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NOTES

A NEW ETHIC OF DISCLOSURE—*NATIONAL STUDENT MARKETING* AND THE ATTORNEY-CLIENT PRIVILEGE

I. Introduction

On February 3, 1972, the Securities and Exchange Commission issued a complaint against National Student Marketing Corporation (NSMC); Peat, Marwick & Mitchell (PMM), its auditors; White & Case, a major New York law firm; and Lord, Bissell & Brook, a major Chicago law firm,[1] charging them, among others,[2] with multiple violations of the Securities and Exchange Acts. According to the SEC's complaint, NSMC solicited proxies from its shareholders which were needed to approve a merger with Interstate National Corporation.[3] The shareholders accordingly approved the merger, subject to certain conditions. First, PMM was to issue a comfort letter stating that it had no reason to believe that the uncertified nine-month financial statements contained in the solicitation materials were not prepared in accordance with generally accepted accounting principles, and that the company had suffered no adverse changes since the previous year-end certified statements were issued. Second, White & Case was to issue an opinion letter stating that all steps required to consummate the merger had been validly taken and that NSMC had not, to the knowledge of counsel, violated any federal or state statute or regulation with respect to the proposed merger. A similar opinion letter from Lord, Bissell & Brook was required by the stockholders of Interstate National Corporation. The comfort letter issued by PMM allegedly disclosed that, in order to present fairly the results of operations and the financial condition of the company, material adjustments to the nine-month unaudited financial statements were needed. PMM therefore recommended resolicitation of the shareholders before consummation of the merger. The letter was allegedly dictated in part to one of the officers of NSMC and a partner of White & Case during the closing meeting; the remainder was dictated to a partner of White & Case shortly after the meeting. The recommendations contained in the comfort letter were revealed neither to the representatives of Interstate National Corporation at the meeting nor to the shareholders of either company. The SEC alleges that, after learning of the letter, both law firms issued opinion letters stating that all steps necessary to consummate the merger had been validly taken and that to the knowledge of counsel no federal or state statute or regulation had been violated.

1 S.E.C. v. Nat'l Student Marketing Corp., [1971-1972 Transfer Binder] CCH FED. SEC. L. R. ¶ 93,360 (1972).

2 The officers of NSMC and individual partners in the law and accounting firms as well as a sole practitioner were also charged with violations.

3 There are four claims in the SEC's complaint. Only the issues raised by the second claim will be discussed in this article. The first claim does not charge the law firms with any violations. The third claim alleges violations of section 17(a) of the Securities Act and rule 10b-5 by White & Case and Lord, Bissell & Brook for issuing an opinion stating that certain shares acquired in the merger could be sold, and by officers and directors of Interstate for selling the shares without revealing the contents of the comfort letter issued by PMM. The fourth claim alleges similar violations involving a different merger.

The SEC contends that these transactions violated: (1) section 17(a) of the Securities Act of 1933,[4] which makes it unlawful for any person to use any means of interstate transportation or communications in the sale or offer of securities to commit fraud; (2) rule 10b-5,[5] which uses language similar to section 17(a) but is broader in scope in including the use of any facility of the national securities exchange; (3) section 13(a) of the Securities Exchange Act of 1934,[6] which requires filing of any reports prescribed by rules or regulations; and (4) section 14(a) of the Securities Exchange Act of 1934,[7] which makes it unlawful to use any means of interstate commerce or facility of the national securities exchange to solicit or permit one's name to be used to solicit any proxy in contravention of any prescribed rules or regulations. Injunctive relief is sought against all defendants. According to the SEC, the proper course of action for the attorneys, once they became aware of the possible violation, would have been to refuse to issue their opinion letters and to insist upon revision of the nine-month financial statements and resolicitation of the shareholders. If the officers of NSMC refused to resolicit the shareholders, the SEC maintains that the attorneys should have withdrawn from the case and notified the Commission of the misleading nature of the financial statements.

A permanent injunction by consent order has been entered against NSMC. By consenting to the injunction, several other defendants have also been restrained from further similar violations and have been barred from asserting any privileges they might have had to withhold information in any related litigation.[8] The attorneys and the accountants did not consent to the injunction because under Rule 2(e) of the SEC's Rules of Practice[9] the entry of such an injunction could result, without any hearing, in their being suspended from future appearances or practice before the commission.

