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THE ILLUSORY STATUTORY BASIS OF SEC RULE 2(e)

Congress established the Securities and Exchange Commission (SEC or Commission)¹ in 1934² to enforce federal securities laws and to regulate trading in securities.³ Congress noted the national public interest in creating reputable securities markets and vested the SEC with the authority to prescribe rules and regulations as required to foster integrity in securities transactions.⁴ Pursuant to congressional authorization, the SEC established a set of Rules of Practice.⁵ In 1935, the SEC promulgated rule 2(e) of the Rules of Practice,⁶ which provided for the regulation and discipline of professionals who "appear or practice"⁷ before the

¹ See 15 U.S.C. § 78d (1976 & Supp. V 1981) (creation of Securities and Exchange Commission). The Securities and Exchange Commission (SEC or Commission) is composed of five commissioners appointed by the President and confirmed by the Senate. *Id.* See generally Gadsby, *The Securities and Exchange Commission*, 11 B.C. INDUS. & COM. L. REV. 833 (1970).

² See Securities Exchange Act of 1934, ch. 404, § 4, 48 Stat. 881, 885 (codified as amended at 15 U.S.C. §§ 78a-78lll (1976 & Supp. V 1981)).

³ See 15 U.S.C. §§ 78b-78d (1976 & Supp. V 1981) (authority and jurisdiction of SEC). Congress established the SEC in the wake of the Great Depression and vested the Commission with broad powers to perfect the national market system for securities and to safeguard the rights of the investing public. *Id.* § 78b. Congress gave the SEC power to make rules and regulations "necessary and appropriate" to implement the SEC's statutory obligations. See *id.* § 78w(a)(1); *infra* text accompanying notes 149-52 (necessary and appropriate requirement).

⁴ See 15 U.S.C. § 78w(a)(1) (1976) (SEC general rulemaking power). The SEC cannot use its general rulemaking power to effect policy objectives contrary to congressional policy. See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979); *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) (quoting *Thorpe v. Housing Auth.*, 393 U.S. 268, 280-81 (1969)); *infra* text accompanying notes 149-52 (necessary and appropriate requirement).

⁵ See 17 C.F.R. § 201.1-28 (1982) (SEC Rules of Practice).

⁶ See *id.* § 201.2(e). SEC rule 2(e) provides in part that:
The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws, (15 U.S.C. § 77a-80b-20 (1976)), or the rules and regulations thereunder.

Id. § 201.2(e)(1). See generally Cheek, *Professional Responsibility and Self-Regulation of the Securities Lawyer*, 32 WASH. & LEE L. REV. 597 (1975) (rule 2(e) effects upon securities lawyer self-regulation); Matthews, *Liabilities of Lawyers Under the Federal Securities Laws*, 30 BUS. LAW. 105 (1975) (rule 2(e) applications); Johnson, *The Dynamics of SEC Rule 2(e): A Crisis for the Bar*, 1975 UTAH L. REV. 629 (1975) (rule 2(e) procedures explained); Comment, *SEC Disciplinary Rules and the Federal Securities Laws: The Regulation, Role and Responsibilities of the Attorney*, 1972 DUKE L.J. 969 (1972) (same).

⁷ See 17 C.F.R. § 201.2(e) (1982). The SEC did not define what exactly the rule 2(e) language "appearing or practicing" before the Commission entails. *Id.* The SEC does, however,

Commission.⁸ Additionally, rule 2(e) established an SEC practitioners' bar and required that attorneys join the SEC bar before appearing or practicing before the Commission.⁹ From 1935 to 1938, the SEC used rule 2(e) to regulate only those attorneys who appeared before the Commission in a representative capacity.¹⁰ Nonrepresentative attorneys acting as filing agents or policy advisors were immune from rule 2(e) prosecution.¹¹ In 1938, the Commission eliminated the requirement of membership in the SEC bar¹² and broadly construed the "appear or practice" language in rule 2(e),¹³ transforming rule 2(e) into a device for the regulation of all attorneys who act on behalf of clients in securities-related transactions.¹⁴

From 1935 until 1970, the SEC premised rule 2(e) liability upon at-

define "practice" in rule 2(g) as including the transaction of business with the Commission and the preparation of papers and opinion letters for SEC files. *See id.* § 201.2(g); *see also* Ferrara, *Administrative Disciplinary Proceedings Under Rule 2(e)*, 36 BUS. LAW. 1807, 1810-11 (1981). Former SEC General Counsel Ferrara contends that the SEC should consider the nexus that exists between the attorney practitioner's conduct and the SEC's administrative processes before determining, pursuant to rule 2(e), that the attorney appeared or practiced before the Commission. Ferrara, *supra*, at 1810-11; *see also* Dolin, *SEC Rule 2(d) After Carter-Johnson: Toward a Reconciliation of Purpose and Scope*, 9 SEC. REG. L.J. 331, 347-55 (1982). The SEC should define appearing or practicing narrowly to include only direct interactions and formal presentations before the Commission. Dolin, *supra*, at 347-55. *But see* remarks of Edward F. Greene, General Counsel of the SEC to the New York Lawyers' Association, *SEC Disciplinary Proceedings Against Lawyers Reviewed*, 187 N.Y.L.J. 15 at 1, col. 2. (Jan. 22, 1982) Greene argues that the SEC should define appearing or practicing broadly to include all possible situations in which an attorney practitioner can disrupt the integrity of the SEC's administrative processes. *Id.*

⁸ *See* 17 C.F.R. § 201.2(e) (1982) (SEC rule 2(e)).

⁹ *See* Rule II(h), [1935] SEC ANN. REPT. 45-46 (original version of SEC rule 2(e)); *see also* Marsh, *Rule 2(e) Proceedings*, 35 BUS. LAW. 987, 987-88 (1980) (SEC bar membership requirement).

¹⁰ *See* 1 FED. REG. 1753 (1938). While the SEC practitioner's bar was in operation the Commission could, in theory, discipline only attorneys who erred while appearing on behalf of clients before the Commission. *Id.* The SEC did not, however, institute any rule 2(e) proceedings against attorneys during the period from 1935 to 1938. *See In re Keating, Muething & Klekamp, Securities Exchange Act Release No. 15982* (July 2, 1979), *reprinted in* [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124, at 81,994 (Karmel, Comm'r, dissenting) (SEC brought first rule 2(e) proceeding against attorney in 1950); *see also In re Fleischman*, 37 S.E.C. 832, 833 (1950) (first rule 2(e) proceeding brought against attorney).

¹¹ *See* 1 FED. REG. 1753 (1938) (original rule 2(e) requiring membership in securities bar only applied to attorneys who appeared on behalf of clients); *see also supra* note 10 (narrow scope of rule 2(e) regulation from 1935 to 1938).

¹² *See* Securities Act Release No. 1761 (June 27, 1938), *reprinted in* 3 FED. REG. 1584 (1938) (SEC amendment to rule 2(e) deleting requirement that practitioner attorneys be members of SEC bar).

¹³ *See* Dolin, *supra* note 7, at 347-55 (explaining SEC's broad construction of the "appear or practice" language); *see also supra* note 7 (possible constructions of "appear or practice" language).

¹⁴ *See, e.g., In re O'Neill*, Securities Act Release No. 5938 (Aug. 3, 1978) (rule 2(e) proceeding against attorney who assisted client in concealing political payments to foreign governments); *in re Feld*, 46 S.E.C. 103, 103-04 (1975) (rule 2(e) proceeding against attorney who prepared misleading offering circular); *In re Keltner*, Securities Act Release No. 4738 (Nov. 30, 1964), *reprinted in* [1964-66 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,191 at

torney unfitness¹⁵ and primarily disciplined attorneys who, by committing subversive or perjurious actions, disrupted the Commission's administrative proceedings.¹⁶ If the SEC determined that an attorney did not possess the requisite professional qualifications to represent others,¹⁷ was lacking in elements of character or integrity,¹⁸ or was guilty of unethical or improper conduct,¹⁹ the attorney was subject to rule 2(e) disciplinary action.²⁰ In 1970, however, the SEC promulgated an amend-

82,266-67 (rule 2(e) proceeding against attorney who filed misleading statement with SEC); *In re Fleischman*, 37 S.E.C. 832, 833 (1950) (rule 2(e) proceeding against attorney who prepared and filed materially misleading documents with SEC); see also Downing & Miller, *The Distortion and Misuse of Rule 2(e)*, 54 NOTRE DAME LAW. 774, 786-88 (1979) (expansion of rule 2(e) liability); Marsh, *supra* note 9, at 988-89 (same).

¹⁵ See 17 C.F.R. § 201.2(e)(1)(i-ii) (1982) (original bases of rule 2(e) attorney liability); see also *infra* text accompanying notes 17-20 (same).

¹⁶ See, e.g., *In re Dewitt*, 38 S.E.C. 879, 879-80 (1959) (SEC permanently suspended SEC practice privilege of attorney who intentionally concealed information relevant to SEC investigation); *In re Dougherty* 38 S.E.C. 82, 82-83 (1957) (SEC permanently suspended SEC practice privilege of attorney who gave false testimony in SEC investigation); *In re Fleischman*, 37 S.E.C. 832, 832-33 (1950) (SEC suspended SEC practice privilege for two years of attorney who prepared and filed materially misleading documents); see also Marsh, *supra* note 9, at 990 (rule 2(e) proceedings prior to 1970). Rule 2(e) disciplinary action entails either temporary or permanent suspension of a practitioner attorney's privilege to practice before the Commission. See 17 C.F.R. § 201.2(e)(1) (1982) (SEC rule 2(e) sanctions).

¹⁷ See 17 C.F.R. § 201.2(e)(1)(i) (1982); 1 FED. REG. 1753 (1936); see also Barber, *Lawyer Duties in Securities Transactions Under Rule 2(e): The Carter Opinions*, 1982 B.Y.U. L. REV. 513, 520-21 (1982) (original bases of practitioner liability); Dolin, *supra* note 7, at 334-35 (same). When the Commission required that all attorney practitioners be members of the SEC bar, rule 2(e) provided a means by which the Commission could refuse an attorney admission to the SEC bar and thus effectively deny the attorney the privilege of engaging in SEC practice. See *In re Van Dorn*, 3 S.E.C. 267, 269 (1938) (SEC can deny audience to professionals who do not meet professional standards); 17 C.F.R. § 201.2(e)(1)(i) (1982) (practitioner attorneys must possess certain qualifications to represent others); see also Dolin, *supra* note 7, at 334-35. Today, membership in a state bar association constitutes conclusive evidence that an attorney possesses the requisite professional qualifications. See 5 U.S.C. § 500(b) (1976 & Supp. V 1981) (attorney duly admitted to state bar association may practice before administrative agencies).

¹⁸ See 17 C.F.R. § 201.2(e)(1)(ii) (1982); 1 FED. REG. 1753 (1936); see also Barber, *supra* note 17, at 520-21 (listing character and integrity as prerequisites for SEC practice); Dolin, *supra* note 7, at 334 (same).

¹⁹ See 17 C.F.R. § 201.2(e)(1)(iii) (1982); 1 FED. REG. 1753 (1936); see, e.g., *In re Feld*, 46 S.E.C. 103, 103-04 (1975) (circulation of misleading offering circular constitutes improper professional conduct that violates rule 2(e)); *In re Schwebel*, 40 S.E.C. 347, 371 (1960) (gross indifference to observation of laws constitutes unethical and improper professional conduct); *In re Dougherty*, 38 S.E.C. 82, 85-86 (1957) (giving false testimony to SEC during investigation constituted improper professional conduct); see also Barber, *supra* note 17, at 520-21 (improper or unethical conduct is basis for rule 2(e) disciplinary action); Dolin, *supra* note 7, at 334 (same); cf. Marsh, *supra* note 9, at 990-93 (application of improper or unethical conduct standard to rule 2(e) proceedings).

²⁰ See 17 C.F.R. § 201.2(e)(1) (1982). The SEC may deny attorney practitioners the privilege of appearing or practicing before the Commission temporarily or permanently. *Id.*; see also Marsh, *supra* note 9, at 993-1003 (administrative procedures involved in rule 2(e) proceedings).

ment to rule 2(e),²¹ subjecting attorneys to disciplinary action whenever a court of competent jurisdiction²² or the SEC in an administrative proceeding²³ determined that the attorney had willfully violated or aided and abetted the violation of any provision of the federal securities laws.²⁴ The 1970 amendment to rule 2(e) ushered in a new era of SEC administrative disciplinary action.²⁵ In essence, the SEC application of the amended rule 2(e) imposed upon practitioner attorneys a fiduciary duty to protect the interests of the securities trading public and safeguard the integrity of the securities markets by ensuring that clients obey federal securities laws.²⁶ The 1970 amendment to rule 2(e), however, conflicts with

²¹ See 17 C.F.R. § 201.2(e)(iii) (1982) (allowing rule 2(e) disciplinary sanction for willful violations or for willfully aiding and abetting violations of federal securities law).

²² See Securities Exchange Act of 1933, § 22, 15 U.S.C. § 77v (1976) (United States district courts have jurisdiction over offenses and violations of 1933 Securities Exchange Act); Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976) (United States district courts have jurisdiction over offenses and violations of 1934 Securities Exchange Act).

