§ 7:2 Regulatory Overlay

Securities lawyers’ responsibilities for opinions in securities transactions have been discussed in court decisions, SEC releases and bar association statements. For example, several courts have held lawyers giving opinions on whether securities offerings are exempt from registration to a high standard of diligence that ensures that the requirements for an exemption are met beyond just relying on client representations. The courts have focused on the critical role lawyers have in preventing securities fraud and giving legal opinions to protect the public interest when they give a securities law opinion.

The SEC has filed enforcement actions against lawyers that have given opinions in securities transactions. In addition, the SEC has provided guidance regarding the obligations of lawyers giving securities law opinions to know the client, to know how the opinion is proposed to be used and to investigate the underlying facts to confirm that the requirements for an exemption exist. The SEC also has brought proceedings under its “Rules of Practice” to suspend lawyers who did not meet these standards in giving securities opinions from appearing and practicing before the SEC.

Various bar groups have addressed lawyers’ responsibilities in preparing securities opinions. These include:

- the American Bar Association in ABA Committee on Ethics and Professional Responsibility Formal Opinion No. 335 (1974) and in the ABA Statement of Policy Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Client Securities Compliance (1975), and


Lawyers giving securities law opinions also should be aware that ethics rules may apply. For example, under Model Rule of Professional Conduct 1.2(d), a lawyer cannot counsel or assist a client engage in what the lawyer knows is a criminal or fraudulent act. Another example is Model Rule 4.1(b). It requires that a lawyer disclose material facts if necessary to avoid assisting a criminal or fraudulent act by the client, but only if such disclosure does not violate Model Rule 1.6. It is important to note that New York did not adopt Model Rule 4.1(b).

Model Rule 1.6(b) permits disclosure of information the lawyer reasonably believes to be necessary to prevent substantial injury based on a crime or fraud in furtherance of which the client has used the lawyer's services. Model Rule 1.6(b) is permissive, while Model Rule 4.1(b) requires disclosure unless prohibited by Model Rule 1.6. For various reasons, that disclosure will almost never be prohibited.
Finally, Model Rule 1.13 recognizes that the organization, and not its management, is the lawyer’s client. Model Rule 1.13(c) authorizes the lawyer in certain circumstances to disclose confidential information to third persons to prevent a substantial injury to the client organization. This is not limited to when a crime or fraud has been committed. In addition, the right to disclose confidential information to third persons under Model Rule 1.13 is not based upon potential injury to any third person, but rather upon potential injury to the organizational client. The Comments to Model Rule 1.13 make it clear, however, that other Model Rules also apply. Thus other exceptions exist that permit disclosure of confidential information about an organizational client.

The SEC’s Part 205 Rules, adopted under section 307 of the Sarbanes-Oxley Act, require lawyers appearing and practicing before the SEC (which could include giving securities law opinions) to report evidence of a material violation of law up-the-ladder within the organization. In certain circumstances, the Part 205 Rules permit the lawyer to disclose confidential information to the SEC.

Finally, securities law opinions expose lawyers and law firms to potential liabilities for securities law violations in addition to the risks they have when preparing and giving other opinions. The primary example is under Rule 10b-5. Thus, opinion preparers and givers need to be even more vigilant and aware of risk when preparing and giving securities law opinions.

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1. Similar issues exist in other situations involving government regulation. These include opinions in the banking context, where bank regulators may seek to impose higher standards, and opinions on tax matters, where the Internal Revenue Service imposes requirements. See ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 346 (1982) and IRS Circular 230 (31 C.F.R. pt. 10).

2. See, e.g., SEC v. Frank, 388 F.2d 486, 489 (2d Cir. 1968) (“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 furnished it to him.”); Felts v. Nat’l Accounts Sys. Ass’n, Inc., 469 F. Supp. 54, 67 (N.D. Miss. 1978) (“The duty of the lawyer [in connection with a securities offering] includes the obligation to exercise due diligence, including a reasonable inquiry, in connection with responsibilities he has voluntarily undertaken.”).

3. See, e.g., SEC v. Spectrum, Ltd., 489 F.2d 535, 541–42 (2d Cir. 1973) (“The legal profession plays a unique and pivotal role in the effective implementation of the securities laws. [T]he 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.”); United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964) (“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.”).

Aqua-Sonic Prods. Corp., 524 F. Supp. 866, Fed. Sec. L. Rep. (CCH) P 98256 (S.D.N.Y. 1981), judgment aff’d, 687 F.2d 577, Fed. Sec. L. Rep. (CCH) P 98715 (2d Cir. 1982) (injunction issued against lawyers who both controlled a corporation and prepared tax opinions; the injunction was granted in part because the lawyers ignored an independent securities law opinion that concluded the investment contracts being sold for securities).


6. 31 BUS. LAW. 543 (1975).

7. 32 BUS. LAW. 1879 (1977).