

FILED

201 OCT 27 P 4:53

*[Signature]*  
CLERK OF THE COURT

1 0024  
2 PATRICK C. CLARY, CHARTERED  
3 Patrick C Clary  
4 Nevada Bar No. 00053  
5 City Center West, Suite 503  
6 7201 West Lake Mead Boulevard  
7 Las Vegas, Nevada 89128  
8 Telephone: 702.382.0813  
9 FAX: 702.382-7277

6 Attorneys for Defendant Patrick C. Clary

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 -o0o-

10 TED R. BURKE; MICHAEL R. and )  
11 LAURETTA L. KEHOE; JOHN BERTOLDO; )  
12 PAUL BARNARD; EDDY KRAVETZ; JACKIE )  
13 & FRED KRAVETZ; STEVE FRANKS; )  
14 PAULA MARIA BARNARD; PETE T. and )  
15 LISA A. FREEMAN; LEON GOLDEN; )  
16 C.A. MURFF; GERDA FERN BILLBE; )  
17 BOB and ROBYN TRESKA; )  
18 MICHAEL RANDOLPH; and FREDERICK )  
19 WILLIS, )

CASE NO. A558629  
DEPT NO. XIII

MOTION FOR SANCTIONS

16 Plaintiffs,

17 vs.

18 LARRY H. HAHN, individually, and )  
19 as President and Treasurer of )  
20 Kokoweef, Inc., and former )  
21 President and Treasurer of )  
22 Explorations Incorporated of )  
23 Nevada; HAHN'S WORLD OF SURPLUS, )  
24 INC., a Nevada corporation; )  
25 PATRICK C. CLARY, an individual; )  
26 DOES 1 through 100, inclusive; )

23 Defendants,

24 and

25 KOKOWEEF, INC., a Nevada )  
26 corporation; EXPLORATIONS )  
27 INCORPORATED OF NEVADA, a )  
28 dissolved corporation, )

Nominal Defendants. )

Law Offices of  
PATRICK C. CLARY, CHARTERED  
7201 West Lake Mead Boulevard, Suite 503  
Las Vegas, Nevada 89128  
Tel: 702.382.0813 - Fax: 702.382.7277

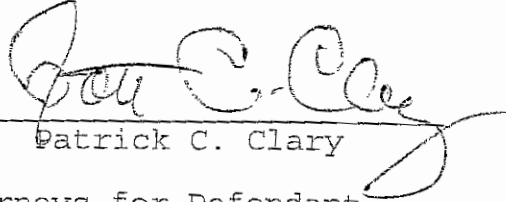


Law Offices of  
**PATRICK C. CLARY, CHARTERED**  
7201 West Lake Mead Boulevard, Suite 503  
Las Vegas, Nevada 89128  
Tel: 702.382.0813 - Fax: 702.382.7277

1 Defendant Patrick C. Clary ("the Movant") moves the Court for an  
2 Order granting sanctions in favor of the Movant and against the  
3 Plaintiffs and their attorneys of record for their violation of Rule  
4 11 of the Nevada Rules of Civil Procedure in their so-called Verified  
5 Derivative First Amended Complaint filed herein on September 22, 2008.

6 This Motion is made and based on all the pleadings and documents  
7 on file herein, the Memorandum of Points and Authorities in support  
8 hereof, and the Affidavit of Patrick C. Clary attached hereto as  
9 Exhibit A and incorporated herein by this reference.

10 PATRICK C. CLARY, CHARTERED

11  
12 By   
Patrick C. Clary

13 Attorneys for Defendant  
14 Patrick C. Clary

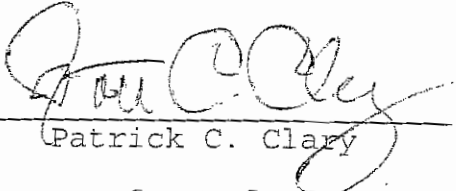
15 NOTICE OF MOTION

16 TO: The above-named Plaintiffs and their Attorneys:

17 NOTICE IS HEREBY GIVEN that the hearing on above and foregoing  
18 Motion for Sanctions will be held in Dept. XIII of the above-entitled  
19 Court in the Regional Justice Center, 200 Lewis Avenue, Las Vegas,  
20 Nevada, on the 1 day of December, 2008, at the hour of 9  
21 A. M., or as soon thereafter as counsel can be heard.

