sign of weakness.

Thus, lawyers may lessen both their own and their clients' exposure to Section 10(b) liability by urging companies to be overly inclusive in their disclosures. Lawyers must not be timid in conversations with management who may push back against such advice. It may also be helpful to offer quantitative financial information to support a recommendation that certain narrative disclosures must be made. As such, it may persuade a resistant executive that a given event, uncertainty, trend, or demand would be material if it were to occur, and, therefore, ought to be disclosed.

B. THE SEC'S DISCIPLINE OF ATTORNEYS UNDER SECTION 17(A)

1. Section 17(a) Liability for Bad Advice After *Weiss*?

Section 17(a) of the Securities Act of 1933 ("Securities Act") forbids fraud in connection with the "offer or sale" of a security.[27] The SEC is not

21. *Id.* at 1293–94.
22. *Id.* at 1293 (quoting Molecular Tech. Corp. v. Valentine, 925 F.2d 910, 918 (6th Cir. 1991).
23. *Id.* at 1294. Mr. Fehn was relying on *In re* Carter & Johnson.
24. *Id.*
25. *Id.*
26. *See id.* at 1293.
27. 15 U.S.C. § 77q(a) (2012).

required to prove or plead scienter when it brings an action under Sections 17(a)(2) and (a)(3); it may succeed by proving the attorney acted negligently.[28] To avoid liability, lawyers must be extremely judicious when rendering legal advice to ensure their opinions do not deviate from a "standard of reasonable prudence."[29]

2. The Application of Section 17(a) Against Lawyers

Congruently, the SEC has not been shy about using this provision against lawyers. In 2006, the United States Court of Appeals for the District of Columbia upheld an SEC finding that Ira Weiss, bond counsel to a Pennsylvania school district, issued legal opinions in violation of Sections 17(a)(2) and (a)(3).[30] Weiss' opinions concerned the tax-exempt status of a set of municipal bonds issued by the Neshannock Township School District ("School District").[31] Weiss, who served as bond counsel in over 100 transactions,[32] advised the School District that interest on bonds issued to fund a construction project would be tax-free.[33]

Nonetheless, the Internal Revenue Service ("IRS") has a three-part test to determine if a local government bond issuance is tax-free.[34] A local government entity may issue up to $10 million in tax-exempt notes and legally invest the proceeds in higher-yielding securities for a three-year period, so long as the issuer satisfies the "expenditure, time, and due diligence tests."[35] Under the first prong, 85% of net proceeds from the issuance must be allocated to expenditures on the relevant capital project within a three-year period. Under the "time" prong, the issuer must incur, within six months of issuance, a binding obligation to a third party to expend no less than 5% of the proceeds on said projects. Finally, the issuer must pursue completion of the capital projects and allocation of net proceeds with due diligence. Importantly, an issuer satisfies the "expenditure, time, and due diligence" rubric upon its reasonable expectations at the time the notes are issued.[36]

According to Weiss, it was reasonable to believe that the issuance presented no red flags. His opinion complied with the National Association of Bond Lawyer's Model Bond Opinion Report, and he was also assured that the School District intended to proceed with the construction projects,

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28. COFFEE & SALE, *supra* note 9, at 917.
29. *In re* Weiss, Exchange Act Release No. 52875, 2005 WL 3273381, at *14 (Dec. 2, 2005).
30. Weiss v. SEC, 468 F.3d 849 (D.C. Cir. 2006).
31. *Id.* at 855.
32. Weiss & Shupe II, Securities Act Release No. 275, 2005 WL 454017, at *5 (ALJ Feb. 25, 2005) (Initial Decision).
33. *Id.* at *2, *7.
34. Weiss, Securities Act Release No. 52875, 2005 WL 3273381, at *3 (Dec. 2, 2005).
35. *Id.*
36. *Id.* at *13.

making the requisite and timely expenditures.[37] As it turned out, however, the IRS determined that the interest on the notes was taxable. The SEC subsequently charged that Weiss negligently offered an unqualified opinion as to the tax-exempt status of these instruments thereby violating Sections 17(a)(2) and (a)(3).[38]

After an administrative law judge ("ALJ"), pre-*Lucia v. SEC*,[39] found in favor of Weiss, the Commission reversed the decision by a four-to-one margin. Noting the lesser state of mind requirement under Sections 17(a)(2) and (a)(3), the Commission wrote that Weiss "knew or should have known that the note transaction was intended to earn arbitrage profits, and that the School District lacked sufficiently concrete plans for the use of the proceeds to justify . . . tax-exempt status."[40] The D.C. Circuit upheld the SEC's determination.[41]

37. Weiss & Shupe II*,* Securities Act Release No. 275, 2005 WL 454017, at *14 (ALJ Feb. 25, 2005) (Initial Decision).

38. Weiss, Securities Act Release No. 52875, 2005 WL 3273381, at *1 (Dec. 2, 2005).

39. The SEC's entire administrative court process has been thrown into chaos by the recent Supreme Court decision in *Lucia v. SEC*. *See* Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018). Essentially, the United States Supreme Court in *Lucia* sent shock waves through the securities industry and the SEC's enforcement program when it held that SEC ALJs are "inferior officers," and must be chosen pursuant to the Appointments Clause of the United States Constitution. *Id.* at 2058. That is, the President, with the advice and consent of the United States Senate, may appoint "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *See* U.S. CONST. art. II, § 2, cl. 2. Initially, the case involved a former investment adviser who was sanctioned by an SEC ALJ. The United States Court of Appeals for the District of Columbia held that SEC ALJs were not subject to the Appointments Clause; however, the United States Court of Appeals for the 10th Circuit had found differently. *See* Lucia v. SEC, 736 F. App'x 2 (D.C. Cir. 2018). In her opinion, Justice Elena Kagan found that the SEC's ALJs were very similar to tax court trial judges where the Supreme Court had previously found those judges to be inferior officers subject to the Appointments Clause. *Lucia*, 138 S. Ct. at 2047–48.

Now that the Supreme Court has opened this door with the finding that SEC ALJs are inferior officers, the SEC's ALJ's will have to be appointed pursuant to the Appointments Clause in the future, and it calls into question what, if anything, will happen to the ALJs at other federal agencies. Further, there will be the question regarding prior SEC cases. The Supreme Court stated that not every Appointments Clause violation requires a new hearing. However, time will tell.

Additionally, although Justice Kagan specifically said it was not being addressed in this case, we may also shortly see that, since the SEC's ALJs are now considered inferior officers subject to the Appointments Clause, they may also now be subject to removal by the SEC Chairman for good cause. Such a result may provide significant power to the president to fire such ALJs at will, maybe even in a Tweet. Of course, Mr. Lucia will have a re-trial before either the full SEC or a new ALJ appointed pursuant to the Appointments Clause, who will determine if his "Buckets of Money" program is real or made-up.

In short, the Supreme Court has upended how the SEC does business.

40. Weiss, Securities Act Release No. 52875, 2005 WL 3273381, at *13 (Dec. 2, 2005).

41. Weiss v. SEC, 468 F.3d 849, 855–56 (D.C. Cir. 2006).

3. Another Lesson for Lawyers

The result in *Weiss* should scare securities lawyers given the SEC's use of Section 17(a), an antifraud provision, to reprimand a lawyer for providing what turned out to be poor advice. Prior to the decision, attorneys relied on *Carter & Johnson*, a 1981 Rule 102(e) proceeding discussed below, to assuage concerns that lawyers would be disciplined by the agency for giving bad advice, even if that advice is negligent and perhaps worse.[42]

After *Weiss*, however, the Commission appears willing to bring enforcement actions for legal opinions, as long as the attorney's "conduct depart[s] from the standard of reasonable prudence and [is] at least negligent."[43] This new form of discipline is discussed directly below.

