OFFICE OF GENERAL COUNSEL

TRAINING PROGRAM LECTURES

Twenty-eighth Session - May 22, 1957

Subject: Office of General Counsel

Speaker: Mr. Thomas G. Meeker, General Counsel

MR. MEEKER: I am known, sometimes, as the chief legal officer of the Commission. The duties of our office extend far beyond merely representing the Commission in judicial proceedings. That is a point I should like to make to your Division, as well as to any other division that may be represented here today.

Among other things, I am called upon by the Chairman and members of the Commission to advise on policy matters which sometimes cut across divisional activities, sometimes involve legal matters, sometimes involve tactics or strategy, and sometimes it's almost like being engaged in battle and arranging your forces--planning and plotting an advance or retreat--but in any event my initial approach to all problems commences from the standpoint of legal analysis.

In addition we advise and assist the Commission and the Divisions and Offices with respect to statutory interpretations, particularly novel rule interpretations. To give an example, the rules under Section 16 of the 1934 Act have been the source of considerable study and comment over the last eight or ten years, and only a year ago the Commission, after considerable thought and much discussion, adopted a general release which, in effect, documented its purposes with respect to the exemption under Rule X-16B-3. I commend that release to you for your examination in terms of the type of thing that I think for the Bar and for the industry an administrative agency such as this ought to produce so that the public may be well advised as the Commission's own thinking with respect to those areas in which the Congress has delegated to it a legislative authority and which in the exercise of its "expertise" (frankly I advise against the use of that word in any judicial proceeding) it has determined should be the rules of the game.

We spend considerable time working with the other Divisions in drafting and re-drafting rules. Some rules which are peculiar to the work of the Division and the professional skills of the Division's personnel, such as the stabilizing rules adopted a little over a year ago, we wouldn't dare venture into. We leave that to those experts on manipulation and stabilization. However, from time to time, such as is the case with Rule 133, we are asked to give the Commission our view as to the power in the Commission to promulgate such a rule, and that we do. It may be of interest to you to note that over the years in spite of the frequent consideration of the Rule 133 problem there had never been a definitive

legal memorandum proposed after the 23rd anniversary of the Commission, in our files with respect to the power of the Commission to adopt that rule. Now there is a comprehensive legal memorandum from our office advising the Commission on the power to promulgate such a rule.

In addition to that, we have the general responsibility for co-ordinating the activities of the Commission with the Congress and particularly in the use of the legislative amendment program which the Commission has been trying to get off the ground for the past few years. In the 1954 program, as in the last program, a Commissioner was designated to co-ordinate the activities on a policy basis. That is helpful because I for one dislike having to run to the Commission table to annoy them every day for policy guidance. I prefer to operate away from the table as much as possible within the extent of my jurisdiction, and it is nice to have a Commissioner who can talk to the others on an informal basis and get a policy determination without having to write a memorandum on it and without having to make a formal appearance. We have followed the same course in this year's legislative program. But the responsibility for setting the time table, for arranging the meetings with industry, and for co-ordinating the activities of the Divisions rests with this office. Each Division in this process carries its own load with the Acts that it administers, as the Division of Corporation Finance with proposed amendments to the 1933 Act and such sections of the 1934 Act that constitute a part of their work-load, the Division of Trading and Exchanges with respect to the 1934 Act, and the Division of Corporate Regulation with respect to the Investment Company Act. They all do drafting, and we have an interdivisional legislative committee of which I am the nominal Chairman in terms of getting it all together, and we work on a team basis in this area.

To get to another aspect of our activity, most of the Congressional appearances have been handled in the past two years by the Chairman; however, from time to time he needs briefing and someone alongside of him to take the responsibility for legal opinions, and that is part of our function.

As you may or may not know, there is presently a Committee of the House Interstate and Foreign Commerce Committee which has the grand name of the Committee on Legislative Oversight. In spite of whatever definition may first come to your mind, their function is to review the activities of this Commission in light of the Statutes which we administer to see whether or not we are going beyond the statutory powers conferred upon us by the Congress in the enactment of the six Acts we administer. We had the responsibility of getting together the material in response to the first inquiry of that Committee, and that involved cooperation from other Divisions and Offices. It is our function to plan the submission and prepare for whatever hearing may occur.

