YOUR COLLEAGUE IN GOVERNMENT

Address of

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before the

JUNIOR BAR SECTION

of the

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It is a privilege and a pleasure to be invited to address your fine organization.[1/] Although I became an exhausted rooster of the Junior Bar Conference of the American Bar Association about two years ago, in my six years of activity among young lawyers in Connecticut and throughout this country in the family of the American Bar Association I developed an abiding respect for the high quality of leadership and service contributed at the State and National level by the organized young lawyers of the State Bar Association of Texas. That your President, Wales Madden, would invite me in my exhausted status to return to this friendly fold does me distinct honor. I am proud to have this opportunity.

You know, Wales, you invited me to speak to your group before the Chairman of the Committee on Legal Education and Institutes asked me to speak on the work of the Securities and Exchange Commission as a part of the Institute on Securities held this past Wednesday. While I think that my talk to that group contained important information for lawyers in Texas and elsewhere, I want you to know that I personally appraise my message to you as just as important -- for without qualified legal arms and legs the Commission cannot efficiently and effectively do the work that the Congress has charged us with responsibility for -- protection of the investing public. One of the most

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1/ The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed herein are those of the author, and do not necessarily reflect the views of the Commission or of the author's colleagues upon the staff of the Commission.

recurring problems that we have is that of the recruitment of able young lawyers -- your colleagues in government -- to serve as counsel for this Commission as well as other agencies of the federal government.

Now I was a young lawyer -- eligible and active, when I left private practice -- and I am happy to say that I had a few good clients of my own that I had to give up, which made the ultimate decision for my wife and me much more difficult. I want to say here that I have absolutely no regrets for that decision of May 1954, but rather as I think you will quickly perceive, I am thoroughly convinced that it was the best decision I ever made. The opportunity for public service, combined with the challenge of a great variety of complex legal problems in company with colleagues, both in and outside of our Commission, of uniformly high professional qualifications and devotion to their duties is more than enough to excite the enthusiasm of any young lawyer.

Your colleagues whom I am talking about today number well over 20,000 strong in federal, state and local government. In 1951, over 8,000 worked for the Executive Branch of the Government alone. In his concluding chapter of a recent book, The Lawyer From Antiquity to Modern Times, published under the auspices of the American Bar Association, Roscoe Pound stated:

> "It cannot be insisted too strongly that the idea of a profession is inconsistent with performance of its function, exercise of its art, by or under the supervision of a government bureau. A profession pre-supposes individuals free to pursue a learned art so as to make for the highest development of human powers. The individual servant of a government exercising under supervision of his official superiors a calling managed by a government bureau can be no

> substitute for the scientist, the philosopher, the teacher, each freely applying his chosen field of learning and exercising his inventive faculties and trained imagination in his own way, not as a subordinate in an administrative hierarchy, not as a hired seeker for what he is told to find by his superiors, but as a free seeker for the truth for its own sake, impelled by the spirit of public service inculcated in his profession."

I have read this quotation merely to join issue with the Dean on it. It does not reflect my own experience as a government lawyer. Quite to the contrary, the exact opposite is true. I sincerely believe that legal service in the government offers to lawyers, particularly young lawyers, a fine opportunity to develop their professional skills. While Attorney General of the United States, the late Mr. Justice Jackson, in speaking of government legal service, summed it up for me:

> "No place in our profession offers greater opportunity and urge to grow than the legal service of the Government . . . The volume of experience, the intensity of it, the sheer pressure to explore special problems can hardly fail to make faithful Government counsel, however humble his beginnings, outstanding among the competent men of this time."

But frankly, I chose my topic today not because I want to sell you on the idea of becoming a government house counsel, but rather because I have been extremely disturbed by misconceptions among lawyers, both of junior bar age and senior bar status, about the government lawyer. Too many have misconceptions of the ability of government lawyers, their capacity to assume, after public service, their place once again in private practice, and their attitude toward those in private practice who come before them and their agency with problems. I am here to dispel at least two of them.

