South Carolina Bar
Continuing Legal Education Division

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South Carolina Bar

Continuing Legal Education Division

The Most Common Securities Law Mistakes by Non-Securities Lawyers

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NELSON MULLINS

Presentation for

South Carolina Bar

Securities Law Mistakes by Non-Securities Lawyers

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January 23, 2026

1

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Not Knowing The Two-word Answer to Most Securities Law Questions

"It Depends"

2

2

Why Securities Law Violations Matter

3

3

Consequences of Securities Law Violations

- Rescission rights of investors
- Regulatory enforcement
- Extreme cases – criminal liability
- Some cases – lawyers can be held liable as aiders and abettors

4

4

"Materiality"

5

5

Materiality

- How do we decide if an issue is material?
- Lets say net income is $2,000,000
- Find an oops of $(20,000)
- This is 1% - is it material????
- What if shares O/S are also 2,000,000
- What if consensus estimate from First Call is EPS of $1.00?????

6

6

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Materiality

- SAB 99
- Codified in Staff Accounting Bulletin
  - Significant likelihood
  - Reasonable investor
  - Alter total mix of information
- Two aspects
  - Quantitative
  - Qualitative

7

7

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Materiality

- Substantial likelihood that investor would consider information important
- Alter the "total mix" of information in the market place
- Reasonably certain to have a substantial effect on the market price of the security
- Earnings guidance almost guaranteed to meet the test
- Materiality generally is tested with 20/20 hindsight

8

8

“Duty to Disclose”

9

9

What is the “Duty to Disclose”?

- Legal foundations in the Securities Act of 1933 and Securities Exchange Act of 1934
- Duty to update
- Duty to correct
- Interaction with the SEC’s reporting requirements

10

10

Disclosure Requirements

- No duty to disclose except for:
  - SEC reporting requirements;
  - Prior to trading own securities; or
  - To correct a prior statement that remains viable in the market and was inaccurate at the time it was made.
- A company may refuse to comment on certain activities, such as pending merger negotiations; however, if a company chooses to make a public statement about a material fact, it has a duty to speak truthfully and not mislead.
- Denying the existence of activity may qualify as a comment and may be actionable if it is a material misstatement or omission. *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

11

11

Hypothetical to Illustrate

Foreign car company ("FCC") secures a patent for a new type of battery that will power the cars of the future. FCC's CEO announced in an October 2025 press conference that the battery is a "significant breakthrough" for the battery-powered auto industry. He said, "On the basis of 6 months of tests, the battery would allow the typical US or foreign-made automobile to drive up to 50 hours and reach a maximum speed of 120 mph." FCC's CFO said that "when full production of 10,000 batteries per month is achieved by early 2026, the cost is expected to be $250 per battery, which will allow retail sales of $500 per battery, doubling FCC's income."

FCC has now determined:

- They really meant to say 120 kmh (75 mph)
- Subsequent testing shows the battery needs to be charged every 28 hours
- Estimated cost is now $260
- Full production is now estimated to be no greater than 8,000 per month

12

Failing to Appreciate What is a "Security"

13

13

"Security"

- '33 Act and '34 Act definitions virtually identical
- "any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, . . . **investment contract**, . . . or, in general, any interest or instrument commonly known as a 'security', . . . or any . . . guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

14

14

"Security"

- "Investment contract"
  - *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946)
  - "*Howey*" test
    - Investment of money
    - Common enterprise
    - Expectation of profits
    - Solely from the efforts of others

15

15

"Security"

- Breaking down the "*Howey*" test
  - Investment of money
    - Consideration that would support a contract
    - "investment" – tied to expectation of profits (*i.e.*, what is the *purpose* of the expenditure?)
  - Common enterprise
    - Vertical commonality
    - Horizontal commonality

16

16

"Security"

- Breaking down the "*Howey*" test
  - Expectation of profits ("economic realities" test)
    - Fixed return will suffice
    - Non-contributory retirement plan will not suffice
    - Interests in a housing cooperative will not suffice
  - Solely from the efforts of others
    - Test not applied literally
    - Typical case involves passive investor
    - Are the other party's efforts "undeniably significant"