There are important issues of both law and fact in this case. For the purposes of this note, all the facts as alleged by the SEC are assumed to be true. The principle legal issue is whether an attorney, notwithstanding the attorney-client privilege, ever has a duty to the public or the SEC to disclose facts learned during his professional employment by a publicly held corporation. The resolution of this issue is critical since it arises while attorneys are playing roles of increased importance in corporate mergers and similar transactions.

Historically the attorney has acted as either an advocate or as an advisor.[10] In each of these roles the attorney is responsible almost exclusively to his client. While these responsibilities are adequately defined, problems often have arisen when third parties have been directly affected by the attorney's work.

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4 15 U.S.C. § 77q (1970).
5 17 C.F.R. § 240.10b-5 (1972).
6 15 U.S.C. § 78m(a).
7 *Id.* § 78n(a).
8 SEC v. Nat'l Student Marketing Corp., No. 225 Civ. 72 (D.D.C., filed July 26, 1972); CCH FED. SEC. L. R. ¶ 93,581 (1972).
9 17 C.F.R. § 201.2(e) (1972).
10 In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as advisor primarily assists his client in determining the course of future conduct and relationships.

ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON 7, EC 7-3 (1970).

Courts have on occasion recognized that in certain circumstances an attorney may have duties running to third parties. In *Heyer v. Flaig*,[11] for example, an attorney was charged with negligence in failing to inform his client at the time he drafted a will of the effects of a post-testamentary marriage. Although the attorney had no previous contact with the intended beneficiaries of the will, the court sustained their complaint on the grounds that "public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable."[12] It has been suggested that similar liability to third parties be imposed in the area of securities law.[13]

II. The Accountant's Responsibilities

In some respects, the attorney's opinion on the legality of a transaction is similar to the C.P.A.'s opinion on the conformity of financial statements to generally accepted accounting principles. The responsibilities of a certified public accountant as an objective observer have been clarified by recent judicial opinions and by pronouncements of the American Institute of Certified Public Accountants.

A certified public accountant may act either as a dependent or an independent accountant.[14] A dependent accountant's duties include undertaking special studies, providing management services, preparing interim financial statements without audit, and other similar functions. An independent accountant's role involves auditing a client's financial statements in accordance with generally accepted auditing standards in order to render an opinion stating that the financial statements are in conformity with generally accepted accounting principles applied on a basis consistent with the preceding year.

An independent accountant has a continuing duty to disclose information which he acquires after issuing an opinion on a financial statement when such information leads him to believe the statement was misleading. This duty arises because the accounting firm's opinion is relied upon by investors.[15]

A detailed list of the independent accountant's responsibilities is contained in the *Statements on Auditing Procedure* published by the Committee on Auditing

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11 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

12 *Id.* at 229, 449 P.2d at 165, 74 Cal. Rptr. at 229.

13 Address by Professor Geoffrey Hazard, Jr., New York Law Journal seminar on "Expanding Responsibilities under the Securities Acts," June 5-6, 1972. Professor Hazard noted other areas which he said give rise to similar responsibilities: bond counsel in issuing bond opinions; an attorney making a report or evaluation of title to real property in connection with an acquisition of any sort; and an attorney's acts in connection with closures of decedent's or incompetent's estates. For a summary of the address see SECURITIES REGULATION & LAW REPORT No. 156, at A-1 (1972).

14 Regulation S-X, 17 C.F.R. § 210.1-01 (1972), contains the accounting rules of the SEC, which apply, *inter alia*, to registration statements filed pursuant to the Securities and Exchange Acts. The rules were recently amended in 37 Fed. Reg. 14,591 (1972), and new guidelines regarding independence were issued. 37 Fed. Reg. 14,295 (1972). The new rules will take effect for statements for periods ending on or after December 31, 1972. Both the old and the new rules provide that the Commission will not recognize any person as a certified public accountant who is not in fact independent. *Id.* § 210.2-01. The examples contained under the old rules have been modified and expanded under the new rules.