Only recently one of these misconceptions was called to my attention. Just imagine a hypothetical young lawyer -- let's assume he was graduated magna cum laude from a fine law school, that he had five years of private practice in corporate work, that he had been persuaded by a United States Attorney to leave a fine law firm and to serve on his staff where for two years he personally prepared and tried difficult civil matters for Uncle Sam and, for the purposes of this discussion, let us imagine that we at the SEC persuaded him to assume the duties of an important supervisory post requiring him to exercise both his administrative and legal talents. Finally, let us assume that he now wants out, that he desires to return after two years of fine service to our Commission, to private practice of law in the large city which he left in order to serve his Government. Wouldn't you be amazed to learn that the highly talented hypothetical man, who had, since leaving private practice for Government where he had developed new skills, both in the trial court and in the specialized area of securities, having done public service of very high order for four years, had been advised by a senior partner in a highly respected and successful law firm that "a Government lawyer upon leaving the service is not ready to practice law privately without rehabilitation, reorientation and a training program which might take two years"?

After three years of working side by side and in a supervisory capacity of your colleague in Government, frankly such an

attitude shocks me. I don't want there to be any mistake about this, and casting aside any personal interest that I might have in this question of horizontal mobility, as the sociologists might characterize the movement from Government legal service back to private practice, I want the record to be clear that I think the attitude I have just described reflects an archaic, narrow-minded, and just plain unrealistic notion of the ability of your colleague in Government and the work that he for the most part is doing. Conceding as I must that advising one client instead of many involves a certain difference in psychological adjustment, nevertheless I am convinced from working with lawyers in our Commission, in other departments and agencies of the Government, and on the staffs of the Congress and the Judiciary that they are generally men and women endowed with first rate legal skills and a high degree of responsibility both to their agency and you, and your clients, the public that they serve.

While the young Government lawyers' legal problems may from day to day involve knotty questions in the framework of a particular statute or statutes, and the rules and regulations thereunder, in my opinion, they are performing services in very much the same way, utilizing the same techniques as are required of the young lawyer who opens up his own office, who is associated with a firm, or, who has the good fortune to have achieved the status of a partner. The Government lawyer, it is certainly true, doesn't gain experience in obtaining new business. To that extent he may not be acclimated

to the successful assumption of one of the most important risks of private practice. But, he is constantly in communication with you and your clients, and his own personal success in the practice and his capacity for selling himself and his legal position are very much dependent on his ability to persuade others to have confidence in his judgment on matters legal as well as practical.

The transition for the Government lawyers to the status of private practice doubtless involves some personal adjustments -- but certainly no more perplexing than involved in bridging the gap between law student and practicing member of bar. If you take anything away from this meeting today and this talk, I sincerely hope it will be your recognition of what I am sure is the fact that your colleagues in Government who wish to rejoin you in private practice are, for the most part and in most cases, within the limits of their established intellectual talents and proved ability based on experience, ready to resume their place with you in private practice of law. Their special experience, whether it be in tax, securities, law enforcement generally, trial and appellate work, legislation, or interpretative work for any of the agencies of government, can only, in my view, be an asset to them and to you, if you desire their association.

The other misimpression among many general practitioners that I want to mention today is that the government lawyer is always simply another potential adversary. Private practitioners can better represent their clients when confronted with problems involving federal laws if they proceed on the assumption that the agency administering the statute involved stands ready and willing to assist

them in achieving resolution of their problems. Specialists, of course, are familiar with the nature and extent of the assistance which may be obtained, but comparatively few general practitioners are aware of the advisory, interpretative and other services generally available from the government lawyer. Let me tell you briefly about the scope of the help I think you can get practicing law before the agency I know best, the S. E. C.

The statutes and rules administered by the Commission deal with relatively complex matters; and although the Commission has recently exerted every effort to simplify its own rules insofar as it is practicable to do so, these statutes and rules may, at times, be a little difficult for the general practitioner who is not versed in the field of securities regulation to grasp. Indeed, there are times when even the specialists and the SEC lawyers struggle with interpretative problems presented in particular cases. Whether the problem be simple or difficult, however, the Commission's staff is always available to assist in its solution -- not because of any legal requirement to do so, 2/ but as a matter of sound administrative policy. The Commission believes that persons affected by the statutes and rules it administers should be assisted in understanding them and their application in particular cases. It is also motivated, in part, by the fact that this is an important factor in obtaining compliance with the law.