C. ATTORNEYS DISCIPLINED FOR FRAUDULENT SECURITIES ACT SECTION 5 DEALS

Section 5 of the Securities Act governs the registration process of securities.[44] Attorneys are integrally involved in the preparation of a company's registration materials. Equally important, lawyers are tasked with advising an issuer about whether it may qualify for an exemption from registration. Attorneys will be prosecuted in SEC enforcement actions for their role in furthering a client's non-compliance or fraud in connection with its Section 5 responsibilities as indicated below. One particular area of trouble for attorneys is when an attorney renders opinion letters indicating that resale restrictions may be removed in an unregistered Securities Act Rule 144A offering. The SEC has brought actions against attorneys holding them liable as "indirect seller[s]" in violation of Section 5.[45] In *SEC v. Greenstone Holdings*,[46] the court held that a lawyer violated Section 5 as an "indirect seller" when she drafted a false opinion letter in connection with a faulty Rule 144 offering.[47]

42. *In re* Carter & Johnson, No. 292, 47 S.E.C. 471, 1981 WL 384414, at *25 (Feb. 28, 1981).

43. *In re* Weiss, Exchange Act Release No. 52875, 2005 WL 3273381, at *14 (Dec. 2, 2005); *see also* SEC v. RPM Int'l Inc., 1:16-cv-01803 (Sept. 9, 2016) (noting that the SEC brought an action against Edward W. Moore, general counsel and chief compliance officer, for violating Sections 17(a)(2) and (a)(3) of the Securities Act and Rules 13b2-1 and 13b2-2 under the Exchange Act. The complaint alleged that Moore failed to disclose material information—the DOJ investigation—to RPM's shareholders and the firm's audit firm.).

44. 15 U.S.C. § 77e (2012).

45. *See* SEC v. CMKM Diamonds, Inc., 729 F.3d 1248 (9th Cir. 2013); *see also* THOMAS LEE HAZEN, REMEDIES FOR VIOLATION OF THE SECURITIES ACT OF 1933 (AND OTHER CONSEQUENCES OF DEFICIENT REGISTRATION STATEMENTS), 2 LAW SEC. REG. § 7.15 (2015).

46. *See* SEC v. Greenstone Holdings, Inc., 954 F. Supp. 2d 211 (S.D.N.Y. 2013).

47. *Id.* at 214–15.

D. RULE 102(E) AND THE REGULATION OF THE PROFESSIONAL CONDUCT OF SECURITIES LAWYERS

1. Background & Rule 102(e)'s Early Years

Rule 102(e) authorizes the Commission to permanently or temporarily bar securities professionals from practicing or appearing before the agency.[48] The Rule contains three separate bases that may lead to either attorney suspension or disbarment.[49] Rule 102(e)(1)(i) applies when the SEC deems that an attorney does not possess the requisite qualifications to represent others.[50] The Commission may rely on Rule 102(e)(1)(ii) if it finds the attorney lacks in character or integrity, or has engaged in "unethical or improper conduct."[51] Rule 102(e)(1)(iii) is used to sanction counsel who have willfully violated or aided and abetted a violation of the federal securities laws, or rules and regulations thereunder.[52]

While the Rule's numbering has changed,[53] the essential provisions of Rule 102(e) have been in place since 1935.[54] Beginning in the late 1970s, the Commission used the Rule, then codified as Rule 2(e), to police the professional conduct of lawyers that practiced before the SEC.[55] According to the Commission, this was necessary to maintain the integrity of its procedures and investigations.[56] However, the validity of the SEC's authority to regulate such conduct was not without its share of criticism. In *In re Keating, Muething & Klekamp*,[57] former Commissioner Roberta Karmel found it especially "repugnant to our adversary system of legal representation to permit a prosecutorial agency to discipline attorneys who

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48. 17 C.F.R. § 201.102(e) (2012).
49. 17 C.F.R. § 201.102(e)(1)(i)–(iii).
50. *Id.*
51. *Id.*
52. *Id.*
53. Rule 102(e) was known as Rule 2(e) until 1995.
54. Gregory G. Ballard, Kevin A. Burke, and Neil D. Corcoran, "*Law and Practice Under Rule 102(e)*," 48 REV. OF SEC. & COMM. REG. 14, 175 (August 19, 2015).
55. Julie Andersen Hill, *Divide and Conquer: SEC Discipline of Litigation Attorneys*, 22 GEO. J. LEGAL ETHICS 373, 383 (2009) (noting that, "[p]rior to 1976, the SEC rarely used Rule 102(e) to sanction attorneys.") [hereinafter Hill, *Divide and Conquer*]; *see also* COFFEE & SALE, *supra* note 9, at 1420 (observing that attorneys were targets under Rule 2(e) "as long as the conduct of the [attorneys] allegedly facilitated in some fashion a violation of the federal securities laws.").
56. *See* Touche Ross & Co. v. SEC, 609 F.2d 570, 579 (2d Cir. 1979) ("The Commission, through its Rule 2(e) proceeding, is merely attempting to preserve the integrity of its own procedures, by assuring the fitness of those professionals who represent others before the Commission.").
57. *In re* Keating, Muething & Klekamp, Securities Act Release No. 15982, 1979 WL 186370, at *2 (July 2, 1979). In this matter, the SEC sanctioned a Cincinnati law firm under Rule 2(e), alleging that the partners of the firm neglected their professional responsibilities when they knowingly prepared disclosure documents with materially misleading statements. *Id.*

act as counsel to regulated persons."[58] It would appear that Commissioner Karmel's concerns were addressed two years later in *In re Carter & Johnson*.

2. *Carter & Johnson* and the False Sense of Comfort that Ensued

In a seminal holding, the SEC appeared to set limits on its prosecutorial scope of action. *In re Carter & Johnson*[59] is an SEC case concerning the scope of Rule 102(e)'s predecessor Rule 2(e). Until recently, the case was also thought to stand for the proposition that the SEC would not sanction attorneys for providing poor, or even negligent, legal advice.[60] As the Commission wrote, "[i]f a securities lawyer is to bring his best independent judgment to bear on a disclosure problem, he must have the freedom [to] make innocent—or even, in certain cases, careless—mistakes without fear of legal liability or loss of the ability to practice before the Commission."[61]

The facts of this case were quite straightforward. William R. Carter and Charles J. Johnson, Jr., represented National Telephone Company ("National") and were responsible for preparing its disclosure documents.[62] When a number of the company's public disclosures were determined to be materially false and misleading, the Commission brought a series of actions against National and its lawyers.[63] Pursuant to Rule 2(e), the SEC attempted to suspend Carter and Johnson from practicing before it.[64]

The SEC first alleged that the lawyers' failure to advise National's board of directors of its controlling shareholder's refusal to "disclose adequately the company's perilous financial condition was itself a violation of ethical and professional standards" under then-Rule 2(e)(1)(ii).[65] The Staff also contended that, under Rule 2(e)(1)(iii), the attorneys willfully aided and abetted their client's violations of the federal securities laws.[66]

An ALJ initially determined that the lawyers' conduct amounted to violations of both Rules 2(e)(1)(ii) and 2(e)(1)(iii).[67] On appeal, however,

58. *Id.* at *12. Commissioner Karmel went on to assert that the "frequently made distinction between the lawyer as an adversary versus the lawyer as an advisor cannot and should not be made by an agency with significant prosecutorial responsibilities." *Id.*
59. *In re* Carter & Johnson, No. 292, 47 S.E.C. 471, 1981 WL 384414, at *4–6 (Feb. 28, 1981).
60. *See, e.g.*, *SEC Enforcement Developments: Renewed Focus on Lawyers*, 45 SEC. REG. & L. REP. (BNA) No. 42, at *3–4 (2013).
61. *In re Carter*, 1981 WL 384414, at *25.
62. *Id.* at *8.
63. *Id.* at *9, *17.
64. *Id.* at *1.
65. *Id.* at *27.
66. *Id.* at *1.
67. Carter was suspended for one year, and Johnson for nine months. *Id.* at *1.

the Commission dismissed the charges.[68] In overturning Carter's and Johnson's Rule 2(e) suspensions, the SEC attempted to issue a clarifying interpretation of "unethical and improper conduct," under then-Rule 2(e)(1)(ii).[69] According to the SEC, once a lawyer is aware of a client's "substantial and continuing failure" to comply with disclosure obligations, the attorney's "continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance."[70] Importantly, "counseling accurate disclosure is sufficient" to prevent a finding of improper conduct, even if the advice is not followed, so long as the client is not "involved in a continuing course of violating the securities laws."[71] Essentially, the SEC shifted the risk to the clients.

