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Divide and Conquer: SEC Discipline of Litigation Attorneys

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Divide and Conquer: SEC Discipline of Litigation Attorneys

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The Securities and Exchange Commission ("SEC") can investigate and discipline attorneys for "unethical or improper professional conduct." Although the SEC's disciplinary authority extends to all attorneys, for more than 70 years it only investigated transactional attorneys. Recently, however, the SEC announced that it is now investigating litigation attorneys for professional misconduct.

This Article examines the problems that arise because the SEC staff that is investigating and prosecuting a client is also allowed to investigate the professional conduct of the litigator representing that client. The Article explains that the SEC's rules governing litigator conduct are unclear and therefore susceptible to agency abuse. The SEC can use ethics investigations (or even threats of investigations) to remove attorneys from cases or to intimidate attorneys into less zealous advocacy. During ethics investigations, the SEC can further erode the attorney-client relationship by pressing litigators for confidential information ordinarily protected by the attorney-client privilege. By dividing the client from the attorney, the SEC can gain the upper hand in its investigation of the client. Because of these problems, the SEC should not investigate litigators for professional misconduct. Instead, litigators' ethical lapses should be investigated by state attorney disciplinary agencies, or, if the allegations are very serious, by criminal authorities. The SEC can then impose reciprocal discipline.

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I. INTRODUCTION

In recent years, legal scholarship has closely examined Securities and Exchange Commission ("SEC")[1] efforts to discipline attorneys for unethical behavior.[2] This scholarship has focused primarily on the ethical duties of

1. The SEC is the regulatory agency charged with administering and enforcing federal securities law. 15 U.S.C. § 78d (2000). The agency is headed by a five-member Commission (the "Commission") appointed by the President of the United States and confirmed by the Senate. *Id.* In addition, numerous "officers, attorneys, economists, examiners, and other employees" (the "staff") assist the Commission in "carrying out its functions under the securities laws." 5 U.S.C. § 4802 (2000).

2. *See, e.g.*, Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017 (2004); Stephen Fraidin & Laura B. Mutterperl, *Advice for Lawyers: Navigating the New Realm of Federal Regulation of Legal Ethics*, 72 U. CIN. L. REV. 609 (2003); Karl A. Groskaufmanis, *Climbing "Up the Ladder": Corporate Counsel and the SEC's Reporting Requirements for Lawyers*, 89 CORNELL L. REV. 511

transactional attorneys who help clients prepare registration statements or other documents filed with the SEC.[3] Transactional attorneys are, however, only a portion of the attorneys who interact with the SEC. Attorneys regularly represent clients involved in SEC inquiries, formal investigations, and administrative proceedings.[4] These litigation attorneys[5] help clients respond to subpoenas, prepare clients to testify, represent clients during testimony, file written submissions, appear before administrative law judges ("ALJs"), and perform a number of other tasks. Although both transactional attorneys and litigation attorneys are governed by the SEC's Rules of Practice,[6] there has been little analysis of the SEC's discipline of litigators.

The scholarly focus on transactional attorneys as opposed to litigators is understandable. Historically, the SEC has concentrated its efforts on regulating transactional attorneys. The SEC's early administrative actions under the Rules of Practice were brought against transactional attorneys.[7] SEC officials even publicly announced that they would use great restraint in investigating and

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(2004); Peter J. Henning, *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 BUFF. CRIM. L. REV. 323 (2002); Sung Hiu Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005); M. Peter Moser & Stanley Keller, *Sarbanes-Oxley 307: Trusted Counselors or Informers?*, 49 VILL. L. REV. 823 (2004); Lisa H. Nicholson, *Sarbox 307's Impact on Subordinate In-House Counsel: Between a Rock and a Hard Place*, 2004 MICH. ST. L. REV. 559 (2004); Michael A. Perino, *SEC Enforcement of Attorney Up-the-Ladder Reporting Rules: An Analysis of Institutional Constraints, Norms and Biases*, 49 VILL. L. REV. 851 (2004); Darlene M. Robertson & Anthony A. Tortora, *Reporting Requirements for Lawyers Under Sarbanes-Oxley: Has Congress Really Changed Anything?*, 16 GEO. J. LEGAL ETHICS 785 (2003); Mark A. Sargent, *Lawyers in the Moral Maze*, 49 VILL. L. REV. 867 (2004); Marc I. Steinberg, *Lawyer Liability After Sarbanes-Oxley – Has the Landscape Changed?*, 3 WYO. L. REV. 371 (2003).

3. *See supra* note 2.

4. *See, e.g.*, Sidley, Our Practices: SEC Enforcement, http://www.sidley.com/secenforcement/ (last visited Apr. 7, 2009) ("Our adversarial skills cover the full spectrum of securities enforcement matters, from defending investigations to litigating unsettled cases in federal court or before administrative and regulatory tribunals."); Skadden, Securities Enforcement and Compliance, http://www.skadden.com/Index.cfm?contentID=47&practiceID=97&focusID=1 (last visited Apr. 7, 2009) ("The Securities Enforcement and Compliance Group at Skadden, Arps, Slate, Meagher & Flom LLP . . . represents public companies, financial services firms, audit firms and their senior management, partners and employees in investigations and enforcement proceedings brought by the SEC . . . .").

5. Throughout this paper the terms "litigation attorney" and "litigator" are used broadly to mean attorneys who represent clients in informal inquiries, formal investigations, administrative proceedings, or court proceedings.

6. *See* 17 C.F.R. § 201.100–201.1106 (2006).

7. *See, e.g.*, Carter, Exchange Act Release No. 17,597, 22 SEC Docket 292 (Feb. 28, 1981) (declining to discipline two transactional attorneys who had not reported accounting problems to securities regulators); Keating, Muething & Klekamp, Exchange Act Release No. 15,982, 17 SEC Docket 1149 (July 2, 1979) (instituting administrative proceedings under SEC ethics rules against a law firm that had performed transactional work); Schwebel, Securities Act Release No. 4304, Exchange Act Release No. 5424, 40 S.E.C. 347 (Nov. 17, 1960) (disciplining a transactional attorney who had assisted a client in preparing false SEC filings); Fleischmann, Unclassified Release No. 115, 37 S.E.C. 832 (June 6, 1950) (same). *See also* Harvey L. Pitt & Dixie L. Johnson, *Justice Delayed, Justice Denied: Observations on the SEC's 'Kern' Decision*, N.Y. L. J., July 11, 1991, at 4 ("For at least two decades, and perhaps longer, the SEC has been obsessed with influencing the critical functions corporate lawyers assume in our society.").

bringing administrative ethics actions against litigation attorneys.[8] In fact, at some points, the Commission[9] may have completely forgotten that litigation attorneys even existed.[10]

In recent years, the focus on transactional securities attorneys only increased. Large-scale financial scandals brought attention to corporate fraud and attorneys' roles in enabling that fraud.[11] As a result, interest grew in having transactional attorneys serve as "gatekeepers" responsible for protecting the public.[12] The Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley")[13] and accompanying regulations (the "Sarbanes-Oxley Rules")[14] solidified transactional attorneys' gatekeeping role by requiring them to report violations of securities laws to corporate executives.[15] Litigation attorneys, on the other hand, escaped public scrutiny and were exempted from Sarbanes-Oxley's mandatory fraud reporting requirements.[16]

Recently, however, the SEC has begun to scrutinize the conduct of litigation attorneys. Under the SEC's Rules of Practice, the SEC may investigate and discipline any attorney for "unethical or improper professional conduct."[17] In early 2008, the SEC instituted its first ever administrative proceeding against a litigation attorney based solely on charges of "unethical or improper professional

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8. *See* Edward F. Greene, *SEC General Counsel's Remarks on Lawyer Disciplinary Proceedings*, 14 SEC. REG. & L. REP. (BNA) 168 (1982).

9. *See supra* note 1 (describing the Commission).

10. In one attorney discipline decision, the Commission noted:

> Very little of a securities lawyer's work is adversary in character. He doesn't work in courtrooms where the pressure of vigilant adversaries and alert judges checks him. He works in his office where he prepares prospectuses, proxy statements, opinions of counsel, and other documents that we, our staff, the financial community, and the investing public must take on faith.

Fields, Securities Act Release No. 5404, 2 SEC Docket 3, 4 n.20 (June 18, 1973).

11. *See, e.g.*, Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 143–44 (2002).

12. *See generally* John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003) [hereinafter Coffee, *The Attorney as Gatekeeper*]; John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW 1403 (2002); Rutherford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9 (2003).

13. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). The Sarbanes-Oxley Act of 2002 is also known as the Public Company Accounting Reform and Investor Protection Act of 2002. Throughout this Article it will be referred to simply as Sarbanes-Oxley.

14. Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Release No. 25,919, 68 Fed. Reg. 6296 (Jan. 29, 2003) (codified at 17 C.F.R. pt. 205).

15. 15 U.S.C. § 7245 (Supp. V 2005); 17 C.F.R. § 205.3(b) (2007).

16. An attorney need not report potential securities violations if "retained . . . to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation." 17 C.F.R. § 205.3(b)(6) (2007).

17. 17 C.F.R. § 201.102(e) (2006). This section is commonly referred to as Rule 102(e).

conduct."[18] According to SEC Assistant General Counsel, Richard M. Humes, the SEC is currently investigating a number of complaints that litigation attorneys have acted unethically by destroying documents, suborning perjury, or obstructing SEC investigations.[19] Because these SEC investigations are confidential,[20] it is impossible to determine the number of investigations currently pending. However, Mr. Humes has stated that the "steady stream"[21] of ethics complaints regarding litigation attorneys is large enough that the SEC "created a new unit within the Office of the General Counsel" to investigate and prosecute them.[22]

In light of the SEC's new policy of investigating and bringing administrative actions against litigation attorneys, this Article examines the question of whether the SEC should investigate and discipline litigation attorneys. The Article begins with a description of the SEC ethics rules and an explanation of the process for disciplining litigators.[23] The Article then examines problems with these rules and processes. First, the ethical standards governing SEC litigator conduct are not clear.[24] Second, and more importantly, the SEC's aggressive investigation of litigation attorneys for alleged ethical violations can pit the litigation attorney against the client. This may deny clients their right to counsel of choice[25] and give the SEC access to otherwise privileged material.[26] In essence, the SEC staff's ability to investigate litigators for "unethical or improper professional conduct" gives it the upper hand in any investigation of the attorney's client.

The Article then explores possible ways to eliminate the harm caused by SEC ethics investigations of litigators. Part V.A evaluates the possibility of waiting for courts to remedy fairness concerns, but concludes this solution is likely to be time consuming. Part V.B evaluates statutory and rule changes that would, among

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18. Altman, Exchange Act Release No. 57,240, 92 SEC Docket 1424 (Jan. 30, 2008) (order instituting administrative proceedings) (alleging that an attorney representing a client before the Commission attempted to negotiate a favorable severance package with the client's former employer by offering that the client would not cooperate with a pending SEC investigation into the employer's conduct). For a more extensive discussion of this case, see notes 111–120 and accompanying text.

19. Richard M. Humes, SEC Assistant General Counsel, Ethics Panel Discussion at SEC Speaks (Feb. 10, 2007) (recording available from Practising Law Institute) [hereinafter Humes, SEC Speaks 2007]. *See also* Trautman Wasserman & Co., Exchange Act Release No. 55,989, Investment Company Act Release No. 27,880, 90 SEC Docket 2832, 90 SEC Docket 2832, 2835–36 (June 29, 2007) (discussing an ethics investigation of a litigation attorney); Giovanni P. Prezioso, SEC General Counsel, Remarks at the Spring Meeting of the Association of General Counsel (Apr. 28, 2005), *available at* http://www.sec.gov/news/speech/spch042805gpp.htm (last visited Apr. 7, 2009) (stating that the SEC was investigating complaints of alleged "subornation of perjury" and "alteration of documents").

20. *See infra* notes 51–53 and accompanying text.

21. Richard M. Humes, SEC Assistant General Counsel, Ethics Panel Discussion at SEC Speaks (Feb. 9, 2008) (recording available from Practising Law Institute) [hereinafter Humes, SEC Speaks 2008].

22. Humes, SEC Speaks 2007, *supra* note 19.

23. *See infra* Part II.

24. *See infra* Part III.

25. *See infra* Part IV.A.

26. *See infra* Part IV.B.

other things, create a truly independent division within the SEC to investigate ethical complaints concerning attorneys. While this approach has some appeal, the Article ultimately concludes that Congress should prevent the SEC from investigating litigation attorneys for "unethical or improper professional conduct."[27] Instead, the SEC should refer ethics matters to state attorney disciplinary authorities, or, in the case of particularly egregious conduct, to criminal authorities. Once these independent authorities have investigated and disciplined the attorney, the SEC could then impose reciprocal discipline. This approach is preferable because state disciplinary agencies and criminal authorities are completely independent from the SEC and have long track records of disciplining litigators.

II. SEC RULES GOVERNING LITIGATOR CONDUCT

Like courts, the Commission and SEC ALJs have the authority to discipline attorneys for contemptuous conduct that occurs in their presence during an administrative proceeding.[28] If this power of contempt were the only avenue for the SEC to discipline a litigator, the SEC's authority would be unremarkable.[29] But it is only the tip of the iceberg.

The SEC's primary authority to discipline litigators is Rule 102(e).[30] Rule 102(e) gives the SEC authority to censure, temporarily suspend, or permanently disbar professionals from practicing before the SEC.[31] Rule 102(e) applies to all attorneys "practicing before" the SEC, including litigation attorneys.[32] Under Rule 102(e) an attorney may be disciplined for (1) failing "to possess the requisite qualifications to represent others," (2) "lacking . . . character or integrity or [engaging] in unethical or improper professional conduct," or (3) "willfully violat[ing] . . . any provision of the Federal securities laws."[33] In addition, the

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27. *See infra* Part V.C.

28. The SEC Rules state:

> [C]ontemptuous conduct by any person before the Commission or a hearing officer during any proceeding . . . shall be grounds for the Commission or the hearing officer to [e]xclude that person from such hearing . . . and/or [s]ummarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding.

17 C.F.R. § 201.180(a)(1) (2006).

29. *See infra* Part V.C (explaining why the power of contempt poses little threat to the fairness of SEC proceedings).

30. *See* 17 C.F.R. § 201.102(e)(1) (2006). Until 1995, Rule 102(e) was known as Rule 2(e). 17 C.F.R. § 201.2(e) (1994); SEC Rules of Practice, 60 Fed. Reg. 32,738, 32,739 (1995) (explaining that the Rules of Practice were renumbered). Rule 102(e) became statute in 2002 as part of Sarbanes-Oxley. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 602 (2002) (codified at 15 U.S.C. § 78d-3). To avoid confusion, throughout this Article, the rule and the statute will be referred to as Rule 102(e).

31. 17 C.F.R. § 201.102(e)(1).

32. *Id.* § 201.102(f). Rule 102(e) also applies to accountants and other professionals who practice before the SEC. *Id.*

33. *Id.* at § 201.102(e)(1).

SEC may discipline attorneys who have been disciplined by another bar, convicted of a crime, or punished under civil securities laws.[34]

In addition to Rule 102(e), the rules implementing Sarbanes-Oxley provide ethical guidelines for some litigators.[35] However, the Sarbanes-Oxley Rules do not apply to all litigators; they only apply to attorneys who represent issuers.[36] Litigators who represent individuals or non-issuer companies are not covered by the Sarbanes-Oxley Rules.[37]

Provided that a litigator does represent an issuer, the Sarbanes-Oxley Rules describe when the litigator may reveal confidential client information.[38] In addition, the Sarbanes-Oxley Rules describe the responsibilities of supervising and subordinate attorneys.[39] However, the most well-known Sarbanes-Oxley Rule—the Rule requiring attorneys to report securities violations to corporate

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34. *Id.* at § 201.102(e)(2) (stating that the SEC may suspend an attorney who is disbarred by another court or convicted of a crime involving "moral turpitude."). *See also id.* at § 201.102(e)(3)(i) (stating that the SEC may temporarily suspend an attorney if the attorney is "by name [p]ermanenly enjoined by any court . . . from violating or aiding or abetting the violation of any . . . federal securities laws" or if the attorney is found to have willfully violated federal securities laws). The SEC routinely suspends attorneys who have been civilly sanctioned for securities law violations. *See, e.g.,* Marks, Exchange Act Release No. 50,432, 83 SEC Docket 2419 (Sept. 23, 2004) (suspending an attorney who was previously convicted of securities fraud); Campbell, Exchange Act Release No. 43,136, 72 SEC Docket 2570 (Aug. 10, 2000) (temporarily suspending an attorney who was previously enjoined from committing future securities law violations).

35. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205).

36. 17 C.F.R § 205.2(a)(1)(ii) (2007) (explaining that the Sarbanes-Oxley Rules extend to those "[r]epresenting an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena"). An "issuer" is a company with publicly traded stock or registered securities. *See* 15 U.S.C. § 7201(a)(7) (2003).

37. *See* 17 C.F.R. § 205.2(a)(1)(ii); Thomas Lee Hazen, *Administrative Law Controls on Attorney Practice – A Look at the Securities and Exchange Commission's Lawyer Conduct Rules*, 55 ADMIN. L. REV. 323, 343 (2003).

38. 17 C.F.R. § 205.3(d)(2) (2007). The Sarbanes-Oxley Rules state:

> An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
>
> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
>
> (ii) to prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, . . . suborning perjury, . . . or committing any act . . . that is likely to perpetrate a fraud upon the Commission; or
>
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

Id.

39. A supervisory attorney must make "reasonable efforts to ensure that a subordinate attorney . . . conforms to this part." *Id.* at § 205.4. A subordinate employee must comply with the Rules "not withstanding that the subordinate attorney acted at the direction of or under the supervision of another person." *Id.* at § 205.5(b).

management—does not apply to litigators.[40]

The Sarbanes-Oxley Rules provide an avenue for attorney discipline independent of Rule 102(e).[41] The SEC may bring an administrative disciplinary proceeding against any attorney suspected of violating the Sarbanes-Oxley Rules.[42] If the Commission determines that the attorney has violated the Sarbanes-Oxley Rules, that attorney may be censured, or temporarily or permanently suspended.[43]

The SEC's Office of the General Counsel is tasked with investigating and prosecuting possible violations of the SEC's attorney practice rules under both Rule 102(e) and the Sarbanes-Oxley Rules.[44] This does not, however, mean the Office of the General Counsel pro-actively monitors attorney conduct, watching for potential violations. Rather, the Office of the General Counsel investigates

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40. *Id.* at § 205.3(b).

41. In adopting the Sarbanes-Oxley Rules, the Commission noted that an early draft of the Rules had "created confusion as to whether the Commission would treat violations of the [R]ule[s] as . . . a violations of Rule 102(e)." Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6314 (Feb. 6, 2003). The final version of the Sarbanes-Oxley Rules included amendments to "emphasiz[e] that the Commission intends to proceed against individuals violating [the Rules] as it would against other violators of the federal securities laws and, where appropriate, to initiate proceedings under [the Rules] seeking an appropriate disciplinary sanction." *Id.*

Nevertheless, conduct that violates the Sarbanes-Oxley Rules also violates Rule 102(e). Sarbanes-Oxley instructed the SEC to implement rules "setting forth minimum standards of professional conduct for attorneys." 15 U.S.C. § 7245 (Supp. V 2005). Consequently, any attorney who violates the Sarbanes-Oxley Rules will have engaged in "improper professional conduct" and be subject to the sanctions of Rule 102(e). As a practical matter, it makes little difference whether disciplinary sanctions are imposed under Rule 102(e) or the Sarbanes-Oxley Rules. Both include the same penalties—censure, temporary suspension, or permanent suspension. *Compare* 17 C.F.R. § 205.6(b) *with* 17 C.F.R. § 201.102(e)(1).

42. *See* 17 C.F.R. § 205.6(b).

43. *Id.* at § 205.6(b). In addition to its administrative powers over attorneys, the SEC has the power to seek "civil or administrative remedies for violation of the federal securities laws," including the Sarbanes-Oxley Rules. 17 C.F.R. § 205.6(a). *See also* 15 U.S.C. § 7202 (2003) (noting that the SEC has authority to punish violations of the Sarbanes-Oxley Act the same as violations of the Securities Exchange Act). This includes civil enforcement actions and administrative cease-and-desist orders. *Id.* at § 78u-2 (providing for civil monetary penalties); *id.* at § 78u-3 (providing for cease-and-desist orders). So far, the SEC "has not brought any [civil] enforcement actions under [the Sarbanes-Oxley Rules]." Richard M. Humes, *Remarks of an SEC Associate General Counsel*, 57 CASE W. RES. L. REV. 341, 348 (2007) [hereinafter Humes, *Remarks*]. In 2001, SEC officials suggested that cease-and-desist proceedings might be used against attorneys in place of Rule 102(e) proceedings. *See* Rachel Witmer, *SEC May Consider Cease and Desist to Sanction Attorneys for Misconduct*, 33 SEC. REG. & L. REP. (BNA) 358 (2001) (reporting on comments by then SEC General Counsel David Becker). However, the SEC has not since brought a cease-and-desist proceeding against an attorney for professional ethical deficiencies. Because it appears that these enforcement mechanisms will not be used against litigation attorneys in the near future, they will not be discussed further.

