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SEC Repression of Effective Advocacy

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Trial Balloon

SEC Repression of Effective Advocacy

by Monroe H. Freedman

One of the greatest difficulties of the litigating attorney is to provide clients with zealous advocacy in the face of efforts by some judges, disciplinary boards and others to repress effective advocacy, particularly on behalf of unpopular clients and causes. Thus, in 1970 the *Harvard Civil Rights-Civil Liberties Law Review* noted, "It has become both professionally and legally dangerous to be a lawyer representing the poor, minorities, and the politically unpopular."

There is one further category of attorneys who should be added to the roster of those who are in legal and professional jeopardy. Oddly enough, they are the lawyers who represent clients in the securities industry.

Previously, in the *Ohio State Law Journal* and the *New York Law Journal*, I have set forth a catalog of serious abuses by the Securities and Exchange Commission of the rights of those subject to its jurisdiction. Of even greater concern, however, is the fact that the SEC has succeeded in intimidating the attorneys who appear before it, with the result that zealous advocacy has been sharply curtailed in securities matters. As one highly experienced and highly regarded securities lawyer commented to me, "The professional training of the New York securities bar is to cave in." Another equally prominent authority said, "The securities bar has abdicated its responsibilities to its clients in deference to the Commission."

One indication of the unhealthy relationship that exists between the SEC and lawyers who practice before it is that practically none of the lawyers with whom I have discussed the problem, including the two quoted above, was willing to be identified by name. However, in each instance in which I have received information on a non-attributation basis, I have been able to confirm the reliability of that information from at least one reputable and experienced attorney who said my information was consistent with his or her experience. In addition, my previous publications on this subject have stimulated numerous letters from experienced attorneys offering additional illustrations of SEC abuses of power. Virtually all such letters have requested that the authors' identities not be used for fear of retaliation against themselves or their clients.

The Commission, of course, starts with the best of motives. It has an important job to do in the public interest, and its members complain they have been provided with a "meager" staff with which to achieve its goals. One way the Commission has sought to resolve its difficulties is by insisting that attorneys, in the public interest, owe a higher obligation to the SEC—a federal agency—than they do to their own clients. Commissioner A. A. Sommer, in the January 30, 1974 issue of the *New York Law Journal*, characterized that notion as "revolutionary" and expressed it euphemistically in terms of an asserted "public responsibility . . . to the investing public."

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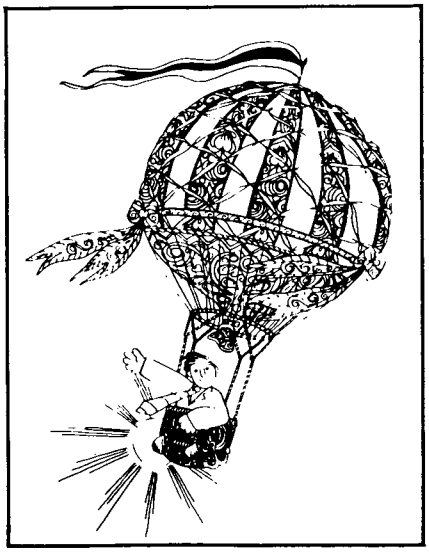

Cop On The Beat

The Commission, for example, has observed, "This Commission with its small staff, limited resources, and onerous tasks is peculiarly dependent on the probity and the diligence of the professionals who practice before it." *In re Emanuel Fields*, S.E.C. Docket 1, 4-5 n.20 (July 3, 1973). Accordingly, "members of this Commission have pointed out time and time again that the task of enforcing the securities law rests in overwhelming measure on the Bar's shoulders." *Id.* The SEC attorney has thus become "another cop on the beat," with the result that "all the verities and truisms about attorneys and their roles [are] in question and in jeopardy." Those insights were offered by Commissioner Sommer in his *New York Law Journal* article. It was not an exaggeration, therefore, when the *New York Times* referred to the SEC's practices as constituting a "major assault" on the adversary system.

The Commission has succeeded in destroying the independence of the securities bar, and in transferring the attorney's primary allegiance from the client to a federal agency,

through the use of what SEC Chairman Ray Garrett, Jr. has confessed are "overly crude weapons." In the same address to a 1973 American Bar Association meeting, Mr. Garrett explained that the Commission "keep[s] the pressure on the professionals" to do the government's job through "suitable incentives." Those incentives, he conceded, include "rewards" as well as "punishments."

