IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ANDREW J. HASWELL, JR., Defendant.	No. 77-0408-B

RESPONSE TO THE ORDER TO SHOW CAUSE, DATED OCTOBER 5, 1977, AND MEMORANDUM IN SUPPORT OF THE COMMISSION'S MOTIONS TO: (1) VACATE THE COURT'S ORDER TO SHOW CAUSE; (2) CLARIFY THE COURT'S ORDER TO SHOW CAUSE; AND (3) REQUEST THE ASSIGNMENT OF ANOTHER DISTRICT JUDGE TO PRESIDE OVER THE DISPOSITION OF THE COURT'S ORDER TO SHOW CAUSE

I. Preliminary Statement

The undersigned attorneys respectfully submit this response to this Court's Order to Show Cause, entered on October 5, 1977, directing the five Securities and Exchange Commission (the "Commission") attorneys who have represented the government in the prosecution of this civil injunctive action to show cause why they should not be held in contempt of this Court as a result of some aspect of their representation on behalf of the plaintiff in this action. 1/

At the outset, we wish to assure the Court that no conduct by Commission counsel was intended to be contemptuous, disrespectful, or otherwise out of order. The Commission and its staff take seriously their responsibilities to administer and enforce the federal securities laws properly and fairly, and respectfully submit that, at all times,

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1/ This response is submitted by attorneys in the Commission's Office of the General Counsel, in Washington, D.C. That Office represents members of the Commission and its staff in proceedings such as the instant case in which such persons are asked to account for actions taken in the scope of their official duties. This response is intended as an individual and separate answer to the Order to Show Cause by each of the five respondents.

the Commission attorneys assigned to this action intended to, and believe they did, comport with the highest ethical responsibilities of the bar and with a full appreciation of the dignity of this Court. The five attorneys named in the Court's Order to Show Cause collectively have amassed 41 years of experience in assisting the Securities and Exchange Commission to administer the federal securities laws, and in litigating government lawsuits before the federal courts of this Country.

For the reasons we set forth in detail below, we respectfully urge this Court to vacate its Order to Show Cause entered on October 5, 1977.

II. Background

Trial in this action was held on September 8 and 9, 1977. The Commission filed its Proposed Findings of Fact, Conclusions of Law and Supporting Brief (hereinafter referred to as the "Proposed Findings") on September 23, 1977. On October 3, 1977, the defendant Haswell filed his reply, along with a Motion to Strike pages 37 through 43 of the Commission's Proposed Findings. 2/ On October 5, 1977, this Court entered an Order directing the attorneys representing the Commission in this action to answer defendant Haswell's Motion to Strike, "with regard to the plaintiff's statements and allegations therein and as to why the Alexander letter was so attached." Without any discussion or explanation, and apparently sua sponte, the Court's Order further directed the Commission's attorneys "to show cause why the Court should not cite each of them for contempt of court."

On October 12, 1977, argument was held before the Court on the question of whether the defendant Haswell should be enjoined from further

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2/ Haswell alleged that this portion of the Commission's Proposed Findings was based on a discussion of a letter, from Donald C. Alexander, former Commissioner of the Internal Revenue Service, to Roderick M. Hills, former Chairman of the Commission (hereinafter referred to as the "Alexander letter"), which was attached to the Commission's submission.

violating the federal securities laws. 3/ On October 20, 1977, the Court entered judgment in favor of the defendant Haswell.

III. The Court Should Vacate Its Order to Show Cause Dated October 5, 1977

A. The Commission's Attorneys Did Not Act Improperly in Attaching the Alexander Letter to the Commission's Proposed Findings. That Letter, as the Defendant Haswell was Aware, was Intended as Legal Argument and Not as Evidence.

At the outset, we respectfully point out to the Court that we are uncertain as to what conduct on the part of the Commission's attorneys forms the basis for the Court's Order to Show Cause. As discussed in more detail below, we are unaware of any conduct by the Commission's attorneys that was committed before this Court that forms the basis for the Court's Order to Show Cause, and, the Commission's attorneys have endeavored to conduct themselves in accordance with established rules of conduct. While it is apparent that, in some fashion, Commission counsel may have upset the Court, we are unaware of what conduct may have been viewed as improper by the Court, and wish to assure the Court that, to the extent such conduct occurred, it was unintentional and not meant to offend, or otherwise trouble the Court. Moreover, we are also unsure whether this Court, in issuing its Order to Show Cause, intended to invoke the possible exercise of its criminal or civil contempt power. Because we believe that this Court will agree that there is good reason to vacate its Order to Show Cause, whatever the original basis for the entry of that Order, we address the merits of the Court's Order in this memorandum. In view of our uncertainty respecting the specific conduct that prompted

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3/ Prior to oral argument, the Court denied the Commission's motion to defer consideration of the merits of the Commission's action until after the resolution of the issues raised by the Order to Show Cause, but granted the Commission's request for permission to raise and discuss the Alexander letter without the Court's considering this conduct to be in contempt of court or in any way contrary to the intendment of the Court's October 5, 1977, Order to Show Cause.

the Court's Order to Show Cause as well as our uncertainty respecting the nature of the contempt thought to have occurred, in this memorandum we proceed on the assumption that the Court's concerns were identical to the considerations cited by the defendant Haswell in his Motion to Strike pages 37 through 43 of the Commission's brief in support of its Proposed Findings. 4/ The grounds urged by the defendant Haswell in support of that motion are:

(1) although the Alexander letter "was in existence prior to and at the time of trial * * * [i]t was not designated * * * on the list of documents furnished to the defendant's counsel at the pre-trial" (Motion to Strike, p. 1);

(2) the letter "has never been identified and its materiality or relevancy has never been established" (Id.);

(3) the letter is "hearsay" (Id.);

(4) although the defendant specifically inquired of counsel for the Commission whether the Commission would offer expert testimony on the question of whether certain municipal bonds, certified by the defendant Haswell as tax-exempt, were in fact tax-exempt, he was told that no such expert testimony would be offered (id. at 2);

(5) "the statements made in the [Commission's] Brief allude to matters clearly outside the record and [are] not supported by admitted or admissible evidence * * *" (id. at 3); and, finally,

(6) the Commission's attorneys "may be in violation" of Canon 7-106(c)(1) of the Code of Professional Responsibility, which provides:

> "(c) In appearing in his professional capacity before a tribunal, a lawyer shall not:
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> (1) State or allude to any matter that he has no reasonable basis to believe is relevant or that will not be supported by admissible evidence." (Id.)

4/ For the reasons set forth infra, pp. 12-15, if our assumptions are incorrect, and we have failed in any way to address fully and satisfactorily to the Court the issues raised by the Order to Show Cause, we respectfully move this Honorable Court for clarification of the Order to Show Cause sufficient to inform the five Commission attorneys who were the subject of the Court's Order to Show Cause of the specific basis for the charge of contempt, and the type of proceeding in which they are involved. Of course, we would welcome the opportunity to submit a further response.

Each of the points raised by the defendant Haswell in support of his Motion to Strike thus assumes that the Commission's attorneys were attempting to make improper evidentiary use of the Alexander letter. As the Commission clearly stated in its Proposed Findings, however, this letter was not in evidence and it was not intended that it be placed in evidence; it was, rather, offered to the Court for its consideration, in connection with the legal argument advanced by the Commission, "as an expression of the position taken by the Commissioner of Internal Revenue on matters discussed in the letter." 5/ Although the defendant Haswell further implied by his Motion to Strike that he had been denied access to the Alexander letter (see ¶1 of the defendant's Motion to Strike), that government counsel had somehow deceived him (id., ¶4), or that government counsel had violated their ethical or professional responsibilities in some manner (id., ¶6), these contentions are without merit. As Mr. Haswell himself admits,

> "the letter has been a focal point in this case ever since its existence was first made known to defendant as an exhibit to and source of extensive argument in the SEC's memorandum in support of its motion for preliminary injunction. It was the first of the [Commission's] exhibits sought, copied and researched by Haswell." 6/

The defendant has thus had actual possession of the letter since May 3, 1977, the date when the Commission's complaint and motion for preliminary injunction against him were first filed. Moreover, the Commission's attorneys have not in any way attempted to mislead defense counsel. When questioned whether the Commission would offer expert testimony or other evidence "to support the SEC's contention that the defendant's opinions were false and fraudulent," Commission counsel correctly "stated that no such evidence would be offered * * *." And no such evidence was offered.

5/ Proposed Findings at p. 37 n.2.

6/ Motion to Strike, p. 2 (emphasis added).

The Commission did not attempt to place the Alexander letter in evidence because it is not evidence. Rather, it is an informal expression of opinion by Mr. Alexander as to how the Internal Revenue Service would construe a certain section of the Internal Revenue Code which is in issue in this case. Federal courts properly may afford consideration to an informal expression of opinion on a legal question involving interpretations of a statute by the agency charged with administering and interpreting the statute in question; moreover, when counsel is aware of such interpretations, it is consistent with his responsibility to the courts to call such expressions of views, in whatever form, to the court's attention. Indeed, the practice has been considered and endorsed by the Supreme Court. For instance, in Rosado v. Wyman, 397 U.S. 397, 406-407 (1970), the controversy involved the compatibility of a provision of state law with the Social Security Act, administered by the Department of Health, Education and Welfare. The petitioners argued that neither the doctrine of exhaustion of administrative remedies nor the doctrine of primary jurisdiction should apply, under the facts of that case, to deprive the federal district court of jurisdiction. The Court agreed and stated:

> "That these formal doctrines of administrative law do not preclude federal jurisdiction does not mean, however, that a federal court must deprive itself of the benefit of the expertise of the federal agency that is primarily concerned with these problems. Whenever possible the district courts should obtain the views of HEW in those cases where it has not set forth its views, either in a regulation or published opinion, or in cases where there is a real doubt as to how the Department's standards apply to the particular state regulation or program."

The Supreme Court also referred, in Rosado, to its opinion in Southwestern Sugar and Molasses Co., Inc. v. River Terminals Corp., 360 U.S. 411, 420 (1959), in which it stated that, simply because an issue was "one appropriate ultimately for judicial rather than administrative resolution, * * * does not mean that the courts must therefore deny them-

selves the enlightenment which may be had from a consideration of the relevant * * * facts which the administrative agency charged with the regulation of the transaction * * * is peculiarly well equipped to marshall and initially to evaluate." 397 U.S. at 407 n.9. 7/

Moreover, federal district courts have often requested counsel to make inquiries of appropriate federal agencies when the interpretation of complex and specialized laws and regulations were at issue. The Securities and Exchange Commission itself is frequently asked to express its views on a question respecting an interpretation of the federal securities laws, and provides such views in the form of letters, memoranda and legal briefs. In Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199, 239 (D. Md., 1976), affirmed, 546 F.2d 25 (C.A. 4, 1976), the court indicated that, "[i]n accordance with the procedure proposed by Mr. Justice Harlan in Rosado, * * * this court suggested to counsel that inquiries * * * be made to the Securities and Exchange Commission and to the Federal Reserve Board." In that case, the Commission's General Counsel apprised the district court of the agency's views on the interpretive questions raised.

Similarly, counsel often, and properly, take the initiative to request such expressions of views, and to bring them to the attention of the court if relevant to the issues raised in an action. Not infrequently, counsel for private litigants have offered informal expressions of opinion by agency members or staff when appropriate to resolve difficult questions of statutory and regulatory interpretation. 8/ See, e.g., Drasner v. Thomson McKinnon Securities, Inc., [Current] CCH Fed. Sec. L. Rep. ¶96,080 (June 6, 1977) at 91,885 n.3, where the plaintiffs

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7/ See also, Far East Conference v. United States, 342 U.S. 570, 574-575 (1952).

8/ These opinions can be in many different forms, including but not limited to letters to private persons, speeches, published articles, or even comments reported in news stories.

presented to the court, attached to their legal brief, two letters authored by members of the staff of the Federal Reserve Board, responding to private requests for interpretations of the law relating to margin requirements. One of these staff letters stated, "It should be recognized that the [statements in this letter] * * * are not representative of any official or unofficial position of the Board of Governors." Although the district court in Drasner accorded these staff letters little weight, pointing out that "these letters were not addressed to the defendant herein, and thus [he] cannot be charged with knowledge of [their] contents * * *," it is nevertheless clear that the court did evaluate the letters, and did not consider it improper that the plaintiffs had brought them to the court's attention.