2/ The Commission is not required by law to render interpretative advice.

There is no fixed requirement as to the method of seeking interpretative or other assistance. Inquiry may be made by letter, telephone or personal visit. Many, if not most, inquiries can be handled by the nearest SEC regional or branch office. 3/ Matters which these offices do not handle will be referred by them to the headquarters office in Washington.

Direct inquiry, of course, may be made of the headquarters office. 4/ There, each division of the Commission has lawyers who render assistance on the statutes and rules for whose administration their particular division is responsible. Novel and particularly difficult questions of interpretation are referred by them to the office of the General Counsel. Occasionally inquiries are made of the wrong division. This, however, presents no serious problem, for the organization of the Commission is such that the inquiry will probably be referred to the proper division. Any substantial delay on this account is rare.

When a private practitioner seeks an interpretation, it is extremely important that his factual statement be adequate. For this reason it is often helpful to arrange a conference with staff personnel who will have responsibility for preparing the interpretative letter.

Any inquiry seeking an opinion with respect to particular transactions should be in writing and include an adequate statement

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3/ Regional offices are maintained in Atlanta, Boston, Chicago, Denver, the District of Columbia, Fort Worth, New York City, San Francisco and Seattle. Branch offices are located in Cleveland, Detroit, Los Angeles, St. Paul and Salt Lake City.

4/ 425 Second Street, Washington 25, D. C.

of the facts of the matter. Private practitioners sometimes express surprise at the staff member's insistence upon receiving all of the facts, including the name of the corporation or individual involved. One reason for this requirement is a natural reluctance to advise on hypothetical situations. Another is the possibility that the Commission's files contain specific information concerning the client which might make the particular problem more concrete to the lawyer who will be analyzing it. Thirdly, the Commission feels that adequate protection and public interest makes it undesirable for it to foster a situation where a person planning to engage in a particular transaction may, in the event of an unfavorable opinion, be able to place his unidentified client in a position to claim that the Commission never rendered any opinion with respect to him or his particular problem, and that he never had any wrongful intent in engaging in the transaction in question. Thus, interpretative assistance is limited to those persons who are honestly attempting to comply with the law.

To encourage affected persons and their lawyers to discuss their problems freely, the Commission's policy is to treat their inquiries and the responses thereto as confidential. No correspondence or memoranda dealing with interpretative matters are placed in the Commission's public files. 5/

5/ Moreover, the Commission has been successful in resisting subpoenas seeking the production of this non-public material. For example, in Pergaments v. Frazer (Unreported, S.D.N.Y., Civil Action No. M8-85. May 5, 1950), Judge Medina quashed a subpoena duces tecum demanding copies of interpretative letters on certain stabilization questions.

Interpretations concerning questions of general importance are sometimes published for the information of the industry and the bar generally. On such occasions, however, names and other indentifying data are omitted if there is objection to their publication. Administrative interpretations, however, should not be confused with the decisions rendered by the Commission itself in administrative proceedings of a quasi-judicial nature. The Commission's findings and opinions in such proceedings are, of course, matters of public record and are always published.

Interpretations rendered by staff lawyers are just that -- and nothing more. However, they do represent the considered judgment of responsible officials familiar with the statute or rule involved. The ultimate construction of the statutes and rules administered by the Commission, of course, is for the courts. The answers to most questions are found either in the language of the statute or rule or in court decisions. In these instances the task of the staff lawyer is relatively simple, i.e., simply explaining the statute or rule, and calling attention to the particular language thereof or the court decisions construing the same. There are, of course, other instances where the applicability of a statute or rule in particular circumstances has not been settled and may be the subject of a reasonable amount of dispute. The staff's opinion, or for that matter the Commission's, of course is not binding as a matter of law.

Although an administrative agency's consistent construction of a statute administered by it is entitled to great weight in the

courts, 6/ and with regard to its own rules is entitled to even greater weight, 7/ as previously noted the ultimate decision is for the courts. Hence, private practitioners who receive what they regard as favorable opinions from the Commission or its staff must realize that such opinions may not be binding in any private litigation rising out of the particular transactions involved.