44. *See* 17 C.F.R. § 200.21 (stating the General Counsel is responsible "for the conduct of administrative proceedings relating to the disqualification of lawyers from practice before the Commission [and] for conducting preliminary investigations . . . into potential violations of [Rule 102(e)]"). *See also* STUART R. COHN, 2 SEC COUNSELING FOR SMALL & EMERGING COMPANIES § 21.14 (2007); SEC, Office of the General Counsel, http://www.sec.gov/about/offices/ogc.htm (last visited Apr. 7, 2009) (noting that the Office of the General Counsel's general litigation group "litigates administrative disciplinary proceedings against attorneys under Rule 102(e) of the Commission's Rules of Practice").

complaints raised by SEC staff. The most likely source of a complaint about a litigator is the SEC's Division of Enforcement. The SEC rules governing formal Division of Enforcement investigations provide that SEC staff "conducting the investigation may report to the Commission any instances where any . . . counsel has been guilty of dilatory, obstructionist or contumacious conduct during the course of an investigation or any other instance of violation of [SEC] rules."[45] In practice, the complaints are directed not to the Commission, but to the Office of the General Counsel.[46]

Attorney ethics investigations are governed by the same rules used by the Division of Enforcement in investigating securities law violations.[47] Under the delegation of authority in SEC rules, the Office of the General Counsel may begin an informal investigation into an attorney's conduct without authorization from the Commission.[48] During an informal investigation, the Office of the General Counsel may interview cooperative witnesses, but it cannot compel testimony or issue compulsory process.[49] In order for the Office of the General Counsel to compel testimony or issue process, the Commission must issue a formal order of investigation.[50] Both informal and formal investigations are non-public.[51] In fact, the SEC staff may, but need not, disclose to attorneys being investigated "the general nature of the investigation, including the indicated violations as they pertain to them."[52] The SEC also need not inform the client represented by the attorney under investigation. The SEC is only required to show a person a copy of the formal order of investigation if that person is "compelled or requested to furnish documentary evidence or testimony at a formal investigative proceeding[.]"[53]

Unless the SEC's contemplated disciplinary action against an attorney is based on disbarment in another jurisdiction, conviction of a crime, or issuance of a cease and desist order with respect to securities law violations, the SEC must

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45. 17 C.F.R. § 203.7(e). "Dilatory" conduct is conduct "tending to cause delay." BLACK'S LAW DICTIONARY 488 (8th ed. 2004). "Obstructionist" conduct is "[i]nterference with the orderly administration of law and justice." *Id.* at 1107. "Contumacious" conduct is "[a] willful disobedience of a court order." *Id.* at 315.

46. *See* Humes, *Remarks*, *supra* note 43, at 345; Prezioso, *supra* note 19 (noting that "investigations of professional misconduct by attorneys are not handled by lawyers in the Enforcement Division who may have dealt with those attorneys in pending cases, but instead are referred to the Office of the General Counsel for investigation and, if appropriate, enforcement proceedings").

47. Humes, SEC Speaks 2007, *supra* note 19 (stating that in Rule 102(e) investigations the SEC is "abiding by the same rules and procedures that the Enforcement Division adheres to").

48. *See* 17 C.F.R. § 200.21; SEC Description of Duties of the General Counsel, 71 Fed. Reg. 27,385-01 (May 11, 2006) (noting that the rule codified at 17 C.F.R. § 200.21 allows "the General Counsel to [conduct] preliminary investigations, in which no process is issued or testimony compelled, where it appears that an attorney may have violated Rule 102(e) of the Commission's Rules of Practice").

49. *See* 17 C.F.R. §§ 200.21, 202.5.

50. *See id.* §§ 200.21, 202.5.

51. *See id.* §§ 202.5(a), 203.5.

52. *See id.* § 202.5(b).

53. *Id.* at § 203.7(a).

provide the attorney "notice and opportunity for hearing."[54] If the Office of the General Counsel, through the evidence collected during its investigation, believes the SEC should take disciplinary action against an attorney, it must ask the Commission to issue an "Order for Proceedings."[55] It is the SEC's practice to allow the accused attorney the opportunity to provide the Commission with a Wells submission explaining why disciplinary action is not warranted.[56] If the Commission decides to issue an Order for Proceedings, the Order will inform the accused attorney of the SEC's allegations.

The hearing itself is held before an ALJ.[57] All hearings are "public unless otherwise ordered by the Commission on its own motion or after considering the motion of a party."[58] The Commission reviews the ALJ's decision.[59] The Commission's decision can be appealed to the United States Court of Appeals.[60]

An attorney suspended from practicing before the SEC may, at any time, apply to be reinstated.[61] The Commission may, in its discretion, allow the suspended attorney to present evidence at a hearing.[62] The Commission may only reinstate an attorney if it determines there is "good cause" for reinstatement.[63]

III. UNCERTAIN RULES FOR LITIGATORS

As is evident from Part II of this Article, Rule 102(e) and the Sarbanes-Oxley Rules are long on penalties and procedures. However, they provide little guidance concerning what a litigation attorney should or should not do. Neither set of rules clearly defines the ethical standards for SEC litigators. Litigators are told that "unethical or improper professional conduct" is prohibited,[64] but what does that mean? The SEC failed to conclusively answer this question in its 1981

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54. *Id.* at § 201.102(e) (2005). *See also id.* at § 205.6 (requiring an "administrative disciplinary hearing" for attorneys disciplined under the Sarbanes-Oxley Rules).

55. *Id.* at § 201.300.

56. "Pursuant to 17 C.F.R. § 202.5(c), persons involved in an SEC investigation may submit a written statement[, a Wells submission,] to the SEC before its staff seeks approval for an action from the Commission." SEC v. Zahareas, 374 F.3d 624, 629 (8th Cir. 2004). *See also* Humes, SEC Speaks 2007, *supra* note 19 (explaining that the SEC uses the Wells process when the Commission considers whether an administrative action should be brought under Rule 102(e)).

57. *See* 17 C.F.R. § 201.110.

58. *Id.* at § 201.102(e)(7). Prior to 1988, Rule 102(e) hearings were non-public. *See* Disciplinary Proceeding Involving Professionals Appearing or Practicing Before the Commission, 56 Fed. Reg. 26,427-01, 26,427–34 (July 13, 1988) (explaining the reasons for the rule change).

59. 17 C.F.R. §§ 201.360, .410, .411.

60. *See* 15 U.S.C. §§ 77i(a), 78y (2006). The appeal may be brought in the circuit where the attorney resides or in the Circuit for the District of Columbia. 15 U.S.C. § 78y.

61. 17 C.F.R. § 201.102(e)(5). *See, e.g.*, Schimmel, Securities Act Release No. 6531, 30 SEC Docket 473 (May 2, 1984) (reinstating an attorney who was previously suspended from practicing before the Commission).

62. 17 C.F.R. § 201.102(e)(5).

63. *Id.*

64. *Id.* at § 201.102(e)(1)(ii).

case *In re* Carter[65] and has made little progress on the subject since. Without further guidance, litigation attorneys cannot tell what actions might subject them to investigation and discipline.[66] In addition, the SEC's ethical rules governing litigators do not specify the mental state necessary to punish attorneys for "unethical or improper professional conduct."[67] For example, it is unclear whether an attorney who acts negligently is subject to discipline.[68]

A. UNETHICAL OR IMPROPER PROFESSIONAL CONDUCT

As explained in Part II, Rule 102(e) allows the SEC to discipline attorneys who engage in "unethical or improper professional conduct."[69] Neither the SEC Rules nor subsequent case law explain what constitutes "unethical or improper professional conduct."

1. UNCERTAIN SEC RULES

Rule 102(e) does not define "unethical or improper professional conduct" with respect to attorneys. An examination of the history of the SEC's Rules of Practice sheds further light on how the SEC may interpret Rule 102(e), but falls short of establishing a standard for litigator conduct.

The phrase "improper professional conduct" first appeared in the Rules of Practice in 1938.[70] However, the SEC was slow to explore its meaning. Prior to 1976, the SEC rarely used Rule 102(e) to sanction attorneys or other professionals.[71] Cases involving attorneys disciplined under Rule 102(e)'s "unethical or improper professional conduct" clause were even rarer. In the few cases that did

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65. Carter, Exchange Act Release No. 17,597, 22 SEC Docket 292 (Feb. 28, 1981).

66. *See infra* Part III.A (discussing the uncertain ethical standard for SEC litigators).

67. *See* 17 C.F.R. § 201.102(e)(1)(ii).

68. *See infra* Part III.B (discussing the lack of mental state requirements in Rule 102(e) and the Sarbanes-Oxley Rules).

69. 17 C.F.R. § 201.102(e)(1)(ii) (2006). Rule 102(e)(1)(ii) also allows an attorney to be disciplined for "lacking . . . character or integrity." *See id.* However, no administrative actions appear to have been brought based on the character and integrity requirements. Furthermore, no statements by SEC officials suggest that the SEC intends to view the requirements of character or integrity as stand-alone grounds for disciplining attorneys. For these reasons, although the character and integrity requirements are obviously vague, this Article does not separately address them.

70. SEC Amended Rules of Practice, 3 Fed. Reg. 1584, 1584–89 (June 30, 1938). The 1938 Rule allowed the Commission to disqualify an attorney from practice before the Commission if the attorney was "found not to possess the requisite qualifications to represent others or to be lacking in character or integrity or to have engaged in unethical or improper professional conduct." *See id.* at 1585. Prior to 1938, the Rule had allowed suspension or disbarment if the attorney was "found by the Commission . . . to be lacking in character, integrity, or proper professional conduct." SEC Rules of Practice as Amended 1936, 1 Fed. Reg. 1753, 1753 (Nov. 7, 1936). The release announcing the 1938 change does not explain the reason for the change. *See* SEC Amended Rules of Practice, 3 Fed. Reg. at 1584–89.

71. Between September 1, 1936 and September 1, 1976, the Commission instituted only about 150 administrative proceedings under Rule 102(e). Pitt & Johnson, *supra* note 7, at 6 n.3 (citing Letter from the American Bar Association's Section of Corporation, Banking and Business Law to the Securities and Exchange

arise, the Commission simply determined without much analysis that transactional attorneys who helped companies submit false SEC filings engaged in improper professional conduct.[72]

In 1964, the SEC amended its rules to authorize SEC staff conducting investigations "to report to the Commission any instances where . . . counsel has been guilty of dilatory, obstructionist or contumacious conduct during the course of the investigation."[73] Following a referral, "the Commission will thereupon take such further action as the circumstances may warrant, including suspension or disbarment of counsel from further appearance or practice before it."[74] This suggests that dilatory, obstructionist, or contumacious conduct violates Rule 102(e)'s prohibition on "unethical or improper professional conduct." It is, however, possible that "unethical or improper professional conduct" should be interpreted to include conduct that is not "dilatory, obstructionist or contumacious." As a result, the 1964 amendments to the SEC's Rules of Practice provided little additional guidance on the meaning of "unethical or improper professional conduct."

2. UNCERTAIN CASE LAW

The Commission's first attempt to squarely address the meaning of "unethical or improper professional conduct" did not occur until *In re Carter*[75] in 1981. Unfortunately, *Carter*, like the earlier amendments to the Rules of Practice, was largely ineffective in defining "unethical or improper professional conduct." *Carter* held that attorneys engage in improper professional practice if they fail to follow "generally recognized norms of professional conduct."[76]

In *Carter*, the SEC brought an administrative proceeding against attorneys William R. Carter and Charles J. Johnson, Jr. seeking to suspend them from

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Commission at (Jan. 26, 1987)) (commenting on a proposed amendment to SEC rules that would make Rule 102(e) proceedings open to the public).

72. *See* Schwebel, Securities Act Release No. 4304, Exchange Act Release No. 6424, 40 S.E.C. 347 (Nov. 17, 1960); Fleischmann, Unclassified Release No. 115, 37 S.E.C. 832 (June 6, 1950).

73. SEC Miscellaneous Amendments, 29 Fed. Reg. 3619, 3620 (Mar. 21, 1964). The referral rule now provides: "The officer conducting the investigation may report to the Commission any instances where any witness or counsel has been guilty of dilatory, obstructionist or contumacious conduct during the course of an investigation or any other instance of violation of these rules." 17 C.F.R. § 203.7(e) (2008). As previously explained, the Commission has delegated the task of reviewing these complaints to the Office of the General Counsel. *See supra* notes 44–46 and accompanying text.

74. SEC Miscellaneous Amendments, 29 Fed. Reg. at 3620–21. The rule now provides: "The Commission will thereupon take such further action as the circumstances may warrant, including suspension or disbarment of counsel from further appearance or practice before it, in accordance with [Rule 102(e)] of . . . the Commission's rules of practice[], or exclusion from further participation in the particular investigation." 17 C.F.R. § 203.7(e) (2008).

75. Carter, Exchange Act Release No. 17,597, 22 SEC Docket 292 (Feb. 28, 1981).

76. *Id.* at 319.

practice before the Commission.[77] Mr. Carter and Mr. Johnson were transactional attorneys who represented National Telephone Company.[78] During the course of their representation, they assisted their client in filing various forms and disclosures with the SEC.[79] They also advised their client about the need to file additional disclosures concerning financial stresses on the company.[80] After National Telephone declared bankruptcy, the SEC investigated the adequacy of the company's disclosures.[81] The SEC also investigated whether Mr. Carter and Mr. Johnson knew of and did not reveal securities law violations to the proper authorities.[82]

The ALJ conducted a hearing and found that Mr. Carter and Mr. Johnson "failed to carry out their professional responsibilities with respect to appropriate disclosure to all concerned, including stockholders, directors and the investing public . . . and thus knowingly engaged in unethical and improper professional conduct."[83] The attorneys appealed the decision to the Commission.[84]

On appeal, the accused attorneys argued that "the Commission ha[d] never promulgated standards of professional conduct for lawyers and that the Commission's application in hindsight of new standards would be fundamentally unfair."[85] However, the Commission held that it "perceive[d] no unfairness whatsoever in holding those professionals who practice before us to generally recognized norms of professional conduct, whether or not such norms had previously been explicitly adopted or endorsed by the Commission."[86] For example, the Commission stated that all attorneys could be held to the "universally recognized requirement that a lawyer refrain from acting in an area where he does not have an adequate level of preparation or care" as stated in the American Bar Association ("ABA") Code of Professional Responsibility.[87] Yet the Commission concluded that Mr. Carter and Mr. Johnson had not breached any "recognized norms."[88] The Commission explained that, although some "local bar ethics committees and disciplinary bodies" as well as the "ABA's Commission on Evaluation of Professional Standards" had considered when an attorney must disclose a client's securities law violations, "precise standards ha[d] not yet

77. *Id.* at 293.
78. *Id.* at 300–01.
79. *See id.* at 300–14.
80. *See id* at 305–06.
81. *Id.* at 300.
82. *See id.* at 300–14.
83. *Id.* at 319.
84. *Id.* at 293.
85. *Id.* at 319.
86. *Id.*
87. *See id.* at 319 n.64.
88. *Id.* at 319–20.

emerged."[89] In other words, because there were no recognized norms with respect to attorney disclosure, Mr. Carter and Mr. Johnson could not be disciplined.[90] Yet the Commission held that future attorneys engaging in the same conduct could be punished by the SEC, regardless of whether state attorney ethical rules adopted a reporting requirement.[91]

Although *Carter* focused on transactional attorneys and the much debated topic of whether transactional attorneys should be required to report client wrongdoing, the opinion makes it clear that all attorneys practicing before the Commission have a duty to follow "accepted norms of professional conduct."[92] Unfortunately, the phrase "accepted norms of professional conduct" is not really any clearer than the phrase "improper professional conduct." The *Carter* opinion suggests that the ABA's Code of Professional Responsibility contains some norms, but it states that the norms must be "generally recognized."[93] However, *Carter* itself prospectively applied a reporting standard that had only been adopted in a small number of states.[94] After *Carter*, the ethical standards applicable to SEC litigators were as murky as ever. It appeared that litigators could potentially be held to state ethical rules, model ethical rules, and rules created by the Commission in an ad hoc manner.

Perhaps realizing that *Carter* had not articulated a clear standard for attorney conduct, the SEC requested public comment regarding the opinion's interpretation of the phrase "unethical or improper professional conduct."[95] The request for comments stated that "[a]fter careful consideration of the[] comments, the Commission [would] issue a further release summarizing and analyzing the comments received,"[96] but the Commission never did.[97]

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89. *See id.* at 320. The Commission noted that "similar issues [were then] under consideration by the ABA's Commission of Evaluation of Professional Standards in connection with the review and proposed revision of the ABA's Code of Professional Responsibility." *Id.*

90. *See id.*

91. *See id.* ("[W]e believe that respondents' conduct raises serious questions about the obligations of securities lawyers, and the Commission is hereby giving notice of its interpretation of 'unethical or improper professional conduct' as that term is used in Rule [102(e)].").

92. *Id.* at 320. *Carter* was not the first Commission opinion to cite a model code of professional responsibility. *See* Kivitz, Securities Act Release No. 5163, 44 S.E.C. 600, 607–08 (June 29, 1971), *rev'd*, Kivitz v. SEC, 475 F.2d 956 (D.C. Cir. 1973) (citing the American Bar Association's Canons of Professional Ethics). *Carter* was, however, the first Commission opinion to attempt to articulate a standard of conduct for the attorneys practicing before it. *See Carter*, 22 SEC Docket at 320.

93. *Carter*, 22 SEC Docket at 319.

94. *See id.* 319–21.

95. *See* Request for Comments on Standard of Conduct Constituting Unethical or Improper Professional Practice Before the Commission, 46 Fed. Reg. 48,233 (Oct. 1, 1981). The Commission's *Carter* opinion had stated that the SEC would seek comments on whether the interpretation announced in *Carter* "should be expanded or modified." *See Carter*, 22 SEC Docket at 320.

96. Request for Comments on Standard of Conduct Constituting Unethical or Improper Professional Practice Before the Commission, 46 Fed. Reg. at 48,233.

97. *See* SEC Final Rule, Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission, 53 Fed. Reg. 26,427-01, 26,431 n.31 (July 13, 1988) ("The Commission has not formally

Instead, attorneys practicing before the Commission had to settle for informal guidance from the staff. In 1982, the SEC's then-General Counsel Edward F. Greene addressed the meaning of "improper professional conduct" in a speech to the New York County Lawyers' Association.[98] He stated: "In those administrative proceedings based upon violations of standards of ethical or professional conduct, I believe that the Commission should use existing state law standards."[99] He further noted that a suspension or disbarment proceeding "may be appropriate with respect to dilatory, obstructionist or contumacious conduct during the course of an investigation."[100] Mr. Greene did not address what standard should be applied in situations where the attorney ethical rules differed among states. He also did not reveal whether the SEC would look to state court interpretations of state ethical rules in evaluating attorney conduct.

Notwithstanding Mr. Greene's speech, in the wake of *Carter*, the SEC staff was understandably gun-shy of attorney disciplinary proceedings based on the "unethical or improper conduct" subsection of Rule 102(e).[101] Instead, the SEC limited its disciplinary cases to those attorneys who had already been enjoined from violating securities laws,[102] convicted of securities-related offenses,[103] or disbarred in other jurisdictions.[104]

With this uncertain backdrop concerning Rule 102(e), Congress enacted Sarbanes-Oxley, and the SEC promulgated the Sarbanes-Oxley Rules.[105] However, according to the Commission, the Sarbanes-Oxley Rules did "not attempt to articulate a comprehensive set of standards regulating all aspects of the conduct

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addressed the expansion or modification of the standard enunciated in Carter . . . and intends to take no further action in that regard.").

98. *See* Greene, *supra* note 8.

99. *See id.* at 171.

100. *Id.* at 170 (citing 17 C.F.R. § 203.7(e)).