These expressions of agency opinion are offered to a court not for evidentiary purposes, and not to establish what the relevant facts of the case are, but as legal argumentation, for the purpose of "producing a persuasion * * * on the part of the tribunal, as to the truth of a proposition * * * of law * * *." See J. Wigmore, Anglo-American System of Evidence, §1 (3d ed. 1940), p. 3. They are, therefore, not evidence and, we respectfully submit, the actions of the Commission's attorneys in bringing the Alexander letter to this Court's attention by attaching it to the Proposed Findings should not in any way be deemed to have been improper.

B. Even Assuming that It was Incorrect to Attach the Alexander Letter to the Proposed Findings, the Actions of the Commission's Attorneys Should Not be Deemed to Have Been in Contempt of the Court. The Commission's Attorneys Acted Throughout in Good Faith and in a Fully Disclosed Manner. Moreover, the Defendant Haswell was Aware of the Intended Use to Which the Alexander Letter Would be Put.

Even if the Court should deem the actions of the Commission's attorneys in attaching the Alexander letter to the Commission's Proposed Findings to have been in error, their actions should in no way be construed as being in contempt of the Court. As indicated, supra, there were com-

pelling reasons to believe that the use made of the Alexander letter was entirely proper. And, the defendant Haswell has not been prejudiced by the use of the Alexander letter in any way; as we have seen, he has known of the existence of the letter since May 3, 1977, and thus has had ample opportunity to challenge its authenticity or raise any other objection he may have had to its use in this action. Moreover, if the use made of the Alexander letter was in any way improper, the Court may simply disregard it. Accordingly, the Court, in response to the defendant's Motion to Strike, was capable of providing him with any relief to which he may have been entitled, and we respectfully submit that there is no need to resort to use of the Court's powers of contempt. 9/

In any event, the actions of the Commission's attorneys should not reasonably be construed as an affront to this Court such as would warrant the exercise of the Court's powers of contempt. In this regard, 18 U.S.C. 401 defines the nature and scope of the contempt power of the federal courts. 10/ It states:

9/ As noted by Mr. Justice Brennan, in the area of contempt,

> "sanctions should be used sparingly and only where coercive devices less harsh in their effect would be unavailing. In other words, there is a duty on the part of the federal district judges not to exercise the criminal contempt power without first having considered the feasibility of the alternatives at hand."

Brown v. United States, 356 U.S. 148, 163 (1957) (dissenting opinion). See also, Anderson v. Dunn, 6 Wheat. 204, 231 (1821) (the contempt power is limited to the "least possible power adequate to the end proposed"); In re Michael, 326 U.S. 224, 227 (1945); In re McConnell, 370 U.S. 230, 234 (1962). What is true of criminal contempt is no less true of civil contempt; where the purpose of the civil contempt is to force compliance with a court order, the court "must then consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." United States v. United Mine Workers, 330 U.S. 258, 304 (1947).

10/ The predecessor of this statute was enacted to limit the broad contempt power granted to the district and appellate courts by the Judiciary Act of 1789, 1 Stat. 73. See Nye v. United States, 313 U.S. 33, 45, 50 (1941); Cammer v. United States, 350 U.S. 399, 404 (1956).

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as:
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> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
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> (2) Misbehavior of any of its officers in their official transactions;
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> (3) Disobedience or resistence to its lawful writ, process, order, rule, decree, or command." 11/

The last two subsections of this provision are not even arguably applicable in the circumstances of this case. 12/ With respect to Section 401(1), the Court of Appeals for the Seventh Circuit recently reiterated the four elements that must be present in order to justify a finding of contempt thereunder:

> (1) the conduct at issue must constitute misbehavior;
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> (2) the conduct must occur in the court's actual presence;
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> (3) the misbehavior must rise to a level of an obstruction to the administration of justice; and
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> (4) there must be an intent to obstruct.

United States v. Seale, 461 F.2d 345, 366-367 (C.A. 7, 1972). We respectfully submit that none of these elements is present in the instant case.

11/ Emphasis added. 18 U.S.C. 401 applies by its terms to criminal contempt and it has been "tacitly assumed that §401 operates as a limitation of the power of federal courts with respect to civil contempt actions." Wright, et al., "Criminal and Civil Contempt in Federal Court," 17 F.R.D. 167, 169 (1955), citing Raymor Ballroom Co. v. Buck, 110 F.2d 207 (C.A. 1, 1940); Penfield Co. v. Securities and Exchange Commission, 330 U.S. 585 (1947). Thus, only actions coming within the parameters of this Section can serve as the basis for a finding of contempt—a basis which we believe to be absent in this case.

12/ Section 401(2) does not apply to attorneys appearing in a representative capacity, but to officials in the employ of the Court. Cammer v. United States, 350 U.S. 399, 405 (1956); Green v. United States, 356 U.S. 165, 171-172 (1958); Foley v. Connelie, 419 F. Supp. 889, 893 (S.D. N.Y., 1976). And, since no disobedience to any order of the Court is involved, Section 401(3) has no application.

Whether or not conduct amounts to "misbehavior" depends upon whether the conduct in question is "inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel or spectator," Id. at 366. Moreover, even if such misbehavior is present, it must create an "actual obstruction in the courtroom," In re McConnell, 370 U.S. 230, 236 (1962), effecting an "immediate interruption" of the court's business, In re Michael, 326 U.S. 224, 227 (1945). The court in Seale added that not just "any interruption" would justify a finding of contempt, "for trials are by nature adversary and contentious, and few proceed without some form of interruption." 461 F.2d at 369. Rather, the contempt power was designed not to "stifle the search for truth through adversary proceedings * * * [but] * * * to preserve it by punishing actual, material obstruction of these proceedings." 461 F.2d at 369. 13/

The conduct of the Commission's attorneys in this case does not satisfy any of the critera relevant to a finding of contempt. For the reasons stated supra, the conduct did not constitute misbehavior, and certainly not intentional misbehavior. The conduct did not occur in or near the physical presence of the Court, 14/ nor did it result in

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13/ As the Seventh Circuit remarked, it is easier to state what conduct "does not rise to the level of an obstruction" than to affirmatively define it. In this regard, the Court of Appeals for the Fourth Circuit has held that actions taken by counsel "under a mistaken view of the law do not constitute contempt of court," unless counsel persevers in his mistaken point of view, contrary to the rulings of the Court, to the point that it constitutes improper conduct obstructing the work of the court. Sprinkle v. Davis, 111 F.2d 925, 930 (C.A. 4, 1940). We would suggest that the same reasoning applies to an attorney who mistakenly, but in good faith, places before the Court material in support of legal argumentation which should not have been cited--although, as noted, supra, we do not believe that the Commission's attorneys acted incorrectly in bringing the Alexander letter to the attention of the Court.

14/ The phrase "so near thereto as to obstruct the administration of justice" indicates that the misbehavior must be

> "in the vicinity of the Court * * *. It is not sufficient that the misbehavior charged has some

(footnote continued)

any obstruction to the administration of justice; nor was there any intent to so obstruct the Court. We are unaware of any case in which a finding of contempt has been based on the contents of a pleading filed with a court.

IV. Motion for Clarification

We are hopeful that the above response has fully addressed and allayed the Court's concerns regarding this matter, and that the Court

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14/ (continued)

> direct relation to the work of the court. 'Near' in this context, juxtaposed to 'presence,' suggests physical proximity not relevancy. In fact, if the words 'so near thereto' are not read in the geographical sense, they come close * * * to being surplusage. There may, of course, be many types of 'misbehavior' which will 'obstruct the administration of justice' but which may not be 'in' or 'near' to the 'presence of the court.'"

Nye v. United States, 313 U.S. 33, 49 (1941). Reversing a finding of contempt in connection with the efforts of the petitioner to exert undue influence to induce the administrator of an estate to dismiss a suit, the Court stated:

> "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

373 U.S. at 52. Other cases affirm that only contumacious conduct occurring in the presence of the court while the court is in session may serve as the basis for a contempt citation. See, e.g., Farese v. United States, 209 F.2d 312 (C.A. 1, 1954) (hallway outside courtroom); United States v. Peterson, 456 F.2d 1135 (C.A. 10, 1972) (threats by narcotics officer to criminal defendant in hallway adjacent to courtroom immediately after hearing); Froelich v. United States, 33 F.2d 660 (C.A. 8, 1929) (letter to special assistant to Ohio Attorney General impugning integrity of presiding judge); Kirk v. United States, 192 F.2d 273 (C.A. 9, 1911) (acts occurred several blocks from courthouse); United States v. Welch, 154 F.2d 705 (C.A. 3, 1946) (improper questioning of jurors away from courthouse); May v. American Machinery Co., 116 F. Supp. 160 (D. Wash., 1953) (advertisement in national magazine describing harmful effect of excessive awards by juries); Schmidt v. United States, 124 F.2d 177 (C.A. 6, 1941) (affadavits filed in clerk's office).

will grant the pending motion to Vacate the Order to Show Cause. In the event that the Court does not grant the motion to vacate at this time, however, we respectfully request that the Court provide clarification of its Order to Show Cause, sufficient to enable the Commission's attorneys to know what the charges against them are and what type of contempt proceedings the Court has instituted. In particular, we seek clarification with respect to the following points:

(1) the specific acts or omissions that form the basis of the contempt charged;

(2) whether the alleged contempt is viewed by the Court as a charge of criminal or civil contempt;

(3) the type of relief which the Court anticipates it may grant as a result of these proceedings; and

(4) the procedure by which the alleged contempt will be prosecuted.

It is essential that a person charged with contempt be given notice which informs him as to whether the charge is one of civil or criminal contempt. The need for a clear designation arises from the requirement that fundamental fairness be afforded one charged with such an offense, and from the critical differences in the trial and adjudication of the two types of charges:

> "In a proceeding as for criminal contempt, the defendant-respondent must be accorded all the protections due one standing a traditional trial of a criminal offense charged by indictment. One important substantive requirement is that the respondent is presumed to be innocent and must be found guilty. More than that, that finding requires evidence showing guilt beyond a reasonable doubt. * * *
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> "In addition the distinction is important in procedural consequences such as, for example, the mode and time of appeal * * *."

Cliett v. Hammonds, 305 F.2d 565, 569-70 (C.A. 5, 1962) (citations omitted). 15/

15/ "Were we unable to determine whether this judgment of contempt was of a civil or criminal nature, we would have to reverse on that ground. No judgment of contempt that is unclear as to its civil or criminal nature will be allowed to stand." Lewis v. S. S. Baune, 534 F.2d 1115, 1119 (C.A. 5, 1976). See also Skinner v. White, 505 F.2d 685, 688 (C.A. 5, 1974).

If the alleged contempt is criminal in nature, those named in the Order to Show Cause are entitled to notice stating "the essential facts constituting the criminal contempt charged and describ[ing] it as such." Rule 42(b), Federal Rules of Criminal Procedure. In United States ex rel. Bowles v. Seidman, 154 F.2d 228 (C.A. 7, 1946), the Court emphasized that principles of due process require that a show cause order in a contempt proceeding "contain enough to inform a defendant of the nature and particulars of the contempt charged." Id. at 230. 16/

Similarly, persons charged with civil contempt are entitled to know that the proceedings are civil, and to know what specific acts constitute the basis for the charge. A person "is entitled to due notice of the nature of the proceeding against him—whether of criminal or civil contempt." Parker v. United States, 153 F.2d 66, 69 (C.A. 5, 1946). As the Supreme Court stated in Gompers:

> "This is not a mere matter of form, for manifestly every citizen, * * * by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit."

221 U.S. at 446 (emphasis added, citation omitted). See also Federal Trade Commission v. A. McLean & Son, 94 F.2d 802 (C.A. 7, 1938). Entitlement to notice of the essential facts constituting the alleged contempt is rooted in basic principles of due process and fairness, as evidenced by analogy with the right of all civil defendants in federal courts to move

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16/ See also, Cooke v. United States, 267 U.S. 517 (1925); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); United States v. Hawkins, 501 F.2d 1029 (C.A. 9, 1974), certiorari denied, 419 U.S. 1079 (1974); Yates v. United States, 316 F.2d 718 (C.A. 10, 1963); Cliett v. Hammonds, 305 F.2d 565 (C.A. 5, 1962); U.S. ex rel. Brown v. Lederer, 140 F.2d 136 (C.A. 7, 1944), certiorari denied, 322 U.S. 734 (1944); Skinner v. White, 505 F.2d 685, 689 (C.A. 5, 1974).

to obtain from the complainant a more definite statement, if such a statement is necessary to enable a person to frame a response. See Rule 12(e), Federal Rules of Civil Procedure. Thus, in a case where respondents were provided only "vague" notice of a charge of "fraud on the court," the Court of Appeals for the Fifth Circuit noted: "The proposition that reasonable notice is one of the indispensible elements of due process requires no citation." Skinner v. White, supra, 505 F.2d at 690.