It is interesting to note that the interpretative assistance rendered by SEC lawyers was commended by the Hoover Commission, which described it as "an excellent practice *** most effectively used." 8/

The staff will help the private practitioner to determine the proper form or forms to be used in connection with filings to be made with the Commission, and confer with him regarding the kind of information required to be given in such forms. Previous filings in similar cases may be made available for whatever assistance they might be to him. Especially helpful to the private practitioner in registering an issue of securities under the Securities Act of 1933 are pre-filing conferences with respect to specific problems. Such conferences usually result in enabling him to file a registration statement in acceptable condition. Thus problems which could delay the effective date of the statement are avoided. Much of this assistance, as in the case of interpretations, may be obtained from

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6/ See U.S. v. American Trucking Ass'ns Inc., 310 U.S.534, 549 (1940).

7/ See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1941).

8/ United States Commission on Organization of the Executive Branch of the Government, Report on Legal Services and Procedure (March, 1955) 67.

the regional and branch offices -- frequently all that may be needed in a particular filing. Some filings under the Securities Act are made directly with the regional offices -- i.e., filings under the Commission's Regulation A which provides a conditional exemption for certain small securities issues from the full registration requirements of the Act. 9/ Inquiries relating to certain other filings, such as proxy statements under the Securities Exchange Act of 1934, might perhaps better be discussed from the outset with the headquarters office. When this is the case, the regional office will so advise. Excellent coordination between the headquarters and regional offices has resulted in a minimum of delay and duplication of effort.

While willing to assist a private practitioner at any time, the staff does not participate in drafting material proposed to be filed. Nor does it suggest answers to particular questions in the forms. Since the filings are those of the company or individual the private practitioner represents, it is his task and responsibility to prepare them, not the staff's. Perhaps this is too obvious to mention but there are some who seemingly labor under the misimpression that this is also an SEC function.

In a situation where the private practitioner believes that his client's proposed transactions would not be in violation of any of the provisions of the federal securities laws, but nevertheless regards it as important that advice be received that the

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9/ Regulation A was promulgated by the Commission pursuant to the power conferred upon it in Section 3(b) of the Securities Act of 1933 (48 Stat. 74, 15 U.S.C. § 77 et seq.).

Commission does not take a different view calling for adverse action on its part, he may request what is commonly called a "no action" letter. Typical circumstances in which this is done is where a client seeks to dispose of a large block of stock to the public and there is a question as to whether he is a controlling person so as to require registration of the offering. The attorney submits in writing the facts upon which he bases his opinion that his client is not a controlling person. The staff, upon consideration of the information submitted, may then advise: "On the assumption that the facts are as you describe them, we will not recommend action to the Commission if you proceed on your own construction." Of course, the staff may decline to issue such a letter if it deems it inappropriate to render such assurance. Or it may even take the more affirmative position that registration would be required. Despite the limited legal significance of such a letter, 10/ it is generally regarded by the Bar as important and useful.

Occasionally in responding to ordinary interpretative inquiries, especially if the questions of fact or law are exceedingly close, the staff may not wish to express an opinion. In such a case, the inquirer might be sent a "no action" letter in lieu of the requested interpretation.

Sometimes a private practitioner will complain to the Commission on behalf of a client that action be taken against an

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10/ A "no action" letter has no binding effect upon the parties in any subsequent private litigation resulting from the transaction or transactions in question.

alleged securities violator. Although there is no single method of lodging such a complaint with the Commission, the enforcement staff would prefer to have a written statement accompanied by such evidentiary material as can be supplied. This is also a matter which may appropriately be handled with one of the regional offices. Bringing an alleged violation to the attention of the Commission is, of course, the right and duty of every citizen. Without the cooperation of private persons with knowledge of the facts, the Commission's enforcement of the securities laws would be materially impaired.

The Commission, like other federal administrative agencies, is vested with full discretion as to what, if any, action is to be taken on such a complaint. If it fails to concur with the complainant's view that there has been a violation of the statutes it administers, or if for other reasons it is of the opinion that the requested action is not warranted in the particular circumstances, it might refuse to grant the complainant's request. 11/ Of course, the failure of the Commission to take any requested action does not preclude the complainant himself from instituting a private law suit.