²³ See 5 U.S.C. §§ 554-559 (1976 & Supp. V 1981) (general federal administrative proceeding procedures); 15 U.S.C. §§ 78w(c)-78aa (1976 & Supp. V 1981) (SEC administrative proceeding procedures); 17 C.F.R. §§ 201.16-.28 (1982) (SEC Rules of Practice relating to administrative hearing procedures). An SEC administrative proceeding can take place as either an informal hearing or a formal trial before an administrative law judge. See 15 U.S.C. § 78v-2 (1976). Following the original proceeding, a party may appeal to the full Commission. See *id.* § 78y. See generally Marsh, *supra* note 9, at 993-1003 (explanation of SEC administrative procedures with regard to rule 2(e)).

²⁴ See Securities Act Release No. 5088 (Sept. 24, 1970) reprinted in [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,913, at 80,032 (amending rule 2(e) by adding rule 2(e)(1)(iii); see also 17 C.F.R. § 201.2(e)(iii) (1982) (rule 2(e)(i)(iii)). see generally Karmel, *Attorney's Securities Laws Liabilities*, 27 BUS. LAW 1153 (1972) (1970 amendment to rule 2(e) analyzed).

²⁵ See Lipman, *The SEC's Reluctant Police Force: A New Role For Lawyers*, 49 N.Y.U. L. REV. 437, 437-41, 468-72 (1974) (following promulgation of 1970 amendment to rule 2(e), SEC began disciplining attorney practitioners for failure to ensure that clients disclose required information); Marsh, *supra* note 9, at 991-92. In the 1970's, the SEC began asserting the authority to discipline any attorney who disregarded the affirmative duty to assist the Commission in ascertaining proper disclosure. *Id.*; see SEC v. National Student Mktg. Corp., 457 F. Supp. 682, 699-701 (D.D.C. 1978) (SEC disciplined attorney for failure to report client's true financial status to SEC when client refused to do so); *In re Fields*, 45 S.E.C. 262, 263 (1973) (SEC instituted rule 2(e) proceeding against attorney for violating duty to protect integrity of market processes). See generally Lowenfels, *Expanding Public Responsibilities of Securities Lawyers: An Analysis of the New Trend in Standard of Care and Priorities of Duties*, 74 COLUM. L. REV. 412 (1974) (increase in rule 2(e) enforcement and liability after 1970); Sommer, *The Emerging Responsibilities of the Securities Lawyer*, [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,631 at 83,386 (1974) (same).

²⁶ See SEC v. National Student Mktg. Corp., 457 F. Supp. 683, 713-14 (D.D.C. 1978) (securities lawyers' duty to ensure that clients obey securities laws); *In re Keating*, Muething & Klekamp, Securities Exchange Act Release No. 15982 (July 2, 1979), reprinted in [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,989 (SEC suspended privilege of law firm to practice before Commission for not discovering client's failure to disclose required information); *In re Feld*, 46 S.E.C. 103, 103-04, 108 (1975) (SEC disciplined attorney for failing to prevent violation of securities laws by client); *In re Ferguson*, Securities Act Release No. 5523 (Aug. 21, 1974) (SEC disciplined attorney for failing to detect and prevent client nondisclosure). See generally Goldberg, *Ethical Dilemma: Attorney-Client Privilege vs. the*

the time-honored adversary ethic embodied in legal representation by requiring attorneys to police client conduct.²⁷

The 1970 amendment to rule 2(e) and the SEC's subsequent determination that attorney practitioners must take affirmative steps toward ensuring client compliance with securities laws²⁸ generated concern in the legal community for two reasons. First, in finding an affirmative duty to dissuade clients from violating federal securities laws,²⁹ the SEC implied that attorney practitioners must serve as enforcement agents for the Commission and not merely as zealous advocates for client concerns.³⁰ Second, the SEC's imposition of a stricter standard regarding attorney responsibility for client conduct resulted in a dramatic increase in the number of rule 2(e) disciplinary proceedings against attorneys.³¹ The SEC's ag-

National Student Marketing Doctrine, 1 SEC. REG. L.J. 297 (1974); Lowenfels, *supra* note 25; 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).

²⁷ See Myers, *The Attorney-Client Relationship and the Code of Professional Responsibility: Suggested Attorney Liability For Breach of Duty to Disclose Fraud to the Securities and Exchange Commission*, 44 FORDHAM L. REV. 1113, 1138-44 (1976) (rule 2(e) forces securities lawyers to consider factors other than sole interests of clients); Note, *A Securities Lawyer's Dilemma: The SEC's Policy of Disclosure v. the Attorney-Client Privilege*, 15 SAN DIEGO L. REV. 797, 803-10 (1978) (SEC rule 2(e) disclosure requirements weaken attorney-client privilege).

²⁸ See *supra* text accompanying notes 21-26 (shift in SEC enforcement philosophy after 1970).

²⁹ See SEC v. National Student Mktg. Corp., 457 F. Supp. 682, 713-14 (D.D.C. 1978) (securities lawyers have affirmative duty to investing public to ensure that clients make proper financial disclosure). See generally Goldberg, *supra* note 26 at 297-99; Shipman, *supra* note 26 at 231-38; Note, *supra* note 27, at 803-10.

³⁰ See SEC v. National Student Mktg. Corp., [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,360, at 91,913 (D.D.C. Feb. 3, 1972) (securities lawyers' duty to public). But see ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 4 (1971) (lawyer should preserve the confidences and secrets of client). The American Bar Association (ABA) and the SEC have differed over the appropriateness of the affirmative duty to disclose enunciated in *National Student Marketing*. See Address by SEC Commissioner A. A. Sommers, Jr., *The Commission and the Bar: Forty Good Years*, Annual Luncheon of ABA Section of Corporation, Banking and Business Law, Honolulu, Hawaii (Aug. 14, 1974), reprinted in Mathews, *Liabilities of Lawyers Under the Federal Securities Laws*, 30 BUS. LAW. 105, 119 (1975). The ABA has criticized the SEC's *National Student Marketing* affirmative duty to disclose standard because the standard requires an attorney who discovers a client's illegality to disclose the discovered information in instances when the ABA's ethical standard would not require disclosure. Compare ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B)(1) (1971) (disclosure optional) with SEC v. National Student Mktg. Corp., 457 F. Supp. 682, 713-14 (D.D.C. 1978). See generally Kidston, *Current Developments in Attorney-Client Privilege*, 36 BUS. LAW. 701 (1981); Myers, *supra* note 27, at 1138-44.

³¹ See *In re Keating, Muething & Klekamp*, Securities Exchange Act Release No. 15982 (July 2, 1979), reprinted in [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,990 (concurring opinion of SEC Chairman Williams). From 1935 to 1979, the SEC instituted 100 rule 2(e) proceedings against attorneys. *Id.* From 1970 to 1979, the SEC instituted 85 rule 2(e) proceedings against attorneys. *Id.* at 81,994 (dissenting opinion of SEC Commissioner Karmel). According to Chairman Williams and Commissioner Karmel, 85% of all rule 2(e) proceedings brought against attorneys occurred after the SEC promulgated the 1970 amendment to rule 2(e). See Marsh, *supra* note 9, at 988-89. Another investigation,

gressive stance on rule 2(e) liability motivated attorney practitioners to challenge the propriety of rule 2(e) as a disciplinary instrument.³² Securities lawyers questioned whether rule 2(e) possessed an underlying statutory basis,³³ whether the Commission had overstepped its congressional mandate in promulgating disciplinary rules,³⁴ and whether the Commission had the authority to define minimum standards of professional conduct.³⁵ In three separate cases after 1970, SEC practitioners attacked the statutory validity of rule 2(e) and the authority of the SEC to promulgate disciplinary rules.³⁶ In each case, the Commission successfully defended SEC power to suspend or disbar attorneys from securities practice.³⁷ In the most recent case,³⁸ the Commission formally enunciated

which, unlike Chairman Williams' and Commissioner Karmel's survey, did not have access to nondisclosable SEC records, showed that the SEC brought 63 rule 2(e) proceedings against attorneys during the 1970-79 period. Marsh, *supra* note 9, at 988-89. The investigation shows that 63% of all rule 2(e) proceedings brought against attorneys occurred after the SEC promulgated the 1970 amendment to rule 2(e). *Id.*

³² See Block and Ferris, *SEC Rule 2(e)—A New Standard For Ethical Conduct Or An Unauthorized Web of Ambiguity?*, 11 CAP. U. L. REV. 501, 508-12, 516-24 (1982); see also *infra* text accompanying notes 32-34 (listing three major challenges securities lawyers have lodged against rule 2(e)).

³³ See, e.g., SEC v. Csapo, 533 F.2d 7, 10-11 (D.C. Cir. 1976) (attorney practitioners questioned rule 2(e)'s statutory basis); Kivitz v. SEC, 475 F.2d 956, 962 (D.C. Cir. 1973) (attorney practitioner claimed rule 2(e) is ultra vires administrative promulgation); Schwebel v. Orrick, 153 F. Supp. 701, 702-03 (D.D.C. 1957) (attorney practitioner attacked SEC's authority to promulgate rule 2(e)), *aff'd on other grounds*, 251 F.2d 919 (D.C. Cir.), *cert. denied*, 356 U.S. 927 (1958).

³⁴ See *In re Keating, Muething & Klekamp*, Securities Exchange Act Release No. 15982 (July 2, 1979), *reprinted in* [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,988-89 (attorney practitioner claimed rule 2(e) not necessary and appropriate to achieve proper SEC objectives); 15 U.S.C. §§ 78b-d, 78w(a)(1) (1976 & Supp. V 1981) (congressional mandate for SEC to promulgate necessary and appropriate rules).

³⁵ See *In re Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,184 (Mar. 7, 1979) (attorneys contest authority of SEC to determine ethical standards for legal profession), *aff'd*, Securities and Exchange Commission Release No. 34-17597 (Feb. 28, 1981), *reprinted in* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,169-70 (attorneys contest SEC minimum conduct standard for attorney practitioners).

³⁶ See *Touche, Ross & Co. v. SEC*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 to 93,498-99 (S.D.N.Y. Apr. 24, 1978), *aff'd*, 609 F.2d 570, 572 (2d Cir. 1979); *In re Keating, Muething & Klekamp*, Securities Exchange Act Release No. 15982 (July 2, 1979), *reprinted in* [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,988-89; *Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,184 (Mar. 7, 1979), *rev'd on other grounds*, Securities and Exchange Commission Release No. 34-17597 (Feb. 28, 1981), *reprinted in* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,169-70.

³⁷ See *Touche, Ross & Co. v. SEC*, 609 F.2d 570, 581-82 (2d Cir. 1979) (upholding validity of rule 2(e)); *In re Keating, Muething & Klekamp*, Securities Exchange Act Release No. 15982 (July 2, 1979), *reprinted in* [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,988-89 (full Commission upheld validity of rule 2(e)); *In re Carter*, Securities and Exchange Commission Release No. 34-17597 (Feb. 28, 1981), *reprinted in* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,169-70 (full Commission upheld validity of rule 2(e) and SEC minimum conduct standard for practitioner attorneys).

³⁸ *In re Carter*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,184 (Mar.

a minimum standard of conduct for practitioner attorneys³⁹ that represents the SEC's furthest and most current extension of rule 2(e) liability.⁴⁰

In the first of the three cases, *Touche, Ross & Co. v. SEC*,⁴¹ a large international accounting firm challenged the SEC's authority to regulate the right of professional practitioners to appear before the Commission.⁴² Touche, Ross & Co. (Touche Ross) sought declaratory relief⁴³ in the district court for the Southern District of New York and asked that the district court enjoin the SEC from conducting rule 2(e) proceedings.⁴⁴ The SEC had instituted rule 2(e) proceedings against Touche Ross one month prior to Touche Ross' commencement of the action for declaratory and injunctive relief,⁴⁵ but the SEC did not pursue the rule 2(e) proceeding until after both the district court and the Second Circuit, on appeal, had heard Touche Ross' arguments against rule 2(e).⁴⁶ Before the district court,

7, 1979), *rev'd on other grounds*, Securities and Exchange Commission Release No. 34-17597 (Feb. 28, 1981), *reprinted in* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,169-70.

³⁹ See *In re Carter*, Commission Release No. 34-17597 (Feb. 28, 1981), *reprinted in* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 to 84,172. The SEC's minimum standard of conduct, enunciated in *Carter*, provides that when a lawyer, who has significant responsibilities in effectuating a client company's compliance with federal disclosure requirements, becomes aware that the client is not complying with disclosure requirements, the lawyer must take affirmative action to remedy the nondisclosure problems or face rule 2(e) disciplinary action. See *id.*

⁴⁰ See Remarks of Edward F. Greene, General Counsel of the SEC, to the New York Lawyers' Association, *SEC Disciplinary Proceedings Against Lawyers Reviewed*, January 13, 1982, *reprinted in* 187 N.Y.L.J. 15 at 1, col. 2 (Jan. 22, 1982) (the SEC's *Carter* conduct standard is still in force); transcript of interview with John S. R. Shad, Chairman of SEC, *Shad Delineates His Goals As Commissioner Chairman To Streamline SEC Rules*, December 14, 1981, *reprinted in* 186 N.Y.L.J. 113 at 51, col. 1 (Dec. 14, 1981) (SEC will apply *Carter* standard in determining rule 2(e) liability of attorney practitioners); see also Dolin, *supra* note 7, at 345-46 (implications of *Carter* standard upon securities practice).