Occasionally we are called upon, as in the Crowell Collier case, to lend one of our top lawyers to a public investigation for the purpose of acting as the presiding officer or chief investigator. In addition to that we are called upon, from time to time, by the Commission to conduct private investigations, particularly in areas which involve possible employee misconduct or possible infractions of our Rules of Practice, or perhaps unethical practices which may lead to a II(e) proceeding to determine whether a lawyer practicing before the Commission should be barred because of past conduct.

Besides these general areas of activity, we are the liaison for the Commission with the Department of Justice. It makes good sense for a Department as large as Justice to have one office which is the one to be called when they have an inquiry and it helps in doing business to know to whom you are talking. To give you a short example of how that works out: Several years ago we had a fairly well publicized proceeding known as Dixon-Yates. During the course of the proceeding it was brought to the Commission's attention that perhaps someone had tried to cause a witness to testify in a manner contrary to what he had intended by bringing a little pressure to bear. We made a very quick investigation and decided that there was sufficient evidence of a possible violation of Federal law to warrant the referral of that matter immediately to the Department of Justice. The matter was so referred, and the Department of Justice carried on from there. Certainly we had a responsibility for the character and integrity of our own proceedings. On the other hand, we do not have the equipment and resources of the Federal Bureau of Investigation. We have enough to do with carrying on our own investigations, and in an ancillary matter such as that, involving violations of Title 18, rather than the criminal provisions of our Statutes, we fall back on the resources of the Department of Justice.

We also have the responsibility for advising the Commission whether or not, as the Statutes suggest, there is sufficient evidence of criminal violations of our Statutes to warrant reference of a case for prosecution to the Department of Justice. The basic responsibility for the investigation of any case arising here or in the field is generally in the Division of Trading and Exchanges. It is only when the case in the eyes of the Regional Administrator or Division director seems to have criminal potentialities that our Office has any impact on the matter from that point on. Normally we get a completed criminal reference report. We have in recent months because of the volume of work and after discussion with the Department of Justice and review of other types of criminal reference reports submitted by other agencies attempted to reduce the size of these reports from the size of "Gone With The Wind" to something more readily absorbable in 15 or 20 pages with all of the exhibits logically and intelligently appended. We find that it takes more time to write a short criminal reference report, but it takes less time to get it to the grand jury and trial if more time is taken initially by those people preparing the report. There is nothing that is more apt to discourage a young Assistant U. S. Attorney than a manipulation case from us which has in the report a summary of investigation perhaps 150 or 200 pages and barrels of details

on transactions of that sort. So we try to review these as they come in from the field or the Divisional offices and suggest changes in the report, such as condensation or additional investigation, if either is necessary; and, when we get into a dispute with them, we are very glad to take the matter before the Commission, and do. If we can review a case in three or four days and concur with the Regional office or the Division, then we take the matter before the Commission. We are, in effect, serving as the Commission's eyes with respect to that report. They, of course, sometimes question us with respect to our recommendation -- very vigorously -- but normally they go along with our recommendation. That is a brief summary of what we do.

Let me now comment briefly upon our function with respect to some of the other principal areas of our activity. Let us first take up litigation.

The General Counsel's Office is responsible for all Commission litigation, including matters before the Supreme Court of the United States, and is also responsible for supervising District Court litigation. You might be interested to know that with respect to matters before the Supreme Court of the United States, the Statute provides that the Solicitor-General must approve any petition for certiorari which we desire to file. He must be persuaded that this is an important question, but once he puts his name on the petition, then we are free to go forward and he is in it with us to the end. It has been a very distinct tradition in this Commission for its General Counsel or a designated associate or assistant to argue cases for the Commission before the Supreme Court. That is a nice relationship, and one which is not enjoyed by every agency of the Government with the Solicitor-General.

It is elementary that each of the Statutes administered by the Commission has review provisions providing for direct review of Commission orders in the U. S. Court of Appeals. The Acts also provide for enforcement of certain of our orders in the U. S. District Court through injunctive proceedings or applications to enforce Commission orders such as are sometimes issued under the Public Utility Holding Company Act of 1935. Sometimes, of course, as in the recent United case -- a decision which we have not received yet from the Third Circuit, involving fee appeals -- those Commission orders were enforced in the District Court which at that point performed a reviewing function. Then it goes to the Court of Appeals for a further reviewing function.

Another area of our litigation activity is Chapter X and XI. The Commission acts as an adviser to the U. S. District Court in reorganization matters, where there is a large public stockholder interest involved, and participates in appeals taken by other parties. It is important to note that no matter how aggrieved we may feel for some public stockholder interest, we do not have the right to assert that appeal ourselves but can only give the Court of Appeals the benefit of our judgment in the event one of the parties to the reorganization appeals.