15 Fischer v. Kletz, 266 F. Supp. 180, 186 (S.D.N.Y. 1967).

Procedure of the American Institute of Certified Public Accountants. It is recognized within the profession that these general rules of auditing procedure may be subject to exception but departures from the committee's recommendations must be justified by those who do not comply. For example, the accountant is expected, upon learning of possible material errors in statements he certified, to discuss the problem with appropriate levels of management, including the board of directors.[16] If the client then fails to make appropriate disclosures to those known to be relying on the erroneous financial statements, the accountant must then give:

> a. Notification to the client that the auditor's report must no longer be associated with the financial statements.
> b. Notification to regulatory agencies having jurisdiction over the client that the auditor's report should no longer be relied upon.
> c. Notification to each person known to the auditor to be relying on the financial statements, that his report should no longer be relied upon. . . . [But when the client is a publicly held corporation] notification to a regulatory agency having jurisdiction over the client will usually be the only practicable way for the auditor to provide appropriate disclosure.[17]

A dependent accountant is not required to make disclosures when he discovers that unaudited statements do not make a fair presentation of the results of operations or the financial condition of a company.[18] The Committee on Auditing Procedure has prescribed the accountant's responsibilities regarding statements prepared without audit as an accounting service to the company. The accountant need only represent that the statements have not been examined by him and that he expresses no opinion on them.[19]

III. The Attorney's Responsibilities

In *NSMC* the SEC is seeking judicial recognition of an attorney's disclosure responsibilities in a securities law context. Although the SEC has not yet provided a comprehensive statement of the attorney's disclosure duties, the standards applied in the case of an accountant may provide guidelines.

When a corporate client's shareholders require him to render an opinion regarding the legality of a proposed transaction the attorney's role resembles that of an accountant. Shareholders rely upon the attorney to protect the corporation's interests and their interests alike. Normally the attorney is expected to advise and work closely with management in the decision-making process. Nevertheless, "[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."[20] Thus, if the interests of manage-

16 American Institute of Certified Public Accountants, Statement on Auditing Procedure No. 41(5)(1969) [hereinafter cited as Statement].

17 Statement No. 41(9)(1967).

18 The court recognized this in *Fisher v. Kletz*, saying: "In sum . . . there is absolutely no basis in law for imposing upon . . . [an accounting firm] a duty to disclose its knowledge of the falsity of the interim [unaudited] financial statements." 266 F. Supp. 180, 195 (S.D.N.Y. 1967).

19 Statement No. 38(4)(1967).

20 ABA Code of Professional Responsibility Canon 5, EC 5-18 (1970).

ment conflict with the interests of the corporation, the attorney would be obliged to act in the best interests of the corporation.

In *NSMC* the attorneys allegedly discovered that proxies were obtained from the shareholders on the basis of misleading financial statements. Since the attorneys normally dealt with management, they first should have notified management that resolicitation would be necessary in order to obtain the requisite shareholder approval for the consummation of the merger. If this advice were given and were followed, there would have been no conflict between the interests of the corporation and the interests of management; however, if management refused to follow this advice, it would have been acting contrary to the interests of the corporations by perpetrating a fraud on the shareholders. Since the attorneys' primary responsibility is to the corporation, they would be obligated to take some action to prevent the fraud.

A fundamental issue in *NSMC* concerns the duty of an attorney to disclose to the SEC any knowledge he might have of an impending violation in order to prevent that violation. The SEC contends that disclosure is required by the Securities and Exchange Acts. A serious counterargument is that such information is within the attorney-client privilege which precludes an attorney from making disclosure.

Since the enactment of the Securities and Exchange Acts, aider and abettor liability has increasingly been imposed for failure to disclose fraudulent activity. In *SEC v. National Bankers Life Insurance Co.*,[21] the court noted that, with respect to fraudulent conduct in violation of section 17(a) of the Securities Act[22] and rule 10b-5,[23] "aiding and abetting" is an elusive concept.[24] The court stated that "[i]t is clear the defendant must have some knowledge of the fraudulent act or scheme he is aiding, though that knowledge may be actual or constructive,"[25] but also noted that "a person may be held as an aider and abettor through either an act or an omission."[26]

In *Brennan v. Midwestern United Life Insurance Co.*, the court sustained a complaint holding that an insider may be held liable as an aider and abettor to fraud for remaining silent because as an insider he owes a duty of "fair play" to the public.[27] The court recognized that not everyone who has knowledge of improper activities in the securities field should be required to make disclosure, but held that such a duty exists when the person is in special relationship and his silence would give requisite assistance or encouragement to the perpetrator of a fraud.[28]

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21 324 F. Supp. 189 (N.D. Tex.), *aff'd mem.*, 448 F.2d 652 (5th Cir. 1971).
22 15 U.S.C. § 77q (1970).
23 17 C.F.R. § 240.10b-5 (1972).
24 324 F. Supp. at 195.
25 *Id.*
26 *Id., citing* Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (N.D. Ind. 1966).
27 259 F. Supp. 673, 681 (N.D. Ind. 1966).
28 *Id.* at 681-82; *see also* Pettit v. American Stock Exchange, 217 F. Supp. 21 (S.D.N.Y. 1963), where a charge against the American Stock Exchange of aiding and abetting the illegal distribution of stock by failing to take disciplinary action against "abusive conduct and practices" of which the Exchange knew or should have known was held sufficient to sustain a complaint.