⁴¹ *Touche, Ross & Co. v. SEC*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,497 (S.D.N.Y. Apr. 24, 1978), *aff'd*, 609 F.2d 570 (2d Cir. 1979).

⁴² See *Touche Ross*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,498-99 (*Touche, Ross* challenged rule 2(e) at trial); *Touche Ross*, 609 F.2d at 573 (*Touche Ross* challenged rule 2(e) on appeal).

⁴³ See *Touche Ross*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,498. *Touche Ross* sought to have the district court declare rule 2(e) an invalid administrative promulgation. *Id.*

⁴⁴ See *Touche Ross*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,498. *Touche Ross* sought injunctive relief and argued that irreparable harm would result if the district court allowed the SEC to decide the legal question pertaining to rule 2(e)'s validity. *Id.*

⁴⁵ See *Touche, Ross & Co.*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,720 at 86,862 (Sept. 2, 1976) (SEC instituted rule 2(e) proceedings against *Touche Ross*).

⁴⁶ See *Touche Ross*, 609 F.2d at 582 (Second Circuit allowed SEC to pursue rule 2(e) proceedings against *Touche Ross* following *Touche Ross*' unsuccessful appeal). The SEC formally instituted rule 2(e) proceedings against *Touche Ross* after holding an investigatory hearing to determine if grounds existed to cite the firm for a rule 2(e) violation. See *in re Touche, Ross & Co.*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,720, at 86,862 (Sept. 2, 1976); see also 15 U.S.C. § 78u(a) (1976 & Supp. V 1981) (power of SEC to hold

Touche Ross argued that rule 2(e) was invalid both because the SEC lacked statutory authority to hold disciplinary proceedings and because the proceedings were inherently biased and violative of the practitioners' due process rights.⁴⁷ The accounting firm also alleged that the SEC, as an administrative body, could not adjudicate the strictly legal questions concerning the Commission's statutory authority to promulgate rule 2(e)⁴⁸ and claimed that Touche Ross faced irreparable harm if the district court allowed the SEC to determine the strictly legal questions administratively.⁴⁹ The district court ruled that Touche Ross did not establish that the SEC exceeded its statutory authority in promulgating rule 2(e)⁵⁰ and did not prove that the rule 2(e) proceedings were either biased or violative of the firm's due process rights.⁵¹ Furthermore, the district court held that, since Touche Ross had not shown that the SEC clearly had violated its statutory authority,⁵² the SEC properly brought

the investigatory hearing). Following the institution of rule 2(e) proceedings, the SEC would have brought the case before an administrative law judge for trial de novo. *See* 5 U.S.C. §§ 554-559 (1976 & Supp. V 1981) (Administrative Procedure Act provisions for trial de novo); 15 U.S.C. § 78v (1976) (Securities Exchange Act of 1934 provision for trial de novo). Touche Ross, however, appealed directly to federal court rather than appearing before an administrative law judge. *See Touche Ross* [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415, at 93,502 (S.D.N.Y. Apr. 24, 1978) (*Touche Ross* trial). Following a trial before an administrative law judge, a rule 2(e) defendant may appeal the administrative law judge's decision to the full Commission. *See* 15 U.S.C. § 78d-1(b) (1976) (right to appeal to full Commission), 17 C.F.R. § 201.17 (1982) (appellate procedure). A rule 2(e) defendant may obtain review of the full Commission's decision in federal district court. *See* 15 U.S.C. § 78y(a) (1976) (review by federal court).

⁴⁷ *Touche Ross*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,498-99. Touche Ross argued that the SEC showed bias by opening the proceeding against Touche Ross to the public. *Id.* at 93,498. Rule 2(e) authorizes the SEC to open any rule 2(e) proceeding to the public. 17 C.F.R. § 201.2(e)(7) (1982). *See* [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,498. Touche Ross argued that the rule 2(e) administrative proceeding violated the due process clause of the fifth amendment because rule 2(e) was invalid and therefore could not rightfully serve as the basis for an administrative proceeding. *Id.*; *see also* U.S. CONST., amend. V (constitutional due process requirement). Touche Ross contended that rule 2(e) was invalid because the SEC possessed no authority to discipline professional practitioners. *See* [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,498.

⁴⁸ *Touche Ross*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,499 (Touche Ross' objections to SEC's attempts to adjudicate strictly legal issue).

⁴⁹ *Id.* at 93,499-500. (Touche Ross claim that irreparable harm would ensue if district court forced exhaustion of administrative remedies). Touche Ross argued that an administrative law judge lacks the jurisdiction and ability to decide questions involving the validity of SEC administrative rules and procedures. *Id.* at 93,499. Touche Ross contended, therefore, that the rule requiring exhaustion of administrative remedies would force Touche Ross to submit to the authority of a court acting without jurisdiction. *Id.* at 93,499-500.

⁵⁰ *Id.* at 93,500-02. The district court held that the SEC had implicit authority, pursuant to the Commission's general rulemaking power, to promulgate rule 2(e). *Id.* at 93,500.

⁵¹ *Id.* at 93,499-502.

⁵² *Id.* at 93,500; *see* 15 U.S.C. § 78w(a)(1) (1976) (administrative agency's rulemaking power to promulgate necessary and proper administrative rules).

the rule 2(e) proceeding against Touche Ross⁵³ and Touche Ross must exhaust all administrative remedies before obtaining judicial review of the SEC's rule 2(e) decision.⁵⁴

On appeal to the Second Circuit, Touche Ross again attacked the validity of rule 2(e), and argued that the SEC had exceeded its statutory authority in promulgating rule 2(e).⁵⁵ The Second Circuit first held that Touche Ross did not need to exhaust all possible administrative remedies before obtaining judicial review of the SEC's statutory authorization to promulgate rule 2(e).⁵⁶ The Second Circuit then considered the statutory basis of rule 2(e)⁵⁷ and determined that the SEC lacked express statutory authority to regulate and discipline professional practitioners.⁵⁸ Nevertheless, the Second Circuit upheld the validity of rule 2(e) on several theories.⁵⁹ The *Touche Ross* court found that the Commission possessed inherent authority to protect the integrity of SEC administrative processes⁶⁰ and implied authority to prescribe rules necessary and appropriate⁶¹ to execute SEC policies.⁶² In addition, the *Touche Ross* court determined that rule 2(e) was valid, despite the absence of SEC express authorization to discipline attorney practitioners, because rule 2(e) disciplinary power constituted a legitimate, reasonable and direct adjunct to the Commission's

⁵³ See *Touche Ross*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,503 (district court's finding that rule 2(e) proceeding against Touche, Ross was not improper).

⁵⁴ See *id.* at 93,502-03 (rule requiring exhaustion of administrative remedies precedent to judicial review does not cause irreparable injury), *rev'd*, *Touche, Ross & Co. v. SEC*, 609 F.2d 570, 574-77 (2d Cir. 1979); see also *Myers v. Bethlehem Shipbldg. Corp.*, 303 U.S. 41, 51 (1938) (litigant must exhaust administrative remedies before seeking judicial review); *United States v. Sing Tuck*, 194 U.S. 161, 167 (1904) (same). *But see* *McKart v. United States*, 395 U.S. 185, 193 (1969) (exhaustion of administrative remedies rule is subject to numerous exceptions); *Leedom v. Kyne*, 358 U.S. 184, 188-89 (1958) (exhaustion of administrative remedies rule does not apply when litigant contests jurisdiction of agency to hold administrative proceeding). See generally *Berger, Exhaustion of Administrative Remedies*, 48 YALE L.J. 981 (1939).

⁵⁵ *Touche, Ross & Co. v. SEC*, 609 F.2d 570, 573 (2d Cir. 1979).

⁵⁶ See *id.* at 574-77. The Second Circuit determined that the issue in *Touche Ross* involved only the validity of rule 2(e) and was purely a question of statutory interpretation. *Id.* at 577. Since *Touche Ross* involved only a question of statutory interpretation, the Second Circuit held that the rule requiring exhaustion of administrative remedies did not apply. *Id.*; see also *supra* note 54 (exhaustion of administrative remedies requirement).

⁵⁷ See *Touche Ross*, 609 F.2d at 577-82 (Second Circuit considered whether rule 2(e) was valid).

⁵⁸ See *id.* at 570 (rule 2(e) has no express statutory basis).

⁵⁹ See *infra* text accompanying notes 60-64 (Second Circuit's theories validating rule 2(e)).

⁶⁰ See *id.* at 581. The Second Circuit determined that if incompetent or unethical practitioners were allowed to file and certify clients' financial statements, the reliability of the SEC's disclosure process would be impaired. *Id.*; see also *infra* text accompanying notes 123-46 (SEC's inherent power to make rules).

⁶¹ See 15 U.S.C. § 78w(a)(1) (1976) (SEC's power to promulgate necessary and appropriate rules); see also *infra* text accompanying notes 147-73 (SEC's implicit power to make rules).

⁶² 609 F.2d at 577-78 (SEC had implied authority to promulgate rule 2(e)).

explicit statutory power.⁶³ Finally, the Second Circuit found support for rule 2(e)'s validity in the fact that every court which had adjudicated a rule 2(e) case had upheld rule 2(e)'s validity.⁶⁴ Although *Touche Ross* pertained to accountant liability under rule 2(e), the Second Circuit, in strong dicta, declared that if rule 2(e) was valid against accountants, rule 2(e) was also valid against attorneys.⁶⁵

Two months after the Second Circuit decided *Touche Ross*, the SEC in *In re Keating, Muething & Klekamp*⁶⁶ brought rule 2(e) proceedings against a law firm and relied upon *Touche Ross* to support the validity of rule 2(e).⁶⁷ In an administrative hearing before the full Commission,⁶⁸ the SEC found that the law firm of Keating, Muething & Klekamp had not taken adequate measures to ensure that staff attorneys filed accurate disclosure documents for firm clients with the SEC.⁶⁹ The SEC then found that the firm negligently conducted its securities practice, and that the firm's negligence constituted improper professional conduct under rule 2(e).⁷⁰ In light of the findings, the SEC instituted disciplinary proceedings against the firm.⁷¹ In a concurring opinion, SEC Chairman Williams claimed that the Second Circuit's *Touche Ross* explanation of rule 2(e)'s validity provided a rationale for disciplining either accountants or attorneys.⁷² Chairman Williams also noted, as an additional basis for maintaining rule 2(e) sanctions, the SEC's inability to assure that all securities traders abide

⁶³ *Id.* at 579-80 (SEC had adjunctive authority to promulgate rule 2(e)); *see also infra* text accompanying notes 174-82 (SEC's adjunctive power to make rules).

⁶⁴ 609 F.2d at 578.

⁶⁵ *See id.* at 580-81 (rule 2(e) applies to both accountants and attorneys).

⁶⁶ Securities Exchange Act Release No. 15982 (July 2, 1979), *reprinted in* [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,981.

⁶⁷ *See id.* at 81,990 (Williams, Chairman, concurring).

⁶⁸ *See id.* at 81,989; *see also* 15 U.S.C. § 78d-1(a)(b) (1976) (right of rule 2(e) defendant to seek review before full Commission).

⁶⁹ [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,988-89.

⁷⁰ *Id.* The SEC found that the firm of Keating, Muething & Klekamp was involved so directly in its client's disclosure operations that the firm must have known about the client's failure to disclose material information. *Id.* The Commission held that the firm engaged in improper and unethical conduct by neglecting to take action to ensure that the client did disclose the required information after discovering the extent of the client's nondisclosure. *Id.* at 81,989. The Commission also held that the firm's silence after discovering the client's illegalities made the firm an aider and abettor to the illegality. *Id.*; *see SEC v. Spectrum, Ltd.*, 489 F.2d 534, 541-42 (1973) (attorney was aider and abettor to client illegality premised on attorney negligence). *See generally* Slain, *supra* note 24 (lack of attorney diligence may serve as basis for rule 2(e) liability); Note, "Due Diligence" and the Expert in Corporate Securities Registrations, 42 S. CAL. L. REV. 293, 301-08 (1969) (same).

⁷¹ [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,989. Although the Commission formally instituted rule 2(e) proceedings against Keating, Muething & Klekamp, the Commission accepted the firm's offer of settlement upon the firm's promise to adopt internal, self-regulatory practices to ensure that the firm makes proper disclosures in the future. *Id.*; *see* 17 C.F.R. § 201.8 (1982) (settlement procedure).

⁷² *See* [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,990 (Williams, Chairman, concurring).

by all federal securities laws.⁷³ Chairman Williams argued that the SEC requires the conscripted aid of practitioner attorneys to prevent securities law violations.⁷⁴

SEC Commissioner Karmel, dissenting, argued against the validity of rule 2(e) as a device for disciplining attorneys⁷⁵ and distinguished *Touche Ross* by suggesting that the SEC should hold accountants to a different standard of liability than attorneys.⁷⁶ The dissent contended that the SEC had absolutely no congressional authority to discipline attorneys under rule 2(e)⁷⁷ but believed that, because Congress had given the SEC express statutory authority to regulate accounting standards, the *Touche Ross* court was correct in finding that the SEC had implied authority to discipline accountants under rule 2(e).⁷⁸ The dissent also argued that the disciplining of an attorney by an administrative agency necessarily infringed upon the authority of federal and state courts to regulate the conduct of the bar.⁷⁹ The dissent noted that judicial authority to discipline attorneys considerably weakened the SEC's claim that rule 2(e) disciplinary power over attorneys was a necessary and appropriate instrument for effectuating SEC policies.⁸⁰ The dissent contended that the SEC did not require the conscripted aid of practitioner attorneys to maintain an effective level

⁷³ See *id.* at 81,991.