22 DATED this \_\_\_\_ day of October, 2008

23 PATRICK C. CLARY, CHARTERED

24  
25 By   
Patrick C. Clary

26 Attorneys for Defendant  
27 Patrick C. Clary

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. Introduction

3 Rule 11 of the Nevada Rules of Civil Procedure provides in  
4 pertinent part as follows:

5 (a) *Signature*. Every pleading, written motion, and other paper  
6 should be signed by at least one attorney of record in the  
attorney's individual name. . . .

7 (b) *Representations to court*. By present to the court (whether  
8 by signing, filing, submitting or later advocating) a  
9 pleading, written motion, or other paper, an attorney . .  
under the circumstances,--

10 (1) it is not being presented for any improper purpose,  
11 such as to harass or to cause unnecessary delay or  
12 needless increase in the costs of litigation;

13 (2) the claims, defenses, and other legal contentions  
14 therein are warranted by existing law or by a non-  
15 frivolous argument for the extension, modification, or  
reversal of existing law or the establishment of new  
law;

16 (3) the allegations and other factual contentions have  
17 evidentiary support or, if specifically so identified,  
18 are likely to have evidentiary support after a  
reasonable opportunity for further investigation or  
discovery. . . .

19 (c) *Sanctions*. If, after notice and a reasonable opportunity to  
20 respond, the court determines that subdivision (b) has been  
21 violated, the court may, subject to the conditions stated  
below, impose an appropriate sanction upon the attorneys,  
law firms, or parties that have violated subdivision (b) or  
are responsible for the violation. . . .

22 Among the allegations contained in the so-called Verified  
23 Derivative First Amended Complaint filed herein on September 22, 2008  
24 ("the Amended Complaint") relating to the Movant are the following,  
25 all of which contain false statements, which cannot be proved by  
26 credible evidence:

27 6. Plaintiffs are further informed and believe, and thereon  
28 allege, that the "Plan of Reorganization" between EIN and  
KOKOWEEF was a scheme concocted by Defendants HAHN and CLARY to  
conceal from the stockholders the Defendants' sale of

LAW OFFICES OF  
**PATRICK C. CLARY, CHARTERED**  
7201 West Lake Mead Boulevard, Suite 503  
Las Vegas, Nevada 89128  
Tel: 702.382.0813 - Fax: 702.382.7277

1 unregistered and non-exempt securities in violation of NRS  
2 90.460. . . .

3 15. Defendant CLARY admitted to BURKE at this meeting that  
4 he had concocted the scheme to "reorganize" EIN to exchange  
5 EIN's shares for KOKOWEEF shares in order to conceal the  
6 illegality of the sale of EIN securities and to conceal these  
7 illegal transactions from the shareholders until hopefully the  
8 statute of limitations has lapsed before the shareholders  
9 discovered this securities fraud.

10 16. During the September 18, 2007 meeting BURKE asked  
11 Defendant CLARY the direct question, "You are general counsel  
12 for KOKOWEEF, Inc., right?" Mr. CLARY responded that in fact he  
13 was general counsel for the corporation and was not acting as  
14 general counsel for Defendant HAHN. However, at that same  
15 meeting, BURKE expressed his concerns over improprieties in the  
16 issuance of securities for EIN and KOKOWEEF, as well as the  
17 corporation's failure to maintain adequate financial records and  
18 comply with the Bylaws. In response, attorney CLARY stated that  
19 if something went wrong he would correct it or "make it go  
20 away." Also, during this meeting, Defendant CLARY informed BURKE  
21 that the issuance of 70,000 shares of stock in KOKOWEEF to BURKE  
22 was illegal and created a tax liability for BURKE and all other  
23 shareholders who had been given shares of stock in exchange for  
24 alleged services contributed to the corporation. Defendant CLARY  
25 stated that he would [sic] inform all of the shareholders that  
26 they needed to file amended tax returns, but the Plaintiffs are  
27 informed and believe, and thereon allege, that as of the date of  
28 filing this action, Defendant CLARY has failed to give notice to  
the shareholders of this tax liability. . . .

