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## Corporate Counsel: Roles and Liabilities - An Essay for Professor Walter Steele

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# CORPORATE COUNSEL: ROLES AND LIABILITIES—AN ESSAY FOR PROFESSOR WALTER STEELE

*Marc I. Steinberg\**

I am delighted to participate in this Dedication to Professor Walter Steele. Professor Steele is an accomplished scholar, teacher, and practitioner. His legal career is an impressive one, superbly serving key constituencies of the legal community.

Unlike many of my colleagues who have known Professor Steele for decades, I became acquainted with Walter upon my joining the SMU Law School Faculty in 1989. Since that time, our friendship has developed as we have served together as colleagues on the faculty, as participants in continuing legal education programs, and as expert witnesses in our consulting work. In these endeavors, Professor Steele represents the “best” of the legal profession, particularly with respect to his astute legal acumen as well as his outstanding ability to perceive and analyze the “real” issues.

Professor Steele’s retirement from full-time teaching is a huge loss for our faculty and students. As a classroom teacher, Professor Steele is widely admired. But as a faculty member, I will personally miss Walter’s willingness to communicate his opinions and ideas with candor and humor, stating his positions with conviction and integrity.

Walt, I miss you on our full-time faculty. I hope that for the next several years you will continue to contribute to our law school and the wider legal community. We need you. My warmest congratulations on this well deserved dedication from the SMU Law Review Association.

The subject of this essay focuses on the corporate and securities attorney. This topic is an important and timely one. Business lawyers play an essential role in the integrity of our nation’s entrepreneurial mission, serving as the “passkey” or the “red” or “green” light to the consummation of financial transactions.<sup>1</sup> Investors and the marketplace rely upon the competence and integrity of counsel to perform this significant func-

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1. See MARC I. STEINBERG, *CORPORATE AND SECURITIES MALPRACTICE* 157 (1992); Samuel H. Gruenbaum, *Corporate/Securities Lawyers: Disclosure, Responsibility, Liability to Investors, and National Student Marketing Corp.*, 54 NOTRE DAME L. REV. 795, 804 (1979); Morgan 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 (1973).

tion. Society also embraces the business lawyer's independence and use of his professional judgment to help promote the client's objectives in a legally permissible manner. Unduly exposing attorneys to litigation when their clients' deals disintegrate is detrimental to our societal interests. Counsel is not a guarantor. But neither should she escape responsibility for her neglect or fraud.<sup>2</sup>

As a general proposition, the business lawyer proffers advice and drafts documents that are fundamental to our economy. Although he does not do so within the confines of litigation, the atmosphere frequently is tense. Whether a particular transaction is successfully consummated may significantly depend on the attorney's acumen. At times, counsel may be pushed by her clients to short-circuit due diligence or to draft less than full disclosure documents.<sup>3</sup> The presence of counsel to withstand this pressure<sup>4</sup> is a matter that business attorneys must face with some frequency. Yet the fabric of the American capitalist system is interwoven with the lawyer's professionalism to stand firm when so confronted. The integrity of our capital markets, premised on adequate disclosure as well as the need for investor protection, demands that sufficiently clear legal principles be set forth that implement these important objectives.<sup>5</sup>

A delicate balance thus should be reached. Counsel should not be subject to "second-guessing" with the specter of hindsight when his client's investors search for a "deep-pocket" to recoup their losses. But neither should counsel be entitled to avoid responsibility by raising the ghosts of "strike suit" litigation where there are genuine issues present involving attorney misconduct.<sup>6</sup> This essay inquires whether Texas and federal law

2. See *Barker v. Henderson*, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986); *SEC v. Spectrum, Ltd.*, 489 F.2d 535, 536 (2d Cir. 1973); *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp 682, 713-714 (D.D.C. 1978).

3. See *In re Fields*, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,407, at 83, 175 n.20 (SEC 1973), *aff'd without opinion*, 495 F.2d 1075 (D.C. Cir. 1974) (stating that a securities attorney "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"). See also *Lincoln Savings and Loan Ass'n v. Wall*, 743 F. Supp 901, 920 (D.D.C. 1990), where Judge Sporkin inquired:

Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?