101. Mr. Greene largely avoided scrutiny over his interpretation of "unethical or improper professional conduct" by adding that "the Commission [had] never brought a disciplinary proceeding against an attorney based solely on a failure to meet ethical or professional standards" and indicating that he believed the Commission should refrain from bringing such cases in the future. *See id.*

102. *See, e.g.*, Studer, Exchange Act Release No. 43,532, Accounting & Auditing Enforcement Release No. 1342, 73 SEC Docket 1683 (Nov. 8, 2000); Rodriguez, Exchange Act Release No. 37,682, 62 SEC Docket 2311 (Sept. 16, 1996); Granai, Securities Act Release No. 6762, Exchange Act Release No. 25,511, 40 SEC Docket 680 (March 24, 1988); Schulman, Exchange Act Release No. 23,668, 36 SEC Docket 843 (Sept. 30, 1986); Hecht, Securities Act Release No. 6490, Exchange Act Release No. 20,234, 28 SEC Docket 1174 (Sept. 27, 1983).

103. *See, e.g.*, Fisher, Exchange Act Release No. 46,954, 79 SEC Docket 170 (Dec. 6, 2002) (imposing discipline after attorney was convicted of conspiracy to commit securities fraud); Cruickshank, Exchange Act Release No. 45,510, 77 SEC Docket 135 (Mar. 6, 2002) (imposing discipline after attorney was convicted of cocaine distribution); Nearen, Exchange Act Release No. 40,505, 68 SEC Docket 227 (Sept. 30, 1998) (imposing discipline after attorney was convicted of securities fraud, money laundering, and other offenses); McGovern, Exchange Act Release No. 25,379, 40 SEC Docket 380 (Feb. 22, 1988).

104. *See, e.g.*, Hackman, Exchange Act Release No. 46,478, 78 SEC Docket 1210 (Sept. 10, 2002) (imposing reciprocal discipline on an attorney previously disbarred in Nevada).

105. *See supra* notes 35–40 and accompanying text.

of attorneys who appear and practice before the Commission."[106] Rather than defining "unethical or improper professional conduct," the Sarbanes-Oxley Rules adopted a handful of rules that are applicable only to attorneys who represent issuers.[107] The Sarbanes-Oxley Rules create additional questions because they do not apply to all litigation attorneys. If a litigation attorney who represents an individual (and is therefore not covered by the Sarbanes-Oxley Rules)[108] violates the Sarbanes-Oxley Rules, has the attorney nevertheless engaged in "unethical or improper professional conduct"?

While Sarbanes-Oxley and the Sarbanes-Oxley Rules did little to clarify the ethical obligations of litigation attorneys, they piqued the SEC's interest in investigating and disciplining litigation attorneys for "unethical or improper professional conduct." Following Sarbanes-Oxley, the SEC reiterated its position that Rule 102(e) "enables the Commission to discipline professionals who have engaged in improper professional conduct by failing to satisfy the rules, regulations or standards to which they are already subject, including state ethical rules governing attorney conduct."[109] The statement seems to suggest that there are standards beyond state ethical rules, and perhaps even beyond the Sarbanes-Oxley Rules, that bind attorneys practicing before the Commission. Again, the SEC did not explain what these standards are. The SEC did, however, take a step that it had been unwilling to take in the years immediately following *Carter* and Mr. Greene's speech—it began to investigate litigation attorneys for "unethical or improper professional conduct."[110]

A recent administrative action confirmed that the SEC will look to state ethical

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106. *See* SEC Proposed Rules: Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,673 (Dec. 2, 2002). The Sarbanes-Oxley Rules

> *supplement* applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

17 C.F.R. § 201.1 (emphasis added). It is not clear what is meant by "supplement." On the one hand, this paragraph could be read to simply establish that local jurisdictions may enforce their own ethics rules for attorneys within their jurisdiction who practice before the SEC. On the other hand, the SEC might well interpret this paragraph as allowing attorneys who violate state ethical rules to be punished under the Sarbanes-Oxley Rules. Commentary by the SEC at the time the Rules were adopted does not resolve this question. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6297 (Feb. 6, 2003).

107. *See supra* notes 35–40 and accompanying text. Even the adopted Sarbanes-Oxley Rules do little to alert litigators to actions that might subject them to SEC discipline. For example, the Sarbanes Oxley Rules allow, but do not require, a litigator representing an issuer to reveal confidential information in order to prevent a material violation of securities law. *See* 17 C.F.R. § 205.3(d)(2)(i). Because this rule is permissive, rather than mandatory, it is unlikely to lead to attorney discipline.

108. 17 C.F.R. § 205.1.

109. SEC Proposed Rules: Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,671 n.13. SEC Associate General Counsel Richard M. Humes has stated that "in bringing a Rule 102(e) proceeding against a lawyer, there is nothing unfair about basing it on the disciplinary rules of the state where he or she practices because he or she is already subject to those rules." Humes, SEC Speaks 2008, *supra* note 21.

110. *See supra* notes 18–22 and accompanying text.

rules in determining whether litigator conduct is unethical or improper. Still, the administrative action falls short of developing a clear standard for litigator conduct. In early 2008, the SEC brought a Rule 102(e) proceeding against litigation attorney Steven Altman for "unethical or improper professional conduct."[111] Mr. Altman represented a witness in a pending SEC investigation regarding substantive securities law violations.[112] Mr. Altman's client was a former employee of a company that was the target of the SEC's investigation. During the investigation, Mr. Altman called the company's attorney and attempted to negotiate a favorable severance package for his client.[113] In return for the favorable severance package, Mr. Altman promised that his client would not cooperate with the SEC investigation and that his client would not remember information about events relevant to the SEC investigation.[114] When the Division of Enforcement staff learned of Mr. Altman's conduct, they referred the matter to the Office of the General Counsel for investigation.[115]

After investigation, the Office of the General Counsel alleged that Mr. Altman's conduct violated "the New York State Bar Association's Code of Professional Responsibility's Disciplinary Rules, to which he was subject during the relevant period."[116] Based on this, the Office of the General Counsel alleged that Mr. Altman "engaged in improper professional conduct."[117] By its issuance of the Order instituting the Rule 102(e) administrative proceeding, the Commission appeared to endorse the application of the New York standards.[118]

The ALJ hearing the case agreed that New York ethics rules applied. She rejected Mr. Altman's argument that Rule 102(e)'s standards for attorney conduct were vague.[119] She reasoned that "attorneys are always on notice that their conduct must be in accord with the ethical standards established by the state bar to which they belong."[120]

Yet nothing in *Altman* or elsewhere commits the SEC to relying solely on state

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111. Altman, Exchange Act Release No. 57,240, 92 SEC Docket 1424 (Jan. 30, 2008). This was the first order instituting proceedings under Rule 102(e)'s "unethical or improper professional conduct" provision since the *Carter* case. *See* Humes, SEC Speaks 2008, *supra* note 21.

112. *See* Altman, Initial Decision Release No. 367, 2009 WL 88063, at *2–3 (Jan. 14, 2009).

113. *See id.* at *3 The company's attorney recorded five of the relevant telephone conversations. *Id.*

114. *See id.* at *4.

115. *See id.*

116. *Altman*, 92 SEC Docket 1424. The order states "Respondent's knowing conduct violates DR-1-102(A)(4) barring 'conduct involving dishonest, fraud, deceit, or misrepresentation,' DR 1-102(A)(5) barring 'conduct that is prejudicial to the administration of justice' and/or DR 1-102(A)(7) barring 'any other conduct that adversely reflects on the lawyer's fitness as a lawyer . . . .'" *Id.* The Office of the General Counsel applied the New York Bar Association's ethical standards in the *Altman* case because Mr. Altman was "a member of the New York Bar" and "a resident of New York." *Id.* It is not clear from the Order where the alleged improper professional conduct took place, or whether Mr. Altman was subject to other state or local bar rules. *Id.*

117. *Id.*

118. *See id.*

119. *See Altman*, 2009 WL 88063, at *19.

120. *Id.*

ethical rules.[121] At a panel discussion regarding ethical standards for securities attorneys, Professor Roberta S. Karmel (herself a former SEC Commissioner) asked SEC Associate General Counsel Richard M. Humes: "[D]oes the Commission itself interpret some state ethics rule, or does the Commission apply some more general standard that is an interpretation of its own opinion about ethical behavior?"[122] Mr. Humes responded:

> Well, to date, the Commission has not put out a release, and I'm not suggesting that it is about to, that addresses how [Rule 102(e)] cases will be handled. What we do have to go on is what the Commission did in [*Altman*], which is to enter an [order instituting administrative proceedings] which is based on the disciplinary rules of New York State which [Mr. Altman] is alleged to have violated.[123]

Mr. Humes's answer seems to leave open the possibility that in some cases, the SEC will offer its own opinion about ethical behavior rather than rely on state disciplinary rules. Simply put, attorneys have no way of predicting how the SEC will interpret the phrase "unethical or improper professional conduct." By failing to adopt a clear position, the SEC leaves itself open to choose from among the potentially applicable rules.

The SEC may argue that its failure to define "unethical or improper professional" conduct is not troubling because it only intends to investigate and punish those acts that are clearly unethical or improper under any conceivable standard.[124] Indeed, the alleged litigator conduct that the SEC reports it is currently investigating—"subornation of perjury," "alteration of documents," and "obstruction of justice"—is not only unquestionably unethical, but also potentially criminal.[125] But nothing in the SEC rules limits it to investigating this conduct. Indeed, the *Carter* case provides a ready instance where the SEC staff investigated and brought disciplinary proceedings against attorneys for conduct that was not universally recognized as unethical under either model rules or state

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121. Even if the SEC were committed to relying solely on state ethical rules, problems could still arise in circumstances where the attorney is a member of more than one state bar association. States have not all adopted the same ethical rules. *Compare* DISTRICT OF COLUMBIA RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2007) (stating that "a lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited") *with* MARYLAND LAWYERS' RULES OF PROF'L CONDUCT R. 3.3(a) (2007) (stating that "[a] lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"). In situations where state ethical rules conflict, the SEC has given no indication of how it will decide which state's rules to apply.

122. Roberta S. Karmel, Ethics Panel Discussion at SEC Speaks (Feb. 9, 2008) (recording available from Practising Law Institute).

123. Humes, SEC Speaks 2008, *supra* note 21.

124. *See id.*

125. *See infra* notes 319–324 and accompanying text.

ethical rules.[126] Uncertain rules leave attorneys wondering what conduct is permissible and what conduct is unethical.[127]

B. UNCERTAIN MENTAL STATE REQUIREMENTS

Rule 102(e) not only fails to define the appropriate standard of conduct, it also fails to provide the mental state necessary to impose discipline. In particular, it is unclear whether an attorney can be punished for negligent conduct that is unethical or improper. For example, is an attorney who negligently fails to produce one insignificant, but responsive document in a large SEC document production subject to investigation and discipline?

In the 1998 *Checkosky v. SEC* opinion,[128] the United States Court of Appeals for the District of Columbia ("D.C. Circuit") held that the SEC "failed to articulate an intelligible standard for 'improper professional conduct' under Rule [102(e)]."[129] In *Checkosky*, two accountants certified that financial statements complied with Generally Accepted Accounting Principles ("GAAP") when, in fact, the financial statements improperly deferred some expenses.[130] There was no evidence that the accountants' mistake was intentional, and the accountants argued they should not be punished for negligent or reckless conduct. Nevertheless, the Commission suspended both accountants for two years.[131] The accountants then appealed to the D.C. Circuit. In a *per curiam* opinion, the D.C. Circuit "remanded the case to the Commission for a more adequate explanation of its interpretation of Rule [102(e)]."[132] The Commission entered a new opinion

126. If the SEC is committed to punishing only those litigation attorneys who have violated criminal laws, it would be preferable to allow the authorities responsible for enforcing criminal laws to conduct the initial investigation. *See infra* Part V.C.2. In those instances, the SEC could impose discipline after the criminal conviction.

127. Steven C. Krane, *The Attorney Unshackled: SEC Rule 2(e) Violates Clients' Sixth Amendment Right to Counsel*, 57 NOTRE DAME L. REV. 50, 83 (1981) ("Because [Rule 102(e)] is ambiguous, subjective and nebulous, it is virtually impossible for an attorney to discern the borderline between zealous advocacy and conduct which [Rule 102(e)] proscribes." (footnote omitted)).

128. 139 F.3d 221 (D.C. Cir. 1998).

129. *Id.* at 223.

130. *Id.* at 222–23.

131. Checkosky, Exchange Act Release No. 31,094, Accounting & Auditing Enforcement Act Release No. 412, 52 SEC Docket 1122 (Aug. 26, 1992). *See also Checkosky*, 139 F.3d at 223 (describing the Commission's decision). An ALJ had suspended the accountants for five years, but the Commission reduced the suspension to two years. *See id.*

132. Checkosky v. SEC, 23 F.3d 452, 454 (D.C. Cir. 1994) (per curiam). Each of the three judges on the D.C. Circuit panel wrote a separate opinion. Judge Laurence H. Silberman concluded that he could not "determine from the [Commission's] order just what the Commission [was] using as its standard for improper professional conduct." *Id.* Judge A. Raymond Randolph thought the Commission had applied a negligence standard but decided the Commission had acted "arbitrarily and capriciously" in applying the negligence standard to the accountants. *Id.* at 467. Finally, District Court Judge John W. Reynolds, sitting by designation, opined that the Commission's decision was adequately explained and supported by the evidence. *See id.* at 493.

affirming the two-year suspensions.[133] This time the Commission stated that Rule 102(e) "does not mandate a particular mental state and that negligent actions by a professional may, under certain circumstances, constitute improper professional conduct."[134] The Commission further explained that a negligent violation of GAAP and Generally Accepted Auditing Standards ("GAAS") violates Rule 102(e) only when it "threatens the integrity of the Commission's processes in the way that the activities of unqualified or unethical professionals do."[135] Again the accountants appealed.[136]

The D.C. Circuit concluded that the Commission's second opinion "provide[d] no clear mental state standard to govern Rule [102(e)]."[137] According to the court, the Commission "manage[d] to embrace and reject standards of (1) recklessness, (2) negligence and (3) strict liability."[138] Moreover, the court reasoned that simply relying on GAAP and GAAS was insufficient because these accounting standards do not contain a sufficient state of mind requirement.[139] The court noted:

> Accountants and attorneys practicing in the securities field will draw little comfort from the knowledge that their missteps will escape sanction as long as they do not "threaten the integrity of the Commission's processes." It is simply impossible to know in advance what sorts of negligent errors will meet this "standard."[140]

The court concluded that "[t]here is no justification for the government depriving citizens of the opportunity to practice their profession without revealing the standard they have been found to violate."[141] The court remanded the case to the Commission "with instructions to dismiss the charge against" the accountants.[142]

Although *Checkosky* involved accountants, its holding that Rule 102(e) did not establish a "clear and coherent" standard for professional conduct is equally applicable to attorneys. At the time of the *Checkosky* opinion, Rule 102(e) treated attorneys and accountants identically.[143] Furthermore, there is no reason to

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133. Checkosky, Exchange Act Release No. 38,183, Accounting & Auditing Enforcement Act Release No. 871, 63 SEC Docket 1691, 1703 (Jan. 21, 1997).

134. *Id.* at 1700.

135. *Id.* at 1702 n.63 (quoting Carter, Exchange Act Release No. 17,597, 22 SEC Docket 292, 298 (Feb. 28, 1981)).

136. *See Checkosky*, 139 F.3d at 221.

137. *Id.* at 225.

138. *Id.* at 233. The court further stated that "[n]ot only does the opinion on remand provide no clear mental state standard to govern Rule [102(e)], it seems at times almost deliberately obscurantist on the question." *Id.* at 225.

139. *See id.* at 224–25.

140. *Id.* at 224.

141. *Id.* at 225–26.

142. *Id.* at 227.

143. 17 C.F.R. § 201.102(e) (2006). The *Checkosky* opinion itself drew no distinction between attorneys and accountants. *See Checkosky*, 139 F.3d at 224 (noting that "[a]ccountants and attorneys . . . will draw little

believe that the norms governing attorney behavior (various state and local ethical rules) could provide an adequate mental state requirement, while the norms governing accountants (GAAP and GAAS) could not. The *Checkosky* opinion noted that while some portions of the accounting standards supply a mental state for violations, not all violations of GAAP or GAAS necessarily require a culpable mental state.[144] Rules governing attorneys have a similar structure. Some sections of state ethical rules address the requisite mental state necessary to violate the standard,[145] while other sections do not.[146] Thus, *Checkosky's* holding should be read to apply to Rule 102(e)'s regulation of both accountants and attorneys.

As a result of *Checkosky*, the SEC amended its Rules of Practice to include mental state requirements for accountant discipline, but it did not create mental

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comfort from the knowledge that their missteps will escape sanction as long as they do not 'threaten the integrity of the Commission's processes'"). *See also* Checkosky v. SEC, 23 F.3d 452, 486 (D.C. Cir. 1994) (Randolph, J., concurring) ("The federal securities laws do not make culpability turn on the nature of the professional."); Keating, Muething & Klekamp, Exchange Act Release No. 15,982, 17 SEC Docket 1149, 1165 n.10 (July 2, 1979) (Williams, Chairman, concurring) (stating that "[n]either Rule [10]2(e), nor the courts' recognition of it, has ever drawn a distinction between accountants and attorneys"). *Cf.* Peter C. Kostant, *Paradigm Regained: How Competition From Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground*, 20 PACE L. REV. 43, 61 n.89 (1999) (stating that "there is some evidence that different standards are sometimes used for lawyers and accountants" but concluding that "the SEC generally holds attorneys and accountants to the same ethical standards"). *But see* Potts, Exchange Act Release No. 29,126, 65 SEC Docket 1376, 1411 (Sept. 24, 1997) (Wallman, Comm'r, dissenting) (stating that it was "very troubling . . . that the Commission applies different standards for actions under Rule 102(e)(1) to accountants as compared to attorneys"). To the extent that there is disagreement on this point, it only further underscores the lack of coherent standards.

144. *Checkosky*, 139 F.3d at 225 n.5. The court explained:

> Because one of GAAS's General Standards is that "[d]ue professional care is to be exercised in the performance of the audit and the preparation of the report," *Codification of Statements on Auditing Standards*, AU § 150.02 (Am. Inst. of Certified Pub. Accountants 1993) (General Standard 3) (cited in Checkosky [v. SEC], 23 F.3d [452,] 486 n. 26 [(D.C. Cir. 1994)] (Randolph, J.)), any negligent audit violates GAAS. But the converse – that all deviations from GAAS are *per se* negligent – might not be true, nor is it self-evidently true with respect to GAAP.

Id.

145. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2008); WYO. RULES OF PROF'L CONDUCT R. 3.3(a) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . .").

146. For example, many state ethical rules provide that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent[.]" MODEL RULES OF PROF'L CONDUCT R. 1.6(a); COLO. RULES OF PROF'L CONDUCT R. 1.6(a). This rule could be violated by an inadvertent disclosure of a single unimportant privileged document or by an intentional disclosure of important material designed to harm the client.

Because some sections of the *Model Rules of Professional Conduct* do not provide a clear mental state requirement, most states have adopted the American Bar Associations' Standards for Imposing Lawyer Sanctions. *See* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1992); Rachna K. Dhanda, Note, *When Attorneys Become Convicted Felons: The Question of Discipline by the Bar*, 8 GEO. J. LEGAL ETHICS 723, 731 & n.53 (1995) (noting that forty-seven states have adopted the ABA Standards for Imposing Lawyer Sanctions). These rules describe the mental state necessary for various types of sanctions. Unfortunately, the SEC has never indicated that it would apply these standards when imposing attorney discipline.

state requirements for attorney discipline.[147] Rule 102(e) now provides that accountants can be punished for "[i]ntentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards."[148] Accountants can also be punished for "[a] single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know that heightened scrutiny is warranted" or "[r]epeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission."[149] While the amendments to Rule 102(e) clarified the standards for imposing accountant discipline,[150] those amendments were "not meant to address the conduct of lawyers, other professionals or experts who practice before the Commission."[151] The SEC did not explain why it chose not to address the mental state standard for attorney conduct,[152] but regardless of the reason, attorneys were left without any guidance.[153]

The SEC had another opportunity to clarify the standard of conduct for attorneys when it adopted the Sarbanes-Oxley Rules. The first draft of the Sarbanes-Oxley Rules stated:

> With respect to attorneys appearing and practicing before the Commission on behalf of an issuer, "improper professional conduct" . . . includes:

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147. *See* Amendment to Rule 102(e) of the Commission's Rules of Practice, 63 Fed. Reg. 57,164, 57,172 (Oct. 26, 1998) (codified at 17 C.F.R. § 201.102(e)).

