

Scourging the Moneylenders from the Temple: The SEC, Rule 2 (e) and the Lawyers

JOHN J. KELLEHER*

This article is a review of attorney discipline by the Securities and Exchange Commission. The author is critical of the agency's assertion of expanded jurisdiction in the area. An appendix contains a comprehensive listing of publicly reported cases of attorney discipline.

INTRODUCTION

Lawyer misconduct has always captured the public's fancy and there has never been a time or place when the legal profession enjoyed much general esteem.¹ Recent years have witnessed a

* Professor of Law, University of San Diego School of Law; Orison Marden Visiting Scholar at New York University School of Law (Academic Year 1978-79). The author gratefully acknowledges the extensive research assistance of Patricia Conaty, a second year law student at the University of San Diego.

1. Social scientists may someday provide empirical insight into the sources of popular hostility to lawyers. The writer's own speculation is that a great deal of the attorney's role is inherently antisocial. He or she often represents the individual in dealing with society, the government, as a party opponent. To the extent the attorney is successful in defeating or deflecting the legislated will of the people, she or he frustrates society and incrementally increases the burden of hostility shouldered by the profession.

Professors E. Gordon Gee and Donald W. Jackson in *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. Rev. 695, suggest a related "built in" source of public hostility:

Lawyers' work, and the adversary system which sustains it, can only mean that there are going to be winners and losers when conflict occurs. The lawyer will often not receive praise for a successful effort because the client feels that his position *should* triumph, but the lawyer will likely be criticized if the client does not prevail.

vigorous revitalization of the age old political tradition: scoriating the legal profession to add spice to an otherwise tedious cycle of low substance public addresses. This squall of criticism is remarkable in perspective only because it has been augmented by the bench and taken more or less seriously by the legal profession.

The Securities and Exchange Commission (SEC or Commission) has not been insensitive to possibilities for harnessing this raw political energy to its own purposes. The agency has focused unprecedented attention upon the bar, both in disciplinary proceedings pursuant to Rule 2(e),² and in the context of injunctions, rule making and investigations. Lawyers have been disciplined, enjoined, commanded to watchdog their clients and appointed "Special Counsel" to investigate troubled corporations.

All of this Commission activity has necessarily placed a great deal of stress upon traditional notions of the role and responsibilities of the attorney in corporate practice. The Commission's increasing insistence that private counsel have public obligations when representing persons or entities subject to agency regulation may be viewed as nothing short of an attempt by government to define the legal profession out of existence, to terminate the adversary system in corporate regulation by "regulation" of the practicing bar. Indeed, the Commission and its staff have often publicly taken the position that the adversary system is in large part inappropriate in the regulatory arena.³ Sadly, this notion has gone unchallenged for so long that it may now be "law" by acqui-

Id. 841-42.

2. 17 C.F.R. § 201.2(e) (1980) provides:

Suspension and disbarment. (1) The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal Securities laws (15 U.S.C. 77a to 80b-20), or the rules and regulations thereunder.

3. See, e.g., *In Re Fields*, [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,407, at 83,174 n.20: "Very little of a securities lawyer's work is adversary in character." As Stanley Sporkin has noted: "In certain fields the adversary system may be too costly, economically unsound, and too time consuming. We're seeing dynamic changes in the traditional adversary system We're prodding the private sector to do as much as it can. We only do as much regulation as is necessary to prime the private sector, to get it to do what it should do and what has to be done." Stanley Sporkin, Director of the Division of Enforcement in an interview with *Fortune* magazine. "What the SEC Expects from Corporation Lawyers," *FORTUNE*, Oct. 23, 1978, 143, 144. See generally Small, *An Attorney's Responsibilities Under Federal and State Securities Laws: Private Counselor or Public Servant?*, 61 CALIF. L. REV. 1189 (1973).

escence. Historically acquiescence to the Enforcement Division's views has been achieved by saber rattling. Nevertheless the Commission's weapons against attorneys are devastatingly real: disciplinary proceedings under Rule 2(e) and injunctive actions in federal court.⁴

This article will examine the legal basis for the Commission's assumption of jurisdiction over attorney discipline and the appropriateness of using disciplinary proceedings as a means of coercing attorney "cooperation" in the Commission's scheme of corporate governance. The author's premise is that a fearless and independent bar is essential to the integrity of the adversary system and that the adversary system itself performs a useful function in keeping those who govern us within the bounds of the Constitution and their legislatively delegated authority. Further, it is assumed that corporations are entitled to differ with government and are entitled to counsel when they do so.

At the outset it should be acknowledged that the securities laws as developed and interpreted since 1933 have imposed a higher commercial morality upon the business community with each passing year. The commercial bar itself has developed an increasing sensitivity to the ethical implications of representing clients who have public obligations. The Commission too has played a laudable role in the search for morality within the context of a capitalist economy and competitive society. This article is not concerned with the goals sought by the Commission. Rather, it takes issue with the means employed, particularly the Commission's assumption of the power to discipline attorneys and its attempted redefinition of their ethical and legal obligations.

RULE 2(e)

The SEC has never been granted, nor claimed, express authorization to regulate or discipline attorneys. Its authority, if any, lies in section 23(a) of the Securities and Exchange Act of 1934⁵ (Ex-

4. Since 1975 there have been 63 publicly disclosed Rule 2(e) proceedings against attorneys. The author has found a total of 111 attorney 2(e) cases in the forty year history of the rule. Since more than half of the cases have been brought in the last four years, "saber rattling" is a mischaracterization except when one realizes that the number of cases published is insignificant in comparison with the number of attorneys who fall within the liberal scope of "practicing" before the Commission.

5. Securities Exchange Act of 1934 ch. 404, 48 Stat. 881 (1934).

change Act) which provides that the Commission shall have "power to make such rules and regulations as may be necessary for the execution of the functions invested in them by this title. . . ."6

Undaunted by the lack of explicit authorization to regulate the bar, the SEC on September 13, 1935 promulgated the original Rule 27 exercising jurisdiction over admission and discipline of attorneys who appeared before it in a "representative capacity." The original rule, by its terms, applies to "any person" and purports to regulate the "privilege" of "practicing" before the agency. In 1961 the SEC amended Rule 2 by adding section 2(g). Section 2(g) broadly defines "practicing" to include, but not to be limited to, "transacting any business with the Commission" and preparing any writing "filed with the Commission."⁸

While expanding the scope of conduct covered under Rule 2(e), the Commission has also amended its disciplinary rule to create additional grounds for prohibition from practice before it. These amendments, contained in present Rule 2(e) (2) and (3),⁹ provide in part that attorneys who have been convicted of a felony or misdemeanor involving moral turpitude, disbarred or found to have

6. *Id.* § 23(a).

7. 17 C.F.R. § 201.2 (1938) provided:

(1) The Commission may suspend or disbar any person who, after such person shall have been given an opportunity to be heard in the matter, is found by the Commission:

- (1) To have violated the rules in this part;
- (2) Not to possess the requisite qualifications to represent others;
- (3) To be lacking in character, integrity or proper professional conduct. . . .

8. 17 C.F.R. § 201.2(g) (1980) provides:

Practice defined. For the purposes of this rule, practicing before the Commission shall include, but shall not be limited to (1) transacting any business with the Commission; and (2) the preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other expert.

9. 17 C.F.R. § 201.2(e) (2), (3) (1980) provide:

(2) Any attorney who has been suspended or disbarred by a Court of the United States or in any State, Territory, District, Commonwealth, or Possession, or any person whose license to practice as an accountant, engineer or other expert has been revoked or suspended in any State, Territory, District, Commonwealth, or Possession, or any person who has been convicted of a felony, or of a misdemeanor involving moral turpitude, shall be forthwith suspended from appearing or practicing before the Commission. A disbarment, suspension, revocation or conviction within the meaning of this paragraph (e) shall be deemed to have occurred when the disbarring, suspending, revoking or convicting agency or tribunal enters its judgment of order, regardless of whether appeal is pending or could be taken, and includes a judgment or order on a plea of *nolo contendere*.

(3)(i) The Commission, with due regard to the public interest and without preliminary hearing, may by order temporarily suspend from ap-

willfully violated the securities laws shall be temporarily sus-

pearing or practicing before it any attorney, accountant, engineer, or other professional or expert who, on or after July 1, 1971, has been by name:

(a) Permanently enjoined by any court of competent jurisdiction by reason of his misconduct in an action brought by the commission from violation or aiding and abetting the violation of any provision of the Federal securities laws (15 U.S.C. 77a to 80b-20) or of the rules and regulations thereunder; or

(b) Found by any court of competent jurisdiction in an action brought by the Commission to which he is a party or found by this Commission in any administrative proceeding to which he is a party to have violated or aided and abetted the violation of any provision of the Federal securities laws (15 U.S.C. 77a to 80b-20) or the rules and regulations thereunder (unless the violation was found not to have been willful).

An order of temporary suspension shall become effective when served by certified or registered mail directed to the last known business or residence address of the person involved. No order of temporary suspension shall be entered by the Commission pursuant to this paragraph (e)(3)(i) more than three months after the final judgment or order entered in a judicial or administrative proceeding described in (a) or (b) of this paragraph (e)(3)(i) has become effective upon completion of review or appeal procedures or because further review or appeal procedures are no longer available.

(ii) Any person temporarily suspended from appearing and practicing before the Commission in accordance with paragraph (e)(3)(i) may, within thirty days after service upon him of the order of temporary suspension, petition the Commission to lift the temporary suspension. If no petition has been received by the Commission within 30 days after service of the order by mail the suspension shall become permanent.

(iii) Within 30 days after the filing of the petition in accordance with paragraph (e)(3)(i) the Commission shall either lift the temporary suspension or set the matter down for hearing at a time and place to be designated by the Commission or both, and after opportunity for hearing, may censure the petitioner or may disqualify the petitioner from appearing or practicing before the Commission for a period of time or permanently. In every case in which the temporary suspension has not been lifted, every hearing held and other action taken pursuant to this paragraph (e)(3) shall be expedited in every way consistent with the Commission's other responsibilities.

(iv) In any hearing held on a petition filed in accordance with paragraph (e)(3)(ii), the staff of the Commission shall show either that the petitioner has been enjoined as described in paragraph (e)(3)(i)(a) of this section or that the petitioner has been found to have committed or aided and abetted violations as described in (e)(3)(i)(b) of this section and that showing, without more, may be the basis for censure or disqualification; that showing having been made, the burden shall be upon the petitioner to show cause why he should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. In any such hearing the petitioner shall not be heard to contest any findings made against him or facts admitted by him in the judicial or administrative proceeding upon which the proceeding under this paragraph (e)(3) is predicated as provided in paragraph (e)(3)(i) of this section. A person who has consented to the entry of a permanent injunction as described in paragraph (e)(3)(i)(a) without admitting the facts set forth in the complaint shall be presumed for all purposes under this paragraph (e)(3) to have been enjoined by reason of the misconduct alleged in the complaint.

pendent from practice before the Commission. Further, an initiation of subsequent proceeding by the suspended attorney to prevent the temporary suspension from maturing by default into permanent disbarment results in a reversal of the normal burden of proof. The attorney must show cause why he should not be disbarred. The attorney, not the SEC, must assume the plaintiff's role and the risk of nonpersuasion.

Moreover, even in Rule 2(e) proceedings where the Commission assumes the burden of proof, the burden employed is extremely low.¹⁰ In addition such proceedings are subject to relaxed rules of evidence.¹¹ The justifications offered for this procedural relaxation in disbarment matters have always been the self-serving assertions that practice before the Commission is a "privilege" and that Rule 2(e) proceedings are not as harsh as regular disbarment since the ultimate sanction is termination of practice before the SEC, not revocation of the respondent's general license to practice law.¹²

The history of ever broadening asserted jurisdiction by the Commission has developed without congressional approval or restraint. The Exchange Act grants express permission to regulate and discipline broker-dealers.¹³ It is silent as to attorneys and all

10. See notes 71 and 72 and accompanying text *infra*.

11. For a discussion of the procedural aspects of practice before the Commission see Timbers & Garfinkle, *Examination of the Commission's Adjudicatory Process: Some Suggestions*, 45 VA. L. REV. 817 (1959); Orrick, *Organization, Procedures and Practices of the Securities and Exchange Commission*, 28 GEO. WASH. L. REV. 50 (1959); Timbers, *SEC Litigation-Before the Commission and the Courts*, 13 RECORD 286 (1958).

12. See, e.g., *In re Kivitz*, [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,144, *rev'd*, 475 F.2d 956 (D.C. Cir. 1973); *In re Fields*, [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,407 at 83,174 n.20,

Yet we think it well to note that the impact of an order by us under our Rule 2(e) is not nearly so devastating as is that of the order of a court barring a man from practicing law at all. The disciplinary sanctions that we impose on lawyers can affect only their capacity to engage in our rather narrow type of practice.

But see, In re McLaughlin & Stern, Ballen and Miller, SEC Sec. Exch. Act Release No. 11553, 7 SEC DOCKET 465 (July 25, 1975); Sec. Lit. Release No. 6978, 7 SEC DOCKET 367 (July 25, 1975) where the entire law firm was censured in Rule 2(e) proceedings for failure to supervise adequately the securities work of an associate attorney.

13. 15 U.S.C. § 78o(b)(4) (1980). Among the distressing implications of SEC disciplinary proceedings against attorneys, one of the most troublesome has been the Commission's attempt to assimilate attorneys' professional responsibility with those of broker-dealers notwithstanding the striking differences between the two occupations.

The agreements in settlement in *SEC v. National Student Mktg. Corp.*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,540, at 94,190 n.43, and in *SEC v. Pryor, Cashman, Sherman & Flynn*, *The Legal Times of Washington*, Sept. 18, 1978, at 1, col. 1, apparently involve firm undertakings to "supervise" associates and partners in their securities practice. *In re McLaughlin & Stern, Ballen and Miller*,

other persons. The only congressional action in the field has been the amendment of the Administrative Procedure Act¹⁴ to remove agency authority, including that of the Commission, to establish standards for admission to practice before agencies. Section 500(b) of the Administrative Procedure Act provides: "An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency . . ." ¹⁵ In section 500 (d) (2) the statute expressly avoids grappling with the troublesome issue of jurisdiction to discipline professionals by providing: "This section does not . . . authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency."¹⁶

The Use of Rule 2(e)

It is difficult to determine what the Commission's use of Rule 2(e) has been in the past because proceedings pursuant thereto may be non-public, and even where the proceeding is publicly reported there is no comprehensive source for finding cases. The appendix to this article contains a compendium of publicly reported Rule 2(e) cases which will hopefully alleviate at least the second of these two difficulties.¹⁷

Rule 2(e) was amended in 1971 to provide explicitly for pro-

supra note 12, censured an entire firm for "failure to supervise" the securities work of an associate. *Cf.* Williams, *Corporate Accountability and the Lawyer's Role*, 34 BUS. LAW 7, 13 (1978) where Chairman Williams advocates law firm "review" of work done by its partners in securities matters. While this may be a commendable business practice, the bar should consider the implications of acknowledging an affirmative duty to watchdog one another's work.