3. Takeaway for Attorneys

Practitioners have, until recently, understood the *Carter & Johnson* decision to support the notion that the SEC would not scrutinize lawyers' conduct simply for rendering incorrect legal advice.[72] This appeared to be the accepted and undisturbed policy through much of the next two decades, and provided a level of comfort to securities practitioners.

In 2008, the Commission dismissed a cease-and-desist action against an attorney after noting it "eschewed a [102(e)] standard that would expose an attorney to professional discipline, 'merely because his advice, followed by the client, is ultimately determined to be wrong.'"[73] Earlier, in 2002, the SEC stated it "generally should not institute Rule 102(e) proceedings against attorneys absent a judicial determination that a lawyer has violated the federal securities laws."[74] Prior to that, in a 1988 release, the SEC wrote:

Indeed, the Commission has generally utilized Rule 2(e) proceedings against attorneys only where the attorney's conduct has already provided the basis for a judicial or administrative order finding a securities law

68. The Commission observed that the lawyers, who voiced concern over the adequacy of the company's disclosures, "were in the uncomfortable position of attempting to provide disclosure advice to an aggressive client whose unreceptive management actively frustrated the giving of advice and ignored what advice managed to get through." *Id.* at *17. This semblance of good faith precluded a finding that the attorney-respondents willfully aided and abetted their client's violations under 2(e)(1)(iii). *Id.* at *24–25.

69. *Id.* at *28.

70. *Id.* at *30.

71. *Id.* The SEC noted that the "exercise of independent, careful and informed legal judgment on difficult issues" was "critical to the flow of material information to the securities markets." *Id.* at *25.

72. *See, e.g.*, *SEC Enforcement Developments: Renewed Focus on Lawyers*, *supra* note 60, at *3–4 (2013).

73. *In re* Monson, Exchange Act Release No. 28323, 2008 WL 2574441, at *4 (June 30, 2008) (quoting *In re* Carter & Johnson, 47 SEC 471, 1981 WL 384414, at *25 (Feb. 28, 1981)).

74. Implementation of Standards of Professional Conduct, 67 Fed. Reg. 71,670, 71,672 (proposed Dec. 2, 2002).

violation in a non-Rule 2(e) proceeding. Accordingly, Rule 2(e) proceedings rarely entail the adjudication of questions concerning the professional standards that govern the conduct of attorneys.[75]

In 1982, Edward F. Greene, then the Commission's General Counsel, clarified that the SEC "would generally not recommend Commission disciplinary proceedings against attorneys appearing as advocates."[76] He recognized that it "could have a serious chilling effect on zealous representation and be a harbinger of prosecutorial abuse."[77] However, most recently, *Altman v. SEC*[78] demonstrates that the SEC possesses the authority to bring original Rule 102(e) actions based entirely on professional responsibility violations.[79]

E. SARBANES-OXLEY SECTION 307 AND SEC STANDARDS OF PROFESSIONAL CONDUCT RULE 205.3

1. Up the Ladder, Out of the Building, and Above the Bar

In 2002, the Sarbanes-Oxley Act became law, and as described above, Congress codified Rule 102(e) as Section 4C of the Exchange Act.[80] It also introduced Section 307 of Sarbanes-Oxley, authorizing the SEC to create Rule of Conduct Part 205, thereby imposing a number of "whistleblowing" responsibilities on corporate counsel.[81] Supporters of Sarbanes-Oxley contended that reforms to corporate governance in the wake of Enron and other scandals had to address the role of individual actors.[82] Congress meant it would now hold attorneys, as well as auditors, accountants, and other gatekeepers liable for their roles in facilitating corporate maleficence.[83]

Section 307 of Sarbanes-Oxley mandated that the SEC issue rules setting forth "minimum standards of professional conduct for attorneys

75. Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission, Securities Act Release No. 33,6783, 1988 WL 1000021, at *10 (July 7, 1988).

76. Edward F. Greene, General Counsel, SEC, Remarks to the New York County Lawyers' Association (Jan. 13, 1982), https://www.sec.gov/news/speech/1982/011382greene.pdf.

77. *Id.*

78. Altman v. SEC, 666 F.3d 1322 (D.C. Cir. 2011).

79. *Id.*

80. Congress codified Rule 102(e) in the Exchange Act by way of Section 602 of Sarbanes-Oxley. 15 U.S.C. § 78d-3(a)(2) (2012); *see also Altman*, 666 F.3d at 1326–27; Marc I. Steinberg, *The Corporate/Securities Attorney as a "Moving Target"—Client Fraud Dilemmas*, 46 WASHBURN L.J. 1, 9 (2006).

81. 17 C.F.R. Part 205 (2003), available at https://www.sec.gov/rules/final/33-8185.htm.

82. The beginning of the twenty-first century saw a few notable corporate scandals. In addition to Enron, there were also the WorldCom and Tyco scams, both revealed in 2002. "Corporate scandals are always a bullish signal for regulatory activity." Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 U. ST. THOMAS L.J. 909, 911 (2004).

83. 17 C.F.R. Part 205 (2003), available at https://www.sec.gov/rules/final/33-8185.htm.

appearing and practicing before the Commission."[84] These rules required that, whenever evidence of a "material violation of securities law or breach of fiduciary duty or similar violation" is apparent, the attorney must engage in "up the ladder" reporting to the Chief Legal Officer ("CLO") or Chief Executive Officer ("CEO") of the company.[85] In the event that the CEO or CLO does not respond appropriately or implement adequate remedial measures, the attorney must inform the audit committee, another independent committee, or go directly to the board of directors.[86]

The SEC also issued 17 C.F.R. Part 205 in response to Congress' mandate in Section 307.[87] Part 205 contains a number of limiting features. It applies solely to attorneys representing issuers with publicly listed securities.[88] While the term "issuer" includes any person or entity controlled by the issuer,[89] Part 205 does not apply to counsel for private companies, nor does it attach to lawyers who represent underwriters.[90] Lawyers representing individual employees or non-issuer companies are likewise not covered by these rules.[91] However, for applicable issuers, Part 205 applies to attorneys "appearing or practicing" before the Commission.[92] This encompasses a broad group of lawyers, and the SEC defines the term "appearing or practicing" to include rendering of advice, or interpreting the securities laws, rules or regulations, as to "any document . . . that will be filed with or submitted to the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document."[93]

2. Part 205 and Potential Conflicts with State Bar Rules

In addition to "up the ladder" attorney reporting, when Rule of Conduct Part 205.3(d)(2) was issued for comment, it contained a proposed incendiary provision, permitting the disclosure of client confidences "out" to authorities under certain circumstances.[94] This portion of the Rule was never adopted. If it had been, it would have required an attorney to reveal client information to the extent reasonably necessary to prevent a material violation of the securities laws likely to cause substantial financial harm, or

84. 15 U.S.C. § 7245.
85. *Id.*
86. *Id.*
87. 17 C.F.R. § 205.
88. *Id.*
89. *Id.*
90. *Id.*
91. Hill, *Divide and Conquer*, *supra* note 55, at 379.
92. *Id.*
93. 17 C.F.R. § 205.2(a)(1)(iii) (2014).
94. At the time of this Article's publication, the "reporting out" provision has not been passed.