148. 17 C.F.R. § 201.102(e)(1)(iv)(A) (2006).

149. *Id.* at § 201.102(e)(1)(iv)(B) (2006).

150. *See* Marrie v. SEC, 374 F.3d 1196, 1198 (D.C. Cir. 2004) (holding that the "lack of clarity" in the standard for accountant discipline identified in the *Checkosky* opinion was remedied by the adoption of the 1998 amendments to Rule 102(e)). However, some have argued that the accountant discipline standards adopted in 1998 are still impermissibly vague. *See* Amendment to Rule 102(e) of the Commission's Rules of Practice, 63 Fed. Reg. 57,164, 57,182–83 (Oct. 26, 1998) (Johnson, Comm'r, dissenting) (arguing that the new accountant rule was "convoluted and incomprehensible"); Leo Orenstein & Marc Dorfman, *A Rule Gone Bad – SEC No Longer Needs to Rely on Rule 102(e), But Can't Seem to Let Go*, LEGAL TIMES, Nov. 20, 2000, at 36 ("One is hard-pressed to disagree with Commissioner Norman Johnson's assessment, offered in his dissent from adoption of the amendment, that this new standard is 'convoluted and incomprehensible,' representing a 'tour de force' of ambiguity reminiscent of that condemned in *Checkosky*.").

151. Amendment to Rule 102(e) of the Commission's Rules of Practice, 63 Fed. Reg. at 57,164 n.3.

152. In a dissenting statement issued when the SEC adopted the new rule for accountants, SEC Commissioner Norman Johnson stated that the Commission's failure to address attorneys was "entirely deliberate." *See id.* at 57,183 n.166 (Johnson, Comm'r, dissenting). He explained that because the Commission wanted to "leave its future options open regarding [attorney discipline under] Rule 102(e), the [accountant amendments] intentionally" avoided adopting a mental state standard for attorneys. *Id.* at 57,183 n.166.

153. *See* SEC Proposed Rules: Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,671 (Dec. 2, 2002) ("In 1998, in response to . . . Checkosky v. SEC . . . the Commission amended Rule 102(e) to clarify the Commission's standard for determining when accountants engage in 'improper professional conduct'. The Commission did not at that time amend the rule to address how it would apply the rule to misconduct by attorneys.").

> (1) Intentional or knowing conduct, including reckless conduct, that results in a violation of any provision of this part; and
>
> (2) Negligent conduct in the form of:
>
> (i) A single instance of highly unreasonable conduct that results in a violation of any provision of the part; or
>
> (ii) Repeated instances of unreasonable conduct, each resulting in a violation of a provision of the part.[154]

The SEC explained that the draft rule "incorporate[d] the same state of mind requirements that were adopted for accountants by the Commission in the 1998 amendment to Rule 102(e)."[155] Unfortunately, this part of the draft rule was discarded.[156] The SEC did not explain why it decided not to define the mental state required to discipline attorneys for "unethical or improper professional conduct."[157]

Now, more than a decade since the D.C. Circuit's *Checkosky* opinion, the SEC still has not provided a clear mental standard to determine when an attorney is subject to discipline for unethical or improper professional conduct under Rule 102(e).[158] In the absence of such a standard, the SEC's authority to discipline attorneys for negligent or reckless conduct is questionable. Moreover, the fact that the SEC has squandered two good opportunities to provide a mental standard raises questions about whether the SEC is deliberately obscuring the standard.

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154. *See id.* at 71,696.

155. *See id.* at 71,675.

156. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6314 (Feb. 6, 2003). Instead, the final Rules state that "[a] violation of this part . . . shall subject [the offending] attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder." 17 C.F.R. § 205.6(a) (2007). The Rules also state that "[a]n administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission." *Id.* at § 205.6(b).

157. The SEC stated only that it "intends to proceed against individuals violating [the Sarbanes Oxley Rules] as it would against other violators of the federal securities laws and, when appropriate, to initiate proceedings under this rule seeking an appropriate disciplinary sanction." Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6314. Some have suggested that "objections concerning the inclusion of a negligence standard" led the SEC to discard the more specific mental state provisions. HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, GOING PUBLIC AND THE PUBLIC CORP § 24.28 (2007).

158. The SEC staff has informally sought to alleviate fear that the SEC will discipline attorneys for negligent conduct, by suggesting that they are only seeking to punish attorneys who act with "scienter." *See* Thomas J. Karr, SEC Acting General Counsel, Ethics Panel Discussion at SEC Speaks (Feb. 7, 2009) (recording available from Practising Law Institute) (explaining that the SEC is generally looking for evidence of scienter when investigating attorneys for ethics violations); Monson, Investment Company Act Release No. 28,323, 93 SEC Docket 1898, 1901 (June 30, 2008) (noting in dicta that the SEC has "refrained from bringing disciplinary proceedings against lawyers under . . . Rule 102(e) based on negligent legal advice"). These informal assurances, however, do not bind the Commission.

IV. INVESTIGATIONS HURT THE CLIENT

While the lack of clear standards under Rule 102(e) is troubling for attorneys who may be investigated for unethical or improper professional conduct, the manner in which the SEC is allowed to conduct its ethics investigations is much more troubling for clients. When the SEC investigates litigators for unethical behavior, it undercuts the adversary process and interferes with the attorney-client relationship.

The SEC's process for investigating and punishing securities laws violators is an adversary process.[159] The SEC's Division of Enforcement diligently investigates and seeks civil penalties for accused law breakers.[160] On the other side of the table, those accused, with the assistance of counsel, defend themselves. The client's attorney is an adversary to the SEC—not a gatekeeper tasked with enforcing the law.[161] Through the adversary process, an impartial decision-maker arrives at a just result.[162]

The SEC's investigation of litigation attorneys for "unethical or improper professional conduct" threatens the adversary process by interfering with safeguards designed to ensure that those accused are treated fairly.[163] For example, once the SEC decides to investigate an attorney, the attorney might be forced to resign from representation, thereby potentially denying the client the

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159. *See In re* Steinhardt Partners, L.P., 9 F.3d 230, 235 (2nd Cir. 1993) (noting that the SEC "stood in an adversarial position" to a company the SEC was investigating even though the company cooperated with the investigation); Saito v. McKesson HBOC, Inc., No. Civ.A. 18553, 2002 WL 31657622, at *4 (Del. Ch. Nov. 13, 2002) (unpublished decision) (holding that "the SEC acts . . . as a foe when it begins investigating a company for potential violations of the Securities Act").

160. *See* SEC, About the Division of Enforcement, http://www.sec.gov/divisions/enforce/about.htm (last visited Apr. 7, 2009) (describing the role of the Division).

161. Professor John C. Coffee, Jr. has defined "gatekeepers" as "independent professionals who are so positioned that, if they withhold their consent, approval, or rating, the corporation may be unable to effect some transaction or to maintain some desired status." Coffee, *The Attorney as Gatekeeper*, *supra* note 12, at 1296. The SEC has long recognized that while it may be proper to insist that transactional attorneys act as gatekeepers, attorneys who act as advocates in an adversary process are not gatekeepers. *See* A.A. Sommer, Jr., SEC Commissioner, The Emerging Responsibilities of the Securities Lawyer, Address to the Banking, Corporation & Business Law Section of the New York State Bar Association (Jan. 24, 1974), in LARRY D. SODERQUIST & THERESA GABALDON, SECURITIES REGULATION 617–19 (4th ed. 1999) ("I would suggest that in securities matters (other than those where advocacy is clearly proper) the attorney will have to function in a manner more akin to that of auditor than to that of the attorney."). Others have argued that the SEC is mistaken because even transactional attorneys act in an adversary role. *See, e.g.*, Joseph C. Daley & Roberta S. Karmel, *Attorneys' Responsibilities: Adversaries at the Bar of the SEC*, 24 EMORY L.J. 747, 765–67 (1975) (rejecting the idea that "attorneys for corporate clients in the disclosure process or in considering exemptions serve in an advisory capacity and have a responsibility to the public investor, and only in litigation do attorneys serve as adversary to the SEC" (footnote omitted)). However, everyone agrees that attorneys who represent clients in active SEC investigations are acting in an adversary role.

162. *See* Keating, Muething & Klekamp, Exchange Act Release No. 15,982, 17 SEC Docket 1149, 1162 (July 2, 1979) (Karmel, Comm'r, dissenting) (noting that "[v]igorous advocacy of differing points of view aids an agency in defining issues, understanding positions, and resolving problems").

163. *See id.* (arguing that "disciplinary action which curtails an attorney in his role as an adversary may . . . impose a loss on the Commission in terms of the operation of its own processes").

right to counsel of choice.[164] In addition, during an ethics investigation, an attorney might, without the client's consent, provide materials that would otherwise be protected by the attorney-client privilege.[165] In effect, the SEC ethics investigation can divide the attorney from the client and make it easier for the SEC to investigate the client.

The SEC's rules and practices are not designed to minimize the harm to clients caused by attorney ethics investigations. As explained in Part II, attorney ethics violations are investigated by the SEC's Office of the General Counsel while substantive securities violations are investigated by the Division of Enforcement. Yet nothing in the SEC's structure or rules prevents these two investigative divisions from working together and sharing information. This leaves open the possibility that the SEC might strategically decide to investigate an attorney for ethics violations in order to gain leverage in the investigation regarding the attorney's client.

A. THE RIGHT TO COUNSEL

Those involved in formal SEC investigations have a limited right to counsel. According to the Administrative Procedure Act ("APA"), "a party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding."[166] In addition, witnesses testifying before the SEC in a formal investigation or hearing have the right to be "accompanied, represented and advised by counsel."[167] The SEC rules further explain:

> The right to be accompanied, represented and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any formal investigative proceeding and to have this attorney (1) advise such person before, during and after the conclusion of such examination, (2) question such person briefly at the conclusion of the examination to clarify any of the answers such person has given, and (3) make summary notes during such examination solely for the use of such person.[168]

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164. *See infra* Part IV.A.3.

165. *See infra* Part IV.B.

166. 5 U.S.C. § 555(b) (2000).

167. The APA states that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented and advised by counsel[.]" *Id.* The SEC's own rule provides that "[a]ny person compelled to appear, or who appears by request or permission of the Commission, in person at a formal investigative proceeding may be accompanied, represented and advised by counsel . . . ." 17 C.F.R. § 203.7(b) (2007). *See also* United States v. Weiner, 578 F.2d 757, 773 (9th Cir. 1978) ("It is firmly established that a party compelled to appear before an investigation by the SEC has a right to retain counsel.").

168. 17 C.F.R. § 203.7(c). The SEC provides subpoenaed individuals with Form 1662 which states:

> You have the right to be accompanied, represented and advised by counsel of your choice. Your counsel may advise you before, during and after your testimony; question you briefly at the conclusion of your testimony to clarify any of the answers you give during testimony; and make

The SEC instructs unrepresented individuals who testify to "advise the Commission employee taking your testimony whenever during your testimony you desire to be accompanied, represented and advised by counsel. Your testimony will be adjourned to afford you the opportunity to arrange to do so."[169] Similarly, individuals who are subpoenaed to provide documents are informed of their right to have an attorney assist in responding to a subpoena.[170] Courts have interpreted this statutory "right to counsel" to mean that the client has a right to "counsel of one's choice."[171]

In addition to the statutory right to counsel of one's choice, SEC adjudicative proceedings must also comply with procedural due process requirements.[172] The Fifth Amendment of the Constitution states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[173] The Supreme Court has explained that due process affords people "notice and opportunity to be heard" before being denied liberty or property.[174] A proper hearing includes "the right to the aid of counsel when desired and provided by the party asserting the right."[175] The contours of the due process right to counsel in civil cases are not

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summary notes during your testimony solely for your use. If you are accompanied by counsel, you may consult privately.

SEC Form 1662, (last visited Apr. 7, 2009).

169. SEC Form 1662, http://www.sec.gov/about/forms/sec1662.pdf (last visited Apr. 7, 2009).

170. The form accompanying an SEC document subpoena states: "May I have a lawyer help me respond to the subpoena? Yes. You have the right to consult with and be represented by your own lawyer in this matter." HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, INTERNATIONAL CAPITAL MARKETS & SECURITIES REGULATION DATABASE Appendix US-22 (2007) *available at* Westlaw 10D Int'l Cap. Markets & Sec. Reg. Appendix US-22. *See also* Ernest F. Lidge III, *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties*, 62 IND. L.J. 549, 616 (1992) ("When the SEC requests a person to supply information voluntarily or serves the person with a subpoena, the agency informs individuals of their right to be represented by an attorney.").

171. SEC v. Higashi, 359 F.2d 550, 553 (9th Cir. 1966) (citing Backer v. Comm'r, 275 F.2d 141, 144 (5th Cir. 1960)). *See also* SEC v. Csapo, 533 F.2d 7, 10–11 (D.D.C. 1976) (noting that the APA's right to counsel "has been construed to imply the concomitant right to the lawyer of one's choice").

172. *See, e.g.*, SEC v. McCarthy, 322 F.3d 650, 659 (9th Cir. 2003) (requiring due process in an SEC subpoena enforcement action); MFS Sec. Corp. v. SEC, 380 F.3d 611, 617–18 (2d Cir. 2004) (noting that decisions made by the Commission are constrained by due process). Indeed, the right to counsel of choice in the APA was meant only to "restate[] existing law and practice that persons compelled to appear in person before an agency or its representative must be accorded the right to be accompanied by counsel and to consult with or be advised by such counsel." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 51 (1947).

173. U.S. CONST. amend. V.

174. Powell v. Alabama, 287 U.S. 45, 68 (1932).

175. *Id.* at 68–69 ("If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."); Cooke v. U.S., 267 U.S. 517, 537 (1925) (noting that due process includes the opportunity to employ the "assistance of counsel"); Potashnick v. Port City Const. Co., 609 F.2d 1101, 1117–18 (5th Cir. 1980) ("Historically and in practice, the right to a hearing has always included the right to the aid of counsel when desired and provided by the party asserting the right."). *Cf. In re* Gault, 387 U.S. 1, 41 (1967) (holding that due process required the right to counsel in civil juvenile proceedings).

well developed,[176] but depriving a respondent of the right to counsel of one's choice in an adjudicative administrative proceeding raises due process concerns.[177] Whether due process also requires access to counsel of choice during the investigatory stage prior to a formal adjudicatory hearing is less clear. The Supreme Court has held that full due process protections are not required during a

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While the Fifth Amendment right to due process does apply in SEC cases, the Sixth Amendment's broader right to counsel is applicable only in criminal cases. *See* Elliott v. SEC, 36 F.3d 86, 88 (11th Cir. 1994); Feeney v. SEC, 564 F.2d 260, 262 (8th Cir. 1977); Nees v. SEC, 414 F.2d 211, 221 (9th Cir. 1969);Boruski v. SEC, 340 F.2d 991, 992 (2d Cir. 1965). *But see* Krane, *supra* note 127 (arguing that the Sixth Amendment's right to counsel should apply in SEC administrative proceedings); Daley & Karmel, *supra* note 161, at 803 (1975) (stating that "older precedents to the effect that the right to counsel is not constitutionally guaranteed in an administrative investigation . . . should at least be questioned"). In contrast to the Due Process Clause, the Sixth Amendment provides criminal defendants the right to *effective* counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Sixth Amendment, indigent defendants in criminal cases are entitled to a court-appointed attorney. *See* Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963). This right to government-provided counsel is not available in SEC proceedings. *See Boruski*, 340 F.2d at 992.

176. As the Fifth Circuit has explained:

> There is a paucity of authority dealing with the existence of a right to counsel in civil cases. This lack of precedent is due in part to the historical development of the right to counsel in criminal cases. Prior to 1836, the English system recognized the right of accused criminals to be represented by counsel in the trial of less serious crimes, while denying the representation to alleged felons.

Potashnick, 609 F.2d at 1117–18. *See also* Michael P. Malloy, *Economic Sanctions and Retention of Counsel*, 9 ADMIN. L.J. AM. U. 515, 578 n.396 (1995) (recognizing that the right to counsel of choice in civil cases is "underdeveloped"); Danielle Stampley, Comment, *Blocking Access to Assets: Compromising Civil Rights to Protect National Security or Unconstitutional Infringement on Due Process and the Right to Hire an Attorney*, 57 AM. U. L. REV. 683, 699 (2008) ("Few cases directly address access to counsel in administrative hearings, but many cases address the issue in criminal proceedings.").

Because there are few civil cases addressing the right to counsel of choice, courts and ALJs sometimes look to criminal cases addressing the Sixth Amendment right to counsel of choice. *See, e.g.*, *Potashnick*, 608 F.2d at 1118 (citing Geders v. United States, 425 U.S. 80 (1976), a criminal counsel of choice case); Blizzard, Exchange Act Release No. 45,806, Investment Advisers Act Release No. 2032, 77 SEC Docket 1335, 1336 n.10 (Apr. 24, 2002) (citing a discussion of the Sixth Amendment right to counsel of choice in Wheat v. United States, 486 U.S. 153, 162 (1988)). Of course criminal cases are not a perfect analogy. On average the liberty or property interests at risk may be greater in a criminal proceeding. *See, e.g.*, *Potashnick*, 608 F.2d at 1118 ("A criminal defendant faced with a potential loss of his personal liberty has much more at stake than a civil litigant asserting or contesting a claim for damages, and for this reason the law affords greater protection to the criminal defendant's rights."). *But see* Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at Kennedy v. Mendoza-Martinez*, 32 U. CHI. L. REV. 290, 292 (1965) (noting that "some non-criminal sanctions are as grave as some criminal sanctions"). In addition, the finality principle suggests that civil litigants may be able to appeal their denial of counsel of choice earlier than could a criminal defendant. *See* Flanagan v. United States, 465 U.S. 259, 264 (1984) (stating that the policy behind the final judgment rule "is at its strongest in the field of criminal law"). Nevertheless, in some instances, criminal cases may provide useful guidance.

177. Goldberg v. Kelly, 397 U.S. 254, 270–71 (1970) (recognizing a due process right to counsel of choice in a welfare benefits case); Am. Airways Charters Inc. v. Regan, 746 F.2d 865, 873–74 (D.C. Cir. 1984) (holding that the Office of Foreign Asset Control could not prevent a corporation from retaining counsel); Mosley v. St. Louis Sw. Ry. 634 F.2d 942, 945 (5th Cir. 1981) (stating that "[t]he right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process . . . and extends to administrative, as well as courtroom, proceedings"); Great Lake Screw Corp. v. NLRB, 409 F.2d 375, 378–80 (7th Cir. 1969) (holding that due process required that a respondent who was denied to right to counsel of choice be given a new hearing).

purely investigative proceeding,[178] but the Court has not addressed whether some due process rights, including the right to counsel of choice, still apply.[179] However, regardless of whether due process provides investigative witnesses a right to counsel of choice, the APA does.[180]

Of course, the right to counsel of choice is not absolute.[181] For example, a client is not entitled to choose an attorney that is not admitted to the bar,[182] an attorney that he or she cannot afford,[183] or an attorney that engages in wrongful conduct.[184] Nevertheless, due process concerns should not be ignored. Because the SEC investigates both the client and the attorney, there are several different ways SEC ethics investigations may deprive clients of their statutory and due process right to counsel of choice.[185]

1. LAWYER INTIMIDATION

First, SEC Division of Enforcement staff may deprive a client of counsel of choice by threatening the client's attorney with disciplinary investigation under

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178. The Supreme Court has explained:

> 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Hannah v. Larche, 36 U.S. 420, 442 (1960) (holding that witnesses compelled to testify in a non-adjudicatory investigation were not entitled to learn of the allegations against them or learn the identity of the persons who made complaints against them). *See also* SEC v. O'Brien, 467 U.S 735, 742 (1984) (holding that Fifth Amendment due process rights were not implicated when the SEC refused to inform the target of an investigation about subpoenas issued to third-party witnesses).

179. Some have suggested that no due process right exists during the investigative process. *See* Georator Corp. v. EEOC, 592 F.2d 765, 768 (4th Cir. 1979) ("When only investigative powers of an agency are utilized, due process considerations do not attach."). However, this view is far from established. It may well be that some limited due process rights, including the right to counsel of choice, attach during an administrative investigation.

180. *See supra* notes 166–171 and accompanying text.

181. *Cf.* United States v. Amlani, 111 F.3d 705, 711 (9th Cir. 1997) (noting that in the criminal context the "right to select one's counsel may be limited in several important respects").

