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TWO PROBLEMS FOR LAWYERS

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I would like to discuss with you today two of the most intricate and difficult problems that lawyers are confronting today. Pushing and hauling, in the one instance between the SEC and the Bar, and in the other, between the Bar and the accounting profession with the SEC an uninterested bystander, has continued for some time, and I must say, given the propensity that all of us have for rhetoric, I do not have much hope of abatement of this pushing and hauling in the near future. The two problems are these: One, when (if ever) does an attorney have an obligation to disclose to the SEC that his client has engaged, or may be about to engage, in conduct which violates one of the federal securities laws? And two, what information about his client's affairs may an attorney properly disclose to the client's auditor in response to the customary annual letter seeking information concerning

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contingent liabilities, the prospects with respect to pending litigation, and so on?

With regard to the first, the question of what disclosures an attorney must make with regard to actual or potential violations of federal securities laws by his client, this issue was relatively dormant and undiscussed until 1972, when the Commission filed its now famous complaint in the National Student Marketing case.

I well remember the shock this complaint produced in the legal profession. At that time I was the Chairman of the American Bar Association Federal Regulation of Securities Committee. I received phone calls, letters, urgent requests that something be done; these concerns of the Bar reached the highest levels of the ABA. I organized a special subcommittee of the main committee for the purpose of examining this problem and, hopefully, reaching some conclusion. The successor to that committee recommended to the ABA Section of Corporation, Banking and Business Law that a resolution with respect to the problem be submitted to the House of Delegates for adoption. The House of Delegates so acted this past summer at the American Bar Association annual meeting in Montreal. This resolution was thought by many to take direct issue with what they conceived to be the underlying legal proposition involved in the part of the National Student Marketing case relating to attorneys. Since the National Student Marketing case is presently pending, I cannot appropriately discuss the merits of the claims and defenses asserted; however, I do not think I am precluded from discussing the resolution adopted by the American Bar Association.

The problem derives from the long-standing obligation of the attorney to protect his client's secrets and confidences. These obligations have been restated in the Canons of Professional Responsibility which were adopted by the American Bar Association in 1969 and have been adopted by virtually all, if not all, state bars. It is the contention of critics that the course which the Commission asserts attorneys should follow when they learn of actual or potential violations of the federal securities laws by their clients would require them to violate their responsibilities under the Canons of Professional Ethics. The gist of the ABA resolution and report is that an attorney should never be placed in a position where he is required to do something which is not permitted or required by the Canons of Professional Responsibility unless the obligation is established by a statute which clearly mandates it. While the Canons themselves acknowledge the fact that they do not purport to lay down standards for the civil liability of lawyers arising out of their professional conduct, nonetheless, as a general proposition, I am at least inclined to agree that lawyers should not be expected to act contrary to the Canons unless that obligation is reasonably clear. And I do not think the Commission has ever suggested a different conclusion.

I mentioned earlier the difficulties with rhetoric in these matters. The other night I re-read the resolution adopted by the American Bar Association House of Delegates, the report which accompanied that and the longer explicatory report of the Section Committee which worked on this matter. I was struck by the difference in tone between the former two documents and the latter. The resolution as adopted and the accompanying formal report fairly breathed fire; they intimated that the very foundations of the attorney-client relationship were being struck down by a meddlesome bureaucracy and that it was imperative that the Bar rise in righteous indignation. To give you a few choice morsels:

> "Various proceedings by the SEC, speeches by members and staff of the Commission, and certain statements in recent judicial opinions have caused many lawyers serious concern as to their responsibility to their clients and to the public when advising in the areas of SEC laws. Their advice is, of course, reviewed by the SEC with the benefit of 'hindsight' when something has gone wrong. Must the lawyer in such matters <u>resolve all uncertainties</u> in favor of the law having application, e.g., if there is any question whether something may be 'material' it should be treated as 'material,' and if the client fails to follow such advice must the lawyer report such failure to the SEC?" (emphasis added)

> "Efforts by the government to impose responsibility upon lawyers to assure the quality of their clients' compliance with the law or to compel lawyers to give advice resolving all doubts in favor of regulatory restrictions would evoke serious and far-reaching disruption in the role of the lawyer as counselor, which would be detrimental to the public, clients and the legal profession." (emphasis added)

[It surely would evoke "serious and far-reaching disruption," but who ever said all doubts must be resolved in favor of regulatory restrictions?]