18 18. During the September 28, 2007 meeting Defendant CLARY  
19 also advised BURKE that the sales of securities in EIN and  
20 KOKOWEEF did not need to be registered with the SEC, because  
21 they fell within an exemption provided by Rule 504 of Regulation  
22 D. However, Plaintiffs are informed and believe, and thereon  
23 allege, that the sale of securities in EIN and KOKOWEEF were not  
24 eligible for the exemption provided by Rule 504 of Regulation D  
25 of the SEC because neither EIN or KOKOWEEF registered the  
26 offering of shares with the State of Nevada or delivered  
27 substantive disclosure documents as required to investors such  
28 as Plaintiffs. Further, neither EIN nor KOKOWEEF filed a Form D  
after they first sold their securities, which is a requirement  
under Rule 504 of Regulation D. Additionally, Defendant CLARY  
advised BURKE that the sale of securities of EIN and KOKOWEEF  
were [sic] also exempt under Nevada securities laws. However,  
Plaintiffs are informed and believe, and thereon allege, that  
these representations were also false in that none of the  
transactions complied with the exemptions provided by NRS §9.250  
[sic] or NRS §9.530 [sic].

27 Many of the allegations contained in the Amended Complaint are  
28 based on a 114-page transcript ("the Transcript") of a settlement

1 conference ("the Settlement Conference") held in the Movant's law  
2 office on September 18, 2008, which has been attached to the original  
3 Complaint and numerous other Court documents filed herein by the  
4 Plaintiffs.

5 What neither set of the Plaintiffs' attorneys has revealed is  
6 that the Transcript, which is probably inadmissible as evidence in  
7 this case, was produced from a hidden recording device that Plaintiff  
8 Ted R. Burke ("Burke") surreptitiously turned on for the meeting  
9 unbeknownst to all the other people at the settlement conference  
10 including Defendant Patrick C. Clary ("Mr. Clary"), acting as general  
11 counsel for Kokoweef, Inc. Obviously, the purpose of making the  
12 recording was to utilize it for the litigation Burke was planning to  
13 file as he has done. See lines 20-21 on page 8 of the Transcript where  
14 Burke stated to Mr. Clary "I -- I've got bad hearing, so you've got  
15 to speak up. I'm sorry."

## 16 II. Argument

17 A. The Amended Complaint against Clary has been brought for an  
18 improper purpose.

19 As the record shows in the above-captioned case, the Plaintiffs,  
20 through their previous counsel, sought to disqualify Clary as counsel  
21 for Kokoweef, Inc. on the ground that Clary was a necessary witness  
22 in the case, but the Court correctly denied their motion. As is shown  
23 in the Affidavit of Patrick C. Clary attached hereto as Exhibit A  
24 ("the Clary Affidavit"), they also filed a grievance with the State  
25 Bar of Nevada in their second attempt to disqualify Mr. Clary. See  
26 paragraph 15 of the Clary Affidavit.

27 Now they are attempting to disqualify him as counsel by creating  
28 a potential conflict of interest through the false allegations against

1 him, an obviously improper purpose that also amounts to harassment of  
2 both Kokoweef, Inc. and Clary and is causing unnecessary delay and  
3 needless increase in the costs of the litigation.