to prevent the issuer from perpetuating a fraud upon the SEC during an investigation or administrative proceeding.[95]

This "reporting out" provision conflicted with the ethical rules imposed by some state bar associations.[96] Rule 1.6(b) of the New York Rules of Professional Conduct ("RPC") generally forecloses an attorney's ability to disclose confidential information absent exceptions.[97] Under RPC 1.6(b)(2), for instance, an attorney may disclose confidential information to the extent reasonably necessary to prevent a client from "committing a crime."[98] While the Part 205.3(d)(2) permits "reporting out" to prevent a "material violation likely to cause substantial harm," not every "material violation" of the securities laws will amount to a crime, and thus, under New York's RPC 1.6(b)(2), would not result in the disclosure of client information.[99]

In 2003, the Washington State Bar noted an identical conflict between the SEC's "reporting out" provision and its own Rule 1.6(b).[100] This prompted an opinion letter from the State recommending that lawyers abide by its own rule in the event of uncertainty.[101] In response, the SEC asserted that, when "federal agencies [] implement rules of conduct that diverge from" state laws, the federal rules take precedence.[102] Uncertainty will remain until the precise question of whether SEC rules preempt state ethics laws in the event of inconsistencies is judicially resolved. Nonetheless, other states, such as New Jersey, require the type of reporting that would have been required nationally of all lawyers if the proposed rule had been approved.[103]

In short, lawyers are advised to follow state ethics rules to avoid conflicts on this point.

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95. 17 C.F.R. § 205.3(d)(2) (2014).

96. David B. Anders, *Ethical Considerations for Defense Lawyers in SEC Proceedings*, 48 REV. OF SEC. & COMMODITIES REG. 81 (2015). The "reporting out" provision comports with a number of state bar associations, notably with the New Jersey State Bar Association.

97. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0-1.6 (2018).

98. *See id.*

99. N.Y. Cnty. Law. Ass'n Comm. on Prof'l Ethics, Formal Op. 746 (Oct. 7, 2013), https://www.nycla.org/siteFiles/Publications/Publications1647_0.pdf.

100. Letter from Giovanni P. Prezioso, General Counsel, SEC, to J. Richard Manning, President, Washington State Bar Ass'n, and David W. Savage, President-Elect, Washington State Bar Ass'n (July 23, 2003), https://www.sec.gov/news/speech/spch072303gpp.htm.

101. *See Washington Ethics Opinion Portends Clash Between SEC State Rules on Revealing Fraud*, 35 SEC. REG. & L. REP. (BNA) 1334, 1334 (Aug. 11, 2003). Like New York, Washington's Rule 1.6(b)(2) also permits an attorney to disclose client confidence to the extent reasonably necessary "to prevent the client from committing a crime." WASH. RULE OF PROF'L CONDUCT r. 1.6(b)(2) (2006).

102. Letter from Giovanni P. Prezioso, General Counsel, SEC, to J. Richard Manning, President, Washington State Bar Ass'n, and David W. Savage, President-Elect, Washington State Bar Ass'n (July 23, 2003), https://www.sec.gov/news/speech/spch072303gpp.htm.

103. N.J. RULES PROF'L CONDUCT r. 1.6(b)(1) (2006).

II. THE SEC'S ATTACK ON LAWYERS: *ALTMAN* AND THE SEC'S EXPANDED AUTHORITY TO PROHIBIT CERTAIN ATTORNEY CONDUCT

The SEC demonstrated that it expanded its reach in attorney prosecutions, most effectively, in *Altman v. SEC*. In *Altman*, the D.C. Circuit upheld the permanent ban of an attorney under Rule 102(e)(1)(ii) and Section 4C of the Exchange Act based solely on professional misconduct.[104] Altman, a general commercial litigator licensed in New York, represented Rosen, a key witness in an SEC administrative proceeding ("AP") against Harrison Securities ("Harrison").[105] According to the Commission, Rosen could offer potentially damaging evidence against Harrison, her former employer.[106] Altman contacted Irving Einhorn, the attorney for Harrison, and informed him that Rosen would not cooperate with the SEC if she received a severance package.[107] In one conversation, Altman mentioned to Einhorn that his client would fail to remember information if she received the desired remuneration, while, on another call, Einhorn asked: "What will we get if they [Harrison] do that, [Rosen] won't cooperate or [Rosen] won't remember?" Altman responded: "Uh, probably both."[108] Unfortunately for Altman, Einhorn taped their phone calls.

On January 30, 2008, the SEC instituted an AP against Altman for engaging in "unethical or improper professional conduct" in violation of Rule 102(e)(1)(ii) and Section 4C of the Exchange Act.[109] Following an evidentiary hearing, an ALJ found that Altman's conduct violated provisions of the New York State Bar Association's Lawyer's Code of Professional Responsibility and Disciplinary Rules.[110] Altman was suspended from practicing or appearing before the Commission for nine months.[111] Shortly thereafter, both Altman and the SEC appealed.

Upon review of the decision, the Commission affirmed the ALJ's findings, but extended Altman's penalty to a permanent bar.[112] According to the SEC, a lifelong ban "serves the public interest and is remedial because it will protect the integrity of [the SEC's] prosecutorial and

104. Altman v. SEC, 666 F.3d 1322, 1324–25 (D.C. Cir. 2011); Mike Scarcella, *Tripped Up by Recorded Calls, Litigator Appeals SEC Banishment*, N.Y. L.J. (Nov. 8, 2011).

105. *Altman*, 666 F. 3d at 1325.

106. *Id.*

107. *Id.*

108. *Id.*

109. *In re Altman*, SEC, Admin. Proc. File No. 3-12944 (Jan. 30, 2008).

110. *Altman*, 666 F. 3d at 1325. Although New York City Bar opinions forbid lawyers from taping one another, no SEC action was commenced against Einhorn for recording Altman's calls. *See, e.g.*, N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 1995-2010 (1995).

111. *Altman*, 666 F. 3d at 1325.

112. *Id.*

adjudicatory processes, and thereby the investing public, from future harm by Altman."[113] Altman then appealed to the D.C. Circuit.

Altman made two primary arguments in his appeal to the D.C. Circuit:[114] (1) The SEC lacked authority to sanction him under Rule 102(e)(1)(ii) and Section 4C based on alleged violations of state bar disciplinary rules; and (2) the Commission did not provide notice that it would proceed against him absent prior action by New York State, and failed to notify attorneys of the scope of conduct that violates Rule 102(e)(1)(ii) and Section 4C.[115]

The court initially held that the SEC had express authority to use Rule 102(e) in response to Altman's conduct.[116] The court looked to the plain text of Section 4C, which "authorizes the Commission to deny the privilege of appearance upon finding improper professional conduct."[117] Although the definition of "unethical or improper professional conduct" is ambiguous, the D.C. Circuit found that violations of state bar disciplinary rules fall within said scope.[118] The fact that the Commission effectively stayed its hand on attorney discipline for the two decades following *Carter & Johnson* was irrelevant.[119] According to the D.C. Circuit, "[t]he Commission's 'powers . . . are not lost by being allowed to lie dormant.'"[120]

The court then rejected Altman's notice argument, finding that the attorney was "on notice of his duty to comply with the New York Bar disciplinary rules, and when appearing before the Commission, he could be held to his duty."[121] The court acknowledged that the SEC has never clarified if "negligent or reckless conduct could fall within Rule 102(e)'s ambit."[122] Since Altman's conduct amounted to "intentional improper

113. *In re* Altman, Exchange Act Release No. 63306, 2010 WL 5092725, at *20 (Nov. 10, 2010).

114. *Altman,* 666 F. 3d at 1324 (noting that Altman's third argument, arguing the Commission's findings were not supported by substantial evidence, was summarily disposed of in the court's analysis of the authority and notice arguments).