Why didn't any of them speak up or disassociate themselves from the transactions?

Where also were the outside accountants and attorneys when these transactions were effectuated?

What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.

4. "The presence to withstand the pressure" is a phrase I attribute to my friend Marc Dorfman, a superb securities attorney who practices in Washington, D.C.

5. See Richard M. Phillips, *Client Fraud and the Securities Lawyer's Duty of Confidentiality*, 49 WASH. & LEE L. REV. 823 (1992).

6. See Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. REV. 225 (1996); Marc I. Steinberg, *Attorney Liability for Client Fraud*, 1991 COLUM. BUS. L. REV. 1 (1991).

have reached an appropriate accommodation.

With respect to Texas law, attorney-client privity still is required in order to institute a lawyer malpractice action.<sup>7</sup> Such an approach, representing a distinct minority position,<sup>8</sup> is out-of-date with the coming of the 21<sup>st</sup> century. Turning to the principles of *Ultramares*,<sup>9</sup> authored by Justice Cardozo nearly seven decades ago, the lack of privity should not preclude recovery where it is specifically foreseeable that known third parties will be relying on the professional's conduct.<sup>10</sup> Perhaps implicitly recognizing the shortcomings of strict privity, the Texas Supreme Court recently held that a non-client may pursue an action for negligent misrepresentation against a subject attorney, adopting the theory advanced by the American Law Institute's (ALI) Restatement (Second) of Torts.<sup>11</sup> Within the confines of this approach,<sup>12</sup> counsel may be subject to liability premised on negligent misrepresentation "when information is transferred by an attorney to a known [non-client] party for a known purpose."<sup>13</sup> Now that this approach has been adopted by the Texas Supreme Court,<sup>14</sup> the arguable

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7. See, e.g., *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996); *Poth v. Small, Craig, & Werkenthin, L.L.P.*, 967 S.W.2d 511 (Tex. App.—Austin 1998, pet. denied); *Gamboa v. Shaw*, 956 S.W.2d 662 (Tex. App.—San Antonio 1997, no pet.).

8. See *Barcelo*, 923 S.W.2d at 579 (Cornyn, J., dissenting) ("By refusing to recognize a lawyer's duty to beneficiaries of a will, the Court embraces a rule recognized in only four states, while simultaneously rejecting the rule in an overwhelming majority of jurisdictions.")

9. See *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

10. This view of *Ultramares* was recognized by the New York high court in *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435, 443 (1985). Both *Ultramares* and *Credit Alliance* concerned alleged accountant negligence.

11. See *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999); see also *First Nat'l Bank of Durant v. Trans Terra Corp.*, 142 F.3d 803 (5th Cir. 1998); see generally RESTATEMENT (SECOND) OF TORTS § 552 (1977).

12. As set forth by § 552 of the ALI Restatement (Second) of Torts:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

13. *F.E. Appling*, 991 S.W.2d at 794. The Texas Supreme Court's use of the term "transferred" should be limited by the preceding sentence which states that the ALI Restatement's "formulation limits liability to situations in which the attorney who provides the information is aware of the nonclient and intends that the nonclient rely on the information." *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 552 cmt. h (1977).

14. See *id.*; see also *Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). Adhering to the Restatement's definition, the Texas Supreme Court in *Sloane* in a case not implicating attorney liability, set forth the elements of a negligent misrepresentation cause of action as follows:

unfairness present in requiring attorney-client privity for malpractice actions has been ameliorated.<sup>15</sup>

In other respects, Texas law generally balances the interests of investor redress and attorney liability in an appropriate manner. For example, in given situations, attorneys may be subject to liability for fraud,<sup>16</sup> aiding and abetting,<sup>17</sup> conspiracy,<sup>18</sup> and failure to warn.<sup>19</sup> Pursuant to the Texas Securities Act, lawyers who engage in investor solicitation (and therefore outside of the standard fare of attorney activities) may be deemed "sellers," thereby incurring liability exposure with respect to material misrepresentations (and half-truths) in the sale of securities.<sup>20</sup> Attorneys who recklessly draft documents central to a securities transaction, such as an offering memorandum, may be liable as aiders and abettors.<sup>21</sup> Hence, under Texas law, provided that the requisite elements of a subject claim