4 B. The Amended Complaint is not warranted by existing law and  
5 is not legally sustainable.

6 The Amended Complaint (like the original Complaint herein)  
7 purports to be a "Shareholders [sic] Derivative Action" presumably  
8 under Section 41.520 of Nevada Revised Statutes, but is defective in  
9 certain respects. First of all, there is no way that the securities  
10 fraud action which the Plaintiffs are attempting to assert "will  
11 benefit the corporation [Kokoweef, Inc.] or its security holders." NRS  
12 Section 41.520(3)(a). Secondly, since Plaintiff Ted R. Burke ("Burke")  
13 was an officer and director of Kokoweef, Inc. during certain of the  
14 periods covered by the allegations contained in the Amended Complaint,  
15 both he and the other former director (who is not a Plaintiff but has  
16 collaborated with Burke) should have been named as Defendants!  
17 Finally, the Amended Complaint does not contain a valid claim against  
18 the Movant because it does not properly allege and plead scienter. See  
19 paragraph 12 of the Clary Affidavit.

20 C. The allegations and factual contentions in the Amended  
21 Complaint lack evidentiary support and are not likely to have  
22 evidentiary support after a reasonable opportunity for further  
23 investigation or discovery.

24 The allegations set forth above are untrue as to Mr. Clary and  
25 are neither supported nor supportable by any credible evidence  
26 whatsoever. (See, in particular, paragraphs 9, 10, and 11 of the Clary  
27 Affidavit.) Accordingly, the claims for relief against Clary contained  
28 in the Amended Complaint, namely the so-called "SECOND CAUSE OF

Law Offices of  
**PATRICK C. CLARY, CHARTERED**  
7201 West Lake Mead Boulevard, Suite 503  
Las Vegas, Nevada 89128  
Tel: 702.382.0813 - Fax: 702.382.7277

1 ACTION," "FOURTH CAUSE OF ACTION," "FIFTH CAUSE OF ACTION," and "SIXTH  
2 CAUSE OF ACTION" must fail.

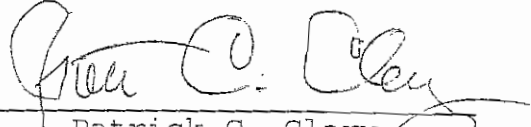
3 Conclusion

4 While the Movant is seeking an award of the maximum sanctions  
5 permitted under Rule 11, the Court should be aware that the unfounded  
6 and unprecedented accusations that the Movant committed securities  
7 fraud, which he never has (as set forth in the Clary Affidavit  
8 especially including paragraph 9 thereof) are causing and will cause,  
9 if not withdrawn or quickly proved to be false, severe damage to the  
10 professional and reputation of the Movant as a respected attorney in  
11 Nevada for 41 years and damage to the good will of the Movant and his  
12 law firm, which is being virtually destroyed. (See paragraph 16 of the  
13 Clary Affidavit.)

14 For the reasons set forth above and in the Clary Affidavit, the  
15 foregoing Motion for Sanctions should be granted by the Court.

16 Respectfully submitted,

17 PATRICK C. CLARY, CHARTERED

18  
19 By   
Patrick C. Clary

20  
21 Attorneys for Defendant  
Patrick C. Clary







know, you probably are." A copy of the article is attached hereto as Exhibit 1.

4. A copy of a Summons, together with a copy of the so-called "Verified Derivative First Amended Complaint" ("the Amended Complaint"), was received in my office, during my absence therefrom, on September 26, 2008, supposedly serving Chartered as resident agent for so-called Nominal Defendant Kokoweef, Inc. ("Kokoweef"), which service was in violation of Rule 5(b)(1) of the Nevada Rules of Civil Procedure. On September 29, 2008, another copy of the Summons and Amended Complaint was served by a process server on me personally as a new Defendant in the above-captioned case.