V. Motion for the Appointment of Another District Judge to Preside Over the Disposition of the Court's Order to Show Cause

In the event that the Court does not grant the pending motion to vacate at this time, nor clarify its Order as requested above, we also respectfully request that the Court request the Chief Judge to appoint another district court judge to preside over the disposition of the Order to Show Cause. We do not make this request out of any disrespect for this Court; the request, rather, is predicated on the view that the selection of another judge to preside in a contempt proceeding must be had if it is appropriate, both for the appearance of justice and in the interest of the sound administration of justice. Thus, the federal courts, including the Supreme Court, have indicated that, where as here, it is not necessary for the court to deal summarily with a charge of contempt, it is appropriate to appoint another judge to preside over the disposition of the charge. 17/

17/ It is probably always preferable for a new judge to preside over a non-summary contempt proceeding, when feasible. Assignment of a contempt proceeding to a different judge is particularly appropriate here, to avoid any unseemly appearances. This is so not only for the reasons discussed in the text, but also because this Court, after having heard a private action involving the defendant Haswell, and after having assumed jurisdiction of this action sua sponte, indicated in its Opinion and Order dated October 19, 1977, that the defendant Haswell "has been gravely damaged by the Commission's wrongful actions in this case." We respectfully wish to assure this Court that this action was instituted by the Commission (not its attorneys) pursuant to the Commission's mandate to enforce and administer the federal securities laws.

In Johnson v. Mississippi, 403 U.S. 212 (1971), the Supreme Court, in ordering a new trial on the contempt charge before a different judge, particularly emphasized the fact that there was no need for the trial court to exercise its summary power:

> "Instant action may be necessary where the misbehavior is in the presence of the judge and is known to him, and where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court * * *. But, there was no instant action here, a week expiring before removal of the case to the federal court was sought."

403 U.S. at 214. 18/ In this case, the Court, in requiring a response within twenty days of its order to show cause, has effectively established that, even if contemptuous conduct did occur, this is not a case in which summary action is required. As has been noted, "* * * it appears from what the Supreme Court did say [in Johnson v. Mississippi, supra], that it is moving toward a per se rule requiring another judge to sit in every case where the contempt citation is deferred until after trial." 19/ There, the court held, in a case involving a lawyer cited for contempt during a trial, that

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18/ In Johnson, allegations of bias on the part of the trial judge provided an alternative basis for the decision as well.

Pennsylvania v. Mayberry, 400 U.S. 455 (1971), also illustrates the direction which the Supreme Court is taking in this area. That case concerned a defendant who acted as his own counsel and who, during the course of the trial, made insulting and derogatory comments to the trial judge. The judge refused to become embroiled in controversy with the defendant and, following the entry of the jury's verdict, found the petitioner guilty of contempt and sentenced him.

The Supreme Court, however, held that where personal attacks occur, a judge should be presumed to be disqualified, and the case should be decided by a different judge. Although Mayberry can, of course, be readily distinguished from the situation here, where no personal attacks on the Court were made, the case suggests strongly that a judge should not preside over the disposition of his own charges of contempt, "where the delay [due to the referral of the case to another judge] may not injure public or private right * * *." Cooke v. United States, 267 U.S. 517, 539 (1925).

19/ People v. Kurz, 192 N.W. 2d 594, 602 (Mich. Ct. App., 1971).

> "although the judge who sat in this case may not have been constitutionally barred from sitting because in this case Walter Kurz did not at any time personally insult or attack the judge in any way whatsoever, the sound administration of justice requires in the light of the Mayberry rule, that in every case where a judge defers consideration of a contempt citation until after the conclusion of the trial the charge must be considered and heard before another judge." 20/

This salutary rule would obviate what would otherwise be an anomaly, namely, that a blatantly contumacious defendant would have a greater assurance of judicial impartiality than a person whose conduct was only slightly offensive to the court or an attorney whose representation of his client only slightly exceeded the permissible bounds of appropriate advocacy. The procedures afforded each should be equivalent, and the consideration of whether the trial judge was "impartial" or "embroiled," whether the attacks upon him were "personal," and whether the judge became an active "combatant," are essentially not relevant. If an uninvolved, and therefore unquestionably impartial, judge decides the case, the inquiry may then be focused where it should, on the conduct of the accused contemnor. As the court noted in People v. Kurz, supra, 192 N.W. 2d at 603 (emphasis added):

> "It is not in the interest of the sound administration of justice to encourage persons charged with or convicted of criminal contempt to search the transcript * * * and attempt to demonstrate that the trial judge acted out of personal animosity, or became personally embroiled, or that his objectivity can reasonably be questioned * * *. In cases such as this, where there is no personal attack on the judge, where the question of his personal involvement in the controversy is doubtful, he should be able to disqualify himself without having to declare that there is a reasonable question about his objectivity, and we should be able to dispose of these cases without having to make an inquiry concerning the objectivity of the judge. Nor do we think it to be in the interest of justice to allow those defendants who personalized their attacks and are the most abrasive a trial before another judge, while denying a

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20/ 192 N.W. 3d at 602-603 (emphasis added).

> trial before another judge to a lawyer who has conducted himself decorously and who is charged with having transgressed the bounds of permissible advocacy."

As pointed out by Mr. Chief Justice Burger, the matter "relates * * * to a question of procedure" and "[should] not reflect on [the judge's] performance." Pensylvania v. Mayberry, supra, 400 U.S. at 469.

Accordingly, unless the Court determines to vacate its Order to Show Cause at this time, or, failing that, unless the Court for the reasons indicated supra, at pages 12-15, provides clarification of the Order to Show Cause sufficient to enable the Commission's attorneys to determine the nature and basis for the charges of contempt made against them, it is respectfully requested that the Court request the Chief Judge of the United States District Court for the Western District of Oklahoma to appoint another judge to preside over the disposition of the Order to Show Cause.

VI. Conclusion

It is submitted that the Commission's attorneys committed no misbehavior such as would warrant a finding of contempt or the imposition of any sanction. Accordingly, it respectfully requested that the Court's Order to Show Cause dated October 5, 1977, be vacated.

In the event that the Court determines not to vacate the Order to Show Cause, it is respectfully requested that the Court supply clarification of its order, in respect to the matters set forth above at pages 12-15, sufficient to enable the Commission's attorneys to answer the charges.

Finally, should the Court determine neither to vacate its Order to Show Cause nor to clarify that Order it is further requested that

the Court request the Chief Judge of the Court to appoint another judge to consider what disposition of the Order to Show Cause should be made.

Respectfully submitted,

Harvey L. Pitt

HARVEY L. PITT
General Counsel

James H. Schropp /TSB

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Dated: October 25, 1977

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

October 25, 1977

Rex B. Hawks, Esquire
Clerk, United States District Court
for the Western District of Oklahoma
United States Courthouse, Room 3210
Oklahoma City, Oklahoma 73102

Re: Securities and Exchange Commission v. Haswell, No. 77-0408-B

Dear Mr. Hawks:

Enclosed for filing with this Court in the above-captioned action are an original and one copy of the Motions of the Securities and Exchange Commission to: (1) Vacate the Court's Order to Show Cause, dated October 5, 1977; (2) Clarify the Court's Order to Show Cause; and (3) Request the Assignment of Another District Judge to Preside Over the Disposition of the Court's Order to Show Cause; and the Response of the Commission to the Court's Order to Show Cause and Memorandum in support of the Motions filed herewith.

Sincerely,

Theodore S. Bloch

Theodore S. Bloch
Attorney

Enclosures

cc: Thomas J. Kenan, Esquire
Robert C. Bailey, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ANDREW J. HASWELL, JR., Defendant.	No. 77-0408-B

MOTION TO VACATE THE COURT'S ORDER TO SHOW CAUSE ENTERED OCTOBER 5, 1977

The Securities and Exchange Commission and each of the five Commission attorneys named in this Court's Order to Show Cause entered October 5, 1977, individually and separately, respectfully move this Court to vacate its Order to Show Cause why each of the named attorneys should not be held in contempt of court.

In support of this motion, the Court is respectfully referred to the Response to the Order to Show Cause, filed herewith.

Respectfully submitted,

James H. Schropp T.S.B.
JAMES H. SCHROPP
Assistant General Counsel

Theodore S. Bloch
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Washington, D.C. 20549
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Dated: October 25, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ANDREW J. HASWELL, JR., Defendant.	No. 77-0408-B

MOTION FOR (1) CLARIFICATION OF THE COURT'S ORDER TO SHOW CAUSE, ENTERED OCTOBER 5, 1977, AND (2) THE APPOINTMENT OF ANOTHER DISTRICT JUDGE TO PRESIDE OVER THE DISPOSITION OF THE COURT'S ORDER TO SHOW CAUSE WHY CERTAIN COMMISSION ATTORNEYS SHOULD NOT BE HELD IN CONTEMPT OF COURT

In the event that the motion of the Securities and Exchange Commission, and each of the five Commission attorneys named in the Court's Order to Show Cause dated October 5, 1977, to vacate the Order to Show Cause, filed with the Court this day, is not granted, the Securities and Exchange Commission, and each of the five Commission attorneys named in the Court's Order to Show Cause, individually and separately, respectfully move the Court for clarification of the Court's Order to Show Cause why each of the named attorneys should not be held in contempt of court. Further, should the Court determine neither to vacate its Order to Show Cause nor to clarify that Order, it is further requested that the Court request the Chief Judge of this Court to appoint another judge to preside over the disposition of this Court's Order to Show Cause why each of the named attorneys should not be held in contempt of court.

In support of the motion for clarification, the Court is respectfully referred to pages 12 through 15 of the Response to the Order to Show Cause; in support of the Motion for the appointment of another district

judge, the Court is respectfully referred to pages 15 through 18 of the Response to the Order to Show Cause.

Respectfully submitted,

James H. Schropp ltsb.

JAMES H. SCHROPP
Assistant General Counsel

Theodore S. Bloch

THEODORE S. BLOCH
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Washington, D.C. 20549
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Dated: October 25, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ANDREW J. HASWELL, JR., Defendant.	No. 77-0408-B

RESPONSE TO THE ORDER TO SHOW CAUSE, DATED OCTOBER 5, 1977, AND MEMORANDUM IN SUPPORT OF THE COMMISSION'S MOTIONS TO: (1) VACATE THE COURT'S ORDER TO SHOW CAUSE; (2) CLARIFY THE COURT'S ORDER TO SHOW CAUSE; AND (3) REQUEST THE ASSIGNMENT OF ANOTHER DISTRICT JUDGE TO PRESIDE OVER THE DISPOSITION OF THE COURT'S ORDER TO SHOW CAUSE

I. Preliminary Statement

The undersigned attorneys respectfully submit this response to this Court's Order to Show Cause, entered on October 5, 1977, directing the five Securities and Exchange Commission (the "Commission") attorneys who have represented the government in the prosecution of this civil injunctive action to show cause why they should not be held in contempt of this Court as a result of some aspect of their representation on behalf of the plaintiff in this action. 1/

At the outset, we wish to assure the Court that no conduct by Commission counsel was intended to be contemptuous, disrespectful, or otherwise out of order. The Commission and its staff take seriously their responsibilities to administer and enforce the federal securities laws properly and fairly, and respectfully submit that, at all times,

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1/ This response is submitted by attorneys in the Commission's Office of the General Counsel, in Washington, D.C. That Office represents members of the Commission and its staff in proceedings such as the instant case in which such persons are asked to account for actions taken in the scope of their official duties. This response is intended as an individual and separate answer to the Order to Show Cause by each of the five respondents.

the Commission attorneys assigned to this action intended to, and believe they did, comport with the highest ethical responsibilities of the bar and with a full appreciation of the dignity of this Court. The five attorneys named in the Court's Order to Show Cause collectively have amassed 41 years of experience in assisting the Securities and Exchange Commission to administer the federal securities laws, and in litigating government lawsuits before the federal courts of this Country.