17

17

"Security"

"Unless the context otherwise requires"

- "Family resemblance" test
  - motivation of the parties
  - plan of distribution
  - reasonable expectation of investors
  - need for Securities Act registration (*e.g.*, existence of another regulatory scheme)

- Cooperative interest/capital account ≠ security
- Note = security (*Reves*)
- Stock = security (*Landreth*)

18

18

“Transactional” nature of the Securities Act of 1933 – there is no “family and friends” exemption

19

19

Under the Securities Act of 1933 Three Types of Offers and Sales

- Registered, such as:
  - S-1 (or F-1)
  - S-3 (or F-3)
- Exempt, such as:
  - Regulation D (private placement)
  - Regulation A
  - Rule 144
- Illegal

20

20

What About Secondary Market Sales

- It depends:
  - Are the securities "restricted"?
  - Is the seller an "affiliate" of the company that is the issuer of the securities?
- If the answer to both questions is "no", then the sale is exempt under section 4(a)(1) – transactions by someone "other than an issuer, underwriter or dealer."

21

21

Who's An "Underwriter"

- "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . . ."
- "*As used in this paragraph* the term 'issuer' shall include . . . any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." – *i.e.*, an "affiliate"

22

22

Who's An "Underwriter"

- So – the definition could read:
  - "any person who has purchased from an issuer or an affiliate of the issuer with a view to, or offers or sells for an issuer or an affiliate of the issuer in connection with, the distribution of any security ..."
  - Critical to understanding exemption from registration found in Section 4(a)(1).

23

23

Section 4(a)(1) Exemption

- The exemption could read transactions by someone other than:
  - an issuer;
  - an "affiliate" of the issuer;
  - underwriter; or
  - dealer.

24

24

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“We’re just a small private company – we’re just making some equity awards to employees.”

25

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Equity Awards to Employees

- Must have an exemption
- For private companies, may use Rule 701
- Could also use 4(a)(2) or Regulation D for executives
- Must also comply with applicable state counterpart

26

“But I only gave an enforceability – what do you mean I gave a securities opinion?”

27

27

The Inadvertent Opinion

Transaction was a stock sale –the transaction could have been a “failed” (*i.e.*, non-exempt) stock sale

Rule 1.1 – Competence

Rule 1.3 – Diligence

Solution – don’t “dabble” and know the law

28

Using general solicitation without an exemption

29

29

What This Looks Like

- Posts on social media
- Blast emails to persons with whom client has no relationship
- Pitching at public events

- Not recognizing the difference between offerings under Rule 506(b) versus Rule 506(c)

30

30

"Why do I need to file a Form D"

31

31

Failure to File a Form D

- No notice to SEC or state officials
- Can jeopardize the exemption, particularly if state blue sky laws are ignored
- Potential penalties
- Can jeopardize future use of Regulation D

32

32

Failing to recognize the importance of state versus federal securities laws

33

33

Pre-emption

The National Securities Markets Improvement Act ("NSMIA")

34

34

“Finders”

35

35

Finders

- Paying transaction-based compensation implicates the broker-dealer laws
- Illegal to pay unlicensed “finders” except in extremely narrow circumstances

36

36

Failure to Understand "Reporting Up" Obligations

37

37

"I don't represent public companies – I'm sure glad those SEC rules 'reporting up' rules don't apply to me."

38

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"Appearing and Practicing before the [SEC]"

- Transacting any business with the SEC including communications in any form;
- Representing an issuer in SEC administrative proceedings or in connection with an SEC investigation, inquiry, information request or subpoena;
- Providing advice re US securities laws, rules or regulations re any document that you have notice will be filed with, submitted to or incorporated by reference in any document submitted to the SEC; or
- Advising issuer whether information or statement required under US securities laws.