The report of the Committee -- not the one which accompanied the resolution, but the longer, certainly more considered, report which went to the Corporation, Banking and Business Law Council -- was, in my estimation, an animal of different stripe. This was thoughtful, carefully drafted; it evidenced sensitivity to the ambiguities of the problem (which I don't think the resolution and the formal report did) and in my estimation articulated a position that is readily reconcilable with that implied by the Commission in its National Student Marketing complaint. For the purposes of this discussion I am going to assume that the American Bar Association really meant what was in the Committee report and that the rhetoric of the resolution and the formal report were, if you will, sales talk to get the House of Delegates sufficiently excited to adopt the report and the resolution.

It is always good to begin with basics. The most basic area of agreement, I am sure, with respect to this problem is the general proposition that society is well-served by a relationship between the lawyer and his client which precludes the former from disclosing the secrets and confidences which he learns concerning his client and his affairs except under the most compelling circumstances. We accept as a basic proposition the desirability of a client being able to counsel with an attorney with full candor and forthrightness and with confidence that the information he supplies his attorney will not, without his consent, go further. A part of this ethical responsibility has been formalized in the attorney-client privilege under which, as a matter of evidentiary law, a lawyer may not be compelled in a court to disclose those matters which have been disclosed to him by his client.

And I would hope that we can also agree upon the proposition that attorneys should not in any fashion lend themselves to the misconduct of their client, or put themselves in the service of that misconduct, and that an attorney's ethical obligations do not permit him to be the silent tool and instrument of a fraud. And I would also hope that we recognize the basic national policy incorporated in the federal securities laws that investors shall be protected against fraudulent and manipulative conduct.

As is evident from the Canons of Professional Responsibility, the ethical mandate against an attorney's disclosure of his client's secrets and confidences is by no means unqualified, and I would suggest that because it is not unqualified, the Commission's concerns and those of the Bar can be reconciled.

Disciplinary Rule 7-102(B)(1) states the circumstances in which a lawyer may, without violating his ethical responsibility to protect secrets and confidences of his client, make disclosure. This rule reads this way:

> "(B) A lawyer who receives information clearly establishing that:
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal except when the information is protected as a privileged communication."

It is obvious that there are, as is not untypical with regard to any general rule, a number of ambiguities involved in this articulation, a number of broad terms that can take on exact coloration and content only when placed in specific circumstances. The debate over the extent of an attorney's responsibility under the Code has, as you might expect, focused on these terms and their proper interpretation. At one time there was concern expressed as to whether the SEC might be regarded properly as a "person" or "tribunal" as those terms are used in DR 7-102(B)(1). It was suggested that the Commission might, indeed, be a tribunal, but only when it was functioning in an adjudicatory context. Most problems with regard to disclosure of client misconduct vis-a-vis the securities laws do not arise in that context but rather arise when the attorney's role is not that of an adversary or an advocate but rather that of counsellor. Hence, I think I would be inclined to agree with those who suggest that for purposes of this discussion it is not appropriate to regard the Commission as a tribunal. However, the question remains, is the Commission, within the meaning of this, a "person?" The American Bar Association Committee Report concluded that the Commission was a "person." Furthermore, the Committee concluded that the question of whether the Commission was an "affected person" was irrelevant and that disclosure to the SEC should accompany disclosure to those most intimately "affected," the investors:

> "Thus, the SEC is clearly a 'person'; whether it [the SEC] is a person 'affected' by a fraud and thus a person to whom a fraud must be disclosed will usually be irrelevant. Members of the public, as potential purchasers or sellers, will clearly be 'affected' by a securities fraud - and disclosure to the SEC will be made in conjunction with (but not necessarily prior to) disclosure to the public."