The test enunciated in *Brennan* is vague. The court was careful to note that whether silence or inaction constituted a violation under any particular circumstances was a question of fact.[29] The test cannot be a "but for" test because fraud could be stopped by anyone revealing it to the SEC. Emphasis, therefore, must be placed on the "special relationship" of the person with knowledge of fraud to determine whether a duty exists.

The management of NSMC was about to perpetrate a fraud by consummating a merger which was approved by the shareholders on the basis of misleading financial statements. If the attorneys for NSMC had actual or constructive knowledge of the impending fraud, they could be held liable as aiders and abettors under the rational in *Brennan* and *National Bankers Life Insurance Co.* The shareholders were relying on the attorneys to protect the corporation against violations of statutes or regulations. The fraud could not succeed unless the attorneys remained silent. Under these circumstances it seems the attorney would be in a "special relationship" and his silence would give "requisite assistance or encouragement" to the perpetrators of the fraud.

In *Fischer v. Kletz* the court recognized "the potentially significant impact upon accountants, *lawyers* and business entities in the event a precise rule or rules of liability for nondisclosure are fashioned and recognized in the law."[30] Nevertheless, it noted that "investors in publicly-held companies have a strong interest in being afforded some degree of protection by and from those professional and business persons whose representations are relied upon for decisional purposes."[31] Although these comments were made with reference to an accounting firm, the language of the court could similarly be applied to attorneys.

IV. The Attorney-Client Privilege

A strong counterargument to this reasoning is that the attorney-client privilege prevents an attorney from making disclosure although other persons in a similar relationship would be required to do so. The attorney-client privilege is intended to enable every person "to freely and fully confer and confide in one having knowledge of the law . . . free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer."[32] The privilege is not unqualified, however. Generally courts have held that it should be strictly confined to its purpose. As one court has stated:

> We recognize that the policy of full disclosure is a "more fundamental one" than the policy of the attorney-client privilege; that the latter is not universally regarded as absolute and is to be strictly limited to the purpose for which it exists. (Citation omitted.)[33]

The court in *Mauch v. Commissioner* succinctly stated the policy behind the privilege: "[I]t is a rule of balance. Some truth is suppressed so that the general

29 259 F. Supp. at 682.
30 266 F. Supp. 180, 189 (S.D.N.Y. 1967) (emphasis added).
31 *Id.*
32 Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960).
33 *Id.* at 631-32; *cf.* United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir.), *cert. denied,* 377 U.S. 976 (1964); Prichard v. United States, 181 F.2d 326, 328 (6th Cir.), *aff'd mem.,* 339 U.S. 974 (1950); *In re* Richardson, 31 N.J. 391, 401, 157 A.2d 695, 701 (1960).

process of administering truth may be furthered."[34] Since the rule is one of balance, the courts have developed exceptions to it permitting disclosure where the general purpose of allowing a client to freely confide in an attorney would not be frustrated. The Courts have looked to the substance of the communications between the attorney and client, and the relationship between the person desiring disclosure and the person asserting the privilege to determine if particular communications are privileged.

Communications between an attorney and a client regarding the future commission of a crime or fraud are widely viewed as being outside the attorney-client privilege. *In re Sawyer's Petition* states the rule in the seventh circuit: "[W]e think that the rule accepted by all courts today is that a client's communication to his attorney in pursuit of a criminal or fraudulent act yet to be performed is not privileged in any judicial proceeding."[35] In *Hinds v. State Bar,* it was held that an attorney had an affirmative duty to make disclosure to the court when he learned that his client intended to perpetrate a fraud by false statements in his effort to secure a divorce.[36] In discovery proceedings it has generally been held that a prima facie case of fraud must be raised by the opponent to defeat the privilege.[37]

The crime-fraud exception to the attorney-client privilege does not impair the accused's rights to counsel or his freedom to reveal all the facts of his case to his attorney. It applies only to consultations concerning future or continuing crimes or frauds and not to those committed in the past.[38] The courts in England very early recognized that the crime-fraud exception might greatly diminish the value of the attorney-client privilege, but held that the question of whether consultation was for a legitimate purpose should be decided on a case-by-case basis.[39]