⁷⁴ See *id.* The Commission first articulated the view that attorneys should aid the SEC in uncovering securities laws violations in *In re Fields*. See *In re Fields*, Securities Act Release No. 5404 (June 18, 1973), reprinted in [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,407 at 83,172. See generally Lipman, *supra* note 25, at 440-42 (SEC premises rule 2(e) liability upon attorney failure to police clients).

⁷⁵ [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,992 (Karmel, Comm'r, dissenting).

⁷⁶ *Id.* at 81,993. The *Keating* dissent argued that Congress had, by statutory authorization, given the SEC statutory authority to regulate the accounting profession but had granted no authority to regulate the legal profession. *Id.* at 81,992; see 15 U.S.C. §§ 77s(a), 77aa (1976 & Supp. V 1981) (SEC's statutory authority to regulate accounting profession). Furthermore, the dissent contended that administrative regulation of the practitioner attorney bar would harm the legal profession by weakening the adversary ethic. [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,996.

⁷⁷ See *id.* at 81,993-95. The *Keating* dissent argued that courts, not federal agencies, have plenary jurisdiction to discipline the legal profession. *Id.*; see also *Kivitz v. SEC*, 475 F.2d 956, 961 (D.C. Cir. 1973) (SEC lacks express authority to regulate attorneys).

⁷⁸ See [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,993 (Karmel, Comm'r, dissenting). The *Keating* dissent contended that language contained in the 1934 Securities Exchange Act, granting the SEC power to define accounting standards implied the SEC authority to regulate the accounting profession. *Id.*; see 15 U.S.C. §§ 77s(a), 77aa (1976 & Supp. V 1981) (Schedule A) (SEC authority to regulate accounting standards). See generally Comment, *Regulation of the Accounting Profession Through Rule 2(e) of the SEC's Rules of Practice: Valid or Invalid Exercise of Power?*, 46 BROOKLYN L. REV. 1159, 1172-79 (1980) (SEC's rule 2(e) authority to regulate accountants).

⁷⁹ See [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,996 (Karmel, Comm'r, dissenting).

⁸⁰ See *id.* at 81,992 (Congress gave the SEC power to promulgate necessary and proper rules); *id.* at 81,996 (regulation of attorneys is not necessary and appropriate).

of enforcement⁸¹ and argued that any rule which required attorneys to function as SEC enforcement agents would undermine the adversary system of legal representation.⁸² Finally, the dissent suggested that if the SEC used rule 2(e) against attorney practitioners at all, the SEC should discipline only those attorneys who act unethically or improperly while personally representing⁸³ clients before the Commission.⁸⁴

In 1981, a well-publicized attack on the validity of rule 2(e) appeared in the *In re Carter* opinions.⁸⁵ In *in re Carter*, the SEC instituted rule 2(e) proceedings against two attorneys⁸⁶ and charged that the attorneys had willfully aided and abetted violations of the 1934 Securities Act (*Carter* trial).⁸⁷ Following a finding of guilty and imposition of a sanction⁸⁸ by an administrative law judge, the two attorneys appealed the *Carter* trial ruling to the full Commission (*Carter* appeal).⁸⁹ At the *Carter* trial, the SEC alleged that the two attorneys, representing a corporate client, willfully aided and abetted the violation of securities disclosure requirements by failing to ensure that the corporation's management made proper disclosures as required by the securities laws⁹⁰ and by failing to report the management's nondisclosures to the corporation's board of directors.⁹¹ The SEC also claimed that the attorneys, by not ensuring that the corporation made proper disclosures, engaged in unethical and improper professional conduct.⁹² The two attorneys did not attack the factual allega-

⁸¹ See *id.* at 81,996.

⁸² See *id.* at 81,992.

⁸³ See *id.* at 81,995. The dissent contended that attorneys who do not appear on behalf of clients before the Commission should be immune from rule 2(e) liability. *Id.* See generally Dolin, *supra* note 7, at 347-55 (explaining SEC's broad construction of appear or practice language in rule 2(e)); *supra* note 7 (appear or practice language).

⁸⁴ [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,995 (Karmel, Comm'r, dissenting).

⁸⁵ [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,165, 82,184 (Mar. 7, 1979), *rev'd on other grounds*, Securities and Exchange Commission Release No. 34-17597 (Feb. 28, 1981), *reprinted in* (1981 Transfer Binder) FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,145.

⁸⁶ See [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,166. In *Carter*, the SEC instituted rule 2(e) proceedings against two attorneys of the New York City law firm of Brown, Wood, Ivey, Mitchell & Petty. *Id.*

⁸⁷ See *id.* at 82,169-69 (SEC charges against two attorney-defendants).

⁸⁸ See *id.* at 82,187. The Commission found both attorneys guilty of rule 2(e) violations and denied both attorneys the privilege of appearing and practicing before the Commission for the periods of one year and nine months, respectively. *Id.*

⁸⁹ See *In re Carter*, Commission Release No. 34-17597 (Feb. 28, 1981), *reprinted in* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) § 82,847 at 84,145; see also 15 U.S.C. § 78d-1(a)(b) (1976) (statutory right to appeal to the full Commission); 17 C.F.R. § 201.17 (1982) (appellate procedure).

⁹⁰ See [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,168.

⁹¹ See *id.* at 82,169.

⁹² See *id.* at 82,180-84 (SEC charged that two attorneys acted unethically and improperly); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1979) (lawyer must exert best efforts to ensure proper disclosure by client); EC 5-18 (1979) (lawyer must advise client corporation's board of directors when corporation's management refuses to disclose proper information).

tions contained in the SEC's charges against them.⁹³ Instead, the two attorneys argued that the rule 2(e) standard was unconstitutionally vague⁹⁴ because the standard failed to define what actions or inactions would constitute unethical or improper professional conduct.⁹⁵

In the *Carter* trial, the administrative law judge determined that the defendant attorneys' failure to take either affirmative action to ensure that the corporation's management made proper disclosure or to communicate management's improper disclosure to the corporation's board of directors constituted unethical and improper conduct in violation of rule 2(e).⁹⁶ The administrative law judge rejected the defendant attorneys' arguments that the rule 2(e) standards were unconstitutionally vague and determined that the two attorneys could have found the applicable standards by consulting the American Bar Association's Code of Professional Responsibility⁹⁷ and the SEC's pronouncements in prior rule 2(e) proceedings.⁹⁸ The two attorney defendants appealed to the full Commission.⁹⁹ On appeal, the two attorney defendants again attacked the validity of rule 2(e) and claimed that the standard contained in rule 2(e) was unconstitutionally vague¹⁰⁰ but also argued that the 1970 amendment

⁹³ See [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,180 (attorney defendants chose affirmative defense rather than contesting underlying facts in SEC's complaint against them).

⁹⁴ See *id.* at 82,184 (attorney's claim that rule 2(e) was invalid); *id.* at 82,180 (attorney's claim that rule 2(e) was unconstitutionally vague).

⁹⁵ See *id.* at 82,180 (claim that rule 2(e) was unconstitutionally vague); see also *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939). A penal or disciplinary statute is unconstitutional if the statute possesses vague standards that do not provide notice to potential defendants by advising when disciplinary action is appropriate. See *Lanzetta*, 306 U.S. at 458.

⁹⁶ [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,186-87 (finding of rule 2(e) violations); see 17 C.F.R. § 201.2(e)(1)(ii) (1982) (1970 amendment to rule 2(e)); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1979) (attorney for corporate client must report corporate management's violations of securities laws to corporation's board of directors if management refused to make proper disclosures).

⁹⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18, EC 7-8, DR 1-102(A)(4), DR 7-102(A)(7) (1979).

⁹⁸ [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,183-84; see *In re Keating, Muething & Klekamp, Securities Exchange Act Release No. 15982* (July 2, 1979), reprinted in [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,988-89 (rule 2(e) disciplinary action against law firm); *In re O'Neill, Securities Act Release No. 5938* (Aug. 3, 1978), (rule 2(e) proceeding against attorney who drafted misleading opinion letter); *In re Melrose, Securities Exchange Release no. 14720* (May 1, 1978), reprinted in [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,578 at 80,337 (rule 2(e) proceeding against attorney who assisted client in violating securities law); *In re Feld*, 46 S.E.C. 103, 103-04 (1975) (rule 2(e) proceeding against attorney who prepared misleading circular); *In re Fleischman*, 37 S.E.C. 832, 833 (1950) (rule 2(e) proceeding against attorney who prepared and filed materially misleading document with SEC).

⁹⁹ See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,145 (*Carter* appeal to full Commission); see also 15 U.S.C. § 78d-1(b) (1976) (right to appeal decision of administrative law judge to full Commission).

¹⁰⁰ See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,169; see also *supra* note 95 (constitutional vagueness standard).

to rule 2(e) represented an invalid usurpation of the authority of state bar associations to discipline attorneys.¹⁰¹

In the *Carter* appeal,¹⁰² the full Commission dismissed the rule 2(e) proceedings against the attorneys but reiterated that the SEC has authority to discipline attorneys and promulgate standards of conduct for practitioner attorneys.¹⁰³ The full Commission held that the standards contained in rule 2(e) were vague and dismissed the rule 2(e) proceedings against the attorneys because the SEC had never defined "unethical and improper conduct."¹⁰⁴ The Commission then defined "unethical and improper conduct" by delineating a minimum standard of conduct for practitioner attorneys representing corporate clients before the SEC.¹⁰⁵ In part, the

¹⁰¹ See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,147-48.

¹⁰² See *id.* at 84,145. The *Carter* defendants appealed the decision of the administrative law judge to the full Commission. *Id.*; see 15 U.S.C. § 78d-1(b) (1976) (right to appeal to full Commission); 17 C.F.R. § 201.17 (1982) (SEC appellate procedure).

¹⁰³ See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,147-48 (SEC authority to promulgate rule 2(e)); *id.* at 84,169-71 (SEC authority to promulgate ethical standard for practitioner attorneys); *id.* at 84,172 (SEC ethical standard); 17 C.F.R. § 201.2(e) (1982) (SEC rule 2(e)). The Commission contended that the authority to promulgate standards of conduct for practitioner attorneys stemmed from the SEC's authority to discipline attorneys. See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,169. Since the defendants in *Carter* attacked the rule 2(e) "unethical or improper" conduct standard as being unconstitutionally vague, the Commission in the *Carter* appeal had an incentive to define what actions constituted unethical or improper conduct to avoid future constitutional challenges to rule 2(e). See Barber, *supra* note 17, at 538-40 (unethical or improper definition in *Carter* appeal); Dolin, *supra* note 7, at 347-53. By arguing that the rule 2(e) unethical and improper conduct standard was unconstitutionally vague and by contending that the SEC had no authority to define what actions constituted unethical or improper conduct, the *Carter* defendants had an argument which if correct, left no rule 2(e) defenses open to the SEC. See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,147-48 (*Carter* defendants' argument).

¹⁰⁴ See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,173 (dismissal of rule 2(e) proceedings against *Carter* defendants).

¹⁰⁵ See *id.* at 84,172. The *Carter* appeal minimum standard of conduct defines unethical or improper conduct in the context of a corporate attorney's duties upon the discovery of a client's nondisclosure. *Id.* The *Carter* conduct standard provides that:

When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance.

Id. The SEC has solicited public comments, which address the appropriateness of the *Carter* conduct standard. See Securities Exchange Act Release no. 18106, reprinted in [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 83,026 at 84,531 (Sept. 21, 1981). The SEC, in *Carter*, also explained what procedures an attorney should follow if the management of a corporate client refuses to comply with securities laws. See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,172. The SEC suggested that an attorney first should advise the corporation's board of directors about the management's nondisclosure and then seek the help of other corporate officers if the board of directors refuses to disclose the required information. *Id.* The Commission advised that, as a final resort, the attorney may resign or disclose the violation to the SEC if all other attempts at securing disclosure fail. *Id.* See generally, Barber, *supra* note 17, at 539-40 (practitioner attorney options under *Carter* standard).

Carter appeal minimum standard of conduct requires that corporate attorneys, who have significant responsibilities in complying with SEC disclosure requirements, must take prompt, affirmative action¹⁰⁶ to ensure proper disclosure immediately upon discovering that a corporate client is not disclosing required information.¹⁰⁷

In spite of the attacks upon rule 2(e)'s validity in *Touche Ross*,¹⁰⁸ *Keating*,¹⁰⁹ and *Carter*,¹¹⁰ rule 2(e) remains an influential and powerful instrument of attorney discipline.¹¹¹ The debate concerning rule 2(e)'s statutory basis, however, continues.¹¹² Many of the SEC's arguments in support of rule 2(e)'s validity are inherently suspect¹¹³ and no doubt will

¹⁰⁶ See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,172 (requirement of prompt, affirmative action upon discovery of client's nondisclosure or misconduct). The SEC did not define precisely what prompt, affirmative action entailed but issued some guidelines on what courses of action were available to practitioner attorneys who discover client misconduct. See *id.* (SEC guidelines on available courses of action); see also *supra* note 105 (explanation of available courses of conduct).