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(1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

*Id.*

15. Note that in *Barcelo*, the Texas Supreme Court reasoned that attorney-client privity was required in an attorney malpractice action based on the following:

(1) potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries; (2) the privity requirement will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation; and (3) [w]ithout this "privity barrier" . . . clients would lose control over the attorney-client relationship, and attorneys would be subject to almost unlimited liability.

*Trans Terra Corp.*, 142 F.3d at 810 (quoting *Barcelo*, 923 S.W.2d at 577-579). The Fifth Circuit, applying Texas law, believed that the Texas Supreme Court's concerns in *Barcelo* did not extend to the negligent misrepresentation claim at bar. This perception proved correct. See *F.E. Appling*, 991 S.W.2d at 787.

16. See, e.g., TEX. BUS. & COM. CODE § 27.01; *DeBakey v. Staggs*, 605 S.W.2d 631 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd), 612 S.W.2d 924 (Tex. 1981); RONALD E. MALLEN & JEFFERY M. SMITH, LEGAL MALPRACTICE § 8.8 (3d ed. 1989).

17. See *Insurance Co. of N. Am. v. Morris*, 928 S.W.2d 133, 153 (Tex. App.—Houston [14th Dist.] 1996), *rev'd on other grounds*, 981 S.W.2d 667 (Tex. 1998).

18. See, e.g., *Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 132 (Tex. App.—Houston [14th Dist.] 1994), *reh'g overruled*, 933 S.W.2d 302 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 471 (Tex. App.—Houston [1st Dist.] 1985, no writ). See generally David J. Beck, *Legal Malpractice in Texas*, 50 BAYLOR L. REV. 547, 776-779 (2d ed. 1998).

19. See *Parker v. Carnahan*, 772 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, writ denied) (stating that "an attorney can be held negligent where he fails to advise a party that he is not representing them on a case where the circumstances lead the party to believe that the attorney is representing him").

20. See TEX. SEC. ACT Art. 581-33A(2); *Lutheran Brotherhood v. Kidder Peabody & Co., Inc.*, 829 S.W.2d 300, 306 (Tex. App.—Texarkana 1992, *vacated as moot*, 840 S.W.2d 384 (Tex. 1992)). See also, *Marshall v. Quinn-L Equities, Inc.*, 704 F. Supp. 1384, 1391 (N.D. Tex. 1988).

21. See TEX. SEC. ACT Art. 581-33F(2). In unusual situations, attorneys and their law firms may incur liability as control persons. See *id.* at 581-33F(1). See note 38 *infra*.

may be proven, attorneys are subject to liability to non-clients.<sup>22</sup>

This approach makes good sense. When an attorney acts in her lawyerly role in a negligent manner, permitting recovery to all foreseeable victims (such as all investors in a public offering) is unduly severe. The prospect of liability based on negligence to an "indeterminate class,"<sup>23</sup> in the words of Justice Cardozo, ill serves the attorney-client relationship, including the attorney's loyalty to his client and the exercise of counsel's independent judgment. Also of concern is the public interest in not unduly subjecting attorneys to liability premised on negligence by hindsight.<sup>24</sup> The Restatement's approach appropriately balances the competing interests.<sup>25</sup> Where, however, the attorney steps out of her "lawyerly role" or acts with reckless or intentional misconduct, different considerations apply. In such circumstances, by acting as entrepreneurs or with reckless disregard, attorneys should not be accorded privileged treatment. Rather, the applicable legal standards should extend to such lawyers like any other defendant.