For the reasons we set forth in detail below, we respectfully urge this Court to vacate its Order to Show Cause entered on October 5, 1977.

II. Background

Trial in this action was held on September 8 and 9, 1977. The Commission filed its Proposed Findings of Fact, Conclusions of Law and Supporting Brief (hereinafter referred to as the "Proposed Findings") on September 23, 1977. On October 3, 1977, the defendant Haswell filed his reply, along with a Motion to Strike pages 37 through 43 of the Commission's Proposed Findings. 2/ On October 5, 1977, this Court entered an Order directing the attorneys representing the Commission in this action to answer defendant Haswell's Motion to Strike, "with regard to the plaintiff's statements and allegations therein and as to why the Alexander letter was so attached." Without any discussion or explanation, and apparently sua sponte, the Court's Order further directed the Commission's attorneys "to show cause why the Court should not cite each of them for contempt of court."

On October 12, 1977, argument was held before the Court on the question of whether the defendant Haswell should be enjoined from further

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2/ Haswell alleged that this portion of the Commission's Proposed Findings was based on a discussion of a letter, from Donald C. Alexander, former Commissioner of the Internal Revenue Service, to Roderick M. Hills, former Chairman of the Commission (hereinafter referred to as the "Alexander letter"), which was attached to the Commission's submission.

violating the federal securities laws. 3/ On October 20, 1977, the Court entered judgment in favor of the defendant Haswell.

III. The Court Should Vacate Its Order to Show Cause Dated October 5, 1977

A. The Commission's Attorneys Did Not Act Improperly in Attaching the Alexander Letter to the Commission's Proposed Findings. That Letter, as the Defendant Haswell was Aware, was Intended as Legal Argument and Not as Evidence.

At the outset, we respectfully point out to the Court that we are uncertain as to what conduct on the part of the Commission's attorneys forms the basis for the Court's Order to Show Cause. As discussed in more detail below, we are unaware of any conduct by the Commission's attorneys that was committed before this Court that forms the basis for the Court's Order to Show Cause, and, the Commission's attorneys have endeavored to conduct themselves in accordance with established rules of conduct. While it is apparent that, in some fashion, Commission counsel may have upset the Court, we are unaware of what conduct may have been viewed as improper by the Court, and wish to assure the Court that, to the extent such conduct occurred, it was unintentional and not meant to offend, or otherwise trouble the Court. Moreover, we are also unsure whether this Court, in issuing its Order to Show Cause, intended to invoke the possible exercise of its criminal or civil contempt power. Because we believe that this Court will agree that there is good reason to vacate its Order to Show Cause, whatever the original basis for the entry of that Order, we address the merits of the Court's Order in this memorandum. In view of our uncertainty respecting the specific conduct that prompted

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3/ Prior to oral argument, the Court denied the Commission's motion to defer consideration of the merits of the Commission's action until after the resolution of the issues raised by the Order to Show Cause, but granted the Commission's request for permission to raise and discuss the Alexander letter without the Court's considering this conduct to be in contempt of court or in any way contrary to the intendment of the Court's October 5, 1977, Order to Show Cause.

the Court's Order to Show Cause as well as our uncertainty respecting the nature of the contempt thought to have occurred, in this memorandum we proceed on the assumption that the Court's concerns were identical to the considerations cited by the defendant Haswell in his Motion to Strike pages 37 through 43 of the Commission's brief in support of its Proposed Findings. 4/ The grounds urged by the defendant Haswell in support of that motion are:

(1) although the Alexander letter "was in existence prior to and at the time of trial * * * [i]t was not designated * * * on the list of documents furnished to the defendant's counsel at the pre-trial" (Motion to Strike, p. 1);

(2) the letter "has never been identified and its materiality or relevancy has never been established" (Id.);

(3) the letter is "hearsay" (Id.);

(4) although the defendant specifically inquired of counsel for the Commission whether the Commission would offer expert testimony on the question of whether certain municipal bonds, certified by the defendant Haswell as tax-exempt, were in fact tax-exempt, he was told that no such expert testimony would be offered (id. at 2);

(5) "the statements made in the [Commission's] Brief allude to matters clearly outside the record and [are] not supported by admitted or admissible evidence * * *" (id. at 3); and, finally,

(6) the Commission's attorneys "may be in violation" of Canon 7-106(c)(1) of the Code of Professional Responsibility, which provides:

> "(c) In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant or that will not be supported by admissible evidence." (Id.)

4/ For the reasons set forth infra, pp. 12-15, if our assumptions are incorrect, and we have failed in any way to address fully and satisfactorily to the Court the issues raised by the Order to Show Cause, we respectfully move this Honorable Court for clarification of the Order to Show Cause sufficient to inform the five Commission attorneys who were the subject of the Court's Order to Show Cause of the specific basis for the charge of contempt, and the type of proceeding in which they are involved. Of course, we would welcome the opportunity to submit a further response.

Each of the points raised by the defendant Haswell in support of his Motion to Strike thus assumes that the Commission's attorneys were attempting to make improper evidentiary use of the Alexander letter. As the Commission clearly stated in its Proposed Findings, however, this letter was not in evidence and it was not intended that it be placed in evidence; it was, rather, offered to the Court for its consideration, in connection with the legal argument advanced by the Commission, "as an expression of the position taken by the Commissioner of Internal Revenue on matters discussed in the letter." 5/ Although the defendant Haswell further implied by his Motion to Strike that he had been denied access to the Alexander letter (see ¶1 of the defendant's Motion to Strike), that government counsel had somehow deceived him (id., ¶4), or that government counsel had violated their ethical or professional responsibilities in some manner (id., ¶6), these contentions are without merit. As Mr. Haswell himself admits,

> "the letter has been a focal point in this case ever since its existence was first made known to defendant as an exhibit to and source of extensive argument in the SEC's memorandum in support of its motion for preliminary injunction. It was the first of the [Commission's] exhibits sought, copied and researched by Haswell." 6/

The defendant has thus had actual possession of the letter since May 3, 1977, the date when the Commission's complaint and motion for preliminary injunction against him were first filed. Moreover, the Commission's attorneys have not in any way attempted to mislead defense counsel. When questioned whether the Commission would offer expert testimony or other evidence "to support the SEC's contention that the defendant's opinions were false and fraudulent," Commission counsel correctly "stated that no such evidence would be offered * * *." And no such evidence was offered.

5/ Proposed Findings at p. 37 n.2.

6/ Motion to Strike, p. 2 (emphasis added).

The Commission did not attempt to place the Alexander letter in evidence because it is not evidence. Rather, it is an informal expression of opinion by Mr. Alexander as to how the Internal Revenue Service would construe a certain section of the Internal Revenue Code which is in issue in this case. Federal courts properly may afford consideration to an informal expression of opinion on a legal question involving interpretations of a statute by the agency charged with administering and interpreting the statute in question; moreover, when counsel is aware of such interpretations, it is consistent with his responsibility to the courts to call such expressions of views, in whatever form, to the court's attention. Indeed, the practice has been considered and endorsed by the Supreme Court. For instance, in Rosado v. Wyman, 397 U.S. 397, 406-407 (1970), the controversy involved the compatibility of a provision of state law with the Social Security Act, administered by the Department of Health, Education and Welfare. The petitioners argued that neither the doctrine of exhaustion of administrative remedies nor the doctrine of primary jurisdiction should apply, under the facts of that case, to deprive the federal district court of jurisdiction. The Court agreed and stated:

> "That these formal doctrines of administrative law do not preclude federal jurisdiction does not mean, however, that a federal court must deprive itself of the benefit of the expertise of the federal agency that is primarily concerned with these problems. Whenever possible the district courts should obtain the views of HEW in those cases where it has not set forth its views, either in a regulation or published opinion, or in cases where there is a real doubt as to how the Department's standards apply to the particular state regulation or program."

The Supreme Court also referred, in Rosado, to its opinion in Southwestern Sugar and Molasses Co., Inc. v. River Terminals Corp., 360 U.S. 411, 420 (1959), in which it stated that, simply because an issue was "one appropriate ultimately for judicial rather than administrative resolution, * * * does not mean that the courts must therefore deny them-

selves the enlightenment which may be had from a consideration of the relevant * * * facts which the administrative agency charged with the regulation of the transaction * * * is peculiarly well equipped to marshall and initially to evaluate." 397 U.S. at 407 n.9. 7/

Moreover, federal district courts have often requested counsel to make inquiries of appropriate federal agencies when the interpretation of complex and specialized laws and regulations were at issue. The Securities and Exchange Commission itself is frequently asked to express its views on a question respecting an interpretation of the federal securities laws, and provides such views in the form of letters, memoranda and legal briefs. In Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199, 239 (D. Md., 1976), affirmed, 546 F.2d 25 (C.A. 4, 1976), the court indicated that, "[i]n accordance with the procedure proposed by Mr. Justice Harlan in Rosado, * * * this court suggested to counsel that inquiries * * * be made to the Securities and Exchange Commission and to the Federal Reserve Board." In that case, the Commission's General Counsel apprised the district court of the agency's views on the interpretive questions raised.

Similarly, counsel often, and properly, take the initiative to request such expressions of views, and to bring them to the attention of the court if relevant to the issues raised in an action. Not infrequently, counsel for private litigants have offered informal expressions of opinion by agency members or staff when appropriate to resolve difficult questions of statutory and regulatory interpretation. 8/ See, e.g., Drasner v. Thomson McKinnon Securities, Inc., [Current] CCH Fed. Sec. L. Rep. ¶96,080 (June 6, 1977) at 91,885 n.3, where the plaintiffs

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7/ See also, Far East Conference v. United States, 342 U.S. 570, 574-575 (1952).

8/ These opinions can be in many different forms, including but not limited to letters to private persons, speeches, published articles, or even comments reported in news stories.

presented to the court, attached to their legal brief, two letters authored by members of the staff of the Federal Reserve Board, responding to private requests for interpretations of the law relating to margin requirements. One of these staff letters stated, "It should be recognized that the [statements in this letter] * * * are not representative of any official or unofficial position of the Board of Governors." Although the district court in Drasner accorded these staff letters little weight, pointing out that "these letters were not addressed to the defendant herein, and thus [he] cannot be charged with knowledge of [their] contents * * *," it is nevertheless clear that the court did evaluate the letters, and did not consider it improper that the plaintiffs had brought them to the court's attention.

These expressions of agency opinion are offered to a court not for evidentiary purposes, and not to establish what the relevant facts of the case are, but as legal argumentation, for the purpose of "producing a persuasion * * * on the part of the tribunal, as to the truth of a proposition * * * of law * * *." See J. Wigmore, Anglo-American System of Evidence, §1 (3d ed. 1940), p. 3. They are, therefore, not evidence and, we respectfully submit, the actions of the Commission's attorneys in bringing the Alexander letter to this Court's attention by attaching it to the Proposed Findings should not in any way be deemed to have been improper.

B. Even Assuming that It was Incorrect to Attach the Alexander Letter to the Proposed Findings, the Actions of the Commission's Attorneys Should Not be Deemed to Have Been in Contempt of the Court. The Commission's Attorneys Acted Throughout in Good Faith and in a Fully Disclosed Manner. Moreover, the Defendant Haswell was Aware of the Intended Use to Which the Alexander Letter Would be Put.

Even if the Court should deem the actions of the Commission's attorneys in attaching the Alexander letter to the Commission's Proposed Findings to have been in error, their actions should in no way be construed as being in contempt of the Court. As indicated, supra, there were com-

pelling reasons to believe that the use made of the Alexander letter was entirely proper. And, the defendant Haswell has not been prejudiced by the use of the Alexander letter in any way; as we have seen, he has known of the existence of the letter since May 3, 1977, and thus has had ample opportunity to challenge its authenticity or raise any other objection he may have had to its use in this action. Moreover, if the use made of the Alexander letter was in any way improper, the Court may simply disregard it. Accordingly, the Court, in response to the defendant's Motion to Strike, was capable of providing him with any relief to which he may have been entitled, and we respectfully submit that there is no need to resort to use of the Court's powers of contempt. 9/

In any event, the actions of the Commission's attorneys should not reasonably be construed as an affront to this Court such as would warrant the exercise of the Court's powers of contempt. In this regard, 18 U.S.C. 401 defines the nature and scope of the contempt power of the federal courts. 10/ It states:

9/ As noted by Mr. Justice Brennan, in the area of contempt,

> "sanctions should be used sparingly and only where coercive devices less harsh in their effect would be unavailing. In other words, there is a duty on the part of the federal district judges not to exercise the criminal contempt power without first having considered the feasibility of the alternatives at hand."

