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SECURITIES REGULATION—ATTORNEYS' LIABILITY—NEGLIGENCE STANDARD INVOKED TO MEASURE CULPABILITY OF WRITER OF OPINION LETTER—*SEC v. Spectrum, Ltd.*[1]

Appellee attorney, Stuart Schiffman, prepared an opinion letter which stated that a substantial quantity of unregistered securities involved in a fraudulent securities scheme were exempt from registration requirements. The Securities and Exchange Commission (SEC), alleging that the letter was the basis on which some of the unregistered stock was sold, charged Schiffman and others involved in the scheme with violations of the registration[2] and antifraud[3] provisions of the Securities Act of 1933 (the 1933 Act) and the antifraud provision[4] of the Securities and Exchange Act of 1934 (the 1934 Act).

Although the SEC obtained permanent injunctions against ten of the defendants,[5] it was unsuccessful in its efforts in the district court to obtain a preliminary injunction against Schiffman. The district court, finding no material factual dispute in the affidavits and depositions warranting an evidentiary hearing, made three conclusions: that there was no evidence of use of Schiffman's letter in a "sale";[6] that there had "been no showing that. . .Schiffman is likely to run afoul of the law in the future";[7] and lastly, that there was insufficient evidence that Schiffman had violated any securities law. Concerning the third conclusion, the district court stated that there was no authority for the classification of an opinion writer as an "underwriter" pursuant to section 2(11)[8] of the 1933 Act and that the standard of culpability of an "aider and abettor"[9] is actual knowledge of the illegal scheme and an intent to further the scheme.

The Court of Appeals for the Second Circuit, however, finding the existence of a highly material factual conflict, held that

1. 489 F. 2d 535 (2d Cir. 1973).
2. 15 U.S.C. § 77e (1970).
3. 15 U.S.C. § 77q(a) (1970).
4. 15 U.S.C. § 78j(b) (1970).
5. Nine of the defendants consented to a permanent injunction. Spectrum, Ltd., was enjoined by summary judgment. SEC v. Spectrum, Ltd., [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,318 (S.D.N.Y. 1972).
6. See note 14 *infra*.
7. SEC v. Spectrum, Ltd., [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,631, at 92,868.
8. 15 U.S.C. § 77b(11) (1970).
9. See note 38 *infra*.

the failure to hold an evidentiary hearing to resolve the factual conflict by oral testimony was reversible error.[10] It consequently reversed and remanded the case to the district court with the admonition that the preliminary injunctive hearing be consolidated with the trial on the merits.[11]

In 1969 the officers of Westward Corp. and Spectrum, Ltd., devised a plan involving the merger of their two companies for the purpose of distributing unregistered Spectrum securities to be subsequently sold to the public. This plan consisted of a two-step procedure to avoid the registration requirements of section 5(c)[12] of the 1933 Act. First, the Spectrum securities issued to the Westward shareholders would be exempt from the registration requirement of section 5 pursuant to Commission rule 133,[13] which provided that the exchange of shares in a merger would not be considered a "sale".[14] Second, under section 4(1) of the 1933 Act,[15] the recipients of the Spectrum shares, provided none were deemed to be "an issuer, underwriter or dealer,"[16] could then resell the shares without filing a registration statement.

Louis Marder, the controlling shareholder and chief executive officer of Westward, did not qualify for the registration exemption since rule 133 classifies the controlling stockholder of the disappearing corporation as an "underwriter".[17] Consequently, prior to the merger, he transferred nominal ownership of many of his shares to various friends.

On November 10, the day of the merger, Spectrum's general counsel, Morton Berger, addressed an opinion letter, based on representations made by Marder and Spectrum's president, to the transfer agent; this letter conveyed Berger's opinion that the merger complied with rule 133. Berger included in the letter a list of recipients (among whom was Marder) of the Spectrum stock who were considered "underwriters" and who should be issued

10. See notes 30-37 *infra*.

11. FED. R. CIV. P. 65(a)(2).

12. Section 5(c) of the 1933 Act [15 U.S.C. § 77e(c) (1970)] makes it "unlawful for any person, directly or indirectly, . . . to sell . . . any security, unless a registration statement has been filed . . . .

13. 17 C.F.R. § 230.133 (1973). Rule 133 was rescinded as of January 1, 1973. 37 FED. REG. 236.36 (1972).