14. Act of Nov. 8, 1965, Pub. L. No. 89-332, § 1, 79 Stat. 1281.

15. 5 U.S.C. § 500(b) (1977).

An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

Id.

16. 5 U.S.C. § 500(d) (2) (1977).

17. Harold Marsh, Jr., in his recent and excellent article on Rule 2(e), Marsh, *Rule 2(e) Proceedings*, 35 BUS. LAW 987 (1980), observes the absence of any reliable compendium of Rule 2(e) cases upon which to base a lawyerly analysis. While studying as the Orison Marden Fellow at New York University in 1979, the author undertook to fill this void. The results of this effort are found in the appendix to this article. As is more fully explained in the introduction to the appendix, our definition of Rule 2(e) "cases" is somewhat broad and we too can only surmise as to the accuracy of the figures reached.

ceedings to be "nonpublic unless the Commission on its own motion or on the request of a party otherwise directs."¹⁸ The amendment was consistent with prior practice of the Commission. As a consequence, all analysis of the cases must proceed from the unsupported assumption that the publicly disclosed cases against attorneys are representative both as to the subject area of alleged misconduct and as to the number of cases annually instituted under the rule.¹⁹ There is a very real danger in such an assumption since an apparent increase in Rule 2(e) litigation or shift in theory of culpability may only reflect a Commission decision to emphasize by public disclosure certain aspects of alleged malpractice before it. The researcher is given no waterline and, hence, cannot say whether the public data is the tip of the iceberg or its entirety.²⁰

Understanding the limitations such a paucity of information places upon the inferences one may draw, the following generalizations can be made concerning the early history of Rule 2(e). In the period 1935 through 1959 only four attorney disciplinary proceedings²¹ were disclosed, all of them in the 1950's. All four were based upon the rule as originally drawn and were concerned with activity committed in a "representative capacity." All four cases involved egregious misconduct which interfered directly with the SEC's fulfillment of its statutory mandate of disclosure. In short, the attorneys were sanctioned for flagrant attempts to defeat the core function of the securities laws.²²

18. 17 C.F.R. § 201.2(e)(7) (1980). A proposal by the Commission to amend Rule 2(e)(7) to provide that the proceedings be public unless otherwise ordered on motion of the Commission or a party was withdrawn on March 4, 1975. In withdrawing the proposal, the Commission advised the public that it "will publish any order of its administrative law judge finding a basis for the imposition of a sanction against a professional" SEC Sec. Act Release No. 5572, 6 SEC DOCKET 374 (March 4, 1975).

19. Then Commissioner Roberta S. Karmel in San Francisco on January 26, 1979 gave a refreshing peek into her own thinking about Rule 2(e) as well as the volume of cases which have been decided: "The validity of Rule 2(e), although highly questionable, is difficult to raise after the Commission has brought over a hundred cases." *The Legal Times of Washington*, Feb. 5, 1979, at 22, col. 2. If this figure is even approximately correct, the publicly disclosed cases represent a high percentage of the cases decided.

Since none of the disclosed cases involves a finding of *no* violation, we have no insight into the limitations, if any, the Commission has found on its power to discipline professionals.

20. Since March, 1974 the Commission has, pursuant to Securities Act Release 5572, published its findings where an attorney has been "convicted." SEC Sec. Act Release No. 5572, 6 SEC DOCKET 374 (March 4, 1975). Hence, we have a somewhat better factual basis for inferences drawn from published reports since that date.

21. *In re Alpher*, 39 S.E.C. 346 (1959); *In re DeWitt* 38 S.E.C. 879 (1959); *In re Dougherty*, 38 S.E.C. 82 (1957); *In re Fleischmann*, 37 S.E.C. 832 (1950).

22. In each of the four cases the conduct would have justified a Commission complaint to the appropriate disciplinary body of the state bar of the respondent

In what was to become the commonplace pattern in subsequent known Rule 2(e) proceedings, two of the four respondents, terminated their matters by negotiated settlement without adversary hearing. Also, none of the respondents challenged the Commission's jurisdiction to conduct such proceedings.²³ Early use of Rule 2(e) demonstrated restraint and attention to the statutory mission of the SEC.

In May 1957 the Commission commenced private Rule 2(e) proceedings against Morris Mac Schwebel, an attorney who was deeply involved in a scheme to sell unregistered Canadian securities to American investors.²⁴ Schwebel did not answer the notice for private hearing, but filed motions with the Commission contesting, *inter alia*, the agency's jurisdiction to discipline him. When this motion was denied, Schwebel took the unprecedented step of filing a complaint in the United States district court seeking an injunction barring the Commission from proceeding in the matter.²⁵

attorneys. While it is beyond the ambition of this article to take issue with the often mouthed complaint that local attorney discipline is lax or functionally non-existent, the author's observation in California suggests that the complaint is founded more on ignorance than data. This is perhaps due to the privacy of such proceedings. In California, where disbarments and suspensions become public information, attorneys receive serious sanction for conduct analogous to that in the four cases under discussion.

23. Since jurisdictional challenge would necessarily come in the United States district court, a public forum, we know with certainty that Rule 2(e) enjoyed a 25 year period in its early development when no one litigated the Commission's authority to proceed.

The writer speculates that the temptation to negotiate a private settlement is given great impetus by the embarrassment of public proceeding. Carrying the dispute to the district court would only amplify the notoriety and injury to the accused attorney's reputation. Thus, the Commission enjoys a built-in shelter from jurisdictional challenge.

Of the 111 attorney cases located, only three were reviewed by the federal courts: *Fields v. SEC*, No. C73-1722 (D.D.C. April 15, 1974), *aff'd* 495 F.2d 1075 (D.C. Cir. 1974), *affirming without opinion In re Fields*, [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,407; *Kivitz v. SEC*, 475 F.2d 956 (D.C. Cir. 1973); *Schwebel v. Orrick*, 153 F. Supp. 701 (D.D.C. 1957), *aff'd on other grounds*, 251 F.2d 919 (D.C. Cir. 1958), *cert. denied*, 356 U.S. 927 (1958); and only *Schwebel* deals with the jurisdictional issue.

24. On May 1, 1964 Schwebel pleaded guilty in federal court to three counts of aiding and abetting in the sale of unregistered securities, and on June 6, 1964 was sentenced to a year and a day in prison and fines totalling \$15,000. SEC Lit. Release No. 2959 (June 9, 1964).

25. The case is noteworthy in another respect besides the jurisdictional challenge. It is probably the first case where the respondent's conduct, albeit subsequently adjudicated criminal under the securities laws, was not so aggravated that a bar disciplinary board of the 1950's would have been likely to sanction him un-

In *Schwebel v. Orrick*,²⁶ the district court rejected the Commission's contention that Schwebel had failed to exhaust his administrative remedies, but granted the Commission's motion to dismiss on the merits of the jurisdictional issue. The court squarely held that the Commission "has implied authority . . . to take disciplinary action against attorneys found guilty of unethical or improper professional conduct"²⁷ On appeal, the Court of Appeals for the District of Columbia affirmed *per curiam*, based on failure to exhaust administrative remedies, stating that the district court had erred in reaching the issue of the Commission's authority to disbar attorneys.²⁸ After losing his battle in the federal courts, Schwebel returned to the Commission proceeding, filed an answer and ultimately negotiated to accept permanent disbarment before the Commission without admitting the allegations against him.²⁹

In the nineteen years since *Schwebel* there have been 106 publicly disclosed proceedings³⁰ against attorneys. Of these only two, *Fields v. SEC*³¹ and *Kivitz v. SEC*³² were reviewed by the federal courts. Neither case addresses the jurisdictional issue. In *Fields*, an order barring the attorney from practice before the SEC was affirmed by the Court of Appeals for the District of Columbia without opinion. However, since *Fields* had raised the jurisdictional issue before the Commission it seems likely that it was urged before the court of appeals as well.³³ The only court discussion of the Commission's jurisdiction under Rule 2(e) in the pe-

less and until the alleged misconduct resulted in criminal conviction. The violation, the *malum prohibitum* crime of aiding and abetting others in the failure to register securities, did not directly affect any complaining client and would not under normal circumstances become a source of bar inquiry until disposition of the criminal proceeding. It was unnecessary for the Commission to disbar Schwebel before the outcome of the criminal case. An injunction would have protected the public without having denied Schwebel his livelihood.

26. 153 F. Supp. 701 (D.D.C. 1957).

27. *Id.* at 704. The court's use of the term "guilty" in this context is unfortunate since it begs the question in issue before it. At the time of the opinion Schwebel had not been found guilty or otherwise at fault. He was only challenging the Commission's jurisdiction to adjudicate the issue.

28. *Schwebel v. Orrick*, 251 F.2d 919, 919 (D.C. Cir. 1973).

29. *In re Schwebel*, 40 S.E.C. 347 (1960), *modified*, 40 S.E.C. 459 (1961).

30. The reader is cautioned concerning the literal accuracy of this figure. As in the accompanying appendix, I have included as Rule 2(e) "cases" all agency action concerning attorney discipline whether or not formal proceedings were instituted. Thus, "voluntary" resignation from practice before the Commission without initiation of proceedings is included as a Rule 2(e) "case."

31. No. C73-1722 (D.D.C. April 15, 1974), *aff'd*, 495 F.2d 1075 (D.C. Cir. 1974).

32. 475 F.2d 956 (D.C. Cir. 1973).

33. *Fields'* challenge to the Commission's jurisdiction in the administrative proceeding was characterized by the Commission as "patently frivolous." *In re Fields*, [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,407, at 83,174.

riod since *Schwebel*, is contained in *Touche, Ross & Co. v. SEC*.³⁴ The case involved accountants, not attorneys, but the opinion is cast in language broad enough to shed some light on the second circuit's interpretation of the Commission's authority to regulate lawyers. In *Touche, Ross* the Commission instituted its first ever Order for Public Proceedings³⁵ against professionals. Although a factually related injunctive action was filed in the district court,³⁶ *Touche, Ross & Co.* was omitted from that proceeding and separately pursued in the administrative forum. The SEC has always asserted the right to proceed publicly from the outset, but it had never previously done so in Rule 2(e) proceedings. The tactical election to pursue *Touche, Ross & Co.* administratively demonstrates the forum shopping potential inherent in the Commission's approach to disciplining professionals. As previously discussed administrative proceedings offer significant evidentiary and procedural advantages to the SEC.

Touche, Ross & Co. responded to the Commission's order by seeking an injunction in the United States District Court for the Southern District of New York.³⁷ Judge Motley dismissed the complaint, relying on *Schwebel* and "the 40-year history of Rule 2(e)."³⁸ The court held that the plaintiffs were bound to exhaust their administrative remedies before they could obtain a federal court hearing on the jurisdictional issue.

Touche, Ross & Co. appealed the district court's decision and on May 10, 1979 the Second Circuit handed down a disappointingly reasoned opinion sustaining the district court's decision below.³⁹ The Second Circuit reversed Judge Motley on the exhaustion of remedies issue and addressed itself to the merits of the *Touche, Ross* challenge to the Commission's jurisdiction. Again, the "forty

34. *Touche, Ross & Co. v. SEC*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,854, though not involving attorneys, the Commission's authority to exercise jurisdiction over accountants in Rule 2(e) proceedings is directly challenged in this case.

35. See reference to Order for Public Proceedings in *Touche, Ross & Co. v. SEC*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,742 at 90,601.

36. *SEC v. Giant Stores*, No. C76-1641 (D.D.C. Sept. 2, 1976); see 10 SEC DOCKET 400 (Sept. 2, 1976).

37. *Touche, Ross & Co. v. SEC*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,742.

38. *Touche, Ross & Co. v. SEC*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415, at 93,502.

39. *Touche, Ross & Co. v. SEC*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,854.

year history” of Rule 2(e) was invoked without any analysis of the cases allegedly providing precedent for Commission jurisdiction. Overlooked entirely was the fact that in the forty year history only one appellate case addressed Commission jurisdiction and no previous appellate level opinion had sustained or even analyzed the issue. The “cases”, such as they are, are overwhelmingly consent decisions involving no scrutiny whatsoever of the jurisdictional issue. Thus, the bald exercise of power by the Commission has now been enshrined as precedent, at least in the area of disciplining accountants.

Touche, Ross is important not only as it relates to the question of Commission jurisdiction but also to show the Commission’s apparently intentional blurring of the distinctions between the legal and accounting professions. However, before discussing *Touche, Ross* further, it is important to look at the SEC’s expanded use of Rule 2(e) in the period between *Schwebel* and *Touche, Ross*. The twenty-five years before *Schwebel* were marked by a restrained use of Rule 2(e) and a limited scope of claimed jurisdiction. *Schwebel* initiates a change in the SEC’s approach. After *Schwebel* the legal theory becomes more diffuse and, as a practical matter, more difficult to attack. The cases increasingly reflect a Commission interest in the field of general bar discipline. There is a subtle shift in scope from intentional, flagrant and occasionally criminal conduct, to negligent conduct,⁴⁰ and conduct only tangentially related to the securities laws.⁴¹ Occasionally, the Commission felt impelled to add to the sanctions imposed by traditional disciplinary authorities.⁴² Moreover, resort to the American Bar Association Canons of Professional Ethics, implying SEC jurisdiction to enforce them, has become a regular occurrence.⁴³ The approach, whether or not conscious, has all the earmarks of a common law development leading toward a federal disciplinary court exercising jurisdiction over all attorneys who are employed by shareholders and corporations within the ever-expanding perimeter of SEC regulation.

40. See, e.g., *In re Schwebel*, 40 S.E.C. 347 (1960), *modified*, 40 S.E.C. 459 (1961); *In re Maizlish*, [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,192.