Brown v. United States, 356 U.S. 148, 163 (1957) (dissenting opinion). See also, Anderson v. Dunn, 6 Wheat. 204, 231 (1821) (the contempt power is limited to the "least possible power adequate to the end proposed"); In re Michael, 326 U.S. 224, 227 (1945); In re McConnell, 370 U.S. 230, 234 (1962). What is true of criminal contempt is no less true of civil contempt; where the purpose of the civil contempt is to force compliance with a court order, the court "must then consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." United States v. United Mine Workers, 330 U.S. 258, 304 (1947).

10/ The predecessor of this statute was enacted to limit the broad contempt power granted to the district and appellate courts by the Judiciary Act of 1789, 1 Stat. 73. See Nye v. United States, 313 U.S. 33, 45, 50 (1941); Cammer v. United States, 350 U.S. 399, 404 (1956).

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as:
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistence to its lawful writ, process, order, rule, decree, or command." 11/

The last two subsections of this provision are not even arguably applicable in the circumstances of this case. 12/ With respect to Section 401(1), the Court of Appeals for the Seventh Circuit recently reiterated the four elements that must be present in order to justify a finding of contempt thereunder:

> (1) the conduct at issue must constitute misbehavior;
>
> (2) the conduct must occur in the court's actual presence;
>
> (3) the misbehavior must rise to a level of an obstruction to the administration of justice; and
>
> (4) there must be an intent to obstruct.

United States v. Seale, 461 F.2d 345, 366-367 (C.A. 7, 1972). We respectfully submit that none of these elements is present in the instant case.

11/ Emphasis added. 18 U.S.C. 401 applies by its terms to criminal contempt and it has been "tacitly assumed that §401 operates as a limitation of the power of federal courts with respect to civil contempt actions." Wright, et al., "Criminal and Civil Contempt in Federal Court," 17 F.R.D. 167, 169 (1955), citing Raymor Ballroom Co. v. Buck, 110 F.2d 207 (C.A. 1, 1940); Penfield Co. v. Securities and Exchange Commission, 330 U.S. 585 (1947). Thus, only actions coming within the parameters of this Section can serve as the basis for a finding of contempt—a basis which we believe to be absent in this case.

12/ Section 401(2) does not apply to attorneys appearing in a representative capacity, but to officials in the employ of the Court. Cammer v. United States, 350 U.S. 399, 405 (1956); Green v. United States, 356 U.S. 165, 171-172 (1958); Foley v. Connelie, 419 F. Supp. 889, 893 (S.D. N.Y., 1976). And, since no disobedience to any order of the Court is involved, Section 401(3) has no application.

Whether or not conduct amounts to "misbehavior" depends upon whether the conduct in question is "inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel or spectator," Id. at 366. Moreover, even if such misbehavior is present, it must create an "actual obstruction in the courtroom," In re McConnell, 370 U.S. 230, 236 (1962), effecting an "immediate interruption" of the court's business, In re Michael, 326 U.S. 224, 227 (1945). The court in Seale added that not just "any interruption" would justify a finding of contempt, "for trials are by nature adversary and contentious, and few proceed without some form of interruption." 461 F.2d at 369. Rather, the contempt power was designed not to "stifle the search for truth through adversary proceedings * * * [but] * * * to preserve it by punishing actual, material obstruction of these proceedings." 461 F.2d at 369. 13/

The conduct of the Commission's attorneys in this case does not satisfy any of the critera relevant to a finding of contempt. For the reasons stated supra, the conduct did not constitute misbehavior, and certainly not intentional misbehavior. The conduct did not occur in or near the physical presence of the Court, 14/ nor did it result in

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13/ As the Seventh Circuit remarked, it is easier to state what conduct "does not rise to the level of an obstruction" than to affirmatively define it. In this regard, the Court of Appeals for the Fourth Circuit has held that actions taken by counsel "under a mistaken view of the law do not constitute contempt of court," unless counsel persevers in his mistaken point of view, contrary to the rulings of the Court, to the point that it constitutes improper conduct obstructing the work of the court. Sprinkle v. Davis, 111 F.2d 925, 930 (C.A. 4, 1940). We would suggest that the same reasoning applies to an attorney who mistakenly, but in good faith, places before the Court material in support of legal argumentation which should not have been cited—although, as noted, supra, we do not believe that the Commission's attorneys acted incorrectly in bringing the Alexander letter to the attention of the Court.

14/ The phrase "so near thereto as to obstruct the administration of justice" indicates that the misbehavior must be

> "in the vicinity of the Court * * *. It is not sufficient that the misbehavior charged has some

(footnote continued)

any obstruction to the administration of justice; nor was there any intent to so obstruct the Court. We are unaware of any case in which a finding of contempt has been based on the contents of a pleading filed with a court.

IV. Motion for Clarification

We are hopeful that the above response has fully addressed and allayed the Court's concerns regarding this matter, and that the Court

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14/ (continued)

> direct relation to the work of the court. 'Near' in this context, juxtaposed to 'presence,' suggests physical proximity not relevancy. In fact, if the words 'so near thereto' are not read in the geographical sense, they come close * * * to being surplusage. There may, of course, be many types of 'misbehavior' which will 'obstruct the administration of justice' but which may not be 'in' or 'near' to the 'presence of the court.'"

Nye v. United States, 313 U.S. 33, 49 (1941). Reversing a finding of contempt in connection with the efforts of the petitioner to exert undue influence to induce the administrator of an estate to dismiss a suit, the Court stated:

> "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

373 U.S. at 52. Other cases affirm that only contumacious conduct occurring in the presence of the court while the court is in session may serve as the basis for a contempt citation. See, e.g., Farese v. United States, 209 F.2d 312 (C.A. 1, 1954) (hallway outside courtroom); United States v. Peterson, 456 F.2d 1135 (C.A. 10, 1972) (threats by narcotics officer to criminal defendant in hallway adjacent to courtroom immediately after hearing); Froelich v. United States, 33 F.2d 660 (C.A. 8, 1929) (letter to special assistant to Ohio Attorney General impugning integrity of presiding judge); Kirk v. United States, 192 F.2d 273 (C.A. 9, 1911) (acts occurred several blocks from courthouse); United States v. Welch, 154 F.2d 705 (C.A. 3, 1946) (improper questioning of jurors away from courthouse); May v. American Machinery Co., 116 F. Supp. 160 (D. Wash., 1953) (advertisement in national magazine describing harmful effect of excessive awards by juries); Schmidt v. United States, 124 F.2d 177 (C.A. 6, 1941) (affadavits filed in clerk's office).

will grant the pending motion to Vacate the Order to Show Cause. In the event that the Court does not grant the motion to vacate at this time, however, we respectfully request that the Court provide clarification of its Order to Show Cause, sufficient to enable the Commission's attorneys to know what the charges against them are and what type of contempt proceedings the Court has instituted. In particular, we seek clarification with respect to the following points:

(1) the specific acts or omissions that form the basis of the contempt charged;

(2) whether the alleged contempt is viewed by the Court as a charge of criminal or civil contempt;

(3) the type of relief which the Court anticipates it may grant as a result of these proceedings; and

(4) the procedure by which the alleged contempt will be prosecuted.

It is essential that a person charged with contempt be given notice which informs him as to whether the charge is one of civil or criminal contempt. The need for a clear designation arises from the requirement that fundamental fairness be afforded one charged with such an offense, and from the critical differences in the trial and adjudication of the two types of charges:

> "In a proceeding as for criminal contempt, the defendant-respondent must be accorded all the protections due one standing a traditional trial of a criminal offense charged by indictment. One important substantive requirement is that the respondent is presumed to be innocent and must be found guilty. More than that, that finding requires evidence showing guilt beyond a reasonable doubt. * * *
>
> "In addition the distinction is important in procedural consequences such as, for example, the mode and time of appeal * * *."

Cliett v. Hammonds, 305 F.2d 565, 569-70 (C.A. 5, 1962) (citations omitted). 15/

15/ "Were we unable to determine whether this judgment of contempt was of a civil or criminal nature, we would have to reverse on that ground. No judgment of contempt that is unclear as to its civil or criminal nature will be allowed to stand." Lewis v. S. S. Baune, 534 F.2d 1115, 1119 (C.A. 5, 1976). See also Skinner v. White, 505 F.2d 685, 688 (C.A. 5, 1974).

If the alleged contempt is criminal in nature, those named in the Order to Show Cause are entitled to notice stating "the essential facts constituting the criminal contempt charged and describ[ing] it as such." Rule 42(b), Federal Rules of Criminal Procedure. In United States ex rel. Bowles v. Seidman, 154 F.2d 228 (C.A. 7, 1946), the Court emphasized that principles of due process require that a show cause order in a contempt proceeding "contain enough to inform a defendant of the nature and particulars of the contempt charged." Id. at 230. 16/

Similarly, persons charged with civil contempt are entitled to know that the proceedings are civil, and to know what specific acts constitute the basis for the charge. A person "is entitled to due notice of the nature of the proceeding against him--whether of criminal or civil contempt." Parker v. United States, 153 F.2d 66, 69 (C.A. 5, 1946). As the Supreme Court stated in Gompers:

> "This is not a mere matter of form, for manifestly every citizen, * * * by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit."

221 U.S. at 446 (emphasis added, citation omitted). See also Federal Trade Commission v. A. McLean & Son, 94 F.2d 802 (C.A. 7, 1938). Entitlement to notice of the essential facts constituting the alleged contempt is rooted in basic principles of due process and fairness, as evidenced by analogy with the right of all civil defendants in federal courts to move

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16/ See also, Cooke v. United States, 267 U.S. 517 (1925); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); United States v. Hawkins, 501 F.2d 1029 (C.A. 9, 1974), certiorari denied, 419 U.S. 1079 (1974); Yates v. United States, 316 F.2d 718 (C.A. 10, 1963); Cliett v. Hammonds, 305 F.2d 565 (C.A. 5, 1962); U.S. ex rel. Brown v. Lederer, 140 F.2d 136 (C.A. 7, 1944), certiorari denied, 322 U.S. 734 (1944); Skinner v. White, 505 F.2d 685, 689 (C.A. 5, 1974).

to obtain from the complainant a more definite statement, if such a statement is necessary to enable a person to frame a response. See Rule 12(e), Federal Rules of Civil Procedure. Thus, in a case where respondents were provided only "vague" notice of a charge of "fraud on the court," the Court of Appeals for the Fifth Circuit noted: "The proposition that reasonable notice is one of the indispensible elements of due process requires no citation." Skinner v. White, supra, 505 F.2d at 690.

V. Motion for the Appointment of Another District Judge to Preside Over the Disposition of the Court's Order to Show Cause

In the event that the Court does not grant the pending motion to vacate at this time, nor clarify its Order as requested above, we also respectfully request that the Court request the Chief Judge to appoint another district court judge to preside over the disposition of the Order to Show Cause. We do not make this request out of any disrespect for this Court; the request, rather, is predicated on the view that the selection of another judge to preside in a contempt proceeding must be had if it is appropriate, both for the appearance of justice and in the interest of the sound administration of justice. Thus, the federal courts, including the Supreme Court, have indicated that, where as here, it is not necessary for the court to deal summarily with a charge of contempt, it is appropriate to appoint another judge to preside over the disposition of the charge. 17/

17/ It is probably always preferable for a new judge to preside over a non-summary contempt proceeding, when feasible. Assignment of a contempt proceeding to a different judge is particularly appropriate here, to avoid any unseemly appearances. This is so not only for the reasons discussed in the text, but also because this Court, after having heard a private action involving the defendant Haswell, and after having assumed jurisdiction of this action sua sponte, indicated in its Opinion and Order dated October 19, 1977, that the defendant Haswell "has been gravely damaged by the Commission's wrongful actions in this case." We respectfully wish to assure this Court that this action was instituted by the Commission (not its attorneys) pursuant to the Commission's mandate to enforce and administer the federal securities laws.