11/ Such refusal is not subject to review. Leighton v. S.E.C., 221 F. 2d 91 (C.A.D.C. 1955), cert. denied, 350 U.S. 825 (1955). In this case, the appellate court dismissed for lack of jurisdiction a petition seeking review of the Commission's refusal to accede to petitioner's demands that it instigate an action to compel the American Express Company to file a registration statement covering its sales of travellers checks. The staff had disagreed with the petitioner's contention that travellers checks were "securities" within the meaning of that term as defined in the Securities Act of 1933, and that the Commission had jurisdiction of the matter.

The Commission's failure to institute proceedings may be based upon considerations other than its interpretation of the pertinent statute -- considerations, moreover, which may have no relevancy in an action for private redress. Accordingly in some areas, such as proxy solicitations where time is of the essence and the complaining party sometimes has greater knowledge of the facts than the Commission and is in a better position to institute immediate court action charging violation of the Commission's proxy rules, private action may serve a salutary purpose in the enforcement of the statute and the Commission's rules thereunder.

In a situation where the Commission is investigating a client of whose innocence the private practitioner is convinced, frank disclosure to the staff of all the facts will be to the client's advantage, since the Commission is not interested in continuing an investigation of an innocent person. Although it is not this speaker's intention to devise methods by which a guilty client may evade any of the sanctions imposed upon violators of the securities laws, full disclosure may also be to his interest even in the case of a technical violation where the facts indicate the absence of intentional wrongdoing.

Private law suits often present for determination interpretative issues important to the Commission in its own administration of the statute or statutes involved. In appropriate cases, the Commission files briefs or memoranda of law and participates in oral arguments on such questions. Although the effect of Commission participation in such cases may be to aid the party whose position

accords with that of the Commission, the purpose of such participation is solely to assist the court to arrive at a correct construction of the statute.

Since the participation of the Commission as amicus curiae might be of great value to the party with whom it agrees on an interpretative question, private practitioners frequently request the Commission to participate. Commission participation, however, is not dependent on the request of counsel for one of the parties. Whenever the Commission is apprised of the case involving the construction of one or more of the statutes it administers and which it feels warrants its participation, it will seek in the public interest to participate as amicus curiae, regardless of whether any of the parties request or desire it to do so. In many instances the Commission's only knowledge of the pendency of particular litigation comes from the private practitioner involved therein. Accordingly, the Commission is always glad to be apprised of the pendency of litigation under its statutes, irrespective of any desire on the part of counsel for its participation and irrespective of whether it may ultimately decide to participate.

As a matter of policy the Commission, as amicus curiae, avoids involvement in any disputes of fact, and makes no factual assertions of its own. Nor does the Commission become involved in legal questions which do not pertain to the construction of the statutes it administers or which do not affect it in its administration of these statutes. 12/

12/ Pursuant to the special request of a court, the Commission has on occasion briefed questions wholly peculiar to the private civil recovery provisions of the federal securities laws.

The private practitioner who seeks Commission participation in a particular case should send it copies of the pleadings which raise the interpretative questions, together with copies of any briefs or memoranda of law which have been filed. This material should be accompanied by a letter summarizing the nature of the case and the interpretative questions raised therein, setting forth the reasons why the private practitioner believes Commission participation is warranted and advising of the time schedule for the filing of briefs and the presentation of oral argument. In appellate court cases, the Commission would appreciate being supplied with a copy of the printed record and copies of any briefs which have been filed. All of this material may be sent directly to the Commission's General Counsel at its headquarters office in Washington, D. C.

Primarily because of budgetary consideration in recent years, the Commission has had to curtail its amicus curiae participations. Both courts and private practitioners have noted this curtailed program with disappointment. The Commission, however, does try to assist the courts as much as its budget and manpower will permit.

There is a great deal more that I could say about the work of the Government lawyer. Today I have just confined myself to discussing two misconceptions about this fellow -- your colleague in Government -- which I think you as young lawyers should have called to your attention and explained away.