41. See, e.g., *In re Plotkin, Yolles, Siegel & Turner*, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,236 (conflict of interest); *In re Germaise*, SEC Sec. Act Release No. 5216 (Dec. 7, 1971) (nondisclosure of secret partnership to a client); *In re Kivitz* [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,144.

42. See, e.g., *In re Schwebel*, 40 S.E.C. 347 (1960), *modified*, 40 S.E.C. 459 (1961); *In re Germaise*, SEC Sec. Act Release No. 5216 (Dec. 7, 1971).

43. See, e.g., *In re Carter* [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175; *In re Germaise*, SEC Sec. Act Release No. 5216 (Dec. 7, 1971) (Canon 6); *In re Kivitz* [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,144, *rev'd*, 475 F.2d 956 (D.C. Cir. 1973) (Canons 34 and 35).

A single illuminating case, *In re Plotkin, Yolles, Siegel & Turner*,⁴⁴ offers a recent example. According to the Commission's findings in connection with the imposition of a negotiated sanction, Plotkin, Yolles, Siegel & Turner was a Michigan law firm specializing in tax law. It was retained by a Regulation D issuer of oil and gas leases to provide tax advice to prospective purchasers of the issuer's securities. Plotkin, Yolles advised their issuer's prospective investors and "in some cases favorably recommended" the investment. The firm received payment for its services from the issuer and two of its partners were themselves investors in the issuer's securities. The Commission found that this potential conflict of interest between the firm and the client/investors "may not have been disclosed to some of" the firm's client/investors.

Plotkin, Yolles neither prepared the issuer's offering circulars nor advised anyone concerning the securities laws. It was in tax practice in Michigan, not securities practice. Nonetheless, the Commission instituted a Rule 2(e) proceeding based upon this relatively technical conflict of interest and accepted a negotiated settlement entailing censure of the law firm, resignation of three of its partners from practice before the Commission and a promise to "consult with competent securities counsel in connection with the preparation of any documents that may be . . . delivered to public investors, until such time as they, [Plotkin, Yolles, Siegel & Turner] demonstrate to the satisfaction of the Commission that they are familiar with the disclosure provisions of the federal securities laws."⁴⁵

Plotkin, Yolles, Siegel & Turner illustrates the Commission's willingness to enter the general field of bar discipline notwithstanding its lack of demonstrated expertise and the only tangential relationship to the securities laws of the alleged violations. The final sanction in the settlement is most troubling since it suggests a readmission examination in spite of the express language of the Administrative Procedure Act removing bar admission requirements from agency purview.⁴⁶

44. *In re Plotkin, Yolles, Siegel & Turner*, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,236.

45. *Id.* ¶ 88,318 (emphasis added).

46. 5 U.S.C. § 500(b) (1977). See notes 14-16 and accompanying text *supra*. Commissioner Karmel noted this readmission examination problem in her dissenting opinion to the reinstatement of Plotkin, Yolles. *In re Plotkin, Yolles, Siegel & Turner*, SEC Sec. Act Release No. 6105, 19 SEC DOCKET 64 (August 15, 1979).

As *Plotkin, Yolles* demonstrates, one can view the case law before *Touche, Ross* as a period of agency expansion of jurisdiction being greeted by acquiescence, compliance and neglect. The profession manifested little concern for SEC disciplinary activity and the courts were almost never asked to scrutinize the issue. *Touche, Ross* ended all that, in part because of the alarming language used in both the district court and the Second Circuit. For instance in *Touche, Ross*, which did not even involve attorneys, the Second Circuit gratuitously confused the issue of attorney discipline with that of accountant discipline. Wholly different policies affect the two professions and accountants, unlike attorneys, have well-defined statutory roles which give the Commission a true statutory basis for regulating that profession.⁴⁷ Additionally, the court relied upon the "small staff and limited resources" argument so frequently advanced by the Commission in justification of its exercise of disciplinary authority over professionals. While this argument has some validity when addressed to the need for accountants to exercise a high degree of professionalism in preparing required financial statements, it is of questionable merit when addressed to attorneys. The conscription of private counsel into performance of the Commission's duties seriously jeopardizes the very foundation of the attorney-client relationship, confidentiality. When the court addressed the argument of limited Commission resources to *both* professions it only further advanced an already too loose analysis of the very separate functions of the two professions.

In addition to the mingling of attorney's discipline with that of accountants, the court went so far as to characterize as "facetious"⁴⁸ appellant's argument "that permitting the SEC to discipline attorneys who appear before it would be equivalent to empowering United States Attorneys to disbar lawyers who represent clients in criminal prosecutions in the federal courts." The argument is far from facetious and indeed is precisely the position taken by former SEC Commissioner Roberta Karmel in her dissenting opinion in *In re Keating, Muething & Klekamp*:⁴⁹ "As a general policy matter, I believe it is repugnant to our adversary system of legal representation to permit a prosecutorial agency to

47. Section 19 of the Securities Act, 15 U.S.C. § 77s(a) (1976), empowers the Commission, among other things, to define accounting terms and to prescribe the form and method of preparing financial statements. This, in addition to the pervasive requirement of financial statements certified by an independent public accountant, provides the cornerstone of the Commission's exercise of jurisdiction over accountants.

48. *Touche, Ross & Co. v. SEC*, 609 F.2d 570, 581 (1979).

49. *In re Keating, Muething & Klekamp*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 (July 2, 1979).

discipline attorneys who act as counsel to regulated persons.”⁵⁰ Commissioner Karmel’s view and that raised by the appellants in *Touche, Ross* deserve serious consideration. The adversary system not only protects clients, it insures the integrity of the forum itself. Unless opposing views are vigorously presented in the forum, here the Commission, it runs the needless risk of overlooking better solutions to the many problems of corporate regulation. A vigorous bar *is* in the public interest.

This debate has been raised again in the recent administrative decision, *In re Carter and Johnson*.⁵¹ *Carter and Johnson*, like *Touche, Ross*, arose when the Commission elected to pursue two highly respected and experienced professionals practicing before it in a Rule 2(e) proceeding rather than in the parallel injunctive proceedings it brought against others in the district court.⁵² The Commission’s Office of General Counsel (OGC) alleged that two attorneys, both partners in a law firm which was outside counsel to a public company, aided and abetted in nondisclosure violations of the federal securities laws. The OGC additionally charged that the attorneys’ activities reflected a lack of professional qualifications, character and integrity requisite to practice before the Commission. The facts set forth in the hearing examiner’s initial decision disclose that the heart of the Commission’s complaint concerned the duties of counsel once a corporation’s management has engaged in conduct arguably violative of the federal securities laws. Although the respondents were most explicit in advising management to make certain disclosures, they did not “blow the whistle” by taking their complaint to the board of directors.⁵³ In the hearing examiner’s view this inaction was sufficient to justify a finding of aiding and abetting in a securities violation *and* a finding of breach of the developing securities lawyers’ code of professional responsibility.

The hearing examiner’s decision is significant not only for its explicit jurisdictional findings,⁵⁴ but also for its specific assertion of the Commission’s power to enter the field of discipline for un-

50. *Id.* at 81,992.

51. *In re Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175.

52. *SEC v. Hart*, No. C78-0065 (D.D.C. Jan. 16, 1978); *see* SEC Lit. Release No. 8255, 13 SEC DOCKET 1422 (Jan. 16, 1978).

53. *In re Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175, at 82,186.

54. *Id.* at 82,184.

ethical conduct not necessarily violative of the securities laws.⁵⁵ In light of the hearing examiner's findings it is likely that the Commission's asserted jurisdiction to discipline lawyers will again receive attention by the court of appeals.⁵⁶ Until the jurisdictional issue is resolved, the Commission, insulated from attack by the doctrine of exhaustion of remedies, will continue to add to its "40-year history" by further entrenchment of its claimed authority to apply administrative law in professional disciplinary matters.

Whether or not a federal bar disciplinary system is, as an abstract proposition, a good idea either to supplement or replace more traditional bar disciplinary structures,⁵⁷ it seems clear to the writer that the SEC is an inappropriate body to assume such functions. As a prosecutorial body, vigorous litigant and frequent opponent of the very individuals sought to be disciplined it is, perhaps, the least appropriate agency to undertake the task.

The Nature of Rule 2(e) Proceedings

In February of 1824, Chief Justice Marshall, in reviewing the application of "one [former Vice-President Aaron] Burr, an attorney" for a writ of mandamus terminating Burr's one year suspension from practice before the Circuit Court for the District of Columbia observed: "[T]he profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The *right* to exercise it ought not to be lightly or capriciously taken from him."⁵⁸ Subsequent judi-

55. *Id.* at 82,181.

56. The writer's hopes on this point were dashed as this article went to print. On February 28, 1981 the long awaited Commission decision in *Carter*, [current] FED. SEC. L. REP. (CCH) ¶ 82,847, was issued. The Commission reasserted its jurisdiction and sustained the hearing examiner's view of the law. However, the proceeding was dismissed because of the insufficiency of the evidence as to intent to violate the law because respondents had not had prior notice of the substantive standard of professional conduct to be applied. This, sadly, adds to the "40 year history" in a fashion which precludes judicial review.

57. Congress has considered a federal administrative bar on several occasions, but never enacted legislation. See, e.g., *Hearings on H.R. 2657 Before Subcomm. on Practice Before Govt. Agencies of the House Comm. on the Judiciary*, 80th Cong., 1st & 2d Sess. (1948); see also S. 932, 85th Cong., 1st Sess., 103 CONG. REC. 1063 (1958); S. 318 & S. 1466, 88th Cong., 1st Sess., 109 CONG. REC. 600 (1963); S. 17, 83d Cong., 1st Sess., 99 CONG. REC. 153 (1953).

The House Committee which most recently considered agency disciplinary jurisdiction reported:

"The Committee believes that there is a presumption that members in good standing of the profession of law . . . are of good moral character, and that surveillance by State bar associations . . . will sufficiently insure the integrity of the practice by such persons before the Internal Revenue Service."

H.R. REP. NO. 1141, 89th Cong., 1st Sess. (1965).

58. *Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824) (emphasis added).

cial decisions have without exception continued to characterize the lawyer's profession as a "right" which can not be denied without implementation of the panoply of constitutional protections.⁵⁹

Notwithstanding the antiquity and unanimity of the judicial authority on this point, the SEC has insisted from the outset that practice before it is a "privilege", revocable administratively without full constitutional protection.⁶⁰ The case of Murray A. Kivitz illuminates this position. In *Kivitz*,⁶¹ the hearing examiner, applying the clear and convincing evidence standard, found that the attorney had violated Rule 2(e). On appeal the Commission held:

Whether or not the evidence is clear and convincing, . . . all that is necessary to sustain the staff's burden of proof . . . is a preponderance of the evidence. Rule 2(e) proceedings do not affect the attorney's license to engage in the general practice of law but only his *privilege* to practice before us.⁶²

The court of appeals, twice noting that the disciplinary issues presented did not involve Commission expertise,⁶³ sharply contradicted the SEC's characterization of the gravity of the proceeding and nature of the attorney's interest in practicing law: "[W]e have always viewed an attorney's license to practice as a right

59. See, e.g., *Willner v. Comm. on Character*, 373 U.S. 96, 102 (1963); *Laughlin v. Wheat*, 95 F.2d 101, 102 (D.C. Cir. 1937).

The right-privilege distinction has become less constitutionally meaningful in recent years. See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

60. Rule 2(e) states that practice before the SEC is a "privilege". 17 C.F.R. § 201.2(e) (1980). See also *In re Schwebel*, 40 S.E.C. 347, 371 (1960), *modified*, 40 S.E.C. 459 (1961); *In re Fields*, [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,407.

Whatever validity this argument may have had in the early years of the Commission, its perpetuation is grotesquely anachronistic when applied to national accounting firms or law firms of any size. In Sec. Act Release No. 5147 the Commission warned that Rule 2(e) may be invoked against an entire law firm so that no partner or associate may engage in securities practice without leaving the firm. SEC Sec. Act Release No. 5147 (May 10, 1971). Compare the case of Pryor, Cashman, Sherman & Flynn reported in *The Legal Times of Washington*, Sept. 18, 1978, at 1, col. 1, in which the Commission obtained an injunction by consent running against an entire law firm because of the alleged misconduct of one of its partners.

In *In re McLaughlin & Stern, Ballen and Miller*, SEC Sec. Exch. Act Release No. 11553, 7 SEC DOCKET 465 (July 25, 1975); SEC Sec. Lit. Release No. 6978, 7 SEC DOCKET 367 (July 11, 1975), an entire law firm was censured for failure to supervise adequately the securities work of an associate of the firm.

61. *In re Kivitz*, [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,144, at 80,473, *rev'd*, 475 F.2d 956 (D.C. Cir. 1973).

62. *Id.* at n.2 (emphasis added).

63. *Kivitz v. SEC*, 475 F.2d 956, 961-62 (D.C. Cir. 1973).

which can not lightly or capriciously be taken from him. This disbarment case involves a lawyer's reputation in the community, his livelihood, his self-esteem—his right.”⁶⁴ The court remanded the matter to the Commission with directions to vacate its disbarment order.

Kivitz is most alarming, not only because of the procedural and evidentiary laxity which triggered the reversal of *Kivitz's* disbarment by the court of appeals, but because the underlying facts reveal a five year witch hunt by the Commission staff against an attorney for conduct having almost nothing to do with the agency. The specific misconduct alleged against *Kivitz* was the use of an intermediary in the negotiation of a retainer agreement and agreement to fee split with a layman.⁶⁵ *Kivitz's* conduct was held to have violated a predecessor provision of Canons 34 and 35 of the present American Bar Association Code of Professional Responsibility.⁶⁶ *Kivitz* had practiced securities law in Washington, D.C., for some twelve years before the alleged misconduct took place and for eighteen years before the Rule 2(e) proceedings were instituted. He had an unblemished professional career and produced seven character witnesses who attested to his excellent professional reputation. He testified in his own behalf and denied any misconduct or knowledge of misconduct by others.

The Commission's evidence, almost exclusively hearsay and double hearsay statements made out of the presence of *Kivitz*,⁶⁷ painted the picture of *Kivitz's* alleged lay accomplice as a self-proclaimed “fixer” and corrupter of government officials. Although government authorities, including the Commission's chairman were involved in the investigation from the outset,⁶⁸ no evidence

64. *Id.* at 962 (citations omitted). See also *Ex Parte Burr*, 22 U.S. (9 Wheat.) 529 (1824).