In Johnson v. Mississippi, 403 U.S. 212 (1971), the Supreme Court, in ordering a new trial on the contempt charge before a different judge, particularly emphasized the fact that there was no need for the trial court to exercise its summary power:

> "Instant action may be necessary where the misbehavior is in the presence of the judge and is known to him, and where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court * * *. But, there was no instant action here, a week expiring before removal of the case to the federal court was sought."

403 U.S. at 214. 18/ In this case, the Court, in requiring a response within twenty days of its order to show cause, has effectively established that, even if contemptuous conduct did occur, this is not a case in which summary action is required. As has been noted, "* * * it appears from what the Supreme Court did say [in Johnson v. Mississippi, supra], that it is moving toward a per se rule requiring another judge to sit in every case where the contempt citation is deferred until after trial." 19/ There, the court held, in a case involving a lawyer cited for contempt during a trial, that

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18/ In Johnson, allegations of bias on the part of the trial judge provided an alternative basis for the decision as well.

Pennsylvania v. Mayberry, 400 U.S. 455 (1971), also illustrates the direction which the Supreme Court is taking in this area. That case concerned a defendant who acted as his own counsel and who, during the course of the trial, made insulting and derogatory comments to the trial judge. The judge refused to become embroiled in controversy with the defendant and, following the entry of the jury's verdict, found the petitioner guilty of contempt and sentenced him.

The Supreme Court, however, held that where personal attacks occur, a judge should be presumed to be disqualified, and the case should be decided by a different judge. Although Mayberry can, of course, be readily distinguished from the situation here, where no personal attacks on the Court were made, the case suggests strongly that a judge should not preside over the disposition of his own charges of contempt, "where the delay [due to the referral of the case to another judge] may not injure public or private right * * *." Cooke v. United States, 267 U.S. 517, 539 (1925).

19/ People v. Kurz, 192 N.W. 2d 594, 602 (Mich. Ct. App., 1971).

> "although the judge who sat in this case may not have been constitutionally barred from sitting because in this case Walter Kurz did not at any time personally insult or attack the judge in any way whatsoever, the sound administration of justice requires in the light of the Mayberry rule, that in every case where a judge defers consideration of a contempt citation until after the conclusion of the trial the charge must be considered and heard before another judge." 20/

This salutary rule would obviate what would otherwise be an anomaly, namely, that a blatantly contumacious defendant would have a greater assurance of judicial impartiality than a person whose conduct was only slightly offensive to the court or an attorney whose representation of his client only slightly exceeded the permissible bounds of appropriate advocacy. The procedures afforded each should be equivalent, and the consideration of whether the trial judge was "impartial" or "embroiled," whether the attacks upon him were "personal," and whether the judge became an active "combatant," are essentially not relevant. If an uninvolved, and therefore unquestionably impartial, judge decides the case, the inquiry may then be focused where it should, on the conduct of the accused contemnor. As the court noted in People v. Kurz, supra, 192 N.W. 2d at 603 (emphasis added):

> "It is not in the interest of the sound administration of justice to encourage persons charged with or convicted of criminal contempt to search the transcript * * * and attempt to demonstrate that the trial judge acted out of personal animosity, or became personally embroiled, or that his objectivity can reasonably be questioned * * *. In cases such as this, where there is no personal attack on the judge, where the question of his personal involvement in the controversy is doubtful, he should be able to disqualify himself without having to declare that there is a reasonable question about his objectivity, and we should be able to dispose of these cases without having to make an inquiry concerning the objectivity of the judge. Nor do we think it to be in the interest of justice to allow those defendants who personalized their attacks and are the most abrasive a trial before another judge, while denying a

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20/ 192 N.W. 3d at 602-603 (emphasis added).

> trial before another judge to a lawyer who has conducted himself decorously and who is charged with having transgressed the bounds of permissible advocacy."

As pointed out by Mr. Chief Justice Burger, the matter "relates * * * to a question of procedure" and "[should] not reflect on [the judge's] performance." Pensylvania v. Mayberry, supra, 400 U.S. at 469.

Accordingly, unless the Court determines to vacate its Order to Show Cause at this time, or, failing that, unless the Court for the reasons indicated supra, at pages 12-15, provides clarification of the Order to Show Cause sufficient to enable the Commission's attorneys to determine the nature and basis for the charges of contempt made against them, it is respectfully requested that the Court request the Chief Judge of the United States District Court for the Western District of Oklahoma to appoint another judge to preside over the disposition of the Order to Show Cause.

VI. Conclusion

It is submitted that the Commission's attorneys committed no misbehavior such as would warrant a finding of contempt or the imposition of any sanction. Accordingly, it respectfully requested that the Court's Order to Show Cause dated October 5, 1977, be vacated.

In the event that the Court determines not to vacate the Order to Show Cause, it is respectfully requested that the Court supply clarification of its order, in respect to the matters set forth above at pages 12-15, sufficient to enable the Commission's attorneys to answer the charges.

Finally, should the Court determine neither to vacate its Order to Show Cause nor to clarify that Order it is further requested that

the Court request the Chief Judge of the Court to appoint another judge to consider what disposition of the Order to Show Cause should be made.

Respectfully submitted,

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Dated: October 25, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. No. 77-0408-B

ANDREW J. HASWELL, JR.,

Defendant.

CERTIFICATE OF SERVICE

I certify that copies of the Motions of the Securities and Exchange Commission to: (1) Vacate the Court's Order to Show Cause, dated October 5, 1977; (2) Clarify the Court's Order to Show Cause; and (3) Request the Assignment of Another District Judge to Preside Over the Disposition of the Court's Order to Show Cause; and the Response of the Commission to the Court's Order to Show Cause and Memorandum in Support of the Motions filed herewith, have been served on this date on counsel for the defendant in this action as follows:

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Dated: October 25, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	
v.	No. 77-0408-B
ANDREW J. HASWELL, JR., Defendant.	

RESPONSE TO THE ORDER TO SHOW CAUSE, DATED OCTOBER 5, 1977, AND MEMORANDUM IN SUPPORT OF THE COMMISSION'S MOTIONS TO: (1) VACATE THE COURT'S ORDER TO SHOW CAUSE; (2) CLARIFY THE COURT'S ORDER TO SHOW CAUSE; AND (3) REQUEST THE ASSIGNMENT OF ANOTHER DISTRICT JUDGE TO PRESIDE OVER THE DISPOSITION OF THE COURT'S ORDER TO SHOW CAUSE

I. Preliminary Statement

The undersigned attorneys respectfully submit this response to this Court's Order to Show Cause, entered on October 5, 1977, directing the five Securities and Exchange Commission (the "Commission") attorneys who have represented the government in the prosecution of this civil injunctive action to show cause why they should not be held in contempt of this Court as a result of some aspect of their representation on behalf of the plaintiff in this action. 1/

At the outset, we wish to assure the Court that no conduct by Commission counsel was intended to be contemptuous, disrespectful, or otherwise out of order. The Commission and its staff take seriously their responsibilities to administer and enforce the federal securities laws properly and fairly, and respectfully submit that, at all times,

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1/ This response is submitted by attorneys in the Commission's Office of the General Counsel, in Washington, D.C. That Office represents members of the Commission and its staff in proceedings such as the instant case in which such persons are asked to account for actions taken in the scope of their official duties. This response is intended as an individual and separate answer to the Order to Show Cause by each of the five respondents.

the Commission attorneys assigned to this action intended to, and believe they did, comport with the highest ethical responsibilities of the bar and with a full appreciation of the dignity of this Court. The five attorneys named in the Court's Order to Show Cause collectively have amassed 41 years of experience in assisting the Securities and Exchange Commission to administer the federal securities laws, and in litigating government lawsuits before the federal courts of this Country.

For the reasons we set forth in detail below, we respectfully urge this Court to vacate its Order to Show Cause entered on October 5, 1977.

II. Background

Trial in this action was held on September 8 and 9, 1977. The Commission filed its Proposed Findings of Fact, Conclusions of Law and Supporting Brief (hereinafter referred to as the "Proposed Findings") on September 23, 1977. On October 3, 1977, the defendant Haswell filed his reply, along with a Motion to Strike pages 37 through 43 of the Commission's Proposed Findings. 2/ On October 5, 1977, this Court entered an Order directing the attorneys representing the Commission in this action to answer defendant Haswell's Motion to Strike, "with regard to the plaintiff's statements and allegations therein and as to why the Alexander letter was so attached." Without any discussion or explanation, and apparently sua sponte, the Court's Order further directed the Commission's attorneys "to show cause why the Court should not cite each of them for contempt of court."

On October 12, 1977, argument was held before the Court on the question of whether the defendant Haswell should be enjoined from further

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2/ Haswell alleged that this portion of the Commission's Proposed Findings was based on a discussion of a letter, from Donald C. Alexander, former Commissioner of the Internal Revenue Service, to Roderick M. Hills, former Chairman of the Commission (hereinafter referred to as the "Alexander letter"), which was attached to the Commission's submission.

violating the federal securities laws. 3/ On October 20, 1977, the Court entered judgment in favor of the defendant Haswell.

III. The Court Should Vacate Its Order to Show Cause Dated October 5, 1977

A. The Commission's Attorneys Did Not Act Improperly in Attaching the Alexander Letter to the Commission's Proposed Findings. That Letter, as the Defendant Haswell was Aware, was Intended as Legal Argument and Not as Evidence.

At the outset, we respectfully point out to the Court that we are uncertain as to what conduct on the part of the Commission's attorneys forms the basis for the Court's Order to Show Cause. As discussed in more detail below, we are unaware of any conduct by the Commission's attorneys that was committed before this Court that forms the basis for the Court's Order to Show Cause, and, the Commission's attorneys have endeavored to conduct themselves in accordance with established rules of conduct. While it is apparent that, in some fashion, Commission counsel may have upset the Court, we are unaware of what conduct may have been viewed as improper by the Court, and wish to assure the Court that, to the extent such conduct occurred, it was unintentional and not meant to offend, or otherwise trouble the Court. Moreover, we are also unsure whether this Court, in issuing its Order to Show Cause, intended to invoke the possible exercise of its criminal or civil contempt power. Because we believe that this Court will agree that there is good reason to vacate its Order to Show Cause, whatever the original basis for the entry of that Order, we address the merits of the Court's Order in this memorandum. In view of our uncertainty respecting the specific conduct that prompted

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3/ Prior to oral argument, the Court denied the Commission's motion to defer consideration of the merits of the Commission's action until after the resolution of the issues raised by the Order to Show Cause, but granted the Commission's request for permission to raise and discuss the Alexander letter without the Court's considering this conduct to be in contempt of court or in any way contrary to the intendment of the Court's October 5, 1977, Order to Show Cause.

the Court's Order to Show Cause as well as our uncertainty respecting the nature of the contempt thought to have occurred, in this memorandum we proceed on the assumption that the Court's concerns were identical to the considerations cited by the defendant Haswell in his Motion to Strike pages 37 through 43 of the Commission's brief in support of its Proposed Findings. 4/ The grounds urged by the defendant Haswell in support of that motion are:

(1) although the Alexander letter "was in existence prior to and at the time of trial * * * [i]t was not designated * * * on the list of documents furnished to the defendant's counsel at the pre-trial" (Motion to Strike, p. 1);

(2) the letter "has never been identified and its materiality or relevancy has never been established" (Id.);

(3) the letter is "hearsay" (Id.);

(4) although the defendant specifically inquired of counsel for the Commission whether the Commission would offer expert testimony on the question of whether certain municipal bonds, certified by the defendant Haswell as tax-exempt, were in fact tax-exempt, he was told that no such expert testimony would be offered (id. at 2);

(5) "the statements made in the [Commission's] Brief allude to matters clearly outside the record and [are] not supported by admitted or admissible evidence * * *" (id. at 3); and, finally,

(6) the Commission's attorneys "may be in violation" of Canon 7-106(c)(1) of the Code of Professional Responsibility, which provides:

> "(c) In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant or that will not be supported by admissible evidence." (Id.)

4/ For the reasons set forth infra, pp. 12-15, if our assumptions are incorrect, and we have failed in any way to address fully and satisfactorily to the Court the issues raised by the Order to Show Cause, we respectfully move this Honorable Court for clarification of the Order to Show Cause sufficient to inform the five Commission attorneys who were the subject of the Court's Order to Show Cause of the specific basis for the charge of contempt, and the type of proceeding in which they are involved. Of course, we would welcome the opportunity to submit a further response.