182. SEC v. Whitman, 613 F. Supp. 48, 51 (D.C. Cir. 1985).

183. *Cf. Amlani*, 111 F.3d at 711 ("[A] defendant is not entitled to an attorney he or she cannot afford or who for other reasons declines to represent the defendant.").

184. *Cf.* Nix v. Whiteside, 475 U.S. 157, 173 (1986) (holding that "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury"); United States v. Collins, 920 F.2d 619, 627 (10th Cir. 1990) ("Courts . . . must balance a defendant's constitutional right to retain counsel of his choice against the need to maintain the highest standards of professional responsibility, the public's confidence in the integrity of the judicial process and the orderly administration of justice . . . .").

185. Keating, Muething & Klekamp, Exchange Act Release No. 15,982, 17 SEC Docket 1149, 1162 (July 2, 1979) (Karmel, Comm'r, dissenting) ("When a prosecutorial agency like the Commission disciplines attorneys acting in a representative capacity, it necessarily impinges upon and interferes with a client's right to counsel.").

Rule 102(e).[186] Part of the purpose of the right to counsel of choice is to preserve the adversary system used in the SEC's administrative process.[187] When an agency action impermissibly restricts opposing counsel's ability to function in an adversary role, it deprives the client of the right to counsel of choice.[188] In the criminal context, courts have held that a defendant is deprived of the right to counsel when the prosecutor creates an actual conflict of interest by threatening the defense attorney with prosecution and the defense attorney responds with less aggressive advocacy.[189]

It is certainly possible that the threat of a Rule 102(e) investigation could intimidate an attorney into less effective advocacy. In a very real sense, suspending an attorney from practice before the SEC deprives the attorney of his or her livelihood. According to one commentator, "[t]he expertise and compulsive due diligence required by the SEC virtually ensures a high degree of specialization in the securities bar."[190] The inability to appear before the Commission effectively ends the ability of an attorney to practice as a securities specialist.[191] Even if the attorney is only investigated and ultimately not

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186. *See* Simon M. Lorne & W. Hardy Callcott, *Administrative Actions Against Lawyers Before the SEC*, 50 BUS. LAW. 1293, 1302 (1995) ("[T]he threat of disciplinary actions before an SEC ALJ poses a particularly disconcerting issue of intimidation when it is premised on the lawyer's performance in the practice of law. To the extent that threat exists, the lawyer's client may in a meaningful sense be deprived of representation by counsel.").

187. *See* Mosley v. St. Louis Sw. Ry., 634 F.2d 942, 945 (5th Cir. 1981) (stating that the right to counsel of one's choice "inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights"). *Cf.* Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 441(1985) (Brennan, J., concurring) ("A fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice to represent their interests in judicial proceedings.").

188. *Cf.* SEC v. Whitman, 613 F. Supp. 48, 49 (D.D.C. 1985). In *Whitman*, the court held that the SEC deprived clients of their right to counsel of choice when it prevented accountants who were assisting the attorneys from attending witness interviews. The court reasoned that without the accounting expertise of the accountants the attorneys were unable to properly defend the clients. *Id.* at 50.

189. *See* Strickland v. Washington, 466 U.S. 668, 692 (1984).

190. Krane, *supra* note 127, at 54 (arguing that the SEC's failure to set clear standards for discipline under Rule 102(e) keeps attorneys without a high degree of specialization from practicing before the Commission). *See also* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 875 (1992) (stating that "lawyers who do securities or banking work are likely to spend a majority of their time in these areas").

191. *See* J. WILLIAM HICKS, CIVIL LIABILITIES: ENFORCEMENT & LITIGATION UNDER THE 1933 ACT § 2.113 (2007) ("Although it is possible to imagine tasks that attorneys . . . could perform that do not fit precisely into the definition of 'practice,' it is clear that the sanction would significantly impair an . . . attorney from maintaining a . . . securities practice." (footnote omitted)); Richard D. Kahn, Note, *Attorney Discipline by the SEC: 2(e) or not 2(e)?*, 17 NEW ENG. L. REV. 1267, 1303 (1982) ("Because a securities attorney practices in such a specialized area of the law, the inability to practice before the Commission is equivalent to the denial of the right to practice law at all.").

The Commission, however, has suggested that suspension from practicing only securities law is not as onerous as a complete suspension. *See* Fields, Securities Act Release No. 5404, 2 SEC Docket 3, 4–5 n.20 (June 18, 1973).

> [T]he impact of an order by us under our Rule [10]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. A lawyer barred

sanctioned by the SEC, an investigation may hurt the attorney's practice.[192] Because the attorney's potential livelihood will be threatened by a disciplinary investigation, it is easy to see how intimidation by the SEC may lead to less zealous advocacy.[193] To the extent this occurs, the client is denied the right to counsel of choice.[194]

The SEC believes that the risk that SEC staff will use Rule 102(e) to intimidate a client's attorney is not large because the Division of Enforcement staff who

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from appearing before us is still free to hold himself out to the world as a lawyer, to practice before all tribunals save this one, and to counsel clients with respect to the infinite variety of legal problems that do not impinge on the area affected by the federal securities statutes.

Id.

192. *See* Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. REV. 225, 239 (1996) ("The reputational paradigm in the legal profession is . . . particularly sensitive to an allegation of improper professional conduct . . . . A securities practice that took years to build can dissolve almost overnight as clients . . . depart for one of many competitors who have managed to avoid disciplinary actions . . . ."). Even SEC staff has acknowledged that an investigation hurts the reputation of the attorney involved. *See* Humes, *Remarks, supra* note 43, at 346 ("[W]e are sensitive to the fact that our inquiries can have a palpable affect on an attorney's professional reputation and livelihood. This concern reminds me of the statement of the Christopher Plummer character in the movie Syriana, who said that 'you are innocent until you are investigated.'" (footnote omitted)).

This is not to suggest that an attorney cannot return to a successful practice after facing a Rule 102(e) proceeding, but avoiding discipline. Indeed, after the conclusion of the *Carter* case, William R. Carter practiced securities law for several more years at Brown, Wood, Ivey, Mitchell & Petty and served as a director of Checkers Motor Corporation. *See In Memoriam*, HARV. L. BULL. (Spring 2007) *available at* http://www.law.harvard.edu/news/bulletin/2007/spring/memoriam.php (last visited Apr. 7, 2009) (discussing Mr. Carter's career). Charles J. Johnson also continued his practice and even co-authored a book on securities law. *See* CHARLES J. JOHNSON, JR. & JOSEPH MCLAUGHLIN, CORPORATE FINANCE AND SECURITIES LAW xxxi–xxxii (4th ed. 2007) (discussing Mr. Johnson's career). However, an SEC ethics investigation is undoubtedly damaging to an attorney's practice.

193. *See* Greene, *supra* note 8, at 170 (noting that "the threat of institution of Rule [10]2(e) proceedings in situations where the lawyer appears as an advocate could have a serious chilling effect on zealous representation"); Norman S. Johnson & Ross A. Albert, *Déjà Vu All Over Again: The Securities and Exchange Commission Once More Attempts to Regulate the Accounting Profession Through Rule 102(e) of its Rules of Practice*, 1999 UTAH L. REV. 553, 573–74 (1999) ("[T]he threat of disciplinary action might well intimidate and interfere with the exercise of independent professional judgment . . . ."); Daley & Karmel, *supra* note 161, at 825 ("An attorney cannot adequately represent his clients when he is worried about his own liability."). *But see* Greene, *supra* note 8, at 170 (arguing that because "lawyers' actions have always been restricted by rules of ethics . . . Commission disciplinary actions, which only enforce existing standards should have no chilling effect beyond that already created by the existence of state and local disciplinary authorities").

194. *See* Lorne & Callcott, *supra* note 186, at 1302. Some might argue that in this regard, Rule 102(e) poses no greater threat to the SEC process than other SEC enforcement powers. After all, the SEC is free to investigate attorneys for a myriad of securities law violations. *See, e.g.*, 15 U.S.C. § 78j (2000); 17 C.F.R. § 240.10b-5 (2007). The SEC can bring cease-and-desist proceedings against attorneys. 15 U.S.C. § 78u-3. It can also bring actions seeking civil monetary penalties and injunctions against attorneys. *Id.* § 78u(d). Any of these actions might have a chilling affect on the advocacy provided by the attorney. But the danger posed by Rule 102(e) is unique. As explained in Part III, Rule 102(e)'s "unethical or improper professional conduct" language, provides no real standard for attorney conduct and does not clearly identify when an attorney may be punished. For this reason, the SEC staff has much broader discretion to threaten investigation under Rule 102(e) than it does in other contexts. In addition, Rule 102(e) investigations may be more likely to affect the attorney's representation because Rule 102(e) investigations focus on the attorney's conduct as an attorney. In contrast, other investigations may not be directly related to the attorney's representation of the client.

might threaten an investigation do not themselves have the power to conduct Rule 102(e) investigations.[195] Instead, Rule 102(e) investigations are conducted by the SEC's Office of the General Counsel.[196] The implication is that the SEC's authority to investigate under Rule 102(e) poses no more danger than states' authority to investigate attorney ethics matters.

But simply creating the Office of the General Counsel to investigate ethics complaints did not solve the problem. There is little true separation between the Office of the General Counsel and the Division of Enforcement. There are no rules or policies that prevent the Division of Enforcement and the Office of the General Counsel from working together. The Office of the General Counsel is free to provide the Division of Enforcement with the information collected during the investigation. Moreover, both may be motivated by the mission of the SEC to "protect investors."[197] Indeed, anecdotal evidence of threats by Division of Enforcement staff[198] suggests that even some SEC attorneys believe that Rule 102(e) can be used as a tool to intimidate opposing counsel. If this intimidation occurs, the client has been deprived of the right to counsel of choice.

The SEC's other measure that is intended to prevent overreaching by the SEC staff is the rule that the Commission must issue a formal order of investigation before the Office of the General Counsel may formally subpoena documents or

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195. *See* Humes, *Remarks*, *supra* note 43, at 345 (noting that the Office of the General Counsel was assigned the task of conducting attorney ethics investigations "to avoid even the perception" that the Division of Enforcement was using the "responsibility to enforce ethical standards as a basis to obtain leverage against lawyers in pursuing and settling its cases"); Humes, SEC Speaks 2007, *supra* note 19 ("Historically there has been a concern, I think, particularly in the private bar that our Enforcement Division may use the possibility of bringing a 102(e) proceeding as leverage to get a lawyer representing a client in an investigation to agree to perhaps a better settlement .... [J]ust to assuage any concerns that the bar might have in that regard, the General Counsel has retained responsibility for both investigating and bringing those cases.").

196. *See supra* note 44 and accompanying text.

197. SEC, The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, http://www.sec.gov/about/whatwedo.shtml (last visited Apr. 7, 2009). *See also* Painter & Duggan, *supra* note 192, at 227 (noting that "the effect of enforcement proceedings against lawyers may be secondary in the minds of agency officials bent on doing anything necessary to combat fraud").

In addition, the SEC's Office of the General Counsel is tasked with "representing the Commission, its members, and its employees at the trial and appellate levels, when they are parties to civil or administrative litigation arising from the performance of the Commission's official functions, such as enforcement investigations and rulemaking proceedings." *See* SEC Office of the General Counsel, http://www.sec.gov/about/offices/ogc.htm (last visited Apr. 7, 2009). It is possible that the Office of the General Counsel's role as a defender of SEC employees could lead to a bias against attorneys accused by those employees of wrongdoing.

198. DAVID M. BRODSKY, ETHICS IN CONTEXT 2005: LEGAL EXPOSURE OF INTERNAL COUNSEL POST-SARBANES-OXLEY 137, 142 (PLI New York Practice Skills Handbook Series No. 154, 2005) WL 154 PLI/NY 137, 142 (summarizing portions of a November 19, 2004 meeting of the ABA Business Law Section's Federal Regulation of Securities Committee) (reporting that a defense attorney stated "that even lawyers' preparation of witnesses is now under scrutiny by the [s]taff"); Krane, *supra* note 127, at 50–53, 81–84 (stating that the SEC has "been known to actually intimidate attorneys, by threats of prosecution under [R]ule [10]2(e) or otherwise").

testimony.[199] In addition, the Commission—not the staff—determines whether to issue an Order for Proceedings.[200]

Unfortunately, the Commission does not serve as an effective check on the staff's investigations. Under the current procedural rules, the SEC staff may conduct informal investigations of attorneys without authorization from the Commission.[201] During an informal investigation the staff can still request documents and interview witnesses.[202] This activity may intimidate an attorney into less zealous advocacy and thereby deprive the client the right to counsel of choice.

2. SECRET INVESTIGATIONS

Even when an attorney has not been threatened by SEC staff, a client may still be deprived of the right to counsel of choice. In some instances, the client and the attorney might not immediately learn of the SEC's investigation of the client's attorney.[203] In these instances, the attorney could have already lost all credibility with the Division of Enforcement, yet the staff might allow the attorney to continue representing the client. Due to the staff's distrust, the client could be denied an effective advocate. Particularly in situations where the attorney's alleged wrongdoing does not implicate the client, such a result would impinge on the client's rights.

A recent Rule 102(e) investigation of a litigator illustrates this problem. During the mutual fund scandals of 2003,[204] the SEC began to investigate Trautman Wasserman & Company, Inc. ("Trautman Wasserman"), a registered broker-dealer.[205] Ultimately, the SEC's investigation focused on market timing and late trading activities of a handful of Trautman Wasserman executives, including Chief Financial Officer Mark Barbera.[206] During the investigation, Mr. Barbera

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199. Prezioso, *supra* note 19 (noting the Commission's role in assuring that the SEC does not engage in overzealous discipline of attorneys). For a discussion of the Commission's role in the Rule 102(e) process see *supra* Part II.

200. *See supra* notes 55–56 and accompanying text.

201. *See supra* notes 48–49 and accompanying text.

202. *See* 17 C.F.R. § 200.21 (2007).

203. *See supra* notes 51–53 and accompanying text (describing how the SEC may conduct informal and formal investigations into attorney professional conduct without informing either the attorney or the client).

204. In September 2003, New York Attorney General Eliot Spitzer announced that his office had evidence of "widespread" instances of late trading and market timing. Press Release, Office of New York State Attorney General Eliot Spitzer, State Investigation Reveals Mutual Fund Fraud (Sept. 3, 2003), *available at* http://www.oag.state.ny.us/press/2003/sep/sep03a_03.html. Shortly thereafter, it became clear that the SEC was also investigating a number of market-timing and late trading cases. *See* Floyd Norris, *Pile of Pennies is Adding Up to a Scandal in Mutual Funds*, N.Y. TIMES, Nov. 1, 2003, at C1.

205. *See* Peter Elkind & Doris Burke, *Janus's Bad Timing: A Widening Market-Timing Scandal Taints a Former Star Portfolio Manager*, FORTUNE, Jan. 12, 2004, at 31.

206. *See* Trautman Wasserman & Co., Securities Act Release No. 8780, Exchange Act Release No. 55,238, Investment Advisers Act Release No. 2589, Investment Company Act Release No. 26,696, 89 SEC Docket 2855 (Feb. 5, 2007) (order instituting administrative proceedings).

and other Trautman Wasserman executives were represented by Leon B. Borstein.[207] According to the SEC, Mr. Borstein met with witnesses, whom he did not represent, and pressured them to provide false testimony to the SEC that would corroborate testimony of one of the other Trautman Wasserman executives.[208] Mr. Barbera was not involved in Mr. Borstein's alleged wrongful conduct.[209] When the Division of Enforcement interviewed the witnesses, the witnesses testified that Mr. Borstein had pressured them to lie.[210] Suspecting that Mr. Borstein had engaged in "unethical or improper professional conduct," the Division of Enforcement requested that the Office of the General Counsel investigate.[211] However, neither the Division of Enforcement nor the Office of the General Counsel informed Mr. Barbera that his attorney was under investigation.[212] Consequently, Mr. Borstein continued to represent Mr. Barbera. Mr. Borstein produced documents on Mr. Barbera's behalf and met with the SEC to discuss Mr. Barbera's Wells submission.[213] About six months later, the Office of the General Counsel contacted Mr. Borstein and asked that he "appear for an interview pursuant to Rule of Practice 102(e)."[214] Mr. Borstein then withdrew from representing Mr. Barbera.[215] Shortly thereafter, the SEC issued an Order Instituting Proceedings against Mr. Barbera.[216]

Upset by the SEC's failure to timely inform him of the investigation of his attorney, Mr. Barbera filed an interlocutory petition asking the Commission to dismiss the proceeding against him.[217] Mr. Barbera argued that "[o]nce Mr. Borstein himself became a 'target,' . . . Mr. Borstein [was] unable to function as an effective advocate."[218] "The Division [of Enforcement] viewed Mr. Borstein as untrustworthy [and, as a result, he] could not serve as an effective advocate."[219] Mr. Barbera asserted that once the SEC began its investigation of

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207. *See* Trautman Wasserman & Co., Exchange Act Release No. 55,989, Investment Advisers Release No. 2613, Investment Company Act Release No. 27,880, 90 SEC Docket 2832, 2837 (June 29, 2007) (order denying petition for interlocutory review).

208. Division of Enforcement's Memorandum Opposing Respondent Mark Barbera's Motion to Dismiss the Administrative Proceedings Against Him at 7, *Trautman Wasserman & Co.*, 90 SEC Docket 2832 (Admin. Proc. File No. 3-12559) [hereinafter Enforcement Trautman Wasserman Brief].

209. *See* Respondent Mark Barbera's Reply Brief in Support of Motion to Dismiss at 8, *Trautman Wasserman & Co.*, 90 SEC Docket 2832 (Admin. Proc. File No. 3-12559) [hereinafter Barbera Reply Brief].

210. *Trautman Wasserman & Co.*, 90 SEC Docket at 2835; Enforcement Trautman Wasserman Brief, *supra* note 208, at 7–8; Barbera Reply Brief, *supra* note 209, at 7.

211. *Trautman Wasserman & Co.*, 90 SEC Docket at 2835 & n.16; Barbera Reply Brief, *supra* note 209, at 9.

212. Barbera Reply Brief, *supra* note 209, at 7. In fact, Mr. Barbera asserted that during the Wells process the Division of Enforcement staff purposely made no mention of the witnesses that had implicated Mr. Borstein in unethical conduct. *Id.*

213. *Id.* at 9.

214. *Trautman Wasserman & Co.*, 90 SEC Docket at 2835.

215. *See id.*

216. *Id.*

217. *Id.* at 2832, 2835.

218. Barbera Reply Brief, *supra* note 209, at 7.

219. *Id.* at 10.

Mr. Borstein, the SEC had a duty to inform Mr. Barbera or Mr. Borstein of the investigation.[220] If such notification had been provided, Mr. Barbera could have made an informed decision about whether to waive the conflict of interest that arose with his attorney.[221] However, without notice of the conflict, Mr. Barbera believed he was deprived of counsel of his choosing.[222]

The Commission declined to dismiss the charges against Mr. Barbera.[223] It rejected Mr. Barbera's argument that he was denied counsel of choice because his attorney was viewed by the SEC staff as "untrustworthy."[224] The Commission explained that, even assuming the staff viewed Mr. Borstein as untrustworthy, "[p]arties in adversarial proceedings may view with skepticism the position asserted by opposing counsel."[225] Moreover, the Commission stated that once Mr. Barbera retained new counsel, "any alleged harm he may have suffered because of [Mr.] Borstein's alleged conflict" was cured.[226]

Mr. Barbera reached a settlement with the SEC shortly after the Commission's decision.[227] Consequently, no court has had the opportunity to address whether the Commission's decision was correct. Undoubtedly the Commission is correct in concluding that nothing in the Due Process Clause requires that Mr. Barbera be represented by an attorney whom the Commission finds credible. On the other hand, the SEC has been aggressive in stamping out potential conflicts of interest that occur when an attorney represents more than one party in an investigation.[228] Ostensibly, the SEC takes this position to ensure that each party receives conflict-free representation from a zealous advocate.[229] Why then is the SEC not

220. *Id.* at 8–9.

221. *Id.* at 9.

222. *Id.* at 7–9.

223. *See* Trautman Wasserman & Co., Exchange Act Release No. 55,989, Investment Advisers Release No. 2613, Investment Company Act Release No. 27,880, 90 SEC Docket 2832, 2837 (June 29, 2007).

224. *Id.* at 2835–36.