A further question raised concerning the DR exception to the confidentiality rule concerns the meaning of "fraud" as used in it. Does this mean only common law fraud, or the somewhat diluted "fraud" under the securities laws, particularly Rule 10b-5, which has been regarded by some courts as embracing simple negligence? The ABA Committee concluded:

> "Even though the draftsmen of the CPR in DR 7-102(B) probably contemplated traditional fraud, a clear violation of the securities laws, if known to the lawyer, would probably involve the application of DR 7-102(B)(1), unless protected by the final clause thereof, which protects confidential communications."

The next question is whether that final clause, which creates an exception to the obligation of a lawyer to disclose in the specified circumstances that his client has perpetrated a fraud, in effect nullifies the thrust of the rest of DR 7-102(B)(1). That clause, you will recall, provides that the obligation to disclose is nullified "when the information is protected as a privileged communication..." This clause, it might be noted, was not in the original Code when adopted in 1969, but was added in 1974.

I think the ABA Committee has taken a realistic viewpoint of this clause and rightly indicates its minimal impact. After noting that a literal reading of that clause would effectively nullify the remainder of DR 7-102(B)(1), the Committee said:

> "However, it is clear that the attorney-client privilege would not extend to permit the lawyer <u>knowingly</u> to allow his client to commit a crime during the course of a representation."

After quoting from an ABA ethics opinion involving practice before the Internal Revenue Service, the Committee continued,

> "Thus, if the attorney-client privilege under state law does not prevent a lawyer from disclosing his client's prospective crime or fraud perpetrated during the course of representation, the addition of the 1974 exception clause would not have any effect in reducing the required disclosures because such information would not be protected by the attorney-client privilege.
>
> "Applying this to the role of lawyer in various SEC contexts, if the crime has already been committed and no future or ongoing offense is predicated on the client's act, the lawyer may not disclose the confidential communication unless the crime was committed during the course of the lawyer's representation. However, if the client is about to engage in illegal conduct, for example, publish a prospectus, which he knows and the lawyer knows to be fraudulent, the lawyer's duty would clearly be to take steps to reveal the fraud."

You will recall that the disciplinary rule provides that the obligation of disclosure attaches if the lawyer "receives information <u>clearly</u> establishing" that the client has committed a fraud in the course of representation. This the ABA Committee construes to protect the lawyer who acts in good faith concerning the propriety of making the disclosure. Again, speaking personally, I would not quarrel with this condition of the obligation.

All of us are acutely aware of the uncertainties of the law in most areas, and not the least of the areas of uncertainty is securities law. Who can recall with comfort the shifting sands of the negotiated transaction exception under Rule 133? Or the difficulties of determining whether investors have the requisite sophistication to be permissible offerees in a private placement? Or for that matter, the slippery slopes in defining an offer? Not infrequently a lawyer will counsel his client concerning alternative courses of conduct, the difficulties of each course, the risks of each, the fact that one course presents significantly greater risks of adverse litigation, though the law is sufficiently uncertain to preclude any definitive judgment that the outcome of any such litigation would be adverse. If the client chooses the riskier course, must the lawyer inform the SEC? I would say clearly not, either under the law as I conceive it to exist or under the Disciplinary Rule. Unless the client chooses a course that is clearly illegal, which is not clouded with legitimate uncertainty, I think it would be unfortunate to suggest that his counsel has an obligation to run to the SEC and say, "My client has chosen a risky course that may possibly, but surely not doubtlessly, result in a violation of the law." On the other hand, when a client insists upon omitting information in a prospectus that is clearly required by law, for instance, a plainly material adverse development in the business, then I think under the

Commission's conceptions of aiding and abetting violations of the securities laws and under the Code, disclosure would be required if the effort to persuade the client to rectify the wrong were unavailing and the client persisted in the wrongful course of action.

But I would take issue with the gloss the House of Delegates resolution and report seek to put on the concept of "clear" in this context. In the resolution it is stated,

> ". . .the lawyer has neither the obligation nor the right to make disclosure when reasonable doubt exists concerning the client's obligation of disclosure. . ." (emphasis added)

In the report it is said that the lawyer should be required to disclose "only in the clearest cases of illegal or fraudulent activity. . ." (emphasis added)

I would suggest that receiving information that "clearly establishes" that a client has committed a fraud is not equivalent to a certainty beyond a reasonable doubt and I don't think "clear" equals "clearest" at all.