65. *Kivitz v. SEC*, 475 F.2d 956, 958 (D.C. Cir. 1973). *Kivitz* was to be paid a total compensation of \$50,000 to prepare a registration statement for a proposed issuance of \$12,000,000 of securities. Hearsay testimony admitted against *Kivitz* were extra-judicial statements by the layman (who invoked his 5th Amendment privilege against self-incrimination and did not testify at the hearing) and others to the effect that one half of this fee was to be given to the laymen for redistribution among corrupt government officials to pave the way for a successful registration process. *Id.* at 958-59.

66. See *In re Kivitz*, [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,144, at 80,477 nn.12 & 13; ABA CANONS OF PROFESSIONAL ETHICS Nos. 34 & 35.

67. According to the folklore of trial lawyers, police court judges in old Philadelphia, usually laymen, used to inquire of the proponent of an extra-judicial utterance: “Was it said in the presence of the defendant?” If the answer was affirmative, the hearsay was admitted under what became known as the “Philadelphia Exception” to the Hearsay Rule. Although freely admitted over *Kivitz's* objection, “subject to connection”, the testimony most injurious to him apparently would not have qualified even under the “Philadelphia Exception.”

68. Attorney David Doane of Boise, Idaho testified that shortly after his first and only meeting with *Kivitz* and the alleged lay “accomplice” he went to the of-

was adduced linking Kivitz to any fee splitting or corruption. Apparently frustrated in a five year effort to prove what they thought they knew, the SEC staff instituted Rule 2(e) proceedings on the eve of the tolling of the statute of limitations. Hearsay, both in the form of tape recordings and live testimony regarding a conversation between the alleged lay accomplice and a third party was admitted. This was done notwithstanding the lack of a link between the hearsay and Kivitz, other than his occasional representation, as an attorney, of the alleged lay "accomplice" and his presence at a single meeting where no impropriety took place.⁶⁹

Kivitz thus illustrates the ease with which Rule 2(e) findings may be made against a professional. The rules of evidence⁷⁰ are relaxed so completely as to give virtually unfettered discretion to the hearing examiner. Moreover, the burden of proof assumed by the Commission, when not shifted to the attorney pursuant to Rule 2(e)(3), is a "mere preponderance" standard,⁷¹ not the "clear and convincing" evidence standard traditionally required by the courts where a professional's livelihood is at stake.⁷² In short, the SEC takes the position that it may treat as an ordinary

office of SEC Chairman Hamer Budge and said: "[H]omer, [sic] what kind of an outfit are you running." *Kivitz v. SEC*, 475 F.2d 956, 964 app. (D.C. Cir. 1973). Doane then told Chairman Budge of his suspicions concerning the arrangement. *Id.*

Doane also testified: "This business of Mr. Murray Kivitz, that is an incidental development, a side issue, as far as I am concerned." *Id.*

Doane was apparently the only witness who had direct conversations with Kivitz. All other evidence was testimony concerning what third parties said about Kivitz to the testifying witness.

69. Witness Doane also testified:

Q. The only documentary evidence that you drew out of this meeting is a perfectly reasonable offer to a legitimate company, isn't it?

A. Sure, that is what I would expect to come out of that. . . ." *Id.*

"There is *no* evidence that Kivitz at any time or in any way contemplated proposed use of political influence to secure registration. . . ." (emphasis added). *Id.* at 959 n.2.

70. S.E.C. Rules of Practice, 17 C.F.R. § 201.14 *Evidence* (1980).

71. The preponderance-of-the-evidence standard in revocation proceedings against an investment advisor was adopted explicitly by the Supreme Court in *Stedman v. SEC*, [Current] FED. SEC. L. REP. (CCH) ¶ 97,878 (Feb. 25, 1981) where the court disapproved of the clear and convincing standard adopted by the District of Columbia Circuit in *Collins Sec. Corp. v. SEC*, 562 F.2d 820 (D.C. Cir. 1977). Since the opinion was based upon an interpretation of § 7 of the Administrative Procedure Act, 5 U.S.C. § 556 (1976 & Supp. III 1979), it is by its terms broad enough to cover Rule 2(e) proceedings against professionals.

72. See, e.g., *In re Lurie*, 113 Ariz. 95, 546 P.2d 1126 (1976); *Vaughn v. State Bar*, 6 Cal. 3d 847, 494 P.2d 1257, 100 Cal. Rptr. 713 (1972); *Florida Bar v. Quick*, 279 So. 2d 4 (Fla. 1973); *In re Bossov*, 60 Ill. 2d 439, 328 N.E.2d 309, cert. denied, 423 U.S. 928 (1975); *In re Gross*, 67 N.J. 419, 341 A.2d 336 (1975).

administrative proceeding a matter which the U.S. Supreme Court has characterized as "quasi criminal" in nature.⁷³

The problems this generates are only aggravated when, on appeal, the unsuccessful attorney litigant before the Commission discovers that the administrative findings are conclusive "if supported by substantial evidence."⁷⁴ Forced to litigate in a hostile forum below, potentially carrying the burden of proof, he must overcome a presumption of propriety on appeal. *Kivitz* no doubt represents the very rare situation where the attorney had the proof, the energy, the financial resources and the will to overcome these barriers.

LAW AND POLICY

Rule 2(e) cases against attorneys can be categorized conveniently by the nature of the misconduct alleged. Type 1 cases are those where the misconduct does not violate the federal securities law, but rather violates the American Bar Association Code of Professional Responsibility or some other non-federal source of ethical guidance. Type 2 cases concern conduct enjoined (or enjoined) under the federal securities laws. Each type of case raises serious issues concerning the competence of the Commission to exercise jurisdiction.

In the Type 1 situation, such cases as *Kivitz* and *Plotkin, Yolles, Siegel & Turner*, the Commission must first find that the attorney-respondent "practices" before it.⁷⁵ Additionally, the agency should be required to find some nexus between the alleged misconduct and the practice before it.⁷⁶ With Type 1 cases though the fundamental problems are jurisdictional and procedural. First, the general enabling language of section 23(a) of the Exchange Act⁷⁷ should not be interpreted to confer jurisdiction to promulgate rules for attorney discipline. The area is too remote from the securities laws and the Commission's expertise. Second,

73. *In re Ruffalo*, 390 U.S. 544, 551 (1968); see also *Charlton v. FTC*, 543 F.2d 903, 906 (D.C. Cir. 1976).

74. 15 U.S.C. § 78y (1977); see *Hughes v. SEC*, 174 F.2d 969, 974 (D.C. Cir. 1949); see also *Kivitz v. SEC*, 475 F.2d 956, 961 (D.C. Cir. 1973).

75. Many settlements apparently involved some discussion of "practice" before the Commission as a potential defense since the reports often include a recitation that the disciplined attorney represents "that he does not presently practice before the Commission . . ." See, e.g., *SEC v. National Student Mktg. Corp.*, SEC Lit. Release No. 7891, 12 SEC DOCKET 273, 274 (Apr. 28, 1977) (Mr. Katz); *SEC v. Capital Planning Ass'n. Inc.*, SEC Lit. Release No. 7572, 10 SEC DOCKET 541, 542 (Sept. 20, 1976) (Mr. Von Schottenstein); *SEC v. Petrofunds*, SEC Lit. Release No. 8001, 12 SEC DOCKET 1093 (June 28, 1977) (Mr. Biller).

76. No case discovered directly discusses this issue.

77. See text accompanying note 5 *supra*.

assuming arguendo that the jurisdictional grant could be established, when did the Commission exercise its authority?⁷⁸ The Code of Professional Responsibility is only binding to the extent it has been adopted either by the state bar regulatory authorities, or, if it possesses the power, by the Commission. The Commission has not promulgated any such code. The present "common law" piecemeal adoption of the American Bar Association Code of Professional Responsibility exposes the SEC to the justified complaint that it is engaging in "ambush" litigation in order to avoid the public comment and jurisdictional debate inherent in the rule making process. It may be that there exists a vacuum in attorney discipline. However, in a system of limited government, the Commission's mandate to enter this arena is too tenuous for it to undertake attorney discipline without express legislative grant or public discussion.

Type 2 cases present a harder knot to unravel. The spectacle of the securities-law-flaunting lawyer representing other, perhaps innocent, clients before the Commission is an anomaly too embarrassing for the profession to tolerate. One cannot help but sympathize with the Commission's goal in issuing rules designed to facilitate the speedy termination of the attorney's right to practice before it in such a situation. Nevertheless, there are at least two serious objections to Rule 2(e) litigation based upon conduct which violates the federal securities laws. With the exception of broker/dealer regulation, both the Securities Act⁷⁹ and the Exchange Act reserve to the federal courts *exclusive* jurisdiction over violations of the securities laws.⁸⁰ The author is unaware of this objection to SEC jurisdiction being raised in any Rule 2(e) proceeding. However, it seems serious enough to require adjudication, particularly in situations similar to *Carter and Johnson* and *Touche, Ross*, where the respondents were not named in the parallel injunctive actions in the federal court. The Commission

78. In SEC Sec. Act Release No. 5953 (August 15, 1978) the Commission disavowed administering the ABA Code of Professional Responsibility, yet indicated that it would construe the Code as "*in pari materii*" with its Conduct Regulation in evaluating attorney behavior. 15 SEC DOCKET 590, 590-91 n.1 (1978).

79. Securities Act of 1933, ch. 38, 48 Stat. 74 (1933).

80. 15 U.S.C. § 78aa (1977). "The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder . . ." *Id.*

15 U.S.C. § 77v(a) (1977). "The district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations . . . in respect thereto . . ." *Id.*

makes a choice to preempt the jurisdiction of the federal court in these cases by proceeding administratively for alleged securities law violations. On its face this action flaunts the express language of the very laws the Commission was created to administer.

Another unasked question is whether the federal courts would entertain a Commission request for a temporary injunction against an attorney precluding her or him from practicing before the Commission pending determination of an injunctive action.⁸¹ If such a request were entertained by the courts, there would be no need for preemptive or parallel Rule 2(e) proceedings.

Post injunction, the jurisdictional objection is less tenable. The federal court has made its finding after exercising its exclusive jurisdiction. The enjoined attorney is precisely centered in the cross-hairs of public interest and the Commission's area of expertise. Even here, however, there are problems under Rule 2(e)(3)⁸² as presently drafted. The rule confers procedural advantages on the agency in total blindness to the recognition that injunctions are prophylactic, disbarments punitive. Where the attorney has been enjoined based upon "mere negligence," the present rule does not meet the constitutional standards mandated by the Supreme Court in matters affecting an attorney's right to practice his profession.⁸³

There are at least two potential solutions for this dilemma. First, the Commission could seek a temporary or permanent injunction from practice before it as ancillary relief in the district court injunctive action. Alternatively, assuming Commission jurisdiction, it could commence a full Rule 2(e) proceeding, but not until after the injunction has been obtained. In the Rule 2(e) proceeding the attorney-respondent would be permitted to offer evidence relevant in a punitive proceeding albeit irrelevant in an injunctive action. That is, the accused attorney could be given the opportunity to present evidence pertaining to his or her fitness to practice before the Commission. Good faith, excellent reputation and otherwise wholly competent practice would all be material and relevant. If the attorney is not given this opportunity, it is submitted that the disbarment procedure is constitutionally defective.

Lurking behind the problem of SEC assumption of jurisdiction to discipline lawyers is the hermaphrodite nature of the Commis-

81. In *SEC v. Ezrine*, [1972-1973 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 93,594, the district court enjoined an attorney from practicing before the SEC after he had refused to comply with a Rule 2(e) disbarment.

82. See note 9 *supra* for the text of the rule.

83. See text accompanying notes 58-59 *supra*.

sion itself. As an archetypal New Deal agency, it was created in conscious disregard for traditional notions of tripartite government and separation of powers. Congress perceived contemporary social and economic ills as beyond the control of conventional modes of government. Agencies such as the Commission were inspired with life and began to function immediately at the periphery of the courts' power to control them. Their successes and abuses have kept lawyers and printers busy ever since.

It is important to observe that nothing in the text or legislative history of the securities laws, nor in the economic collapse which provoked those laws, suggests a congressional intention to regulate the practice of law before the SEC or other government agencies. Congress gave the Commission express jurisdiction to regulate brokers and dealers.⁸⁴ Congress gave the federal courts the *exclusive* power to adjudicate actions for alleged violation of the securities laws.⁸⁵ Thus, to the extent the Commission exercises jurisdiction over attorneys for disciplinary matters not violating the securities laws, as in *Kivitz* and in *Plotkin, Yolles, Siegel & Turner*, it acts without express authority, relying on its inherent power as a "court" and upon the general enabling language of Section 23(a) of the Exchange Act.⁸⁶ To the extent the Commission purports to sanction professionals for otherwise unadjudicated alleged securities law violations, as in *Carter and Johnson, Schwebel and Touche, Ross, & Co.*, it does so in derogation of the exclusive jurisdiction of the federal courts.

In this latter area (the use of Rule 2(e) proceedings where an injunction might be sought in the federal courts) serious policy questions are raised. Disregarding for the moment the jurisdictional objections, should the Commission be permitted to avoid federal court and thereby deny its opponent the liberal discovery provided by the federal rules?⁸⁷ Is it fair to allow relaxed rules of evidence⁸⁸ and a lower standard of proof⁸⁹ in a proceeding where

84. 15 U.S.C. § 78o (1977).

85. See note 80 *supra*.

86. See text accompanying notes 5 & 6 *supra*.

87. Compare S.E.C. Rule of Practice, 17 C.F.R. 201.15 (1980), with FED. R. CIV. P. 26(b).

88. Compare Commission's Rules of Practice, 17 C.F.R. § 201.14 (1980): "The hearing officer shall receive relevant and material evidence . . . and exclude all irrelevant, immaterial or unduly repetitious evidence" with the detailed provisions of the Federal Evidence Code. In practice formalities are at a minimum in admin-

a professional or firm of professionals stands to lose its livelihood? Should the Commission be permitted to sanction by disbarment where it might not be able to obtain an injunction?⁹⁰

These and similar hard questions must be asked with the SEC in perspective. It is a litigating prosecutorial agency. In its fiscal year ending September 30, 1979,⁹¹ its enforcement staff initiated 1,171 investigations,⁹² 108 injunctive actions,⁹³ 81 administrative proceedings⁹⁴ and referred 45 cases to the Department of Justice for criminal prosecution.⁹⁵ In virtually every case, the Commission was opposed by lawyers, the very group it claims jurisdiction to discipline for professional misconduct.