5. Many of the allegations contained in the Amended Complaint are based on a 114-page transcript ("the Transcript") of a settlement conference ("the Settlement Conference") held in my law office on September 18, 2008. The Transcript was attached to the original Complaint and numerous other Court documents filed herein by the Plaintiffs,

6. What neither set of the Plaintiffs' attorneys has revealed is that the Transcript, which is probably inadmissible as evidence in this case, was produced from a hidden recording device that Plaintiff Ted R. Burke ("Burke") surreptitiously turned on at the Settlement Conference unbeknownst to all the other people attending and participating in the same including me, acting as general

counsel for Kokoweef. Obviously, the purpose of making the recording was to utilize it in the litigation Burke was planning to file as he has done. At lines 20-21 on page 8 of the Transcript, Burke is quoted as stated to me that "I -- I've got bad hearing, so you've got to speak up. I'm sorry."

7. The Transcript itself, on its face, lacks credibility and is highly suspect in certain respects. For example, on page 18, at lines 9-10, I am quoted as saying the following: "Then we have a jury trial. . .," which I never would have said; instead I would have said that "you **don't get** a jury trial." Similarly, on page 21, at lines 17, I am quoted as saying "you didn't have to worry about anything that occurred less then [sic--should be 'than'] five year ago," when I had to have said "**more** than five years ago."

8. In addition, the Transcript contains the word "indiscernible" 205 times, of which statements attributable to me contain the same word at least 66 times, and statements attributable to Burke contain it 28 times! Furthermore, the Transcript contains references to an "UNIDENTIFIED SPEAKER" 85 times! If Burke did not and does not know who the "UNIDENTIFIED SPEAKER" is, then he is probably unqualified to testify as a witness in this case.

9. Paragraph 6 of the Amended Complaint makes the false accusation that the "Plan of Reorganization," which is a part of an Agreement and Plan of Reorganization prepared by me between

Kokoweef and Explorations Incorporated of Nevada ("EIN"), which was a Nevada corporation that has since been dissolved, "was a scheme concocted by Defendant HAHN and CLARY to conceal from the stockholders the Defendants' sale of unregistered and non-exempt securities in violation of NRS 90.460." I can say both honestly and emphatically that there was absolutely no such scheme to conceal anything from anyone!

10. Paragraph 15 of the Amended Complaint goes on to falsely allege that "Defendant CLARY admitted to BURKE at this meeting [meaning the Settlement Conference on September 18, 2008] that he concocted the scheme to 'reorganize' EIN to exchange EIN's shares for KOKOWEEF shares to **conceal the illegality of the sale of EIN securities and to conceal these illegal transactions from the shareholders until hopefully the statute of limitations has lapsed before the shareholders discovered this securities fraud**" (emphasis added). I have carefully reread the Transcript, and I have found no such admission therein because, in truth and in fact, I never made any such admission.

11. More to the point, I have never committed securities fraud in my entire life, including the long period of time that I have been a lawyer. The allegations quoted from the Amended Complaint in the Motion for Sanctions accusing me of misconduct are false and not based on any credible evidence whatsoever.

12. In addition, the Amended Complaint is lacking as a claim

for securities fraud including the requirement under case law that scienter be alleged and pled. Even though the Plaintiffs' new lawyers obviously are lacking in knowledge of the securities laws, they apparently didn't even read that portion of the Transcript found on page 17, at lines 14-19, where the following is stated:

MR. HAHN: I don't think there's any criminal --

MR. BURKE: Intent here.

MR. CLARY: Any -- any scienter here on the part of anybody.

MR. BURKE: Right.

MR. CLARY: Scienter means criminal intent.

13. Addressing paragraph 16 of the Amended Complaint, I deny that I did anything wrong. With regard to the allegation that I "failed to give notice to the shareholders of this tax liability," the authorization and issuance of shares of the common stock of Kokoweef for service or without consideration were rescinded.