115. *Id.*

116. *Id.*

117. *Id.* at 1326.

118. *Id.* The court observed that Section 4C's text, which tracked Rule 102(e)(1)(ii), provided the SEC explicit authority to regulate Altman's professional responsibility violations. It also relied on *In re* Carter & Johnson, wherein the SEC stated that it perceived "no unfairness whatsoever in holding those professionals who practice before [the Commission] to generally recognized norms of professional conduct . . . whether or not such norms had previously been explicitly adopted or endorsed by the Commission." *Id.* (citing *In re* Carter & Johnson, 47 S.E.C. 471, 508 (Feb. 28, 1981)).

119. Similarly, the prior statements from the SEC Staff describing their reluctance to prosecute de novo conduct violations were also irrelevant.

120. *Altman*, 666 F.3d at 1327 (quoting United States v. Morton Salt Co., 338 U.S. 632, 647–48 (1950)).

121. *Id.* at 1328.

122. *Id.*

conduct in the nature of 'extreme departures,'" the court was satisfied that it fell within the Rule's scope.[123]

Nonetheless, *Altman* leaves unresolved the question if negligent or reckless conduct may be punished under Rule 102(e)(1)(ii). As such, the case has marked a major source of uncertainty and frustration for securities lawyers moving forward. For example, attorneys who are actively engaged in having their clients avoid certain uncomfortable situations with their employers or even the public, risk the potential of having their actions construed as being an impediment to regulatory action. Moreover, the SEC now has precedent to support the use of Rule 102(e) for conduct infractions in the absence of independent securities law violations, regardless of a state bar's inaction to discipline the professional. Increasingly, the pressure to prosecute individual actors, including attorneys, is echoed in the court of public opinion.[124] Thus, the Commission's seemingly opportunistic pursuit of Rule 102(e) actions against attorneys with added vigor has clearly resonated with the public.[125]

The *Altman* conundrum, however, remains in more recent cases as well. For example, the SEC charged and barred from practice a former corporate counsel for allegedly participating in an unlawful sale of unregistered securities.[126] In the *Lubin* matter, the SEC accused the attorney of filing false corporate documents with the SEC resulting in over $34 million worth of securities transactions based upon the false and misleading statements.[127]

Similarly, the SEC also barred from practice before the SEC an ex-general counsel of an oil services company.[128] That case involved the ex-general counsel assisting the co-CEOs in mailing illegal payments to a foreign national employee that worked for the state oil company. These payments resulted in an approximately $40 million contract for the ex-general counsel's company.[129]

These cases illustrate the SEC's intense attack on the lawyers, and the breadth of conduct the SEC will consider in moving against counsel.

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123. *Id.* (quoting Marrie v. SEC, 374 F.3d 1196, 1205 (D.C. Cir. 2004)).

124. *See* E. Norman Veasey & Christine T. Di Guglielmo, *General Counsel Buffeted by Compliance Demands and Client Pressures May Face Personal Peril*, 68 BUS. LAW. 57, 73 (2012).

125. *See generally*, Lewis D. Lowenfels, Alan R. Bromberg, and Michael J. Sullivan, *Attorneys as Gatekeepers: SEC Actions Against Lawyers in the Age of Sarbanes-Oxley*, 37 U. TOL. L. REV. 877 (2006).

126. *See In re* Lubin, SEC. Admin Proc. File No. 3-18070 (July 19, 2017).

127. *Id.*

128. *See In re* Weisman, SEC. Admin. Proc. File No. 3-18001 (May 25, 2017).

129. *Id.*; *Case Info.: U.S. v. Gregory Weisman*, STAN. L. SCH., fcpa.stanford.edu/enforcement-action.html?id=490 (last visited Feb. 23, 2019).

III. THE SEC'S PARTICULARIZED SCRUTINY OF ATTORNEYS

Over the last several years, the SEC and its Staff have indicated an enhanced focus on regulating attorney conduct. For example, in January 2014, Associate General Counsel Richard Humes stated that the Division of Enforcement would pursue more Rule 102(e) cases against attorneys for "obstruction of commission processes."[130] He expressly noted document production and witness preparation as areas of concern.[131] Additionally, in a March 2014 speech, then-SEC Chair Mary Jo White stated that a primary emphasis of the Commission was a "renewed focus on . . . attorneys . . . and professionals who play a critical role in the securities industry and share the responsibility with regulators to protect investors."[132]

These comments echo the remarks of former Enforcement Director Robert Khuzami. During a June 2011 speech to the United Jewish Appeal Federation ("UJA"), Khuzami described four areas of attorney misconduct the SEC finds problematic: (1) multiple representations and potential conflicts of interest; (2) improper "coaching" of witnesses, resulting in the witness forgetting critical information; (3) the use of internal investigations as "advocacy pieces"; and (4) delaying tactics such as "eleventh hour" document production.[133] Flagrant examples of attorney misconduct in any of these areas would be legitimate concerns in any SEC investigation. For many reading this Article, intentionally engaging in such obstreperous conduct is something none would consider, but the equally critical aspect to this analysis is that such conduct as defined by the SEC is often open to widely different interpretations. Thus, all lawyers must navigate between impermissible obstruction and zealous representation, not knowing if the SEC will judge such conduct as violative.

A. LAWYERS' TRIANGLE: MULTIPLE REPRESENTATIONS AND CONFLICTS OF INTEREST

As former Enforcement Director Khuzami listed "multiple representations of witnesses,"[134] conflicts of interest may occur when counsel represents both the company under SEC investigation as well as

130. Sidley Austin LLP, *Shot Across the Bow: Loving v. IRS and SEC Rule 102(e)*, SEC ENFORCEMENT QUARTERLY: 1ST QUARTER 2014, 10 (2014), https://www.sidley.com/~/media/files/news/2014/05/sec-enforcement-quarterly-newsletter/files/click-here-to-view-the-newsletter/fileattachment/sec-enforcement-quarterly-1st-quarter-2014.pdf.

131. *Id.*

132. Mary Jo White, Chair, Sec. Exch. Comm'n, Perspectives on Strengthening Enforcement, via videoconference to the Annual Forum of the Australian Securities and Investments Commission (Mar. 24, 2014) (transcript available on SEC website).

133. Robert S. Khuzami, Dir, Div. of Enf't, Sec. Exch. Comm'n, Remarks to Criminal Law Group of the UJA-Federation of New York (June 1, 2011) (transcript available on SEC website) [hereinafter Khuzami, *UJA Remarks*].

134. *Id.*

employees, who are key witnesses in the same proceeding. Although this may raise concerns from SEC staff regarding the credibility of each witness-employee's testimony, at the same time, the SEC has recognized that multiple representations may be optimal, and, in many cases, free of any taint of impropriety.[135]

Existing American Bar Association ("ABA") rules directly address multiple representations. Model Rule 1.7 prohibits simultaneous representation of clients when "the representation of one client will be directly adverse to another client."[136] Alternatively, that rule forecloses multiple representations when there is a "significant risk that representation of one or more clients will be materially limited" by the attorney's responsibilities to a present or former client, or the lawyer's own interests.[137]

The SEC's concerns over multiple representations are exacerbated by its cooperation guidelines. Under these guidelines, a key factor in deciding how much to reward a whistleblower is "whether the individual was first to report the misconduct" or to offer cooperation.[138] When the opportunity for lesser sanctions is offered as a reward for being first to report, the lawyer is more likely to represent multiple clients with directly competing interests.