14. The 1933 Act is not applicable unless there is a sale or an offer to sell. *See generally* Note, *The SEC's No-Sale Rule and Exchange of Securities Pursuant to Voluntary Reorganization*, 67 HARV. L. REV. 1237 (1954). Actually, the rule 133 exemption was not applicable in this case because the proposed merger was not submitted to a shareholder vote and because the merger agreement was predicated on an illicit scheme.

15. 15 U.S.C. § 77d(1) (1970).

16. *Id.*

17. 17 C.F.R. § 230.133(c) (1973).

restricted stock. On November 25, Berger addressed a second letter (not in the form of an opinion letter) to Spectrum's president listing those persons who had received unrestricted shares.

Following the merger, Marder delivered for sale 125,000 shares of unrestricted Spectrum stock, nominally belonging to Marder's friends John and William Doyen, to Michael Gardner, a registered broker-dealer. Gardner refused to sell these shares without an opinion letter stating that they were exempt from registration. Berger, when contacted, refused to write such a letter for a stockholder. Gardner then contacted Schiffman.

According to Schiffman, he visited Gardner's office twice. On the second visit, he contended, one of Gardner's clients, James Morse, asked him if he would help a friend, a Mr. Doyen. He agreed. Morse telephoned Doyen; Schiffman took the phone, and Doyen requested that Schiffman write an opinion letter confirming the unrestricted nature of the Spectrum securities. After being shown Berger's two letters, he agreed. He subsequently conferred with Berger and wrote the requested opinion letter, which was addressed to Doyen but delivered to Gardner's office. Four days later he addressed a second letter to Doyen, also delivered to Gardner's office, stating that the prior letter was not to be used for the sale of unregistered Spectrum stock.

Gardner's version of what occurred differs sharply from that of Schiffman's. Gardner stated that Marder himself was present at the meeting and that it was Marder who asked Schiffman to prepare an opinion letter for Spectrum securities that were going to be sold by Marder. Gardner did not recall any telephone conversation with Doyen.

There is also a dispute about what transpired at a subsequent meeting between Berger and Schiffman. Berger claimed to have warned Schiffman that he suspected that the stock was going to be traded by a control person. Schiffman denied that this warning was given.

In any case it is undisputed that Gardner sold 50,000 shares of the stock after Schiffman had agreed to write, but before he had actually written, the opinion letter. The SEC also alleged that Gardner used the opinion letter to assure a Canadian buyer that the unregistered shares could be traded without registration. This allegation, however, was unsupported by independent evidence.

The Second Circuit reversed the district court's denial of preliminary injunctive relief for the latter's failure to hold an evidentiary hearing. Since an injunction is an extraordinary remedy and the reversal of a trial judge's denial of a preliminary

injunction is rare,[18] it might be helpful to examine this portion of the decision in some detail.

Injunctions, both preliminary and permanent, are specifically authorized by section 20(b)[19] of the 1933 Act and section 21(e)[20] of the 1934 Act; both types are widely used by the SEC in its enforcement functions.[21] Because they are "statutory" as opposed to "equitable" in nature, it is not necessary to show a threat of imminent or irreparable harm.[22] Courts have reasoned that, since a statute forbids the conduct sought to be enjoined, the legislature has already determined that the prohibited act presents a serious danger.[23] The criteria employed in SEC injunctive actions is that the SEC must show that a violation has occurred or is about to occur and that the defendant has a "propensity for future violations".[24] Mere cessation of the violation prior to the court hearing is not considered conclusive proof of a lack of "propensity for future violations".[25] The court may consider past violations as well as the circumstances of the present violation in determining such propensity.[26]

A preliminary injunction is considered interlocutory relief in an SEC action for a permanent injunction.[27] To obtain a preliminary injunction the SEC must make a "clear showing"[28] of probable success in a trial on the merits, *i.e.*, a *prima facie* showing that the defendant has violated, or is about to violate, the law and that he has the propensity to violate it again.[29]

Since a judge's decision to grant or deny an injunction is discretionary, it is seldom reversed except for abuse of discretion.[30] The Second Circuit applies the "clearly erroneous" stan-

18. See 3 & 6 L. LOSS, SECURITIES REGULATION at 1975 and 4108 (2d ed. 1961); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965); P.L.I., ENFORCEMENT AND LITIGATION UNDER THE SECURITIES LAWS (B4-3539, No. 116, 1973) at 257 [hereinafter cited as P.L.I.].

19. 15 U.S.C. § 77t(b) (1970).

20. 15 U.S.C. § 78u(e) (1970).

21. There are approximately 100 SEC injunction suits instituted each year. *See* 36 SEC ANNUAL REPORT 99 (1970).

22. *See Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1059 (1965).