It should be noted in passing that DR 7-102(B)(1) is not a permissive rule; it does not say that in the circumstances described the attorney may notify the tribunal or affected persons; rather it says the attorney must give such notification.

There is one other facet of this problem. What of the lawyer's knowledge of the intention of a client to commit a crime - and I would note that most of the violations of securities laws that we talk about in this context constitute not only bases for civil action, but are crimes as well? DR 4-101(C) provides that a lawyer is permitted to reveal the intention of his client to commit a crime and the information necessary to prevent the crime. I would not regard the development of a legal doctrine that made such disclosure mandatory a perversion or an undercutting of the Code; rather I would deem it not at all inappropriate since it would simply substitute a legal precept for the exercise of the lawyer's judgment.

My conclusion from all this is simply that the "gulf" that separates the Commission - or at least this Commissioner - from the responsible spokesmen of the Bar is one of rhetoric and not substance. I consider it most unfortunate that the actual resolution adopted by the ABA House of Delegates and the accompanying report did not reflect the cool, logical approach taken by the Committee on Counsel Responsibility and Liability in reporting to the Section on Corporation, Banking and Business Law. The form of that resolution and report may have been effective in securing House of Delegates' approval, but, unfortunately, those documents have obscured the real basis of accord which, if it exists at all, is contained in the full Committee report.

Another problem which intimately affects lawyers and their responsibilities these days is that pertaining to attorneys' responses to the customary inquiries of auditors at the time of audit with respect to the attorney's knowledge concerning litigation and other contingent liabilities. Prior to 1973, while I am sure many lawyers gave careful attention to the scope of the auditors' inquiry and the nature of their reply, nonetheless there was little discussion concerning the subleties of both the inquiry and the reply and relatively little concern with some of the nuances, implications and, for that matter, liability exposures inherent in the process. In the April 1973 issue of The Business Lawyer, Richard Deer, a prominent Indianapolis, Indiana corporate practitioner, discussed these problems in a penetrating and comprehensive article. Since then the subject has been one of major controversy and discussion between the auditing and legal professions, and, though the problem is being solved on an ad hoc, company-by-company, year-by-year basis between specific auditors and specific lawyers, the broader controversy appears at the moment to be at something of an impasse. The controversy was exacerbated this past week when the Auditing Standards Executive Committee of the American Institute of Certified Public Accountants issued a proposed statement on the subject which takes direct issue with the most recent position of the American Bar Association Committee working on the matter.

Let's begin with the basic concerns of each profession. An auditor when he performs an audit of financial statements is required to do that audit in accordance with generally accepted auditing standards and that is what his opinion says he has done. Generally accepted auditing standards require that he seek to the extent possible verification outside the representations of management with respect to the information contained in the financial statements. This is the reason he observes the counting of inventory, seeks confirmations of accounts receivable and sends, or more correctly, causes his client to send, inquiries to lawyers in a form prepared by the auditor concerning pending or threatening litigation and other contingent liabilities. Seeking this external confirmation of information furnished by management is an integral, and, in the eyes of the auditor, essential part of generally accepted auditing standards. The information and opinions furnished by the attorney have particular importance for several reasons. For one thing, the attorney's professional integrity is at stake in providing truthful answers; for another, the attorney is obviously in the best position, both vis-a-vis his client and professionally, to furnish the information and express opinions with respect to the possible outcome of litigation, damages which may be assessed and so on.

The attorney, however, feels restrained from giving a totally complete and candid answer to a broad inquiry by the concerns I have discussed earlier, namely, his ethical, and sometimes legal, obligation to preserve his client's confidences and secrets. In the opinion of many members of the legal profession, disclosing some matters that might be included within the definition of "contingency" or "contingent liability" might very well compromise the client's position, might conceivably adversely affect his negotiating position with respect to pending or threatening claims, and may, for that matter, be deemed to be admissions against interest in any trial. Thus, the attorney, duly sensitized by Dick Deer's article, is increasingly reluctant to make a clean breast of all that might be spoken in response to a broad inquiry from auditors.