Attorneys must address potential conflicts at the onset of representation. Counsel should document interviews with employees, and consider drafting a waiver of future conflicts when conflicts might arise.[139] These waivers must comply with ABA Model Rule 1.7 if the lawyer reasonably believes he or she "will be able to provide competent and diligent representation to each affected client," and the client provides "informed consent, confirmed in writing."[140]

Although multiple representations are a legitimate concern, vigilance should be left to the practitioners and not the SEC. Counsel is acutely aware

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135. *Id.* Khuzami stated that: "In many cases, there is no problem presented by multiple representations – such as when one lawyer or one firm represents employees who are purely witnesses with no conflicting interests or material risk of legal exposure. There are myriad benefits that may flow from having one firm represent multiple employees and the corporation. One advantage is the efficiency unlocked from having one firm that is "intimately familiar" with complex and critical issues pertinent to the investigation, benefitting not only the company but also the government that is conducting the investigation. *See* Michael N. Levy & Todd A. Ellinwood, *Representing Multiple Individuals in Government Investigations*, 21 NO. 11 ANDREWS CORP. OFF. & DIRECTORS LIAB. LITIG. REP. 14, at *2–4 (Nov. 28, 2005).

136. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1) (AM. BAR ASS'N 1980).

137. *Id.*

138. 17 C.F.R. § 202.12(a)(1)(ii) (2011).

139. In *SEC v. Tang*, a United States District Court upheld the use of advanced waivers over an SEC challenge to disqualify the firm. SEC v. Tang, 831 F. Supp. 2d 1130, 1147 (N.D. Cal. 2011). In addition to finding that the SEC lacked standing to disqualify, the court determined that the advance waiver sufficiently alerted the clients upfront regarding the risks of the multiple representations. *Id.*; *see also* SEC v. Csapo, 533 F.2d 7, 9–10 (D.C. Cir. 1976); SEC v. Higashi, 359 F.2d 550, 553 (9th Cir. 1966).

140. MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (1983).

of its obligations under the ABA Model Rules and state disciplinary codes. Lawyers will not invest substantial time, money and energy into a matter if there is a risk that multiple representations may run afoul of existing laws. As the Commission has been quick to recognize, attorneys are on the front lines in many key corporate matters. Accordingly, they are in the best position to weigh the relative costs and merits of representing both a corporation and its many constituents, while also considering the ethical rules that govern the profession.

B. TROUBLESOME TESTIMONY TACTICS

1. Inappropriate Coaching of Witnesses

The SEC claims that one area of growing concern is the inappropriate coaching of witnesses, where a lawyer may "train" his or her client to "lose" recollection of information crucial to an investigation.[141] Attorneys are subject to both SEC and ABA regulations that govern the preparation of clients for deposition and trial testimony.

Under ABA Model Rule 3.4(b), attorneys are explicitly prohibited from assisting a witness in preparing false testimony.[142] Rule 7(c) of the SEC Rules Relating to Investigations outlines permissible conduct for attorneys that represent, advise, and accompany witnesses before the SEC.[143] An attorney may: (1) advise the client "before, during and after the conclusion" of the examination, (2) question the client "briefly at the conclusion of the examination to clarify any of the answers" given, and (3) make notes during the examination exclusively for the client's use.[144] Attorneys may also advise the client to avoid speculation or guessing.[145]

Beyond these general policies, however, attorneys are given little guidance on the ethical bounds of witness preparation by the SEC. In fact, the SEC has neglected to define when permissive witness coaching crosses the line and exposes a lawyer to discipline. Accordingly, attorneys must

141. Khuzami, *UJA Remarks*, *supra* note 133. In his remarks, Khuzami noted, as a general example, situations "when no amount of contemporaneous documents can refresh a witness's absence of recollection on seemingly inculpatory points, but that same witness offers specific, detailed and consistent memories on most every point potentially helpful to his defenses, often down to minute details."

142. MODEL RULES OF PROF'L CONDUCT r. 3.4(b) (1983).

143. 17 C.F.R. § 203.7(c) (2008).

144. *Id.*

145. Khuzami, *UJA Remarks*, *supra* note 133. Khuzami acknowledged this well-accepted practice, however, he expressed his reservations for extreme situations in which "one is left to wonder whether witnesses are under instructions only to testify about those events that they recall with near certainty, even in response to questions inviting the witness to qualify the answer with whatever level of recollection the witness possesses."

exercise heightened care when preparing witnesses for SEC depositions or testimony.[146]

2. "Signaling" Behavior During Client Testimony

Related to the issue of improper witness coaching is the SEC's concern that some attorneys become inappropriately disruptive or active during testimony.[147] The Commission argues that this allows counsel to signal responses to clients, or to prompt them to "forget" information.[148]

Again, there is no definitive set of guidelines that constitutes impermissible signaling. As a lone example, former Enforcement Director Khuzami focused on one "troubling episode" wherein "defense counsel would subtly tap his client's foot with his own after certain questions were asked," resulting in the witness "invariably and immediately answer[ing] 'I don't remember.'"[149] However, this behavior may be added in other forms. For example, lawyers are foreclosed from tampering with witness testimony under ABA Model Rule 3.4. Nonetheless, members of the defense bar must also remain active during their client's testimony for strategic reasons and, at least some lawyers might be inclined to do so if the SEC approaches testimony in a prosecutorial, rather than a fact-gathering manner.[150] Aggressive interaction with the Staff is generally required to prevent a waiver of the attorney-client privilege.[151]

While acts of signaling may obstruct an SEC investigation, lawyers must protect their client from questioning that is vague, unduly accusatory, or could result in their case being placed at a procedural disadvantage. As such, absent jolting examples of clearly impermissible conduct, the SEC has failed to delineate a reasoned line between the two extremes. Accordingly, lawyers find themselves stuck in a disquieting web of ambiguity, and must, therefore, proceed with heightened caution.

146. *Id.* This line is difficult to discern. When a client fails to recall a key event, attorneys should advise the client not to speculate on the matter. Khuzami acknowledged that "guessing" during testimony runs "the risk that a misstatement or speculation could be viewed as an admission."

147. Richard Hill, *SEC Lawyers to Increase Focus On 'Inappropriate Conduct' by Defense*, 43 SEC. REG. & L. REP. (BNA) 2403 (2011) [hereinafter Hill, *SEC Lawyers to Increase Focus On 'Inappropriate Conduct' by Defense*].

148. *Id.*

149. Khuzami, *UJA Remarks*, *supra* note 133.

150. Hill, *SEC Lawyers to Increase Focus On 'Inappropriate Conduct' by Defense*, *supra* note 147.

151. Thomas Zaccaro et al., *Expect More Scrutiny of Defense Attorney Conduct*, LAW360 (Jan. 7, 2014), http://www.law360.com/articles/498842/expect-more-sec-scrutiny-of-defense-attorney-conduct.

C. LATE, DELAYED, AND INADEQUATE DOCUMENT PRODUCTION

The Staff is also skeptical of the handling and production of documents during SEC investigations.[152] Specifically, the Commission is concerned with firms rigging privilege logs to withhold relevant documents entirely or, at least, until the night before or shortly after, testimony.[153] Attorneys must be forthcoming and upfront in document production during a pending SEC investigation. An inadequate response to an SEC document request will trigger credibility concerns from Enforcement Staff. If viewed as a tactic deliberately designed to obstruct an investigation, the attorney would also be subject to considerable sanctions, a Rule 102(e) proceeding, and potentially, a referral to the DOJ for perjury or obstruction charges.

A former Nixon Peabody LLP partner was sentenced to seven years in prison for criminally obstructing an SEC investigation.[154] The SEC Office of the General Counsel first initiated a Rule 102(e) action alleging that the lawyer engaged in "improper or unethical conduct" by backdating disclosure documents, and removing incriminating data from company files, prior to an SEC document request.[155] The Rule 102(e) proceedings were stayed pending the lawyer's eventual conviction for several felonies in United States District Court, including, among other things, obstruction of justice and knowing assistance of his client's securities law violations.[156]

However, the vast majority of cases do not concern direct obstruction. As a result, the SEC may be bringing Rule 102(e) actions—or worse—when attorneys negligently, or, in good faith, fail to produce a responsive document, or produce the relevant document too soon before or too late after relevant witness testimony. One cannot answer this question without addressing the practicalities of responding to a voluminous SEC document subpoena.