23. *Id.*

24. 489 F.2d at 540. There is some debate about whether the latter criterion should be phrased, "whether there is a reasonable likelihood that the wrong will be repeated." For a discussion of both phrases see Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 384-85 (2d Cir. 1973), *cert. denied*, 414 U.S. 910 (1973).

25. SEC v. Griffin, 296 F. Supp. 883 (D. Miss. 1968).

26. SEC v. Northeastern Financial Corp., 268 F. Supp. 412 (D.N.J. 1967); SEC v. Broadwall Sec., Inc., 240 F. Supp. 962 (S.D.N.Y. 1965).

27. P.L.I., *supra* note 18, at 262.

28. Dopp v. Franklin Nat'l Bank, 461 F.2d 873, 878 (2d Cir. 1972).

29. P.L.I., *supra* note 18, at 262.

30. Meccane, Ltd. v. John Wanamaker, New York, 253 U.S. 136 (1920).

dard of review in deciding whether the trial court has abused that discretion.[31] Only if no reasonable basis for the decision is found will it be reversed.[32]

There is one exception to the above rule. In *Dopp v. Franklin,*[33] the Second Circuit emphasized that the "clearly erroneous" standard does not apply when no evidentiary hearing is held. When a dispute is resolved through the use of written affidavits, no deference need be given to the district court's findings since the court of appeals is just as able to interpret the written evidence as the trial court.[34]

In the instant case, the Second Circuit disagreed with all three of the lower court's conclusions. Concerning the major conclusion, since no evidentiary hearing was held, the Second Circuit found a material factual conflict[35] relating to whether or not Schiffman actually committed a securities violation as an aider and abettor of the illegal distribution scheme. It, accordingly, reversed and remanded for a resolution of that conflict by oral testimony.[36] Further, the Second Circuit was not content with reversing and remanding for an evidentiary hearing. It also took issue[37] with the district court's requirement of knowledge of the illegal scheme plus an intent to further that scheme as the standard of culpability for determining status as an aider and abettor.[38] It classified that standard "to be a sharp and unjusti-

31. SEC v. Bangor Punta, 331 F. Supp. 1154 (S.D.N.Y. 1971), *aff'd sub nom.*, Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973), *cert. denied,* 414 U.S. 910 (1973).

32. *Id.*

33. 461 F.2d 873 (2d Cir. 1972).

34. *Id.*

35. See text accompanying notes 17 and 18 *supra.*

36. Additionally, the district court also found that Schiffman had no propensity to commit future violations and that there was no evidence of a "sale" using his opinion letter. A question of the relationship between the various conclusions of the district court arises. How would a resolution of the factual conflict described above disturb these latter two findings? Concerning the lack of propensity there are two explanations. First, the Second Circuit, since there was no evidentiary hearing below, may have conducted a *de novo* review [*see Developments in the Law—Injunctions,* 78 HARV. L. REV. 994, 1071 (1965)] of the written testimony and found such a propensity. Second, and more probably, the Second Circuit may have believed that the establishment of a violation, about which the court of appeals found a material dispute, would be a material fact to consider in determining whether such a propensity existed [see cases cited at note 26 *supra* and accompanying text]. Concerning the lack of evidence of a sale, the Second Circuit stated that the SEC should have the opportunity at the hearing to offer proof of the alleged sale.

37. 489 F.2d at 541-43.

38. For a general discussion of "aider and abettor" in securities laws see 2 A. BROMBERG, SECURITIES LAW: FRAUD § 8.5(515) (1971); Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution,* 120 U. PA. L. REV. 597, 620-38 (1972) [hereinafter cited as Ruder]. Professor Ruder, using a criminal law analogy, advocates the standard employed by the district court in the instant case.

fied departure from the negligence standard which [this court has] repeatedly held to be sufficient in the context of enforcement proceedings seeking equitable and prophylactic relief."[39]

Although this negligence standard has been frequently applied in SEC injunctive actions,[40] it appears that its application to aiders and abettors, although dictum, is an extension of existing law.[41] Nevertheless, the court's extension is justified, at least in the limited area of lawyers in an opinion writing role, in light of the purposes of the securities laws, the particular role that lawyers play in furthering those purposes, and the importance of the opinion letter in the securities area.