In the securities law area the crime-fraud exception has been applied in shareholder derivative actions so as to prevent a corporation from asserting the attorney-client privilege against its shareholders. In *Garner v. Wolfinbarger* the court upheld the stockholders' right, upon a showing of cause, to examine documents allegedly proving that the attorney advised management of his reservations before the fraudulent sale of the corporation's stock:[40]

> Two traditional exceptions are also persuasive in negativing any absolute privilege in a corporation in the circumstances of this case. These are the exceptions for communications in contemplation of a crime or fraud, and for communications to a joint attorney.[41]

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34 113 F.2d 555, 556 (3d Cir. 1940).
35 229 F.2d 805, 808-09 (7th Cir), *cert. denied,* 351 U.S. 966 (1956); *see, e.g.,* Clark v. United States, 289 U.S. 1 (1933); United States v. Shewfelt, 455 F.2d 836 (9th Cir. 1972); United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), *aff'd on other grounds,* 385 U.S. 293 (1966); *In re* Selser, 15 N.J. 393, 105 A.2d 395 (1954). For a collection of cases, *see Annot.,* 125 A.L.R. 508 (1940).
36 19 Cal. 2d 87, 92-93, 119 P.2d 134, 137 (1941).
37 *See, e.g.,* Clark v. United States, 289 U.S. 1 (1933); United States v. Shewfelt, 455 F.2d 836 (9th Cir. 1972).
38 Garner v. Wolfinbarger, 430 F.2d 1093, 1102-03 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971).
39 Regina v. Cox, [1884] 14 Q.B.D. 153, 162-63; *accord,* Clark v. United States, 289 U.S. 1 (1933).
40 430 F.2d 1093, 1103-04 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971).
41 *Id.* at 1102.

In these circumstances, where the stockholders were seeking discovery, the court liberally interpreted the crime-fraud exception, saying:

> [W]e do not consider unavailability of the privilege to be confined to the narrow ground of prospective criminal transactions. The differences between prospective crime and prospective action of questionable legality or prospective fraud, are differences of degree, not of principle.[42]

In support of its view the court also noted that where shareholders seek disclosure against their corporation another exception is applicable. The court referred to several cases holding that when the same attorney acts for two or more parties having a common interest, neither party may exercise the privilege in a subsequent controversy with the other,[43] and held that since the employment of an attorney was for the benefit of all the stockholders, a group of stockholders, upon a showing of cause, could penetrate the privilege when it was asserted against them.[44]

In *Fischer v. Wolfinbarger*, a more liberal standard was applied which permitted stockholders to penetrate the attorney-client privilege without a showing of cause.[45] There it was held that "[a] corporate entity acts only for its stockholders, and they are entitled to see written communications and to inquire concerning oral communications between their corporation and its attorneys."[46]

It was shown earlier that the attorney may have an affirmative duty to make disclosure to prevent fraud. It was also shown that the courts have not allowed corporations to assert the attorney-client privilege against shareholders seeking to protect their interests, at least when they can show cause for disclosure. Therefore, the attorney-client privilege should not abrogate the attorney's duty to make disclosure when he is acting to protect the shareholder's interests from fraud by management. Any necessary disclosure should be made to the SEC for two reasons: (1) The SEC is the regulatory agency having supervisory power over security transactions; and (2) the alternative would be disclosure to the individual shareholders and this would not be practical in the case of a publicly held corporation.

In *NSMC* the attorneys allegedly knew that the proxy solicitations were misleading; yet they took no action to prevent the merger from being consummated. Such inaction, if proven, would seem to establish a breach of duty owed to both the corporation and the shareholders.

V. Ethical Considerations

Canon 4 of the Code of Professional Responsibility provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client." However, the Disciplinary Rules provide that a lawyer may reveal "[c]onfidences or secrets when

42 *Id.* at 1103.
43 *Id.*
44 *Id.* at 1103-04.
45 50 F.R.D. 510 (W.D. Ky. 1968).
46 *Id.* at 511.

permitted under Disciplinary Rules or required by law or court order."[47] The Disciplinary Rules also contain a positive statement of the attorney's responsibility. Rule 7-102(A)(3) provides that in representing a client a lawyer shall not "Conceal or knowingly fail to disclose that which he is required by law to reveal." Thus, if the attorney has a duty to make disclosure which is not abrogated by the attorney-client privilege, he not only is permitted by the Code of Professional Responsibility to make disclosure but he is ethically required to do so.