Federal law is more restrictive than Texas law with respect to the ability of private complainants to seek redress under the securities laws.<sup>26</sup> The key difference for the purposes of this essay is that aider and abettor liability may not be imposed under the federal securities laws in private actions.<sup>27</sup> In the attorney liability context, the crucial issue thus is drawing an appropriate distinction between primary and secondary conduct.<sup>28</sup>

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22. See generally Alan R. Bromberg, *Civil Liability under Texas Securities Act § 33 (1977) and Related Claims*, 32 Sw. L.J. 867 (1978); Keith A. Rowley, *The Sky Is Still Blue in Texas: State Law Alternatives to Federal Securities Remedies*, 50 BAYLOR L. REV. 99 (1998); Marc I. Steinberg, *The Texas Securities Act: A Plaintiff's Preferred Route?*, 58 TEX. B.J. 1096 (1995).

23. See *Ultramares*, 174 N.E. at 444.

24. For an expansive approach that may be perceived as unduly onerous in the context of attorney liability for negligence, see *Zendell v. Newport Oil Corp.*, 544 A.2d 878, 881 (N.J. 1988) (applying *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138 (N.J. 1983)). For further discussion, see Steinberg, *supra* note 1, at 12-25; Steven K. Ward, *Developments in Legal Malpractice Liability*, 31 S. TEX. L. REV. 121 (1990).

25. See *supra* notes 11-15, 24 and accompanying text.

26. This assertion does not extend to the U.S. Securities and Exchange Commission (SEC) which has significant authority to pursue enforcement actions against allegedly violative attorney misconduct under the federal securities laws. Such actions include those for injunctive relief, cease and desist orders, rule 102(e) disciplinary proceedings, and civil money penalties. In addition, the SEC has authority to bring actions against aiders and abettors for violations of the Securities Exchange Act. See Exchange Act § 20(f), 15 U.S.C. § 78t(f) (1994). For further discussion, see MARC I. STEINBERG & RALPH C. FERRARA, *SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT* (1985 & 1998 Supp.).

27. See *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 184 (1994) (holding that § 10(b) of the Exchange Act does not provide for the imposition of aiding and abetting liability in private actions). The court's rationale precludes the imposition of aiding and abetting liability in private actions brought for other alleged federal securities law violations. See MARC I. STEINBERG, *UNDERSTANDING SECURITIES LAW* 238 (2d ed. 1996). Likewise, relying on *Central Bank*, courts have rejected liability in private actions premised on conspiracy. See, e.g., *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 843 (2d Cir. 1998).

28. A number of recent law review articles have addressed the issue of primary liability under Section 10(b). See, e.g., Douglas M. Branson, *Chasing the Rogue Professional After the Private Securities Litigation Reform Act of 1995*, 50 SMU L. REV. 91 (1996); Alan

It is relatively clear that certain conduct will subject an attorney to primary liability exposure. For example, the rendering of an attorney opinion letter invokes primary liability principles.<sup>29</sup> Affirmative representations or statements made by a lawyer to a non-client likewise is deemed primary conduct.<sup>30</sup> Stated in different terms, although counsel may not have the duty to disclose financial information about his client to another, once counsel elects to do so, "he assumes a duty to provide complete and nonmisleading information with respect to subjects on which he undertakes to speak."<sup>31</sup>

Courts, however, are divided when the attorney's or law firm's conduct is the drafting of the client's materially misleading disclosure documents, where such documents are provided by the client to investors.<sup>32</sup> In such circumstances, the law firm has no direct communication with the investors and its name and signature may appear nowhere in the documents. Accordingly, investors are unaware of the law firm's role.<sup>33</sup> Prior to the U.S. Supreme Court's decision in *Central Bank of Denver*, which rejected aider and abettor liability in private actions under Section 10(b) of the Securities Exchange Act,<sup>34</sup> this type of alleged misconduct frequently was viewed in secondary liability terms.<sup>35</sup> Indeed, one appellate court, rejecting primary liability principles in this context, perceived one well known law firm as a "scrivener" of its client's disclosure materials.<sup>36</sup>

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R. Bromberg & Lewis D. Lowenfels, *Liabilities of Lawyers and Accountants Under Rule 10b-5*, 53 BUS. LAW. 1157 (1998); Ann Maxey, *Competing Duties? Securities Lawyers' Liability After Central Bank*, 64 FORDHAM L. REV. 2185 (1996); Robert A. Prentice, *Locating that "Indistinct" and "Virtually Nonexistent" Line Between Primary and Secondary Liability Under Section 10(b)*, 75 N.C. L. REV. 691 (1997); Manning Gilbert Warren III, *The Primary Liability of Securities Lawyers*, 50 SMU L. REV. 383 (1996).