The other hold that we have in this area is that we may move in Chapter XI proceedings for arrangements to dismiss if we believe the proceeding properly belongs in Chapter X. I commend the General Stores case for your reading on that point.

We are encouraged from time to time by private parties or on our own motion to participate in private litigation amicus curiae. One thing that disturbs me is the loose way in which the participation amicus curiae is confused with intervention. In my more than three years with the Commission we have had several amicus curiae participations and we have also had (and I think it is one of the first in the history of the Commission) an intervention. The basic distinction is that when we move to intervene and become a party plaintiff or a party defendant, we move in there for the purpose of putting in the record facts of which we have knowledge and which we don't think the parties to the litigation have knowledge. You can readily see from your experience with the Commission that there would be such areas where a Government agency may have access to information which it wishes to make public and which may alter the development of the factual record for the District judge. Years ago when the law under Section 16 was being developed, the Commission had a flood of appearances amicus curiae. So much so that the first important case where the Commission didn't show up, a judge in the Second Circuit made unkind remarks about the Commission for failing to show up. In recent years due to our economy wave the Commission cut down on everything, including printing costs, and the Commission had a tacit policy against participating in cases amicus curiae, although from 1953 to 1957 we were involved in approximately five. One of the most recent ones, of course, was the famous Allegheny case where we participated in the Supreme Court amicus curiae solely on the question involving the Investment Company Act.

We always have a problem in these cases whether or not to make an oral argument. There are times when I can assure you it makes good sense and it is in the public interest not to make an oral argument. My own conviction is that the Allegheny case was one of them in which we should not have and did not argue orally. I commend the decision in that case as the best evidence of the correctness of my position.

Every now and then the Commission gets sued. That causes great alarm. Sometimes we get a temporary restraining order against us, ex parte, and you know that most injunctive suits are tried in the newspapers to completion before the courts get them docketed. We had that happen in the Great Sweet Grass case. So we get sued occasionally, at which time the General Counsel's Office takes over in defense of the Commission. Every once in a while someone threatens to subpoena a Commissioner, as they did in the Swan Finch case. We take the position here that a Commissioner's testimony may or may not be taken, and this we would contest based on what they were looking for. The issue should be raised here in the District of Columbia on deposition in a civil case and no other way. We would even take that position in a motion to quash a summons which was served within 100 miles. The difficulty of moving to quash such a subpoena is that there is no appeal from a denial of a motion to quash.

In connection with appellate litigation, of course, we write briefs and we get the assistance of other Divisions and Offices. For example, in the Insurance Securities case without the Division of Corporate Regulation our office couldn't have handled the preparation for trial and the briefs. We lost that case in the District Court and are now handling it on appeal. We couldn't handle it without the judgment, experience and assistance of those who have been administering the provisions of the Act and proceeding under the interpretations which we assert to be correct and legal under the Public Utility Holding Company Act.

We attempt to win all cases, naturally. There is a unique relationship here in our Commission unlike some of the other agencies, of the General Counsel to the Commission in connection with its quasi-judicial activity. I have nothing to do with it. This is a great protection for me on the Hill, I can assure you. Our Office of Opinion Writing is an independent office. This relationship, due to taking the General Counsel away from the quasi-judicial activity of the Commission, is in my estimation one of the best things that the Commission does because it eliminates any possible claim that the Commission is being advised by a person who may have to prosecute in an ancillary matter relating to a judicial determination or quasi-judicial determination which the Commission may make.

I should like to say a brief word about District Court litigation. Some of you may wonder why with good lawyers such as we have in the Regional Offices we have any relationship with contested litigation. All I can say to you is that a Government agency, unlike a private litigant, has a duty to the public and to the Congress (and of course it reports to both), and in the exercise of that duty in the legal area it seems to me that there should be uniformity in the Regional Offices in litigation. You try to get uniformity in your Division through your recently organized Branch of Small Issues in the Regulation A field. We are terribly disturbed when a Regional Office goes in without proper preparation. But we are supposed to be satisfied in contested litigation with the memoranda that are being filed, the legal positions that the Regional Offices are taking with respect to contested litigation.

I am sorry that time does not permit us to describe some of our other functions but perhaps we can meet again in one of these sessions.

Thank you.

Adjourned.