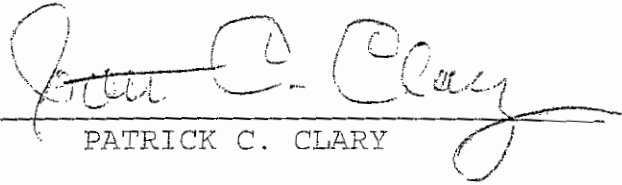
14. Addressing paragraph 18 of the Amended Complaint, I have been advised that the staff of the Securities and Exchange Commission ("the SEC") has relaxed the requirement for filing Form D and that the failure to do so does not relinquish reliance on the exemption under Rule 504 of Regulation D. Furthermore, again, if the Plaintiffs' attorneys had bothered to read that portion of the transcript found on page 26, lines 20-21, they would have seen that I stated "fortunately, the state [of Nevada] had an exemption for

reorganizations," namely Subsection 17 of Section 90.530 of Nevada Revised Statutes, and that I went on to state, on lines 23-25, "you pay the filing fee and file a form, and I filed the reorganization agreement, and if they don't do anything in ten days, you're exempt."

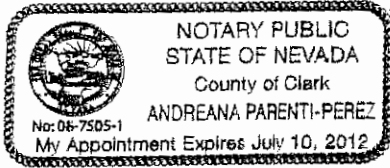
15. Furthermore, the Plaintiffs' predecessor attorney by motion previously sought to have me disqualified as attorney for Kokoweef in this case by arguing that I would be a necessary witness, but his motion was denied. Failing in that, the Burke caused a grievance ("the Grievance") to be filed against me by the State Bar of Nevada. A copy of the Grievance will be provided to the Court *in camera* if requested. This is the second attempt to disqualify me as Kokoweef's counsel. It is obvious that the Plaintiffs' new lawyers have themselves concocted a scheme with the Plaintiffs to try a third time to get me disqualified by wrongfully naming me as a party Defendant in this case.

16. The false and fraudulent accusations against me are causing and will continue to cause me severe damages including damage to my professional and personal reputation and good will. Naming me as a Defendant in this case has been "the straw that broke the camel's back" for me professionally, because I have been forced into seeking to withdraw as a partner in the New Law Firm, which I have worked countless hours, days, and weeks to develop and establish. Even if I win this case hands down, as has been said by

others wrongfully accused, how will I get back my good name?

  
PATRICK C. CLARY

SUBSCRIBED AND SWORN TO before me on October 3, 2008.







# Are You Practicing Securities Law and Don't Know It? If you don't know, you probably are.

By Patrick C. Clary

- If you are forming business organizations for clients, including corporations, limited partnerships and limited-liability companies, and preparing documentation, including minutes of meetings, stock purchase agreements, limited partnership agreements, and operating agreements respectively, which provide for the issuance of debt or equity interests in such business organizations, including corporate stock, limited liability interests and limited-liability member interests;

- If you are negotiating and preparing for clients financing-related agreements, including, again, stock purchase agreements, limited partnership agreements, operating agreements and even joint-venture agreements;

- If you are advising clients regarding financing arrangements and agreements for their business or advising other clients who are, directly or indirectly, providing financing for business enterprises;

- If you have been involved in business or residential real estate transactions which involve clients who sell, or clients who buy, debt or equity interests in such real estate projects that are financially more complicated than a mere direct sale or purchase of a real estate ownership interest; or

- If you are representing clients who are acting as intermediaries in financial transactions but are not licensed broker-dealers of securities;

THEN, for the reasons set forth below, you probably are practicing securities law perhaps without even knowing it. If so, you may be failing to advise your clients about the enormous impact that the securities laws have on people and entities who are on both sides, or even in the middle, of financing transactions!

## What is or is not a "security?"

Not only is a "security" specifically defined in the federal securities laws as what a person unsophisticated in se-

curities law would consider a security to be, such as "stock, treasury stock, preorganization certificate or subscription, and voting-trust certificate," but it is also, for example, a note, bond, debenture, evidence of indebtedness, investment contract, option, and fractional undivided interest in oil, gas or other mineral rights." Section 2(1) of the Securities Act of 1933, as amended ("the Securities Act" or "the '33 Act"), 15 U.S.C. §77a(1), and Section 3(a)(10) of the Securities Exchange Act of 1934, as amended ("the Exchange Act" or "the '34 Act"), 15 U.S.C. §78c(10). For example, Nevada's Uniform Securities Act also expressly includes in the definition of a "security," "a limited partnership interest" and "an interest

in a limited-liability company," in order to make it clear that, unbeknownst to some, those interests are clearly "securities." NRS 90.295.