In an effort to provide guidelines to attorneys, the Committee on Audit Inquiry Responses, which is a part of the ABA's Section on Corporation, Banking and Business Law, prepared a document entitled, "Proposed Guidelines for Lawyers' Responses to Auditors' Requests for Information." This met with criticism, not only from some auditors, but also from many attorneys, including particularly the American College of Trial Lawyers. That document was then amended and in July of this year the most recent version was published. This has been greeted with a notable lack of enthusiasm by accountants and they have suggested that if the legal profession en masse were to follow it, it could result in unfortunate consequences which I will detail shortly.

At the moment, it appears that the controversy centers on three points. These are: (1) when an auditor makes inquiry with regard to "contingencies" or "contingent liabilities," to what extent should an attorney furnish information concerning unasserted claims, that is, claims which persons may have against the corporation, but of which they may not be aware, or which, although aware of them, they have not actually asserted? There is no question that attorneys are expected to furnish information concerning the fact of litigation pending or claims that have been threatened; it is with respect to unasserted claims that the controversy relates; (2) the second area of controversy concerns when an attorney should express an opinion with respect to the expected outcome of pending or threatened litigation or unasserted claims; (3) finally, when may or should an attorney estimate the damages which might be asserted as a consequence of pending or threatened litigation or unasserted claims.

Financial Accounting Standards Board Opinion No. 5, entitled, "Accounting for Contingencies" establishes the benchmarks which govern the approach taken by auditors with regard to contingencies.

The opinion distinguishes the contingencies as to which an auditor must make an accrual against income and those which he must simply disclose, and, of course, by inference, indicates the sort of contingencies which need be neither accrued nor disclosed. A future loss contingency must be currently recorded as a liability if it is probable at the date of the financial statements that the outcome of the litigation, pending or threatened, would be unfavorable and if the amount of the loss can be reasonably estimated. Future loss contingencies must be disclosed, but not accrued, if one or the other of the above requirements is missing but in addition, it is reasonably possible that the outcome will be unfavorable. With regard to unasserted claims, the above tests apply but, in addition, to either accrue or disclose it must appear that the assertion of the claim is probable. It should be emphasized that these are standards which the auditor must follow in connection with the auditing of financial statements and thus a judgment that a contingency must be accrued or disclosed will result in public disclosure.

The American Bar Association committee establishes a somewhat different standard with respect to when attorneys should make disclosure about unasserted claims to auditors in response to the latter's inquiries in connection with an audit. The committee states that disclosure should be made by attorneys to auditors about such matters only in response to a specific request of the client to do so and only after the client has been informed with regard to the consequences of such disclosure. The routine request from the client in connection with an audit to inform the auditor with regard to contingencies or contingent liabilities is not regarded as sufficient. The report also states that an attorney should request clients to authorize disclosure only if the client believes that "assertion of the claim is imminent or, if not imminent, the likelihood that the claim will not be asserted is remote." Obviously, there is considerable difference between a standard that uses such words as "imminent" and "remote" and one which employs such words as "probable." Quite simply, there are matters which an attorney would not be permitted to disclose to the auditors under the Bar standard which the auditors would, by FASB Opinion No. 5, be compelled, if known, to disclose either through an accrual or otherwise in the financial statements - that is, an unasserted claim the assertion of which is probable but not imminent or as to which the possibility of assertion is not remote.

The second controversy centers upon the ABA's position with regard to the prediction of the outcome of pending or threatened litigation or unasserted claims. The committee states that an attorney should give an opinion with regard to the outcome of a pending or threatened matter, or a disclosable unasserted claim, only if an unfavorable outcome is either "probable" or "remote." These terms are defined in a very circumscribed fashion. An adverse outcome is regarded as "probable" when a claimant's chance of success is overwhelming and the prospect of the client's successfully defending is slight; conversely, an adverse outcome is "remote" when the client's chances of success are overwhelming and those of the claimant remote. Obviously, between these two extremes lies most of the litigation with which an attorney deals. While an attorney in discussing litigation with his client may exude optimism, nonetheless, in my estimation, it would be most infrequently that an adverse outcome would be either remote or overwhelming. All of us have had too much experience with the vagaries of juries and even judges. Furthermore, were an attorney to assert that an adverse outcome was either remote or overwhelming, the consequences to him professionally if he were wrong might be very drastic, not to mention the effect on his relationship with his client. Furthermore, any assertion that the likelihood of an adverse outcome was overwhelming disclosed in the financial statements would very gravely undercut any bargaining position which he had. The auditors are not seeing shadowy spectres when they suggest that attorneys following these standards would probably rarely be inclined to give any opinion suggesting the "probable" outcome of pending or threatened matters, not to mention the probable outcome of unasserted claims.