29. See, e.g., *Kline v. First W. Gov't Sec., Inc.*, 24 F.3d 480 (3d Cir. 1994); *Ackerman v. Schwartz*, 947 F.2d 841 (7th Cir. 1991). Of course, the inclusion of an attorney's opinion letter in an issuer's registration statement subjects the attorney to Securities Act § 11 liability exposure as an expert. See § 11(a) of the Securities Act, 15 U.S.C. § 77k(a) (1994). See generally S. FitzGibbon & D. Glaser, *Legal Opinions* (1992); Darrel A. Rice & Marc I. Steinberg, *Legal Opinions in Securities Transactions*, 16 J. CORP. L. 375 (1991).

30. See, e.g., *Trust Co. of La. v. N.N.P. Inc.*, 104 F.3d 1478 (5th Cir. 1997).

31. *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 268 (6th Cir. 1998) (*en banc*).

32. This scenario also is referred to as whether counsel has a duty to blow the whistle on his client. See e.g., *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 497 (7th Cir. 1986). Both the American Bar Association's Model Rules and the Texas Disciplinary Rules of Professional Conduct decline to mandate such disclosure (and the ABA Rules in fact forbid such disclosure unless substantial bodily harm is threatened). Nonetheless, by continuing to remain in the representation with knowledge that fraud is afoot, the attorney may violate the ethical rules by providing assistance to such client. See ABA Model Rules 1.2, 1.6, 1.13; Texas Disciplinary Rules 1.02, 1.05, 1.12. See also *Bernstein v. Portland Sav. & Loan Ass'n*, 850 S.W.2d 694 (Tex. App.—Corpus Christi 1993, writ denied).

33. *Compare Walco Invs., Inc. v. Thenen*, 881 F. Supp. 1576 (S.D. Fla. 1995), with *Lycan v. Walters*, 904 F. Supp. 884 (S.D. Ind. 1995).

34. 511 U.S. 164 (1994).

35. See, e.g., *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds*, 492 U.S. 914 (1989); M. Steinberg, *supra* note 1, at 74 (stating that "[s]ecurities attorneys all too often find themselves alleged to be aiders and abettors of their client's or a third party's securities fraud").

36. See *Schatz v. Rosenberg*, 943 F.2d 485, 497 (4th Cir. 1991) (stating that the law firm "did no more than 'paper the deal' or act as a scrivener for [its client]").

Although the Securities and Exchange Commission (SEC) has authority to pursue aiders and abettors today,<sup>37</sup> private claimants normally must rely on primary liability principles.<sup>38</sup> Asserting that the *Central Bank* decision does not preclude secondary actors from being primarily liable under Section 10(b),<sup>39</sup> attorneys who allegedly draft fraudulent disclosure documents are now sued as primary violators. A number of courts and the SEC agree. According to the SEC, an attorney, acting alone or with others, who “creates” a misrepresentation can be liable as a primary violator irrespective of whether such attorney (or her law firm) is identified by name with the subject misrepresentation.<sup>40</sup> Pursuant to the Sixth Circuit’s “direct contacts” test, attorneys who draft disclosure materials with the expectation that such materials will be furnished to investors are deemed primary participants.<sup>41</sup> A third standard provides that attorneys “who significantly participate in the creation of their client’s misrepresentations, to such a degree that they may fairly be deemed authors or co-authors of those misrepresentations, should be held accountable as primary violators under section 10(b) . . . even when the lawyers . . . are not

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37. See note 26 *supra*.

38. In rare situations, controlling person liability may be successfully alleged against an attorney or law firm. See, e.g., *In re Rospach Securities Litigation*, [1992 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,939 (W.D. Mich. 1992).

