AMERICAN BAR ASSOCIATION
Tuesday, August 7, 1973

The fact that I would accept the appointment as chairman of the SEC was widely public before the President had taken the formal action.

This made me a fugitive for a few days, because I didn't want to be sounding off as the new Chairman before the President had announced the appointment.

My unavailability was enhanced by my commitment to talk at the ALI-ABA seminar at Haverford College.
Haverford has a picture-book campus and lousy telephone service.

Nevertheless, when the leak was out, the second call I got was from Don Evans.

The first, I might say, was from some super hawker type trying to sell me a world-wide clipping service. I assured him that, while I had a fairly inflated ego, the girls in my family were doing an adequate job of clipping and telephoning to see who had clipped what.

The next call was from Don. He had promised to produce for this occasion a high government official, and he had not yet landed one. Would I please be the high government official?

I warned Don of two things--

(1) I had not been confirmed, and if I weren't, it would be a short and lugubrious address. Furthermore, I would not in fact be a government official -- high or otherwise.

(2) In any event, having been in office at most one day, the talk could only be a collection of platitudes.

Don's desperation was such that he was undismayed. He would take his chances on the Senate. And platitudes would be just fine -- muttering that that is all you usually get from a Chairman of the SEC anyway.

Having been in Don's predicament myself a few times, and realizing that I would be talking to the family, so to speak, I agreed.

But you are warned, despite whatever expectations you might have entertained in coming to this luncheon, platitudes is what you are likely to get.

I am sure that you lawyers are most interested in what I will do as Chairman. So am I! But I can't really talk about that. I can't talk about it because I don't

know. And I don't know -- in some areas because of [illegible] ignorance -- but also because I shouldn't know.

Some reporters pressed me for statements about what I would do about sundry problems.

One reporter for a national newspaper wrote rather critically of the Senate committee for not inquiring more searchingly into the views of me and Al Sommer on the many pending matters.

It seems obvious to me -- and I am sure to Al -- that we shouldn't really have any views.

I am sure that this is frustrating to a reporter and perhaps to other observers. If new management is coming in, one ought to know what new management's policies are going to be. One reporter observed, for example, that neither Al nor I represented consumer interests. No Senator asked us about that.

I think such concerns and inquiries misconceive the nature of our jobs. This is so for several reasons.

First of all, the Commission has five members, and each has one vote. All substantive matters are for Commission decision. This means that what I think and

what Al thinks may be interesting but is certainly not necessarily decisive. Hugh Owens, Phil Loomis and John Evans are strong and able men with vast experience and minds of their own.

Whenever possible, the Commission speaks as a Commission on all matters of substance. It would be ridiculous for me or Al to say what the Commission was going to do, or what positions it was going to take, until all five of us have come to agreement.

I don't mean that we will only move through unanimity -- like the Soviets. But the tradition of the SEC has been to work together and arrive at a consensus whenever possible. I expect this tradition to continue. After all, with four such able men, one must have second thoughts if he has differing views.

Secondly, to a lawyer it seems quite improper to express views on pending matters before one has become familiar with the record and the arguments.

An obvious example is the pending proceeding regarding the proposal of the New York Stock Exchange to

revise its rule regarding minimum brokers' commissions -- generally to increase them. Any lawyer would instantly agree that neither Al nor I should have any view on this issue until we are in office and have caught up with the case.

Thirdly, being in office makes a great difference. I have tried to explain to reporters that whatever notions I may have acquired as an observer would have to be squashed once I was in a position of responsibility.

I trust none of you will take this too literally. No one can completely forget what he has learned through experience and observation. I presume that Al and I were appointed in large part because we have been around the track a few times.

But it is also true that the world looks different from the other side of the table. A lawyer in private practice has a glorious position. In his practice his views are properly dominated by the interests of his client. And when he steps out of that role and lectures on the law, he is free to speak his mind without the dire threat that someone might take his words as law.

Al and I have been in this blessed state. We are now faced with the frightful fact that what we think and say may actually become law. You take a new look at things when you are in this scary position.

But let me get back to the peculiar experience of being an unordained appointee. I stopped dodging reporters and cameramen after the President made the formal announcement on July 7.

On July 8 I flew back from San Diego to Chicago.

[TV cameraman at O'Hare. Crowd said "Who is that!"]

Some of the questions disturbed me. "What are you going to do about favoritism at the SEC?"

By favoritism they meant Vesco.

If the SEC showed Mr. Vesco any favoritism, he doesn't need any enemies.

Yet the idea is around. Many of the letters I received spoke of reestablishing the high reputation of the SEC.

From what I know, there is no real reason what the SEC's reputation should need reestablishing. I don't know anything the Commission or the staff has done to

suggest that it has not been administering and enforcing the law in accordance with the high standards that have always been its hallmark.