225. *Id.* at 2836. The Commission suggested that the situation might be more troublesome if the SEC had acted in bad faith. *See id.* However, the Commission held that Mr. Barbera had not proven that the SEC acted in bad faith. *See id.* It explained that "courts must presume that . . . government officials . . . conduct themselves in good faith." *Id.*

226. *Id.* The Commission added that "[e]ven if [Mr.] Barbera had shown that he had been prejudiced by the alleged conflict between [Mr.] Borstein and himself, he had not demonstrated that the appropriate remedy for that prejudice [wa]s complete dismissal of the case against him." *Id.*

227. Trautman Wasserman & Co., Securities Act Release No. 8894, Exchange Act Release No. 57,327, Investment Company Act Release No. 28,152, 92 Docket 1690 (Feb. 14, 2008) (order making findings and imposing remedial sanctions as to Mark Barbera).

228. *See* SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976) (overturning SEC's decision to disqualify an attorney based on a conflict of interest); SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966) (same); Blizzard, Exchange Act Release No. 45,806, Investment Advisers Act Release No. 2032, 77 SEC Docket 1335 (Apr. 24, 2002) (disqualifying an attorney based on a potential conflict of interest).

229. *See Blizzard*, 77 SEC Docket at 1336. The Commission's *Blizzard* opinion noted that "an attorney before any tribunal must advocate his client's position forcefully in order to advance the integrity of the proceeding." *Id.* Forceful advocacy may be compromised when the attorney represents two clients with conflicting positions. *Id.* The Commission then explained that the need for zealous advocacy was so important

always eager to disclose a potential conflict of which the attorney and client are not aware?[230] It is easy to see how a client like Mr. Barbera may become disillusioned about the fairness of the SEC process when he later learns that the SEC has been secretly investigating his attorney. Due process may require that the client be given enough information to make an informed decision regarding his counsel of choice.[231]

3. FORCED RESIGNATION

Mr. Barbera's case illustrates another potential way that Rule 102(e) investigations of litigation attorneys can violate clients' right to counsel of choice. Once Mr. Borstein learned the SEC was investigating him, he withdrew from representing Mr. Barbera.[232] "Mr. Barbera then had no choice but to retain new counsel, who did not have the benefit of and knowledge from being involved in the investigation . . . ."[233] Mr. Barbera's counsel of choice was Mr. Borstein. The SEC's decision to investigate Mr. Borstein prevented Mr. Borstein from representing Mr. Barbera.

Nevertheless, the Commission decided that any infringement on Mr. Barbera's right to counsel of choice was not sufficient to justify dismissing the charges against Mr. Barbera.[234] The Commission noted that the right to counsel of choice was "not . . . absolute."[235] In this case, the Commission concluded that Mr. Barbera's right to counsel of choice was "outweighed by the necessity of ensuring that [the] administrative proceeding [wa]s conducted with a scrupulous regard for the propriety and integrity of the process."[236]

To support its position, the Commission relied on its questionable 2002

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that an ALJ acted properly in disqualifying an attorney even when no actual conflict of interest had been proven. *Id.* at 1336–37.

230. Those skeptical of the SEC's motives might note that preventing an attorney from representing multiple clients reduces the likelihood that the attorney will help the clients collude with each other. Informing a client of an SEC investigation into the client's attorney may yield no such benefit for SEC investigators.

231. Courts have suggested that, in some instances, the SEC has a duty to inform a defendant of potential conflicts of interest. *See* United States v. Stringer, 521 F.3d 1190, 1200–01 (9th Cir. 1991) (holding that the SEC had no duty to warn a defendant of a conflict arising when the defendant's attorney represented other defendants where the defendant knew the attorney represented other defendants and the defendant had been warned about the potential for conflicts); *Csapo*, 533 F.2d at 11 ("The SEC properly fulfilled its duty by informing those who came before it whether their lawyer had appeared on behalf of others and, if so, the possible conflicts which might arise. The choice must then be made by the witness after a full and frank disclosure by his attorney of the attendant risks.").

232. *See* Trautman Wasserman & Co., Exchange Act Release No. 55,989, Investment Advisers Release No. 2613, Investment Company Act Release No. 27,880, 90 SEC Docket 2932, 2836 n.28 (June 29, 2007).

233. Barbera Reply Brief, *supra* note 209, at 10.

234. Trautman Wasserman & Co., Exchange Act Release No. 55,989, Investment Advisers Release No. 2613, Investment Company Act Release No. 27,880, 90 SEC Docket 2832, 2835–36 (June 29, 2007).

235. *Id.* at 2835.

236. *Id.* at 2835 n.20 (citing Blizzard, Exchange Act Release No. 45,806, Investment Advisers Act Release No. 2032, 77 SEC Docket 1335, 1337 (Apr. 24, 2002)).

Blizzard decision.[237] In *Blizzard*, the SEC's Division of Enforcement sought to disqualify an attorney from representing both the respondent and a witness in an administrative proceeding.[238] The ALJ denied the Division's request and the Division sought interlocutory review by the Commission.[239] The Commission held that even though no "actual conflict ha[d] been established" and both clients had consented to the representation, disqualification of the attorney was required because "[e]ven the appearance of a lack of integrity could undermine the public confidence in the administrative process."[240] This "appearance" of impropriety standard gives the SEC significant discretion.

Courts never had the opportunity to review the Commission's *Blizzard* decision because the ALJ later dismissed the charges against the respondent.[241] However, the "appearance of lack of integrity" standard adopted by the *Blizzard* opinion is plainly inconsistent with more rigorous standards established by federal courts.[242] For example, the Ninth Circuit has held that "before the SEC may exclude an attorney from its proceedings, it must come forth . . . with 'concrete evidence' that his presence would obstruct and impede its investigation."[243] If the SEC does not have concrete evidence, removal of the attorney denies the client the right to counsel of choice.[244]

Although the Commission in Mr. Barbera's case did not directly adopt the *Blizzard* "appearance" standard, the Commission did not embrace a "concrete evidence" standard either. In fact, the Commission never considered what amount of evidence would be needed to ensure that Mr. Barbera was not denied the right to counsel.[245] Taken together Mr. Barbera's case and the *Blizzard*

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237. *Id.*

238. *Blizzard*, 77 SEC Docket at 1335.

239. *Id.*

240. *Id.* at 1336–37.

241. *See* Blizzard, Exchange Act Release No. 49,899, Investment Advisers Act Release No. 2253, 83 SEC Docket 372, 378 n.23 (June 23, 2003) (affirming the ALJ's decision and explaining that no further discussion of the respondent's right to counsel claim was warranted).

242. *See* MARC I. STEINBERG & RALPH C. FERRARA, SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT § 10.7 (2007) (questioning "the likelihood that the SEC's position [in *Blizzard*] ultimately will prevail in the federal courts"); Sutherland Asbill & Brennan LLP, *Legal Alert – "Appearance" of Potential Conflict Disqualifies Counsel From Representing Multiple Client In SEC Administrative Proceeding*, Southerland Asbill & Brennan LLP, May 3, 2002) http://www.sutherland.com/files/News/c93101cf-8775-4275-bd4c-b68ba823557c/Presentation/NewsAttachment/b5935295-4b71-40e0-9e04-5de283084ba5/secrel2032.pdf ("The 'appearance' standard enunciated by the SEC for administrative proceedings in [*Blizzard*] seems to be in conflict with the 'concrete evidence' standard set forth in [other cases].").

243. SEC v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976) (quoting SEC v. Higashi, 359 F.2d 550, 553 (9th Cir. 1966)). The Ninth Circuit's decision in *Higashi*, while similar, stopped short of setting a "concrete evidence" standard. *See Higashi*, 359 F.2d at 553. *Higashi*, nevertheless, made it clear that the SEC does not have unfettered discretion to disqualify attorneys. *See id.*

244. *See Csapo*, 533 F.2d at 11; *Higashi*, 359 F.2d at 553.

245. Although the Commission referred to witness testimony implicating Mr. Borstein, the Commission was careful to "express no view as to the ultimate veracity of the testimony, or to its admissibility or probative value in any proceeding." Trautman Wasserman & Co., Exchange Act Release No. 55,989, Investment Advisers

opinion leave litigation attorneys wondering if there is any limit on the SEC's discretion to effectively remove them from their clients' cases by instituting Rule 102(e) proceedings. This approach is plainly inconsistent with the right to counsel guaranteed by the Due Process Clause, the APA, and SEC rules and regulations.

B. ATTORNEY-CLIENT CONFIDENTIALITY BREACHED

In addition to the right to counsel of choice, clients also have the expectation that any information shared with their attorneys will be held in confidence. However, Rule 102(e) investigations of litigation attorneys can compromise this confidentiality. When the SEC begins a Rule 102(e) investigation of an attorney, the SEC collects documents, testimony, and other evidence relating to the attorney's alleged wrongdoing. If the SEC investigates a litigation attorney for ethical lapses during an SEC investigation of the attorney's client (or an investigation for which the client is a witness), the SEC will likely seek documents or testimony that ordinarily would be protected by the attorney-client privilege.[246] The litigator may then disclose that privileged information, even if it is not in the client's interest. This intrusion into the attorney-client relationship compromises the fairness of the SEC's administrative process by giving the SEC access to information that would otherwise be protected by the attorney-client privilege. In addition, disclosure of privileged information in some Rule 102(e) cases may discourage other clients from communicating with their attorneys. This would compromise the fairness of the SEC administrative process on a wider basis.

It is an elementary principle of law that attorney-client communications are protected by the attorney-client privilege.[247] It is equally elementary that an

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Release No. 2613, Investment Company Act Release No. 27,880, 90 SEC Docket 2832, 2835 (June 29, 2007). It is possible that the witness testimony could have satisfied the concrete evidence standard, but the Commission simply never applied the standard.

Perhaps the Commission felt no need to address the appropriate standard because it concluded that, regardless of the propriety of the Rule 102(e) investigation, Mr. Barbera had not shown that he had been harmed by the change in attorneys. The Commission reasoned that Mr. Barbera's new counsel "had access to [Mr.] Borstein" and had contacted Mr. Borstein to "gather information" that was used in preparing Mr. Barbera's defense. Barbera Reply Brief, *supra* note 209, at 7. However, if the Commission was relying primarily on its conclusion that Mr. Barbera had not suffered any harm, it seems odd that the Commission cited *Blizzard* or noted that the right to counsel can be outweighed by threats to the integrity of the Commission process. *Trautman Wasserman & Co.*, 90 SEC Docket at 2835.

246. *See* Stephen J. Crimmins, *New Legislation Will Require Attorneys to Report Evidence of Their Corporate Clients' Violations*, 34 SEC. REG. & L. REP. (BNA) 1340 (Aug. 12, 2002) ("[T]o the extent the SEC takes on bar discipline [type] cases, there are particular problems that will arise in obtaining the evidence to prosecute attorneys .... If the SEC attempts to subpoena the attorney's files, it may well be met by an attorney-client privilege assertion.").

247. The attorney-client privilege applies if:

attorney has an ethical obligation to maintain client confidences.[248] The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the . . . administration of justice."[249] Full and frank communication is necessary because the U.S. system of justice relies on the expertise of attorneys. The attorney-client privilege aids the attorney in gathering the information necessary to give sound legal advice and encourages the client to seek legal advice early and often.[250] Because the attorney-client privilege is intended to benefit the client, ordinarily an attorney cannot invoke or waive the privilege without the client's consent.[251] If this were the rule applied to SEC efforts to collect information in a Rule 102(e) investigation of a litigation attorney, there would be no problem. The client could decide whether to allow the attorney to disclose confidential information.

There is, however, an important exception to the attorney-client privilege: an attorney is allowed to disclose privileged information over the objections of a client in order for the attorney to defend himself or herself.[252] This self-defense exception typically arises when the attorney and client develop conflicting

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> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Mach. Corp. 89 F. Supp. 357, 358–59 (D. Mass. 1950).

248. *See* MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 4 (2008) ("A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law."). According to the Supreme Court:

> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client . . . ; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

Stockton v. Ford, 52 U.S. 232, 247 (1850).

249. Upjohn Co. v. United States, 449 U.S. 383, 387 (1981).

250. *See id.* at 387–91.

251. *See, e.g.*, Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967). Once a client consents, an attorney is freed from the ethical obligation to maintain the confidence. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."); MICH. RULES OF PROF'L CONDUCT R. 1.6(c) ("A lawyer may reveal . . . confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them . . . .").

252. *See* SEC v. Forma, 117 F.R.D. 516, 524 (S.D.N.Y. 1987) ("The self-defense doctrine permits an attorney to disclose attorney-client communication in order to defend himself against accusations of wrongful conduct.").

interests, such as in fee disputes or malpractice cases.[253] However, federal courts[254] have held that the self-defense exception is equally applicable when the attorney is accused of wrongdoing by a third party, including the government.[255] These courts conclude that an attorney may reveal privileged information under the self-defense exception regardless of whether the alleged wrongdoing is criminal or civil in nature.[256] Indeed, an attorney need not wait until being formally charged; an attorney may reveal privileged information during a government investigation, including the informal stage of a Rule 102(e) investigation.[257]

An attorney who reveals confidential information under the self-defense exception to the attorney-client privilege is also relieved of a professional responsibility to keep the confidence. The *Model Rules of Professional Conduct,* as adopted in nearly all states,[258] allow an attorney to reveal confidential

253. *See, e.g.*, Judwin Props., Inc. v. Griggs & Harrison, P.C., 981 S.W.2d 868, 870 (Tex. App. 1998) (holding that the attorney-client privilege did not protect attorney-client communication related to a fee dispute between a law firm and its client); Connell, Foley & Geiser, LLP v. Israel Travel Advisory Servc., Inc., 872 A.2d 1100, 1107 (N.J. Super. Ct. App. Div. 2005) (noting that "when a client sues for legal malpractice, the [attorney-client] privilege is impliedly waived").

254. Federal courts, in cases based on federal question jurisdiction, apply federal common law when deciding attorney-client privilege questions. *See* FED. R. EVID. 501. The same federal common law is applied in SEC administrative proceedings. *See* Weeks, Exchange Act Release No. 45,393, Accounting & Auditing Enforcement Act Release No. 1504, 76 SEC Docket 2112, 2116 (Feb. 4, 2002) (interpreting the SEC Rules "as permitting the invocation of common law privileges in a Commission administrative proceeding to the same extent that Rule 501 of the Federal Rules of Evidence would permit the invocation of common law privileges in federal district court").

255. *See* Apex Mut. Fund v. N-Group Sec., 841 F. Supp. 1423, 1430 (S.D. Tex. 1993) ("When a client accuses an attorney of wrongdoing, the client himself waives the privilege by challenging the attorney's actions. Although this reasoning does not apply when an attorney is sued by a third party, courts that have confronted this situation have concluded that an attorney can waive the privilege to defend himself against third-party accusations even though the client does not agree to waive the privilege."); *In re* Nat'l Mortgage Equity Corp. Pool Certificates Secs. Litig., 120 F.R.D. 687, 690–92 (C.D. Cal. 1988) (holding that an attorney accused of securities fraud could reveal client confidences in defense of the third party action); First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 561 (S.D.N.Y. 1986) (denying a client's motion for a protective order to prevent an attorney from revealing privileged material to support his own defense). *See also* Rosen v. NLRB, 735 F.2d 564, 576 (D.C. Cir. 1984) (stating in dicta that "[w]hen a serious charge against an attorney arises out of his or her representation of a client, courts have allowed attorneys to disclose confidential information obtained from the client"); Qualcomm Inc. v. Broadcom Corp., No. 05CV1958-RMB(BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (finding that attorneys could reveal privileged information over the client's objections in order to defend themselves from accusations of wrongful conduct).

State courts have been unwilling to extend the self-defense exception to situations where the attorney is accused of wrongdoing by someone other than the client. *See, e.g.*, McDermott Will & Emery v. Superior Court, 99 Cal. Rptr. 2d 622, 626-27 (Cal. Ct. App. 2000). This, however, is of little consequence because, as explained in note 254 *supra*, privilege issues in SEC cases are decided by federal common law.

256. *See First Fed. Sav. & Loan Ass'n*, 110 F.R.D. at 566.

257. *See Forma*, 117 F.R.D. at 524 ("Formal charges need not have been issued for the self-defense exception to apply.").

258. Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaborative: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 694 n.91 (2007) (explaining that 47 states have adopted confidentiality rules similar to the *Model Rules of Professional Conduct* and 2 states have adopted

information "to establish a defense to a criminal charge or civil claim against the [attorney] based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the [attorney's] representation of the client."[259] Federal courts have relied on these ethical standards when ruling that an attorney may disclose confidential information in self-defense.[260]

Because of the self-defense exception, clients may be prejudiced through no fault of their own. Even if the SEC does not allege that the client knew of, assisted in, or benefited from the attorneys' alleged wrongdoing, the attorney may choose to disclose confidential communications.[261] Moreover, once an attorney discloses information to the SEC's Office of the General Counsel, there is nothing to prevent the Office of the General Counsel from sharing that information with the Division of Enforcement. Indeed, there is nothing to keep the Division of Enforcement from using information collected in a Rule 102(e)

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confidentiality rules similar to the *Model Code of Professional Responsibility*). Only California requires that an attorney "maintain inviolate the confidence, and at every peril to himself or herself . . . preserve the secrets, of his or her client." *See* CAL. BUS. & PROF. CODE § 6068(e) (West 2004).

259. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2008). *See also* MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(c)(4) (1983) (stating that a lawyer may reveal "[c]onfidences or secrets necessary . . . to defend himself or his employees or associates against an accusation of wrongful conduct"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 (1998) ("A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client."); Susan Martyn, *In Defense of Client-Lawyer Confidentiality . . . And Its Exceptions . . .*, 81 NEB. L. REV. 1320, 1344 (2003) ("When a lawyer is accused of wrongdoing in the course of representing a client, whether by a client, former client, or a third person, the law governing lawyers commonly recognizes an exception for lawyer self defense.").

Even under California's more strict confidentiality rule (*supra* note 258) "case law and the official discussion . . . suggest that the ethical duty of confidentiality may be excused to the extent necessary for a lawyer to defend himself in litigation with a client or against accusations of misconduct made by a third party." Carole J. Buckner & Robert K Sall, *The Self-Defense Exception to the Ethical Duty of Confidentiality*, ORANGE COUNTY LAW., July 2006, at 59, 61 (noting that California Evidence Code § 958 modifies the confidentiality rule by allowing disclosure of "communication[s] relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship"). *But see* Los Angeles County Bar Assoc. Prof'l Responsibility & Ethics Comm., Ethics Opinion No. 519: Whether There is a Self-Defense Exception to an Attorney's Duty to Protect and Preserve Confidential Client Information in Order to Permit the Attorney to Defend Against Third Party Claims (2007) *reprinted in* 30 LOS ANGELES LAW. 76 (April 2007) ("Under current California law, an attorney cannot, without his or her former or present client's consent, disclose the client's privileged communications with the attorney or the client's confidential information, for the purpose of defending allegations brought against the attorney by a third party.").

260. *See* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194–95 (2d Cir. 1974) (holding that an attorney's disclosure of confidential client information to the SEC in order to prevent the attorney from being charged with securities fraud did not violate applicable attorney ethics rules, including Disciplinary Rule 4.101); *Qualcomm*, 2008 WL 638108, at *3 (citing *Model Rule of Professional Conduct Rule* 1.6 in an opinion allowing attorneys to disclose confidential information for self-defense purposes); *In re Nat'l Mortgage Equity Corp.*, 120 F.R.D. at 691–92 (relying on *Model Rule of Professional Conduct Rule* 1.6 in concluding that an attorney could disclose confidential information in order to defend himself from a third party securities fraud action).

261. If a client and attorney collaborate in wrongdoing, the attorney-client privilege can be overcome by the crime-fraud exception. *See, e.g.*, United States v. Zolin, 491 U.S. 554, 562 (1989).

investigation against the client. If the SEC establishes a pattern of seeking privileged information in Rule 102(e) investigations of litigation attorneys, clients may respond by keeping information from their attorneys.[262] This would harm the SEC's investigatory process by making the attorneys less able and effective advocates.[263]

The self-defense exception to the attorney-client privilege and the confidentiality rules leave the SEC with a powerful incentive to investigate—it may allow the SEC access to privileged information that the client would not agree to disclose.[264] To a certain extent, the self-defense exception encourages the SEC to investigate all attorneys, litigators and non-litigators, for any potential violation of law, rule, or ethical requirement.[265] However, the incentive to investigate litigation attorneys under Rule 102(e) is particularly strong, because these investigations go directly to the attorney's conduct in representing a client involved in a current SEC investigation. Rule 102(e) investigations of litigation attorneys are more likely to turn up information that can be used against the attorney's client. Furthermore, as explained in Part III, Rule 102(e)'s vague

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262. *See* Fisher v. United States, 425 U.S. 391, 403 (1976) ("As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."). *But see* David A. Green, *Lawyers as "Tattletales": A Challenge to the Broad Application of the Attorney-Client Privilege and Rule 1.6, Confidentiality of Information*, 20 GA. ST. U. L. REV. 617, 635–36 (2004) (arguing that there is "no support for the belief that, without confidentiality rules, clients would be reluctant to share information with their attorneys"); Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 815 (2004) (arguing that "[t]here is no evidence that [the self-defense exception to the attorney-client privilege has] had undesirable effects on the candor with which clients communicate to lawyers").