Although the use of opinion letters permeates the business and securities areas,[42] they receive sparse treatment in the securities laws. Schedule B of the 1933 Act requires an opinion of the issuer's counsel of the "legality of the issue"[43] to be included with form S-1 when an issuer files a registration statement.[44] Often a lawyer is asked to render an opinion regarding pending litigation, claims, or other liabilities (direct or contingent) which might affect the company. These may or may not be filed with the SEC or included in the annual report.[45] An underwriting agreement usually requires that an opinion letter from the issuer's counsel concerning the compliance with securities laws be submitted to

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39. 489 F.2d at 541. The cases cited by the court adopt the negligence standard but do not concern aiders and abettors: SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 (2d Cir. 1972), Hanly v. SEC, 415 F.2d 589, 596 (2d Cir. 1969); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 854-55 (2d Cir. 1968) (en banc), *cert. denied*, Kline v. SEC, 394 U.S. 976 (1969). *Cf.* Lanza v. Drexel, 479 F.2d 1277, 1304 (2d Cir. 1973) (en banc).

40. The court specifically limits the use of the negligence standard to SEC injunctive actions:

> We. . . emphasiz[e]. . . that the standard . . . for the author of an opinion letter in an action for injunctive relief only should not be construed to apply to more peripheral participants in an illicit scheme or . . . to criminal prosecutions or private suits for damages.

489 F.2d at 542.

41. It is difficult to determine the precise standards for aider and abettor status in SEC injunctive actions for several reasons: one, aider and abettor status is employed principally in SEC administrative actions [see 17 C.F.R. §§ 201.2(e)(1) and 201.2(e)(3)(i)]; two, most SEC injunctive actions are settled by consent; and three, actual knowledge of the aiders and abettors is frequently evident and, hence, not discussed by the court. *See* Ruder, *supra* note 38, at 632.

42. For a discussion of opinion letters, see Freeman, *Opinion Letters and Professionalism*, 1973 DUKE L.J. 371; Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 BUS. LAW 915 (1973) [hereinafter cited as Fuld]. For an example of the form of an opinion letter, see C. ISRAELS & G. DUFF, WHEN CORPORATIONS GO PUBLIC 312-16 (1962).

43. 15 U.S.C. § 77aa Schedule B (14) (1970).

44. *See* Fuld, *supra* note 42, at 940.

45. *Id.* at 941-44.

the underwriter as a condition precedent to the closing.[46] The opinion letter in the instant case is related to the latter type. Since unregistered stock is normally non-transferrable, the broker desired an opinion letter (although it was not required by law) to assure himself, as well as his would-be customers, that the stock was exempt from the registration requirement.

An analysis of the cases and articles which discuss opinion letters reveals three reasons for their importance: first, they can be instruments for inflicting great pecuniary loss;[47] second, they assist the by-passing of certain regulations (*e.g.*, registration) which would have required disclosure to the SEC;[48] and lastly, they are relied upon by the SEC, the financial community, and the investing public.[49]

The purposes of the securities laws have been amply publicized in *SEC v. Texas Gulf Sulphur Co.*[50] The Second Circuit, after examining the legislative history of the Securities Exchange Act of 1934, stated en banc that "[t]he dominant congressional purposes underlying the Securities Exchange Act of 1934 were to promote free and open public securities markets and to protect the investing public . . . ."[51]

In a recent article concerning the professional's role in achieving those purposes, Theodore Sonde,[52] Assistant General Counsel of the SEC, depicted the practicing attorney as occupying the "public's first line of defense in investor protection."[53] Expanding on that theme the SEC explained that the private securities attorney had a "peculiarly strategic" role

> in the investment process and in the enforcement of the body of federal law aimed at keeping that process fair. . . . [T]he

46. *Id.* at 940; 1 G. ROBINSON & K. EPPLER, SECURITIES LAW SERIES: GOING PUBLIC 199 (1971).

47. *See* United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964) where Judge Friendly states: "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar."

48. Shipman, *The Need for SEC Rules to Govern the Duties and Civil Liabilities of Attorneys Under the Federal Securities Statutes*, 34 OHIO ST. L.J. 231, 267 (1973): "A lawyer's opinion that an exemption exists is crucial, for it is the passkey used to avoid registration with the SEC and that agency's opportunity to examine disclosure documents before a sale is made."

49. See text accompanying notes 54 & 55 *infra*.

50. 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied*, Kline v. SEC, 394 U.S. 976 (1969).

51. *Id.* at 858.

52. Mr. Sonde argued the *Spectrum* case for the SEC before the Second Circuit. 489 F.2d at 536.

53. Sonde, *The Responsibility of Professionals Under the Federal Securities Laws—Some Observations*, 68 NW. U.L. REV. 1, 2 (1973).