¹⁰⁷ See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,172 (*Carter* standard).

¹⁰⁸ See [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,497 (S.D.N.Y. Apr. 24, 1978), *aff'd*, 609 F.2d 570, 573 (2d Cir. 1979); see also *supra* text accompanying notes 41-49, 55 (attacks by *Touche Ross* on rule 2(e)).

¹⁰⁹ See Securities Exchange Act Release No. 15982 (July 2, 1979), reprinted in [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 at 81,981; see also *supra* text accompanying notes 75-84 (*Keating* dissent's attacks on rule 2(e)).

¹¹⁰ See [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,175 at 82,165, 82,184 (Mar. 7, 1979), *rev'd on other grounds*, Commission Release No. 34-17597 (Feb. 28, 1981), reprinted in [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,145; see also *supra* text accompanying notes 93-95, 100-01 (*Carter* attacks on rule 2(e)).

¹¹¹ See Matthews & Thompson, *The Commission's Enforcement Program: The Uncertainty Is Over & All Is Well*, 188 N.Y.L.J. 112 at 29, col. 1-2 (Dec. 13, 1982) (rule 2(e) still in force despite SEC enforcement slowdown); Remarks of Edward F. Greene, General Counsel of the SEC, to the New York Lawyer's Association, *SEC Disciplinary Proceedings Against Lawyers Reviewed* (Jan. 13, 1982), reprinted in 187 N.Y.L.J. 15 at 4, col. 1-2 (Jan. 22, 1982) (*Carter* conduct standard still in force regardless of practitioner attorney and ABA protests); Transcript of interview with John S. R. Shad, Chairman of SEC, *Shad Delineates His Goals as Commission Chairman to Streamline SEC Rules* (Dec. 14, 1981), reprinted in 186 N.Y.L.J. 113 at 51, col. 1 (Dec. 14, 1981) (SEC will apply *Carter* appeal standard in determining rule 2(e) liability for attorney practitioners).

¹¹² See Statement by Section on Corporation, Banking and Business Law, adopted by ABA Board of Governors on November 30, 1981, *ABA Statement on SEC Attorney Conduct Proposal*, 4 Legal Times of Washington 27 at 24, col. 2 (Dec. 7, 1981) (hereinafter cited as *ABA Statement*). The ABA responded to the SEC's call for comments on the *Carter* conduct standard by vehemently arguing against the *Carter* standard. *Id.* Although the ABA argued that the *Carter* standard was unnecessary and invalid, the ABA did not address the question of rule 2(e)'s validity. *Id.*; see also Ranii, *ABA Opposes Securities Lawyers' Code*, 4 Nat'l L.J. 13 at 5, col. 4 (Dec. 7, 1981). See generally Block & Ferris, *supra* note 32, at 518-25 (criticisms of *Carter* standard); Dolin, *supra* note 7, at 362-73 (same); Note, *Attorney Discipline by the SEC: 2(e) or not 2(e)?*, 17 NEW ENG. L. REV. 1267, 1291-302 (1982).

¹¹³ See *infra* text accompanying notes 127-32 & 137-46 (inherent authority argument flawed); *infra* text accompanying notes 162-72 (implicit authority argument flawed); *infra* text accompanying notes 179-82 (adjunctive authority argument flawed); *infra* text accompanying notes 18-388 (SEC argument that Congress implicitly ratified rule 2(e) flawed).

receive future judicial scrutiny.¹¹⁴ Additionally, the Commission's minimum standard of conduct faces strong opposition from the American Bar Association and from state bar associations.¹¹⁵

Over the course of the past thirty years, the SEC has formulated four arguments in support of rule 2(e). Three arguments assert a statutory basis for rule 2(e),¹¹⁶ while the fourth asserts that, even if Congress did not vest the SEC with authority to promulgate rule 2(e), Congress ratified the SEC's use of rule 2(e) by purposefully not restraining the SEC's exercise of rule 2(e) power.¹¹⁷ Since rule 2(e) does not have and has never had an express statutory basis in any federal securities law,¹¹⁸ the rule's validity must depend upon either inherent,¹¹⁹ implicit,¹²⁰ or adjunctive¹²¹ statutory

¹¹⁴ See Matthews & Thompson, *supra* note 111, at 45 n.10. The SEC has never instituted a rule 2(e) proceeding against an attorney practitioner based upon a violation of the Carter appeal standard. *Id.* Furthermore, the SEC has begun a program of deemphasizing practitioner disciplinary actions. *Id.*; see also *SEC Faced With Tight Budget, Is Paring "Peripheral" Defendants From Complaints*, Wall Street J., Oct. 20, 1982, at 6, col. 1-2 (SEC deemphasizes enforcement); Hudson, *SEC Goes Easier On Accountants, Relying More On Self-Regulation*, Wall Street J., Aug. 10, 1982, at 29, col. 3-6 (same). *But see* Speech by SEC Commissioner Barbara S. Thomas, reprinted in *Enforcement Policy*, 5 Legal Times of Washington 19 at 23, col. 1 (Oct. 11, 1982) (suggesting that SEC will not deemphasize enforcement operations). Since the SEC appears to be deemphasizing disciplinary actions against attorneys, a future proceeding challenging the Carter standard may not arise until the SEC again begins aggressive disciplinary enforcement. See Greene, *supra* note 111, at 4; *infra* text accompanying notes 207-11 (explaining current SEC enforcement policy).

¹¹⁵ Block & Ferris, *supra* note 32, at 516-17 (ABA questions validity and propriety of Carter standard); Ranii, *supra* note 112, at 5 (same); *ABA Statement*, *supra* note 112, at 29 (ABA claims Carter standard impinges upon attorney-client relationship).

¹¹⁶ See *infra* text accompanying notes 123-46 (SEC's inherent authority to promulgate rule 2(e)); *infra* text accompanying notes 147-73 (SEC's implicit authority to promulgate rule 2(e)); *infra* text accompanying notes 174-82 (SEC's adjunctive authority to promulgate rule 2(e)). See generally Note, *SEC Disciplinary Proceedings Against Attorneys Under Rule 2(e)*, 79 MICH. L. REV. 1270 (1981).

¹¹⁷ See *infra* text accompanying notes 183-88 (implied congressional ratification of rule 2(e)). See generally Note, *supra* note 116, at 1288-89.

¹¹⁸ See *Touche, Ross & Co. v. SEC*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415 at 93,500 (S.D.N.Y. Apr. 24, 1978 (SEC admits rule 2(e) has no express statutory authorization), *aff'd*, 609 F.2d 570 (2d Cir. 1979).

¹¹⁹ See *Touche, Ross & Co. v. SEC*, 609 F.2d 570, 573 (2d Cir. 1979) (SEC claimed inherent power to promulgate rule 2(e)); Marsh, *supra* note 9, at 1009 (same); *infra* text accompanying notes 123-46 (SEC's inherent power). An administrative agency's inherent authority is the power to act in ways not specifically authorized by statute but required and proper for maintenance of effective regulatory processes. See Note, *supra* note 116, at 1279 (inherent authority explained).

¹²⁰ See *Touche Ross*, 609 F.2d at 582 (SEC claims implicit power to promulgate rule 2(e)); 15 U.S.C. § 77s (1976 & Supp. V 1981) (1933 Securities Act implicit power); *id.* § 78w (1934 Securities Exchange Act implicit power); *id.* § 80b-11(a) (1940 Investment Companies and Advisors Act implicit power); Marsh, *supra* note 9, at 1007-08 (SEC implicit power claim); *infra* text accompanying notes 147-73 (SEC implicit power). An administrative agency's implicit authority is the power to make rules pursuant to a legislative grant of general rulemaking power. See Note, *supra* note 116, at 1280-81 (implicit authority explained).

¹²¹ See *Touche Ross*, 609 F.2d at 579 (SEC claims adjunctive power to promulgate rule 2(e)); Marsh, *supra* note 9, at 1004 (adjunctive authority claim); *infra* text accompanying

underpinnings or upon implied congressional ratification.¹²²

The Commission claims that it possesses inherent authority to maintain probity in all SEC administrative proceedings.¹²³ In *Touche Ross*, the Commission contended that rule 2(e) is merely an exercise of the SEC's inherent authority to preserve the integrity of SEC regulatory processes.¹²⁴ The Commission also contended that the power to discipline attorneys allowed the SEC to exclude unqualified and incompetent attorneys from administrative practice and thus ensure that Commission proceedings remain professional and efficient mechanisms of securities regulation.¹²⁵ The SEC in *Touche Ross* offered the Second Circuit three cases in support of the Commission's argument that administrative agencies possess inherent power to regulate attorney practitioners.¹²⁶ The SEC's three supportive cases, however, all concerned agencies that possess quasi-judicial powers.¹²⁷ Quasi-judicial agencies, unlike truly regulatory agencies, act like courts in adjudicating personal and property rights.¹²⁸ Quasi-judicial agencies, which function like courts, possess the same power to screen and regulate attorney practitioners that courts exercise to ensure decorum and responsible conduct during proceedings.¹²⁹ The SEC is, however, a truly regulatory agency and not a quasi-judicial agency because SEC attorney practitioners conduct a majority of their practice outside the Commission's formal administrative hearing room.¹³⁰ Thus, the SEC's inherent

notes 174-82 (SEC adjunctive power claim). An administrative agency's adjunctive authority is the power to act in ways not specifically authorized by statute but reasonably related to express powers granted by the legislature. See Note, *supra* note 116, at 1281-82 (adjunctive authority explained).

¹²² See Note, *supra* note 116, at 1288-89 (implied ratification explained); *infra* text accompanying notes 182-87 (implied congressional ratification of rule 2(e)).

¹²³ See *Touche Ross*, 609 F.2d at 573 (SEC inherent power claim); *supra* note 119 (explaining inherent power).

¹²⁴ See *Touche Ross*, 609 F.2d at 581.

¹²⁵ See *id.* at 581-82 (SEC arguments in favor of rule 2(e) inherent power).

¹²⁶ *Id.* at 581; see *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 120-21 (1926) (Board of Tax Appeals has inherent power to regulate attorney practitioners); *Koden v. United States*, 564 F.2d 228, 233 (7th Cir. 1977) (Board of Immigration Appeals has inherent power to regulate attorney practitioners); *Herman v. Dulles*, 205 F.2d 715, 716 (D.C. Cir. 1953) (International Claims Commission has inherent power to regulate attorney practitioners).

¹²⁷ See *Touche Ross*, 609 F.2d at 581 (SEC's three cases supporting inherent power); see also *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 120-21 (1926) (Board of Tax Appeals is quasi-judicial agency); *Koden v. United States*, 564 F.2d 228, 233 (7th Cir. 1977) (Board of Immigration Appeals is quasi-judicial agency); *Herman v. Dulles*, 205 F.2d 715, 716 (D.C. Cir. 1953) (International Claims Commission is quasi-judicial agency).

¹²⁸ See *Goldsmith v. Board of Tax Appeals*, 270 U.S. at 121. The Supreme Court in *Goldsmith* stated that quasi-judicial agencies are executive officers or administrative boards who adjudicate in administrative proceedings the rights and interests of individuals who appear before them. *Id.*; see also *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976) (quasi-judicial agency resembles court); *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975) (same).

¹²⁹ See *Touche Ross*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,415, at 93,500 (Apr. 24, 1978) (SEC argues that quasi-judicial power to discipline practitioners is necessary).

¹³⁰ See *Barber*, *supra* note 17, at 516-17 (SEC lawyers perform mostly administrative

power to maintain probity in SEC administrative proceedings is narrow¹³¹ and cannot support rule 2(e), which the SEC claims is a broad-based instrument for regulation of practitioner attorneys.¹³² Furthermore, the SEC already possesses regulatory power to maintain decorum and integrity in SEC administrative processes by virtue of SEC rule 2(f).¹³³ SEC rule 2(f) provides for appropriate disciplinary actions when attorney practitioners act contemptuously during Commission proceedings.¹³⁴ Therefore, if rule 2(e) is merely an exercise of SEC inherent power to protect Commission "proceedings", rule 2(e) is a redundant regulatory mechanism.¹³⁵ The SEC, however, also contends that rule 2(e) exists to protect Commission "processes."¹³⁶

In *Touche Ross*, the SEC contended that rule 2(e) represented an exercise of inherent power to preserve the integrity of SEC regulatory processes,¹³⁷ yet the SEC has never defined what the term "processes" entails.¹³⁸ One commentator suggests that the SEC has equated the term "processes" with the term "practice before the Commission" as defined in SEC rule 2(g).¹³⁹ If the SEC can, in exercise of rule 2(e) power, regulate all aspects of attorney practice before the Commission, then rule 2(e)

duties on behalf of clients); Dolin, *supra* note 7, at 347-51 (legal practice before the SEC involves making filings for clients, drafting advisory opinions, and pursuit of other in-office duties); Marsh, *supra* note 9, at 1004 (SEC is not quasi-judicial administrative agency).

¹³¹ See *supra* text accompanying notes 123-25 (SEC's exercise of inherent power must relate to agency efforts to maintain integrity in regulatory processes).