39

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Not Appreciating the broad definitions of the federal securities laws

40

40

"Sale" and "Offer"

- "'sale' . . . shall *include* every contract of sale or disposition of a security or interest in a security, *for value* [and] 'offer' shall *include* every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value."
- Note carve-out for 5(c) purposes of preliminary negotiations with and among underwriters
- Note gradual deregistration of "offers" – carve-outs for "test the waters" communications and research reports; Rule 163; Rule 163A; Rule 163B; Rule 165.

41

"Prospectus"

- "any prospectus, notice, circular, advertisement, letter, or communication, . . . which offers any security for sale or confirms the sale of any security . . . ."
- Useful to think of a "prospectus" simply as a "written offer."
- Specifically excludes
  - communication that accompany or are preceded by a final prospectus ("free writing")
  - certain "tombstone" ads

42

42

"Prospectus"

- Communications during the "waiting" period
- Liability under Section 12(a)(2) – but consider effects of *Gustafson v. Alloyd Company, Inc.*, 513 U.S. 561 (1995) – when is a prospectus not a prospectus?
  - "crowdfunding" exemption
  - Regulation A+ exemption

43

43

"Proxy"

- A "proxy" includes a:
  - proxy
  - consent
  - authorization
- A proxy "solicitation" includes any:
  - request for a proxy
  - request to execute or not execute or revoke a proxy
  - Communications "reasonably calculated" to result in procuring, withholding or revoking a proxy

44

44

Private tender offers

45

45

Apply to Both Public and Private Companies

- Antifraud provisions
- Minimum offer period
- Requirement for prompt payment
- Company position statement
- No purchases outside the tender offer
- Can't trade if in possession of material non-public information

46

Insider Trading

47

47

Question

Suppose you are at a restaurant and overhear two bankers discussing a major acquisition that has not yet been made public by the companies involved. If you trade on the basis of this information overheard at a restaurant, are you guilty of insider trading?

- Yes
- No

48

48

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Insider Trading

- Section 10(b) of the 1934 Act states that it shall be unlawful:
  - (b) To use or employ, in connection with the purchase or sale of any security … any manipulative or deceptive device or contrivance in contravention of [SEC rules].
- Rule 10b-5 provides:
  - It shall be unlawful…:
    - (a) To employ any device, scheme, or artifice to defraud,
    - …
    - (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit on any person,
  - in connection with the purchase or sale of any security.

49

49

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Insider Trading

- In interpreting Section 10(b) and Rule 10b-5, the Supreme Court has repeatedly rejected the notion of "a general duty between all participants in market transactions to forgo actions based on material, nonpublic information."
- Nothing in the law requires a symmetry of information in U.S. securities markets.
- In other words, it is not a fraud or deceit not to share information unless there is a duty to share it.
- So, when does a duty to share information arise?
- Is there a fiduciary duty to disclose? Only if there is personal gain associated with failure to disclose.

50

50

Insider Trading Theories

- "Classic"
  - *Texas Gulf Sulphur*
  - *Chiarella*
- "Tipper-tippee"
  - *Dirks*
  - *Salman*
- Misappropriation – *O'Hagan*
- Recent developments – "shadow" trading
  - *SEC v. Panuwat*

51

51

"Shadow Trading" Case


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SEC Charges Biopharmaceutical Company Employee with Insider Trading

FOR IMMEDIATE RELEASE | 2021-155

Washington D.C., Aug. 17, 2021 — The Securities and Exchange Commission today charged a former employee of California-based Medivation Inc. with insider trading in advance of Medivation's announcement that it would be acquired by pharmaceutical giant Pfizer Inc.

According to the SEC's complaint, filed in the U.S. District Court for the Northern District of California, Matthew Panuwat, the then-head of business development at Medivation, a mid-sized, oncology-focused biopharmaceutical company, purchased short-term, out-of-the-money stock options in Incyte Corporation, another mid-cap oncology-focused biopharmaceutical company, just days before the Aug. 22, 2016, announcement that Pfizer would acquire Medivation at a significant premium. Panuwat allegedly purchased the options within minutes of learning highly confidential information concerning the merger. According to the complaint, Panuwat knew that investment bankers had cited Incyte as a comparable company in discussions with Medivation and he anticipated that the acquisition of Medivation would likely lead to an increase in Incyte's stock price. The complaint alleges that Medivation's insider trading policy expressly forbade Panuwat from using confidential information he acquired at Medivation to trade in the securities of any other publicly-traded company. Following the announcement of Medivation's acquisition, Incyte's stock price increased by approximately 8%. The complaint alleges that, by trading ahead of the announcement, Panuwat generated illicit profits of $107,066.