*Nevada's Securities Act also expressly includes the definition of a "security," ...*

Under *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) and its progeny, the "catch all" (as I put it an "investment contract") is a "security" when a person invests his money in a common enterprise with the expectation of profits from the significant efforts of others. I won a case in the Ninth Circuit and beyond in *Hocking v. Dubois*, 88 F.2d 1449 (9th Cir. 1989), cert. denied 494 U.S. 1078 (1990), where a condominium in Hawaii was held to be a security under the circumstances under which it was offered and sold, because it met the foregoing *Howey* test. *Hocking*, supplemented by its progeny, still stands as the leading case in the Ninth Circuit with respect to real estate securities.

## Registering securities vs. complying with an exemption from registration

While the "heart" (in my opinion) of the Securities Act is full and accurate disclosure, more specifically its "thrust" is what I call the "11th Commandment," namely: "Thou shall register thy securities." However, to go through the full registration process to raise capital is often too costly and time-consuming, especially for small businesses, which I



have mostly represented, so the alternative for a prospective issuer of securities is to comply with an exemption from the registration requirements of the Securities Act.

Congress empowered the United States Securities and Exchange Commission ("the SEC") to implement and enforce rules and regulations under the federal securities laws. Regulation D, which was originally adopted by the SEC in 1982 under the Securities Act, provides the most commonly used method of complying with an exemption from registration and to provide a "safe harbor" for issuers. Regulation D was adopted under both the small offering exemption provided by Section 3(b) and the private, or non-public, offering exemption provided by Section 4(2) of the Securities Act, 15 U.S.C. §77c(b) and §77d(2), respectively.

Rule 501 of Regulation D, 17 CFR §230.501, provides definitions of terms, and the most commonly used definitions for an "accredited investor" are: (1) a director, executive officer, or general partner of an issuer; and (2) a natural person with a net worth exceeding \$1,000,000 or with an individual income in excess of \$200,000 or joint income with that person's spouse in excess of \$300,000, subject to certain other details.

Rule 504, 17 CFR §504, is the easiest to comply with and permits the offer and sale of securities not exceeding an

aggregate of \$1,000,000 in any 12-month period to an unlimited number of offerees and purchasers, none of whom need be accredited investors. Rules 505 and 506, 17 CFR §§ 505 and 506, permit offers and sales to not more than 35 investors who are not accredited investors, the rest of whom must be accredited, with Rule 505 limited to \$5,000,000 but with Rule 506 having no monetary limitation. While full and complete disclosure is always required, Rule 504 has no specific disclosure requirements, but Rules 505 and 506 do have specific informational and financial disclosure requirements but not if the securities are offered only to accredited investors.

There also must be compliance with a securities or transactional exemption under the securities or "blue sky" laws of the states in which the offerees and purchasers reside.

### **Liabilities under the securities laws**

There are basically three types of liabilities that can arise under the securities laws, (1) criminal liabilities, (2) civil liabilities resulting from actions brought by governmental agencies and (3) civil liabilities to investors and others. While the federal and state governments are empowered to

*Securities continued on page 34*



## **Richard M. Teichner, CPA/ABV, CVA, CDFATM**

Director of Litigation Support and Business Valuation Services  
with Barnard, Vogler & Co., CPAs

providing

**Consulting and Expert Witness Testimony for  
Business Litigation and Family Law Matters  
and Business Valuation Services throughout Nevada**

Contact Mr. Teichner at:  
(775) 786-6141 Fax (775) 323-6211  
rteichner@barnardvoglerco.com  
100 W. Liberty Street, Suite 1100 Reno, NV 89501



**BARNARD VOGLER & CO.**  
Certified Public Accountants

*Securities continued from page 33*

prosecute criminally, in their respective names, violators of securities laws, the SEC is empowered, in its name, to bring civil enforcement actions in the federal courts seeking injunctions, disgorgements, and other relief, and certain state securities agencies can also file administrative and court actions. For example, the Securities Division of the Secretary of State of the State of Nevada is empowered to issue cease and desist orders against securities violators. NRS 90.360.