> task of enforcing the securities law rests in the overwhelming measure on the bar's shoulders. These are statements of what all who are versed in the practicalities of securities law know to be a truism, i.e., that this Commission. . . is peculiarly dependent on the probity and the diligence of the professionals who practice before it. 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 . . . .[54]

Judge Kaufman echoes these views in his opinion:

> We do not believe, moreover, that imposition of a negligence standard with respect to the conduct of a secondary participant is overly strict, at least not in the context of this case. *The legal profession plays a unique and pivotal role in the effective implementation of the securities laws.* Questions of compliance with the intricate provisions of these statutes are ever present and the smooth functioning of the securities markets will be seriously disturbed if the public cannot rely on the expertise proffered by an attorney when he renders an *opinion* on such matters.[55]

All three justifications are emphasized when the court addresses Professor Ruder's argument that imposing a negligence standard on aiders and abettors would place an undue burden on business activities.[56] In the court's reply it states that "in the distribution of unregistered securities, the preparation of an opinion letter [by an attorney] is too essential and the reliance of the public too high to permit due diligence to be cast aside in the name of convenience."[57]

Although this writer has been unable to find any other cases involving lawyers *qua* lawyers as secondary participants, there are two other cases involving lawyers that are instructive. The first, *Escott v. BarChris Construction Corp.*,[58] involves a lawyer-

54. *In re* Emanuel Fields, SEC Securities Act Release No. 5404 (June 18, 1973)(emphasis added)(holding that Emanuel Fields, a lawyer, was permanently disqualified from practicing before the SEC), also reported in [1973 Transfer Binder] CCH FED. SEC. L. REP. 79,407, at 83,172.

55. 489 F.2d at 541, 542 (emphasis added).

56. Ruder, *supra* note 38, at 632-33.

57. 489 F.2d at 542.

58. 283 F. Supp. 643 (S.D.N.Y. 1968).

director who signed a false and misleading registration statement filed with the SEC in violation of section 11 of the 1933 Act.[59] Although clearly distinguishable from *Spectrum* (and not cited by the *Spectrum* court) in that *BarChris* involved a private action for damages under a different section of the 1933 Act, it is interesting to note that the *BarChris* court held the lawyer-director to a higher standard of diligence than other directors. Despite finding that he honestly believed the statement and that he had been misled by the officers of the company, the court held that he failed to make a reasonable investigation.[60]

In *SEC v. Frank*,[61] involving a lawyer who was allegedly negligent in drafting an offering circular, the Second Circuit reversed the lower court's grant of a preliminary injunction because the lower court failed to hold an evidentiary hearing. Although, seemingly similar to *Spectrum*, this case is distinguishable in that the lawyer was charged as a primary participant and that he was not charged with a violation of the registration provisions. Judge Friendly, in dictum, did state, however, that

> [a] lawyer has no privilege to assist in circulating a statement with regard to securities which he knows to be false simply because his client has furnished it him. . . . [A] lawyer, no more than others, can [not] escape liability for fraud by closing his eyes to what he saw and could readily understand.[62]

The SEC, rather than risk denial of a permanent injunction, accepted "undertakings" from Frank and dismissed the case before trial on the merits.[63]

To these may be added the much publicized *National Student Marketing Corp. (NSMC)* complaint.[64] *NSMC* is quite similar to *Spectrum* in that lawyers, together with their firms,[65] are

59. 15 U.S.C. § 77k (1970).

60. Escott v. BarChris Constr. Corp., 283 F. Supp. at 692.

61. 388 F.2d 486 (2d Cir. 1968).

62. *Id.* at 489.

63. SEC Litigation Release No. 3957 (Mar. 28, 1968).

64. SEC v. National Student Marketing Corp., Civil No. 225-72 (D.D.C., filed Feb. 3, 1972); complaint also reported in [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,360, at 91,913. *See* Green, *Irate Attorneys—A Bid to Hold Lawyers Accountable to Public Stuns and Angers Firms*, Wall St. J., Feb. 15, 1972, at 1, col. 1; Koch, *Attorney's Liability, The Securities Bar and the Impact of National Student Marketing Corp.*, 14 WM. & MARY L. REV. 883 (1973); Note, *The Attorney's Duty*, 46 TEMP. L. Q. 153 (1972); Note, *Securities Regulation—Attorneys' Liability—Advising, Abetting, and the SEC's National Student Marketing Offensive*, 50 TEX. L. REV. 1265 (1972). *See also* 17 ST. LOUIS U.L. REV. 380 (1973).