¹³² See *In re Carter*, Securities and Exchange Commission Release No. 34-17597 (Feb. 28, 1981), reprinted in [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,149-50 (SEC's explanation of rule 2(e)'s purpose).

¹³³ See 17 C.F.R. § 201.2(f) (1982). SEC rule 2(f) provides in part that contemptuous conduct by a practitioner attorney during the course of an administrative hearing is a basis for excluding the attorney from participation in the hearing. *Id.*

¹³⁴ See *id.* (SEC rule 2(f)); see also Marsh, *supra* note 9, at 1005. If the SEC desires only to maintain proper decorum during administrative hearings and force observance of professional conduct standards during all proceedings, rule 2(f) provides ample disciplinary power to allow the SEC to ensure that all proceedings remain orderly and professional. See 17 C.F.R. § 201.2(f) (1982) (SEC rule 2(f)); *supra*, note 133 (same). Thus, SEC Rule 2(f) serves well as a device for sanctioning practitioner attorneys who engage in improper or unethical conduct during the course of a SEC administrative proceeding. See *supra* note 133 (rule 2(f)).

¹³⁵ See *supra* note 134 (SEC rule 2(f) provides ample disciplinary power if Commission is interested only in maintaining decorum and order in administrative proceedings); see also 17 C.F.R. § 201.2(f) (1982) (SEC rule 2(f)).

¹³⁶ See *Touche Ross*, 609 F.2d at 581 (SEC contends rule 2(e) exists to protect administrative processes).

¹³⁷ See *id.* In *Touche Ross*, the SEC argued that rule 2(e) was necessary to ensure that all SEC regulatory processes remain free from reproach. *Id.*

¹³⁸ See Dolin, *supra* note 7, at 347-55 (SEC has never defined "processes" with regard to rule 2(e)).

¹³⁹ See *id.* at 348 n.8 (rule 2(g) "practice before the Commission"); see also 17 C.F.R. § 201.2(g) (1982) (SEC rule 2(g)). As defined in rule 2(g), "practice before the Commission" entails the transacting of any business with the Commission and the preparation of any statement, opinion or other paper for filing with the Commission. *Id.*

represents a device whereby the SEC can regulate every aspect of the securities attorney's professional life.¹⁴⁰ Congressional legislative history, however, shows that Congress did not intend to grant the SEC such expansive power.¹⁴¹ In 1965, Congress amended the Administrative Procedure Act (APA)¹⁴² and specifically prohibited administrative agencies from attempting to restrict any attorney in good standing with a state bar association from practicing before the agency.¹⁴³ Legislative history to the 1965 amendment to the APA shows that Congress purposefully deferred to the state bar associations on questions of attorney competence to practice law.¹⁴⁴ An expansive construction of rule 2(e) power conflicts with congressional deference to the state bar associations.¹⁴⁵ Therefore, Congress did not intend to grant the SEC broad inherent authority to protect SEC administrative processes.¹⁴⁶

The Commission's second and strongest defense of rule 2(e)'s statutory basis is the claim of implicit authority to discipline attorney practitioners.¹⁴⁷ The SEC claims that implicit statutory authority to promulgate rule 2(e) lies in language contained in the Securities Exchange Act of 1934 ('34

¹⁴⁰ See Dolin, *supra* note 7, at 351-55. A broad definition of "processes" will allow the SEC to regulate aspects of a practitioner attorney's practice that do not involve securities transactions. *Id.*; see also Amicus Brief of Sullivan & Cromwell at 14, *In re Carter*, Securities and Exchange Commission Release No. 34-17597 (Feb. 28, 1981), reprinted in [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,145 (SEC's rule 2(e) authority should not extend to lawyer's conduct as advisor or draftsman outside of formal administrative hearing setting). See generally Comment, *supra* note 6, at 990 (interpretation of rule 2(e)'s scope to include attorney in-office operations is overly broad and unreasonably burdensome on practitioner attorneys).

¹⁴¹ See Block & Ferris, *supra* note 32, at 508-12 (rule 2(e) cannot regulate all aspects of practitioner attorney bar); see also *infra* text accompanying notes 142-46 (congressional limitations on rule 2(e) power).

¹⁴² 5 U.S.C. §§ 500-576 (1976 & Supp. V 1981).

¹⁴³ See Act of November 8, 1965, § 1(a), 79 Stat. 1281 (1965) (codified at 5 U.S.C. § 500(b) (1976 & Supp. V 1981) (amendment of Administrative Procedure Act (APA)).

¹⁴⁴ See H.R. REP. No. 1141, 89th Cong., 1st Sess. 2-3, reprinted in 1965 U.S. CODE CONG. & AD. NEWS 4170, 4170-73 (report of House Committee on the Judiciary on bill favoring abolition of agency admission requirements for practitioner attorneys); see also Marsh, *supra* note 9, at 1006 (congressional intention to strip administrative agencies of power to regulate admission of attorneys to regulatory practice).

¹⁴⁵ See Marsh, *supra* note 9, at 1006-07 (state bar prerogatives); Note, *supra* note 112, at 1280 (same); see also 5 U.S.C. § 500(b) (1976 & Supp. V 1981) (section of APA abolishing administrative agency bars). *But see* 5 U.S.C. § 500(d)(2) (1976 & Supp. V 1981) (APA neither authorizes nor limits administrative agency's authority to promulgate disciplinary standards for practitioners).

¹⁴⁶ See Marsh, *supra* note 9, at 1006-07 (limitations on rule 2(e) inherent power); *supra* notes 142-45 and accompanying text (APA limits rule 2(e) inherent power).

¹⁴⁷ See *Touche, Ross & Co. v. SEC*, 609 F.2d 570, 577-78 (2d Cir. 1979) (SEC's implicit authority to promulgate rule 2(e)); *In re Carter*, Securities and Exchange Commission Release No. 34-17597 (Feb. 28, 1981), reprinted in [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,147-48 (same); see also *supra* note 120 (explanation of implicit power). See generally Barber, *supra* note 17, at 524-26; Block & Ferris, *supra* note 32, at 508-12.

Act).¹⁴⁸ Section 23(a)(1) of the '34 Act authorizes the SEC to make rules and regulations "necessary and appropriate" to the administration of federal securities laws.¹⁴⁹ The "necessary and appropriate" language in the '34 Act is similar to grants of general rulemaking authority found in the enabling statutes of other federal agencies.¹⁵⁰ Congress routinely gives general rulemaking authority to federal agencies so that the agencies can resolve myriad administrative problems without acting in an ultra vires capacity.¹⁵¹ The agencies given general rulemaking authority, however, may not use their unspecified power to undermine statutory goals or contravene congressional intent.¹⁵² Thus, the legislative history of the '34 Act is important in determining the validity of rule 2(e).¹⁵³

Legislative history to the '34 Act mentioning or alluding to attorney practitioner disciplinary procedures is scarce, but one Senate Committee Report on the '34 Act¹⁵⁴ suggests that Congress considered giving the SEC's regulatory predecessor the authority to regulate attorney practitioners but declined to do so.¹⁵⁵ The Senate Committee Report shows that

¹⁴⁸ See 15 U.S.C. § 78w(a)(1) (1976) (Section 23(a)(1) of 1934 Act) (SEC has power to make rules and regulations necessary and appropriate to implement provisions of 1934 Securities Exchange Act).

¹⁴⁹ See *Touche, Ross*, 609 F.2d at 577 (implicit authorization); 15 U.S.C. § 78w(a)(1) (1976) (codification of 1934 Securities Exchange Act).

¹⁵⁰ See, e.g., 21 U.S.C. § 871(b) (1976) (authorizing Attorney General of United States to promulgate rules necessary and appropriate to allow Drug Enforcement Administration to enforce federal controlled substances laws); 29 U.S.C. § 156 (1976) (authorizing National Labor Relations Board to make rules necessary to carry out provisions contained in National Labor Relations Act); 42 U.S.C. §§ 7601(a), 7607(d) (Supp. V 1981) (authorizing Environmental Protection Agency to promulgate rules necessary and appropriate to enforce federal antipollution laws); 46 U.S.C. § 841(a) (1976 & Supp. V 1981) (authorizing Federal Maritime Commission to make rules and regulations necessary to carry out provisions contained in federal shipping laws); 47 U.S.C. §§ 154(i), 303(r) (1976 & Supp. V 1981) (authorizing Federal Communications Commission to promulgate rules necessary to enforce federal communications laws); 49 U.S.C. § 1903(b)(10) (1976 & Supp. V 1981) (authorizing National Transportation Safety Board to make rules necessary to carry out provisions contained in federal transportation safety laws).

¹⁵¹ See B. SCHWARTZ, ADMINISTRATIVE LAW § 57, at 151 (1976). The basic premise underlying all statutes vesting administrative agencies with general rulemaking power is the doctrine of ultra vires. *Id.* An ultra vires action is an action by an agency that exceeds the statutory limits set by Congress in the agency's enabling legislation. *Id.* An ultra vires action is invalid unless ratified by Congress. *Id.*; see also *CAB v. Delta Airlines, Inc.*, 367 U.S. 316, 322 (1961) (ultra vires action invalid); *Brannan v. Stark*, 342 U.S. 451, 465 (1952) (ultra vires action stricken); *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974) (ultra vires action declared invalid).

¹⁵² See SCHWARTZ, *supra* note 151, § 57, at 151-52 (administrative action that contravenes congressional intent is ultra vires unless ratified by Congress).

¹⁵³ See *infra* text accompanying notes 154-56 (analyzing legislative history to 1934 Securities Exchange Act).

¹⁵⁴ See S. REP. NO. 875, 73d Cong., 1st Sess. 248 (1933), reprinted in 2 J.S. ELLENBERGER & E.P. MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 248 (1973).

¹⁵⁵ See *id.* Prior to the creation of the SEC, the Federal Trade Commission functioned

Congress feared that the concentration of attorney practitioner disciplinary power in the hands of a securities regulatory body would be dangerous to the legal profession.¹⁵⁶ Furthermore, the profusion of other regulatory and disciplinary provisions in the Securities Acts pertaining to brokers,¹⁵⁷ securities dealers,¹⁵⁸ investment advisors,¹⁵⁹ security exchange members,¹⁶⁰ and accountants¹⁶¹ makes the omission of an attorney practitioner disciplinary provision appear intentional.¹⁶² Arguably, then, the SEC has no implied congressional authority to discipline attorney practitioners.¹⁶³

The Commission also claims that rule 2(e) disciplinary power is necessary and appropriate to the administration of federal securities laws because the state bar associations and other regulatory authorities do not provide adequate regulation of member attorneys.¹⁶⁴ The SEC argues that

as the regulatory agency in charge of overseeing the securities markets. *See* Securities Act of 1933, Pub. L. No. 73-22, § 2(5), 48 Stat. 74, 75 (1933), *reprinted in* 1 J.S. ELLENBERGER & E.P. MAHAR, *supra* note 154, at 75 (listing Federal Trade Commission as agency responsible for administering original 1933 Securities Act). During hearings on the 1933 Securities Act and in response to a comment by Senator Couzens of Michigan, an attorney with the Department of Commerce remarked that a statutory provision authorizing the Federal Trade Commission to regulate attorney practitioners would be dangerous and would lead to many abuses in administrative authority. S. REP. NO. 875, 73d Cong., 1st Sess. 248 (1933), *reprinted in* 2 J.S. ELLENBERGER & E.P. MAHAR, *supra* note 154, at 248 (1973).

¹⁵⁶ *Id.*

¹⁵⁷ *See* 15 U.S.C. § 78o (1976 & Supp. V 1981) (SEC authorization to regulate and discipline securities brokers and dealers).

¹⁵⁸ *See id.* § 78o-4(b)(4) (1976 & Supp. V 1981) (SEC authorization to regulate and institute disciplinary proceedings against municipal securities dealers).

¹⁵⁹ *See id.* § 80b-3(e)(4) (SEC authorization to discipline investment advisors).

¹⁶⁰ *See id.* § 78s(h) (SEC authorization to suspend or expel member of national security exchange).

¹⁶¹ *See id.* § 77s (SEC authorization to promulgate standards for accountants); *id.* § 78c (defining the persons regulated by the SEC). *See generally* Comment, *supra* note 78 at 1159 (rule 2(e) regulation of accountants).

¹⁶² *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (when statute expressly enumerates certain persons or things, one may assume that Congress intended to exclude all other persons or things from statutory operation). Often, courts rely on the logical principle of *expressio unius est exclusio alterius* in determining inclusion or exclusion from statutory operation. *See* Burgin v. Forbes, 293 Ky. 456, 463, 169 S.W.2d 321, 325 (1943) (principle applied); Newblock v. Bowles, 170 Okla. 487, 489, 40 P.2d 1097, 1100 (1935) (same). *Expressio unius est exclusio alterius* provides that the expression of one thing shows the intent to exclude all others by implications. *See* Little v. Town of Conway, 171 S.C. 27, 31, 171 S.E. 447, 448 (1933) (exclusion by implication principle applied).

¹⁶³ *See* Note, *supra* note 112 at 1288-89 (rule 2(e) power to regulate attorneys is excluded by implication); *see also* Amicus Curiae Brief of Sullivan & Cromwell at 6, *In re* Carter, Securities and Exchange Commission Release No. 34-17597 (Feb. 28, 1981), *reprinted in* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,145 (Congress denied SEC power to regulate attorneys by implication).