Litigation is a rough and tumble business. Hot tempers and bruised egos are commonplace. It asks too much detachment of the Commission's enforcement staff to prosecute securities law violations with one hand while enforcing standards of professional conduct for its opponents with the other.⁹⁶ From a practi-

istrative proceedings and technical objections, even those arguably mandated by due process, are ignored.

89. The Commission has taken the position that it need not prove scienter in Rule 2(e) proceedings:

"We accept respondents' assertions that they acted in good faith and accordingly do not find any willfulness in the sense referred to by them. However, in a disciplinary action under Rule II(e) we are not required to make such a finding." *In re Haskins & Sells and Andrew Stewart*, SEC Accounting Release No. 73, File No. 4-66, 5 FED. SEC. L. REP. (CCH) ¶ 72,092, 62,197 (Oct. 30, 1952).

Following *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), the general counsel to the Commission suggested in a memorandum to Chairman Hills of the SEC that *Hochfelder* might mandate fewer injunctive actions and "greater reliance upon Rule 2(e)." STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, SUBCOMM. ON REPORTS ACCOUNTING AND MANAGEMENT, 94th CONG., 2d SESS., ACCOUNTING ESTABLISHMENT APPENDIX I, 1472, n.2 (Comm. Print 1976). See also *In re Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175, holding *Hochfelder* to be inapplicable in administrative proceedings citing, *inter alia*, *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965); and *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976), *cert. denied*, 434 U.S. 1009 (1978).

90. For example, non-likelihood of recurrence is potentially a complete defense in an injunctive action. See *SEC v. National Student Mktg. Corp.*, 457 F. Supp. 682 (1978). Disbarment matters have always fulfilled a punitive as well as prophylactic function thus making non-likelihood of recurrence relevant, but not dispositive.

91. 45TH SEC ANN. REP. (1979).

92. *Id.* at 121 table 31.

93. *Id.* at 122 table 33.

94. *Id.* at 122 table 32.

95. *Id.* at 122 table 34.

96. The writer has been advised informally that the Commission has a "Chinese wall" in Rule 2(e) matters to prevent vigorous representation from spilling over into disciplinary charges. Nonetheless, in *SEC v. Csapo*, 533 F.2d 7 (D.C. Cir. 1976) where the Commission's use of its sequestration rule, 17 C.F.R. § 203.7(b), was overruled by the court of appeals, one sees improper staff invocation of a little used rule to isolate the key defendant from his counsel at a critical time in the proceedings. This case strongly suggests that a Rule 2(e) "Chinese wall" would

ing lawyer's point of view, the situation is simply intolerable. The fear that vigorous representation could trigger a disciplinary investigation impermissibly taints already difficult judgments with personal ethical concerns.⁹⁷ It asks too much of the lawyer to risk his livelihood on a close point of law. He must perforce dull the edge of his advice and err in favor of the Commission. In such a circumstance, the rights of the intimidated lawyer's client are seriously threatened. Ignorant of his counsel's jeopardy the client may sail into a maelstrom blissfully unaware that his captain has been forced to abandon ship. Such handicapping in favor of any party, particularly the government, hardly seems consistent with the overall goals of our legal system.

It must be observed too that, in recent years, the practicing securities lawyer has operated in an environment permeated with reminders from the Commission's Enforcement Division, his opponents in all investigations and most litigations, that they are also the watchdogs of his professional conduct.⁹⁸ In such a milieu it is too difficult to put out of mind the fact that Murray Kivitz, who represented clients before the Commission for twelve years without blemish, subsequently was under investigation for five years and in litigation for almost four more years in order to vindicate conduct which took place in a matter of hours and for which he received no compensation. Under the present state of the law, *Kivitz* is a potent warning not to raise the Commission's ire.

remain inviolate until zeal overcame restraint in a case perceived by the enforcement staff as too important to tolerate hard hitting defense counsel.

97. A tangential, but illuminating case from the Ninth Circuit demonstrates the quandary presented by ethical conflict with the client's best interest. In *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978) the petitioner's homicide conviction was reversed because of trial counsel's "abandonment of a diligent defense" when he believed his client to have committed perjury. (After being denied permission to withdraw from the case, the attorney summed up for his client, but made no use of her testimony, which he believed to be perjured.) Judge Hufstedler, concurring in the reversal said: "No matter how commendable may have been counsel's motives, his interest in saving himself from potential violation of the canons was adverse to his client, and the end product was his abandonment of a diligent defense." *Id.* at 732.

98. In an interview with *FORTUNE*, Stanley Sporin, voluble Director of the Commission's Enforcement Division, seems particularly concerned with his role as guardian of the professional ethics of the corporate bar. See "*What the SEC Expects from Corporation Lawyers*", *FORTUNE*, October 23, 1978, at 143.

CONCLUSION

The courts should terminate or radically contain and define the Commission's exercise of jurisdiction over the bar. Unchecked, we will drift into an agency dominated federal bar disciplinary system as an encrustation over the already confused and little understood law regulating attorney conduct. Human progress has seldom been achieved by increasing the complexity of the laws governing our lives.

Perhaps it is time for Congress to consider again or, for that matter, the Supreme Court on its own motion to consider establishment of preemptive or parallel federal standards of professional responsibility. Once established, the impartial enforcement of such standards might indeed elevate the bar to that position of public confidence and respect which it has always claimed, yet never attained. However, should this search for a more orderly and comprehensive system of attorney discipline be undertaken, one can only hope that a neutral investigative and adjudicative body would be established. Further expansion of the authority of the SEC or any other litigating agency would only undercut the adversary system and stifle the voice of loyal opposition.

APPENDIX

Research in the area of attorney discipline by the SEC presents some unique problems, the most glaring of which is the existence of an undefined body of non-public cases. However, this impediment is almost eclipsed by the fact that even where Rule 2(e) decisions are publicly reported there is no comprehensive index. The public reports of such cases are scattered throughout the various Commission releases and are only selectively published by the commercial services. Even the awesome word search capabilities of Lexis legal research can't entirely retrieve Rule 2(e) cases since, at least in the writer's experience, a suitably narrow program could not be devised. In the winter of 1979 I undertook to alleviate this situation by a meticulous search using the impressive library facilities at New York University School of Law. I had the informal assistance of several former colleagues at the SEC who wished to fathom the mysteries of lawyer discipline by the agency. What follows is a chronological arrangement of the reported "cases" which were discovered.

A word of caution seems appropriate. The very disarray that this appendix seeks to cure raises the spectre of omitted proceedings. It is possible that subsequent proceedings, including reversals or mitigation of sanctions, may not have been discovered. In light of this problem and a sincere desire not to injure the reputations of the attorneys mentioned, we have published this appendix without inclusion of most of the last names of attorneys involved. The casual reader doesn't need this data and the serious researcher can discover it by retrieval of the case. Where cases are discussed in the text of this article last names are included in this appendix.

There are additional difficulties. Most "cases" were settled by consent without the respondent attorney's admission of the misconduct alleged. The reader is cautioned that the allegations should be considered in light of the fact that they were usually not admitted and that settlement reflects practical considerations beyond the scope of the reports from which our recitations are drawn. Further, many "cases" are found only in SEC releases reflecting the SEC's view of the circumstances.

Finally one must recognize that weight of numbers and antiquity does not elevate to the status of law negotiated settlements entered into without judicial oversight or review. At best such re-

ports represent custom. More likely, they are a memorial to how far accused attorneys are willing to bend to avoid litigation in this strange and perilous sea.

What follows is a compendium of the public cases that appear to have disciplinary implications. Included are Rule 2(e) proceedings, Rule 2(e) non-proceedings involving consent withdrawal from practice before the Commission, injunctive actions in which a lawyer's right to practice before the Commission apparently was on the bargaining table and criminal cases where a lawyer-defendant sustained a conviction involving securities related crime. I am confident that this appendix contains at least 90% of the publicly reported Rule 2(e) proceedings. It may contain them all. The other matters included are those somewhat fortuitously encountered in my research. No effort has been made to discover and include such tangential cases except where they relate to a known Rule 2(e) proceeding.

The listed "cases" have generally been reported in SEC releases. For several of the cases involving criminal convictions or disbarment the release did not state the disposition. However, under 17 C.F.R. § 201.2(e)(2) (*See note 9 supra* for text) the disposition for disbarment and certain criminal convictions would be mandatory suspension from appearing before the Commission. For appropriate cases, the disposition mandated by the statute is given unless a specific disposition was stated in the release.

Jacob G. United States v. Gruber, 39 F. Supp. 291 (S.D.N.Y. 1941), *aff'd.*, 123 F.2d 307 (2nd Cir. 1941).

Allegations: Jacob G. was convicted, along with an SEC employee, of conspiracy and wiretapping in order to gain knowledge of the SEC's activities concerning one of his clients.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Albert F. *In re* Albert F., 37 S.E.C. 832 (1950).

Allegations: False statements and failure to disclose true circumstances regarding ownership of stock in a declaration filed with the Commission.

Disposition: Prohibited from appearance or practice before the Commission for one year with a prior approval requirement thereafter.

Remarks: Albert F. had been in practice for more than 40 years without any involvement in any improper professional conduct.

William D. *In re William D.*, 38 S.E.C. 82 (1957).
Allegations: False and misleading statements given as testimony before the Commission.
Disposition: Prior approval by the Commission required for subsequent appearance or practice before it.
Remarks: William D. had practiced law without any improper conduct for 37 years, 20 of which had been before the Commission.

James D. *In re James D.*, 38 S.E.C. 879 (1959).
Allegations: Prepared false financial statements; advised "gun jumping"; obtained money from client for stated purpose of corrupting SEC employees; and advised client money had to be so distributed, although no such monies had been distributed.
Disposition: Permanent disqualification from appearing or practicing before the Commission, entered into by consent.

Sol A. *In re Sol A.*, 39 S.E.C. 346 (1959).
Allegations: Prepared registration statement containing misrepresentations and material omission.
Disposition: Agreed to refrain from practice before the Commission without obtaining prior approval.

Morris MacSchwebel *In re Schwebel*, 40 S.E.C. 347 (1960), *modified*, 40 S.E.C. 459 (1961).

Allegations: Active participant in scheme to distribute unregistered securities; approved and filed on behalf of companies false and misleading financial statements.
Disposition: Permanent disqualification from practice and appearance before the Commission.
Remarks: Schwebel challenged Commission jurisdiction in United States district court which found Commission jurisdiction. *Schwebel v. Orrick*, 153 F. Supp. 701 (D.D.C. 1957). The court of appeals affirmed on basis of failure to exhaust administrative remedies, but vacated the district court's ruling on jurisdiction. *Schwebel v. Orrick*, 251 F.2d 919 (D.C. Cir. 1958), *cert. denied*, 356 U.S. 927 (1958).

Schwebel was convicted on guilty plea of aiding and abetting in sale of unregistered securities on May 1, 1964 and sen-

tenced to fine and prison. SEC Lit. Release No. 2959 (June 9, 1964).

Arnold N. SEC Sec. Act Release No. 4372 (June 8, 1961).

Allegations: Convicted of violating section 5 of the Securities Act of 1933 (Securities Act) on plea of *nolo contendere*.

Disposition: Suspended from practice before the Commission.

Page R. SEC Sec. Act Release No. 4619 (June 27, 1963).

Allegations: Prepared and caused to be filed several false registration statements and Regulation A notifications.

Disposition: Disqualified from practice before the Commission by resignation.

Erwin P. SEC Sec. Act Release No. 4619 (June 27, 1963).

Allegations: Co-respondent with Page R., *supra*, and charged with identical misconduct.

Disposition: Disqualified from practice before the Commission by resignation.

Nathan W. SEC Sec. Exch. Act Release No. 6932 (Nov. 5, 1962).

Allegations: None stated in the Securities Exchange Act Release.

Disposition: Resignation from practice before the Commission.

Leonard N. SEC Sec. Act Release No. 4642 (Sept. 19, 1963).

Allegations: Prepared and filed false and misleading Regulation A notifications.

Disposition: Permanent disqualification.

Ronald F. *In re* Ronald F., SEC Sec. Act Release No. 4736 (Nov. 24, 1964), [1964-66 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,190.

Allegations: Recommended use of Regulation A financing to companies for which he knew such exemptions were unsuitable. Material misrepresentations and omissions in Regulation A filings.

Disposition: Consented to permanent disqualification from appearing or practicing before the Commission.

John G. *In re* John G., SEC Sec. Act Release No. 4737 (Nov. 4, 1964), [1964-66 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,169.

Allegations: Recommended use of Regulation A financing to companies for which he knew such exemptions were unsuitable. Material misrepresentations and omissions in Regulation A filings.

Disposition: While not admitting allegations, consented to permanent disqualification from appearing or practicing before the Commission.

Remarks: Facts suggest this is a companion case to Ronald F., *supra*.

Donald K. *In re* Donald K., SEC Sec. Act Release No. 4738 (Nov. 30, 1964), [1964-66 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,191.

Allegations: Participated in numerous false Regulation A filings.

Disposition: Allegations which were specifically denied were dismissed. While not admitting remaining allegations, consented to two year suspension from appearing or practicing before the Commission.

Leonard M. *In re* Leonard M., SEC Sec. Act Release No. 4739 (Dec. 1, 1964), [1964-66 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,192.

Allegations: False and misleading Regulation A filings.

Disposition: SEC dismissed private denial proceedings after Leonard M. tendered withdrawal from practice without admitting allegations in the proceedings.

Marshal S. *In re* Marshal S., SEC Sec. Act Release No. 4829 (April 29, 1966).

Allegations: Permanent injunction against violation of registration provisions of the Securities Act.

Disposition: Permanent disqualification. Respondent

pleaded guilty to charges of violation of § 5(a)(1) of Securities Act, he was fined \$5,000, ordered to make restitution to investors and placed on three year probation. In addition respondent was suspended from District of Columbia bar for three months.

Irving R. *In re* Irving R., SEC Sec. Act Release No. 4864 (May 1, 1967).

Allegations: "May have engaged in unethical or improper professional conduct".

Disposition: Resigned from practice before the Commission without commencement of a Rule 2(e) proceeding.

Martin F. United States v. Frank, 520 F.2d 1287 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976).

Allegations: Criminal conviction for conspiracy involving market manipulation by use of Swiss banks.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Related Case: SEC v. Frank, 388 F.2d 486 (2d Cir. 1968).