But if the SEC has suffered in public esteem, however unjustly, Al and I will be pleased if our appearance serves to restore the SEC's reputation to what it always has been and should have continued to be.

The whole experience, thus far, has shown the advantage of putting out news on a slow week end. I was apparently seen on television by cousins and aunts who ordinarily would not have paid much attention to the SEC or its Chairman.

It even got world-wide coverage. One friend and former student sent me a clipping from the British Financial Times that he had read in Masai-Maru, Kenya, while on photo-safari. He didn't say whether the news had stimulated a Sommer bull market on the Nairobi exchange.

One financial correspondent told me that my appointment met with the comment on Wall Street that I was a 33 Act man but not a 34 Act man. That sounded like

describing a girl-watcher as a leg man rather than a you-know-what man. If some lawyer can practice the 33 Act without a peek at the 34 Act, he practices in a firm that is specialized beyond anything I have encountered.

Nevertheless, I recognize what that comment is meant to say. I have not been directly and professionally involved in the prolonged travail seeking to establish the form and substance of the securities markets for the next generation. Al Sommer, through his membership on the NASD board, is surely more conversant with these matters than I.

However, it is also true that if either of us were more deeply involved in the present internecine struggles of the securities industry, we would not have been appointed. While you can know too little, you can also know too much.

As any lawyer knows, you strive to promote the legitimate interests of your client. When you client becomes, in the language of the statutes, the "public interest and the interest of investors", then you do your best to further that.

Whatever the special interests of our former clients might have been, Al and I have new clients now. And I have been doing enough homework to believe that even an old 33 Act man can catch up with these not new 34 Act problems and the astounding array of divergent views and interests regarding the future structure of the securities industry.

Al and I and the present commissioners also realize that there is no way to resolve the present problems facing the securities industry without disappointing the expectations of a substantial segment of the industry.

Fortunately, while we all would prefer to be loved by everyone, we are not engaged in a popularity contest.

In fact, I have had many letters from persons engaged in the securities industry saying, in effect, "For God's sake get something decided. Let the chips fall where they may." I am sure that the present commissioners have this goal, and so do Al and I. Congress, of course, threatens to take the game away from us.

Al and I are knowingly entering upon our duties at a most critical and unusual period in the history of Federal securities regulation -- and I am not talking about Watergate or campaign contributions.

Not only are stock prices down for the most part, but the market seems out of joint when measured against what we have come to think of as normal in the years since 1945. Shares of companies that appear to be doing well are now selling at 4 or 5 times earnings, that only recently were selling at much higher ratios.

Many common stocks today can be, and apparently are being, bought on a dividend yield basis of 8% or more.

This large part of the market resembles the world described by Arthur Stone Dewing and other pre-World War II writers. A world that seemed so quaint to me as a young student. Imagine thinking that one should expect a higher cash yield on common stock than on bonds of the same issuer because of the junior rank!

One wonders whether we are observing a massive readjustment in investor expectations.

But then there are the few stocks that have retained relatively high price earnings ratios. And serious commentators are speaking of a two-tier market -- the difference being the interest of institutional investors. The high priced stocks, it is said, are those favored by managers of institutional portfolios, who maintain the price in effect by trading with each other.

This has led to suggestions in the Congress and elsewhere for measures to break up this concentration of institutional trading and investment in the upper tier of stocks.

There is widespread concern with the apparent withdrawal of many individual investors from the stock markets. Many reasons are cited.

Inflation.

Unsettled international monetary conditions.

Unfairness of the market -- insiders and institutions get all the breaks.

Or perhaps -- as was suggested in The Post yesterday morning -- the simple fact that many individual investors have [illegible] a lot of money on stocks in the last several years.

Whatever the reason, virtually all observers agree that our economy will suffer without active individual investors maintaining a healthy auction market -- the

classical peg on which so many of our ideas about the value of securities hang.

At the same time the securities industry is having a hard time. The losses suffered so far this year, especially by the national retail firms, have been well publicized.

And this comes at a time when the very structure of the industry and its pricing methods and market place are still in a state of flux.

Five years of study by the Commission, the Congress, and the industry itself have not led to a consensus. In a way the studies have accentuated, rather than lessened, the differing economic interests of the various components of the industry.

These differences involve banks and exchanges as well as broker-dealers, with geographical as well as functional elements.

One result of all of this reexamination of the securities markets and industry has been a largely unprecedented degree of Congressional attention. There are many bills pending in Congress, and probably more to come.

I would be foolish to predict how all of this will work out, but for everybody's sake I hope the time for decision is fast approaching.

Perhaps more of you are familiar with the Casey program of rule revisions under the Securities Act. I am told that a revised staff version of Rule 146 is awaiting Al and me. We will read it with great interest.

There is also what some have described as the SEC's attack on lawyers. Obviously I cannot discuss pending cases, and in fact, I am not yet familiar with the Commission's information on these cases.