¹⁶⁴ *See* address by former SEC Chairman Williams to section of Corporation, Banking and Business Law, ABA Convention, August 1980, *Professionalism and the Corporate Bar*, *reprinted in* 36 BUS. LAW. 159, 162-68 (1980). Former Chairman Williams stated that rule 2(e) is necessary and appropriate because self-regulation by the state bar associations is lax. *Id.* at 164.

rule 2(e) can serve effectively as an additional disciplinary device and contends that the additional disciplinary power provided by rule 2(e) protects administrative processes by raising the minimum acceptable level of attorney practitioner competence and ethics to a higher standard.¹⁶⁵ The ABA vehemently disagrees with the SEC's contention that state bar associations have been lax in disciplining member attorneys.¹⁶⁶ Furthermore, the ABA contends that, even if the state bar associations have been lax in disciplining member attorneys, the SEC lacks both the ability and the expertise to regulate and discipline attorney practitioners.¹⁶⁷

The Commission's contention that rule 2(e) is a necessary and appropriate exercise of regulatory authority is questionable in light of the quasi-adjudicative power that the SEC claims under the 1970 amendment to rule 2(e).¹⁶⁸ The 1970 amendment to rule 2(e) allows the SEC to discipline attorney practitioners upon a finding that the attorney willfully violated or willfully aided and abetted a violation of the federal securities laws.¹⁶⁹ The SEC has instituted disciplinary proceedings against attorney practitioners pursuant to the 1970 amendment to rule 2(e) without first bringing action in federal district court to determine if a willful violation or willful aiding and abetting of a violation of the federal securities laws has occurred.¹⁷⁰ The 1970 amendment to rule 2(e) thus allows the SEC to adjudicate securities law violations under the pretext of disciplining attorney practitioners.¹⁷¹ Section 27 of the 1934 Act specifically provides that the

¹⁶⁵ See *id.*, reprinted in 36 BUS. LAW. at 164 (rule 2(e) is necessary to raise practitioner attorney competence to acceptable level); see also Securities Act Rel. No. 5088 (Sept. 24, 1970), reprinted in [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,913 at 80,032 (SEC contention that laxity of professional self-regulation necessitated promulgation of 1970 amendment to rule 2(e)). See generally Comment, *supra* note 6, at 973-75, 974 n.14 (problems in profession self-regulation).

¹⁶⁶ See ABA Statement, *supra* note 112, at 25, col. 1 (ABA disagreement with SEC on attorney self-regulation proficiency); see also, Note, *supra* note 112, at 1298-302 (ABA contention that state bar associations adequately police legal profession).

¹⁶⁷ See Note, *supra* note 112, at 1298-302 (state bar associations provide ample professional self-regulation); see also Block and Ferris, *supra* note 32, at 518 (explaining ABA response to SEC's professional self-regulatory laxity contention).

¹⁶⁸ See 17 C.F.R. § 201.2(e)(1)(iii) (1982) (1970 amendment to rule 2(e)). By allowing for attorney disciplinary action upon a finding of a willful violation or a willful aiding and abetting of a violation of a securities law, the 1970 amendment to rule 2(e) implicitly gives the SEC the jurisdiction to adjudicate and determine what are "willful" violations. *Id.*; see also Best, *In Opposition to Rule 2(e) Proceedings*, 36 BUS. LAW. 1815, 1815-17 (1981) (rule 2(e) vests the SEC with unauthorized quasi-judicial power); Dolin, *supra* note 7, at 355-61 (explaining 1970 amendment); *infra* text accompanying notes 169-71 (same).

¹⁶⁹ See 17 C.F.R. § 201.2(e)(1)(iii) (1982) (rule 2(e)).

¹⁷⁰ See, e.g., *In re Carter*, Securities and Exchange Commission Release No. 35-17597 (Feb. 28, 1981), reprinted in [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,146 (rule 2(e)(1)(iii) prosecution without prior judicial determination of willful violation of securities laws); *In re Hawtrey*, Securities Exchange Act Release No. 14760 (May 15, 1978).

¹⁷¹ See Best, *supra* note 168, at 1816-17 (SEC's use of rule 2(e)(1)(iii) power becomes de facto adjudication of securities laws violations); Note, *supra* note 112, at 1286-87 (rule 2(e) undermines jurisdiction of federal district courts to adjudicate securities law violations); see also Dolin, *supra* note 7, at 355 (rule 2(e) allows SEC to adjudicate securities law violations).

federal district courts shall have exclusive jurisdiction to adjudicate securities law violations.¹⁷² Therefore, the 1970 amendment to rule 2(e) is neither necessary nor appropriate to the administration of federal securities law. The 1970 amendment is not necessary because the SEC can prosecute violations of securities law in federal court and is not appropriate because the SEC has no jurisdiction to adjudicate securities law violations in SEC administrative proceedings.¹⁷³

The Commission's third and final defense of rule 2(e)'s statutory basis involves a claim of adjunctive authority to discipline attorney practitioners.¹⁷⁴ Adjunctive authority is the unspecified power to act toward the fulfillment of an authorized end.¹⁷⁵ Adjunctive authority does not possess a basis in necessary and appropriate statutory language and need not protect the integrity of the SEC's administrative processes to be valid.¹⁷⁶ Instead, adjunctive authority is valid if it is reasonably related to the achievement of a specified statutory purpose.¹⁷⁷ The Commission claims that exercise of rule 2(e) disciplinary power is reasonably related to the realization of the statutory objectives in the '34 Act.¹⁷⁸ The Commission's contention that SEC use of rule 2(e) disciplinary power is a valid

¹⁷² See 15 U.S.C. § 78aa (1976) (codification of § 27 of 1934 Act vesting federal district courts with jurisdiction to hear cases involving violations of security exchange laws).

¹⁷³ See 15 U.S.C. § 77v (1976) (statute conferring jurisdiction upon federal courts and state courts to hear actions stemming from violations of 1933 Act); *id.* § 78aa (statute conferring exclusive jurisdiction upon federal courts to hear actions stemming from violations of 1934 Act); see also Note, *supra* note 112, at 1286-87 (SEC should function as complaining witness and not judge or prosecutor in securities law enforcement action). *But see* 15 U.S.C. § 78w(d) (1976) (SEC can function as prosecutor in seeking an injunction to enjoin activities that violate securities law).

¹⁷⁴ See *infra* text accompanying note 175-77 (adjunctive authority).

¹⁷⁵ See *Touche Ross*, 609 F.2d at 579-80 (SEC adjunctive power claim); *supra* note 121 (explaining adjunctive power); see also *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 655 (1978) (exercise of administrative power is valid if power is legitimate, reasonable, and direct adjunct to agency's express power); *United States v. Chesapeake & Ohio Ry.*, 426 U.S. 500, 511-15 (1976) (same).

¹⁷⁶ See *Trans Alaska Pipeline Rate Cases*, 436 U.S. at 654-55. The Interstate Commerce Commission (ICC) has adjunctive power to establish maximum interim rates without a hearing even though Congress did not vest the ICC with express statutory authority to establish interim rates. *Id.*; see also *United States v. Chesapeake & Ohio Ry.*, 426 U.S. at 511-513, 515 (ICC has adjunctive power to increase railway rates even though Congress did not provide the Commission with express power to raise rates).

¹⁷⁷ See *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) (administrative rule is valid if reasonably related to achievement of express statutory purpose); *Thorpe v. Housing Auth.*, 393 U.S. 268, 280-81 (1969) (administrative regulation is valid if reasonably related to purposes of enabling legislation).

¹⁷⁸ See *Touche Ross*, 609 F.2d at 579-80 (SEC adjunctive power claims); see also 15 U.S.C. § 78b (1976 & Supp. V 1981) (statutory objectives in 1934 Act). The SEC maintained that rule 2(e) is reasonably related to the realization of congressional objectives set forth in the 1934 Act because the rule allows the SEC to protect investors directly by excluding disreputable attorneys from SEC practice. See Amendment to Rule 2(e) of the Rules of Practice, Securities Act Release No. 5088 (Sept. 24, 1970), reprinted in [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,913 at 80,032 (purpose of 1970 amendment to rule 2(e)).

use of adjunctive power, however, is questionable.¹⁷⁹ The Supreme Court limited the scope of administrative agency adjunctive power in *F.C.C. v. Midwest Video Corporation*.¹⁸⁰ The *Midwest Video* court held that an agency's exercise of adjunctive power does not meet the reasonably related test, and is therefore invalid, if exercise of the power conflicts with express statutory law.¹⁸¹ Since the SEC's exercise of rule 2(e) power conflicts with section 27 of the '34 Act, which vests federal district courts with exclusive jurisdiction to determine violations of the securities laws, the SEC's adjunctive power to apply rule 2(e) does not meet the reasonably related requirement.¹⁸²

The Commission's final argument in support of rule 2(e) involves a claim that Congress has ratified the SEC's construction of the '34 Act and promulgation of rule 2(e) by not passing legislation denying disciplinary power to the SEC.¹⁸³ The Commission contends that if Congress had desired to abolish rule 2(e), Congress would have included a provision formally denying rule 2(e) power to the SEC in one of the three Securities Act reenactments passed since the SEC promulgated rule 2(e).¹⁸⁴ Purposeful and premeditated congressional silence or inaction may serve as evidence of implied congressional acceptance of the agency's statutory construction.¹⁸⁵ The SEC contends that because Congress has known of rule 2(e)'s existence and purpose for over forty years and has taken no action to abolish rule 2(e) or limit SEC disciplinary authority during that period, Congress has deferred to the SEC's statutory construction and

¹⁷⁹ See *infra* text accompanying notes 179-82 (fallacies in SEC's use of adjunctive authority to support validity of rule 2(e)).

¹⁸⁰ 440 U.S. 689 (1979).

¹⁸¹ *Id.* at 708.

¹⁸² See 15 U.S.C. § 78aa (1976) (exclusive jurisdiction of federal district courts to hear cases involving violations of 1934 Act); *supra* text accompanying notes 168-73 (SEC use of rule 2(e)(1)(iii) power is quasi-judicative). Since the SEC's use of rule 2(e) usurps the plenary right of federal district courts to adjudicate securities laws violations, rule 2(e) is not reasonably related to the achievement of an authorized statutory purpose. See *in re Midwest Video*, 440 U.S. at 708 (1979) (reasonably related requirement).

¹⁸³ See *SEC v. Sloan*, 436 U.S. 103, 118-19 (1978) (congressional failure to overturn SEC administrative promulgation during reenactment of SEC rulemaking statutory provisions is implicit ratification of SEC promulgation).

¹⁸⁴ See *id.*; *U.S. v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 718-20 (1975) (long standing administrative rule is entitled to substantial deference if Congress has considered rule in reenactment of rule's enabling legislation); see also Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 155 (1975) (reenactment of the 1934 Act, *codified* at 15 U.S.C. §§ 78w (1976)); Securities Act Amendments of 1964, Pub. L. No. 88-467, 78 Stat. 580 (1964) (same); Act of May 27, 1936, Pub. L. No. 74-621, 49 Stat. 1379 (1936) (same).

¹⁸⁵ See *U.S. v. National Ass'n of Sec. Dealers*, 422 U.S. at 719 (legislative inaction shows congressional acceptance of agency construction); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) (congressional inaction shows deference to agency's statutory construction); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (same). *But see* *SEC v. Sloan*, 436 U.S. at 119 (agency may not bootstrap itself into area in which agency has no jurisdiction by repeatedly violating statutory mandate).

thus has ratified rule 2(e).¹⁸⁶ Implicit ratification of rule 2(e) would have occurred, however, only if Congress actually had considered the SEC's statutory construction during subsequent reenactments of the 1934 Act.¹⁸⁷ Since the Commission has offered no evidence that Congress took the SEC's statutory construction into account in passing the Securities Act reenactments, Congress presumably has not ratified rule 2(e) by implication.¹⁸⁸

Although the SEC's defenses and explanations of the statutory basis behind rule 2(e) are not persuasive, no court has determined that rule 2(e) is an invalid administrative promulgation.¹⁸⁹ Furthermore, the current climate in Congress and the ABA indicates that rule 2(e) has achieved legitimacy.¹⁹⁰ While Congress has not passed a law formally authorizing administrative agencies to promulgate disciplinary rules, Congress has considered a bill that would provide administrative agencies statutory authority to regulate attorney practitioners.¹⁹¹ The ABA has offered two proposals that would increase attorney practitioner liability and make attorney practitioners more amenable to disciplinary action.¹⁹² First, the ABA's Standing Committee on Professional Discipline has suggested, in the Model Rules of Federal Agency Discipline,¹⁹³ that Congress vest

¹⁸⁶ See *SEC v. Sloan*, 436 U.S. at 118-19 (SEC implicit ratification argument); see also Note, *supra* note 116, at 1288-89 (explaining SEC implied ratification argument).

¹⁸⁷ See *Zuber v. Allen*, 396 U.S. 168, 193 n.28 (1969) (implied ratification occurs only if Congress expressly considers and deliberates upon agency's statutory construction and then purposefully chooses legislative inaction).

¹⁸⁸ See SEC, ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION 45-46 (1935); Note, *supra* note 116, at 1288 (implied ratification requirements).