Each of the points raised by the defendant Haswell in support of his Motion to Strike thus assumes that the Commission's attorneys were attempting to make improper evidentiary use of the Alexander letter. As the Commission clearly stated in its Proposed Findings, however, this letter was not in evidence and it was not intended that it be placed in evidence; it was, rather, offered to the Court for its consideration, in connection with the legal argument advanced by the Commission, "as an expression of the position taken by the Commissioner of Internal Revenue on matters discussed in the letter." 5/ Although the defendant Haswell further implied by his Motion to Strike that he had been denied access to the Alexander letter (see ¶1 of the defendant's Motion to Strike), that government counsel had somehow deceived him (id., ¶4), or that government counsel had violated their ethical or professional responsibilities in some manner (id., ¶6), these contentions are without merit. As Mr. Haswell himself admits,

> "the letter has been a focal point in this case ever since its existence was first made known to defendant as an exhibit to and source of extensive argument in the SEC's memorandum in support of its motion for preliminary injunction. It was the first of the [Commission's] exhibits sought, copied and researched by Haswell." 6/

The defendant has thus had actual possession of the letter since May 3, 1977, the date when the Commission's complaint and motion for preliminary injunction against him were first filed. Moreover, the Commission's attorneys have not in any way attempted to mislead defense counsel. When questioned whether the Commission would offer expert testimony or other evidence "to support the SEC's contention that the defendant's opinions were false and fraudulent," Commission counsel correctly "stated that no such evidence would be offered * * *." And no such evidence was offered.

5/ Proposed Findings at p. 37 n.2.

6/ Motion to Strike, p. 2 (emphasis added).

The Commission did not attempt to place the Alexander letter in evidence because it is not evidence. Rather, it is an informal expression of opinion by Mr. Alexander as to how the Internal Revenue Service would construe a certain section of the Internal Revenue Code which is in issue in this case. Federal courts properly may afford consideration to an informal expression of opinion on a legal question involving interpretations of a statute by the agency charged with administering and interpreting the statute in question; moreover, when counsel is aware of such interpretations, it is consistent with his responsibility to the courts to call such expressions of views, in whatever form, to the court's attention. Indeed, the practice has been considered and endorsed by the Supreme Court. For instance, in Rosado v. Wyman, 397 U.S. 397, 406-407 (1970), the controversy involved the compatibility of a provision of state law with the Social Security Act, administered by the Department of Health, Education and Welfare. The petitioners argued that neither the doctrine of exhaustion of administrative remedies nor the doctrine of primary jurisdiction should apply, under the facts of that case, to deprive the federal district court of jurisdiction. The Court agreed and stated:

> "That these formal doctrines of administrative law do not preclude federal jurisdiction does not mean, however, that a federal court must deprive itself of the benefit of the expertise of the federal agency that is primarily concerned with these problems. Whenever possible the district courts should obtain the views of HEW in those cases where it has not set forth its views, either in a regulation or published opinion, or in cases where there is a real doubt as to how the Department's standards apply to the particular state regulation or program."

The Supreme Court also referred, in Rosado, to its opinion in Southwestern Sugar and Molasses Co., Inc. v. River Terminals Corp., 360 U.S. 411, 420 (1959), in which it stated that, simply because an issue was "one appropriate ultimately for judicial rather than administrative resolution, * * * does not mean that the courts must therefore deny them-

selves the enlightenment which may be had from a consideration of the relevant * * * facts which the administrative agency charged with the regulation of the transaction * * * is peculiarly well equipped to marshall and initially to evaluate." 397 U.S. at 407 n.9. 7/

Moreover, federal district courts have often requested counsel to make inquiries of appropriate federal agencies when the interpretation of complex and specialized laws and regulations were at issue. The Securities and Exchange Commission itself is frequently asked to express its views on a question respecting an interpretation of the federal securities laws, and provides such views in the form of letters, memoranda and legal briefs. In Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199, 239 (D. Md., 1976), affirmed, 546 F.2d 25 (C.A. 4, 1976), the court indicated that, "[i]n accordance with the procedure proposed by Mr. Justice Harlan in Rosado, * * * this court suggested to counsel that inquiries * * * be made to the Securities and Exchange Commission and to the Federal Reserve Board." In that case, the Commission's General Counsel apprised the district court of the agency's views on the interpretive questions raised.

Similarly, counsel often, and properly, take the initiative to request such expressions of views, and to bring them to the attention of the court if relevant to the issues raised in an action. Not infrequently, counsel for private litigants have offered informal expressions of opinion by agency members or staff when appropriate to resolve difficult questions of statutory and regulatory interpretation. 8/ See, e.g., Drasner v. Thomson McKinnon Securities, Inc., [Current] CCH Fed. Sec. L. Rep. ¶96,080 (June 6, 1977) at 91,885 n.3, where the plaintiffs

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7/ See also, Far East Conference v. United States, 342 U.S. 570, 574-575 (1952).

8/ These opinions can be in many different forms, including but not limited to letters to private persons, speeches, published articles, or even comments reported in news stories.

presented to the court, attached to their legal brief, two letters authored by members of the staff of the Federal Reserve Board, responding to private requests for interpretations of the law relating to margin requirements. One of these staff letters stated, "It should be recognized that the [statements in this letter] * * * are not representative of any official or unofficial position of the Board of Governors." Although the district court in Drasner accorded these staff letters little weight, pointing out that "these letters were not addressed to the defendant herein, and thus [he] cannot be charged with knowledge of [their] contents * * *," it is nevertheless clear that the court did evaluate the letters, and did not consider it improper that the plaintiffs had brought them to the court's attention.

These expressions of agency opinion are offered to a court not for evidentiary purposes, and not to establish what the relevant facts of the case are, but as legal argumentation, for the purpose of "producing a persuasion * * * on the part of the tribunal, as to the truth of a proposition * * * of law * * *." See J. Wigmore, Anglo-American System of Evidence, §1 (3d ed. 1940), p. 3. They are, therefore, not evidence and, we respectfully submit, the actions of the Commission's attorneys in bringing the Alexander letter to this Court's attention by attaching it to the Proposed Findings should not in any way be deemed to have been improper.

B. Even Assuming that It was Incorrect to Attach the Alexander Letter to the Proposed Findings, the Actions of the Commission's Attorneys Should Not be Deemed to Have Been in Contempt of the Court. The Commission's Attorneys Acted Throughout in Good Faith and in a Fully Disclosed Manner. Moreover, the Defendant Haswell was Aware of the Intended Use to Which the Alexander Letter Would be Put.

Even if the Court should deem the actions of the Commission's attorneys in attaching the Alexander letter to the Commission's Proposed Findings to have been in error, their actions should in no way be construed as being in contempt of the Court. As indicated, supra, there were com-

pelling reasons to believe that the use made of the Alexander letter was entirely proper. And, the defendant Haswell has not been prejudiced by the use of the Alexander letter in any way; as we have seen, he has known of the existence of the letter since May 3, 1977, and thus has had ample opportunity to challenge its authenticity or raise any other objection he may have had to its use in this action. Moreover, if the use made of the Alexander letter was in any way improper, the Court may simply disregard it. Accordingly, the Court, in response to the defendant's Motion to Strike, was capable of providing him with any relief to which he may have been entitled, and we respectfully submit that there is no need to resort to use of the Court's powers of contempt. 9/

In any event, the actions of the Commission's attorneys should not reasonably be construed as an affront to this Court such as would warrant the exercise of the Court's powers of contempt. In this regard, 18 U.S.C. 401 defines the nature and scope of the contempt power of the federal courts. 10/ It states:

9/ As noted by Mr. Justice Brennan, in the area of contempt,

> "sanctions should be used sparingly and only where coercive devices less harsh in their effect would be unavailing. In other words, there is a duty on the part of the federal district judges not to exercise the criminal contempt power without first having considered the feasibility of the alternatives at hand."

Brown v. United States, 356 U.S. 148, 163 (1957) (dissenting opinion). See also, Anderson v. Dunn, 6 Wheat. 204, 231 (1821) (the contempt power is limited to the "least possible power adequate to the end proposed"); In re Michael, 326 U.S. 224, 227 (1945); In re McConnell, 370 U.S. 230, 234 (1962). What is true of criminal contempt is no less true of civil contempt; where the purpose of the civil contempt is to force compliance with a court order, the court "must then consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." United States v. United Mine Workers, 330 U.S. 258, 304 (1947).

10/ The predecessor of this statute was enacted to limit the broad contempt power granted to the district and appellate courts by the Judiciary Act of 1789, 1 Stat. 73. See Nye v. United States, 313 U.S. 33, 45, 50 (1941); Cammer v. United States, 350 U.S. 399, 404 (1956).

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as:
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistence to its lawful writ, process, order, rule, decree, or command." 11/

The last two subsections of this provision are not even arguably applicable in the circumstances of this case. 12/ With respect to Section 401(1), the Court of Appeals for the Seventh Circuit recently reiterated the four elements that must be present in order to justify a finding of contempt thereunder:

> (1) the conduct at issue must constitute misbehavior;
>
> (2) the conduct must occur in the court's actual presence;
>
> (3) the misbehavior must rise to a level of an obstruction to the administration of justice; and
>
> (4) there must be an intent to obstruct.

United States v. Seale, 461 F.2d 345, 366-367 (C.A. 7, 1972). We respectfully submit that none of these elements is present in the instant case.

11/ Emphasis added. 18 U.S.C. 401 applies by its terms to criminal contempt and it has been "tacitly assumed that §401 operates as a limitation of the power of federal courts with respect to civil contempt actions." Wright, et al., "Criminal and Civil Contempt in Federal Court," 17 F.R.D. 167, 169 (1955), citing Raymor Ballroom Co. v. Buck, 110 F.2d 207 (C.A. 1, 1940); Penfield Co. v. Securities and Exchange Commission, 330 U.S. 585 (1947). Thus, only actions coming within the parameters of this Section can serve as the basis for a finding of contempt—a basis which we believe to be absent in this case.

12/ Section 401(2) does not apply to attorneys appearing in a representative capacity, but to officials in the employ of the Court. Cammer v. United States, 350 U.S. 399, 405 (1956); Green v. United States, 356 U.S. 165, 171-172 (1958); Foley v. Connelie, 419 F. Supp. 889, 893 (S.D. N.Y., 1976). And, since no disobedience to any order of the Court is involved, Section 401(3) has no application.

Whether or not conduct amounts to "misbehavior" depends upon whether the conduct in question is "inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel or spectator," Id. at 366. Moreover, even if such misbehavior is present, it must create an "actual obstruction in the courtroom," In re McConnell, 370 U.S. 230, 236 (1962), effecting an "immediate interruption" of the court's business, In re Michael, 326 U.S. 224, 227 (1945). The court in Seale added that not just "any interruption" would justify a finding of contempt, "for trials are by nature adversary and contentious, and few proceed without some form of interruption." 461 F.2d at 369. Rather, the contempt power was designed not to "stifle the search for truth through adversary proceedings * * * [but] * * * to preserve it by punishing actual, material obstruction of these proceedings." 461 F.2d at 369. 13/

The conduct of the Commission's attorneys in this case does not satisfy any of the critera relevant to a finding of contempt. For the reasons stated supra, the conduct did not constitute misbehavior, and certainly not intentional misbehavior. The conduct did not occur in or near the physical presence of the Court, 14/ nor did it result in

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13/ As the Seventh Circuit remarked, it is easier to state what conduct "does not rise to the level of an obstruction" than to affirmatively define it. In this regard, the Court of Appeals for the Fourth Circuit has held that actions taken by counsel "under a mistaken view of the law do not constitute contempt of court," unless counsel persevers in his mistaken point of view, contrary to the rulings of the Court, to the point that it constitutes improper conduct obstructing the work of the court. Sprinkle v. Davis, 111 F.2d 925, 930 (C.A. 4, 1940). We would suggest that the same reasoning applies to an attorney who mistakenly, but in good faith, places before the Court material in support of legal argumentation which should not have been cited--although, as noted, supra, we do not believe that the Commission's attorneys acted incorrectly in bringing the Alexander letter to the attention of the Court.

14/ The phrase "so near thereto as to obstruct the administration of justice" indicates that the misbehavior must be

> "in the vicinity of the Court * * *. It is not sufficient that the misbehavior charged has some

(footnote continued)

any obstruction to the administration of justice; nor was there any intent to so obstruct the Court. We are unaware of any case in which a finding of contempt has been based on the contents of a pleading filed with a court.