The rewards consist of favored treatment of some lawyers in their appearances before the Commission. For example, a few attorneys do receive the opportunity, denied to others, to appear before the Commission at a critical stage of the proceedings against some of their clients. That, of course, creates an unconscionable conflict of interest for the lawyers, by putting pressure on them to trade off the rights of some clients to curry favor with the Commission and thereby advance the rights of other clients. It also amounts to a denial of the right to effective assistance of counsel and of equal protection of the laws to clients who are not so favored.

The punishments are directed toward intimidating attorneys into foregoing zealous advocacy on behalf of their clients. One attorney, engaged in vigorous defense of his client's rights, was advised by a staff member that he should "take a look at the National Student Marketing complaint." In that case, members of one of the most prestigious law firms in the country were named as defendants in an action by the Commission, in part on the ground that they had not informed the Commission of possibly incriminating information that they had received about their client in the course of the lawyer-client relationship.

Indeed, an attorney may appear before the Commission on behalf of a client and receive no warning that the attorney is also a target of the investigation. In one case reported in the August 10, 1974 issue of *Business Week*, a lawyer who was attending a meeting at the SEC to discuss a forthcoming investigation of his client was served with a personal subpoena within minutes after refusing to disclose the contents of conversations he had had with witnesses in connection with his client's case. In addition, the attorney was reminded that his "primary duty was to the Commission, not to the client." The climate of fear that has thereby been engendered within the securities bar has been heightened by the reminder that an entire law firm might be disbarred or suspended for a lapse on the part of a single firm member—a sanction that is particularly vicious in view of the fact that disbarment or suspension may result from simple negligence without any showing of improper intent. *SEC v. Spectrum, Ltd.*, 54 F.R.D. 70 (S.D.N.Y. 1971).

Revealing Comments

One of the most revealing comments that I have heard, illustrating the unhealthy relationship between the SEC and the attorneys who practice before it, was provided in a speech to SEC practitioners by William L. Cary, a former Commission Chairman and now a Professor at Columbia Law School. Professor Cary related that an irate attorney had once appeared at the Commission to protest that a staff attorney had been engaging in arbitrary conduct toward the attorney's client. With obvious approval and delight, Professor Cary quoted the staff attorney as saying, "Listen, if we weren't as arbitrary as we are, you wouldn't be as fat as you are." The high-minded moral that former Chairman Cary drew from that episode was, "So keep in mind that your practice depends upon what the Commission does." Professor Cary then went on to admonish the attorneys that they have a professional responsibility to "force" their own clients toward a "process of disclosure."

Perhaps the most dangerous power of the Securities and Exchange Commission is that of instituting its own disciplinary proceedings against attorneys whose conduct displeases members of its staff. There is an important distinction to be noted, of course, between disciplinary proceedings that are carried on by an impartial disciplinary board of the bar, and those conducted by one's adversary. When the SEC seeks to discipline an attorney, it acts, not as a disinterested third party, but as a partisan. It is as if prosecutors had disciplinary powers over defense attorneys, or attorneys representing plaintiffs in personal injury cases had disciplinary powers over those representing insurance companies. We can hardly expect an advocate to give "entire devotion to the interest of the client [and] warm zeal in the maintenance and defense of his rights," when the attorney representing the other party has the power to suspend or disbar that advocate.

Moreover, the situation is made far worse by the vagueness of the standards imposed by the Commission. For example, the SEC claims the power to discipline adversary attorneys on grounds that they are "lacking in character." 17 C.F.R. § 201.2(e). Nor is it fanciful to infer that such power will be abused. As Commissioner Sommer conceded in a speech at the American Bar Association meeting in Hawaii last summer, young staff attorneys, "short on experience, long on desire," may "very often" find that the best way to counter skilled adversaries is through "strong assertions of authority."