¹⁸⁹ See *Touche, Ross & Co. v. SEC*, 609 F.2d 570, 579 (2d Cir. 1979) (upholding SEC's authority to promulgate rule 2(e)). No federal court after the Second Circuit decided *Touche Ross* has ruled on the SEC's authority to promulgate rule 2(e). See *Downing & Miller*, *supra* note 14, at 776-81.

¹⁹⁰ See S. REP. NO. 1018, 96th Cong., 2d Sess. 90-91 (1980). In a joint report, the Senate Committee on Governmental Affairs and the Senate Committee on the Judiciary spoke out in favor of a bill that would authorize administrative regulations, such as rule 2(e), providing for discipline of attorney practitioners. See *id.*; see also S. 262, 96th Cong., 1st Sess., § 203(a), 125 CONG. REC. 1415 (1979) (bill amending Administrative Procedure Act to allow administrative agencies to discipline attorney practitioners for unethical or improper conduct). The ABA has, in the wake of the *Carter* proceedings, ceased attacking the legitimacy of rule 2(e) and begun attacking the legitimacy of the *Carter* minimum conduct standard. See *ABA Statement*, *supra* note 112, at 24, col. 2-3; see also *infra* text accompanying notes 192-99 (ABA attorney practitioner disciplinary proposals).

¹⁹¹ See S. 262, 96th Cong., 1st Sess., 125 CONG. REC. 1415 (1979). If passed, S. 262 would have amended the Administrative Procedure Act to allow any administrative agency to promulgate a disciplinary measure such as rule 2(e). *Id.* at § 203, 125 CONG. REC. 1415 (1979).

¹⁹² See MODEL RULES OF FEDERAL AGENCY DISCIPLINE rule 2 (Proposed Final Draft 1981); MODEL RULES OF PROFESSIONAL CONDUCT rule 1.13 (Discussion Draft 1980); see also Block & Barton, *Securities Litigation: Attorneys' Responsibilities-Professional Ethics and the Federal Securities Laws*, 8 SEC. REG. L.J. 333, 342-48 (1981) (discussing ABA Model Rules).

¹⁹³ See generally MODEL RULES OF FEDERAL AGENCY DISCIPLINE (Proposed Final Draft 1981).

jurisdiction in the federal district courts to discipline attorney practitioners who appear before administrative agencies.¹⁹⁴ The Model Rules of Federal Agency Discipline provide for the United States District Court for the District of Columbia to determine minimum levels of professional conduct for attorney practitioners after considering the ABA's Code of Professional Responsibility and specialized agency requirements.¹⁹⁵ Under the Model Rules of Federal Agency Discipline, state bar associations would prosecute all disciplinary actions and the SEC, like other agencies, would act only as a complaining witness.¹⁹⁶ Second, the ABA's Standing Committee on Professional Discipline has proposed a new set of Model Rules of Professional Conduct,¹⁹⁷ which would increase the potential disciplinary liabilities of attorney practitioners.¹⁹⁸ Under the proposed Model Rules of Professional Conduct, corporate attorneys would owe an increased obligation to the public to disclose client illegalities to the appropriate policing agency or face disciplinary action.¹⁹⁹ Two commentators have suggested that the standard imposed by the Model Rules of Federal Agency Discipline is equivalent to the *Carter* minimum conduct standard.²⁰⁰

While the ABA is amenable to increasing the potential disciplinary

¹⁹⁴ See *id.* rule 2 (jurisdiction of federal district court to hear cases involving attorney misconduct before administrative agencies); see also Greene, *supra* note 7, at 4, col. 4 (SEC supports rule 2 of Model Rules of Federal Agency Discipline).

¹⁹⁵ See MODEL RULES OF FEDERAL AGENCY DISCIPLINE rule 2 (provision allowing United States District Court for the District of Columbia to determine minimum standards of conduct for attorney practitioners). See generally Block & Ferris, *supra* note 32, at 526 n.135.

¹⁹⁶ See MODEL RULES OF FEDERAL AGENCY DISCIPLINE rule 4 (right of state bar associations to prosecute cases involving misconduct of attorney practitioners); see also Greene, *supra* note 7, at 4, col. 4 (SEC supports rule 4 of the Model Rules of Federal Agency Discipline).

¹⁹⁷ See generally MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1980).

¹⁹⁸ See *id.* rule 1.13 (ethical obligations of corporate attorney). Rule 1.13(b) provides that an attorney representing a corporate client has an affirmative duty to report corporate illegalities to the highest authority within the corporation and to report the illegalities to the appropriate administrative agency should the highest corporate authority refuse to take curative action. *Id.*; see Wilczek, *Corporate Attorneys Face Dilemma in Rulings on Duties and Loyalties*, 186 N.Y.L.J. 113 at 44, col. 2-4 (Dec. 14, 1981) (discussing rule 1.13).

¹⁹⁹ See MODEL RULES OF PROFESSIONAL CONDUCT rule 1.13(b) (duty of corporate attorneys to disclose client illegalities). The New York State Bar Association has attacked rule 1.13 and has claimed that the rule, by making disclosure obligatory instead of optional, forces the corporate attorney into the role of policeman and "whistle blower." See Draft Comments of New York Bar Association Special Committee on ABA Model Rules Proposals, reprinted in 8 SEC. REG. L.J. at 347 (1980).

²⁰⁰ See Block & Barton, *supra* note 192, at 348. By providing for disciplinary action against attorney practitioners who do not report client illegalities to the proper authorities, rule 1.13 requires attorney practitioners to disclose the same information the willful aiding and abetting clause of rule 2(e) requires. Compare MODEL RULES OF PROFESSIONAL CONDUCT rule 1.13(b) (requiring disclosure to protect corporate client's ultimate interest and to avoid disciplinary sanction) with 17 C.F.R. § 201.2(e)(1)(iii) (requiring disclosure or resignation to avoid rule 2(e) aider and abettor liability). See generally Burke, *The Duty of Confidentiality and Disclosing Corporate Misconduct*, 36 BUS. LAW. 239, 254-55 (1981).

liability of member attorneys²⁰¹ and apparently has acquiesced to the validity of rule 2(e),²⁰² the ABA vehemently objects to the *Carter* minimum standard of conduct for attorney practitioners.²⁰³ The ABA denies that the SEC possesses authority to promulgate a standard of practitioner conduct and argues that the Commission lacks the expertise to determine what constitutes unethical professional conduct.²⁰⁴ Both ABA contentions are correct.²⁰⁵ Even if the Commission can establish the validity of rule 2(e) by demonstrating that the SEC possesses inherent, implicit, or adjunctive authority to discipline attorney practitioners, the Commission cannot establish the validity of the *Carter* conduct standard.²⁰⁶

Although many parties today acquiesce in or expressly accept the

²⁰¹ See *supra* text accompanying notes 192-99 (ABA proposals to increase attorney practitioner disciplinary liability).

²⁰² See *ABA Statement, supra* note 112, at 24, col. 2-3. After the SEC issued the *Carter* decision, the ABA refrained from contesting the statutory validity of rule 2(e) and chose to attack only the authority of the SEC to promulgate the *Carter* minimum conduct standard. See *id.*; see also Amicus Brief of the Section of Corporation, Banking and Business Law of the American Bar Association [hereinafter cited as ABA Amicus Brief] at 20-21, *In re Carter, Securities and Exchange Commission Release No. 34-15797* (Feb. 28, 1981), reprinted in [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,145 (ABA admission that rule 2(e) may be valid and proper administrative rule).

²⁰³ See Ranii, *supra* note 112, at 5, col. 4 (ABA opposes *Carter* standard); *ABA Statement, supra* note 112, at 24, col. 2-3 (ABA argument against *Carter* standard).

²⁰⁴ See *ABA Statement, supra* note 112, at 24, col. 2-4.

²⁰⁵ See *id.* at 24, col. 2-3. The SEC's four arguments in support of the rule 2(e)'s validity do not support the validity of the *Carter* minimum conduct standard. See *supra* text accompanying notes 123-46 (inherent authority argument); *supra* text accompanying notes 147-73 (implicit authority argument); *supra* text accompanying notes 174-82 (adjunctive authority argument); *supra* text accompanying notes 183-88 (implied ratification argument). The *Carter* standard is not necessary to maintain integrity in SEC administrative processes because the standard, unlike rule 2(e), does not purport to provide for disciplinary sanctions in the event of attorney practitioner noncompliance. See *supra* text accompanying notes 123-46 (inherent authority argument). The *Carter* standard is not an administrative rule or regulation and therefore cannot be a necessary and appropriate agency promulgation. See *supra* text accompanying notes 147-73 (implicit authority argument). The *Carter* standard is not reasonably related to the realization of any statutory purpose contained in the 1934 Act and conflicts with the plenary right afforded state bar associations to promulgate ethical standards. See *supra* text accompanying notes 174-82 (adjunctive authority argument). Finally, because the Commission has created the *Carter* standard only recently, Congress has yet to consider the propriety of the standard or to ratify the standard by implication. See *supra* text accompanying notes 183-88 (implied ratification argument). In addition, although the SEC may possess over 40 years of experience in policing securities markets, the SEC has absolutely no experience or expertise in defining ethical standards. See ABA Amicus Brief, *supra* note 202, at 25 (SEC has no expertise in defining ethical standards); Dolin, *supra* note 7, at 366 (same).

²⁰⁶ See *supra* note 202 (SEC cannot use arguments that purport to support rule 2(e)'s validity to support the *Carter* conduct standard). The SEC could argue, however, that the *Carter* standard merely defines what action constitutes willful aiding and abetting pursuant to rule 2(e)(1)(iii) and is not an ethical conduct standard. Thus, the SEC could argue that the *Carter* standard removes the inherent vagueness in rule 2(e) and is a valid clarification

validity of rule 2(e), the existence of rule 2(e)'s statutory basis remains in doubt.²⁰⁷ The issue pertaining to rule 2(e)'s statutory basis, however, probably will not appear as a question before either the full Commission or the federal bench as long as the present SEC administration under Chairman Shad remains in office.²⁰⁸ Under Chairman Shad, the SEC has reduced dramatically the number of rule 2(e) proceedings brought against attorney practitioners.²⁰⁹ Following a recommendation by the SEC General Counsel,²¹⁰ the Shad Commission has referred many potential rule 2(e) proceedings to state bar associations and has avoided many potential attacks upon rule 2(e)'s validity.²¹¹ Above all, the SEC has not yet brought a rule 2(e) proceeding against an attorney practitioner alleging a violation of the *Carter* conduct standard.²¹² Opponents of the SEC's ethical norm for attorney practitioners and of SEC disciplinary authority in general may very well emerge victorious from any forthcoming litigation involving the validity of the *Carter* appeal minimum standard of conduct.²¹³

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of an already valid rule. See *supra* text accompanying notes 94-95 (rule 2(e) vagueness problems).

²⁰⁷ See R.S. KARMEI, REGULATION BY PROSECUTION: THE SECURITIES & EXCHANGE COMMISSION VERSUS CORPORATE AMERICA (1982) 172-183, 192 (*Touche Ross* and *Carter* did not establish validity of rule 2(e)).

²⁰⁸ See Matthews & Thompson, *supra* note 111, at 29, col. 1-2. Under Chairman Shad, the SEC has shifted the primary focus of its disciplinary activity from attorney practitioners to broker-dealers. *Id.*

²⁰⁹ See *id.* (reduction in rule 2(e) proceedings against attorneys under Chairman Shad during 1981 and 1982); *Interview with SEC Commissioner Longstreth*, 15 SEC. REC. & L. REP. (BNA) 566, 570 (Mar. 18, 1983) (same); see also, SEC, *Faced With Tight Budget, Is Paring "Peripheral" Defendants From Complaints*, *supra* note 114, at 6, col. 1-2. (discussing reduction in rule 2(e) proceedings).

²¹⁰ See Remarks of Edward F. Greene, General Counsel of the SEC, to the New York Lawyers' Association, *SEC Disciplinary Proceedings Against Lawyers Reviewed*, *supra* note 7, at 1, col. 2 (SEC should refer most potential rule 2(e) cases to state bar associations for disciplinary action).

²¹¹ See Matthews & Thompson, *supra* note 111 at 45 n.10 (SEC, during 1981-82 period, referred many potential rule 2(e) cases to state bar associations); see also Hudson, *SEC Goes Easier on Accountants, Relying More on Self-Regulation*, *supra* note 114, at 29, col. 3-6 (SEC, during 1981-82 period, referred many potential rule 2(e) cases involving accountants to state CPA societies and A.I.C.P.A.).

²¹² See 5 FED. SEC. L. REP. (CCH) ¶ 66,107 at 59,056-57.2 (SEC had not instituted rule 2(e) proceedings under the *Carter* conduct standard as of February 2, 1983). *But see Interview with SEC Commissioner Longstreth*, *supra* note 209, at 570 (SEC had "very long pipeline" of *Carter* conduct standard cases under investigation as of Mar. 18, 1983).

²¹³ See Dolin, *supra* note 7, at 372-73 (*Carter* conduct standard is invalid administrative promulgation); *ABA Statement*, *supra* note 112, at 25, col. 3-4 (suggesting that *Carter* conduct standard may not withstand judicial scrutiny); *supra* note 205 (explaining invalidity of *Carter* conduct standard).