39. See *Central Bank*, 511 U.S. at 191:

The absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the [S]ecurities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met. In any complex securities fraud, moreover, there are likely to be multiple violators . . . .

*Id.* (emphasis in original).

40. See Brief of the SEC, Amicus Curiae in *Klein v. Boyd*, at 20, Nos. 97-1143, 97-1261 (3rd Cir. 1998).

41. See *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 268 (6th Cir. 1998); *Molecular Tech. Corp. v. Valentine*, 925 F.2d 910 (6th Cir. 1991). In *Molecular Technology*, the Sixth Circuit reasoned:

Applying section 10(b)/rule 10b-5 principles to [the attorney] Snyder’s involvement with the SDE shell transaction leads us to conclude that sufficient evidence was introduced to create a triable fact issue for the jury. Snyder drafted the merger agreement between State Die and Extra Production at the August 11, 1983 meeting. . . . At that meeting, Snyder . . . knew that 60,000 shares (representing about 90% of the outstanding shares) of State Die stock were in escrow; Snyder was aware that the title to the real property of State Die, which was part of the consideration in the merger with Extra Production, was held by an unrelated leasing company and, thus, not transferable; Snyder contemplated obtaining State Die’s most recent annual report, a corporate certificate of good standing, tax returns, etc. (although he never obtained any such documents); and Snyder knew that State Die had substantial debts, including one \$194,000 bank debt. Snyder did not disclose any of this information in the amended offering circular. Taking this evidence in the light most favorable to the plaintiffs, a reasonable jury could find that Snyder knew certain information in the amended offering circular was misleading and that Snyder had a duty to disclose that information to investors such as the plaintiffs under 10(b)/rule 10b-5. . . .

*Id.* at 917-918.



identified to the investor."<sup>42</sup>

An attorney who intentionally drafts fraudulent disclosure documents on the client's behalf indirectly<sup>43</sup> engages in deceptive conduct and should be held accountable as a primary violator.<sup>44</sup> To allow an attorney to escape liability to aggrieved investors for such deliberate misconduct misconstrues the applicable federal statutes and impugns the integrity of the practicing bar.<sup>45</sup> Also of importance is that in 1998 Congress enacted legislation preempting, with certain exceptions, the applicability of state law in securities class actions involving nationally traded securities.<sup>46</sup> Hence, federal law may be the only source of redress in this context, thus calling for a flexible interpretation of the pertinent statutory framework.

This essay seeks to set forth a cogent rationale accommodating the competing interests at stake. The success of our private and public capital markets is owed in large measure to the integrity and expertise of the corporate and securities bar. It behooves the bar therefore to oppose policies and proposals that provide shelter to their inept or corrupt brethren. The public certainly deserves as much. I believe that Professor Walter Steele would agree.

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42. *Klein v. Boyd*, [1998 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 90,136, at 90,324 (3d Cir. 1998), *rehearing en banc granted, judgment vacated*, [1998 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 90,165 (3d Cir. 1998).

43. Section 10(b) of the Securities Exchange Act makes it unlawful "for any person, directly or indirectly . . . [t]o use or employ . . . any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j(b) (1994) (emphasis added). See *Central Bank*, 511 U.S. at 191.

44. See SEC Brief, *supra* note 40, at 12 (asserting that "[a] person who creates a misrepresentation, but takes care not to be identified publicly with it, 'indirectly' uses or employs a deceptive device or contrivance and should be liable").

45. See *id.* at 12-20. See also *Lincoln Sav. and Loan Ass'n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990); sources cited notes 1-4, 40-44 *supra*.

46. See Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353 (Nov. 3, 1998). See H.R. Rep. No. 105-803, 105th Cong., 2d Sess. (1998). See generally Lisa L. Casey, *Shutting the Doors to State Court: The Securities Litigation Uniform Standards Act of 1998*, 27 SEC. REG. L.J. 141 (1999); David M. Levine & Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 BUS. LAW. 1 (1998); Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 86 CORNELL L. REV. 1 (1998).

# Articles