- Bought call options 7 minutes after receiving internal email regarding a transaction
- SEC told jury that Panuwat made $120,000 in illicit profits
- Eight-day trial concluded on 4/5/2024
- Jury found Panuwat liable for insider trading
- On September 29, 2024, Court imposed maximum civil penalty of $321,197 but refused to impose officer/director bar
- On November 8, 2024, Panuwat appealed to the Ninth Circuit – case was set to be heard in 2025

52

52

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Questions???

53

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Legal Implications of Artificial Intellignece

Jeffrey Kelly

No Materials Available

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South Carolina Corporate Statutory and Case Law Update

Benjamin Barnhill

No Materials Available

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Advice for Lawyers serving on Non-Profit Boards

Ginny Waller

Advice for Lawyers Serving on Nonprofit Boards
SC Supreme Court Commission on CLE Course #: 260131

Course Overview
Lawyers are uniquely suited to strengthen nonprofit boards—but they're also uniquely positioned for ethical risk. This one-hour CLE will help legal professionals understand how to serve responsibly on nonprofit boards by balancing fiduciary duties, professional ethics, and practical governance realities.
Participants will learn:

1. The legal and fiduciary obligations of nonprofit directors under South Carolina law;
2. The ethical boundaries that apply when lawyers serve as directors; and
3. Practical strategies for contributing effectively without assuming unintended professional liability.

Why Lawyers Are Invited to Serve
Nonprofits often seek attorneys for their credibility, analytical skills, and professional networks. Yet many boards mistakenly assume that a lawyer-director automatically provides free legal advice. Serving as a board member is not the same as serving as counsel. Understanding that distinction is key to staying within ethical bounds and maintaining effective governance.

Fiduciary Duties of Nonprofit Directors

1. Duty of Care
S.C. Code Ann. § 33-31-830 (2024), based on the Model Nonprofit Corporation Act, requires that directors:

1. Act in **good faith**;
2. With the **care an ordinarily prudent person** would exercise; and
3. In a manner **reasonably believed to be in the best interest** of the corporation.

A director fulfills this duty by being informed, attending meetings, reviewing materials, and asking questions. Failure to act with diligence or to monitor financial condition can constitute a breach of the duty of care.

Key Case: *Osborn v. University Med. Ass'n*, 278 F. Supp. 2d 720 (D.S.C. 2003), clarifies that "gross negligence" requires conscious wrongdoing; ordinary mistakes are protected if made in good faith.

2. Duty of Loyalty

Directors must act solely in the interests of the organization. Conflicts of interest should be disclosed in writing, documented in minutes, and resolved through recusal. Boards should adopt a written Conflict of Interest Policy that requires annual disclosures and sets forth how conflicts will be handled.

Best Practice: Even potential conflicts—such as when a director's firm provides services to the nonprofit—should be addressed transparently.

Disclosure is good; documentation is better; recusal is best.

]

3. Duty of Obedience

This duty requires the board to ensure that the organization remains faithful to its stated charitable purpose and complies with laws governing tax-exempt status. Directors must avoid activities inconsistent with the nonprofit's mission or that could jeopardize its 501(c)(3) status (e.g., excessive lobbying, private inurement).

Ethical Responsibilities for Attorney-Directors

South Carolina's Rules of Professional Conduct (Rule 407, SCACR) apply even when lawyers serve as unpaid directors.