Of course, an attorney's disclosure of confidential information under the self-defense exception is permissible, not mandatory. Because disclosure is not mandatory, a sophisticated client who is concerned about potential future disclosures might attempt to obtain pre-emptive assurances from the attorney that the attorney would not disclose confidences during a Rule 102(e) investigation. With such an arrangement, the client could be candid with the attorney. Whether attorneys will agree to such an arrangement remains to be seen.

263. *See* Valerie Figueredo, *Misadventures into Corporate Prosecutions After the Holder, Thompson, and McNulty Memoranda*, 33 U. DAYTON L. REV. 1, 24 (2007) ("Inhibiting communications between an attorney and a client hurts our justice system because it results in the loss of fully informed and vigorously adversarial legal representation, thereby ensuring that attorneys will be unable to effectively counsel their clients to comply with the law." (quotation marks and citation omitted)).

264. This would not be the SEC's first effort to erode the attorney-client privilege. The SEC's Sarbanes-Oxley Rules drew criticism from some because the Rules, in some instances, require transactional attorneys to disclose confidential information without the client's consent. *See generally* Todd John Canni, *Protecting the Perception of the Public Markets: At What Cost? The Effects of "Noisy Withdrawal" on the Long-Standing Attorney-Corporate Client Relationship*, 17 ST. THOMAS L. REV. 371 (2004). In addition, the SEC has drawn criticism for pressuring corporations to waive the attorney-client privilege. *See* Letter from Karen J. Mathis, President, Am. Bar Ass'n, to Christopher Cox, Chairman, SEC (Feb. 5, 2007), *available at* http://www.abanet.org/poladv/letters/attyclient/2007feb05_privwaivsec_l.pdf.

265. *See* Jennifer Cunningham, Note, *Eliminating "Backdoor" Access to Client Confidences: Restricting the Self-Defense Exception to the Attorney-Client Privilege*, 65 N.Y.U. L. REV. 992, 1024–26 (1990) (noting the danger that the SEC may circumvent the attorney-client privilege in order to collect information about a client by accusing an attorney of wrongdoing).

standards give the SEC significant leeway to begin investigations. This combination of factors results in a situation where the SEC staff has an incentive to begin Rule 102(e) investigations of litigators in order to gather information to use against the litigator's client.

V. CHANGES TO THE SEC'S ETHICAL POLICING OF LITIGATORS

As explained, Rule 102(e) investigations of litigation attorneys undermine the fairness of the SEC's administrative process.[266] There is no clear standard for determining whether conduct constitutes "unethical or improper professional conduct" or for evaluating whether the attorney's mental state at the time of the violation warrants punishment.[267] In addition, the process for conducting Rule 102(e) investigations leaves opportunities for SEC overreaching (or the appearance of overreaching)[268] and prejudice to the client in nearly every possible investigation scenario. If the SEC begins a secret investigation of a litigator, the attorney's client will later justifiably complain that the SEC did not disclose a serious conflict of interest.[269] Yet if the SEC immediately discloses a Rule 102(e) investigation, the attorney's client will complain that the investigation was used to remove the attorney without sufficient evidence of misconduct.[270] If the SEC requests or subpoenas documents in the Rule 102(e) investigation, the client may suspect that the SEC is investigating the attorney only to collect privileged information that the client would not agree to disclose.[271] Indeed, if the SEC even raises the possibility that it may investigate a litigation attorney, some may suspect that the SEC is trying to strong-arm the attorney into less aggressive advocacy.[272]

The question then becomes how best to remedy the deficiencies in Rule 102(e), yet still ensure that SEC litigators act in an ethical manner while representing clients before the SEC. This Part considers three possible approaches. It first considers simply waiting for the judicial system to force action.[273] While it is possible that the judicial process would eventually be effective, it would

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266. *See supra* Parts III and IV.

267. *See supra* Part III.

268. The SEC denies that its staff would use Rule 102(e) as a tool to give it the upper hand in an investigation into a client. Humes, *Remarks*, *supra* note 43, at 345 ("[T]hose of us at the Commission are confident that the Division [of Enforcement] would not use any responsibility to enforce ethical standards as a basis to obtain leverage against lawyers in pursuing and setting cases . . . ."); Krane, *supra* note 127, at 81 n.197 ("[T]he Commission has never, or virtually never, brought a Rule [102(e)] proceeding against a lawyer who appeared as an advocate for a client under investigation or accused of past wrongdoing . . . . It is almost impossible to point to an actual case that appears to have resulted from vindictiveness." (quoting former SEC Solicitor Paul Gonson)).

269. *See supra* Part IV.A.2.

270. *See supra* Part IV.A.3.

271. *See supra* Part IV.B.

272. *See supra* Part IV.A.1.

273. *See infra* Part V.A.

unnecessarily delay needed changes.

This Part next considers what can be described as a legislative and regulatory change approach.[274] This approach takes the identified problems and seeks to fix each of them by implementing narrow changes to existing statutes and regulations. This approach leaves the authority to investigate litigation attorneys with the SEC. While this approach has some appeal, I ultimately conclude the SEC is not the best authority to investigate litigation attorney ethics.

I conclude Congress should adopt a statute to completely prevent the SEC from investigating litigation attorneys for "unethical or improper professional conduct."[275] Litigation attorneys' ethical lapses should be investigated by existing state bar authorities, or, if appropriate, criminal authorities. Once an attorney has been disciplined through one of these independent avenues, the SEC could then impose reciprocal discipline.

A. JUDICIAL VINDICATION

Because the problems associated with Rule 102(e) implicate basic notions of fairness that are recognized by the law, one approach is to wait for courts to remedy damage done by Rule 102(e) investigations of litigation attorneys. We could wait for the next *Carter*-like case for a court to instruct the SEC to adopt a clear definition of "unethical or improper professional conduct." We could wait for the next *Checkosky*-like case for a court to instruct the SEC to adopt a mental state requirement for attorneys. We could wait for a client to convince a court that his attorney was less zealous due to SEC threats of a Rule 102(e) investigation. We could wait for a court to be squarely presented with the issue of whether the SEC violates the right to counsel of choice by failing to disclose Rule 102(e) investigations. We could even wait for a court to reaffirm *Csapo's* "concrete evidence" standard for removing attorneys from a case.

Unfortunately, if the past cases are any indication, attorneys and clients alike may lose confidence in the fairness of the SEC's process long before courts address these issues. Historically there have been few cases that address Rule 102(e). In spite of the fact that Rule 102(e) has been in existence since the 1930s,[276] *Carter* was not decided until 1983, and there as been little effort to define the term "unethical or improper professional conduct" since then.[277] Similarly, the question of the mental state required for punishment was not addressed until *Checkosky* in 1998, and there has been no judicial attention given to the mental state requirements for attorneys since.[278] This dearth of case law is

274. *See infra* Part V.B.
275. *See infra* Part V.C.
276. *See supra* note 70.
277. *See supra* Part III.A.2.
278. *See supra* Part III.B.

unsurprising. Attorneys faced with discipline under Rule 102(e) may often prefer to settle ethics charges quickly rather that suffer the harm to their professional reputations that come with lengthy court battles.

Clients who are hurt by SEC ethics investigations may be more likely than their attorneys to challenge the fairness of the SEC's process.[279] Unfortunately, few of these cases are likely to gain traction. Clients may have difficulty proving that they were harmed by investigations of their attorneys.[280] In addition, clients may have difficulty judicially protecting privileged information because the self-defense exception, which allows attorneys to disclose material to protect themselves, is relatively well-established.[281]

Rather than wait for courts to force action, Congress or the SEC should take affirmative steps to prevent unfairness caused when SEC investigates litigators for "unethical or improper professional conduct."

B. STATUTORY AND REGULATORY CHANGES TO SEC INVESTIGATIONS

Simply deciding that Congress and the SEC should take affirmative steps in order to ameliorate the harm caused by SEC investigations of litigation attorneys under Rule 102(e) does not determine what steps are necessary. Informal guidance and unwritten SEC policy are not binding and subject to change at any time. Consequently, statutory and regulatory changes are necessary to ensure that the SEC investigative process is fair.

But what new rules and statutes would be best? One approach is to take the list of identified problems with Rule 102(e) investigations and remedy them through changes to regulations or statutes. For example, new statutes and regulations should:

- Establish a clear definition of the term "unethical or improper professional conduct."
- Establish clear mental state requirements for attorney punishment under Rule 102(e).
- Require that after an initial ethics complaint is received, the Office of the General Counsel must investigate it independently.
- Require that clients be informed of Rule 102(e) investigations of their attorney (even in the preliminary stage) so that they can make informed decisions about counsel.

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279. *See, e.g.*, Trautman Wasserman & Co., Exchange Act Release No. 55,989, Investment Advisers Release No 2613, Investment Company Act Release No. 27,880, 90 SEC Docket 2832 (June 29, 2007).

280. In criminal cases, clients have had difficulty establishing that they were deprived of the right to counsel because they were unable to show that their attorneys engaged in less effective advocacy as a result of the prosecution's intimidation. *See, e.g.*, United States v. Roth, 86 F.2d 1382 (7th Cir. 1988); United States v. Aiello, 681 F. Supp. 1019, 1026 (E.D.N.Y. 1988). In addition, Mr. Barbera's case illustrates that courts are not inclined to believe that a client is harmed when one attorney is replaced by another. *See supra* Part IV.A.3.

281. *See supra* Part IV.B.

- Establish that attorneys may not be removed from cases for ethical violations without concrete evidence that a violation occurred.
- Prohibit the Office of the General Counsel from sharing information collected during a Rule 102(e) investigation with Division of Enforcement staff.

If all of these changes were implemented, they would transform the Office of the General Counsel into an independent investigator of attorney conduct with a clear set of standards to apply. This would be a large improvement from the current system. Attorneys would know the terms under which they could be disciplined. The Division of Enforcement would have less opportunity and incentive to overreach. Clients would be fully informed and would not have otherwise privileged material used against them.

The weakness of this approach is that it still leaves the task of investigating ethical complaints about SEC litigators within the purview of the SEC itself. The SEC does not have a lengthy history of investigating this type of conduct. Historically, the SEC has focused on investigating and disciplining transactional attorneys.[282] Moreover, even with statutes and regulations that require the Office of the General Counsel to act independently, opposing lawyers and clients might still be skeptical of the separation. After all, the Office of the General Counsel would still be an office within the SEC. If attorneys remain skeptical of the ethics investigator's independence, they might still respond to threats from the Division of Enforcement with less zealous advocacy. If clients are not convinced that their privileged information will be protected, they might not share confidential information with their attorneys. Although these complaints may seem minor when compared with the problems in the current Rule 102(e), they justify considering a solution that moves the power to investigate litigator ethical lapses outside of the SEC.

C. NO SEC ETHICS INVESTIGATIONS OF LITIGATORS

The next possible approach is for Congress to eliminate altogether the SEC's Rule 102(e) authority to investigate litigation attorneys for alleged ethical lapses.[283] Instead, the SEC would refer ethics complaints about litigators to state

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282. *See supra* notes 7–16 and accompanying text.

283. Under this approach, the SEC would retain its ability to investigate litigators for substantive securities law violations, such as insider trading or securities fraud. Unlike ethics investigations, substantive securities law violations fall squarely within the mission of the SEC. In addition, investigations for substantive securities law violations provide less of an opportunity for overreaching than Rule 102(e). *See supra* note 194.

In addition, SEC ALJs and the Commission itself (as opposed to SEC staff) would retain their authority to discipline SEC litigators for ethical violations that occur in their presence. ALJs and the Commission must retain this power of contempt in order to "preserve order in [the tribunal] for the proper conduct of business." Cooke v. United States, 267 U.S. 517, 534 (1925). *See also* Arthur Best, *Shortcomings of Administrative Agency Lawyer Discipline*, 31 EMORY L.J. 535, 536 n.3 (1982) ("[T]he needs of administrative law judges . . . for

attorney disciplinary authorities[284] or criminal authorities.[285] After an attorney is disciplined or sanctioned by an independent investigator, the SEC would be free to impose reciprocal discipline.[286] This approach recognizes that many of the current problems associated with Rule 102(e) investigations of litigators occur because the same agency investigates both the attorney and the client. This approach would decisively eliminate that problem. However, whether this approach is preferable to the statutory and regulatory change approach discussed in Part V.B depends on whether state disciplinary systems and criminal authorities will be at least as effective as the SEC in investigating legitimate complaints of ethical violations. I believe that state disciplinary authorities and criminal authorities would be at least as effective.

1. STATE ATTORNEY DISCIPLINARY SYSTEMS

State attorney disciplinary systems are an established avenue for investigating and punishing attorney misconduct.[287] Every state has well developed rules regulating litigator conduct.[288] Because the SEC's rules governing litigator conduct rely largely on state ethical rules,[289] the question is not whether the state ethical rules are sufficiently rigorous. Instead, the question "is whether the bar's enforced standards of competence and integrity are sufficient to protect against lawyer abuse of those components of the public interest embodied in the federal securities laws."[290] The answer is yes.

State bar associations and lawyer disciplinary agencies are tasked with investigating and prosecuting rule violations.[291] All states have professional staff dedicated to investigating and prosecuting attorneys for ethical violations.[292]

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coercive power to maintain order may be as great as the needs of conventional judges[.]"). Moreover, this contempt authority does not pose the same problems as Rule 102(e) investigations because the independence of the ALJs and the Commission is firmly established. They cannot participate in an investigation in any way. *See* 5 U.S.C. § 554(d); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962).

284. *See infra* note 305 and accompanying text (describing the SEC's authority to make referrals to state disciplinary agencies).

285. 15 U.S.C. §§ 77t(b), 78u(d) (allowing the SEC to transmit information concerning potential criminal violations to the Attorney General).

286. 17 C.F.R. § 201.102(e)(2) (2006) (allowing reciprocal discipline).

287. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2008).

288. *See id.* § 5 cmt. 5 ("Today, every state has adopted a lawyer code defining sanctionable offenses, and in general discipline is administered only for a violation so defined.").

289. *See supra* Part III.A.2.

290. Harold M. Williams, *Professionalism and the Corporate Bar*, 36 BUS. LAW. 159, 164 (1980).

291. *See* Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 933–34 (1994); Am. Bar Ass'n, Directory of Lawyer Disciplinary Agencies, http://www.abanet.org/cpr/regulation/directory.pdf (last visited Apr. 7, 2009).

292. AM. BAR ASS'N CENTER FOR PROF'L RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS, Chart VIII (2006), http://www.abanet.org/cpr/discipline/sold/06-ch8.pdf [hereinafter SURVEY ON LAWYER DISCIPLINE].

These professionals see a wide variety of attorney discipline cases[293] and, in most cases, specialize in attorney ethical cases.[294] Because state disciplinary officials have a breadth of experience and expertise, they are able to impose sanctions in a more consistent manner than SEC officials.[295] Moreover, in every state, the state's highest court ultimately determines whether the attorney has acted improperly and evaluates whether the imposed sanction is appropriate.[296] This adds yet another safeguard to ensure that accused attorneys are disciplined in a fair and consistent manner. In contrast, the SEC has struggled to articulate a standard for litigator conduct and has a string of Rule 102(e) proceedings that are far from consistent.[297]

Nevertheless, some have argued that the SEC's expertise in securities law gives it the edge in disciplining securities attorneys.[298] After all, state disciplinary professionals may not regularly deal with securities issues. While it is certainly true that the SEC staff has expertise in securities law, this expertise is largely irrelevant in most litigator discipline cases.[299] According to SEC Assistant General Counsel Richard Humes, the SEC is currently investigating complaints that litigation attorneys have destroyed documents, suborned perjury, and obstructed investigations.[300] These are the types of cases that state disciplinary authorities handle regularly.[301] In most cases, it will not take an expert in securities law to determine whether a litigator has destroyed documents,

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293. Patricia W. Hatamyer & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 810 (2004) (analyzing the various offenses leading to attorney discipline in 2000).

294. Only South Dakota and Wyoming lack a full time professional that is dedicated solely to attorney disciplinary matters. *See* SURVEY ON LAWYER DISCIPLINE, *supra* note 292, Chart VIII. *See also* Judith Kilpatrick, *Regulating the Litigation Immunity: New Power and a Breath of Fresh Air for the Attorney Discipline System*, 24 ARIZ. ST. L.J. 1069, 1104 (1992) (noting that attorney discipline prosecutions are a specialized practice area).

295. Krane, *supra* note 127, at 89 ("State bar associations have more experience with disciplinary proceedings than does the SEC, and as such are more likely to adjudicate the rights of the attorney in accord with commonly accepted standards of professional conduct."); Lorne & Callcott, *supra* note 186, at 1301 (noting that the SEC has no "[s]pecial expertise in determining or applying [attorney ethical] standards").

296. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 10 (2008) (stating that "ultimate authority" over attorney discipline "is vested largely in the courts"). Many states have appointed disciplinary councils, often composed of attorneys, who make the initial determination of rules violations and the appropriate sanction. *See* Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 10 nn. 41–42 (1998). Sanctioned attorneys can then appeal their punishment in state courts. *See id.*

297. *See supra* Part III.

298. *See* Cramton et al., *supra* note 262, at 796–97 ("Lawyers with considerable expertise in securities law would be required to prosecute disciplinary violations involving lawyer conduct in connection with complex corporate fraud situations, and such lawyers are lacking in bar counsel offices.").

299. *See* Best, *supra* note 283, at 569 ("When agencies regulate conduct that occurs outside of formal hearings one of their primary justifications for exercising that power must be that they have expertise which is useful to the discipline process. Such specialized knowledge may not be relevant, however, if the alleged misconduct involves standard, simple offenses.").

300. Humes, SEC Speaks 2007, *supra* note 19.

301. *See, e.g.*, *In re* Murray, 362 N.E.2d 128 (Ind. 1977) (disbarring an attorney found to have suborned perjury); *In re* Williams, 23 N.W.2d 4 (Minn. 1946) (disbarring an attorney who advised a client to destroy

suborned perjury, obstructed the SEC's investigation, or otherwise engaged in unethical conduct.[302] State bar disciplinary authorities have sufficient expertise to handle these cases.

Still, some scholars have argued that SEC regulation of attorneys is useful because the SEC is better positioned than the state bars to uncover unethical conduct that occurs during the course of an SEC investigation.[303] It is true that the SEC staff may be better positioned to view unethical conduct, but this does not mean it is best positioned to prosecute and punish the conduct. State disciplinary authorities do not generally witness unethical conduct. They typically begin investigations of attorneys only after receiving complaints from clients, opposing counsel, judges, or others.[304] Indeed, the SEC staff can make complaints to the state disciplinary authorities.[305] Because the disciplinary agency is not a witness to the complaint and is not aligned with either party, it can act as an independent party in evaluating the merits of the complaint. If the complaint is unfounded, the disciplinary agency need not investigate or prosecute it further. In contrast, when the SEC staff is responsible for both observing the conduct and deciding whether the conduct should be investigated and prosecuted, there is no meaningful independent evaluation of the merits of the complaint.[306]

Although state disciplinary agencies are independent, some have argued that we cannot rely on them to police ethics in securities cases because they lack the financial resources to investigate and discipline attorneys practicing at large law firms.[307] Several commentators have noticed that state disciplinary authorities

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relevant documents); *In re* Glass, 59 A.D.2d 248 (N.Y. App. Div. 1977) (disbarring an attorney who was previously convicted of obstructing justice).

302. While Professor Cramton and his colleagues argued that the SEC's securities expertise is necessary to effectively discipline attorneys practicing before the SEC, their analysis focused largely on the conduct of transactional attorneys. *See* Cramton et al., *supra* note 262, at 796–97. Because transactional attorneys have been only rarely disciplined by state disciplinary agencies, it is possible to conclude that transactional attorneys should be investigated by the SEC, but litigation attorneys should not.

303. *See* Wilkins, *supra* note 190, at 836 ("Simply as a result of their participation in an ongoing process, [SEC] officials are likely to uncover information about lawyers' misconduct that would escape the attention of disciplinary officials.").