Philip P. SEC Lit. Release No. 4275 (Nov. 20, 1969). SEC Lit. Release No. 5531 (Sept. 19, 1972).

Allegations: Criminal conviction for violations of anti-fraud provisions and for conspiring to deprive Commission of the faithful services of an employee.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Remarks: Related to Murray A. Kivitz, *infra*.

Paul K. *In re* Paul K., 44 S.E.C. 374 (1970).

Allegations: Criminal conviction for market manipulation.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Murray A. Kivitz *In re* Kivitz, SEC Sec. Act Release No. 5163 (June 29, 1971), [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,144, *rev'd*, 475 F.2d 956 (D.C. Cir. 1973).

Allegations: Commission alleged improper use of a layman as intermediary between self and client; improper offer to ac-

cept professional employment involving splitting fee with layman for use in making corrupt payments.

Disposition: Commission suspension reversed by D.C. Circuit.

Remarks: Opinion of circuit court takes hearing examiner to task for convicting Kivitz without evidence other than inadmissible, double hearsay. See *In re* Kivitz, SEC Sec. Act Release No. 5378, 1 SEC DOCKET No. 9, 1 (March 28, 1973) for the Commission order vacating prior order and dismissing proceedings.

Irwin G. *In re* Irwin G., SEC Sec. Act Release No. 5216 (Dec. 7, 1961).

Allegations: Violated ABA Canon 6 by failure to disclose information in a public offering.

Disposition: Two year suspension.

Thomas Q. *In re* Irwin G., SEC Sec. Act Release No. 5216 (Dec. 7, 1961).

Allegations: Convicted of criminal violation of the registration and anti-fraud provisions of the Securities Act.

Disposition: Permanently disqualified with proviso that if criminal conviction reversed, may apply to have disqualification reduced to a two-year suspension.

Carey M. SEC Lit. Release No. 5307 (Jan. 26, 1972).

Allegations: While Director of and General Counsel to an insurance company, mailed false and misleading proxy statement. Plead guilty to securities fraud in connection with proxy statement.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Eugene A. SEC Lit. Release No. 5337 (March 2, 1972).

Allegations: Convicted of perjury and obstruction of justice in connection with SEC investigation of securities offering.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Darwin B. Bar Misc. 3077, Supreme Court of California (Feb. 29, 1972); *see* 47 CALIF. ST. B. J. 241.

Allegations: Criminal conviction for the fraudulent interstate sales of securities and conspiracy. Darwin B. was disbarred in California.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Thomas B. SEC Lit. Release No. 5397 (May 1, 1972).

Allegations: Helped to prepare misleading offering circular, non-disclosed representation of parties with potentially conflicting interest.

Disposition: Consented to entry of a permanent injunction.

Ivan E. SEC Sec. Act Release No. 5268 (July 7, 1972).

Allegations: Permanently enjoined in SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972); Criminally convicted for conspiring to violate Regulation T.

Disposition: Permanent disqualification.

Remarks: When Ivan E. ignored his disqualification and appeared as counsel in a Commission administrative hearing he was enjoined in U.S. district court from further practice before the Commission. SEC v. Ezrine, 72 Civ. 3161 (S.D.N.Y.) [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,594. *See* SEC Lit. Release No. 6481, 5 SEC DOCKET No. 1, 760 (Aug. 15, 1974). U.S. district court entered a final judgment of permanent injunction and ancillary relief.

Elliot B. SEC Sec. Exch. Act Release No. 9666 (July 10, 1972).

Allegations: False Regulation A filing, false testimony before the SEC, facilitated unlawful stock purchases.

Disposition: The Commission instituted private proceedings pursuant to Rule 2(e). Under terms of Offer of Settlement, Elliot B. resigned from practice before the Commission.

Subsequent proceedings: SEC Sec. Exch. Act Release No. 16588 19 SEC DOCKET 658 (February 19, 1980).

Upon application to the Commission for reinstatement to appear and practice before the Commission, Elliot B. was reinstated. Elliot B. agreed he would be subject to the direction of experienced securities counsel in all securities matters.

Murray W. SEC Lit. Release No. 5531 (Sept. 19, 1972).

Allegations: Convicted after trial of one count of perjury before the grand jury; sentenced to one year in prison.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Remarks: Murray W. consented to a permanent injunction in unrelated case. SEC Lit. Release No. 5676 (Dec. 21, 1972).

Martin R. SEC Lit. Release No. 5677 (Dec. 26, 1972).

Allegations: Criminal conviction for obstruction of justice in connection with Commission investigation of Globus International Ltd. common stock.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Charles R. SEC Lit. Release No. 5820, 1 SEC DOCKET No. 9, 24 (March 30, 1973).

Allegations: Permanently enjoined from violations of the registration and anti-fraud provisions of the securities laws.

Disposition: Resigned from practice before the Commission.

Richard M. SEC Lit. Release No. 5831, 1 SEC DOCKET No. 10, 22 (April 5, 1973).

Allegations: Criminal conviction for mail and securities fraud.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Related case: United States v. Mackay, No. Cr. 54-71 (D. Utah March 30, 1973), *aff'd*, 491 F.2d 616 (10th Cir. 1974), *cert. denied*, 416 U.S. 972 (1974).

Edward G. SEC Lit. Release No. 6041, 1 SEC DOCKET No. 11, 376 (Aug. 28, 1973).

Allegations: Facilitated illegal distribution of securities by providing opinion letters which had no basis in fact.

Disposition: Permanent injunction and consented to a two year suspension of practice before the Commission.

Related Case: SEC v. Universal Major Indus. Corp. 546 F.2d 1044 (2d Cir. 1976), *cert. denied*, 434 U.S. 834 (1977).

Rexford M. SEC Lit. Release No. 5873, 1 SEC
DOCKET No. 14, 29 (April 30, 1973).

Allegations: Assisted in the issuance of unregistered stock in excess of that disclosed in merger agreement.

Disposition: Consented to permanent injunction; resigned from practice before the Commission for a period of three years.

Donald P. *In re* Comac Co., SEC Inv. Co. Act Release No. 374, 1 SEC DOCKET No. 13, 14 (April 26, 1973).

Allegations: Aiding and abetting willful violations of the Investment Company Act.

Disposition: Resigned from practice before the Commission.

Francis L. United States v. Redmond, 546 F.2d 1386 (10th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978).

Allegations: Criminal conviction for false representations in sale of mining company's securities.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Related Case: SEC v. Northwest Pacific Enterprises Inc., SEC Lit. Release No. 5890, 1 SEC DOCKET No. 16, 27 (May 16, 1973) (prior injunction similar conduct).

Emanuel Fields SEC Sec. Act Release No. 5404 (June 18, 1973).

Allegations: False opinion concerning legality of offer and sale of stock.

Disposition: Permanent disqualification from appearing or practicing before Commission.

Related Cases: Fields appealed to the District of Columbia Circuit apparently alleging, *inter alia*, lack of jurisdiction, which he had argued before the Commission. The court affirmed without opinion. *Fields v. SEC*, No. C73-1722 (D.D.C. 1974), *aff'd*, 495 F.2d 1075 (D.C. Cir. 1974).

Robert P. SEC Lit. Release No. 5971 (July 13, 1973).

Allegations: Criminal conviction in connection with filing false and misleading annual report.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

Related Case: United States v. Zane, 73 C.R. 426 (S.D.N.Y. 1973).

Remarks: For the details of the indictment see SEC Lit. Release No. 5768, 1 SEC DOCKET No. 6, 27 (March 5, 1973).

John B. SEC Lit. Release No. 6010 (Aug. 2, 1973).

Allegations: Violations of registration and anti-fraud provisions of the Securities Act and violation of the anti-fraud provision of the Securities Exchange Act.

Disposition: The Commission filed a complaint (March 25, 1976) alleging that John B. had violated Rule 2(e) of the Commission Rules of Practice by continuing to practice before the Commission while under suspension from such practice. John B. consented to the entry of a final judgment of permanent injunction. The court enjoined John B. from appearing and practicing before the Commission in contravention of the suspension imposed under Rule 2(e). See SEC Lit. Release No. 7328, 9 SEC DOCKET 293 (March 25, 1976).

Paul G. *In re Paul G.*, SEC Sec. Exch. Act Release No. 10458, 2 SEC DOCKET 631 (Oct. 26, 1973).

Allegations: Violation of the registration and anti-fraud provisions of the securities laws.

Disposition: Four year suspension by consent.

George M. *In re George M.*, SEC Sec. Act Release No. 5442, 3 SEC DOCKET 101 (Nov. 30, 1973).

Allegations: Permanent injunction prohibiting further violations of the registration provisions of the Securities Act.

Disposition: Permanently suspended from appearing or practicing before the Commission.

Stanley K. SEC Lit. Release No. 6183, 3 SEC DOCKET 325 (Dec. 27, 1973).

Allegations: Criminal conviction for violation of the anti-fraud provisions of the Securities Act and mail fraud in a scheme to sell unregistered securities.

Disposition: Mandatory suspension under 29 C.F.R. § 201.2(e)(2).

Robert B. United States v. Blackwood, 456 F.2d 526 (1972), *cert. denied*, 409 U.S. 863 (1972).

Allegations: Criminal conviction for transporting in interstate and foreign commerce securities of a value of more than \$5,000, knowing them to be stolen and conspiring to do so.

Disposition: Mandatory suspension under 29 C.F.R. § 201.2(e)(2).

Remarks: Robert B. was subsequently convicted of violations of the antifraud provisions of the Securities Act, mail fraud and conspiracy in connection with sales of securities of American Capital Corp. Robert B.'s sentence was suspended with three years probation because at the time he was already in prison for other convictions. United States v. Bruce, 488 F.2d 1224 (5th Cir. 1973), *cert. denied*, 419 U.S. 825 (1974).

Robert L. *In re Robert L.*, SEC Sec. Act Release No. 5462, 3 SEC DOCKET 600 (Feb. 27, 1974).

Allegations: While director of a company prepared false quarterly reports.

Disposition: Permanently suspended from appearing or practicing before the Commission.

Related Case: SEC v. American Associated Sys., Inc., 73 Civ. 2243 (E.D. Ky. 1973), *aff'd*, 482 F.2d 1040 (6th Cir. 1973), *cert. denied*, 414 U.S. 1130 (1974).

Remarks: Jan. 7, 1974 the Supreme Court denied Robert L.'s petition for a writ of certiorari. In November 1973 he petitioned the Commissioner to lift the temporary suspension. The Commission denied the petition and directed the matter for hearing. However, prior to the date for the hearing Robert L. withdrew his petition. Robert L. and counsel stated they understood the suspension would become permanent as a result of his withdrawal.

Sam C. *In re Sam C.*, SEC Sec. Act Release No. 5518, 4 SEC DOCKET 656 (Aug. 2, 1974).

Allegations: Violation of registration provision of the Securities Act.

Disposition: Consent injunction and resignation from practice before the Commission.

Related Case: SEC v. Kniffin, Civ. No. 2265-72 (D.C. Cir. 1974).

Jo F. *In re Jo F.*, SEC Sec. Act Release No. 5523, 5
SEC DOCKET 37 (Aug. 21, 1974).

Allegations: Violation of the anti-fraud provisions of the Securities Act and the Exchange Act.

Disposition: Censure.

Related Case: SEC v. Senex, 74 Civ. 53 (E.D. Ky. 1974).

Walter G. *In re Walter G.*, SEC Sec. Act Release
No. 5532, 5 SEC DOCKET 243 (Oct. 8,
1974).

Allegations: Violation of the anti-fraud provisions of the Exchange Act.

Disposition: Tendered resignation from practice before the Commission.

Related Case: SEC v. United States Financial, Inc., 74 Civ. 92-T (D.D.C. August 6, 1974).

Remarks: For additional information see: SEC Lit. Release No. 6258, 3 SEC DOCKET 641 (Feb. 25, 1974).

Sylvan R. *In re Sylvan R.*, SEC Sec. Act Release
No. 5553, 6 SEC DOCKET 49 (Jan. 8,
1975).

Allegations: Permanent injunction in connection with sale of debentures by means of a false and misleading prospectus.

Disposition: Permanent disqualification from appearing or practicing before the Commission.

Related Case: SEC v. Fisher, No. C-8876 (S.D. Ohio 1974).

John O. *In re John O.*, SEC Sec. Act Release No.
5554, 6 SEC DOCKET 50 (Jan. 8, 1975).

Allegations: Permanent injunction in connection with scheme to transfer assets and voting stock of a corporation, recordation of misleading entries in corporate books and issuance of a false prospectus.

Disposition: Permanent disqualification from appearing or practicing before the Commission.

Related Case: SEC v. Fisher, No. C-8876 (S.D. Ohio 1974).

Donald H. *In re Donald H., SEC Sec. Exch. Act Release No. 11253, 6 SEC DOCKET 304 (Feb. 18, 1975).*

Allegations: Permanent injunction prohibiting violation of the anti-fraud provisions of the securities laws.

Disposition: Permanent disqualification from appearing or practicing before the Commission.

Related Case: SEC v. Wright Invs., Inc., Civ. No. 74-339S (W.D. Wash. 1974).

Gerald C. *In re Gerald C., SEC Sec. Exch. Act Release No. 11304, 6 SEC DOCKET 474 (March 20, 1975).*

Allegations: Consent injunction from violation of net capital and record keeping provisions.

Disposition: Consent injunction. Permanently disqualified from appearing or practicing before the Commission.

Related Case: SEC v. Scherl, Egner & Bassuck, Inc., No. C 74-3778 (S.D.N.Y. 1974).

Remarks: Gerald C. was vice-president of brokerage firm.

Peter L. *SEC Lit. Release No. 6910, 7 SEC DOCKET 130 (June 2, 1975).*

Allegations: Consented to an injunction against violations of anti-fraud provisions. The respondent also consented to an injunction against violations of the Investment Company Act for self dealing, over reaching breaches of fiduciary duty and filing of false reports with the Commission.

Disposition: Consented to a court order to comply with undertaking not to appear or practice as an attorney before the Commission without first making a written application and receiving permission to do so.

Related Case: SEC v. Seaboard Corp., [1973-74 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,415 (March 5, 1974).

David K. *SEC v. Allegheny Beverage Corp., SEC Lit. Release No. 6949, 7 SEC DOCKET 280 (June 24, 1975).*

Allegations: Commission filed complaint (May 1973) charging David K. and others with violations of securities laws with respect to a public offering of debentures.