65. The naming of two prestigious law firms as well as the lawyers makes this complaint unprecedented.

charged with preparing false and misleading opinion letters concerning a merger agreement in violation of the antifraud provisions of both the 1933 and 1934 Acts. Although they have been charged as aiders and abettors, it appears that they had actual knowledge of the fraudulent scheme and that the negligence standard is not an issue. In addition, the lawyers are charged with failing to disclose the misrepresentations to the SEC.

Although the above cases are distinguishable from *Spectrum,* there is discernible a strand of commonalty concerning the lawyer's role in protecting the public's interest. In *BarChris* there is an affirmative duty of the lawyer to conduct a reasonable investigation before interposing his expertise between the representations of his client and the public. In *Frank,* the Second Circuit, albeit in dictum, echoed this idea and stressed that a lawyer is not necessarily protected by taking his client's assertions at face value. Using the same reasoning in *Spectrum* it would appear that Schiffman could not merely accept the statement from his client or another attorney[66] that the unregistered stock qualified for an exemption, but would have to take some affirmative action to insure that the laws were followed.

The above cases, together with *Spectrum,* tend to indicate that an attorney—at least the securities attorney—has a broader duty to the public than has generally been realized. One commentator, after conducting an informal survey concerning lawyers' written opinions, summarized his results by stating "that lawyers, as a group, do not as a rule expect to be held strictly accountable for their written advice."[67] He concluded his article with a warning which could be considered a portent of the *Spectrum* case. "For those who feel that the whole idea of an attorney being held responsible for less-than-adequate advice or complete failure of advice is unworthy of serious concern, the time is fast approaching when these heads had better come out of the sand!"[68]

It is no overstatement to say that the time referred to has come. The aggressive attitude to enforce this public duty demonstrated by the SEC in the *Spectrum* and *National Student Marketing Corp.* cases has struck a responsive chord in the Second Circuit. The attorney in the securities field must acknowledge his

66. *But cf.* Beardsley v. Ernst, 47 Ohio App. 241, 191 N.E. 808 (1934), in which an accountant was insulated from liability because he relied on another accountant's audit and so stated in his certificate. Schiffman claims to have relied on Berger's opinion.

67. Corso, *Opinions of Counsel: Responsibilities and Liabilities,* 17 CLEVE-MAR. L. REV. 375 (1968).

68. *Id.* at 387.

obligation to an increasingly skeptical public. Moreover, the Bar must assume the same self-policing role that the American Institute of Certified Public Accountants has undertaken with respect to its members.[69]

69. For further discusion of this topic, see generally *Attorney Responsibility and Potential Liability Under the Maryland Securities Act*, 2 BLUE SKY L. REP. ¶ 23,628 [Md. Securities Act Release No. 16 (Mar. 9, 1974)]; Schulman, *Responsibilities of the Attorney* in EMERGING FEDERAL SECURITIES LAW: POTENTIAL LIABILITY (V. Norbin ed. 1969); Freeman, *Liability of Counsel for Issuer*, 24 BUS. LAW. 635 (1969); Goldberg, *Policing Responsibilities of the Securities Bar: The Attorney-Client Relationship and the Code of Professional Responsibility—Considerations for Expertizing Securities Attorneys*, 19 N.Y.L.F. 221 (1973); Henkel, *Liability of Counsel for Underwriter*, 24 BUS. LAW 641 (1969); Karmel, *Attorneys' Securities Laws Liabilities*, 27 BUS. LAW. 1153 (1972); Lathrop & Rinehart, *Legal Malpractice and Rule 10b-5 Liability: Pitfalls for the Occasional Securities Practitioner*, 5 LOYOLA L. REV.—L.A. 449 (1972); Mann, *Rule 10b-5: Evolution of a Continuum of Conduct to Replace the Catch Phrases of Negligence and Scienter*, 45 N.Y.U. L. REV. 1206 (1970); Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Actions—Rachal v. Hill*, 71 COLUM. L. REV. 1329 (1971); Note, *Accountants' Liabilities for False and Misleading Financial Statements*, 67 COLUM. L. REV. 1437 (1967); Comment, *SEC Disciplinary Rules and the Federal Securities Laws: The Regulation, Role and Responsibilities of the Attorney*, 1972 DUKE L. J. 969; Note, *Public Accountants and Attorneys: Negligence and the Third Party*, 47 NOTRE DAME LAW 588 (1972).