But last spring Don Evans appointed me as Chairman of a new Section Committee on Professional Responsibility and Liability, and I had begun to think a little more about this matter.

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I have also read in the press the many attacks upon the performance of lawyers that have come in the last few days of our Annual Meeting.

Some of these attacks merely illustrate the perennial problem that the bar has in explaining and justifying to the rest of our citizens the role of the advocate. The representation of unpopular causes is one of the aspects of our history that has produced our romantic heroes -- especially when the advocate did not agree, in his private views, with the cause of his client.

Consider this for a moment. Other lawyers in town for this meeting have argued that the lawyer should fight for his own peculiar revelation as to how our society should be reconstituted. I am saying that the romantic hero of our profession is the lawyer who fought -- not for what he believed in -- after all, that would be easy -- but for the right of his client who believed differently.

If person outside the legal profession do not understand this professional ideal, it only illustrates the persistent problem we have of explaining our role in society.

To me, and I suspect to most lawyers, the heart of our Constitution and our society is process rather than substance.

The fundamental questions for our body politic are not so much what laws are enacted -- and, economically, who has what -- but, rather, how are these decisions made.

I believe our Founding Fathers accepted the proposition that no person, or group of persons, has -- or ever will have -- any special revelation as to what the present order of society should be.

Many, of course, have, do, and will claim such revelation. If they can achieve such a revealed order through proper procedures, they are entitled to it -- but only for so long as it can be maintained through equally proper procedures.

But, agreeably, it is only agreement on process, rather than substance, that has enabled the civilization of Western Europe and of the United States to overcome the suicide of earlier religious wars, including World War II.

The legal profession is the bulwark of process. The suggestion that lawyers should only work for causes in which

they believe -- other than the cause of preserving the process -- is, to my mind, to deny a proper understanding of the process of American society and the role of legal profession within it.

But lawyers are urged to have a conscience and to fight for what their consciences dictate. I am sure that I will be misunderstood by many non-lawyers when I say that too much conscience on stubstantive [sic] matters is unprofessional.

Then why do I say it? Because I think it leads to the complete destruction of our system of ordered liberties if every view as to policy in every sphere is esculated [sic] into a matter of high principal [sic] and conscience. Life is hard enough without encouraging everyone to canonize his peculiar insights into what is good by making them a matter of conscience.

This is all the more disastrous if the lawyers adopt an exaggerated role of conscience in their professional activities. What becomes of due process if the unpopular accused must search for a lawyer who agrees with him before he finds a means for asserting his rights?

But what of the role of the counsellor [sic]? Defending the rights of someone with respect to something he has already done is one thing. But what about providing legal counsel with respects to something he has not yet done?

The counsellors [sic] role is certainly different from that of the advocate's defense of past activities. It is relatively easy, even for the layman, to understand the value of defending in court even the worst criminal. The counsellor [sic], however, is involved before the evil deed is done.

Does the lawyer as legal counsellor [sic], being consulted before the action, have a duty to interpose his individual conscience between his technical knowledge of the law and the desires of his client?

The classical answer is no. The lawyer should not usurp, or even intrude upon, the client's prerogative to make the decision, having been properly advised.

Current thinking is leading toward the answer yes. The lawyer must concern himself with the effects of his advice upon others than his immediate client. In the

securities field, this means the effects upon his client's securityholders and even prospective securityholders.

But it should be understood that the Commission's actions relate to the lawyer's alleged participation in violations of the law -- not to the lawyer's intrustion [sic] into policy decisions within the law.

One can say with confidence that the SEC's actions in this field has had the salutary effect of stimulating thought and writing -- some of which is bringing new light on what we business lawyers have been doing.

The article by Mr. Fuld in the April issue of the Business Lawyer, for example, is especially good. Also Jim Check's paper in the Review of Securities Regulation [Apr. 5, 1973].

I would hope that this fresh examination within the bar will lead to a consensus to which we all can repair -- bar and enforcement agencies and courts -- as to the business lawyer's responsibilities and the standard of care which he should apply in meeting these responsibilities.

Professor Morgan Shipman has recently urged, in a most helpful article, that -- with respect to matters relating to securities regulation -- the SEC engage in a proposed rule-making endeavor as to a lawyer's duty -- rather than proceed in the Common Law Tradition of developing the law by selected prosecution of individuals.

This is a challenging idea which we will consider carefully. So is the idea that the organized bar should assume the initiative in establishing standards -- like the AICPA.

It goes against human nature to expect the prosecuted to think well of the prosecutor. Only Socrates and Jesus Christ seem to have risen to such a self-denying view. But I hope in the course of time it will appear that the SEC has helped the bar to reexamine its performance in business matters to its own greater glory as the guardians of sound process in our economy and society.