Disposition: Agreed not to practice before the Commission for a period of 16 months. Included within the agreement were certain exceptions.

Related Case: SEC v. Allegheny Beverage Corp., 73 Civ. 932 (D.D.C. 1975).

Remarks: The Commission agreed to dismiss its action against respondent's law firm in view of representations made to the court that the law firm had ceased to exist. For details of the complaint filed in 1973 see SEC Lit. Release 5888, 1 SEC DOCKET No. 16, 26 (May 14, 1973).

Harold Y. SEC v. Stirling Homex Corp., SEC Lit. Release No. 6960, 7 SEC DOCKET 370 (July 2, 1975).

Allegations: Consented to a permanent injunction enjoining him from violations of the reporting and anti-fraud provisions of federal securities law.

Disposition: Undertook not to practice before the Commission without prior approval of the Commission.

William S. SEC v. Amalgamated Automotive, Inc., SEC Lit. Release No. 6969, 7 SEC DOCKET 364 (July 7, 1975).

Allegations: Consented to a permanent injunction, for aiding and abetting the violation of the anti-fraud provision of the Securities Act, and the violation of the anti-fraud and reporting provision of the Exchange Act.

Disposition: Agreed not to practice before the Commission without first obtaining the Commission's approval.

M. & S., B. and M. *In re M. & S., B. and M., SEC Sec. Exch. Act Release No. 11553, 7 SEC 465 (July 25, 1975); SEC Lit. Release No. 6978, 7 SEC DOCKET 367 (July 11, 1975).*

Allegations: Failure to supervise adequately the securities work of an associate attorney.

Disposition: Censure of entire firm.

Related Case: SEC v. Allegheny Beverage Corp., 73 Civ. 932 (D.D.C. 1975).

Bradford C.

Nebraska State Bar Ass'n v. Cook,
194 Neb. 364, 232 N.W.2d 120 (1975).

Allegations: Bradford C., former Chairman of the SEC, admitted perjuring himself before a federal grand jury while General Counsel to the SEC. The admission was made under oath while testifying for the government in the criminal prosecution of Maurice Stans and John Mitchell. Bradford C. was suspended from practice by the Nebraska State Bar Association. The report of the disciplinary action is found in the cited case. Although there is no public record of a Rule 2(e) proceeding it is very likely under the circumstances that proceedings were initiated.

Wade M.

SEC v. Lexton-Ancira Inc., SEC Lit. Release No. 7077, 7 SEC DOCKET 858 (Sept. 9, 1975).

Allegations: Permanent injunction for violation of the anti-fraud provisions.

Disposition: The respondent, who had not practiced before the Commission, agreed to refrain from practicing before the Commission for a period of 12 months.

Related Case: SEC v. Lexton-Ancira Inc., 75 Civ. 1466 (D.D.C. 1975).

Stanley T.

In re Stanley T., SEC Sec. Act Release No. 5617, SEC Sec. Exch. Act Release No. 11662, 7 SEC DOCKET 864 (Sept. 18, 1975).

Allegations: Permanent injunction for violations of the registration and antifraud provisions.

Disposition: Summary suspension; resignation from practice before the Commission.

Related Case: SEC v. Patterson Corp., 74 Civ. 167-5 (S.D. Cal. 1974).

David L.

In re David L., SEC Sec. Act Release No. 5629, SEC Sec. Exch. Act Release No. 11740, 8 SEC DOCKET 62 (Oct. 15, 1975).

Allegations: Criminal conviction for mail fraud and filing false reports with the Commission. The respondent entered a plea of *nolo contendere*.

Disposition: Prior to the criminal conviction, the respondent consented in an order of settlement to permanent disqualification before the Commission.

Related Case: SEC v. United States Financial, Inc., 74 Civ. 92-S (S.D. Cal. 1974).

Remarks: Respondent was sentenced to two years in prison.

Lloyd F. *In re* Lloyd F., SEC Sec. Exch. Act Release No. 11775, 8 SEC DOCKET 291 (Oct. 30, 1975).

Allegations: Inadequate investigation of offering materials of an issuer while acting as counsel to underwriter.

Disposition: Censure by consent.

Milton L. *In re* Milton L., SEC Sec. Exch. Act Release No. 11776, 8 SEC DOCKET 294 (Oct. 30, 1975).

Allegations: Failure to conduct due diligence inquiry while counsel to an issuer.

Disposition: Censure by consent.

Maxwell B. *In re* Maxwell B., SEC Sec. Act Release No. 5632, 8 SEC DOCKET 235 (Oct. 23, 1975).

Allegations: Permanently enjoined from violation of the registration and anti-fraud provisions.

Disposition: Permanent disqualification from appearing or practicing before the Commission.

Related Case: SEC v. Mountain States Dev. Co. No. C68-69 (D. Utah 1971), *aff'd*, No. C72-1108 (10th Cir. 1973).

Norman B. SEC Lit. Release No. 7148, 8 SEC DOCKET 361 (Oct. 31, 1975).

Allegations: Guilty plea to violations of anti-fraud provisions of the Exchange Act.

Disposition: Resigned before the Commission.

Harold H. SEC v. Nelson, SEC Lit. Release No. 7215, 8 SEC DOCKET 949 (Dec. 29, 1975).

Allegations: Consent injunction from violation of anti-fraud and proxy provisions; criminal conviction. For factual discussion by Cooper, U.S.D.J. see *United States v. Herman*, 443 F. Supp. 625 (S.D.N.Y. 1977).

Disposition: Consent stipulation not to practice before the Commission for 18 months.

Paul B. SEC Lit. Release No. 7278, 8 SEC DOCKET 1293 (Feb. 10, 1976).

Allegations: Permanent injunction from violation of registration and anti-fraud provisions.

Disposition: Temporary suspension.

Subsequent Proceeding: SEC Sec. Exch. Act Release No. 16558, 19 SEC DOCKET 503 (Feb. 6, 1980).

The Commission failed to receive from respondent a petition to lift the temporary suspension after the required 30 day period. Respondent confirmed that he had been served with the Commission's Order of Temporary Suspension. Because of respondent's failure to petition to terminate the suspension, the Commission entered a Notice of Permanent Disqualification from Appearance or Practice before the Commission.

Morton S. *In re Morton S.*, SEC Sec. Exch. Act Release No. 12254, 9 SEC DOCKET 262 (March 25, 1976).

Allegations: Respondent found to have failed to exercise an appropriate amount of professional diligence, when on notice of potential improprieties at the closing conference for public sale of securities.

Disposition: Suspension with leave to apply for readmission after 12 months.

Related Case: SEC v. Technical Resources, Inc., 76 Civ. 1111 (S.D.N.Y. Dec. 22, 1977).

Paul S.

Allegations: Criminal conviction for mail fraud, wire fraud and sale of unregistered securities.

Disposition: Mandatory suspension under 17 C.F.R. § 201.2(e)(2).

John R. SEC v. Emersons Ltd., SEC Lit. Release No. 7392, 9 SEC DOCKET 667 (May 11, 1976).

Allegations: Permanent injunction from violation of anti-fraud, reporting and proxy provisions.

Disposition: Resigned from practice before the Commission.

John S. *In re John S.*, SEC Sec. Exch. Act Release No. 12425, 9 SEC DOCKET 620 (May 11, 1976).

Allegations: Permanent injunction from violations of the anti-fraud provisions.

Disposition: Five year suspension from practice before the Commission. The respondent need not reapply for permission to practice before the Commission after the suspension term, he would be automatically reinstated.

Related Case: SEC v. Ianelli, 74 Civ. 3417 (S.D.N.Y. 1975), *aff'd*, No. 75-6045 (2d Cir. Nov. 19, 1975).

Alvin S. *In re Alvin S.*, SEC Sec. Exch. Act Release No. 12501, 9 SEC DOCKET 784 (June 1, 1976).

Allegations: Permanent injunction for violation of registration and anti-fraud provisions of the Securities Act and violation of the anti-fraud provision of the Exchange Act.

Disposition: Permanent disqualification from appearing or practicing before the Commission.

Related Case: SEC v. Sitomer, Sitomer & Porges, 73 Civ. 4508 (S.D.N.Y. 1976); Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 419 U.S. 998 (1974); *In re Porges*, SEC Sec. Exch. Act Release 13975, 13 SEC DOCKET 118 (Sept. 20, 1977).

Stephen S. *In re Alvin S.*, SEC Sec. Exch. Act Release No. 12501, 9 SEC DOCKET 784 (June 1, 1976).

Allegations: Permanent injunction for violation of registration and anti-fraud provisions of the Securities Act and violation of the anti-fraud provision of the Exchange Act.

Disposition: Three year suspension with leave to seek reinstatement. Reinstated, with provision he practice before the Commission under supervision. *In re Stephen S.*, SEC Sec. Exch. Act Release No. 13853, 12 SEC DOCKET 1495 (Aug. 11, 1977).

Related Cases: SEC v. Sitomer, Sitomer & Porges, 73 Civ. 4508 (S.D.N.Y. 1976); Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 419 U.S. 998

(1974); *In re Porges* SEC Sec. Exch. Act Release No. 13975, 13 SEC DOCKET 118 (Sept. 20, 1977).

Irwin R. *In re Irwin R.*, SEC Sec. Act Release No. 5714, 9 SEC DOCKET 760 (June 1, 1976).

Allegations: Preparation of a false registration statement.

Disposition: Proceedings dismissed.

Truman G. *Illinois v. Whitlow*, SEC Lit. Release No. 7421, 9 SEC DOCKET 812 (June 1, 1976).

Allegations: Indicted for conspiracy and misleading false representation in connection with the offer and sales of securities of Royal National Investment Corp.

Disposition: Consented to an order prohibiting him from practicing before the Commission.

Related Case: SEC v. Royal Nat'l Inv. & Mortgage Corp., Civ. No. 75C1000 (N.D. Ill. 1975).

Milton K. *SEC v. Harwitz*, SEC Lit. Release No. 7451, 9 SEC DOCKET 923 (June 16, 1976).

Allegations: Consent injunction for violation of anti-fraud provisions, reporting requirements, and proxy provision.

Disposition: Resigned from practice before the Commission.

Related Case: SEC v. Harwitz, 76 Civ. 1072 (D.D.C. 1976).

Francois De L. *In re Francois De L.*, SEC Sec. Exch. Act Release No. 12721, 10 SEC DOCKET 244 (Aug. 19, 1976).

Allegations: Preparation of false and misleading documents filed with the Commission.

Disposition: Resigned from practice before Commission.

Related Case: SEC v. Roussel, 76 Civ. 2571 (E.D. La. Aug. 19, 1976).

Arthur A. SEC Lit. Release No. 7546, 10 SEC DOCKET 400 (Sept. 2, 1976).

Allegations: Permanent injunction by consent from violation of anti-fraud provisions.

Disposition: Under an order of ancillary relief the respondent undertook *inter alia*, not to serve as an officer, director or executive of any company whose securities are publicly held for a period of three years. Respondent resigned from appearance or practice before the Commission.

Related Case: SEC v. Giant Stores Corp., 76 Civ. 1641 (D.D.C. 1976).

Leroy V. SEC Lit. Release No. 7572, 10 SEC DOCKET 541 (Sept. 20, 1976).

Allegations: Permanent injunction from violating registration, anti-fraud and filing provisions.

Disposition: Undertaking not to practice before the Commission without securing prior approval from the Office of General Counsel.

Related Case: SEC v. Capital Planning Ass'n, 76 Civ. 1198-SW (N.D. Cal. 1976).

William L. *In re* William L., SEC Sec. Exch. Act Release No. 13124, 11 SEC DOCKET 1352 (Dec. 30, 1976); SEC Lit. Release No. 7445, 9 SEC DOCKET 921 (June 6, 1976).

Allegations: Permanent injunction from violation of anti-fraud and registration provisions.

Disposition: Permanent disqualification from practice before the Commission.

Related Case: SEC v. Management Dynamics, No. C73 2462 (S.D.N.Y. 1976), *aff'd*, 515 F.2d 801 (2d Cir. 1975).

Hubert L. *In re* Walter P., SEC Inv. Co. Act Release No. 9642, 11 SEC DOCKET 1761 (Feb. 14, 1977).

Allegations: Violation of anti-fraud provisions, in connection with the offer and sale of securities.

Disposition: Resigned from practice before the Commission.

Related Case: *In re* Parker, SEC Inv. Co. Act Release No. 9382, 10 SEC DOCKET 188, (July 30, 1976); SEC Inv. Co. Act Release No. 9642A, 11 SEC DOCKET 1804 (Feb. 25, 1977).

Gerald L. *In re* Walter P., SEC Inv. Co. Act Release No. 9642, 11 SEC DOCKET 1761 (Feb. 14, 1977).

Allegations: Violation of anti-fraud provisions in connection with the offer and sale of securities.

Disposition: Resigned from practice before the Commission.

Donald B.

In re Donald B., SEC Sec. Act Release No. 5807, 11 SEC DOCKET 1778 (Feb. 22, 1977).

Allegations: In connection with Schedule D, offering respondent violated registration and anti-fraud provisions.

Disposition: Resigned from practice.

Related Case: SEC v. Petco Oil & Gas, Inc., Civ. No. 76-0244-D (W.D. Okla. 1976).

Robert K.

SEC Lit. Release No. 7891, 12 SEC DOCKET 273 (April 28, 1977).

Allegations: The Commission's release identifies Robert K. as "a defendant in the National Student Marketing Corp. case." but does not specify the misconduct alleged. One can infer from the terms of the consent injunction that the issuance of an opinion letter was involved.

Disposition: In addition to the terms of the permanent injunction, respondent stipulated that he would give the Commission written notice prior to engaging in any practice before it.

Related Case: SEC v. Nat'l Student Mktg. Corp. [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,540.

Remarks: In return for respondent's stipulation the Commission represented that it had no present intention of instituting any proceedings under Rule 2(e). Respondent apparently raised the jurisdictional issue of "practice" before the Commission and negotiated his settlement of the injunctive proceeding in the shadow of a potential Rule 2(e) proceeding. If this is correct it exemplifies Commission use of the Rule 2(e) disciplinary power to gain advantage in the civil injunctive action.

Jules Le B.

SEC Lit. Release No. 7920, 12 SEC DOCKET 421 (May 12, 1977).

Allegations: Consent injunction for violations of the anti-fraud provisions of the federal securities laws.

Disposition: Agreed not to practice before the Commission without giving prior notice to the Commission. The Commission agreed not to proceed under Rule 2(e) at the time when the injunction was consented to.