A final area of controversy concerns the quantification of any probable outcome. The Bar memorandum states that an attorney may only estimate the potential amount of loss or a range of loss if he believes that the probability of inaccuracy in his estimate is <u>slight</u>. Again, given the uncertainties of litigation, the number of instances in which the probability of inaccuracy in estimating the damages that might be awarded in a case would be slight will be very few. Even attorneys who might feel that they could foretell the outcome of a case in accordance with the suggested standards might be hesitant in putting a dollar estimate on that outcome. Thus once more, if this standard becomes widely used by the legal profession, auditors quite rightly can foresee a drying-up of opinion-type information in response to their letters to counsel.

What would be the consequences of Bar adherence to these standards in responding to auditors' inquiries? In all probability, we would see a much larger number of auditors' opinions qualified because of uncertainties concerning the outcome of litigation or unasserted claims. When a contingency exists that may, in the eventuality, impact the financial statements of a company in a material manner, but the extent of that impact is uncertain, an auditor will describe the uncertainty in a paragraph in his report and then in the opinion paragraph begin it with the words, "Subject to the outcome of the matters discussed above . . ." This is a signal to the reader that there is an uncertainty that may down the road impact the financial statements materially and the reader is cautioned to examine the statements with that uncertainty in mind. Since under the proposed Bar standards undoubtedly fewer and fewer attorneys would be inclined to predict the outcome of pending or threatened matters or to put dollar values on them, we may expect more "subject to" opinions. While obviously at the Commission we strongly prefer that as many uncertainties as possible be resolved so that investors may have as concise a picture as possible of the financial position or the results of operations of the company, nonetheless, we recognize that often there will be uncertainties that simply cannot be resolved at the financial statement date or the date of the auditor's opinion. If attorneys, either individually or as a group, determine reasonably that in accordance with a rational standard, they cannot respond meaningfully to the auditors' inquiry with regard to the probable outcome of the litigation or the dollars that may be involved in the outcome, I doubt whether we would be inclined to do anything, notwithstanding an increase in the number of qualified opinions. At the same time, where an unreasonable standard of certainty is created before an attorney can give a judgment as to the outcome of litigation, the Commission would be loath to accept a qualified opinion without some investigation of the facts involved in the specific case. If substantial uncertainty does exist and no reasonable estimate of uncertainty can be made, an auditor's report qualified as to uncertainty would be acceptable.

However, there is a graver concern and that is the possibility that in some circumstances, if attorneys follow the behest of the Bar committee, the result may not be opinions qualified as to uncertainty, but opinions qualified as to scope. When an auditor is unable to do in any measure what is required by generally accepted auditing standards he will typically qualify his opinion as to scope. For instance, if he is unable to observe physically the taking of inventory or use appropriate alternative means to ascertain it, or if he is unable to independently verify accounts receivable, then his opinion will usually be preceded by the words "Except for . . ." followed by an indication of the audit steps which were not able to be taken. Thus, if an auditor does not secure from the lawyer a letter in response to his inquiry, or if he regards the letter as insufficient for purposes of satisfying auditing standards, then he will likely qualify his opinion as to scope, thus indicating that an essential audit step has not been completed. The consequences of this are considerably graver than those with regard to an opinion qualified because of uncertainty. The Commission does not accept for filing under the 1933 Act registration statements which contain opinions qualified as to scope; thus, an issuer whose financial statements required to be included in the registration statement were accompanied by such a qualified opinion would be unable to register under the 1933 Act. This could obviously retard not only financing efforts but also, because of the necessity of registering securities in most acquisition transactions, thwart mergers and other acquisitions. Under the 1934 Act, a Form 10-K including such statements qualified as to scope would not be regarded as in compliance with the requirements under the 1934 Act and consequently the issuer would be in default under Section 13(a), a circumstance that might lead to a number of untoward consequences, not the least of which could be the suspension of trading. Furthermore lenders and other financial institutions tend to look askance at opinions qualified as to scope and in some circumstances such opinions might well cause a default under debt instruments.