304. *See* Hatamyer & Simmons, *supra* note 293, at 831.

305. THOMAS LEE HAZEN, 2 LAW OF SECURITIES REGULATION § 9.8[3] (5th ed. 2006) (citing SEC Rule of Practice 30-14, Exchange Act Release No. 37,894 (Oct. 30, 1996)). Professor Hazen notes that the authority was further delegated to the Ethics Counsel. *See id.* n.51 (citing Delegation of Authority to the General Counsel, SEC News Digest 96-213, 1996 WL 663696).

306. *See supra* notes 195–202 and accompanying text (discussing steps the SEC has taken to prevent overzealous investigations of attorneys and explaining why they fall short).

307. *See* Cramton et al., *supra* note 262, at 796–97. Professor Cramton and his colleagues argue that:

> Bar counsel's offices do not usually pay enough to attract and keep lawyers with securities expertise, and lawyers are unwilling to support the increases in bar dues that would finance higher pay and larger staffs. Moreover, unlike the SEC, which also needs more funds to attract and retain top-notch securities lawyers, bar counsel employment does not offer as promising a route to a prestigious career in private practice following government service. Lawyers with considerable expertise in securities law would be required to prosecute disciplinary violations involving lawyer conduct in connection

are more likely to punish sole practitioners or attorneys in small law firms.[308] However, the reasons that large firm attorneys are rarely disciplined are not clear; it may have nothing to do with resources. Large firm attorneys may simply not violate ethics rules as often as small firm attorneys.[309] Indeed, the SEC's two public Rule 102(e) investigations of litigation attorneys for "unethical or improper professional conduct" both involve attorneys at small firms.[310] In addition, while the SEC appears to be allocating more resources to attorney discipline,[311] it is unclear exactly what resources are necessary to effectively regulate SEC litigator behavior. It may well be that, although there is apparently a "steady stream" of complaints from the SEC's Division of Enforcement,[312] an independent investigator would determine that only a few complaints merit serious investigation or prosecution. After all, the SEC managed to enforce the

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> with complex corporate fraud situations, and such lawyers are lacking in bar counsel offices. The attorneys they would be prosecuting would almost always be from large law firms that have such expertise, not to mention the money and the incentive to fight such charges tooth and nail.

Id. (footnote omitted). *See also* Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 215 (2003) (noting that she had never "come across [a] case in which a state bar authority has successfully challenged the conduct of a big-time securities or corporate lawyer" and attributing that to the state bars' lack of resources).

308. *See, e.g.*, SUPREME COURT OF ILLINOIS, ANNUAL REPORT OF THE ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION (2003), http://iardc.org/AnnualReport03/2003annual_report.html (noting that 67% of lawyers sanctioned in Illinois in 2003 were sole practitioners); Manual R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 882 n.62 (1996) (reporting that during a five-month period in 1994, 55% of attorneys disciplined in California were sole practitioners); *A Perception of Bias in Lawyer Discipline*, LEGAL TIMES, June 8, 1992, at 12 (discussing a Washington, D.C. Court of Appeals Task Force report finding that 83.6 percent of surveyed attorneys who were the subject of a disciplinary complaint were sole practitioners or worked in small law firms).

309. *See* Deborah Hansen, *Preventing Grievances*, 70 TEX. BUS. J. 724 (2007). Ms. Hansen notes:

> Large firms have layers of protection from ethical violations: internal checks and procedures to catch potential conflict problems, numerous employees to effectively manage ongoing litigation and communicate with clients (a happy client is unlikely to file a grievance even if the attorney makes a mistake), and a general lack of funding stressors that might tempt a lawyer to stray from the profession's ethical guidelines for safeguarding clients' funds.

See also Samual E. Trosow, *The Database and the Fields of Law: Are There New Divisions of Labor?*, 96 LAW LIBR. J. 63, 84 n.107 (2004) (stating that structural differences in large law firms may make their attorneys less prone to disciplinary actions); Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 47 (2002); Ramos, *supra* note 308, at 82 n.62 (noting that although more sole practitioners are disciplined, sole practitioners make up the largest percent of attorneys).

310. *See* Altman, Initial Decision Release No. 367, 2009 WL 88063, at *30 n.2 (Jan. 14, 2009) (noting that an attorney disciplined under Rule 102(e), was at the time of the ethics investigation, a sole practitioner); Trautman Wasserman & Co., Exchange Act Release No. 55,989, Investment Advisers Release No. 2613, Investment Company Act Release No. 27,880, 90 SEC Docket 2832, 2835–36 (June 29, 2007) (order denying petition for interlocutory review) (discussing Rule 102(e) proceeding against Leon B. Borstein). Mr. Borstein practices at the three attorney firm, Borstein & Sheinbaum. *See* Borstein & Sheinbaum, http://www.lawyers.com/borsteinsheinbaum/ (last visited Apr. 7, 2009).

311. *See supra* note 22 and accompanying text.

312. Humes, SEC Speaks 2008, *supra* note 21.

securities laws for more than 70 years without investigating litigation attorneys for unethical or improper professional conduct.[313]

The SEC, without giving a reason why, has simply argued that the states do a poor job investigating instances of attorney misconduct. In a 2002 speech, then-SEC Chairman Harvey Pitt stated that he was "not impressed, or pleased, by the generally low level of effective responses we receive from state bar committees when we refer possible disciplinary proceedings to them."[314] However, the fact that state bar associations have apparently chosen not to investigate or bring disciplinary charges based on some SEC referrals, does not necessarily mean the state disciplinary authorities are not adequately disciplining attorneys. Following Mr. Pitt's comments, Charles Plattsmier, Chief Disciplinary Counsel for the Louisiana State Bar Association, revealed that the Louisiana Bar had received one of the SEC's complaints.[315] Mr. Plattsmier explained that the SEC had not provided any evidence to support the complaint.[316] In that instance, the SEC seemed to expect the state bar to rely solely on the SEC's conclusion.[317] Perhaps Mr. Pitt was just frustrated when the state disciplinary authorities exercise the independence that makes the state authorities a superior avenue for investigating and disciplining litigation attorneys. I see no reason to conclude that the state disciplinary authorities cannot effectively investigate and discipline litigators for ethical violations that occur during the course of an SEC investigation.

2. CRIMINAL INVESTIGATIONS

The task of investigating SEC litigators for unethical conduct will not fall solely on the shoulders of state attorney disciplinary staff. Just as the SEC may refer unethical litigator conduct to the state disciplinary authorities, the SEC may also refer wrongful conduct to the Department of Justice or local United States

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313. *See supra* Part III.A (discussing the progression of cases under Rule 102(e)'s "unethical or improper professional conduct standard").

314. Harvey Pitt, SEC Chairman, Speech Before the Annual Meeting of the American Bar Association (Aug. 12, 2002), *available at* www.sec.gov/news/speech/spch579.htm. *See also* Rachel McTague, *Pitt Says SEC Will Take on Assignment of Disciplining Lawyers if State Bars Do Not*, 34 SEC. REG. & L. REP. (BNA) 1529 (Sept. 23, 2002) (reporting that Chairman Pitt stated that "while the SEC makes referrals to state bars in cases in which lawyers are involved in violations of the securities laws, his records show 'no responses' from state bars in such cases").

315. Megan Barnett, *How to Account for Lawyers*, U.S. NEWS & WORLD REP., Dec. 9, 2002, at 26. The Louisiana complaint was one of the eleven complaints the SEC sent to state disciplinary authorities in 2002. *Id.* Prior to 2002, the SEC sent state disciplinary authorities only a few complaints a year. *Id.* It is unclear whether the SEC has made more complaints in the subsequent years.

316. *See id.* (explaining that "the SEC was really not much help" because it "simply forwarded a copy of its consent order against an attorney . . . without the evidence used to reach it.").

317. *See id.*

Attorney for criminal investigation.[318]

A number of criminal statutes prohibit attorneys from acting in ways that may jeopardize the integrity of the SEC's investigative process. In particular, federal criminal law prohibits obstructing a pending administrative proceeding,[319] suborning perjury,[320] tampering with a witness,[321] concealing or destroying documents,[322] making false statements to investigators,[323] and aiding and abetting securities law violations.[324] While these criminal laws may not reach the

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318. 15 U.S.C. §§ 77t(b), 78u(d) (allowing the SEC to transmit information concerning potential criminal violations to the Attorney General); SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1377 (D.C. Cir. 1980) (explaining that securities laws "explicitly empower the SEC to investigate possible infractions of the securities laws with a view to both civil and criminal enforcement, and to transmit the fruits of its investigations to [the Department of] Justice in the event of potential criminal proceedings"); Zathrina Perez, *Securities Fraud*, 45 AM. CRIM. L. REV. 923, 984 (2008) ("The standard method for determining whether a violation warrants criminal prosecution requires the SEC to prepare and forward a referral to the DOJ."). Although the SEC has a formal process that can be used to make criminal referrals, *see* 17 C.F.R. § 200.19b, the SEC staff typically makes an informal report by simply calling the relevant criminal authority. *See* U.S. GOV'T ACCOUNTABILITY OFF., MUTUAL FUND TRADING ABUSES: SEC CONSISTENTLY APPLIED PROCEDURES IN SETTING PENALTIES, BUT COULD STRENGTHEN CERTAIN INTERNAL CONTROLS, GAO-05-385, 25–27 (2005).

319. *See* 18 U.S.C. § 1505 (2005).

> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . [s]hall be fined under this title, imprisoned not more than 5 years, . . . or both.

Id. See also id. § 1503 (prohibiting corruptly obstructing the "due administration of justice"); *id.* §1512(c)(2) (prohibiting obstruction or attempted obstruction of any official proceeding).

320. *See id.* § 1621.

> Whoever . . . having taken an oath . . . in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury and shall . . . be fined under this title or imprisoned not more than five years, or both.

Id.

321. *See id.* § 1512.

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding [or to] be absent from an official proceeding to which such person has been summoned by legal process . . . shall be fined under this title or imprisoned not more than ten years, or both.

Id. See also id. §§ 1513–15.

322. *See id.* § 1512(c).

> Whoever corruptly . . . alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than 20 years, or both.

Id. See also id. § 1519 (prohibiting the alteration or destruction of documents with the intent to obstruct a proceeding within the jurisdiction of an administrative agency).

323. *See id.* § 1001.

324. *See id.* § 2 (providing that anyone who aids or abets an offense against the United States may be criminally punished as a principal).

most minor unethical conduct, they are far-reaching. They encompass nearly all activity that could significantly threaten the SEC's administrative process.[325] Moreover, the penalties for these offenses are not insubstantial. In some instances, an attorney found guilty could face up to twenty years in prison.[326] Once an attorney has been convicted of a crime involving "moral turpitude," the SEC can impose discipline without conducting its own investigation.[327]

The SEC has not shown hesitancy in referring obstruction of justice-type cases to the Department of Justice.[328] And the Department of Justice has not shown any hesitancy in prosecuting them.[329] There is no reason to believe that the Department of Justice would not zealously investigate and prosecute significant instances of SEC litigator misconduct.

Of course, a criminal investigation might produce many of the same problems discussed in Part IV. A criminal investigation of a litigation attorney might create a conflict of interest, pressure a litigator into less zealous representation, or even force the attorney to withdraw from representation in the SEC case. Likewise, when faced with a criminal investigation, a litigator may disclose confidential information over the objections of his or her client.

However, criminal investigations have distinct advantages over Rule 102(e) investigations. First, in contrast to Rule 102(e)'s "unethical or improper professional conduct standard," the criminal laws are generally well defined and typically cover only egregious conduct.[330] Criminal laws do not provide the Department of Justice with significant discretion to investigate minor negligent

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325. Indeed, the SEC's current Rule 102(e) investigations of litigation attorneys for destroying documents, suborning perjury, and obstructing justice (*see supra* note 19 and accompanying text) would all be covered by criminal statutes.

326. *See, e.g.*, 18 U.S.C. §§ 1512(c), 1519.

327. 17 C.F.R. § 201.102(e)(2) (2006).

328. According to one group of securities attorneys:

> Lying to the SEC staff is treated very seriously and will often persuade the SEC to make a criminal referral even where the substantive violation is marginal. Indeed, the SEC has not only referred cases for substantive violations, but also for perjury, obstruction of justice and making false statements. These cases can have a wide variety of factual bases, including lying under oath, intentionally withholding documents responsive to a subpoena, lying to the [s]taff during a telephone interview, and influencing others to lie to the SEC. Violations of this nature will practically guarantee a criminal referral.

LAWRENCE J. ZWEIFACH ET AL., SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2007: RECENT DEVELOPMENTS IN THE CRIMINAL PROSECUTION OF FEDERAL SECURITIES LAW VIOLATIONS 753, 761.

329. The SEC has brought a number of high-profile cases using the obstruction laws to punish those suspected of securities law violations. *See, e.g.*, Arthur Andersen L.L.P. v. United States, 544 U.S. 696 (2005) (overturning the conviction of accounting firm Arthur Andersen, whom the Department of Justice prosecuted under 18 U.S.C. § 1512(b)); United States v. Stewart, 433 F.3d 273 (2nd Cir. 2006) (upholding Martha Stewart's conviction of, among other things, obstructing an agency proceeding).

330. Some have argued that the obstruction laws are too broad and do not provide sufficient notice of the type of conduct prohibited. *See* Geraldine Szott Moohr, *On the Prospects of Deterring Corporate Crime*, 2 J. BUS. & TECH. L. 25, 28–29 (2007). While it is true that the obstruction laws cover a wide variety of conduct, one need only compare Part III's discussion of the uncertain standards for litigator conduct under Rule 102(e) with

conduct that has little practical effect on the SEC's investigation.[331] As a result, to the extent a criminal investigation harms a client, we can take comfort in knowing that the investigation relates to egregious conduct.[332] Criminal laws do not provide the opportunity for overreaching that Rule 102(e) currently does.

The other major advantage of criminal investigations is that the Department of Justice and United States Attorneys, like state bars, exercise independent judgment.[333] If the SEC refers a frivolous complaint to the criminal authorities, the criminal authorities need not investigate.[334] In fact, the Department of Justice regularly declines to prosecute referrals from the SEC.[335] Because the Department of Justice exercises independent judgment, it is less likely that the Department of Justice will investigate a litigator for the sole purpose of building the SEC's case against the litigator's client.[336]

In sum, state attorney disciplinary systems and criminal authorities can effectively investigate and discipline litigation attorneys for ethical violations that occur during the course of an SEC investigation. Allowing disciplinary and criminal authorities to handle the investigations eliminates harm to attorneys and clients that can occur under Rule 102(e).[337]

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the specific conduct prohibited in the criminal laws (*see* notes 319–24) to determine that, vague as the obstruction laws might be, they still provide more guidance than Rule 102(e).

331. This does not leave litigators immune from punishment for conduct that, although minor, is nevertheless unethical. As explained in Part V.C.1, state disciplinary authorities can investigate and sanction attorneys for a variety of unethical conduct.

332. In addition, by letting the Department of Justice prosecute criminal perjury and obstruction cases, we can ensure that those who interfere with SEC investigations are treated similarly to those who interfere with other agencies' proceedings. *See* Neil Devins & Michael Harris, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 600 (2003).

333. *See* Perez, *supra* 318, at 984.

334. U.S. ATT'Y MANUAL § 9-2.020, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.020 (last visited Apr. 7, 2009).

335. Devins & Harris, *supra* note 332, at 561–62 (noting that the Department of Justice declines to prosecute a significant number of SEC referrals); Clifton Leaf, *Enough is Enough: White-Collar Criminals: They Lie They Cheat They Steal and They've Been Getting Away With it for Too Long*, FORTUNE, March 18, 2002, at 60, 64 (reporting that between 1992 and 2001, the SEC's Division of Enforcement referred 609 cases to the Department of Justice with 525 resulting in criminal prosecutions).

336. This is not to say that there is no danger of overreaching by the Department of Justice. Because the Department of Justice is tasked with prosecuting violations of criminal securities laws, it is not uncommon for the Department of Justice to investigate a client who is also being investigated by the SEC. *See, e.g.*, SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1374 (D.C. Cir. 1980). During these parallel investigations, the Department of Justice and the SEC routinely share information. *See generally* Ralph C. Ferrara & David A. Garcia, *Meeting in Dark Corners and Strange Places: Scheming Between the SEC and the Department of Justice*, 38 SEC. REG. & L. REP. (BNA) 1332 (2006). It is certainly possible that the Department of Justice might investigate litigators in order to build a criminal case against the litigator's client. *Cf.* Lance Cole, *Revoking Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why it is Misguided)*, 48 VILL. L. REV. 469, 554–60 (2003) (asserting that the Department of Justice unnecessarily subpoenas attorney testimony in order to build criminal cases). However, the danger of overreaching by the Department of Justice is less because they are cabined by more concrete rules. *See supra* notes 330–32 and accompanying text.

337. Clients themselves can also play a role in assuring that their attorney acts in an ethical manner. Criminal defendants have long brought malpractice cases against attorneys for professional negligence that violates

VI. CONCLUSION

"Divide and conquer" is an old military strategy.[338] The theory is that by dividing your adversary into smaller parts, you can use a smaller force to defeat each of the parts.[339] Rule 102(e) allows the SEC to divide clients from their attorneys by investigating attorneys for professional misconduct.[340] When the SEC investigates a litigation attorney, it shifts the balance of power in the adversary process and allows the SEC to build the case against the litigator's client with less effort. Investigation of a litigation attorney undermines safeguards that were implemented to ensure that the adversary process is fair—the right to counsel of choice and the attorney-client privilege. Because there are other effective avenues available for litigator discipline, there is no need for the SEC to investigate litigation attorneys for "unethical or improper professional conduct." If, however, the SEC continues to investigate litigation attorneys, Congress and the SEC should implement statutory and regulatory changes to protect attorneys and their clients.

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ethical rules. *See, e.g.*, Lawson v. Nugent, 702 F. Supp. 81 (D.N.J. 1988) (providing bad advice); Canady v. Schwartz, 577 N.E.2d 437 (Ohio Ct. App. 1989) (failing to adequately research). *See also* Thomas Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, In the Effort to Improve Corporate Lawyers' Professional Conduct*, 17 GEO. J. LEGAL ETHICS 1, 8 (2003) ("[C]ivil liability has long replaced professional discipline as the principal means of enforcement of professional standards."); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 102 (1995) (arguing that "[t]he time has come to consider legal malpractice law a part of the system of lawyer regulation").

338. The exact origin of the phrase "divide and conquer" is uncertain, but it has been in common use since at least 1588. GREGORY TITELMAN, RANDOM HOUSE DICTIONARY OF POPULAR PROVERBS & SAYINGS 53–54 (1996).

339. As Chinese military strategist Sun Tzu explained:

> By discovering the enemy dispositions and remaining invisible ourselves, we can keep our forces concentrated, while the enemy's must be divided.
>
> We can form a single united body, while the enemy must split up into fractions. Hence there will be a whole pitted against separate parts of a whole, which means that we shall be many to the enemy's few.
>
> And if we are able thus to attack an inferior force with a superior one, our opponents will be in dire straits.

SUN TZU, THE ART OF WAR 28 (Lionel Giles, trans., Barnes & Noble Books 2003) (circa 500 B.C.).

340. While the SEC's rules are probably the best known federal administrative rules governing attorney conduct, other administrative agencies also have attorney practice rules. *See, e.g.*, 8 C.F.R. § 1003.102 (2007) (Immigration and Naturalization Service); 12 C.F.R. § 513.4(a)(2)–(3) (2008) (Office of Thrift Supervision); 17 C.F.R. § 14.8(c) (2007) (Commodity Futures Trading Commission); 31 C.F.R. §§ 10.50–.51 (2007) (Internal Revenue Service). Even though other administrative agencies have attorney practice rules, they have not investigated and disciplined attorneys with the same regulatory zeal as the SEC. *See* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 43-44 (1991) (noting that the SEC has been the "most aggressive agency" in disciplining attorneys); Katy Motiey, Note, *Ethical Violations by Immigration Attorneys: Who Should be Sanctioning?* 5 GEO. J. LEGAL ETHICS 657, 688 (1992) (noting that "the SEC uses [the] power [to suspend and disbar attorneys] more often than the [Immigration and Naturalization Service]"). Aside from the SEC, no agency has instituted special measures targeted at investigating litigation attorneys for ethical violations. There is, however, a danger that if the SEC is allowed to use Rule 102(e) to divide litigation attorneys from their clients, other agencies will also begin to investigate litigation attorneys using unfair rules and processes.