Remarks: The Commission, solely on the grounds of the injunction, has the power to institute Rule 2(e) proceedings for a period of three years. The Commission so advised the respondent.

Related Case: SEC v. American Commonwealth Financial Corp., 77 Civ. 0648 (N.D. Tex. 1977).

Charles P. SEC Lit. Release No. 7955, 12 SEC DOCKET 806 (June 6, 1977).

Allegations: Permanent injunction from further violations of the anti-fraud, reporting and proxy solicitation provisions. Conduct allegedly took place while respondent was special counsel to a public corporation in corporate securities matters.

Disposition: Consent injunction and agreement not to practice before the Commission for a period of 90 days.

Related Case: SEC v. United States Financial Inc., 74 Civ. 92-T (S.D. Cal. May 23, 1977).

Dale Y. *In re* Dale Y., SEC Sec. Exch. Act Release No. 13675, 12 SEC DOCKET 1014 (June 24, 1977).

Allegations: Permanent injunction for violation of anti-fraud and registration provisions.

Disposition: Permanent disqualification from appearance or practice before the Commission.

Related Cases: SEC v. American Mining & Smelting, Civ. No. 4-72251 (D.Minn. 1976).

C. Wayne L. *In re* C. Wayne L., SEC Sec. Exch. Act Release No. 13678, 12 SEC DOCKET 1016 (June 24, 1977).

Allegations: Permanent injunction arising out of scheme to inflate apparent value of investments in an insurance company portfolio.

Disposition: Permanent disqualification from appearance or practice before the Commission.

Related Case: SEC v. Standard Life Corp., Civ. CN-75-0052-E (W.D. Okla. July 2, 1975).

Grant A. *In re* Grant A., SEC Sec. Exch. Act Release No. 13676, 12 SEC DOCKET 1015 (June 24, 1977).

Allegations: Injunction from violation of the anti-fraud and registration provisions.

Disposition: Permanent disqualification from appearance or practice before the Commission.

Related Case: SEC v. Jeroboam Wines, Ltd., Civ. C-74-2 (D. Mont. July 18, 1975).

Osius B. SEC Lit. Release No. 8001, 12 SEC DOCKET 1093 (June 28, 1977).

Allegations: Permanent injunction from violation of anti-fraud provisions.

Disposition: Respondent did not actively practice before the Commission and represented that he did not intend to practice before the Commission in the future. He also agreed to give the SEC a 30-day notice when and if he intended to practice before them. The SEC agreed not to institute Rule 2(e) proceedings.

Related Case: SEC v. Petrofunds, Inc., 76 Civ. 2368 (S.D.N.Y. June 28, 1977).

Sidney R. SEC Lit. Release No. 8001, 12 SEC DOCKET 1093 (June 28, 1977).

Allegations: Involvement in fraudulent public offering of securities.

Disposition: Agreed to 60 day suspension. Commission agreed not to initiate Rule 2(e) proceedings.

Related Case: SEC v. Petrofunds, Inc., 76 Civ. 2368 (S.D.N.Y. June 28, 1977). See SEC Lit. Release No. 7412, 9 SEC DOCKET 754 (May 26, 1976).

Bennett R. SEC Lit. Release No. 8001, 12 SEC DOCKET 1093 (June 28, 1977).

Allegations: Misuse and diversion of investors' money.

Disposition: Respondent agreed not to practice before the Commission. Commission agreed not to initiate Rule 2(e) proceedings.

Related Case: See related case cited Sidney R. *supra*.

Edmund D. SEC Lit. Release No. 8001, 12 SEC DOCKET 1093 (June 28, 1977).

Allegations: Law firm and partner allegedly involved in fraudulent public offering.

Disposition: Agreed to undertake specified office procedures, Commission agreed not to initiate Rule 2(e) proceedings.

Related Case: See related case cited Sidney R. *supra*.

*Plotkin, Yolles,
Siegel & Turner*

*In re Plotkin, Yolles, Siegel &
Turner, SEC Sec. Act Release
No. 5841, 12 SEC DOCKET 1098
(July 5, 1977).*

Allegations: That the respondent had a non-disclosed conflict of interest in providing tax advice without charge to certain persons considering investment in an issuer.

Disposition: The firm was censured and three of its partners were permitted to resign from practice before the Commission with the special proviso that they might apply for readmission after the passage of 18 months from the date of the order.

Subsequent Proceedings: SEC Sec. Act Release No. 6105, 19 SEC DOCKET 64 (August 15, 1979).

Upon application of the three attorneys they were reinstated "subject to the condition that they continue to consult with competent securities counsel . . . until they demonstrate to the satisfaction of the Commission that they are familiar with the disclosure provisions of the federal securities laws." *Id.* at 65. (A similar proviso was made in the initial proceeding).

But cf. In re Keating, Muething & Klekamp, SEC Sec. Exch. Act Release No. 15982, 17 SEC DOCKET 1149, 1157 (July 2, 1979) (Karmel, R., dissenting).

Lawrence L. SEC Lit. Release No. 8073, 12 SEC DOCKET 1563 (Aug. 18, 1977).

Allegations: Consent injunction from violation of the anti-fraud and reporting provisions.

Disposition: Agreed not to practice before the Commission.

Related Case: SEC v. Fisco, Inc., 77 Civ. 1426 (D.D.C. 1977).

Robert G. SEC Lit. Release No. 8073, 12 SEC DOCKET 1563 (Aug. 18, 1977).

Allegations: Consent injunction from violation of the anti-fraud and reporting provisions.

Disposition: Agreed not to practice before the Commission.

Related Case: See related case cited Lawrence L. *supra*.

Robert P. *In re* Robert P., SEC Sec. Exch. Act Release No. 13975, 13 SEC DOCKET 118 (Sept. 20, 1977).

Allegations: Permanently enjoined from violations of registration and anti-fraud provisions of the Securities Act and from violations of anti-fraud and reporting provisions of the Exchange Act.

Disposition: Denied the "privilege" of appearing or practicing before the Commission for a period of three years, except in so far as he conducts such practice under supervision of another attorney.

Related Cases: SEC v. Sitomer, Sitomer & Porges, 73 Civ. 4508 (S.D.N.Y. 1976); *In re* Sitomer, SEC Sec. Exch. Act Release No. 12501, 9 SEC DOCKET 784 (June 1, 1976); Meyerhofer v. Empire Fire and Marine Ins., Co., 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 419 U.S. 998 (1974).

Bernard K. SEC Lit. Release No. 8119, 13 SEC DOCKET 178 (Sept. 20, 1977).

Allegations: Permanent injunction from violating anti-fraud, reporting and proxy provisions.

Disposition: Agreement not to practice before the Commission for one year. The Commission agreed not to proceed with Rule 2(e) proceedings.

Related Case: SEC v. Sharon Stell Corp., 77 Civ. 1631 (D.D.C. Sept. 20, 1977).

Edward J. *In re* Edward J., SEC Sec. Exch. Act Release No. 14028, 13 SEC DOCKET 282 (Oct. 5, 1977).

Allegations: The Commission found Edward J. had violated the anti-fraud provisions of the Exchange Act.

Disposition: Resigned from practice.

Related Cases: *In re* Edward J., SEC Sec. Exch. Act Release No. 12905, 10 SEC DOCKET 726 (Oct. 19, 1976); SEC Sec. Exch. Act Release No. 13513, 12 SEC DOCKET 372 (May 16, 1977) (notice of permanent disqualification from appearance or practice before the Commission); SEC Sec. Exch. Act Release No. 13513A, 12 SEC DOCKET 820 (June 16, 1977) (withdrawal of notice of permanent disqualification from practice or appearance before the Commission).

Edward G. SEC Lit. Release 8171, 13 SEC DOCKET
504 (Oct. 27, 1977).

Allegations: Injunction from violation of registration and anti-fraud provisions.

Disposition: Agreed not to practice before the Commission for a period of four years.

Related Case: SEC v. Ginsberg, No. C-76-1116 (N.D. Ohio Oct. 21, 1977).

Mark L. SEC Lit. Release No. 8250, 13 SEC DOCKET
1422 (Jan. 16, 1978).

Allegations: Mark L. was former in-house counsel to National Telephone Comp., Inc. and was a named defendant in a civil action against National Telephone and others. The injunction complaint alleged violations of the antifraud and reporting provisions.

Disposition: The case is one of several recent injunctive actions in which an attorney's right to practice before the Commission was indisputably on the bargaining table in the settlement negotiations. Here, the respondent consented to the entry of a permanent injunction as well as an order prohibiting him from practicing before the Commission for six months. In return for this, no Rule 2(e) proceeding was instituted.

Related Case: SEC v. Hart, Civ. No. 78-0065 (D.D.C. 1978); *In re Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175.

Mary M. *In re Mary M.*, SEC Sec. Exch. Act Release No. 14720, 14 SEC DOCKET 974
(May 1, 1978).

Allegations: Respondent was general counsel to Intercontinental Diversified Corp. (IDC), a public corporation filing annual and periodic reports with the Commission. These reports failed to disclose certain unlawful payments made by IDC to candidates for public office in the Bahamas. The Commission found that the reports were materially false and misleading and that respondent should have known so.

Disposition: The respondent submitted an offer of settlement to the Commission and the Commission accepted the offer. The settlement recited that respondent had not prac-

ticed before the Commission in the past and would not engage in practice before the Commission without prior approval of the Commission.

Related Cases: SEC v. Intercontinental Diversified Corp., Civ. No. 78-0025 (D.D.C. filed Jan. 6, 1978).

John H. *In re* John H., SEC Sec. Exch. Act Release No. 14760, 14 SEC DOCKET 1095 (May 15, 1978).

Allegations: Violation of the anti-fraud and registration provisions.

Disposition: Thirty day suspension from practice and a voluntary resignation thereafter from all further practice before the Commission.

Robert N. *In re* Robert N., SEC Sec. Exch. Act Release No. 14803, 14 SEC DOCKET 1225 (May 26, 1978).

Allegations: Respondent prepared for distribution to stockholders and for filing with the Commission documents which he knew or should have known contained false and misleading information and which omitted to state material facts necessary to make the statement made, in the light of the circumstances under which they were made, not misleading.

Disposition: Respondent without admitting or denying the allegations of the Commission submitted an offer of settlement. As part of the settlement the respondent resigned from practice before the Commission. The Commission issued an order granting Robert N. permission to apply to be reinstated 120 days from the date of his resignation.

John O. *In re* John O., SEC Sec. Act Release No. 5938, SEC Sec. Exch. Act Release No. 14870, 15 SEC DOCKET 428 (Aug. 3, 1978).

Allegations: Opinion letters alleged to have been written without adequate factual basis.

Disposition: Resignation from practice before the Commission.

William R. Carter & Charles J. Johnson *In re* Carter, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847.

Allegations: Violation of, and aiding and abetting in the violation of, the anti-fraud provisions of the Securities Acts. In

connection with representation of National Telephone Co., an issuer filing periodic reports with the Commission.

Disposition: Proceeding dismissed. The Commission sustained and amplified the hearing examiner's finding of jurisdiction to discipline attorneys. Additionally, it reasserted the Commission's power to define the appropriate standard of conduct to apply. Having done so, the Commission announced that its rule would apply prospectively and on that basis dismissed the case. This disposition, of course, adds to the "forty year history" in a fashion which precludes judicial review.

Melvan J.

In re Melvan J., SEC Sec. Act Release No. 6024, SEC Sec. Exch. Act Release No. 15556, 16 SEC DOCKET 1029 (Feb. 8, 1979).

Allegations: Permanently enjoined by consent for violation of federal securities laws.

Disposition: The Commission accepted the respondents offer of settlement in which he undertook not to practice before the Commission until the Commission relieved him of this undertaking.

K. M. & K.

In re K. M. & K., SEC Sec. Exch. Act Release No. 15982, 17 SEC DOCKET 1149 (July 2, 1979).

Allegations: The Commission alleges the firm knew or should have known of material misstatement and omissions from SEC filing with respect to certain financial transactions. The firm failed to act on this information in accord with its professional responsibilities.

Disposition: Imposed "Remedial Sanctions" under Rule 2(e), requiring respondents to undertake specified office procedures.

Stephen G.

In re Stephen G., SEC Sec. Exch. Act Release No. 16046, 17 SEC DOCKET 1381 (July 26, 1979).

Allegations: Permanent injunction for violations of anti-fraud provisions. The respondent was responsible for the preparation of false and misleading prospectuses.

Disposition: Permanent disqualification from appearance or practice before the Commission.

Related Case: SEC v. Century Mortgage Co., 79 Civ. 0049 (D. Utah Dec. 20, 1978), *appeal dismissed*, Civ. No. 79-1202 (10th Cir. 1979).

Richard H.

SEC Sec. Act Release No. 6131, SEC Sec. Exch. Act Release No. 16225, 18 SEC DOCKET 458 (Sept. 27, 1979)

Allegations: Richard H. was permanently enjoined from violation of the registration and anti-fraud provisions. The injunction, apparently obtained by consent, involved issuance of opinion letters concerning the availability of exemptions from registration of limited partnership interests in coal mines.

Disposition: Commission instituted Rule 2(e) proceedings resulting in an Offer of Settlement in which Richard H. neither admitted nor denied the Commission's finding of facts and accepted a 12 month suspension from practice before the Commission.

Remarks: Commissioner Karmel's dissent cogently sets forth her position that the Commission's Rule 2(e) jurisdiction, if any, is quite limited and that "package" settlements involving Rule 2(e) are inappropriate. *Id.* at 460 (Karmel, R., dissenting).

Bernard C.

In re Bernard C., SEC Sec. Exch. Act Release No. 16448, 19 SEC DOCKET 13 (December 21, 1979).

Allegations: The Commission brought a Rule 2(e) proceeding after respondent was enjoined by the district court (S.D.N.Y.) from further violations of the anti-fraud provisions of the Securities Act.

Respondent was found to have made a misrepresentation in a letter to an escrow agent in connection with a best efforts all or nothing underwriting of an offering of securities.

Disposition: In an offer of settlement, respondent without admitting or denying the Commission's allegations or findings, consented to a three month suspension from practicing before the Commission.

Related Case: SEC v. Rega, 73 Civ. 2944 (S.D.N.Y. 1975), [1975-76 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,222, *aff'd. sub nom.* SEC v. Coven, 581 F.2d 1020 (2d Cir. 1978), *cert. denied*, 440 U.S. 950.