There is doubt that the Commission has the statutory authority that it claims to discipline attorneys. In my own view, such power violates constitutional rights to due process and effective assistance of counsel. At any rate, one would at least expect that the Commission would exercise that power with restraint. On the contrary, however, in one case it was necessary for an attorney to go to the United States Court of Appeals to obtain reversal of a two-year suspension on a charge of improper conduct five years previously. *Kivitz v. SEC*, 475 F.2d 956 (D.C. Cir. 1973). Although the court ultimately found the Commission's evidence to be insufficient to support a finding of impropriety and directed the Commission to vacate its order against the attorney, the intimidating effect of such abuses of power is plain. Indeed, simply for the Commission to commence disciplinary action against an attorney constitutes, in itself, a severe penalty. As acknowledged by Commissioner Sommer in his Hawaii speech, the Commission "know[s] full well" that

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Opening Statement

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problem confined in space and time. It represents a combination of ill-conceived tactics and bad taste which hopefully will pass.

On the other hand, I feel that the breaches of civility attributable to the bench are far more pervasive and, unfortunately, more enduring. If the bar is guilty of a consistent disservice to the court, I suggest it is the confusion which allows respect to be replaced by courtship, candor by obsequity. May I be candid? I have often seen counsel visit needless inconvenience upon the court by tardiness, neglect, irrelevance, lack of preparation, and, yes, inadequacy. I have been in the ranks. But in eighteen years of trial practice, I have never once seen a lawyer act with intentional discourtesy to a judge nor impose a calculated rudeness.

On the other side, I have too often seen lawyers treated with unjustifiable rudeness and disrespect and not infrequently humiliated in open court before client and colleague. I cannot believe my experience unique.

In his article on judicial intimidation, in the last issue, Leon Jaworski accented the obligation of trial counsel to resist the improper exercise of judicial response. The problem is that the leaders of the trial bar—the very ones whose prestige and ability supports a capability to respond to such pressures—are so seldom the victims, receiving instead the cordialities and respect which they have earned. Human nature being what it is, they remain silent.

Surely all understand the pressures faced by the trial judge and the irritations he must face in attempting to manage his responsibilities, but there is seldom justification for the type of rudeness which we have all encountered or seen visited upon our unfortunate brother. It demeans the process, it subtracts from the whole, and it erodes the environment of justice. Respect is by definition a correlative relationship, and it is the duty of the trial bar to so state. Upon these premises, I suggest this issue is more than "a matter of manners."

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an injunction action against a professional can have a "profoundly adverse effect," very often "far more profound and devastating" than a similar action against a business person.

Further Expansion

Despite that awareness on the part of the Commision (or, perhaps, because of it), the SEC has sought to expand even further its disciplinary powers and the destructive impact of those powers. In a proposed amendment to its Rules of Practice, the Commission has provided that its disciplinary inquiries should be made public at the outset. The result of that action, of course, would be to damage seriously or to destroy an attorney's practice, even if the attorney should ultimately be found innocent of any improper conduct.

My concern in this article has been directed, of course, toward the heavy-handed abuse of its powers by the SEC against lawyers who practice before it, and the seriously detrimental effect that such abuse of power has had, and will continue increasingly to have, on the lawyer's role as an advocate in an adversary system. There is, however, an interesting postscript to my remarks.

About a year ago, I directed similar criticisms against the SEC before the Securities Regulation Institute, and that address was later published in my column on Legal Ethics in the *New York Law Journal.* Subsequently, a New York securities attorney wrote a response, in which he asserted that my position was lacking in any factual, scholarly, or intellectual basis. In replying, I quoted from a letter to me from SEC Commissioner Sommer. He referred to my presentation as "one of the true highlights" of the program, urged me "most strongly" to publish it in a law journal and give him the "privilege of seeing your thoughts in print," and concluded, "Again, deep congratulations for a job extraordinarily well done." It seemed to me obvious that Commissioner Sommer would hardly take the trouble to write such a letter about a speech consisting wholly of unfounded charges, and I said so.

The next development was strange indeed. Commissioner Sommer wrote to the *New York Law Journal* to complain that my use of his letter to support my position was "base, crude and unworthy." (He also protested that his letter to me was "personal," despite the fact that it was typed in a government office, by a government secretary, mailed in a government envelope, and written on an official Securities and Exchange Commission letterhead.) It is difficult to account for Commissioner Sommer's abrupt reversal of his view of my position. If my remarks were, as he wrote, "extraordinarily good" and "much too important" to be limited to the audience at the Securities Regulation Institute, how then could they be, at the same time, wholly unfounded and "irresponsible"?

One possible inference from that episode is that the Commission is as intolerant of dissent, or even candor, on the part of its junior commissioners, as it is of zealous advocacy by the lawyers who appear before it.