IV. Motion for Clarification

We are hopeful that the above response has fully addressed and allayed the Court's concerns regarding this matter, and that the Court

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14/ (continued)

> direct relation to the work of the court. 'Near' in this context, juxtaposed to 'presence,' suggests physical proximity not relevancy. In fact, if the words 'so near thereto' are not read in the geographical sense, they come close * * * to being surplusage. There may, of course, be many types of 'misbehavior' which will 'obstruct the administration of justice' but which may not be 'in' or 'near' to the 'presence of the court.'"

Nye v. United States, 313 U.S. 33, 49 (1941). Reversing a finding of contempt in connection with the efforts of the petitioner to exert undue influence to induce the administrator of an estate to dismiss a suit, the Court stated:

> "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

373 U.S. at 52. Other cases affirm that only contumacious conduct occurring in the presence of the court while the court is in session may serve as the basis for a contempt citation. See, e.g., Farese v. United States, 209 F.2d 312 (C.A. 1, 1954) (hallway outside courtroom); United States v. Peterson, 456 F.2d 1135 (C.A. 10, 1972) (threats by narcotics officer to criminal defendant in hallway adjacent to courtroom immediately after hearing); Froelich v. United States, 33 F.2d 660 (C.A. 8, 1929) (letter to special assistant to Ohio Attorney General impugning integrity of presiding judge); Kirk v. United States, 192 F.2d 273 (C.A. 9, 1911) (acts occurred several blocks from courthouse); United States v. Welch, 154 F.2d 705 (C.A. 3, 1946) (improper questioning of jurors away from courthouse); May v. American Machinery Co., 116 F. Supp. 160 (D. Wash., 1953) (advertisement in national magazine describing harmful effect of excessive awards by juries); Schmidt v. United States, 124 F.2d 177 (C.A. 6, 1941) (affadavits filed in clerk's office).

will grant the pending motion to Vacate the Order to Show Cause. In the event that the Court does not grant the motion to vacate at this time, however, we respectfully request that the Court provide clarification of its Order to Show Cause, sufficient to enable the Commission's attorneys to know what the charges against them are and what type of contempt proceedings the Court has instituted. In particular, we seek clarification with respect to the following points:

(1) the specific acts or omissions that form the basis of the contempt charged;

(2) whether the alleged contempt is viewed by the Court as a charge of criminal or civil contempt;

(3) the type of relief which the Court anticipates it may grant as a result of these proceedings; and

(4) the procedure by which the alleged contempt will be prosecuted.

It is essential that a person charged with contempt be given notice which informs him as to whether the charge is one of civil or criminal contempt. The need for a clear designation arises from the requirement that fundamental fairness be afforded one charged with such an offense, and from the critical differences in the trial and adjudication of the two types of charges:

> "In a proceeding as for criminal contempt, the defendant-respondent must be accorded all the protections due one standing a traditional trial of a criminal offense charged by indictment. One important substantive requirement is that the respondent is presumed to be innocent and must be found guilty. More than that, that finding requires evidence showing guilt beyond a reasonable doubt. * * *
>
> "In addition the distinction is important in procedural consequences such as, for example, the mode and time of appeal * * *."

Cliett v. Hammonds, 305 F.2d 565, 569-70 (C.A. 5, 1962) (citations omitted). 15/

15/ "Were we unable to determine whether this judgment of contempt was of a civil or criminal nature, we would have to reverse on that ground. No judgment of contempt that is unclear as to its civil or criminal nature will be allowed to stand." Lewis v. S. S. Baune, 534 F.2d 1115, 1119 (C.A. 5, 1976). See also Skinner v. White, 505 F.2d 685, 688 (C.A. 5, 1974).

If the alleged contempt is criminal in nature, those named in the Order to Show Cause are entitled to notice stating "the essential facts constituting the criminal contempt charged and describ[ing] it as such." Rule 42(b), Federal Rules of Criminal Procedure. In United States ex rel. Bowles v. Seidman, 154 F.2d 228 (C.A. 7, 1946), the Court emphasized that principles of due process require that a show cause order in a contempt proceeding "contain enough to inform a defendant of the nature and particulars of the contempt charged." Id. at 230. 16/

Similarly, persons charged with civil contempt are entitled to know that the proceedings are civil, and to know what specific acts constitute the basis for the charge. A person "is entitled to due notice of the nature of the proceeding against him—whether of criminal or civil contempt." Parker v. United States, 153 F.2d 66, 69 (C.A. 5, 1946). As the Supreme Court stated in Gompers:

> "This is not a mere matter of form, for manifestly every citizen, * * * by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit."

221 U.S. at 446 (emphasis added, citation omitted). See also Federal Trade Commission v. A. McLean & Son, 94 F.2d 802 (C.A. 7, 1938). Entitlement to notice of the essential facts constituting the alleged contempt is rooted in basic principles of due process and fairness, as evidenced by analogy with the right of all civil defendants in federal courts to move

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16/ See also, Cooke v. United States, 267 U.S. 517 (1925); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); United States v. Hawkins, 501 F.2d 1029 (C.A. 9, 1974), certiorari denied, 419 U.S. 1079 (1974); Yates v. United States, 316 F.2d 718 (C.A. 10, 1963); Cliett v. Hammonds, 305 F.2d 565 (C.A. 5, 1962); U.S. ex rel. Brown v. Lederer, 140 F.2d 136 (C.A. 7, 1944), certiorari denied, 322 U.S. 734 (1944); Skinner v. White, 505 F.2d 685, 689 (C.A. 5, 1974).

to obtain from the complainant a more definite statement, if such a statement is necessary to enable a person to frame a response. See Rule 12(e), Federal Rules of Civil Procedure. Thus, in a case where respondents were provided only "vague" notice of a charge of "fraud on the court," the Court of Appeals for the Fifth Circuit noted: "The proposition that reasonable notice is one of the indispensible elements of due process requires no citation." Skinner v. White, supra, 505 F.2d at 690.

V. Motion for the Appointment of Another District Judge to Preside Over the Disposition of the Court's Order to Show Cause

In the event that the Court does not grant the pending motion to vacate at this time, nor clarify its Order as requested above, we also respectfully request that the Court request the Chief Judge to appoint another district court judge to preside over the disposition of the Order to Show Cause. We do not make this request out of any disrespect for this Court; the request, rather, is predicated on the view that the selection of another judge to preside in a contempt proceeding must be had if it is appropriate, both for the appearance of justice and in the interest of the sound administration of justice. Thus, the federal courts, including the Supreme Court, have indicated that, where as here, it is not necessary for the court to deal summarily with a charge of contempt, it is appropriate to appoint another judge to preside over the disposition of the charge. 17/

17/ It is probably always preferable for a new judge to preside over a non-summary contempt proceeding, when feasible. Assignment of a contempt proceeding to a different judge is particularly appropriate here, to avoid any unseemly appearances. This is so not only for the reasons discussed in the text, but also because this Court, after having heard a private action involving the defendant Haswell, and after having assumed jurisdiction of this action sua sponte, indicated in its Opinion and Order dated October 19, 1977, that the defendant Haswell "has been gravely damaged by the Commission's wrongful actions in this case." We respectfully wish to assure this Court that this action was instituted by the Commission (not its attorneys) pursuant to the Commission's mandate to enforce and administer the federal securities laws.

In Johnson v. Mississippi, 403 U.S. 212 (1971), the Supreme Court, in ordering a new trial on the contempt charge before a different judge, particularly emphasized the fact that there was no need for the trial court to exercise its summary power:

> "Instant action may be necessary where the misbehavior is in the presence of the judge and is known to him, and where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court * * *. But, there was no instant action here, a week expiring before removal of the case to the federal court was sought."

403 U.S. at 214. 18/ In this case, the Court, in requiring a response within twenty days of its order to show cause, has effectively established that, even if contemptuous conduct did occur, this is not a case in which summary action is required. As has been noted, "* * * it appears from what the Supreme Court did say [in Johnson v. Mississippi, supra], that it is moving toward a per se rule requiring another judge to sit in every case where the contempt citation is deferred until after trial." 19/ There, the court held, in a case involving a lawyer cited for contempt during a trial, that

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18/ In Johnson, allegations of bias on the part of the trial judge provided an alternative basis for the decision as well.

Pennsylvania v. Mayberry, 400 U.S. 455 (1971), also illustrates the direction which the Supreme Court is taking in this area. That case concerned a defendant who acted as his own counsel and who, during the course of the trial, made insulting and derogatory comments to the trial judge. The judge refused to become embroiled in controversy with the defendant and, following the entry of the jury's verdict, found the petitioner guilty of contempt and sentenced him.

The Supreme Court, however, held that where personal attacks occur, a judge should be presumed to be disqualified, and the case should be decided by a different judge. Although Mayberry can, of course, be readily distinguished from the situation here, where no personal attacks on the Court were made, the case suggests strongly that a judge should not preside over the disposition of his own charges of contempt, "where the delay [due to the referral of the case to another judge] may not injure public or private right * * *." Cooke v. United States, 267 U.S. 517, 539 (1925).

19/ People v. Kurz, 192 N.W. 2d 594, 602 (Mich. Ct. App., 1971).

> "although the judge who sat in this case may not have been constitutionally barred from sitting because in this case Walter Kurz did not at any time personally insult or attack the judge in any way whatsoever, the sound administration of justice requires in the light of the Mayberry rule, that in every case where a judge defers consideration of a contempt citation until after the conclusion of the trial the charge must be considered and heard before another judge." 20/

This salutary rule would obviate what would otherwise be an anomaly, namely, that a blatantly contumacious defendant would have a greater assurance of judicial impartiality than a person whose conduct was only slightly offensive to the court or an attorney whose representation of his client only slightly exceeded the permissible bounds of appropriate advocacy. The procedures afforded each should be equivalent, and the consideration of whether the trial judge was "impartial" or "embroiled," whether the attacks upon him were "personal," and whether the judge became an active "combatant," are essentially not relevant. If an uninvolved, and therefore unquestionably impartial, judge decides the case, the inquiry may then be focused where it should, on the conduct of the accused contemnor. As the court noted in People v. Kurz, supra, 192 N.W. 2d at 603 (emphasis added):

> "It is not in the interest of the sound administration of justice to encourage persons charged with or convicted of criminal contempt to search the transcript * * * and attempt to demonstrate that the trial judge acted out of personal animosity, or became personally embroiled, or that his objectivity can reasonably be questioned * * *. In cases such as this, where there is no personal attack on the judge, where the question of his personal involvement in the controversy is doubtful, he should be able to disqualify himself without having to declare that there is a reasonable question about his objectivity, and we should be able to dispose of these cases without having to make an inquiry concerning the objectivity of the judge. Nor do we think it to be in the interest of justice to allow those defendants who personalized their attacks and are the most abrasive a trial before another judge, while denying a

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20/ 192 N.W. 3d at 602-603 (emphasis added).

> trial before another judge to a lawyer who has conducted himself decorously and who is charged with having transgressed the bounds of permissible advocacy."

As pointed out by Mr. Chief Justice Burger, the matter "relates * * * to a question of procedure" and "[should] not reflect on [the judge's] performance." Pensylvania v. Mayberry, supra, 400 U.S. at 469.

Accordingly, unless the Court determines to vacate its Order to Show Cause at this time, or, failing that, unless the Court for the reasons indicated supra, at pages 12-15, provides clarification of the Order to Show Cause sufficient to enable the Commission's attorneys to determine the nature and basis for the charges of contempt made against them, it is respectfully requested that the Court request the Chief Judge of the United States District Court for the Western District of Oklahoma to appoint another judge to preside over the disposition of the Order to Show Cause.

VI. Conclusion

It is submitted that the Commission's attorneys committed no misbehavior such as would warrant a finding of contempt or the imposition of any sanction. Accordingly, it respectfully requested that the Court's Order to Show Cause dated October 5, 1977, be vacated.

In the event that the Court determines not to vacate the Order to Show Cause, it is respectfully requested that the Court supply clarification of its order, in respect to the matters set forth above at pages 12-15, sufficient to enable the Commission's attorneys to answer the charges.

Finally, should the Court determine neither to vacate its Order to Show Cause nor to clarify that Order it is further requested that

the Court request the Chief Judge of the Court to appoint another judge to consider what disposition of the Order to Show Cause should be made.

Respectfully submitted,

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