Responding to an SEC subpoena is a time-consuming process replete with managerial, technological, and coordination challenges. When an SEC subpoena is issued, counsel may have to review terabytes of data in a short period of time, and make significant judgment calls as to the documents responsive to the SEC's request, or subject to the attorney-client

152. Khuzami, *UJA Remarks*, *supra* note 133.

153. *SEC Enforcement Developments: Renewed Focus on Lawyers*, *supra* note 60, at *4. In addition, Khuzami voiced displeasure with attorneys "setting aside as potentially privileged an extremely large and over-inclusive group of documents." Khuzami, *UJA Remarks*, *supra* note 133.

154. Stewart Bishop, *Ex-Nixon Peabody Atty Gets 7 Years for $22M Ponzi Coverup*, LAW360 (Sept. 23, 2013), http://www.law360.com/articles/474925/ex-nixon-peabody-atty-gets-7-years-for-22m-ponzi-coverup.

155. Jean Eaglesham, *Legal Eagles in Cross Hairs,* WALL ST. J. (Apr. 30, 2012), http://www.wsj.com/articles/SB10001424052702304868004577376391979631740.

156. *In re* Tamman, Exchange Act Release No. 69746, 2013 WL 2607651, at *1 (June 12, 2013).

privilege.[157] Often, less seasoned attorneys will carefully review this data, make preliminary decisions on unclear questions, and communicate these findings to more experienced lawyers. Much may be lost in the translation. No one suggests that this excuses poor behavior, but rather the realities of this process make slight delays frequent, and tough questions of relevance or client-privilege create legitimate hurdles.

IV. THE NEED FOR CLARIFICATION AND PROTECTIONS

The lack of clarity and frustration from both the SEC and defense bar calls out for definitive standards. As such, the SEC must provide clearer guidelines and protections for attorneys practicing before the Commission if it continues to seek to prosecute counsel based on their professional conduct. These guidelines must maintain, rather than chip away from, the adversarial system without descending into potential harm to the public.

A word about the adversarial system: it enables defense counsel to adequately protect their clients' rights, by firmly demonstrating weaknesses and/or lapses in the Commission's case. The SEC must carefully consider the actions it brings, saving both the potential defendant or respondent and taxpayer funds. The SEC's attention should be devoted to protecting investors, promoting capital formation, and encouraging fair and orderly public markets. Their actions should not, however, seek to govern the professional responsibility of attorneys, litigate legal ethics, or interfere in the centuries-old adversarial system.[158] Of course, any changes must recognize the important SEC mission of protecting the public.

Accordingly, the appropriate series of practical solutions that define the SEC's relationship with the bar must be considered. To achieve that goal, the SEC must implement express language clarifying the scope of Rule 102(e) in three specific areas, as well as agree to refer all violative conduct to state bar organizations. Finally, there must be protections outside of the SEC's conventional arsenal that permit independent review of attorney investigations and misconduct charges.

A. SETTING PROPER PARAMETERS: THREE WAYS TO CLARIFY THE SCOPE OF RULE 102(E)

The SEC must modify the express language of Rule 102(e) to limit the term "improper or unethical conduct" to intentional acts of wrongdoing. At present, the scope of Rule 102(e) is alarmingly vague. The Commission has

157. *See* Richard D. Marshall et al., *Khuzami on the 'Epidemic of Perjury'*, LAW360 (June 17, 2011), http://www.law360.com/articles/251432/khuzami-on-the-epidemic-of-perjury.

158. The government actively prosecutes attorneys for willful blindness, "even absent actual knowledge." Melissa Maleske, *Government's Willful Blindness Theories Put Lawyers at Risk*, LAW360 (Oct. 4, 2016), https://www.law360.com/articles/847489/government-s-willful-blindness-theories-put-lawyers-at-risk. This suggests that attorneys may have to "police" their clients in addition to advocating for them.

never defined "unethical or improper professional conduct," nor has it been clear as to the requisite mental state an attorney must demonstrate to run afoul of said Rule.[159] While the D.C. Circuit in *Altman* found that "egregious" behavior falls within its ambit, the court left unresolved if negligent or reckless conduct did as well. Such gaping uncertainty demands codified clarity.

Rule 102(e) investigations and actions cause serious reputational harm to lawyers and must be deployed with restraint. By exclusively targeting intentional misconduct, the SEC may properly focus its resources on prosecuting egregious obstructionists. If this practice were implemented, the Staff's natural tendency to be over-inclusive in investigating attorneys under the pretext of Rule 102(e) would temper. Potential Rule 102(e) actions as a tool for intimidation would be limited. When the SEC threatens sanctions based entirely on negligent or reckless conduct, it can more readily—and strategically—bring Rule 102(e) investigations to interfere with an attorney's ability to zealously defend its client in an agency action.[160]

Reigning in the language of Rule 102(e) would also increase focus on intentional misconduct and provide certainty for securities lawyers. The SEC has, in years past, assured lawyers it would not bring Rule 102(e) proceedings based on negligent conduct.[161] However, staff opinions and public assurances do not constitute official expressions of the Commission's views and certainly do not bind the SEC's actions.[162] Surely, "[a]n attorney cannot adequately represent his clients when he is worried about his own liability."[163] Until Rule 102(e) is explicitly limited to intentional violations, the very uncertainty over the Rule's scope will unnecessarily chill independent legal judgments and ardent defense.

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159. *See* Hill, *Divide and Conquer*, *supra* note 55, at 383.

160. *See, e.g.*, Norman S. Johnson & Ross A. Albert, "*Déjà Vu All Over Again": The Securities and Exchange Commission Once More Attempts to Regulate the Accounting Profession Through Rule 102(e) of its Rules of Practice*, 1999 UTAH L. REV. 553, 573 (1999) (observing that "the threat of disciplinary action might well intimidate and interfere with the exercise of independent professional judgment.").

161. "[T]he Commission ordinarily will not sanction lawyers under the securities laws merely for giving bad advice, even if that advice is negligent and perhaps worse." *See* Giovanni P. Prezioso, General Counsel, SEC, Remarks before the Spring Meeting of the Ass'n of General Counsel (Apr. 28, 2005). *But see In re* John E. Isselmann, Jr., Securities Act Release No. 50428, Accounting and Auditing Enforcement Release No. 2108 (Sept. 23, 2004), *In re* Google, Inc. and David C. Drummond, Securities Act Release No. 8523 (Jan. 13, 2005); *see generally In re* Ira Weiss & Andrew Shupe II, Securities Act Release No. 8459, Exchange Act Release No. 50235 (Aug. 24, 2004) (reporting that SEC alleged lawyer knowingly and recklessly issued false tax opinion); *Weiss v. SEC*, 468 F.3d 849 (D.C. Cir. 2006) (noting that the court upheld the order to impose sanctions for issuing false tax opinion).

162. *In re* Altman, Exchange Act Release No. 63306, 2010 WL 5092725, at *16 (Nov. 10, 2010) (citing 17 C.F.R. § 202.1(d)).

163. Joseph C. Daley & Roberta S. Karmel, *Attorneys' Responsibilities: Adversaries at the Bar of the SEC*, 24 EMORY L. J. 747, 825 (1975).

There are two additional changes that the SEC must make to the text of Rule 102(e). The Rule must exclude legal opinions rendered in good faith. This would place another appropriate limit on the SEC's regulatory authority and prevent intrusions on ethical questions best left to the state bar associations. Rule 102(e) seeks to defend the integrity of the Commissions' processes and investigations. However, by their very nature, good faith legal opinions are not designed to obstruct.