Key rules to consider:

Rule	Key Obligation	Relevance to Board Service
1.1 – Competence	Provide competent representation.	Do not advise on matters outside your expertise (e.g., tax or employment) unless retained as counsel.
1.6 – Confidentiality	Protect client information.	Board discussions are not automatically privileged.
1.7 – Conflict of Interest	Avoid concurrent conflicts.	Duties of loyalty may clash with duties to clients or firm.
1.13 – Organization as Client	Lawyer represents the entity, not individuals.	Clarify that advice is to the corporation, not officers or directors.
2.1 – Advisor	Exercise independent professional judgment.	Provide candid advice, not simply what the board wants to hear.

Comment 35 to ABA Model Rule 1.7:

"If the dual role risks compromising independence, the lawyer should not serve as a director or should cease to act as counsel."

Bottom line: You cannot fully wear both hats at once.

South Carolina Statutory Protections

Under S.C. Code Ann. § 33-31-202 (2024), a director is not liable for acts or omissions unless there is intentional misconduct or knowing violation of law. The comments for S.C. Code Ann. Section 33-31-202(b) define intentional wrongdoing as the specific intent to perform or fail to perform the act with actual knowledge that the specific action or failure to act will cause harm. This broad protection applies to negligent or grossly negligent acts but not to intentional wrongdoing or self-dealing.

Federal Protection: The federal Volunteer Protection Act of 1997 (42 U.S.C. § 14501 et seq.) further limits personal liability for volunteer directors acting in good faith within their duties.

Common Ethical Pitfalls

1. **Blurring Roles:** Giving legal advice during board meetings without an engagement letter.

2. **Conflicts of Interest:** Representing the organization or its executives while serving as a director.

3. **Misunderstanding Privilege:** Assuming all board communications are attorney-client privileged.

4. **Over-Caution:** Becoming the "naysayer" who blocks innovation out of fear.

    - *Good lawyers protect possibility, not prohibit it.*

    - Frame risks constructively: "Here's how we can do this safely."

Case Lessons

***In re Carter*, 400 S.C. 170 (2012)**

Attorney publicly reprimanded for neglecting a client's matter while claiming no formal representation existed.

Lesson: Behavior can create an attorney-client relationship even without a contract.

***In the Matter of Warder*, 316 S.C. 249 (1994)**

Public reprimand for failure to communicate and lack of diligence.

Lesson: Competence, diligence, and communication apply to all professional conduct, paid or volunteer.

Before You Join a Nonprofit Board

Due Diligence Checklist

- Review Articles of Incorporation, Bylaws, and IRS 990s (past 3 years).
- Request audited financial statements and annual budget.
- Confirm Directors & Officers (D&O) and general liability insurance coverage.
- Read the Strategic Plan and most recent board minutes.
- Review Conflict of Interest and Whistleblower policies.
- Ensure your firm allows outside board service and confirm coverage exclusions.
- Clarify expectations: *"I'm serving as a board member, not as legal counsel."*

Practical Guidance for Attorney-Directors

- Attend and actively participate in meetings.
- Keep discussions mission-focused, not purely risk-focused.
- When a legal question arises, recommend engaging outside counsel.
- Disclose and document all potential conflicts.
- Encourage other directors to understand fiduciary duties.
- Use your skills to strengthen governance—draft policies, clarify roles, simplify compliance.
- Balance caution with creativity: *Be a guardrail, not a roadblock.*

Key Takeaway

"Serve smart. Stay ethical. Lead well."

Attorneys can bring enormous value to nonprofit boards when they understand both the guardrails and the opportunities. By maintaining clarity of role, diligence in duty, and a constructive mindset, lawyer-directors can help nonprofits achieve mission impact responsibly and sustainably.

Selected Resources

- **S.C. Nonprofit Corporation Act**, S.C. Code Ann. §§ 33-31-101 et seq. (2024 update)
- **S.C. Rules of Professional Conduct**, Rule 407, SCACR
- **IRS Publication 557**, "Tax-Exempt Status for Your Organization"
- **S.C. Bar Ethics Advisory Opinions:** 88-11, 89-19, 97-45, 03-12
- **Volunteer Protection Act of 1997**, 42 U.S.C. § 14501 et seq.
- **Waller Consulting Checklist:** *Before You Join a Nonprofit Board*

Presenter

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