The problem of fraud is specifically treated by the code. The Disciplinary Rules forbid the attorney to "Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."[48] They also provide 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.[49]

Thus, the Code of Professional Responsibility would seem to impose a duty upon an attorney to make disclosure to the commission or the shareholders if he learns of a client's fraud.

VI. The Duty to Investigate

The attorney's investigatory responsibilities differ from those of the independent accountant. This is important because a question may arise as to whether the attorney should be held responsible for failure to prevent a fraudulent act if he knew of no impending violations of statutes, regulations or conditions but could have discovered such discrepancies if he had made an investigation.

In situations such as *NSMC,* the attorneys' and accountants' investigatory responsibilities are basically contractual. The independent accountant's opinion will state that he has examined the company's financial statements ". . . in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances."[50] In general, the attorney's opinion will state that no violations of federal or state statutes or regulations have occurred *to the knowledge of counsel.* The attorney does not undertake an investigation; he only undertakes to render an opinion on the facts which have come to his attention. In this regard his role is similar to that of the dependent accountant.[51] But an attorney cannot ignore facts which have come to his attention. As one court stated: "[A] lawyer, no more than others, can escape liability for fraud by closing his eyes to what he saw and could readily understand."[52]

47 ABA Code of Professional Responsibility Canon 4, DR 4-101(C)(2)(1970).
48 *Id.* Canon 7, DR 7-102(A)(7).
49 *Id.* DR 7-102(B).
50 Statement No. 50(3)(1971).
51 *See* text accompanying notes 21-22 *supra.*
52 SEC v. Frank, 388 F.2d 486, 489 (2d Cir. 1968). These remarks on the duties of investigation apply only to attorney's opinions rendered "to the knowledge of counsel." Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k (1970), may require an investigation to be made before an attorney signs a registration statement.

Earlier it was shown that an attorney may be liable for fraud even if he only has "constructive knowledge" of the violation.[53] Thus, though the attorney has not undertaken an investigation by contract, he may be required to draw inferences from facts within his knowledge and perform a limited investigation to resolve doubts about the legality of a transaction which arise during his employment. If an attorney did not perform this limited investigation, a court might consider it a lack of professional care.

VII. Conclusion

An attorney for a corporation owes his loyalty to the entity and not necessarily to management. When the attorney learns that management is about to perpetrate a fraud, he must make efforts to dissuade management from pursuing this course. Failing that, he has a duty to reveal the facts to the SEC to prevent fraud from occurring. The attorney-client privilege does not bar such disclosure since the crime-fraud exception would be applicable as well as the exception which would allow stockholders to penetrate the privilege, upon a showing of cause, when they believed that management is acting adversely to their interests. While these disclosure responsibilities have not been judicially recognized in the field of securities law *NSMC* offers an opportunity for such recognition in the future. The attorney may be required to conduct a limited investigation before rendering an opinion "to the knowledge of counsel" when he learns of facts which would cause a competent professional to suspect violations. The attorney should not be required to examine financial statements when he is acting solely as attorney for the corporation because he has not undertaken to do so.

The controversy over *NSMC* has been widely publicized. Clients have exhibited a lack of understanding of its implications causing great concern to attorneys and clients alike. As a result, some clients may in the future hesitate to make full disclosure to counsel. Attorneys should take the initiative to reassure clients that even if disclosure of impending fraudulent activities is required, that does not mean damaging facts learned while defending a client must be disclosed. This advice would accomplish two purposes. First, it would help convince clients that they need not fear disclosing information to their attorney; second, it would discourage attempted securities violations since it would be difficult to perpetrate a fraud without the attorney's being apprised of the illegal activity.

The concept of the attorney being required to disclose certain facts is not new to the law. It has, however, never been extended to the securities field, although it should have been. If these disclosure responsibilities are recognized, the attorney will no longer be able to hide behind the attorney-client privilege when rendering an opinion; but that is not the purpose of the privilege anyway.

John F. Gaither, Jr.

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53 SEC v. Nat'l Bankers Life Ins. Co., 324 F. Supp. 189 (N.D. Tex.), *aff'd mem.*, 448 F.2d 652 (5th Cir. 1971); see text accompanying notes 20-24 *supra*.