The SEC must also clarify the definition of "practicing" before the Commission. Specifically, limiting the term to "representation in a pending investigation," while excluding from the definition duties such as *assisting* companies in the *preparation* of filings would provide much needed clarification. The SEC reads the term "practicing" before the agency quite broadly. Its definition in Rule 102(f) runs the gamut from representation of clients in inspections or administrative proceedings to the preparation (however minor) of virtually any statement filed with the Commission.[164]

For example, in *Loving v. I.R.S.*,[165] a recent case from the D.C. Circuit, the court held that the IRS could not legally regulate individuals, who, while *assisting* taxpayers in preparation of tax returns, did not *represent* those taxpayers in disputes with the agency.[166] Like the SEC's ability to bar or suspend persons from "practicing" before it under Rule 102(e), the IRS may also "regulate the practice of representatives of persons before" the agency.[167] According to the D.C. Circuit, however, tax preparers do not "practice"[168]—nor do they "represent" taxpayers—before the agency.[169] After *Loving*, the SEC's authority to use Rule 102(e) to sanction lawyers who only prepare filings, but do not represent the client in agency investigations, seems legally suspect.[170]

Implementing these changes ensures that attorneys will better appreciate the scope of Rule 102(e). Further, the added clarity will promote zealous advocacy without the added fear of the reputational and financial harm that accompanies a Rule 102(e) investigation or action.

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164. Russel G. Ryan, *'Practicing Before' the SEC: Rule 102(e) Scope in Jeopardy After IRS Setback*, 46 SEC. REG. & L. REP. (BNA) 403 (2014) (citing SEC Rules of Practice, Rule 102(e), 17 C.F.R. § 201.102(f)).

165. Loving v. I.R.S., 742 F.3d 1013, 1022 (D.C. Cir. 2014).

166. *Id.* at 1017 ("Put simply . . . preparers are not agents. They do not possess legal authority to act on the taxpayer's behalf. They cannot legally bind the taxpayer by acting on the taxpayer's behalf.").

167. *See* 31 U.S.C. § 330(a)(1) (2014).

168. *Loving*, 742 F.3d at 1018 (explaining that ". . . to 'practice before' a court or agency ordinarily refers to practice during an investigation, adversarial hearing, or other adjudicative proceeding.").

169. *Id.* at 1017.

170. *See* Ryan, *supra* note 164 ("If . . . the IRS lacks the power to define 'practicing before' that agency to include anything more than representing clients 'during an investigation, adversarial hearing, or other adjudicative proceeding,' the SEC likely has no greater power under its own rules.").

B. MANDATORY REFERRAL OF CONDUCT BASED INFRACTIONS TO STATE BAR ASSOCIATIONS

The SEC must also refer de novo investigations and prosecutions of conduct infractions to state bar associations. State organizations, rather than the SEC's staff, are the appropriate bodies to regulate original cases of attorney discipline. Every state bar maintains its own set of professional conduct rules. These rules already cover much of the behavior the SEC now wants to sanction. Professor Hill is correct that "it [does] not take an expert in securities law to determine whether a litigator has destroyed documents, suborned perjury, obstructed the SEC's investigation, or otherwise engaged in unethical conduct."[171] State bar organizations have proven perfectly capable of weeding out such misconduct and are the appropriate bodies to do so.

As compared to the SEC, state bar organizations have superior experience in investigating and prosecuting attorneys for conduct violations.[172] This familiarity makes it more likely that infractions are adjudicated appropriately, and "in accord with commonly accepted standards of conduct" pursuant to the various state regulations.[173] Supplemental SEC oversight in the realm of professional conduct adds little and its costs are unnecessary. The Commission must respect zealous advocacy, and not expect that a lawyer will simply lead a flock of sheep to slaughter. When it comes to governing the professional conduct of lawyers, the role of "gatekeeper" is best left to its intended guardians: state bar organizations already empowered to handle such complaints.

C. INDEPENDENT BOARD TO REVIEW INVESTIGATIONS AND FIELD COMPLAINTS

Finally, an independent body must be created to review SEC actions brought pursuant to Rule 102(e). This unit would serve the additional function of fielding complaints from attorneys and other securities professionals concerning SEC investigations. There is currently no checking mechanism, other than the SEC's discretion, on bringing Rule 102(e) investigations against practitioners. Rule 7(e) authorizes the Enforcement Staff to report "instances where any witness or counsel has been guilty of dilatory, obstructionist, or contumacious conduct during the course of an investigation."[174] These reports are then referred to the Office of the General Counsel, which conducts an investigation or charges the individual(s). A non-partisan review structure, one outside of the SEC's

171. Hill, *Divide and Conquer*, *supra* note 55, at 419–20.
172. *Id.* at 418–19.
173. Steven C. Krane, *The Attorney Unshackled: SEC Rule 2(e) Violates Client's Sixth Amendment Right to Counsel*, 57 NOTRE DAME L. REV. 50, 89 (1981).
174. 17 C.F.R. § 203.7 (2008).

conventional bailiwick, provides a necessary check on unbridled investigations of minor or negligent disciplinary infractions.[175]

This oversight system would require the SEC to communicate the precise basis for a conduct charge to a non-agency committee.[176] When an impartial body reviews a written account of the attorney's behavior, the lawyer will more likely feel that his conduct has been fairly adjudicated. This system promotes dual benefits. It improves accountability of both the SEC and lawyers, while resulting in a greater sense of procedural fairness for both parties. Providing a mechanism for attorneys to submit complaints assures lawyers that their zealous defense will not be undermined by questionable SEC investigations. This system would inject an element of credibility into the SEC's Rule 102(e) charges, while providing protections for attorneys to affirmatively check dubious cases.

CONCLUSION

Attorneys are subject to numerous rules that underscore an utmost duty of loyalty to the client, but these obligations exist against a backdrop that requires obeisance to the law, attention to moral considerations, and ethical factors.[177] Advocates defending clients in SEC proceedings will be aware of these responsibilities. Those who violate the federal securities or criminal laws will be prosecuted for their actions. The SEC and DOJ are the proper agencies to pursue these violators or criminals. Violations of professional responsibility and unethical conduct, however, are matters appropriately delegated to state bar organizations.

Additionally, the SEC's intensified focus on attorney conduct harms the agency's core missions. The SEC is devoted to protecting investors and the public markets, while promoting the capital raising process. Only through the adversarial system may these goals be effectively pursued. When the SEC polices the conduct of attorneys who represent its adversaries, it becomes the prosecuting attorney, judge, and jury, all in one. This result is unjust and inequitable. It casts a chilling effect on zealous defense and limits the ability of counsel to provide independent judgments. Attorneys cannot confidently demonstrate weaknesses in the Commission's cases, and clients lose the benefits of full representation and a fair process.[178] This also

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175. *See, e.g.*, Leslie Donavan, Comment, *Justice Department's Prosecution Guidelines of Little Value to State and Local Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 955, 965 (1981) ("Meaningful control of discretion is impossible without at least some form of internal administrative review.").

176. The precise composition of the committee could include an equal distribution of retired members of the bar and former SEC staffers. For example, the ABA and SEC could nominate and elect these members, respectively, on a bi-annual basis.

177. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 1983).

178. *See, e.g.*, Steven C. Krane, *The Attorney Unshackled: SEC Rule 2(e) Violates Clients' Sixth Amendment Right to Counsel*, 57 NOTRE DAME L. REV. 50 (1981) (describing the potential constitutional due process issues raised and implicated by these procedures).

thwarts the integrity of the SEC's investigations. The Commission correctly recognized that part of an attorney's "duty . . . must [be to] advocate his client's position forcefully in order to advance the integrity of the proceeding."[179]

Now more than ever, the SEC must recognize the need to clarify the scope of its rules and implement protections for attorneys that practice before the agency. These practical solutions create tangible reform that will benefit not only lawyers and the SEC, but the public as well.

179. *In re* Blizzard, 77 SEC Docket 1335, 2002 WL 714444, at *2 (Apr. 24, 2002).