Nevertheless, the most common action that issuers should actively seek either to avoid by compliance, or successfully to defend in litigation, are civil actions brought by investors, generally seeking recovery of the amount of their investments, interest thereon, and attorneys' fees against issuers and their officers, directors and controlling persons. See Section 18 of the Securities Act, 15 U.S.C. §77(o), and Section 20 of the Exchange Act, 15 U.S.C. §78(t), as well as NRS 90.660, et seq., which impose civil liability of controlling persons. Furthermore, unlike the normal rule in civil cases where the plaintiff has the burden of proof, when the issuer asserts as a defense compliance with an exemption, the burden of proof shifts to the defendant(s) to prove such compliance. See NRS 90.690(1).

Moreover, broker-dealers of securities are required to be licensed (see Section 15 of the Exchange Act, 15 U.S.C.

§78o). Intermediaries in financing transactions, who charge compensation (e.g. brokerage commissions or finder's fees) but who are not so licensed, also can incur severe liabilities.

### "Substance" over "form"

Unlike other areas of administrative law, where it could be argued that "form" over "substance" prevails, under the securities laws it is clearly the opposite: "substance" over "form" prevails. See *Hocking, supra*.

In Preliminary Note No. 7 to Regulation D, the SEC states as follows: "In view of the objectives of these rules and the policies underlying the [Securities] Act, Regulation D is not available to any issuer for any transaction or chain of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the [Securities] Act. In such cases, registration under the [Securities] Act is required." How do you explain that to a client? I can tell you that it is not easy.

### Conclusion

Business practitioners who are not familiar with or have not fully recognized the complexities of the securities laws should surely be wary and circumspect when getting involved in financing transactions. Yet, do not fear! When I graduated from law school and went to work for Sam Lionel and Grant Sawyer on March 1, 1967 (the day they started Lionel & Sawyer), I had never taken a course in securities law or ever worked for the SEC or any state securities agency. So I started my learning process in the field a year or so later, and here I am now. Just don't try to learn it overnight, and get some help. You'll sleep better at night.

Many years ago some corporate lawyer in California opined that, when it was required for the board of directors of a corporation to adopt a resolution to create Section 1244 stock under the Internal Revenue Code (no longer a requirement), it was malpractice, particularly in a new corporation involving speculative investments, not to do so. In representing issuers of securities, may I offer the proposition that failing to evidence at least the minimal compliance with Rule 504 of Regulation D when forming a new corporation and issuing stock, for example, may amount to the same thing? Let's pull together and try to avoid the possible professional problems of failing our clients and ourselves by at least recognizable and reasonable compliance with the securities laws. ©

*Patrick C. Clary, a native Las Vegas, who holds bachelor of arts and juris doctor degrees from The American University in Washington, D.C., has practiced law in Nevada for 40 years.*

**StorageOne** Number One In Value  
Number One In Service  
Number One In Satisfaction

11705 LAS VEGAS BOULEVARD, LAS VEGAS, NEVADA 89104  
CONVENIENT DOWNTOWN LOCATION  
Entrance on Las Vegas Blvd. and Exit on 4th St.

- Monthly Rental
- No Deposit!
- Air-Cooled Units
- Boxes & Moving Supplies
- Stored Property Insurance
- Open Monday-Friday with Macys
- Computerized Gate Access
- Camera Surveillance & Door Alarms

**UP TO THREE MONTHS FREE!**  
(NEW RECORD STORAGE CUSTOMERS ONLY)

CHECK OUT OUR WEBSITE FOR COMPLETE LOCATION!  
**GoStorageOne.com 330-4319**