The possibility that adherence by attorneys to the standards proposed by the Bar committee might eventuate in opinions limited as to scope is clearly stated in the recent exposure draft issued by the Auditing Standards Executive Committee. That draft states that "refusal" to furnish information with respect to pending litigation, to furnish information with respect to unasserted claims when the FASB Opinion No. 5 standards would require disclosure or accrual, or to furnish information concerning the likely outcome of litigation, claims and the like or the likely amount of loss, might result in a limitation as to scope. However, the exposure draft is not devoid of some hopeful glimmers. It recognizes the difficulty counsel may experience in assessing probabilities and likelihoods in the area of litigation:

> "A lawyer may be unable to respond concerning the probability of assertion of a claim or the likelihood of an unfavorable outcome of pending or threatened litigation, or the amount or range or potential loss because of inherent uncertainties. Factors influencing the likelihood of a claim being asserted or of an unfavorable outcome may sometimes not be within a lawyer's competence to judge, historical experience of the entity in similar litigation or the experience of other

> entities may not be relevant or available; and the amount of the loss frequently will be a subject of wide possible variance at many stages of litigation. Consequently, a lawyer may not be able to form a conclusion with respect to such matters. In such circumstances, the auditor ordinarily will conclude that the financial statements are affected by an uncertainty concerning the outcome of a future event which is not susceptible of reasonable estimation. If the effect of the matter on the financial statements could be material, the auditor ordinarily will conclude that he is unable to express an unqualified opinion."

Furthermore, the draft suggests that counsel may avoid the imposition upon his client of an opinion qualified as to scope because of his failure to give estimates or assessments of probability if he states "...that he has been unable to form a conclusion [i.e., a conclusion using FASB opinion standards] on such matters." Thus it would appear that where counsel so states, presumably honestly and sincerely, the auditor may give an opinion qualified because of uncertainty but need not qualify as to scope.

It is obviously of tremendous importance that the accounting and legal professions compose their differences in this area. While the Commission is reluctant to place itself between these two professional groups, nonetheless if we begin to receive a significant number of opinions qualified as to scope because of this controversy, then the problem truly becomes ours as well as that of the professions and the issuers and we will face it. While I am sympathetic with the legal profession's increasing reluctance, in the face of expanding liability concepts, to peer into the crystal ball and seek to ascertain the outcome of pending matters or to quantify the consequences of any foreseeable outcome, I would suggest that the standards suggested by the accounting profession may be more tolerable than appear at first blush and I would urge a renewed effort by the Bar to avoid inflicting upon their clients the distasteful consequences of opinions qualified as to scope. I suspect that clients, confronted with such a prospect, will find little consolation in semantic quarrels, and may say "A plague on both your houses..."

It has been suggested by some responsible accounting leaders that perhaps accountants should be relieved of the responsibility of making any statements with regard to unasserted claims not known to them and that in some fashion the burden with respect to disclosure of such unasserted claims should be placed upon counsel and issuers. Putting aside the question of the Commission's authority to compel this, it may well be that in the absence of an ability to reach an accommodation with regard to a mutually satisfactory formula, this would be a tenable course. However, clearly a preferable course would be one which preserved the traditional roles of auditor and counsel and imposed upon both of them comparable rules with regard to disclosure of unasserted claims.

The two problems I have discussed are obviously of great significance to virtually all lawyers. As is evident from the Code of Professional Responsibility, the problem of disclosing a client's past or intended wrongdoing is not confined to securities or corporate lawyers by any means. While the problem of counsel's communication to auditors may seem to be confined to those who have corporate practices, nonetheless, I think it has broader implications than that. In virtually every aspect of law practice there are communications between attorneys and other professionals. Essential to the effectiveness of professions is the confidence of each in the integrity of the other, in the candor of the other, and in the competence of the other. Unless the respective professions fully understand their roles, and relate them intelligently to each other, the public may impose upon them even more onerous standards than those they would impose upon themselves.